Unrecognised Subjects in International Law

Edited by

Władysław Czapliński & Agata Kleczkowska

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Introductory Remarks

This volume is a collection of studies on various aspects of the legal situation as regards entities not recognised under international law. In recent years there has been a heated discussion on the legal situation of non-state actors. At the same time, the issue of entities that arose in an unlawful way (e.g. through secession as a result of the unlawful use of force) was also raised. Under classical international law, the emergence of a state is a legal fact and is not subject to checks on its legality. However, this approach has been evolving. As the significance of the rule of law has grown, in international relations also, the attitude of the international community to the consequences of the law being violated has also been changing. In the conflict between the principle of effectiveness and the maxim *ex iniuria jus non oritur*, it is the legalistic approach that prevails. Nevertheless, circumstances often conspire to ensure that, as a result of various activities of countries on the world map, new subjects appear, more or less stable, dependent on other states. Of fundamental importance to the fate of such entities has been and will be international recognition. The aim of the research project (under Grant NCN 2014/13/B /HS5 /01490) has been to examine whether current international law in any way protects non-recognised entities and their rights, as well as the obligations imposed on them. Authors representing a diverse approach to the science of law and international practice, originating from different continents, have explored different aspects of legal subjectivity and its relationships with recognition. The studies published in the book are the result of several years of research and scientific discussion. We would like to avail of the chance to thank all those contributing directly and indirectly to the publishing of this book.

Władysław Czapliński,
Agata Kleczkowska
(Editors)

List of Abbreviations

ECHR – European Court of Human Rights
ECJ – European Court of Justice
EU – European Union
FRG – Federal Republic of Germany
GDR – German Democratic Republic
ICJ – International Court of Justice
ICTY – International Criminal Tribunal for the former Yugoslavia
ILA – International Law Association
ILC – International Law Commission
NATO – North Atlantic Treaty Organization
OSCE – Organization for Security and Co-operation in Europe
PLO – Palestine Liberation Organization
PRC – People's Republic of China
ROC – Republic of China
TRNC – Turkish Republic of Northern Cyprus
UN – United Nations
UN GA – United Nations General Assembly
UN SC – United Nations Security Council
UNESCO – United Nations Educational, Scientific and Cultural Organization
UNTS - United Nations Treaty Series
VCLT – Vienna Convention on the Law of Treaties
WTO – World Trade Organization

Recognition (and Non-recognition) of Non-state Actors

*Enrico Milano**

Introduction

In this brief essay I will try to capture the significance of recognition (and lack thereof) with regard to non-State actors; as well as whether and to what extent recognition by other States is lawful and may produce legal consequences in terms of legal status. I will deal with two types of situation in which non-State actors may be recognised. On the one hand, there are unrecognised entities claiming to be States, often established on part of the territory of a State (typically seceding entities); and on the other there are non-State actors exercising territorial control over part of the territory of a State and claiming to be or to become the legitimate government of that State.

What I shall not be dealing with here is the obligation of non-recognition resulting from an unlawful situation that is addressed in the contribution by Anne Lagerwall. Nor will I address the issue of implied forms of recognition by domestic tribunals giving effect to legal acts emanating from unrecognised entities.

1. International legal issues relating to the recognition of seceding entities and insurgents

With regard to both types of situation in which an internal armed conflict has emerged, the traditional doctrine of belligerency (first developed during the American Civil War and conditioning the applicability of certain obligations of war and those concerning the protection of foreign nationals to the recognition of belligerent status by the home government and foreign States) is no longer in force, having fallen into desuetude since the Inter-War period, as the practice of intervention in the Spanish Civil War indicated.[1] The application of common article 3

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[1] On the issue of belligerency, *see* among others: W.L. Walker, *Recognition of Belligerency and Grant of Belligerent Rights*, 23 Transactions of the Grotius Society 199 (1937); J.W. Garner, *Recognition of Belligerency*, 32 American Journal of International Law 106 (1938); H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947; E. Luard,

to the Geneva Conventions and the 1977 Second Protocol – which in fact replace the institution of belligerency as far as the rules of warfare are concerned – is not conditional upon recognition by either the home government or third States: as we know, the minimum threshold is of dual identity, relating as it does to both the intensity of military clashes and the level of military organisation of the rebel group.[2] In the case of Protocol II, alongside the issue of ratification is the requirement of territorial control by rebels as a triggering condition for applicability.[3]

Also, in both scenarios of non-State actors aiming at statehood or at the acquisition of the status of legitimate government, it is typical for a certain degree of territorial control to be acquired, to the exclusion of the central government, with the qualification as insurgents arising in this way. According to most authors, insurgents do have a degree of international legal personality, which is transitional in nature and limited to the enjoyment of certain rights and obligations, especially under international humanitarian law, which may have important implications in terms of State responsibility.[4] Again, the acquisition of such limited degree of inter-

Conflict and Peace in the Modern International System, Little, Brown, Boston: 1968; J. Wilkenfeld, *Domestic and Foreign Conflict Behavior of Nations*, 5 Journal of Peace Research 56 (1968); R. Higgins, *International Law and Civil Conflict,* in: E. Luard (ed.) *International Regulation of Civil Wars*, New York University Press, New York: 1972; E. Luard, *Civil Conflicts in Modern International Relations,* in: E. Luard (ed.) *International…*; J.E. Bond, *The Rules of Riot: International Conflict and the Law of War*, Princeton University Press, Princeton: 1974; H. McCoubrey, N.D. White (eds.), *International Law and Armed Conflict*, Aldershot, Hants, Dartmouth: 1992; Y.M. Lootsteen, *The Concept of Belligerency in International Law*, 166 Military Law Review 109 (2000).

[2] Y. Sandoz, C. Swinarski & B. Zimmermann (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff Publishers, Geneva: 1987, pp. 1351–1352; N. Ronzitti, *Il Diritto Internazionale dei Conflitti Armati*, Giappichelli, Torino: 2014, p. 362; P. Benvenuti, *Movimenti Insurrezionali e Protocolli Aggiuntivi alla Convenzione di Ginevra del 1949*, 3 Rivista di Diritto Internazionale 512 (1981), p. 517; N. Quénivet, *Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict*, in: D. Jinks et al. (eds.), *Applying International Humanitarian Law in Judicial and Quasi-Judicial Bodies*, T.M.C Asser Press, The Hague: 2014, p. 35.

[3] Sandoz, Swinarski & Zimmermann, *supra* note 2, p. 1352; J.G. Stewart, *Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict*, 850 International Review of the Red Cross 85 (2003), p. 391; Ronzitti, *supra* note 2, p. 363.

[4] *See* the Articles on the *Responsibility of States for Internationally Wrongful Acts*, as corrected by document A/56/49 (Vol. I)/Corr.4, Art. 10: "1. The conduct of an insurrectional movement which becomes the new Government of a State shall be considered an act of that State under international law. 2. The conduct of a movement, insurrectional or other, which succeeds in establishing a new State in part of the territory of a pre-existing State or in a territory under its administration shall be considered an act of the new State under international law […]" As a general principle, conducts of members of insurrectional movements are not attributable to the State under international law, on the assumption that the structures and organisation of the movement remain independent of those of the State. Art.10 deals with the exceptional circumstance where the insurgents successfully install themselves as the new government,

national legal personality is not dependent upon recognition by the home government or third countries; and as a matter of fact the express recognition of insurgent status is unknown in contemporary practice. More common is the recognition of a group of insurgents fighting for the self-determination of a territory still under colonial or foreign rule, as a national liberation movement (e.g. the PLO or the POLISARIO front in Western Sahara). But even here recognition is not constitutive of international legal personality for national liberation movements.[5] It is quite instructive here that, in its 2015 POLISARIO judgment, the EU General Court established the *jus standi* of POLISARIO, ascertaining its legal personality on the basis of a number of elements, including participation in UN-led negotiations with Morocco over the future of Western Sahara, as well as the conclusion of an international peace agreement with Mauritania. In contrast, recognition by a number of countries or international organisations was not even mentioned.[6]

If we look at the relevance of recognition with regard to the former scenario, namely where a seceding entity has emerged (in cases such as Somaliland, Kosovo, Abkhazia, Transdniestria, etc.), the debate boils down to the traditional question as to whether recognition of the putative State is constitutive or declaratory. Moreover, if premature, recognition can even represent a violation of the duty to not intervene in the internal affairs of a State.[7] As to the declaratory/constitutive debate, the view also expressed in the ILA Report of the Committee on Recognition and Non-Recognition constitutes the generally accepted state of the art: recognition as such is not constitutive of the international legal personality of a new State, but rather, in times of global interdependence, represents an important vehicle of effectiveness in international relations and intercourse.[8] In other words: recognition by other

stating the continuity between the new organisation and the State. In such a case, the State does not cease to exist as a subject of international law, and the acts committed by members of the insurrectional movement will be attributable to the State. ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Yearbook of the International Law Commission, Vol. II, Part Two (2001), p. 50.

[5] A. Cassese, *International Law*, Oxford University Press, Oxford: 2005, p. 140; F. Angeli, *Non-State actors and international humanitarian law. Organized Armed Groups: A Challenge for the 21st Century*, *idem*, Milano: 2010, p. 68; K. Parlett, *The Law of International Responsibility*, Oxford University Press, Oxford: 2010, p. 251; K. Mastorodimos, *National Liberation Movements: Still a Valid Concept (with Special Reference to International Humanitarian Law)?,* 17 Oregon Reiew of International Law 71 (2015).

[6] Case T-512/12 *Front Polisario v. Council* [2015] ECLI:EU:T:2015:953, paras. 39–60.

[7] H. Lauterpacht, *Recognition of States in International Law*, 53 Yale Law Journal 385 (1944), p. 391; D. Raič, *Statehood and the Law of Self-Determination*, Martinus Nijhoff Publishers, Leiden/Boston: 2002, p. 33; A. Schuit, *Recognition of Governments in International Law and the Recent Conflict in Libya*, 14 International Community Law Review 381 (2012), p. 400; C. Ryngaert, S. Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 Leiden Journal of International Law 467 (2011), p. 472.

[8] *Recognition/Non-Recognition in International Law*, 75 International Law Association Reports 424 (2014), pp. 457ff. *See also*: J. Crawford, *The Criteria for Statehood in International Law*, 48

countries will not engender direct legal consequences in terms of evolution from non-State actor to statehood. And yet, if statehood is a matter of fulfilling the Montevideo criteria (at least in the absence of serious violations of peremptory norms), the acquisition of those constitutive elements will be facilitated substantially by participation in international relations, which is in turn facilitated by international recognition. As for premature recognition of statehood, that will occur when any of the necessary elements of statehood are missing: as I have argued elsewhere, in the case of Kosovo, a number of acts of premature recognition were issued between 2008 – the time of the declaration of independence – and 2012 – the time of the end of the international supervision by a number of States (which established a situation of dependence formalised in former articles 143 to 147 of the Kosovo Constitution).[9]

From the standpoint of international law, the latter scenario, namely that of a rebel group seeking to overthrow the legitimate government, is less settled. What is relatively uncontroversial in the doctrine is that the legality of a government does not rest on international recognition. That is certainly an important element in the maintenance or *de novo* acquisition of international legitimacy from a political standpoint; but it is not the criterion by which the legality of a government shall be assessed. As a matter of practice, in contemporary international relations, States tend to engage in the explicit or implicit espousal of the Estrada doctrine, by which newly-formed governments, whether installed constitutionally or unconstitutionally, are not recognised, to the extent that such recognition may imply passing a judgment on political events that remain within the reserved domain of the State.[10] The doctrine gives expression more to a cautious attitude generally shared by most States, than to a legal obligation to refrain from expressly recognising new governments. In any case, recognition will be implied by the dealings that a foreign country will entertain with a government.

However, recognition remains politically important when two or more groups compete for control of State institutions and States seek to support one or other competitor (typically an established government and one or more rebel groups, think of the situation in Libya in 2011, the situation in Syria since 2012, or the

British Yearbook of International Law 93 (1976); J. d'Aspremont, *L'Etat non démocratique en droit international. Etude critique du droit international positif et de la pratique contemporaine*, Pedone, Paris: 2008; A. Peters, *Statehood after 1989: 'Effectivités' between Legality and Virtuality*, 3 Proceedings of the European Society of International Law 1 (2010), p. 3; J. Vidmar, *Explaining the Legal Effects of the Recognition*, 61 The International and Comparative Law Quarterly 2 (2012), p. 362.

[9] E. Milano, *Formazione dello stato e processi di State-building nel diritto internazionale, Kosovo 1999-2013*, Editoriale Scientifica, Napoli: 2013.

[10] *Recognition/Non-Recognition in International Law*, 77 International Law Association Reports 533 (2016), p. 538. *See also* P.C. Jessup, *The Estrada Doctrine*, 25 The American Journal of International Law 4 (1931), p. 719; C.G. Fenwick, *The Recognition of New Governments Instituted by Force*, 38 The American Journal of International Law 3 (1944), p. 449.

situation in Yemen since 2015). In this respect, a key issue needing to be addressed concerns the extent to which recognition of rebels may constitute a violation of the obligation of non-intervention in the internal affairs of a State.

The question has to be tackled by first drawing a distinction between those situations in which certain rebel or opposition forces acquire political recognition and those situations in which they are recognised as a new lawful government entitled to represent the State in its international relations. The different acts of recognition issued during the 2011 Libyan civil conflict prove quite instructive in this respect. In a first phase, a number of countries proceeded to the recognition of the Transitional National Council (TNC), which was fighting the Qaddafi regime, as "legitimate representative of the Libyan people." Only some months after did those governments proceed to the recognition of the TNC, using certain expressions, such as "the legitimate governing authority in Libya," or the "the only legitimate interlocutor for bilateral relations" (the latter wording was applied by the Italian government).[11] The distinction was spelled out expressly by the US administration in 2012, when it extended recognition to the Syrian Opposition Coalition (SOC) as "legitimate representative of the Syrian people." It nevertheless went on to clarify that it did not recognise the SOC as the government of Syria.[12]

The above distinction poses two further controversial questions: the first relates to the legality of an opposition faction within a country being recognised as legitimate political representative for that country's people as a whole; while the second revolves around requirements that a new government achieve the legality capable of justifying external recognition.

As regards the first issue, I would submit that, in general, such recognition, short of recognition of a new government, may amount to an unlawful intervention in the internal affairs of a State. The 1970 Friendly Relations Resolution is very clear in prohibiting any form of military, political or economic support to rebels fighting a government for whatever good or bad reason. That rule was reaffirmed by the ICJ in 2005 in its *Congo/Uganda* judgment.[13] Lack of condemnation of such recognitions

[11] Press Release, Italian Ministry of Foreign Affairs, *Focus-Libya: Frattini, the NTC is Italy's only interlocutor*, available at https://www.esteri.it/mae/en/sala_stampa/archivionotizie/approf ondmenti/ 2011/04/20110404 _focus libia_frattini_cnt.html (accessed 12 March 2018). For a discussion on these declarations *see* S. Talmon, *Recognition of the Libyan National Transitional Council*, 38 University of Oxford Legal Research Paper Series 1 (2011), p. 3; R. Grote, T.J. Röder, *Constitutionalism, Human Rights, and Islam after the Arab Spring*, Oxford University Press, New York: 2016, p. 59: J. van Essen, *De Facto Regimes in International Law*, 74 Utrecht Journal of International and European Law 28 (2012), p. 42.

[12] US State Department, *Daily Press Briefing, 13 November 2012 and 3 December 2012*, available at: www.state.gov (accessed 12 March 2018); *see also* S. Talmon, *Recognition of Opposition Groups as the Legitimate Representative of a People*, 12 Chinese Journal of International Law 219 (2013).

[13] ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Merits, Judgment, 3 February 2006, ICJ Rep 2005, p. 168, at paras. 161–165. *See* also UN GA Resolution 2625 of 24 October 1970 "Declaration on Principles of International Law

may be explained by qualification thereof as non-forcible countermeasures adopted by third parties, with a view to there being a reaction to gross violations of *erga omnes* obligations by the government of a State, such as those protecting fundamental human rights. A clear trend in this respect may be detected, even if it must be conceded that practice is predominantly arising in Western countries.

As to the second issue, in the case of recognition as a lawful government, the step of this kind taken is by nature non-temporary and so may only with difficulty be construed as a countermeasure aiming at restoring international legality with regard to gross violations of human rights. Here the question simply boils down to the requirement as regards legality met or not met by a new government, which overthrows an old government by forcible means. Modern international law regulates that issue through the principle of effectiveness, as well as a presumption. The latter revolves around the legality of an effective government exercising authority over a territory and a population, as well as the presumption that the government so established would have a right to maintain its status until its final defeat or disappearance. The problem in addressing this question is that practice, especially over the last 30 years, is very limited, precisely because the Estrada doctrine was affirmed.

However, recent cases such as those Libya and Côte d'Ivoire point to an evolution in the state of international law, by showing that, in cases in which the lawful government has lost legitimacy due to its resort to non-constitutional means and/or to widespread violence towards its population, and where the population is able to express a coherent political organisation controlling significant parts of the territory of the State – and with a prospect of control being extended over the rest of the country, recognition of a new government would not then be considered premature.[14] In other words, the application of the principle of effectiveness has evolved, and the presumption simply has no further application. Here also, one must concede that the state of international law is fluid; and that, given the limited practice available, it is difficult to determine whether these trends are already part of positive international law.

concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations," A/25/2625: "No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law."

[14] A. Schuit, *Recognition of Governments in International Law and the Recent Conflict in Libya*, 14 International Community Law Review 381 (2012), p. 398; A. Kaczorowska-Ireland, *Public International Law*, Routledge, Abingdon: 2015, p. 223; C.M. Cerna, *Democratic Legitimacy and Respect for Human Rights: The New Gold Standard*, 108 AJIL Unbound 222 (2015), p. 227. *See also* A.H. Berlin, *Recognition as Sanction: Using International Recognition of New States to Deter, Punish, and Contain Bad Actors*, 31 University of Pennsylvania Journal of International Law 531 (2009).

Finally, it is important to note that, while recognition is not constitutive of the legal status of a putative government, direct legal consequences of great importance will anyway follow. i.e. the possibility of the State being represented in bilateral relations to the exclusion of the former government; the issue of access to State funds and assets present on the territory of the recognising country to the exclusion of the former government; and perhaps more importantly the right to invite military aid in the territory with a view to a counter-insurgency or deposed government being fought against. In this latter respect, one can detect an interesting evolution of international law towards a more liberal understanding of the concept of intervention by invitation.

Conclusions

Whereas the doctrinal debate over recognition has faded somewhat over the years, including over matters such as the recognition of new governments, the practice of recognition remains one of the essential features of international law, and one that goes beyond the traditional remits of State recognition and recognition of territorial situations. The present paper has shown that recognition of non-State actors, despite the desuetude of formal institutions in contemporary international law such as that of belligerency and that of *de facto* recognition, may become relevant under international law, in particular when it relates to territorial entities aiming to achieve separation from the parent State, or struggling to gain power within the State. In this respect, the legal notion of international community interferes with the more traditional bilateral paradigm, increasingly allowing third States to resort to recognition as a means of enforcing fundamental values of the international community as a whole. In sum, recognition may become the flipside of non-recognition for serious violations of peremptory norms; and that is an aspect of recognition that has been under-investigated, and thus worthy of further research.

Abstract: The present essay considers the significance of recognition (and lack thereof) with regard to non-State actors; and whether and to what extent recognition by other States is lawful and may produce legal consequences in terms of their legal status. It deals with two types of situation. i.e. unrecognised entities, often established on part of the territory of States, claiming to be States; as well as non-State actors, with territorial control over parts of the territory of a State, claiming to be or to become the legitimate government of that State.

Keywords: recognition; non-State actors; international law; countermeasures.

Illegal States?

*Dagmar Richter**

Introduction

This article is concerned with the legal status of "illegal States" which may be considered a specific category of "unrecognized entities" in international law. However, it is questionable whether such a thing as an "illegal State" can exist at all. Can such a normative concept be reflected by principles of international law pertaining to the existence of States and, if so, what criteria would render a State illegal? The article will also clarify the relationship between illegality and recognition. What does recognition mean today for State entities which come into existence illegally or later become illegal, wholly or in part?

1. Fundamentals of international law

1.1. Statehood and recognition

According to classical doctrine, as an entity under international law, a State should fulfil three main criteria, namely possession of a defined territory, permanent population and effective government.[1] Despite the uncertainty surrounding the fulfillment of these requirements, it is unanimously agreed that once an entity has been admitted to the United Nations, statehood cannot be doubted by other Member States.[2] In very rare cases such as that of Bosnia-Hercegovina for instance, recognition by the international community, in particular by the UNO, has created statehood, even though effective government has not yet been established.[3]

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[1] The so-called "Three-elements-doctrine" was introduced by G. Jellinek, *Allgemeine Staatslehre*, 3rd ed., Verlag O. Härling, Berlin: 1914, pp. 396ff. *See generally* J. Crawford, *The Criteria for Statehood in International Law*, 48 (1) British Yearbook of International Law 93 (1976–1977).

[2] *See e.g.* V. Epping, *Der Staat als die „Normalperson" des Völkerrechts*, in: K. Ipsen (ed.), *Völkerrecht*, 6th ed., C.H. Beck, München: 2014, p. 130 (mn. 167).

[3] C. Hillgruber, *The Admission of New States to the International Community*, 9 European Journal of International Law 491 (1998), pp. 493–494.

The role recognition plays in establishing statehood remains the subject of debate. According to the standards laid down in Art. I (d) of the Montevideo Convention[4] a State, in addition to the classical criteria mentioned before, needs to have the "capacity to enter into relations with other States." Though today the view predominates that recognition has a purely declaratory effect, and does not determine statehood,[5] the need to prove a capacity to enter into relations with other States implicitly presupposes recognition carries such a meaning. Whilst recognition by fellow States can prove the effectiveness of a given entity's State-like power, non-recognition can render an entity *de facto* non-existent. But even taking into account the traditional three-elements-doctrine, the capacity to enter into relations with third States seems a prerequisite of "effective" government, because it is crucial to exercising sovereign rights in external contexts. If a State is not accepted by all other States, it cannot freely and independently determine its foreign policy and thus lacks "external sovereignty."[6] External sovereignty however, is a feature which cannot be dissociated from independent statehood,[7] especially not in times of globalisation and internationalisation. Accordingly, one of the basic elements of statehood at least indirectly refers to recognition, which means that the declaratory approach, and the constitutive approach inevitably overlap to a certain extent. Additionally, States have the prerogative to judge for themselves whether a given entity has actually fulfilled the prerequisites of statehood. A State is a State simply because it exists; but it still needs to prove its existence and viability, mainly by recognition – which ultimately cannot be dissociated from questions of political approval.[8]

Recognition or "cooptation" of new States has always been meaningful in international State practice. E.g., in 1991 EC Foreign Ministers adopted the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union"[9] establishing a common position on the process of recognition on the basis of certain requirements such as a respect of the rule of law, democracy, human rights, and minority rights. They also clarified that they would not recognise any "entities which are the result of aggression."

It has rightly been observed that non-recognition of an entity that has acquired the prerequisites of statehood continues to be an exception in State practice. This can be explained by the fact that outlawing a *de facto* regime not only deprives the entity

[4] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 League of Nations Treaty Series 19.

[5] *See e.g.* Art. III of the Montevideo Convention.

[6] *Cf.* D. Grimm, *Sovereignty: The Origin and Future of a Political and Legal Concept*, Columbia University Press, New York: 2015, pp. 77–98.

[7] For the discussion on the possibility of a distinction between the existence of states on the one hand, and their participation in the international community on the other *see* M.D. Evans, *International Law*, 3rd ed., Oxford University Press, Oxford: 2010, pp. 240–241.

[8] *Cf. ibidem*, pp. 241–243.

[9] Declaration of 16 December 1991, 31 I.L.M. (1992), pp. 1486–1487.

in question of the rights of a State under international law, but also makes it impossible to call upon that entity to fulfil international obligations and responsibilities in the manner of a State, despite the fact that the international community might have an elementary interest in so doing. For these reasons, non-recognition is considered an option only if recognition of the new State as a partner in international relations appears to be clearly more detrimental than non-recognition.[10]

1.2. Declaration of independence

It is widely accepted in International Law that, other than in the context of decolonisation,[11] and in some cases also of genocide (according to the theory of remedial secession),[12] no entity has the right to establish an independent State.[13] Another question, however, is whether entities can even legitimately attempt to do so by declaring independence. The ICJ, in its Advisory Opinion of 22nd July 2010,[14] considered whether the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo of February 2007 was in accordance with international law; this issue seemed further complicated by the fact that Kosovo was subject to a plethora of resolutions and regulations transferring administrative power to the UN Mission in Kosovo (UNMIK). Having considered the particulars of the case, the ICJ concluded that "the adoption of the declaration of independence of 17 February 2008 did not violate general international law, UN SC Resolution 1244 (1999) or the Constitutional Framework."[15]

Ever since, it seems to have become accepted doctrine that the mere fact of unilaterally declaring independence does not in itself predetermine illegality.[16] Although

[10] Hillgruber, *supra* note 3, p. 494.

[11] *See* UN GA Resolution 2625 (1970) of 24 October 1970 "Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter or the United Nations," A/RES/25/2625, relating to the peoples' right to self-determination. *See also* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, p. 16, paras. 52–53 (hereinafter: *Namibia* Advisory opinion); ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep. 1995, p. 90, para. 29; ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, para. 88.

[12] *Cf.* Separate Opinion of Judge Cançado Trindade, paras. 205–208 to the ICJ, *Accordance with international law of the unilateral declaration of independence in respect of Kosovo*, Advisory Opinion, 22 July 2010, p. 430 (hereinafter *Kosovo* Advisory Opinion).

[13] *See* A/RES/25/2625, *supra* note 11: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States …"

[14] *Kosovo* Advisory Opinion, *supra* note 12.

[15] *Ibidem*, para. 122.

[16] *See* A. Tancredi, *Neither Authorized nor Prohibited – Secession and International Law after Kosovo, South Ossetia and Abkhazia*, 18 Italian Yearbook of International Law 37 (2008).

a general prohibition of unilateral declarations of independence is not implicit in the principle of territorial integrity, declarations supported by the unlawful use of force, or other egregious violations of the norms of general international law, particularly peremptory laws (known as *ius cogens*), can be censured.[17] In such instances the declaration of independence becomes poisoned by the grave violations of international law which preceded it, and therefore can be qualified "as having no legal validity"[18] – with such a qualification sometimes even accompanied by a clear statement that it "will not be accepted."[19]

1.3. Illegality and non-recognition

1.3.1. Non-recognition as an obligation

1.3.1.1. *Serious breaches of international law*

The obligation not to recognise a situation which came about as a consequence of a serious breach of international law dates back to the origins of the concept of the prohibition of force. During the Manchukuo crisis of 1932, the US Government notified the Governments of Japan and the Chinese Republic that it would not recognise any situation, treaty, or agreement brought about by means contrary to the covenants and obligations of the Pact of Paris (Kellogg Briand Pact) of 27 August 1928 – this later became known as the "Hoover-Stimson Doctrine."[20]

As regards the prohibition of the use of force (Art. 2[4] UN Charter), the UN GA's Friendly Relations Declaration (1970)[21] states that "[n]o territorial acquisition resulting from the threat or use of force shall be recognised as legal," and despite the non-binding character of this Resolution, it has become customary in international law to respect it.[22]

Ever since, the range of applications of this duty of non-recognition has broadened; Art. 41(2) of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts states that:[23] "No State shall recognize as lawful a

[17] *Kosovo* Advisory Opinion, *supra* note 12, para. 81, relating to, *inter alia*, UN SC Resolution 216 (1965) of 12 November 1965, S/RES/216, and UN SC Resolution 217 (1965) of 20 November 1965, S/RES/217 concerning Southern Rhodesia; UN SC Resolution 541 (1983) of 18 November 1983, S/RES/541, concerning Northern Cyprus; and UN SC Resolution 787 (1992) of 25 September 1991, S/RES/787, concerning the Republika Srpska.

[18] S/RES/217, *supra* note 17, para. 3.

[19] *See e.g.* S/RES/787, *supra* note 17, para. 3.

[20] H. Meiertöns, *The Doctrines of US Security Policy: An Evaluation under International Law*, Cambridge University Press, Cambridge: 2010, pp. 83ff.

[21] A/RES/25/2625, s*upra* note 11.

[22] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Rep. 1986, p. 14, paras. 191–193 (hereinafter: *Nicaragua* Judgment).

[23] Annex, UN GA Resolution 56/83 of 28 January 2002, A/RES/56/83.

situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation." The above references an obligation arising under a peremptory norm of general international law, which is to be considered "serious" if it involves gross or systematic failure to fulfil the obligation.

Thus, we may speak of a comprehensive obligation not to recognise as lawful a situation which came about as a consequence of a breach of peremptory international law consisting of a *duty of non-recognition,* and a *duty of non-assistance.*[24] This principle applies to all situations where recognition would involve, directly or indirectly, acceptance of the threat or use of force or similarly grave breaches of international law.[25] If, for instance, a new entity arises, or tries to arise as a result of the use of force, or similarly egregious violations of international law, States must not recognise any acts nor situations which would not exist, had such a violation not taken place. Accordingly, the duty of non-recognition entails that States must refrain, for example, from entering into treaty relations, or even entertaining the idea of such relations with a perpetrator State with respect to an unlawfully acquired territory.[26] Thus, they must not recognise a State-like entity established under such circumstances.

1.3.1.2. *Premature recognition*

Recognition of a new State which has declared its independence from another State can constitute a violation of the principles of non-intervention and territorial integrity if such recognition is premature. Recognition is premature if it disregards the right to respect for territorial integrity enjoyed by the original State in a situation where the "new State" cannot be considered to exercise effective State power over the territory concerned, whilst the "old State" still maintains some degree of control.[27] However, illegal recognition alone cannot render the new State illegal, given that recognition is only declaratory of the existence of a new State. In other words illegality remains limited to the act of (premature) recognition, and

[24] *See generally* S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in: C. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Erga Omnes Obligations*, Martinus Nijhoff Publishers, Leiden/Boston: 2005, pp. 99ff.

[25] *Cf.* Commentary to Art. 41, International Law Commission, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Text adopted by the ILC at its fifty-third session, in 2001, and submitted to the UN GA as a part of the Commission's report (A/56/10), Yearbook of the International Law Commission, Vol. II, Part Two (2001), p. 114, para. 5.

[26] *Namibia* Advisory opinion, *supra* note 11, paras. 122, 124.

[27] This was an issue *e.g.* in the case of Croatia being recognised by Germany on 23 Dec. 1991. *See* H. Zygojannis, *Geburt aus Ruinen. Kosovo als neuer Staat in Europa*, Duncker & Humblot, Berlin: 2013, pp. 173ff.

has no impact on the actual existence of the entity concerned. Thus, if the entity in question acquires statehood later, it cannot be considered an illegal State just because it had been recognised prematurely.

1.3.2. Exemptions from the obligation not to recognise

There is little practice in International Law relating to the extent of the obligation not to recognise a certain status or entity – or indeed the potential consequences of non-compliance. However, the ICJ Advisory Opinion of 21 June 1971 on the *Legal Consequences for States for the Continued Presence of South Africa in Namibia (South West Africa)* formulated a general principle, the scope of which is not entirely clear. In Resolution 276 (1970) the UN SC declared that the continued presence of the South African authorities in that country was illegal, and consequently that all actions taken by the Government of South Africa on behalf of, or concerning Namibia after the termination of the Mandate were illegal and invalid. The UN SC also called upon all States to refrain from any dealings with the Government of South Africa which were inconsistent with Resolution 276 (1970).[28] The obligation not to recognise therefore did not relate to the very existence of the new entity, but to South Africa's administration of Namibia – which was a non-independent entity at that time. Nonetheless, the findings of the ICJ are highly relevant to understanding the limits of the obligation of non-recognition: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[29]

Accordingly, non-recognition must not invalidate acts that are of major importance to individuals, – particularly those relating to the provision of certificates on the legal status of a person. The ECHR adopted and further elaborated this position, ruling that: "It is to be noted that the International Court's Advisory Opinion, (…), shows clearly that (…) the obligation to disregard acts of de facto entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the de facto authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights (…), which would

[28] UN SC Resolution 276 (1970) of 30th January 1970, S/RES/276, paras. 2 and 5.

[29] *Namibia* Advisory Opinion, *supra* note 11, para. 125. *See also* ECHR, *infra* note 30.

amount to depriving them even of the minimum standard of rights to which they are entitled."[30]

It has been inferred from such judgments that the impact of non-recognition is limited, due to the fact that international law denies the non-recognised entity the enjoyment of only those rights and privileges which are representative of statehood.[31] However, ECHR itself concedes that there is general practice on granting exemptions but none on the extent and scope such exemptions should have.[32] If one interprets the ICJ "to the detriment" formula, or the "life goes on" formula of the ECHR in a wider sense, the necessity of exception can be seen to extend not only to essential certificates on the civil status of persons (private-law relationships) but also to other acts regulating the interaction between the public and the law, where the latter must be considered indispensable in order to live a normal life and to enjoy the plenitude of human rights. It is not quite clear whether the reference by the ECHR to the "minimum standard of human rights" is meaningful in this context. The dilemma lies in the fact that an extension of the number of acts eligible for exemption can be helpful to the population of the illegal entity, while at the same time deepening and perpetuating the illegal situation itself. To provide an example, the granting of building permission, and registration of titles in the land register can be considered necessary to the establishment of a family home or business premises, while at the same time depriving their former owners of their possessions, and even fundamentally changing ownership rights in the territory in question. Consequently, such acts should be exempt from non-recognition only where individual interests and rights clearly outweigh the general interest of international law in the implementation of non-recognition *vis-à-vis* the fruits of a blatant breach of fundamental norms. This depends, *inter alia*, on the existence of good faith on the acquirers' side – which must be considered lacking where secession goes hand-in-hand with "ethnic cleansing" or other forms of displacement.

1.3.3. Collective non-recognition as a sanction

The denial of recognition, e.g. for reasons relating to the threat or use of force, cannot prevent a State from *de facto* developing, given that recognition, in general, is only declaratory and not constitutive of statehood. On the other hand, denying a State-like entity the rights and privileges inherent in statehood is today no longer seen to constitute a violation of international law in itself.[33] This development must be evaluated against the background of the emergence of peremptory norms such as the

[30] ECHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 10 May 2001, para. 96.

[31] S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten. Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nordzypern*, Mohr Siebeck, Tübingen: 2005, p. 263.

[32] *Cyprus v. Turkey*, *supra* note 30, para. 97.

[33] In contrast, H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, p. 74: duty to recognise.

prohibition of the threat or use of force, and more recently with "*collective non-recognition*," used as a "minimum necessary response" – an effective sanction on the part of the international community in cases of serious breaches of international law.[34]

However, the legal effects of collective non-recognition on the State in question still remain to be clarified. If the UN SC were to call upon UN Member States not to recognise a given State-like entity, because the circumstances of its origin were associated with serious breaches of international law,[35] the question would arise whether the latter could lose its *de facto* statehood (or the rights normally inherent in statehood), on the grounds of such merely normative deliberations. Only in early cases did UN GA pursue a policy of non-recognition with respect to both the *de jure* and the *de facto* existence of a critical entity.[36]

Ostensibly, it would seem clear that denial of recognition cannot prevent a State from *de facto* developing, given that recognition is only declaratory of statehood. Accordingly, it has been put forth that collective non-recognition can only have declaratory effect, because it must be seen as equivalent to recognition.[37] It has also been argued that the refusal of recognition cannot alter the existence of facts, *i.e.* convert a State into a "non-State."[38] Although these arguments seem logical by themselves, the weakness of this position lies in the fact that it would allow for serious breaches of international law (in facilitating the establishment of new States) to be disregarded. On this basis, it is hard to imagine how the obligation not to recognise the results of such breaches[39] can be effected.

In this context, it has been argued that it is only following formal recognition that a new State acquires the status of a sovereign State under international law where it enjoys relations with third States recognizing it as such. The reliability of the new entity as a partner in international relations (cf. Art. 4[1] UN Charter) must therefore be considered the decisive criterion of statehood. Any other assumption would allow for even the most serious transgressions to remain unburdened by significant legal consequences, and would be inconsistent with State practice established in the cases of Rhodesia, the South African homelands and Northern Cyprus.[40] According to this position, collective non-recognition

[34] ILC, *supra* note 25, Commentary to Art. 41, para. 8.

[35] *See* Talmon, *supra* note 31, pp. 304ff (with many references to practice by UN GA and UN SC).

[36] Report of the Collective Measures Committee, Official Records: Sixth Session, Supplement No. 13, October 1951, UN Doc. A/1891, para. 39, concerning the collective measure taken by the League of Nations in the case of Manchukuo.

[37] *Cf.* F. Hoffmeister, *Legal Aspects of the Cyprus Problem: Annan Plan and EU Accession*, Brill/Nijhoff, Leiden: 2006, p. 50.

[38] *Cf.* R. Higgins, *The Development of International Law through the Political Organs of the United Nations,* Oxford University Press, Oxford: 1963, p. 41 (note 69).

[39] *See* Section 1.3.1.1. of this article.

[40] Hillgruber, *supra* note 3, pp. 494–495, 499. A comprehensive survey on all three cases is given by Talmon, *supra* note 31, pp. 83–211.

would have a *status-nullifying effect*, implying that discerning an "illegal state" in such cases would be fallacious, because no State should supposedly exist in the first place. The problem with this approach however, is that it becomes hard to discern whose authority would produce such an outcome. A nullification of status could arguably be achieved by a binding resolution of the UN SC, based on Chapter VII. However, international practice does not support this theoretical scenario.[41] Furthermore, a doctrine of radical nullification would result in obligatory human-rights exemptions from the duty to non-recognition – which after all could hardly be granted to a legal person who should not exist at all.

For these reasons, an increasing number of authors plead for a "third way," whereby collective non-recognition shouldn't be status-nullifying, but rather have *status-denying effect*.[42] According to this position, collective non-recognition would act as a sanction, denying the rights and privileges of a State to a "state" which has attained the formal prerequisites of statehood as a result of a serious breach of international law, in particular through the violation of the prohibition of the threat or use of force. With respect to this, some authors opine that denying statehood to an entity that has been established by the use of force or other serious breaches of law would constitute a classical countermeasure[43] as described by Arts. 22, 49-54 of the ILC Draft Articles on State Responsibility for Internationally Wrongful Acts.[44] However, a countermeasure *a priori* is not at stake if the entity in question does not even *de facto* fulfill the requirements of statehood, including provisions concerning effectiveness of government.[45] Moreover, resorting to the right to use countermeasures seems dubious, because it would imply that the denial of the rights inherent in statehood would constitute a violation of international law, which does not conform to current doctrine.[46] If, on the contrary, international law requires the non-recognition of a situation resulting from the violation of the prohibition of the threat or use of force,[47] the denial of statehood simply entails obedience to the principles of international law and, consequently cannot be subject to justification.

It is not fully clear whether the denial of status approach accepts that there can be an "illegal state" which is merely denied the rights and privileges of a State, or

[41] *See infra* Section 2.

[42] A. Cassese, *International Law*, 2nd ed., Oxford University Press, Oxford: 2005, p. 374; Talmon, *supra* note 31, pp. 260 *et seq*., 302, speaks of a "*negatorische Wirkung*."

[43] *See e.g.* O. Schachter, *International Law in Theory and Practice. General Course in Public International Law*, RCADI, 1982, vol. 178, p. 184; A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal*, Cambridge University Press, Cambridge: 1995, p. 158.

[44] ILC, *supra* note 25.

[45] *Cf.* ILC, *Third report on State responsibility by Mr. James Crawford, Special Rapporteur,* 4 August 2000, UN Doc. A/CN.4/507/Add.4, para. 388.

[46] Lauterpacht, *supra* note 33.

[47] The *de facto* entity is not a third subject of international law with respect to a "sponsor state" that actually used force in order to establish that entity. Rather, the entity must be considered a fruit of the use of force, such as any other advantage that might result from it.

whether its very status as a State is denied in the first place. Only if a State exists at all can it be considered an "illegal State." On the one hand, it can be argued that even a serious breach of international law cannot affect statehood as a *de facto* status, but only impact upon the legal privileges of statehood. According to this position a State may fulfil the criteria of statehood and, nonetheless, be treated in most respects as if it were not a State; this approach would suit a merely declaratory doctrine of recognition. On the other hand, denying statehood itself conforms better to the notion of status denial as a sanction, and accordingly, to the general obligation not to recognise any result of a serious breach of international law. An alternative then would be to consider entities which must not be subject to recognition as "*de facto* regimes" or similar.[48] This is also reflected by the description of non recognition as an attempt "to prevent the attribution of statehood to an illegal entity."[49] Treating the respective entities as limited (partial) subjects of international law has the advantage of subjecting them to at least some obligations under international law, whilst the legitimate State on whose territory the illegal *de facto* regime exists remains the only State on the spot. Thus, no such thing as an "illegal state" can exist – only an "illegal *de facto* regime."

2. State practice in selected cases

2.1. Non-recognition with regard to unlawful extension of territorial sovereignty

The practice of international law pertaining to non-recognition is becoming increasingly established in cases where a State illegally extends either its own territory (e.g., by illegal annexation) or its territorial power (e.g., by illegal forms of occupation). Even though a state's international treaties regularly coincide with its territorial enlargement (cf. Art. 29 VCLT), this rule does not apply to territories acquired by a serious breach of international law.

2.1.1. Non-recognition in cases involving the right to self-determination

2.1.1.1. *Territories occupied by Israel*

Numerous UN SC resolutions have condemned the continued Israeli occupation of the West Bank, Eastern Jerusalem, the Gaza Strip, and the Golan Heights[50] – and

[48] For more details *see* J.A. Frowein, *Das de facto-Regime im Völkerrecht. Eine Untersuchung zur Rechtsstellung 'nichtanerkannter Staaten' und ähnlicher Gebilde,* Carl Heymanns Verlag, Köln/Berlin: 1968; *idem*, *De Facto Regime*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017).

[49] C.L. Rozakis (partially concurring and partially dissenting) to *Chrysostomos and Papachrysostomou v. Turkey* (App. No. 15299/89, 15300/89), Report of the European Commission of Human Rights (Plenary), 86-A (1983), DR 4, 37 (43–44).

[50] *See* in particular, UN SC Resolution 242 (1967) of 22 November 1967, S/RES/242 and UN SC Resolution 446 (1979) of 22 March 1979, S/RES/446 (with special regards to settlements).

some authors regard this as a *de facto* annexation.[51] In its Wall Advisory Opinion, the ICJ ruled on the right of the Palestinian People to self-determination[52] which,in light of the UN SC findings on the illegality of the Israeli occupation, has led the Court to conclude that third parties have a duty "not to recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory" and "not to render aid and assistance in maintaining the situation created by such construction."[53] Additionally, International Humanitarian Law prohibits the exploitation of the resources of an occupied territory by the occupying power.[54] The consequences of these findings concern in particular the import of goods from the settled areas into third States, which by contributing to the economic development of the settlements is therefore also considered to contribute to maintaining the illegal situation.[55]

The EU started to clarify its position after the former EC and its Member States signed the EC-PLO Agreement of 24 February 1997, following their earlier signing of the EC-Israel Agreement of 20 November 1995.[56] In 2012, when the expansion of settlements to new, critical areas threatened the negotiation process with Palestine, the Foreign Affairs Council explicitly stated that "all agreements between the State of Israel and the EU must unequivocally and explicitly indicate their inapplicability to the territories occupied by Israel in 1967."[57]

Following this, the European Commission adopted Guidelines stating that "[t]he EU does not recognise Israel's sovereignty over any of the territories referred to in point 2 and does not consider them to be part of Israel's territory."[58]

Since the EC-PLO Agreement of February 1997 was signed, the issue of territorial scope has become a significant subject of dispute between the EC and Israel.[59]

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[51] E. Kassoti, *The Legality under International Law of the EU's Trade Agreements covering Occupied Territories: A Comparative Study of Palestine and Western Sahara*, 3 CLEER Papers 1 (2017), p. 30.

[52] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 136, paras. 155–156.

[53] *Ibidem*, paras. 155–156, 159.

[54] *See e.g.* Kassoti, *supra* note 51, p. 14 with further details, *e.g.* concerning Art. 55 of the 1907 Hague Regulations.

[55] T. Moerenhout, *The Obligation to Withhold from Trading in Order Not to Recognize and Assist Settlements and their Economic Activity in Occupied Territories*, 3 Journal of International Humanitarian Legal Studies 344 (2012), p. 349.

[56] Kassoti, *supra* note 51, p. 27, mentions the 2001 Notice to Importers as to be the first measure addressing the issue.

[57] Conclusion No. 4 of the Council conclusions on the Middle East Peace Process, 3209th Foreign Affairs Council meeting, Brussels, 10 December 2012, available at: www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/134140.pdf (accessed 15 April 2018).

[58] European Commission, *Guidelines on the eligibility of Israeli entities and their activities in the territories occupied by Israel since June 1967 for grants, prizes and financial instruments funded by the EU from 2014 onwards of 30 June 2013*, OJ C-205/9, para. 3.

[59] Opinion of the Advocate General Bot delivered on 29 October 2009, ECLI:EU:C:2009:674, paras. 26–31.

One example of this is the *Brita GmbH* case,[60] in which the ECJ was asked to rule on whether the EC-Israel Agreement or the EC-PLO Agreement could be applied without distinction to goods certified as being of Israeli origin, but which prove to originate in the occupied territories (more specifically the West Bank). Rather than take account of the legal status issues in question, the Court constrained itself to stating that there existed two Euro-Mediterranean Association Agreements, one with the State of Israel, and another with the PLO, each of them having its own territorial scope. Yet, addressing the question of whether the importing EU state was bound by the reply given by the exporting State (Israel), it made direct reference to the political background, saying: "The aim of the subsequent verification was to establish the precise place of manufacture of the imported products, for the purposes of determining whether those products fell within the territorial scope of the EC-Israel Association Agreement. The European Union takes the view that products obtained in locations which have been placed under Israeli administration since 1967 do not qualify for the preferential treatment provided for under that agreement."[61]

The result of this new practice is that Israel can now neither include products originating from the occupied territories in its own trade with EU Member States, nor even authentically claim that they are of Israeli origin. This example shows that collective non-recognition may also be practised as a sanction at a later stage in the development of a notoriously illegal situation, should it for any reason worsen (as in the case of the expansion of Israeli settlements).

2.1.1.2. *Western Sahara*

Western Sahara, a former Spanish colony, has been on the UN list of non-self-governing territories since the UN began following a decolonisation policy at the end of 1963. Ever since, the organisation has constantly affirmed the right of the Sahrawi people to self-determination.[62] Accordingly, in its Western Sahara Advisory Opinion, the ICJ found that the Sahrawi have a right to self-determination.[63] A few days later, the UN SC explicitly reaffirmed, with respect to Western Sahara, the terms of UN GA Resolution 1514 (XV) of 14 December 1960 (Declaration on the Granting of Independence to Colonial Countries and Peoples).[64] Facing the imminent withdrawal of Spain from Sahrawi territory, and the claims to that territory subsequently put forth by Morocco and Mauretania, the Frente Polisario

[60] Case C-386/08 *Brita GmbH v. Hauptzollamt Hamburg Hafen* [2010] ECR I-1289, paras. 46–47, 51–53.

[61] *Ibidem*, para. 64.

[62] *See* T. Marauhn, *Sahara*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017).

[63] ICJ, *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Rep. 1975, p. 12, paras. 64–73, 162.

[64] UN SC Resolution 377 (1975) of 22 October 1975, S/RES/377.

liberation movement instigated the establishment of the Sahrawi Arab Democratic Republic, which was finally proclaimed on 27 February 1976,[65] and recognised by a considerable number of UN Member States.[66] Nevertheless, Western Sahara has always remained an example of "failed decolonisation"[67] due to the fact that Morocco has persisted in exercising sovereignty over Western Sahrawi territory, *inter alia* by exploiting its natural resources.[68]

In this case, the EC/EU was not really inclined to consider Sahrawi rights in its treaty negotiations with Morocco, probably due to the fact that the latter became increasingly important to EC/EU Mediterranean partnership strategies. Even after the EU, in its Agreements with Israel, had begun to insist that the occupied Palestinian territories were not included in Israeli territory, it did not follow the same approach with respect to Western Sahara – and sharp criticism on the basis of doctrine followed. The EU was not only blamed for exercising "realpolitik," and showing "disinterest in upholding the right to self-determination in relation to the analogous situation in Western Sahara,"[69] but also of aiding and assisting Morocco in the on-going perpetration of internationally wrongful acts.[70]

Two recent judgments by the ECJ are likely to induce a change in this policy. By referring to its judgment on *Front Polisario* (2016), the ECJ ruled that it is contrary to the principle of international law on the relative effect of treaties (cf. Art. 34 VCLT) to take the view that the territory of Western Sahara comes within the scope of the EU-Moroccan Association Agreement.[71] Accordingly, the Grand Chamber of the ECJ decided in its preliminary ruling on *Western Sahara Campaign UK* (2018) that the Fisheries Partnership Agreement and pertinent Protocol between the EC and the Kingdom of Morocco cannot be interpreted in such a way as to include Western Sahara, even if this were (tacitly) consented to by both parties to the treaty (cf. Art. 29, 31 [4] VCLT).[72] The Court underlined the established case law according to which the European Union is bound to observe international law in its entirety when exercising its powers.[73] If the territory of Western Sahara

[65] For recognition as representation of the Sahrawi people *see* UN GA Resolution 34/37 of 21 November 1979, A/RES/34/37.

[66] For further details *see* Marauhn, *supra* note 62, para. 11.

[67] *Ibidem*, paras. 6–12, 49.

[68] *Ibidem*, paras. 40–42.

[69] *See e.g.* J. Crawford, *Third Party Obligations with respect to Israeli Settlements in the Occupied Palestinian Territories*, Opinion of 24 January 2012, para. 131, available at: www.tuc.org.uk/sites/default/files/tucfiles/LegalOpinionIsraeliSettlements.pdf (accessed 15 October 2017).

[70] *E.g.* Kassoti, *supra* note 51, p. 56.

[71] Case C-104/16 P *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro* [2016] ECLI:EU:C:2016:973, paras. 105–107.

[72] Case C-266/16 *Western Sahara Campaign UK v. Commissioners for Her Majesty's Revenue and Customs, Secretary of State for Environment, Food and Rural Affairs* [2018] ECLI:EU:C:2018:118, especially paras. 70–73.

[73] *Ibidem*, para. 47.

were to be included within the scope of the Association Agreement, it would be in direct contradiction to certain rules of general international law applicable to relations between the European Union and the Kingdom of Morocco, particularly the principle of self-determination (Art. 1 of the UN Charter), and the principle of the relative effect of treaties (Art. 34 VCLT).[74]

2.1.1.3. *Non-recognition in order to defend the right to self-determination?*

It is worth noting that both in the case of *Front Polisario* and *Western Sahara Campaign UK* the ECJ avoids mentioning a duty not to recognise a situation resulting from the violation of the right to self-determination. It rather indirectly refers to it as merely another principle of international law which must be respected like any other. Accordingly, the third-party-principle is, for instance, applied in cases where a State tries to extend its sovereignty to a given territory in a way which disregards the local people's right to self-determination. On the one hand, the ECJ accepts that the right of a people to self-determination creates a distinct party which renders the international law principle of the relative effect of treaties (cf. Art. 34 VCLT) applicable. On the other hand, it seems not to be inclined to consider a duty to non-recognition, where a violation of the right to self-determination is at stake.

2.1.2. Non-recognition in cases of annexation: territorial integrity of Kuwait (1990) and Ukraine (2014)

It is undisputed today that annexation is not only prohibited but also constitutes a grave breach of a peremptory norm of international law.[75] Nevertheless, in 1990, under the regime of Saddam Hussein, Iraq invaded Kuwait and afterwards declared its intent to "merge" with Kuwait. In response, the UN SC made it very clear in Resolution 662 (1990) that this annexation had "no legal validity," and was to be considered "null and void," with the body calling upon all States not to recognise it.[76]

On 21 March 2014, in the aftermath of an armed conflict and an illegal referendum, the Russian Federation decided to separate Crimea from Ukraine, and integrate it into its own territory under the credible threat of use of force against Ukraine.[77] While the UN SC was prevented from taking action in this matter by the Russian veto, the UN GA called upon all States and international organisations "not to recognise any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol," including "any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means," which passed with a hundred votes.[78]

[74] *Ibidem*, para. 63.

[75] *See* Section 1.3.1.1.

[76] UN SC Resolution 662 (1990) of 9 August 1990, S/RES/662.

[77] For further details and references *see* C. Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 367 (2014).

[78] UN GA Resolution 68/262 of 27 March 2014, A/RES/68/262 especially paras. 2 and 6.

While the annexation of Kuwait has been reversed by military action, the annexation of Crimea still requires consideration. As subsequent practice shows, there has been some form of collective non-recognition following the UN GA Resolution 68/262. The EU and its Member States in particular consistently refuse to enter into any treaty relations with Russia regarding the Crimean territory.[79] Additionally, economic and other sanctions have been put in place.[80] The US has prohibited funding "any activity that recognises the sovereignty of the Russian Federation over Crimea."[81] However, the planned Crimea Annexation Non-recognition Act[82] is yet to become law. China had to be called on by the Ukrainian President "to adhere to the policy of non-recognition;"[83] Belarus seems to constantly swing from one side to the other.[84] Ultimately, State practice shows that there is readiness to implement a policy of non-recognition in accordance with UN GA Resolution 68/262. However, it seems difficult to exercise it against the Russian Federation.

2.2. Illegal forms of the establishment of new entities – a case for "illegal states"?

2.2.1. "Southern Rhodesia" (1965)

In 1965, representatives of the white minority population in the Former British Crown Colony of Southern Rhodesia declared themselves an independent and sovereign "Republic of Rhodesia." The UN SC considered this a "usurpation of power by a racist regime," classified the declaration of independence as having "no legal validity," and called upon "all States not to recognise this illegal authority and not to entertain any diplomatic or other relations with it."[85]

The case of "Southern Rhodesia" seems to show that, in exceptional cases,[86] a declaration of independence can in itself be illegal. However, the post-colonial context

[79] *See* European External Action Service, *The EU non-recognition policy for Crimea and Sevastopol: Factsheet*, 12 December 2017, available at: https://eeas.europa.eu/headquarters/headquarters-Homepage/37464/eu-non-recognition-policy-crimea-and-sevastopol-fact-sheet_en (accessed 15 October 2017).

[80] *See* in particular Council Decision 2014/145/CFSP of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine, [2014] OJ L 78, p. 16; Council Regulation (EU) No 833/2014 of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine, [2014] OJ L 229/1.

[81] Section 1234 of the National Defense Authorization Act For Fiscal Year 2017, Public Law 114–328 of 23 December 2016.

[82] H.R.463, (re-)introduced in House of Representatives on 1 December 2017.

[83] Interfax Ukraine, *Poroshenko calls on China to adhere to non-recognition of occupation of Ukraine's Crimea by Russia*, Kyiv Post, 05.12.2017.

[84] A. Shraibman, *The Lukashenko Formula: Belarus's Crimea Flip-Flops*, Carnegie Moscow Center, 1 June 2016, available at http://carnegie.ru/commentary/63698 (accessed 15 October 2017).

[85] S/RES/217, *supra* note 17, paras. 3 and 6.

[86] *See* for the rule *Kosovo* Advisory Opinion, *supra* note 12.

seems to have influenced the decision of the UN SC here, through the perception that a "racist regime" was seeking independence in order to undermine Rhodesia's legitimate prospect of decolonisation in contradiction with the principles of the United Nations, and in breach of the right to self-determination of colonised peoples.[87] The same applies in the case of Namibia, where the ICJ also affirmed a duty of non-recognition.[88] One must be cautious about drawing generalised conclusions from these precedents alone, but it seems appropriate to infer that the UN SC might consider a declaration of independence legally invalid, if it were in conflict with the essential principles of the United Nations.

2.2.2. The so-called "Turkish Republic of Northern Cyprus" (1983) as a model case

2.2.2.1. *Historic background and normative framework existing before the declaration of independence*

The former British Crown Colony of Cyprus became independent in 1959/60, after the Greek Cypriots fought a bloody war for independence from the British and their Turkish Cypriot allies.[89] The 1960 Treaty of Nicosia, signed by the United Kingdom, Greece, Turkey, and Cyprus, established the Republic of Cyprus as an independent entity with "incomplete statehood," and limited sovereignty.[90] The intrinsic error in this construct lay in the fact that two antagonistic ethnic groups, residing in two almost entirely distinct parts of the country were doomed to an institutionalised form of power sharing, and permanent negotiations within a two-community system. Under such circumstances, only three years later, in 1963, constitutional crisis begat civil war. The presence of UN Peacekeeping Forces (UNFICYP) in Cyprus from 1964 did not prevent Turkish Military Forces from invading the Island in 1973, and occupying a considerable part of it; this invasion was accompanied by grave breaches of human rights, the expulsion of ca. 170,000 Greek-Cypriots from Northern Cyprus and the exodus of the Turkish-Cypriots from Southern Cyprus, which altogether lead to the *de facto* division of Cyprus.

In response, the UN GA passed Resolution 3212 (XXIX), in which the existence of a crisis constituting "a threat to international peace and security" was unanimously recognised. The Resolution called upon all States "to respect the sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus, and to refrain from all acts and interventions directed against

[87] *See* Art. 1(2), Art. 73(b) of the UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 16 UNTS 1 (1945); only later: A/RES/25/2625, *supra* note 11.

[88] *Supra* chapter 1.3.2.

[89] A survey on the history of the conflict is given by Talmon, *supra* note 31, pp. 11–27; P.A. Zervakis, *Political Conflict Lines on Cyprus and the Role of International Organizations*, in: T. Giegerich (ed.), *The EU Accession of Cyprus – Key to the Political and Legal Solution of an "Insoluble" Ethnic Conflict?* Nomos, Baden-Baden: 2006, pp. 14–15.

[90] C. Brewin, *The European Union and Cyprus*, Eothen, Huntingdon: 2000, pp. 1–3.

it."[91] Furthermore, it affirmed the "fundamental right to independence, sovereignty and territorial integrity" of the Republic of Cyprus.[92] With such contents, the UN GA's Resolution was explicitly endorsed by UN SC Resolution 365 (1974),[93] which additionally urged the parties to implement measures contained in the two Resolutions as soon as possible.

2.2.2.2. *Declaration of independence and actions taken by the United Nations and international community*

When in 1975 the separatist party declared the Northern part of the Republic of Cyprus a "Federated Turkish State," the UN SC instantly condemned this declaration. It called upon all States, and other involved parties to refrain from any action which might prejudice the sovereignty, independence, territorial integrity, and non-alignment of the Republic of Cyprus, as well as from "any attempt at partition of the island or its unification with any other country."[94] Yet, the process of separation still came to pass, following a Declaration, issued by the Turkish Cypriot authorities, proclaiming a new "*Turkish Republic of Northern Cyprus*" on 15 November 1983; this was then instantly recognised by Turkey. The UN SC then responded by passing Resolution 541 (1983), which states that: "… Considering that this declaration [of independence] is incompatible with the 1960 Treaty concerning the establishment of the Republic of Cyprus and the 1960 Treaty of Guarantee. Considering, therefore, that the attempt to create a 'Turkish Republic of Northern Cyprus' is invalid; (…) 2. Considers the declaration referred to above as legally invalid and calls for its withdrawal; (…) 7. Calls upon all States not to recognise any Cypriot State other than the Republic of Cyprus."[95]

Interestingly, this Resolution does not purposely invalidate the declaration of independence as a threat to security and peace, but rather presents the inherent invalidity resulting from its incompatibility with pre-existing international treaties regimenting the status of Cyprus. As a result, the Resolution has been criticised for a lack of altruistic desire to re-establish the status-quo as it was in 1960, instead being perceived to be driven by the need to maintain a balance of power between the two superpowers of the time.[96]

In Resolution 550 (1984)[97] the UN SC regretted the non-implementation of its former resolutions, in particular Resolution 541 (1983), and censured "the legally invalid 'Turkish Republic of Northern Cyprus'." This is of interest, because

[91] UN GA Resolution 3212 of 1 November 1974, A/RES/3212, para. 1.

[92] *Cf. ibidem*, para. 6.

[93] UN SC Resolution 365 (1974) of 13 December 1974, S/RES/365. *See also* UN SC Resolution 367 (1975) of 12 March 1975, S/RES/367.

[94] S/RES/367, *supra* note 93, paras. 1 and 2.

[95] S/RES/541, *supra* note 17.

[96] *See e.g.* C. Rumpf, *Comments on the Legal Status of Cyprus: Issues of Conflict and their Causes*, in: Giegerich, *supra* note 89, p. 56.

[97] UN SC Resolution 550 (1984) of 11 May 1984, S/RES/550.

in Resolution 550 (1984), invalidity is not associated with the declaration of independence itself (as is the case in Resolution 541 [1983]) but rather with the particulars of the TRNC itself. It also seems noteworthy that UN SC Resolution 550 (1984) declared certain secessionist actions (e.g., exchange of ambassadors between Turkey and the TRNC) "illegal and invalid," and called for their immediate suspension. This means that the UN SC did not consider illegality and invalidity incompatible concepts.

The question thus arises whether both Resolutions are legally binding with respect to UN Member States. The fact that the texts make no reference to either Chapter VII of the UN Charter, or any binding UN decision[98] seems to indicate that they are non-binding. But irrespective of that, the obligation not to recognise a situation created by a serious breach of international law follows just the same from customary international law, which has been breached by the military occupation of parts of the Republic of Cyprus by Turkey. Notwithstanding the fact that the incompatibility of the declaration of independence with existing treaties has been declared the crucial reason for non-recognition, Resolution 541 (1983) can be considered declaratory and binding in light of customary international law,[99] at least with regard to the legal necessity not to recognise the TRNC. Since the position taken by the UN SC was fully adopted by other representatives of the international community, including the Committee of Ministers of the Council of Europe, and the European Council,[100] the establishment of the TRNC has ultimately led to a situation which has rightly been described as "*collective non-recognition*."[101]

2.2.2.3. *Impacts of the UN SC resolutions on jurisprudence*

The UN SC judgment on Northern Cyprus had further effects, *inter alia* in the *Loizidou* case (1996),[102] where compliance with the Convention-based right to property in Northern Cyprus (where questions of unlawful deprivation of property arose) depended on the Constitutional justification of the TRNC of 7 May 1985. However, in accordance with applicable UN SC resolutions, the ECHR took a clear position on non-recognition: "In this respect it is evident from international practice and the various, strongly worded resolutions referred to above (…) that the international community does not regard the 'TRNC' as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government

[98] Usually, the SC "decides" in the context of a binding decision.

[99] A. Epiney, B. Hofstötter, *Zur Stellung von Nordzypern und Nordzyprern im europäischen Gemeinschaftsrecht*, in: A. Epiney, U. Haltern, B. Hofstötter & A. Ileri (eds.), *Zypern in der Europäischen Union*, Nomos, Baden-Baden: 2008, pp. 91–93.

[100] For further details *see* ECHR, *Loizidou v. Turkey* (App. No. 15318/89), Grand Chamber, 18 December 1996, para. 22.

[101] *See* Talmon, *supra* note 31.

[102] ECHR, *supra* note 100.

of Cyprus (…) Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely. The Court (…) does not consider it desirable, let alone necessary, in the present context to elaborate a general theory concerning the lawfulness of legislative and administrative acts of the 'TRNC'."[103]

Thus, not only did the ECHR uphold the UN SC's decision concerning the obligation not to recognise any Cypriot State other than the Republic of Cyprus, it also endorsed the exemption rule of the ICJ.[104] It did not refer to anything like an "illegal State" but rather pointed to the non-existence of the "TRNC." The ECHR however, did not fail to notice how the Republic of Cyprus was deprived of any possibility of exercising jurisdiction on the territory of the so-called "TRNC." Therefore, in order to avoid "a regrettable vacuum in the system of human-rights protection in the territory in question," in the case *Cyprus v Turkey* (2001) the ECHR started to construe substitute responsibilities on the part of the invading power. Ever since, "effective overall control" has served as a placeholder for legitimate jurisdiction at present lacking.[105] Effective overall control of this function thus shifts general responsibility to a third State – which ensures the survival of the administration of the newly proclaimed "State" which, according to international law, need not at all be recognised as such.

In the *Apostolides* case (2009)[106] the ECJ found that the Courts of the Republic of Cyprus may judge on real estate situated in the Northern part of Cyprus, even though the Republic of Cyprus lacks control over this part of the Island. And even were the Republic of Cyprus prevented from enforcing such judgments, the latter, by virtue of Regulation EC/44/2001 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters, must be recognised and enforced by all EU Member States. Accordingly, lack of control over any part of an EU Member State (e.g., the Republic of Cyprus with regard to its Northern territory) can be compensated for by the implementation of EU-enforced law, in a situation where the Turkish Cypriot respondent is the owner of property in another EU Member State. By this construct the ECJ intensified the effects of the EU's policy of non-recognition vis-à-vis the TRNC.

2.2.2.4. *Is the "TRNC" an "illegal State"?*

It has been put forth in doctrine that with regard to the three classical prerequisites of statehood the TRNC should be considered a State.[107] However, the fact

[103] *Ibidem*, paras. 44–45.

[104] *Supra* Section 1.3.2. *See also* ECHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 10 May 2001, paras. 96–98.

[105] *Ibidem*, paras. 77–78.

[106] Case C-420/07 *Apostolides v. Orams* [2009] ECLI:EU:C:2009:271. *See also* Case C-432/92 Anastasiou [1994] ECLI:EU:C:1994:277, paras. 40ff, 47.

[107] Talmon, *supra* note 31, p. 231 with numerous references; Epiney, Hofstötter, *supra* note 99, p. 88; Rumpf, *supra* note 96, pp. 57–58.

that the TRNC is forbidden from entering into relationships with other States is irrelevant to statehood, because recognition (according to prevailing opinion) is merely declaratory. This argumentation however, is not convincing – as, were the occupying Turkish army not stationed in Northern Cyprus, the Republic of Cyprus could re-gain control from the TRNC. Accordingly, it must be doubted whether "effective" government actually exists in Cyprus, all the more so as the TRNC lacks the capability to enter into relations with third States (except Turkey) and, thus lacks external sovereignty.

The majority of authors therefore, believe that the TRNC is not a State.[108] This seems to conform to international practice. As has been shown, the S.C. explicitly called upon all States "not to recognise any Cypriot State other than the Republic of Cyprus." Accordingly, the ECHR explicitly stated "that the international community does not regard the 'TRNC' as a State under international law."[109] However, such statements do not necessarily relate to the factual prerequisites of statehood but rather deny the recognition of statehood for normative reasons, *i.e.* on the grounds of "collective non-recognition."[110]

Apparently, the TRNC is considered a *de facto* regime, which means that the government of the Republic of Cyprus remains the only *de jure* government. As a partial subject of international law, the TNRC then becomes subject to certain obligations under it, which for factual reasons cannot be exercised by the legitimate government; at the same time, the Republic of Cyprus remains entitled to legislate on the Northern part of its territory, unless the applicability of such laws is suspended.[111] This approach also conforms to the ICJ opinion on Namibia, according to which the obligation to disregard acts of *de facto* entities is far from absolute,[112] which results in certain acts of the TRNC authorities having to be considered valid, if this seems necessary to the protection of human rights, or the settlement of the conflict by negotiation.

After all, the TRNC represents an illegal regime which, with the help of a third State, rules over a territory illegally separated from another State. According to traditional terminology this would seem to represent an "illegal *de facto* regime" however, in more recent terminology it can be referred to as an "illegal State-like entity" or an "illegal entity short of statehood" depending on whether the criteria of statehood are considered fulfilled.[113]

[108] Epiney, Hofstötter, *supra* note 99, pp. 93, 102.

[109] ECHR, *supra* note 100, para. 44. *See also* ECJ, *Apostolides v. Orams, supra* note 106, para. 47. In contrast, ICTY, *Prosecutor v. Tadić* (IT-94-1-A), Judgment in the Appeals Chamber, 15 July 1999, para. 128: "State entity."

[110] *Supra* Section 2.2.2.2.

[111] C*f.* Epiney, Hofstötter, *supra* note 99, pp. 93–98.

[112] *See supra* Section 1.3.2.

[113] *See* Conclusions.

2.2.3. The so-called "Moldovan Republic of Transdniestria"

2.2.3.1. *History and circumstances of the conflict*

The so-called "Moldovan Republic of Transdniestria" (MRT) is situated mainly on the East side of the river Dniester (Nistru River), between Moldova and Ukraine. Its appearance can be considered a consequence of the dissolution of the former Soviet Union – a process which fomented new forms of nationalism, and ethnic tensions between Romanian-speaking Moldavians, and ethnic Ukrainians and Russians.[114] When the former "Moldavian Soviet Socialist Republic" declared independence in June 1990, discriminatory laws concerning, *inter alia* the removal of Russian as official language, and the prospect of a possible reunification between Moldova and Romania inspired fear in ethnic minority populations, particularly in the region of Transdniestria (otherwise Transnistria), where the share of ethnic Russians and Ukrainians was especially high. On 2 September 1990, the "Second Congress of the Peoples' Representatives of Transdniestria" proclaimed the "Pridnestrovian Moldavian Soviet Socialist Republic" which, however, was not endorsed by the Soviet Union. As a result of violent clashes between the separatists, and Moldovan forces, which had been taking place since the autumn of 1990, the USSR military units formerly stationed in Moldova changed their designation to the "Russian Operational Group in the Dniestrian Region of the Republic of Moldova" – which the Republic of Moldova considered an act of occupation. In spite of all the joint statements issued by Moldova and Russia regarding peaceful settlement, the withdrawal of Russian military forces, and the respect shown for the principle of territorial integrity and human rights,[115] the conflict continued to exist – albeit in the form of a "frozen conflict." The ethnically Ukrainian and Russian majority in Transdniestria started to discriminate against the Romanian minority, and suppress Romanian teaching institutions in the area.[116] In 2006, 97 percent of the Transdniestrian population voted in favour of independence from Moldova, and joining Russia. Ever since, a sort of *de facto* regime continues to exercise *de facto* power in Transdniestria, with the military and political support of the Russian Federation.[117]

2.2.3.2. *Positions taken by the international community*

The so-called "Moldovan Republic of Transdniestria" has not been recognised as sovereign State by any member of the UN; while recognition granted by South

[114] The following facts originate from ECHR, *Ilaşcu and Others v. Moldova and Russia* (App. No. 48787/99), Grand Chamber, 4 July 2001, sub A.1. *See also* extensively ECHR, *Catan and Others v. Moldova and Russia* (App. No. 43370/04, 8252/05 and 18454/06), Grand Chamber, 19 October 2012, paras. 8ff.

[115] The Joint Statement by the presidents Voronin (Moldova) and Putin (Russia) of 16 April 2001 is quoted by ECHR, *Ilaşcu…*, *supra* note 114, sub A.1 (*in fine*).

[116] *See e.g.* European Parliament Resolution of 6 February 2014 on Transnistria 2014/2552(RSP), [2017] OJ C 93.

[117] *See infra* Section 2.2.3.3.

Ossetia, Nagorno-Karabakh, and Abkhazia cannot be considered relevant, as these entities themselves lack recognition by the international community. Even though the situation in Transdniestria shows some similarities to that in Northern Cyprus, the UN SC has not issued any statements. To the contrary, it seems paralysed by the veto power of the Russian Federation. Moldova's attempt to put the withdrawal of all foreign (in particular Russian) military forces on the UN GA's Agenda failed.[118]

In spite of this failure, the European Parliament clarified that it "[f]ully rejects the organisation and outcome of the 'referendum' on independence for the Transnistrian region of Moldova and its possible accession to the Russian Federation, as this is in sharp contradiction with the internationally recognised sovereignty and territorial integrity of the Republic of Moldova and as the repressive regime in Transnistria does not allow for the free expression of the popular will."[119]

Other EU organs have expressed themselves less explicitly, but nevertheless adopted a long series of repressive measures against the "leadership of the Transnistrian region of the Republic of Moldova."[120] Overall, the EU "remains committed to contributing to the objective of reaching a peaceful solution to the conflict, in full respect of Moldova's territorial integrity."[121]

2.2.3.3. *Decisions by the ECHR relating to the status of Transdniestria*

The situation in Transdniestria has raised serious concerns with regard to human rights violations, including various forms of discrimination against members of the Romanian-speaking population, as well as the politicisation of education policy.[122] In the case of *Ilaşcu and Others v Moldova and Russia* (2004)[123] the ECHR (GC) affirmed "jurisdiction" (Art. 1 ECHR) as the basis for the responsibility of the Russian Federation for the following reasons: "In the light of all these circumstances, the Court considers that the Russian Federation's responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In

[118] UN GA Resolution 72/193 of 18 August 2017, A/RES/72/193. Moldova stated in its explanatory memorandum: "The Republic of Moldova considers the presence of these military forces to be a threat to the maintenance of international peace and security."

[119] European Parliament Resolution on Moldova (Transnistria) 2006/2645(RSP), [2006] OJ C 313 E/427, paras. 1 and 3.

[120] *See* Council Common Position 2003/139/CFSP, [2003] OJ L 53/60. *See also e.g.* Council Common Position 2004/179/CFSP, [2004] OJ L 55/68; Council Decision 2006/96/CFSP implementing Common Position 2004/179/CFSP, [2006] OJ L 44/32; and most recently, Council Decision 2017/1935/CFSP, [2017] L 273/11, according to which the restrictive measures against the leadership will be extended until 31 October 2018.

[121] Council Common Position 2004/179/CFSP, [2004] OJ L 44/32, para. 3.

[122] *See* ECHR, *Catan…*, *supra* note 114, paras. 43ff.

[123] EHCR, *Ilaşcu*…, *supra* note 114.

acting thus, the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova."[124]

This seems fully in line with the "effective (overall) control" doctrine, which the Court applied consistently in several previous cases.[125] However, it also affirmed Moldova's jurisdiction (Art. 1 ECHR) in spite of the fact that this State was *de facto* prevented from exercising authority over Transdniestrian territory: "The State in question must endeavour, with all the legal and diplomatic means available to it vis-à-vis foreign States and international organisations, to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention. Moldova's positive obligations relate both to the measures needed to re-establish its control over Transdniestrian territory, as an expression of its jurisdiction, and to measures to ensure respect for the applicants' rights, including attempts to secure their release. The obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separatist regime of the "MRT", and secondly to act by taking all the political, judicial and other measures at its disposal to re-establish its control over that territory. (…) In the Court's opinion, when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation (…), to re-establish its authority over Transdniestrian territory. (…) there was little Moldova could do (…)."[126]

With this construct, the Court extended jurisprudence relating to the existence of "positive obligations" to the legitimate possessor of State authority. It has rightly been observed in doctrine that the *Ilaşcu* judgment not only contains an additional (and problematic) obligation to negotiate in order to guarantee the continuation of the enjoyment of rights guaranteed by the Convention in separatist regions, but also indicates the "resilience of the State's rights in its territory."[127] Nonetheless, the ECHR did clarify that while inclining more towards diplomatic activities, including negotiations with the "Transdniestrian regime," Moldova should not renounce its attempts to exercise its jurisdiction in the region.[128]

In its *Ilaşcu* judgment the ECHR established a doctrine of "multifold responsibility" – that is responsibility on the part of a State supporting a separatist regime, as well as on the part of the State, whose sovereignty has been violated. This certainly conforms to the rigorous outlook of this Court on the matter of human rights. In subsequent cases the ECHR conceded that Moldova had fulfilled her obligation, *inter alia* by initiating criminal proceedings with regard to illegal acts

[124] *Ibidem*, para. 382.

[125] *See e.g.* ECHR, *supra* note 100.

[126] ECHR, *Ilaşcu*…, *supra* note 114, paras. 333, 339–341.

[127] T.D. Grant, *Ukraine v. Russian Federation in light of Ilaşcu: Two short points*, EJIL Talk, 22 May 2014, available at: https://www.ejiltalk.org/ukraine-v-russian-federation-in-light-of-ilascu-two -short-points/ (accessed 15 October 2017).

[128] EHCR, *Ilaşcu*…, *supra* note 114, para. 344.

taken by "MRT authorities," and informing foreign ambassadors as well as the OECD on the violations in question.[129] By contrast, the Russian Federation, as a state sponsor of separatism, has been held responsible for all the human-rights violations committed by "MRT authorities"[130] – with little hope that the pertinent judgments will ever be implemented.[131]

2.2.3.4. *Is the "Moldovan Republic of Transdniestria" an "illegal State"?*

"MRT authorities" have always striven to act in the manner of authorities of an independent State.[132] However, the "Moldovan Republic of Transdniestria" is not considered a State by any of the UN Member States, even the Russian Federation. Although Russian troops did not invade this territory – as Turkish forces did in the case of Northern Cyprus – they have extended their presence without the consent of the Republic of Moldova, which also constitutes an act of aggression,[133] and hence a serious breach of international law. Even if there was some reason to protect the Russian/Ukrainian- speaking minority population in Transdniestria from oppressive acts by the Moldovan majority, this would not justify the permanent presence of troops belonging to a third power, against the explicit will of the legitimate government.[134] However, the situation is distinct from that in Cyprus in that the Russian Federation, though it may patronise Transdniestrian separatism, remains uninterested in the establishment of an independent Transdniestrian State; and it is even less inclined to incorporate Transdniestria into its own territory – which still seems to be the ultimate aim of the Transdniestrian regime in declaring independence.

Ultimately therefore, it may be doubted whether a *de facto* regime has emerged in this case. Rather, a regional administration existing *sui generis* has, with the help of the Russian Federation separated from the Republic of Moldova while still more or less maintaining cooperation with all sides, whilst the populations resorts to multiple citizenship in order to ameliorate the practical shortcomings of the

[129] ECHR, *Mozer v. the Republic of Moldova and Russia* (App. No. 11138/10), Grand Chamber, 23 February 2016, para. 152; ECHR, *Turturica and Casian v. the Republic of Moldova and Russia* (App. No. 28648/06 and 18832/07), 30 August 2016, para. 52; ECHR, *Catan…*, *supra* note 114, paras. 147–148.

[130] In later decisions, the ECHR found that interferences by "MRT authorities" with individual human rights principally lack a legal basis and, as a consequence, principally remain unjustified. *See* ECHR, *Turturica and Casian v. the Republic of Moldova and Russia* (App. No. 28648/06 and 18832/07), 30 August 2016, para. 49.

[131] *See* ECHR, *Ilaşcu, Ivanţoc, Leşco and Petrov-Popa v. Moldova and Russia* (App. No. 23687/05), 4 June 2012.

[132] *See e.g.* the facts relating to *Turturica and Casian*, ECHR, *supra* note 129.

[133] Art. 3 (e) of UN GA Resolution 3314 (XXIX) of 14 December 1974, A/RES/29/3314 (Annex).

[134] *Cf.* the discussion on "humanitarian intervention," and more recently on "responsibility to protect." Strictly denying any use of force: *Nicaragua* Judgment, *supra* note 22, para. 268. Affirming under certain conditions: European Parliament Resolution on the Right to Humanitarian Intervention A3-0227/94, [1994] OJ 1994, No. C 128, pp. 225–227.

resultant situation. This situation can therefore be characterised as representing a form of "illegal regional administration."

2.2.4. The so-called "Nagorno-Karabakh Republic"

2.2.4.1. *History of the conflict*

Nagorno-Karabakh is a territory situated within the borders of Azerbaijan. When the conflict in this area became virulent, it had a mixed population of around 189,000, comprising 77% ethnic Armenians, 22% ethnic Azeris, as well as Russian and Kurdish minorities.[135] With the beginning of Perestroika in the former USSR, Armenians from the then Nagorno-Karabakh Autonomous Oblast began to agitate for unification with the Armenian SSR. In December 1989 the Supreme Soviet of the Armenian SSR and the Nagorno-Karabakh regional council adopted a joint resolution "on the reunification of Nagorno-Karabakh with Armenia." Violent clashes between both groups then provoked a military confrontation between Armenian and Azerbaijani forces. On 31 August 1991 Armenia and Azerbaijan declared independence from the collapsing Soviet Union. Following that, on 2 September 1991, local authorities in Nagorno-Karabakh declared independence of the so-called "Nagorno-Karabakh Republic" (NKR), which was later confirmed by the Armenian population in a referendum of dubious legality. The subsequent war, which caused thousands of deaths, and rendered displaced a similar number of persons, led to the occupation of approximately 20 percent of the Azerbaijani territory by the "Nagorno-Karabakh Republic" –supported by Armenian forces. After a ceasefire has been signed by representatives of Armenia, Azerbaijan and the "NKR" in May 1994, initiatives were taken under the auspices of the OECE involving the so-called "Minsk Group"[136] (USA, Russia, France), to provide a framework for conflict resolution.

2.2.4.2. *Positions taken by the international community*

The UN SC responded to the 1993 occupation of Nagorno-Karabakh by Armenian forces by adopting a series of resolutions[137] – none of which were based on Chapter VII. All of them expressed in an almost identical manner a "serious concern that a continuation of the conflict (…) would endanger peace and security in the region," reaffirming the "sovereignty and territorial integrity of the Azerbaijani Republic and of all other States in the region" as well as the "inviolability of

[135] *See* also for the following facts relating to the historic background A.Y. Melnyk, *Nagorny-Karabakh*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017); and ECHR, *Sargsyan v. Azerbaijan* (App. No. 40167/06), Grand Chamber, 16 June 2015.

[136] Established in the context of the OSCE Budapest Summit 1995.

[137] UN SC Resolution 822 (1993) of 30 April 1993, S/RES/822; UN SC Resolution 853 (1993) of 23 July 1993, S/RES/853; UN SC Resolution 874 (1993) of 14 October 1993, S/RES/874; UN SC Resolution 884 (1993) of 12 November 1993, S/RES/884.

international borders and the inadmissibility of the use of force for the acquisition of territory," and demanding immediate withdrawal of foreign (Armenian) forces from Azerbaijani territory.[138] This was followed by several similar statements issued by national authorities, and international organisations, as well as European institutions such as the EU and CoE.[139]

During the following years the OECE formulated the cornerstones of a framework for conflict resolution. As early as 1996, the Lisbon Summit Document[140] suggested *i.a.* to confer to Nagorno-Karabakh "the highest degree of self-rule within Azerbaijan." However, the conflict remained frozen for many years. In 2008 UN GA Resolution 62/243[141] reaffirmed "continued respect and support for the sovereignty and territorial integrity of the Republic of Azerbaijan within its internationally recognised borders," and also that "no state shall recognise as lawful the situation resulting from the occupation of the territories of the Republic of Azerbaijan, nor render aid or assistance in maintaining this situation." This seems interesting, because previous UN SC resolutions did not contain any explicit clauses on non-recognition. Also in contrast to the UN SC, the UN GA did stress the necessity of an "effective democratic system of self-governance" to be established in Nagorno-Karabakh. However, the position of the UN GA was endorsed neither by the UN SC nor the Minsk Group, because it was considered somewhat unbalanced.[142] Instead, the 2009 L'Aquila Statement by the OSCE Minsk Group Co-Chair countries suggested the conflicted parties adopt an updated version of the Madrid Document of November 2007,[143] which enshrined the following Basic Principles: "1. return of the territories surrounding Nagorno-Karabakh to Azerbaijani control; 2. an interim status for Nagorno-Karabakh providing guarantees for security and self-governance; 3. a corridor linking Armenia to Nagorno-Karabakh; 4. future determination of the final legal status of Nagorno-Karabakh through a legally binding expression of will; 5. the right of all internally displaced persons and refugees to return to their former places of residence; and 6. international security guarantees that would include a peacekeeping operation."

In January 2012 the Presidents of Armenia, Azerbaijan, and the Russian Federation re-iterated these Basic Principles as a foundation for future negotiations between Armenia and Azerbaijan under the auspices of the OSCE "Minsk Group" (Sochi Joint Declaration).[144] After a fresh flare-up of hostilities in early 2016, the

[138] *E.g.* UN SC Resolution 884 (1993).

[139] For details *see* Melnyk, *supra* note 135, para. 6, with references.

[140] OSCE Lisbon Document, DOC.S/1/96, 3 December 1996, Annex I, p. 15.

[141] UN GA Resolution of 14 March 2008, A/RES/62/243.

[142] Melnyk, *supra* note 135, para. 7.

[143] *Statement by the Presidents of France, Russia and the USA of 10 July 2009*, available at www.osce.org/mg/51152 (accessed 15 October 2017).

[144] *Sochi Joint Declaration of 23rd January 2012*, available at: http://www.president.am/en/press-release/item/2012/01/23/news-1998/ (accessed 15 October 2017). A report on the meeting of the

Presidents of both States showed some commitment to intensifying the negotiation process in October 2017.[145] However, a more permanent problem lies in the fact that the population of Nagorno-Karabakh almost entirely consists of ethnic Armenians who fiercely refuse the return of ethnic Azeris.

2.2.4.3. *Jurisprudence relating to the conflict*

In *Chiragov and Others v. Armenia* (2015) the ECHR described the role Armenia played in the Nagorno-Karabakh conflict as follows: "All of the above reveals that the Republic of Armenia, from the early days of the Nagorno-Karabakh conflict, has had a significant and decisive influence over the 'NKR,' that the two entities are highly integrated in virtually all important matters and that this situation persists to this day. In other words, the 'NKR' and its administration survives by virtue of the military, political, financial and other support given to it by Armenia which, consequently, exercises effective control over Nagorno-Karabakh and the surrounding territories (…) The matters complained of therefore come within the jurisdiction of Armenia for the purposes of Article 1 of the Convention."[146]

The assumption made by the Court, according to which both entities are "highly integrated in virtually all important matters" relates to several close ties. However, it seems well-established today that Nagorno-Karabakh cannot provide any major "State functions" to its population without resorting to Armenian institutional, financial, and in particular, military facilities and resources.[147]

2.2.4.4. *Is Nagorno-Karabakh an illegal State?*

Nagorno-Karabakh is not recognised as a State by any of the UN member states – including Armenia. It is, rather, considered a "non-State political entity under the authority of a de facto government."[148] When, for instance, the *de facto* authorities conducted "elections" in July 2012 in order to consolidate and legitimise independence, the ambassadors of the Minsk Group Co-Chair countries noted "that none of their three countries, nor any other country, recognises Nagorno-Karabakh as an independent and sovereign state."[149] Considering the fact that the latter seems to be not only closely tied to Armenia, but even *de facto* integrated into the Republic of Armenia, there is reason to doubt whether Nagorno-Karabakh can even be considered a "*de facto* regime." Some authors, therefore, speak of a "satellite 'puppet state'

Presidents of Armenia, Azerbaijan and Russia is available at: http://en.kremlin.ru/events/president/news/14348 (accessed 15 April 2018).

[145] *See* OSCE, *News and Press Releases*, available at: www.osce.org/cio/231431 and www.osce.org/chairmanship/350416 (accessed 15 October 2017).

[146] ECHR, *Chiragov and Others v. Armenia* (App. No. 13216/05), Grand Chamber, 16 June 2015, para. 186.

[147] Melnyk, *supra* note 135, para. 8.

[148] *Ibidem*.

[149] *Statement of the OSCE Minsk Group Co-chairs of 20th July 2012*, available at: www.osce.org/mg/92313 (accessed 15 October 2017).

or even a de facto Armenian province."[150] By rendering all manner of institutional, economic and military support to Nagorno-Karabakh, Armenia thus violates its obligation under international law not to render aid or assistance to maintain a situation resulting from the illegal occupation of foreign territories. Given the nature of Armenia's role in assisting Nagorno-Karabakh, this situation can be said to amount to a *de facto* annexation.

2.2.5. The so-called "Republics" of South Ossetia and Abkhazia

2.2.5.1. *Historical backgrounds*

2.2.5.1.1. South Ossetia

South Ossetia[151] is a territory of about 3900 square miles located in the Caucasus region, within the borders of the Republic of Georgia. Though Ossetians have long considered themselves a people of their own right, with a specific history and culture (including a former Ossetian "state"), they traditionally aligned more with Russia than with Georgia. Yet open conflict only broke out in November 1989 when, looking forward to the impending dissolution of the Soviet Union, the Supreme Soviet of Georgia refused a motion by the South Ossetian Regional Soviet to keep the region's former autonomous status within a future Georgian State. After Georgia declared independence from the USSR in March 1990, South Ossetia's parliament then proclaimed its own autonomy in September, with a view to becoming a "Soviet Democratic Republic" within the USSR. The decision made by the Georgian parliament to retaliate by abolishing South Ossetia's autonomy resulted in violent clashes which later evolved into an internal armed conflict (1992-1994). On 29 May 1992, in response to the outcome of a dubious referendum, the *de facto* South Ossetian Parliament declared independence from Georgia, and sought re-unification with Russia. However, they were then refused by the Russian Federation.

When Georgia became a Member State of the UN on 31 July 1992, its borders were supposed to overlap with the borders of the former Georgian SSR, including South Ossetia (as well as Abkhazia). In 1994, with the approval of the UN SC, Joint Peacekeeping forces under Russian command were deployed to the area,[152] with the result that in this period the conflict remained temporarily "frozen" whilst South Ossetia intensified State-building efforts, and continued its approaches to Russia. At the same time, while a great proportion of ethnic Georgians living in South Ossetia was expelled, most of the Ossetians acquired Russian citizenship. In that period, none of the UN Member States (including Russia) acknowledged South Ossetian

[150] Melnyk, *supra* note 135, para. 10.

[151] For the following *see* A. Nußberger, *South Ossetia*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017).

[152] UN SC Resolution 934 (1994) of 30 June 1994, S/RES/934. For more details *see* G. Dubinsky, *The Exceptions That Disprove the Rule? The Impact of Abkhazia and South Ossetia on Exceptions to the Sovereignty Principle*, 34 Yale Journal of International Law 241 (2009), p. 242, with reference to the relevant Agreement.

statehood. Only Abkhazia and Transdniestria, themselves lacking recognition by the international community, "recognised" South Ossetia in November 2006.

The situation changed fundamentally in August 2008, when the Republic of Georgia launched a military operation to regain control of South Ossetia. After Georgia's defeat by Russian forces, and separatist militia, Georgian troops were ousted from South Ossetia and Abkhazia – and so too were the ethnic Georgians still living in these areas.[153] By a presidential decree of 26 August 2008, the Russian Federation recognised South Ossetia as an independent State. Nicaragua, Venezuela, Nauru, and Tuvalu, for mysterious reasons, followed suit between 2008 and 2011, whereas the EU, NATO, and OSCE condemned unilateral recognition as a violation of Georgia's right to territorial integrity.[154] In the aftermath of several "international treaties" between the Russian Federation and South Ossetia, which ensured Russia's cooperation and military protection, South Ossetia became *de facto* separated from Georgia, and remains so to this day.

2.2.5.1.2. Abkhazia

Abkhazia[155] is a territory of about 8500 square kilometers, which, like South Ossetia, is located within the borders of the Republic of Georgia. The Abkhazians, similarly to the Ossetians, claim to have been a people of their own ever since ancient times. However, unlike South Ossetia, which constituted an Autonomous Region ("Oblast") in Soviet Times, Abkhazia possessed the status of an Autonomous Socialist Soviet Republic. As in all equivalent cases however, problems did not escalate until the dissolution of the USSR made imminent the establishment of a Georgian State. On 25 August 1990 the Abkhaz SSR declared independence and claimed sovereignty in order to remain associated with Russia, which decision was, again, declared null and void by the Supreme Soviet of Georgia.

When the Republic of Georgia declared itself an independent state on 9 April 1991, it preserved the former autonomous status of Abkhazia. However, the latter still declared its secession on 31 July 1992 – while Georgia continued to consider Abkhazia to be part of its territory. In the aftermath, clashes between the

[153] For the legal assessment of the conflict *see Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, vol. I–III, September 2009, available at: www.mpil.de/en/pub/publications/archive/independent_international_fact.cfm (accessed 15 October 2017). *Also* A. Nussberger, *The War between Russia and Georgia – Consequences and Unresolved Questions*, 1 Göttingen Journal of International Law 235 (2009). The fact-finding mission was established by Council Decision 2008/901/CFSP of 2 December 2008 concerning an independent international fact-finding mission on the conflict in Georgia, [2008] L 323/66.

[154] A. Sabou, *The EU "Engagement Without Recognition" Policy in its Eastern Neighbourhood de facto States: The Case of Abkhazia and South Ossetia*, LXII Studia UBB. Europaea 127 (2017). OSCE Newsroom, *OSCE Chairman condemns Russia's recognition of South Ossetia, Abkhazia independence*, 26 August 2008, available at: www.osce.org/cio/50011 (accessed 15 October 2017).

[155] *See* for the following A. Nußberger, *Abkhazia*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017).

two ethnic groups increased – eventually leading to armed hostilities. The armed conflict ended on 14 May 1994[156] with Georgia's defeat, and as a consequence the Georgian population was almost completely expelled from Abkhazia. Ever since, the Community of Independent States, as well as the UN and OECD have struggled to maintain peace in the region, and find a political solution to the Abkhazian question. Abkhazia has, in the meantime, proceeded with State-building, whilst the conflict has remained frozen.

As in the case of South Ossetia, the situation changed dramatically at the beginning of August 2008, when the armed conflict broke out in the Republic of Georgia.[157] After a cease-fire agreement was put in place, the Russian Federation recognised the Republic of Abkhazia as independent state by Presidential Decree on 26 August 2008. As in the case of South Ossetia, recognition by Nicaragua, Venezuela, Nauru, Tuvalu and, temporarily, by Vanuatu then followed. In this case too, the EU, NATO and OECD condemned the unilateral recognition by Russia of Abkhazia as a violation of Georgia's territorial integrity,[158] whilst on 28 August 2008, the Georgian Parliament declared Abkhazia an occupied territory. When UNOMIG was to leave Abkhazia in autumn 2009, the Russian Federation took their place by offering military and political cooperation on the basis of a Treaty on Friendship, and diverse other treaties concluded with Abkhazia. Today Abkhazia can be considered closely attached to the Russian Federation, particularly with regard to the use of Russian currency, as well as the Russian citizenship adopted by most of the Abkhazians alongside "Abkhaz citizenship."

2.2.5.2. *Statements of the UN SC relating to the status of South Ossetia and Abkhazia*

Since 1993, the UN SC has adopted numerous resolutions relating to the conflict in Georgia, in particular relating to Abkhazia.[159] In these resolutions, the UN SC repeatedly called upon the parties concerned to intensify efforts "to achieve an early and comprehensive political settlement to the conflict, including a resolution of the political status of Abkhazia, fully respecting the sovereignty and territorial integrity of the Republic of Georgia." Time and again, it reaffirmed the right of refugees and displaced persons to return to Abkhazia, deplored the "continued obstruction of such return by the Abkhaz authorities," and eventually condemned "ethnic killings"[160] committed in Abkhazia. The acute tension already existing in

[156] Letter dated 17 May 1994 from the Permanent Representative of Georgia to the United Nations Addressed to the President of the Security Council, UN Doc. /1994/583, annex I.

[157] *See supra* Section 2.2.5.1.1.

[158] *See supra* note 154.

[159] *See* list of resolutions referred to by UN SC Resolution 971 (1995) of 12 January 1995, S/RES/971. *See also* UN SC Resolution 993 (1995) of 12 May 1995, S/RES/993 and UN SC Resolution 1036 (1996) of 12 January 1996, S/RES/1036.

[160] S/RES/1036, *supra* note 159, para. 7.

April 2008 induced the UN SC to reaffirm "the commitment of all Member States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognised borders and supports all efforts by the United Nations and the Group of Friends of the Secretary-General, which are guided by their determination to promote a settlement of the Georgian-Abkhaz conflict only by peaceful means and within the framework of the Security Council resolutions."[161]

It follows clearly from this that in April 2008 the UN SC, including the Russian Federation, still considered all States obliged to respect the territorial integrity of Georgia "within its internationally recognized borders." This position however, contrasts sharply with the fact that on 26 August, in the wake of the armed conflict, the Russian Federation formally recognised South Ossetia and Abkhazia as independent States. The Russian Federation thus appears to have changed its legal standpoint fundamentally as a consequence of the hostilities which occurred in August 2008.[162]

2.2.5.3. *Practice by international courts*

Although Georgia and Russia were counterparties in some seemingly major cases, none of these have resulted in any important ruling on status issues.[163] However, there is one case pending before the ECHR relating to the responsibility of Georgia and Russia for human-rights violations (in the shape of torture, and unlawful detention), which allegedly occurred in Abkhazia.[164] Should the requirements as regards admissibility be fulfilled in this case, the ECHR would have to first decide whether Georgia or Russia (or both) had effective control in the Abkhaz region, and whether they violated their positive obligations. In this case one could expect the Court to uphold the standards already established in the case of *Ilaşcu*.[165]

2.2.5.4. *Are the "Republics" of South Ossetia and Abkhazia illegal States?*

South Ossetia and Abkhazia are distinct from other cases of this type, in that a small number of UN Member States (Russia, Nicaragua, Venezuela, Nauru, and Tuvalu) has recognised them as States. However, even were one to assume a constitutive approach to recognition, such a group of States cannot be considered representative of a broad consensus of the international community on the existence of statehood. While if one were to judge according to the predominant declaratory

[161] UN SC Resolution 1808 (2008) of 15 April 2008, S/RES/1808, para. 1.

[162] For more details on the Russian motives *see infra* Section 2.2.5.4.

[163] *See e.g.* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, 1 April 2011, ICJ Rep. 2011, p. 70; ECHR, *Georgia and Russia I* (App. No. 13255/07), Grand Chamber, 3 July 2014; ECHR, *Georgia and Russia II* (App. No. 38263/08), 13 December 2011.

[164] ECHR, *O.J. and J.O. v. Georgia and Russia* (App. No. 42126/15, 42127/15), Communicated on 10 March 2016.

[165] *See supra* Section 2.2.3.3.

approach it would not even matter if both entities were recognised at all, as long as they fulfilled the criteria of statehood. If a policy of collective non-recognition could therefore be held to exist in such cases, it would be somewhat, albeit not significantly compromised by the recognition given by the aforementioned States. However, there is serious reason to doubt the effectiveness of the governments of Abkhazia and, particularly of South Ossetia.

The reasons and motives for the recognition of South Ossetia and Abkhazia by the Russian Federation have been put forth explicitly by the President of Russia. Once the armed conflict of August 2008 was over, the Russian President assured the "Presidents" of South Ossetia and Abkhazia "that Russia will support any decision on the status of South Ossetia and Abkhazia made by the peoples of these republics."[166]

The Russian President also recalled in this context the need for a legally binding treaty abjuring the use of force to be signed by all parties, whose implementation would be guaranteed by Russia, the EU, and the OSCE. In the presidential decrees of 26 August 2008, the Russian Federation formally recognised South Ossetia and Abkhazia, with President Medvedev issuing a formal presidential statement to this effect that same day.[167] The President explained that Russia had come forward "as a mediator and peacekeeper insisting on a political settlement," and in doing so "we were invariably guided by the recognition of Georgia's territorial integrity." Russia had repeatedly called for a return to the negotiating table, and did not deviate from this position "even after the unilateral proclamation of Kosovo's independence." However, her persistent proposals to the Georgian side to conclude agreements with Abkhazia and South Ossetia on the non-use of force remained unanswered, and were ignored by NATO and the United Nations. He proceeded: "Tbilisi made its choice during the night of August 8, 2008. Saakashvili opted for genocide to accomplish his political objectives. (…) It is our understanding that after what has happened in Tskhinval and what has been planned for Abkhazia they have the right to decide their destiny by themselves. The Presidents of South Ossetia and Abkhazia, based on the results of the referendums conducted and on the decisions taken by the Parliaments of the two Republics, appealed to Russia to recognise the State sovereignty of South Ossetia and Abkhazia. The Federation Council and the State Duma voted in support of those appeals. A decision needs to be taken based on the situation on the ground. Considering the freely expressed will of the Ossetian and Abkhaz peoples and being guided by the provisions of the UN Charter, the 1970 Declaration on the Principles of International Law Governing Friendly Relations

[166] Quoted from the Kremlin homepage, *Dmitry Medvedev met with President of South Ossetia Eduard Kokoity and President of Abkhazia Sergei Bagapsh*, 14 August 2008, available at: http://en.kremlin.ru/events/president/news/1092 (accessed 15 October 2017).

[167] *Statement by President of Russia Dmitry Medvedev*, 26 August 2008, available at: http://en.kremlin.ru/events/president/transcripts/1222 (accessed 15 October 2017).

Between States, the CSCE Helsinki Final Act of 1975 and other fundamental international instruments, I signed Decrees on the recognition by the Russian Federation of South Ossetia's and Abkhazia's independence. Russia calls on other States to follow its example. This is not an easy choice to make, but it represents the only possibility to save human lives."

This argumentation emphasises two major grounds for recognition, one being the people's right to self-determination,[168] the other the untenable nature of any future coexistence of the Abkhaz and Ossetian peoples with the Georgian majority population following the armed conflict. Russia even speaks of Georgia's alleged "genocide" of minority populations. However, Russia's subjective determination that there was a risk of genocide unilaterally threatening Ossetian and Abkhaz lives seems biased, and must therefore be regarded as doubtful.[169] No clear evidence was present to suggest genocide was imminent – nor did the Presidential statement mention the fact that almost all ethnic Georgians living in South Ossetia and Abkhazia were expelled in a manner reminiscent of "ethnic cleansing" – which casts doubt on the existence of a "freely expressed will." Furthermore, Russia did not leave it to the UN SC to determine whether its resolutions, which all insisted on the maintenance of Georgia's territorial integrity, should be upheld after the armed attack of August 2008, but simply unilaterally broke with them by creating a *fait accompli*. Although the President of Russia denied any correlation between the recognition of South Ossetia and Abkhazia, and the recognition of Kosovo by a couple of Western European States, it has been argued that this stance might have instigated Russia's turnaround with regard to Georgia.[170]

The Parliamentary Assembly of the Council of Europe explicitly objected to Russia's decision: "The Assembly condemns the recognition by Russia of the independence of South Ossetia and Abkhazia as a violation of international law and Council of Europe statutory principles. The Assembly reaffirms its attachment to the territorial integrity and sovereignty of Georgia and calls on Russia to withdraw its recognition of the independence of South Ossetia and Abkhazia and respect fully the sovereignty and territorial integrity of Georgia, as well as the inviolability of its frontiers."[171]

The status of South Ossetia and Abkhazia was thoroughly examined by the Independent International Fact-Finding Mission on the Conflict in Georgia, whose

[168] Dubinsky, *supra* note 152, p. 244, points to the fact that President Medvedev in an interview given by to the Financial Times, *Why I Had to Recognize Georgia's Breakaway Regions*, 27.08.2008, used the term of "nations" instead of "peoples" in conjunction with the right to self-determination.

[169] *Cf.* Dubinsky, *supra* note 152, pp. 245–246.

[170] *Cf.* L. Alexidze, *Kosovo and South Ossetia: Similar or Different – Consequences for International Law*, 12 Baltic Yearbook of International Law 75 (2012).

[171] PACE Resolution 1633 (2008) of 2 October 2008 "The consequences of war between Georgia and Russia," para. 9. *Also* Report of the Monitoring Committee, Council of Europe Doc. 11724, 1 October 2008, paras. 53, 58.

report suggested three different categories of "territorial entities"[172]: "1. (full) states fulfilling the relevant criteria for statehood and universally recognised; 2. state-like entities fulfilling the relevant criteria, but which are not, or not universally, recognised; and 3. entities short of statehood (not fulfilling the relevant criteria, or only some of them, or only in a weak form, but eventually recognised by one or more states)."

With special regard to the situation in Georgia, the Fact-Finding Mission came to the following conclusions[173]: "Thus, South Ossetia came close to statehood without quite reaching the threshold of effectiveness. It was – from the perspective of international law – thus not a state-like entity, but only an entity short of statehood. (…) Abkhazia is more advanced than South Ossetia in the process of state-building and might be seen to have reached the threshold of effectiveness. It may therefore be qualified as a state-like entity. However, it needs to be stressed that the Abkhaz and South Ossetian claims to legitimacy are undermined by the fact that a major ethnic group (i.e. the Georgians) were expelled from these territories and are still not allowed to return, in accordance with international standards. South Ossetia should not be recognised because the preconditions for statehood are not met. Neither should Abkhazia be recognised. Although it shows the characteristics of statehood, the process of state-building as such is not legitimate, as Abkhazia never had a right to secession. Furthermore, Abkhazia does not meet basic requirements regarding human and minority rights, especially because it does not guarantee a right of safe return to IDPs/refugees."

It is particularly interesting to see that, in spite of the alleged predominance of the declaratory theory, the existence or non-existence of recognition is considered crucial for making categorical distinctions among entities that fulfil the criteria of statehood in equal measure. Where traditional lawyers think of a "stabilised *de facto* regime,"[174] the approach taken here speaks of "State-like" entities which are deliberately denied the status of real or "full" States. Thus, the notion of statehood is moving away from the classical principle of effectiveness towards a more normative concept of state-building which not only takes into account the legitimacy of the process of the establishment of a new state, but also calls for respect of the "basic requirements regarding human and minority rights."

3. Conclusions

3.1. Consistent pattern of the establishment of illegal entities

Arguably all cases in which "illegal States" or "illegal entities" are established show the same pattern: a minority population representing the majority in a cer-

[172] *Report of the Independent International Fact-Finding Mission on the Conflict in Georgia*, *supra* note 153, vol. II, pp. 128–129.

[173] *Ibidem*, p. 134.

[174] *See e.g.* Nußberger, *supra* note 155, para. 27.

tain part of the territory of a given State feels itself inadequately involved and disrespected by the central government. The situation then escalates because of particular circumstances. In the case of Northern Cyprus, the continued enjoyment of minority rights by the local population seemed to be endangered, whereas in the cases relating to the dissolution of the Soviet Union, the guarantor of peace between different ethnicities disappeared, whilst a newly-empowered local majority made nationalist policy decisions. The regional minority is then put under pressure by measures ranging from, the suppression of certain languages (e.g., Russian in Moldova) to the threatening of a given minority's existence (e.g., Kosovo). After armed conflict breaks out, members of the majority population are expelled from the minority-controlled territory, with the help or in the presence of the armed forces of a third-party protector State (e.g., Turkey with regard to Northern Cyprus, Russia with regard to Transdniestria, Nagorno-Karabakh, South Ossetia and Abkhazia). In the aftermath of this expulsion a referendum is called, in which the vast majority of this newly-homogeneous population "affirms" independence. The newly independent "State," in some but not in all cases, will then be recognised by the protecting power, and in some cases by a select number of other States. The overwhelming majority of States will however, refuse recognition due to the threat or use of force involved in the establishment of the entities in question, and due to the gross violations of human rights inherent in the process, and the denial of safe return to IDPs/refugees by the newly established regime. Kosovo constitutes an exception to this rule, in that the majority of States came to the conclusion that in this case independence would be the only way to effectively put an end to ethnic cleansing (remedial independence). Accordingly, most UN Member States have now officially recognised Kosovo.[175]

3.2. Collective non-recognition – fields of application, sources of illegality and strategies for settlement

International practice[176] shows that a duty not to recognise newly established entities in situations where a violation of the prohibition of the threat or use of force is involved is now widely accepted by the international community. This development can be seen to parallel the established practice in the case of territorial acquisitions which result from the threat or use of force, where an obligation not to recognise their validity is already considered "well established today as a general principle of international law."[177] However, implementation of this rule by indi-

[175] 114 recognitions according to Republic of Kosovo, Ministry of Foreign Affairs, available at www.mfa-ks.net/?page=2,224 (accessed 15 October 2017). In contrast, website "Kosovo Thanks You" (available at: www.kosovothanksyou.com (accessed 15 October 2017)) lists 117 recognitions by February 2018.

[176] *Supra* Section 2 and Section 1 of the Conclusions.

[177] J.A. Frowein, *Non-Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017), para. 3.

vidual States varies. In most of the cases mentioned here, the EU and its Member States endeavour to exercise a strict policy of "collective non-recognition" which results in the newly established entity remaining dependent on the protection and assistance of a third power. Frequently, a situation of *de facto* separation against a backdrop of "frozen conflict" persists for many years – which, regardless of the ICJ exception rule to non-recognition, is certainly not conducive to the protection of the human rights of the population in question.

When refusing to recognise a newly established entity, the international community refers not only to the threat or use of force, but also to the gross violations of human rights which accompany it, as well as the destructive behavior of the separatist side in negotiating a sustainable solution of the conflict (including the right of safe return for expelled persons). In recent times, the diplomatic efforts of the EU, the OECD, and special formations such as the Minsk Group, have given rise to proposals to adopt certain "framework principles,"[178] including provisions on territorial questions, final-status negotiations, as well as the establishment of a specific (autonomous) status for the territories in question, a right of return for all internally displaced persons and refugees, international security guarantees, etc. However, the ultimate aim of such principles is not the recognition (under certain circumstances) of the newly established entity, but rather the defense (under certain circumstances) of the international law principle of territorial integrity.

In spite of the fact that the right of peoples to self-determination constitutes an *erga omnes* obligation (unlike the threat or use of force), a violation of this principle does not lead to equivalent statements of non-recognition. According to current practice, both States and International Organisations seem to feel free to react to a violation of an *erga omnes* obligation by denying recognition of any of its results. And while it is true that they are aware of the fact that they must not assist perpetrator States in violating any norms of international law (Art. 16 ILC Articles on Responsibilities of States), they do not feel obliged to collectively sanction this breach by non-recognition. Where non-recognition is practiced, the obligation to do so stems from internal rules which prescribe observance of the international rule of law – as is exemplified by current EU practice.[179]

The role of the UN SC in cases such as these tends to be contradictory in general, and in cases where one party in the conflict possesses veto power, it becomes virtually non-existent. Only in select cases has the UN SC called upon States not to recognise as lawful a situation created by a serious breach of a peremptory norm of international law;[180] these are the cases of South Africa's administration of Namibia, the annexation by Iraq of Kuwait, the establishment of Southern Rhodesia, and the establishment of the TRNC. However, none of the UN SC resolutions

[178] *Supra* Sections 2.2.4.1, 2.2.4.2.
[179] *Supra* Section 2.1.1.2.
[180] *Supra* Section 1.3.2, 2.1.2, 2.2.1, 2.2.2.2.

relating to non-recognition can be considered binding. In some cases where the UN SC failed, the UN GA took the lead, by calling upon all States not to recognise any attempts to modify Ukraine's borders, or to deny recognition to the situation resulting from the *de facto* annexation of Nagorno-Karabakh by Armenia, for example.[181] Additionally, the ICJ declared a duty not to recognise the illegal situation resulting from the construction of a wall in the occupied Palestinian territory.[182]

3.3. A new normative approach to illegal entities

In some of the cases mentioned here, the respective entities clearly remain "entities short of statehood," because they do not fulfill the relevant criteria, or do so only in a weak form, even if they might have been recognised by one or more States. In such a case, no issue of an "illegal State" can arise, as there is no State – only an "illegal entity" of another type. In this article, the TRNC, in accordance with traditional terminology, has been referred to as an "illegal *de facto* regime," Transdniestria an "illegal regional administration," and Nagorno-Karabakh a territory "*de facto* annexed by Armenia." In accordance with terminology used by the EU Independent International Fact-finding mission, South Ossetia has been qualified as an "illegal entity short of statehood" and Abkhazia has been deemed an "illegal State-like entity."

The emergence of an "illegal State" is thus conceivable only in cases where the objective requirements of statehood have been met; this is worth considering with respect to the TRNC and Abkhazia. Whereas formerly both entities short of statehood, and entities short of recognition were usually referred to as *de facto* regimes, recent practice seems to have become more inclined to distinguish between the two. As has been suggested by the EU Independent International Fact-finding mission, among others, South Ossetia "should not be recognised because the preconditions for statehood are not met," whereas Abkhazia, in spite of having met such preconditions should also remain unrecognised, because "the process of state-building as such is not legitimate." This was initially explained by the fact that Abkhazia had no right to secession and, following that, by the fact that it did not meet "the basic requirements regarding human and minority rights" including the right of safe return for IDPs and refugees.[183]

This new approach clearly calls to mind pertinent requirements formulated by the Council of Europe, and the European Union – in the aftermath of the collapse of the Soviet Union and its block system[184] – which made recognition dependent on

[181] *Supra* Section 2.1.2, 2.2.4.2.
[182] *Supra* Section 2.1.1.1.
[183] *Supra* Section 2.2.5.4.
[184] Declaration of 16 December 1991, s*upra* note 9.

respect for the rule of law, democracy, human rights, and minority rights, as well as the absence of aggression. This practice is in line with international law, as current doctrine does not endorse the existence of any obligation to formally recognise a State, thereby granting it the rights and privileges inherent in statehood.[185] Denying the recognition of statehood to Abkhazia, for example, because its "process of state-building as such is not legitimate," therefore means that Abkhazia is placed in an analogous situation to one in which it did not fulfil the criteria of statehood.[186] What we see here is therefore a *resurgence of the constitutive approach to statehood* in a limited and specific context. We can also speak of a normative approach or *new normativity,* which bases recognition of statehood on the readiness and capability of the entities concerned to fulfil certain core obligations as members of the international community, particularly where they relate to respect for basic human rights. Thus, even though as a general rule legitimacy has not yet become a prerequisite for statehood, it can still influence the emergence of a new State if it is based on a serious breach of international law, such as a violation of the prohibition of force. Under such circumstances no State would come into being on the grounds of normative concerns. Though it is cogitable that the community of States could on the contrary determine to engage in the collective recognition of an illegal entity as a State ("*ex iniuria ius oritur*"), recent State practice does not support the existence of "positive recognition,"[187] but rather the denial of recognition in such cases. This is due to the fact that only exceptionally does recognition become constitutive, *i.e.* if a serious breach of (peremptory) international law is at stake and the obligation not to recognise as lawful a situation created by such a breach applies. In these cases the failure to pass the legitimacy test begets collective non-recognition, which then serves as a means of sanctioning non-compliance with the most fundamental principles of international law. Accordingly, the newly-established entity can *de facto* exist as an "illegal entity," yet will never become an "illegal State."

Abstract: The article examines whether "illegal States" exist in international law. For this purpose the criteria of statehood, and the concept of the recognition of States will be revisited with a view to clarifying their potential interrelationship with the notion of illegality. This includes a fresh perspective on the consequences of a State's incapacity to exercise "external sovereignty" in times of globalisation and internationalisation, as well as the significance of "*de facto* non-existence." A subject of special focus here is the duty not to recognise as lawful a situation arising from a serious breach of international law, which may eventually lead to a state of "collective non-recognition." This article analyses practices pertinent to the establishment of a possible "illegal entity," identifies

[185] *Supra* Section 1.3.3.

[186] *Cf.* Evans, *supra* note 7, p. 242: It is meaningless to assert that Northern Cyprus, Abkhazia, South Ossetia etc. are States if no one is prepared to accept them as such.

[187] For the particularities of the case of Kosovo *see supra* Section 1.2 and 3.1.

consistent patterns within them, and highlights the characteristics of situations in which such processes occur, in order to classify the entities emerging from them. Recent convention dictates that "illegal entities short of statehood" (often in a State of quasi-annexation by a third State) are to be distinguished from "illegal State-like entities" (formerly known as *de facto* regimes). The first category of entities cannot be recognised due to a lack of statehood, the latter should not be recognised, because the process of State-building is not considered legitimate. The author therefore investigates whether a *new normativity*, which seeks to base recognition of statehood on the readiness and capability of the entity in question to fulfil certain core obligations as member of the international community (including respect of human and minority rights), is thus emerging. Under such circumstances, a critical entity can therefore *de facto* exist as an "illegal State-like entity" – without ever becoming an "illegal State."

Keywords: Abkhazia, collective non-recognition, declaration of independence, *de facto* regime, entities short of statehood, illegal States, Nagorno-Karabakh, Northern Cyprus, recognition of States, South Ossetia, State-like entities, Transnistria/Transdniestria, Western Sahara.

De facto Regimes in International Law

*Stefan Oeter**

Introduction

The subject of *de facto* regimes (also sometimes referred to as "*de facto* states") is one of some significance to international relations, albeit only the target of rather scarce attention where international legal doctrine is concerned. The number of books and articles dealing with the phenomenon explicitly is thus very limited.[1] However, there was a degree of interest in the phenomenon and its legal aspects throughout the 1970s and 1980s in Germany, due to the very specific situation the two German states found themselves in, and given the special regime for bilateral relations created with the "Foundational Treaty" (*Grundlagenvertrag*) of 1973.[2]

Operating with elements of the doctrine of the *de facto* regime, the Federal Republic of Germany had to come to terms with the existence of a second German state, and even to formalise that acceptance of political reality in the institutional terms of a treaty – while still upholding the claim that there was a *de jure* continuity of a unitary German statehood (in the legal tradition of the German Reich).[3]

The need to deal in detail with the intricacies of *de facto* statehood gave a push to academic interest in the matter, with the background again being the specific

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[1] *See* G. Nolte, *Faktizität und Subjektivität im Völkerrecht. Anmerkungen zu Jochen Froweins „Das de facto Regime im Völkerrecht" im Lichte neuerer Entwicklungen*, 75 (4) *ZaöRV* 715 (2015); J.A. Frowein, *De Facto Regime* Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 14 February 2018); S. Turmanidze, *Status of the „De Facto State" in Public International Law*, Diss. Univ., Hamburg: 2010; M. Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law*, Nijhoff, Leiden: 2004; S. Pegg, *International Society and the De Facto State*, Ashgate, Aldershot: 1998; W.H. Balekjian, *Die Effektivität und die Stellung nichtanerkannter Staaten im Völkerrecht*, Nijhoff, The Hague: 1970; J.A. Frowein, *Das de facto-Regime im Völkerrecht*, Heymanns, Köln: 1968.

[2] *See particularly* G. Ress, *Die Rechtslage Deutschlands nach dem Grundlagenvertrag vom 21. Dezember 1972*, Springer, Berlin/Heidelberg: 1978.

[3] *See* Ress, *supra* note 2, pp. 199–228.

legal situation of Germany after World War II. The one German state (the "German Reich") had been occupied by the four Allied Powers following unconditional surrender in May 1945. Occupation as such did not end previous statehood, however,[4] though the partitioning of Germany into the FRG and the GDR in the late 1940s led to a diplomatic stalemate. The FRG, claiming to be the state continuing the German Reich, saw the GDR as nothing more than an illegitimate "puppet state" of the Soviet Union, notwithstanding the former's viewing itself as a new state completely unrelated to the Reich.[5] Any third state recognizing the GDR was seen by the FRG as an unfriendly state violating the sovereign rights of the German nation, with the effect of that being subsequent termination of diplomatic relations (under the so-called "Hallstein doctrine").[6] The rise of the "block free" movement with its sympathies for the east left that policy looking more and more untenable. The FRG had to make its peace with the new realities – a move that finally happened with the so-called "eastern Treaties" (*Ostverträge*).[7] A central cornerstone of this cluster of treaties was the "Foundational Treaty" (*Grundlagenvertrag*) with the GDR.[8] This paved the way for the accession of both German states to the UN; but a question remained as to how an international treaty with the GDR might be concluded without eschewing the (legalist) claim of *de jure* "German unity"?

Recourse to the doctrine of *de facto* statehood helped to square the above circle. The GDR definitely constituted at least a *de facto* regime as of 1974 – and this enabled Bonn to conclude a treaty under international law with it, without being required to extend recognition as a (separate) sovereign state.[9] With some tricky legal constructs, the Federal Republic could uphold its claim that the German "Reich" had not been extinguished, but continued by way of the joint responsibility of the

[4] *See* G. Gornig, *Der völkerrechtliche Status Deutschlands zwischen 1945 und 1990*, Fink, München: 2007, pp. 19–22.

[5] *See* T. Sempf, *Die deutsche Frage unter besonderer Berücksichtigung der Konföderationsmodelle*, Heymann, Köln: 1987, pp. 104–110.

[6] *See* W.G. Gray, *Germany's Cold War: The Global Campaign to Isolate East Germany, 1949-1969*, University of North Carolina Press, Chapel Hill: 2003; W. Kilian, *Die Hallstein-Doktrin: Der diplomatische Krieg zwischen der BRD und der DDR 1955-1973*, Duncker & Humblot, Berlin: 2001.

[7] *See* J. von Dannenberg, *The Foundations of Ostpolitik: The Making of the Moscow Treaty between West Germany and the USSR*, Oxford University Press, Oxford: 2008, pp. 131–259; G. Teyssen, *Deutschlandtheorien auf der Grundlage der Ostvertragspolitik*, Lang, Frankfurt am Main: 1987, pp. 300–366; C. Arndt, *Die Verträge von Moskau und Warschau: politische, verfassungsrechtliche und völkerrechtliche Aspekte*, 2nd ed., Verlag Neue Gesellschaft, Bonn: 1982.

[8] Concerning the "*Grundlagenvertrag*" *see e.g.* J.G. Gleich, *Die Anerkennung der DDR durch die Bundesrepublik*, Peter Lang, Frankfurt am Main: 1975, pp. 138–199; Ress, *supra* note 2, pp. 52-119, 154-228, 229-271, 298-321, 372-389; E.D. Plock, *The Basic Treaty and the Evolution of East-West Relations*, Westview, Boulder/London: 1986, pp. 89–166.

[9] *See* Ress, *supra* note 2, pp. 120-152.

four occupying powers for "Germany as a whole," as symbolized by institutions such as the Allied Control Council as well as the special status of Berlin.[10]

With the unification of Germany, the above interest vanished, as the complex details and murky doctrinal intricacies of the legal situation of Germany ("*Rechtslage Deutschlands*") had lost its practical significance, having been relegated to the archives of legal history.

This was not to say that Germany had been the only case dealt with under the notion of *de facto* regime, as North Vietnam has been treated in the same light by the US and other Western states throughout the 1960s and early 1970s, while the "Republic of China" in Taiwan also came to resemble a *de facto regime* more and more, with its claim to represent all of China looking ever-shallower.[11] With the recognition of the People's Republic of China by the US, and the takeover of the Chinese seat at the UN SC by the PRC, the tiny remnant of the Kuomindang's "Republic of China," as a previous regime ruling over China, shifted into a shadowy existence where it *de facto* constituted a separate state, but in legal terms was still viewed (by Beijing as well as Taipei) as one of the bits and pieces of Chinese statehood.[12]

Western diplomacy then started to deal with Taiwan more and more in terms of "*de facto* statehood," while not giving too much reasoning for what was being done, given the diplomatic turmoil with Beijing this might engender. Even lawyers from Taipei started to conceptualise the separate existence of Chinese statehood on the island of Taiwan in doctrinal categories of a *de facto* regime.[13]

The phenomenon has not lost its practical significance in recent decades either. Rather, civil war-like situations whereby countries fragment happen again and again. As long as the armed conflict rages, the bits and pieces controlled by the

[10] *See* F. Freiherr Waitz von Eschen, *Die völkerrechtliche Kompetenz der Vier Mächte zur Gestaltung der Rechtslage Deutschlands nach dem Abschluß der Ostvertragspolitik*, Lang, Frankfurt am Main: 1988, pp. 1-73, 176-261.

[11] *See* A. Hsiu-An Hsiao, *The International Legal Status of Unrecognized Claimants to Statehood. A Comparative Analysis of Taiwan and the Turkish Republic of Northern Cyprus*, 47 (1) Issues & Studies 1 (2011); T.S. Rich, *Status for Sale: Taiwan and the Competition for Diplomatic Recognition*, 45 (4) Issues & Studies 159 (2009); J.-W. Lin, *Taiwan's Referendum Act and the Stability of the Status Quo*, 40 (2) Issues & Studies 119 (2004); M. Neukirchen, *Die Vertretung Chinas und der Status Taiwans im Völkerrecht*, Nomos, Baden-Baden: 2004, pp. 217–314; E. Ting-Lun Huang, *Taiwan's Status in a Changing World*, 9 Annual Survey of International & Comparative Law 55 (2003); J. DeLisle, *The Chinese Puzzle of Taiwan's Status*, 44 (1) Orbis 35 (2000); L. Chen, *Taiwan's Current International Legal Status*, 32 (3) New England Law Review 675 (1998); L. Antonowicz, *The International Legal Status of the Republic of China on Taiwan*, 23 The Polish Yearbook of International Law 191 (1997–1998); T.-W. Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA Journal of International Law & Foreign Affairs 351 (1996/1997); *see also* the collective volume by J.-M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order*, Kluwer, London: 1996.

[12] *See* Neukirchen, *supra* note 11, pp. 107–215, 218–242.

[13] *See* Hsiao, *supra* note 11, pp. 1–55.

various warring parties cannot really consolidate into forms of established *de facto* statehood. This rather requires a subsequent ceasefire, usually one brokered (or imposed) by outside powers. The series of conflicts in the wake of the break-up of Yugoslavia and the Soviet Union created numerous situations in which separate territorial fragments could consolidate, developing various kinds of consolidated *de facto* statehood. The constitutive republics of the "Socialist Federative Republic of Yugoslavia" that separated in 1991 and 1992 were soon recognised, in the face of the long-standing resistance of Belgrade and its allies.[14] The factual separation of Kosovo from Serbia was imposed by the Western powers in 1999, though with Kosovars having to wait until 2008 for any declaration of independence – in fact a unilateral move from local actors in Prishtina that divided the international community bitterly.[15] Just over 100 sovereign states among a total of roughly 200 worldwide recognise Kosovo as an independent state. The other half of the state community, including even some members of the EU, object vehemently to this recognition, claiming that Kosovo still constitutes a part of Serbia from the legal point of view (with the recognition of a secessionist entity thus violating the sovereignty and territorial integrity of Serbia).[16] For this resisting group of states, the regime in Kosovo constitutes at best a *de facto* regime.

Indeed, Serbia itself has entered into certain practical arrangements with Kosovo,[17] under pressure from the EU to embark upon a process of the normalisation of relations. However, it still finds it difficult to extend formal recog-

[14] *See* S. Oeter, *Yugoslavia, Dissolution of* (2011), Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 14 February 2018), paras. 20–33.

[15] Concerning the unilateral declaration of independence and its legal consequences *see* K.W. Watson, *When in the Course of Human Events: Kosovo's Independence and the Law of Secession*, 17 (1) Tulane Journal of International & Comparative Law 267 (2008); A. Orakhelashvili, *Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo*, 12 Max Planck Yearbook of United Nations Law 1 (2008); D. Fierstein, *Kosovo's Declaration of Independence: An Incident Analysis of Legality, Policy and Future Implications*, 26 (2) Boston University International Law Journal 417 (2008); R. Muharremi, *Kosovo's Declaration of Independence: Self-Determination and Sovereignty Revisited*, 33 (4) Review of Central and East European Law 401 (2008); P. Hilpold, *Das Kosovo-Problem – ein Testfall für das Völkerrecht*, 68 (3) ZaöRV 779 (2008), pp. 795-801; J. Vidmar, *International Legal Responses to Kosovo's Declaration of Independence*, 42 (3) Vanderbilt Journal of Transnational Law 778 (2009); T. Fleiner, *The Unilateral Secession of Kosovo as a Precedent in International Law*, in: U. Fastenrath (ed.), *From Bilateralism to Community Interest*, Oxford University Press, Oxford: 2011, pp. 877–894; T. Jaber, *A Case for Kosovo? Self-determination and Secession in the 21st Century*, 15 (6) International Journal of Human Rights 926 (2011).

[16] *See only* S. Oeter, *The Kosovo Case – An Unfortunate Precedent*, 75 (1) ZaöRV 51 (2015), pp. 67–72.

[17] *See* F. Bieber, *The Serbia-Kosovo Agreements: An EU Success Story?*, 40 (3–4) Review of Central and East European Law 285 (2015), as well as A. Ernst, *The April Agreement: A Step Towards Normalization between Belgrade and Pristina*, 1 (1) Contemporary Southeastern Europe 122 (2014).

nition as an independent state to Kosovo, not least for constitutional reasons (as Kosovo continues to be referred to in the Constitution of Serbia as a province thereof).

Some EU Member States also have principled objections to full recognition, with the result that the EU Association and Stabilization Agreement with Kosovo must perforce resort to a cumbersome formula compromise.[18]

Comparable situations may be found in post-Soviet space, with all its "frozen conflicts." Transnistria[19] and Abkhazia definitely qualify as consolidated *de facto* regimes.[20] While the states from which they seceded *de facto* in the early 1990s refuse to recognize their legal statehood through to the present day, they cannot avoid dealing with them in practical matters. In turn, there is no willingness of the international community to recognise the above entities, partly because they were created with the help of (legally doubtful) military interventions by an outside power (Russia). Equally, it is obvious that the regimes in both areas enjoy quite a degree of legitimacy with their populations, with the majority of the local population likely to object to any reintegration into the state from which they have factually seceded.[21] A comparable situation exists with Somaliland, a portion of the former state of Somalia that effectively separated from the institutional framework of the Somali state and – with relative success – runs a *de facto* state completely independent from the authorities in Mogadishu.[22] The same may be said

[18] *See* in detail P. van Elsuwege, *Legal Creativity in EU External Relations: The Stabilization and Association Agreement Between the EU and Kosovo*, 22 (3) European Foreign Affairs Review 393 (2017).

[19] *See* B. Bowring, *Transnistria*, in: C. Walter et al. (eds.), *Self-Determination and Secession in International Law*, Oxford University Press, Oxford: 2014, pp. 157–174.

[20] *See* F. Mirzayev, *Abkhazia*, in: C. Walter et al. (eds.), *Self-Determination and Secession in International Law*, Oxford University Press, Oxford: 2014, pp. 191–213, but *also* Turmanidze, *supra* note 1, pp. 221–292.

[21] *See also* S. Stephan, *The Proliferation of Status Proposals for Abkhazia v- Distinct Concepts or Mere Labels?*, 20 (1) International Journal on Minority and Group Rights 119 (2013).

[22] Concerning the case of Somaliland *see* S.G. Philipps, *When Less was More: External Assistance and the Political Settlement in Somaliland,* 92 (3) International Affairs 629 (2016); A. Schira, *Die Entstehung des Staates Kosovo im Vergleich zu den Sezessionsbestrebungen Südossetiens, Abchasiens und Somalilands*, Kovac, Hamburg: 2015; pp. 33-39, 110-123; J.N. Maogoto, *Somaliland: Scrambled by International Law?*, in: D. French (ed.), *Statehood and Self-Determination*, Cambridge University Press, Cambridge: 2013, pp. 208-225; B.R. Farley, *Calling a State a State: Somaliland and International Recognition,* 24 (2) Emory International Law Review 777 (2010); A. Kreuter, *Self-Determination, Sovereignty, and the Failure of States: Somaliland and the Case for Justified Secession*, 19 (2) Minnesota Journal of International Law 363 (2010); B. Poore, *Somaliland: Shackled to a Failed State*, 45 (1) Stanford Journal of International Law 117 (2009); A.K. Eggers, *When Is a State a State? The Case for Recognition of Somaliland*, 30 (1) Boston College International & Comparative Law Review 211 (2007); Schoiswohl, *supra* note 1, pp. 95–190; S. Kibble, *Somaliland: Surviving Without Recognition*, 15 (5) International Relations 5 (2001).

of the Turkish Republic in Northern Cyprus that came about as a result of the conflict on the island, followed by the intervention of Turkey, in 1974.[23] Even entities such as the Autonomous Kurdistan within Iraq bear some traits of a successful "*de facto* state," since the governmental authority of the government in Arbil rests on its own fundaments and has largely cut ties with the central government in Baghdad.[24]

What sense does it make to conceptualise these situations in terms of *de facto* statehood or a de facto regime? One answer is that there is constructive added value in the doctrine of the *de facto* regime. This allows for pragmatic solutions regarding diplomatic interactions and agreed arrangements, and even for formal treaty-making, without the trap of implicit recognition of a (secessionist) entity as a fully-fledged sovereign state being entered.[25] There will often be serious obstacles to this kind of recognition. The former (and *de jure* still continuing) holder of territorial sovereignty might be barred constitutionally from recognising the new entity as independent state – and often its public domestically will still not be prepared to go that way. Other states will also object to full recognition – be this on account of friendly relations with the former holder of the sovereignty, or for principled reasons that no secessionist entity should be recognized "prematurely."[26] The concept of the *de facto* regime, with its doctrinal implications, allows for the circumvention of some of these formal obstacles.

The reflections in the remainder of this paper will embrace the doctrinal fundaments of the concept of *de facto* statehood, and will try to map the constructive potential, but also the limits, of this doctrinal construction. To this end, the paper will first circumscribe the phenomenon and describe the basic tenets of the doctrinal construct that is the *de facto* regime. In a second step, it will sketch out some ideas on the construct's major consequences. Finally, in a third step, it will follow up with some reflections on concept's grey zones and limits where legal policy is concerned.

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[23] *See* B. Ercan, *Zypern, die Türkei und die EU: Eine rechtliche Untersuchung des Beitritts Zyperns zur EU, der Nichtanerkennung Zyperns durch die Türkei und der Beziehungen zwischen der EU und der TRNZ*, Nomos, Baden-Baden: 2012, pp. 197–237; S. Talmon, *Kollektive Nichtanerkennung illegaler Staaten: Grundlagen und Rechtsfolgen einer international koordinierten Sanktion, dargestellt am Beispiel der Türkischen Republik Nord-Zypern*, Mohr Siebeck, Tübingen: 2006, pp. 37–41, 48–81; Pegg, *supra* note 1, pp. 98–114; Turmanidze, *supra* note 1, pp. 132–158.

[24] *See* O. Bengio, *The Kurds in Iraq: Building a State within a State,* Lynne Rienner, Boulder/London: 2012, pp. 297–313, and D. Natali, *The Kurdish Quasi-State*, Syracuse University Press, Syracuse: 2010, pp. 103–138.

[25] *See also* J.A. Frowein, *Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 14 February 2018).

[26] Concerning the prohibition of "premature recognition" *see* S. Oeter, *Self-Determination*, in: B. Simma, D.E. Khan, G. Nolte, A. Paulus (eds.), *The Charter of the United Nations: A Commentary*, vol. I, 3rd ed., Oxford University Press, Oxford: 2012, pp. 313–333, para. 39.

1. Definition and delimitation

A *de facto* state or *de facto* regime reflects the existence of an intermediate phenomenon caught between factuality (i.e. the factual existence of an entity that looks like a state) and (il)legality (i.e. a legal situation in which a number of legal reasons speak against that same entity being qualified as an independent "state" in terms of international law).[27] Factuality and legality push and pull in opposite directions here. On the one hand, in factual terms, the entity in question fulfils all the basic preconditions that usually constitute statehood.[28] There is a consolidated power structure with a set of institutions (under a responsible government) which exercises exclusive authority over a defined territory and given people (the inhabitants of the territory controlled).[29] Indeed, authorities may often base their 'state authority" on the exercise of popular sovereignty, with a constitution put in place and regular elections of holders of power held.[30] While the said elections will not always be completely fair or void of irregularities, it is typical for this circumstance to be of little value in distinguishing the *de facto* regimes from neighbouring states in the same region, which will often rig similar irregularities in their own elections. In factual terms, then, there is a solid claim for independent statehood in such cases.

In legal terms, however, statehood tends be flawed in most of the cases involving *de facto* regimes. Often these constitute the result of a secessionist move whereby a new entity separated unilaterally from its former "mother state" – without managing to achieve any acceptance for such a move by the former sovereign or third states.[31] There is a prohibition on "premature" recognition of such entities in customary international law – at least for as long as the (former) territorial sovereign chooses not to accept and recognise the independence of the separatist entity.[32]

Even worse in legal terms are the situations in which the separate *de facto* statehood of the entity was brought about by military intervention in violation of the prohibition on the use of force.[33] Changes in territorial status brought about by force contradict the *jus cogens* rule of the non-use of force in international relations, and thus are non-recognisable under international law (at least in any rigid interpretation of current rules).[34]

[27] *See* Frowein, *De Facto Regime*, *supra* note 1, paras. 1–2.

[28] *See* Pegg, *supra* note 1, pp. 26–28; Turmanidze, *supra* note 1, pp. 9–13.

[29] *See* Pegg, *supra* note 1, pp. 44–50.

[30] *See also* N. Caspersen, *States without Sovereignty: Imitating Democratic Statehood*, in: N. Caspersen, G. Stansfield (eds.), *Unrecognized States in the International System*, Routledge, London and New York: 2011, pp. 73–89.

[31] *See* Schoiswohl, *supra* note 1, pp. 46–59, but *also* U. Saxer, *Die internationale Steuerung der Selbstbestimmung und der Staatsentstehung*, Springer, Heidelberg: 2010, pp. 385–399.

[32] *See* D. Högger, *Recognition of States: A Study on the Historical Development in Doctrine and Practice with a Special Focus on the Requirements*, LIT, Wien/Zürich: 2015, pp. 30–32.

[33] S*ee* Frowein, *De Facto Regime*, *supra* note 1, paras. 4–5.

[34] *See* Y. Ronen, *Transition from Illegal Regimes under International Law*, Cambridge University Press, Cambridge: 2011, pp. 71–101.

Although *de facto* states might, in practical terms, fulfil all the requirements of independent states, they suffer from legal impediments to full recognition – and thus must be distinguished from the exponents of fully sovereign statehood that constitute the upper stratum of public authority under the international system.[35] The disputed status of the Republic of Kosovo may serve as an example here. Kosovo has a clearly delimited territory – the territory of the former "Autonomous Province of Kosovo and Metohija" that enjoyed a special status inside the Republic of Serbia in the times of socialist Yugoslavia. The overwhelming majority of inhabitants of this territory also constitute a separate people with linguistic, cultural and religious characteristics that distinguish them radically from Serbs (as the "state nation" of Serbia).[36] Throughout the period of UN administration by virtue of UN SC Resolution 1244 (1999), the local authorities in Kosovo were assuming more and more sovereign rights, to the point where the Kosovar government came to enjoy largely full control over its territory.[37] Admittedly, there are parts of the territory in which the Kosovar government has no authority in practice – in particular the Serbian populated north between the River Ibar and the Serbian border.

However, once again, it has to be said that a lack of factual authority in certain disputed tracts of land is not an uncommon feature, being present in a large number of states. Of itself, this cannot therefore justify non-recognition. Likewise, the existence of certain residual powers in the hands of the UNMIK and the EU's mission known as EULEX[38] represents no convincing reason for effective control over territory and society by the Kosovar government to be denied. (In fact, Bosnia and Hercegovina is in a largely similar situation, yet in that case no doubt is raised regarding its quality as a sovereign state).[39]

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[35] *See* Pegg, *supra* note 1, pp. 120–146.

[36] *See* Oeter, *supra* note 14, paras. 10, 70.

[37] *See* J. Gow, *Kosovo – The Final Frontier? From Transitional Administration to Transitional Statehood*, 3 (2) Journal of Intervention and Statebuilding 329 (2009).

[38] Concerning UNMIK *see* J. Zeh, *Das Übergangsrecht. Zur Rechtsetzungstätigkeit von Übergangsverwaltungen am Beispiel von UNMIK im Kosovo und dem OHR in Bosnien-Herzegowina*, Nomos, Baden-Baden: 2011; U.A. Reich, *Internationale Verwaltung im Kosovo: Rechtsgrundsätze internationaler Administration am Beispiel der UNMIK*, Nomos, Baden-Baden: 2012, pp. 41–57, 74–108; L. Moos, *Individualrechtsschutz gegen menschenrechtswidrige hoheitliche Maßnahmen von Übergangsverwaltun-gen der Vereinten Nationen am Beispiel der United Nations Interim Administration Mission in Kosovo*, Duncker & Humblot, Berlin: 2013, pp. 39–64; N. van Willigen, *Peacebuilding and International Administration: The Cases of Bosnia and Herzegovina and Kosovo*, Routledge, London: 2013; concerning EULEX *see* T. Altwicker, *Bridging the Security Gap through EU Rule of Law Missions? Rule of Law Administration by EULEX*, 21 (1) Journal of Conflict and Security Law 115 (2016); R. Muharremi, *The European Union Rule of Law Mission in Kosovo (EULEX) from the Perspective of Kosovo Constitutional Law*, 70 (2) ZaöRV 357 (2010).

[39] *See* Oeter, *supra* note 14, paras. 65–69.

Rather, the core problem driving roughly half of the world's states in the direction of non-recognition is of a different, purely legal, nature. After the military intervention of NATO states in Serbia in 1999, regarded by most states around the world as illegal, Kosovo was transferred under UN administration by UN SC Resolution 1244. The UN SC did not want (and would probably have lacked the legal authority) to change the legal status of the territory, so the Resolution stressed continued *de jure* Serbian sovereignty over Kosovo.[40] The unilateral secession brought about by the 2008 declaration of independence of Kosovo could not change the (*de jure* subsiding) territorial title of Serbia.

Thus, in the absence of a consensual agreement with Serbia capable of changing the status, Kosovo remained – in the eyes of a large group of states – a rebellious province trying to separate from Serbia. Defying the will of the holder of territorial title, by recognising such a separatist entity as a sovereign and independent state, would be tantamount to acceptance of what in fact constituted a prohibited intervention in violation of Serbia's territorial sovereignty – so goes the traditionalist reading of the principles of international law.[41]

Thus, for states adhering to such a traditional reading of international law, any recognition of Kosovo as an independent state constitutes a violation of fundamental principles of international law – and should thus be avoided. In consequence, the states following such legal reasoning deliberately reject recognition of Kosovo, not because it fails to fulfil the criteria for independent statehood, but because international law bars states from recognising the product of an illegal secession. Only if and when Serbia itself recognises Kosovo as a new state, thus accepting the separation, will the group of objectors follow on from others in recognising Kosovo.

In the meantime, an entity like Kosovo constitutes (for states insisting on the prohibition of "premature recognition" at any rate) nothing but the aforesaid *de facto* regime. Perhaps such a regime has consolidated its authority over territory and people as much as it can, but as long as the legal vice remains, the reluctant parties feel barred from extending recognition. This does not mean that any provisional structure of authority exercising some degree of authority over a tract of land and its inhabitants constitutes a (consolidated) *de facto* regime.

There in fact exists a borderline downwards distinguishing established *de facto* regimes from more-provisional power arrangements exercising some territorial control.[42] In particular, in civil-war situations, armed non-state groups often

[40] *See* Vidmar, *supra* note 15, pp. 831–833; Orakhelashvili, *supra* note 15, pp. 32–34; Oeter, *supra* note 16, pp. 66-67; M. Goodwin, *What Future for Kosovo? – From Province to Protectorate to State? Speculations on the Impact of Kosovo's Genesis upon the Doctrines of International Law*, 8 (1) German Law Journal 1 (2007), p. 11.

[41] *See* C. Tomuschat, *Recognition of New States – The Case of Premature Recognition*, in: P. Hilpold (ed.), *Kosovo and International Law. The ICJ Advisory Opinion of 22 July 2010*, Nijhoff, Leiden: 2012, pp. 31–46.

[42] *See* Schoiswohl, *supra* note 1, pp. 202–206.

manage to gain some degree of territorial control over certain fragments of territory.[43] International law takes account of the fact that such armed groups may exercise some form of state-like authority, as can be seen in Additional Protocol II to the Geneva Conventions.[44] As long as such territorial control is provisional (and mostly short-lived), as it is inclined to be in the context of civil wars, the fragment of state authority does not constitute a stable and consolidated power structure resembling an operating state authority in factual terms, and thus cannot be qualified as a *de facto* regime.[45] In an ongoing armed conflict, the provisional authority of any armed group can reach its end from one day to the next, with any change of military balance.[46] The aura of stability and longevity characterising consolidated state structures is lacking here – and one should be careful not to identify these (provisional) fragments of power in civil-war situations with the phenomenon of a 'stabilised" and "consolidated" *de facto* regime.

2. The legal status of *de facto* regimes

If an entity is to be qualified as a *de facto* regime, a follow-up question results from this, namely: what does qualification as a *de facto* regime mean in legal terms, i.e. what legal consequences are attendant upon such a status?

The remarks set out in what follows will try to give some hints as to the legal situation usually characteristic for *de facto* regimes.

2.1. International Legal Personality

The status of a consolidated *de facto* regime usually implies a minimum degree of legal personality under international law.[47] If one follows the (still dominant)

[43] *See* K. Schlichte, *In the Shadow of Violence: The Politics of Armed Groups*, Campus, Frankfurt am Main: 2009, pp. 123–143, 168–177.

[44] Concerning the threshold of application of AP II *see* D. Fleck, *The Law of Non-International Armed Conflict*, in: *idem* (ed.), *The Handbook of International Humanitarian Law*, 3rd ed., Oxford University Press, Oxford: 2013, p. 587.

[45] Concerning the status of non-state armed groups in non-international armed conflict *see* T. Rodenhäuser, *Organizing Rebellion: Non-State Armed Groups under International Humanitarian Law, Human Rights Law, and International Criminal Law*, Oxford University Press, Oxford: 2018; P. Urs, *Effective Territorial Control by Non-State Armed Groups and the Right of Self-Defence*, 77 (1) ZaöRV 31 (2017); D. Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart, Oxford: 2016, pp. 101–116, 120–155; S. Podder, *Non-State Armed Groups and Stability*, 34 (1) Contemporary Security Policy 16 (2013); M. Pedrazzi, *The Status of Organized Armed Groups in Contemporary Armed Conflicts*, in: M. Odello (ed.), *Non-State Actors and International Humanitarian Law*, FrancoAngeli, Milano: 2010, pp. 67–80.

[46] Concerning the roads to decay and the centrifugal forces of non-state armed groups *see* Schlichte, *supra* note 43, pp. 146–167.

[47] *See* Frowein, *De Facto Regime*, *supra* note 1, para. 3; Schoiswohl, *supra* note 1, pp. 206–214.

"declaratory theory" on the nature of recognition, the political entities *de facto* fulfilling all the requisites of statehood in essence constitute 'states," even if not recognised as such by other states. As states they qualify as subjects of international law. Accordingly, *de facto* regimes are in principle able to participate in international relations, are able to enter into legal relations with third states under international law and bear the rights and obligations of a subject of international law.[48] If other states agree, they may also send diplomatic envoys enjoying certain privileges and immunities and may, again in agreement with the state concerned, establish diplomatic missions, although these missions will usually not be qualified as Embassies (for reasons of protocol).[49] In practice, they also host certain missions of other states that serve diplomatic functions, while also not being qualified in terms of protocol.

2.2. The binding nature of Customary International Law

In their quality as subjects of international law, *de facto* regimes are bound (and also entitled) by the web of customary rules. As members of the international society, they fall under the same legal rules as do full states, and they must thus take care to ensure that international obligations incumbent upon them are respected.[50] Where they fail to respect their international obligations, they are due to fall under the rules of international responsibility and must bear all the secondary obligations that go along with that.[51] The ICJ in its Namibia Advisory Opinion of 1971 confirmed that by ruling that "physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States."[52]

2.3. Human Rights obligations

Basic principles of the international system, in particular fundamental human rights, bind upon *de facto* regimes as they bind upon all other states. International human rights treaties will usually not be ratified by them as High Contracting Parties, because the community of states will not accept them in this context, in relation to multilateral treaty regimes. However, this does not mean that they evade human rights obligations altogether. At the very least, the catalogue of fundamental human rights, applicable as general principles of law to all states (or as customary international law), will be of a binding nature for them, and will have to be obeyed by

[48] *See* Schoiswohl, *supra* note 1, pp. 206–214.

[49] *See* Frowein, *De Facto Regime*, *supra* note 1, para. 9.

[50] *See* Schoiswohl, *supra* note 1, pp. 216–219.

[51] *See* Frowein, *De Facto Regime*, *supra* note 1, para. 7.

[52] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, para. 118.

them in their internal operations.[53] The extent of these fundamental human rights binding upon all subjects of international law, irrespective of any treaties ratified in the field of human rights, has been discussed in the context of the elaboration of the "Turku Declaration on Minimum Humanitarian Standards" of 1990 – a document seeking to clarify the core content of human rights minimum standards.[54]

2.4. (Non-)Use of Force

The same is true for other fundamental principles of the international legal order and basic tenets of customary international law, such as the prohibition on the use of force in international relations. *De facto* regimes are not allowed, just as any other members of the international community are not allowed, to attack other states or exercise any force incompatible with international law.[55] At the same time, they also enjoy the protection of international law. Third states are not allowed to use force against them.[56] Any argument running counter to such reciprocal duties vis-à-vis the (non-)use of force would create serious loopholes in the international endeavour to proscribe the use of force in international relations, and would thus endanger the peace-preserving function of international law.[57] Documents like the famous Resolution on the definition of aggression supply explicit acknowledgement of this by stating that the term "state" is used in the Resolution "without prejudice to questions of recognition or to whether a State is a member of the United Nations."[58] States insisting on their (upheld) territorial title to the lands under the (factual) authority of a *de facto* regime sometimes find it difficult to accept such an obligation not to use force against "rebels." They would prefer to qualify the relationship to the "illegal regime" that has taken parts of their territory as a purely "internal affair," leaving room for (unilateral) force, as "law enforcement." However, as soon as we qualify a *de facto* state as a (more or less consolidated) subject of international law, international law's ambition of "peace through law" must bar any attempt to restore previous legal titles by force. As a result, the doctrine rightly concludes that the fundamental rules on the (non-)use of force in international relations do not only bind *de facto* regimes vis-à-vis other states, but that other

[53] *See* H.-J. Heintze, *Are De Facto Regimes Bound by Human Rights?*, 15 OSCE Yearbook 267 (2009); M. Schoiswohl, *De Facto Regimes and Human Rights Obligations*, 6 Austrian Review of International and European Law 45 (2001).

[54] *See* A. Eide, T. Meron, A. Rosas, *Combating Lawlessness in Grey Zone Conflicts through Minimum Humanitarian Standards*, 89 (1) American Journal of International Law 215 (1995).

[55] *See* Frowein, *De Facto Regime*, supra *note* 1, paras. 4–5.

[56] This is disputed by some authors – *see e.g.* P. C.W. Chan, *The Legal Status of Taiwan and the Legality of the Use of Force in a Cross-Taiwan Strait Conflict*, 8 (2) Chinese Journal of International Law 455 (2009), pp. 482–485.

[57] *See also* Heintze, *supra* note 53, pp. 269–271.

[58] UN GA Resolution 3314 (XXIX) of 14 December 1974 "Definition of Aggression," A/RES/29/3314, Art. 1.

states are also bound by these rules not to use force against *de facto* states.[59] The same might apply to the basic tenets of the prohibition on intervention, and to the principle of self-determination.

2.5. Treaty-Making Power

In principle, *de facto* regimes are also able to enter into treaty relations with other states.[60] There might be a thin line not to be crossed to avoid the conclusion of treaties being qualified as (implicit) recognition. However, with specific wording and safeguard clauses in that direction, reserving any recognition as sovereign state, such treaty-making does not raise specific problems. Ultimately, it is a matter for the contracting parties whether, and in which forms, the conclusion of treaties is seen as useful. Non-recognition as such does not exclude any type of treaty relations. If full treaty relations under international law are to be avoided, recourse to less-formal types of executive agreements or administrative contracts may still be possible.[61]

2.6. Limitations

However, there are certain important limitations that curtail the possibility of *de facto* regimes participating fully in the spectrum of international (legal) relations. *De facto* regimes are subjects of international law with only a limited capacity to act.

De facto regimes usually have difficulties in becoming members of international organisations. The legal objection raised towards full recognition in most cases will play out in the sense that member states of international organisations will deny the quality of such regimes as states qualifying for membership.[62] There are ways to circumvent this obstacle by some deployment of imaginative solutions in treaty-drafting – it for example being possible to recall the entitlement that "separate customs territories" may become members of the WTO under the WTO Agreement.[63]

Nevertheless, *de facto* regimes will generally not have the capacity to enter into agreements on boundaries and territory vested in them. The right to agree to changes of territoriality is a prerogative of sovereign statehood. As long as a territorial title of a third state bars the *de facto* regime from exercising full territorial sovereignty,

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[59] *See* Frowein, *De Facto Regime*, *supra* note 1, paras. 4–5; *see also* Frowein, *Das de facto-Regime im Völkerrecht*, *supra* note 1, pp. 52–66.

[60] *See* Frowein, *De Facto Regime*, *supra* note 1, para. 8; as an illustrative example *see* also the case of the TRNC, where collective non-recognition puts severe limits on treaty practice, *see* Talmon, *supra* note 23, pp. 370–390.

[61] *See* Talmon, *supra* note 23, pp. 385–388.

[62] *See only* – with the TRNC as an illustrative case – Talmon, *supra* note 23, pp. 546–596.

[63] *See* P.L. Hsieh, *Facing China: Taiwan's Status as a Separate Customs Territory in the World Trade Organization*, 39 (6) Journal of World Trade 1195 (2005); *see also* C.-H. Wu, *WTO and the Greater China*, Nijhoff, Leiden: 2012.

or its creation by illegal use of force hinders the recognition of full sovereignty, territorial transactions or adjustments of boundary will not be seen as fully binding. A later transition to full sovereign statehood might lead to the overall validity of such transactions. However, the limitations in a *de facto* regime's capacity to act as holder of territorial title will bring with it a lasting invalidity of such transactions, as long as the limitations persist. This is particularly true in cases of secessionist regimes, in which – for as long as they continue to go unrecognised by the former "mother state" – the *de jure* claim of (persisting) territorial sovereignty on the part of said "mother state" will go on barring any change of territorial title conceded by the *de facto* regime.

A comparable problem might often arise with citizenship. Citizenship of *de facto* regimes is not necessarily recognised, since a third state, as holder of territorial sovereignty, will continue to claim personal jurisdiction over the entire citizenry of the *de facto* state. As a result, passports issued by the *de facto* regime might be not recognised – or might even be rejected – by third-party states.[64] However, there is a tendency, at least with established *de facto* regimes surviving over a long period of time, for this obstacle to be overcome, with third-party states becoming more and more accepting of the passports issued by such a regime (and thus implicitly of its claim of citizenship). Taiwan may be kept in mind as an example of such practice.[65]

It is also not self-evident that acts of public authority of *de facto* regimes must be recognised. Third states might prefer to ignore any exercise of public authority of such "illegal regimes," in line with the legal impediment to full recognition.[66] However, there is good argument that the so-called "Namibia exception,"[67] concerning acts regulating personal status, should at least be accepted as relevant. The overall prevalence of human rights calls for the recognition of acts regulating the personal status of individuals. Denying the validity of such acts would be to the serious detriment of the protected legal interests of individuals bearing no responsibility for the confused nature of territorial sovereignty in such cases. Non-recognition in such cases may not be allowed to mean that individuals lose the human-rights protection that the basic principles of international law call for.[68]

Sovereign immunity will also pose problems under certain conditions. A failure to recognise the full statehood of a political entity will often mean that third states will deny its capacity to claim sovereign immunity before courts of law.[69]

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[64] *See* Talmon, *supra* note 23, pp. 491–495.

[65] *See* Ch. Chen et al., *Contemporary Practice and Judicial Decisions of the Republic of China (Taiwan) Relating to International Law, 2015*, 33 Chinese (Taiwan) Yearbook of International Law and Affairs 290 (2015), pp. 381–383.

[66] *See* only – with the TRNC as an illustrative case – Talmon, *supra* note 23, pp. 503–524.

[67] Concerning the so-called "Namibia exception," *see* in detail Ronen, *supra* note 32, pp. 83–100.

[68] *Ibidem*, pp. 88–98.

[69] *See also* Talmon, *supra* note 23, pp. 538–542.

3. Challenges and limits

From a legal perspective at least, the main challenge in dealing with *de facto* regimes is probably one inherent in the old principle *ex iniuria ius non oritur* ("unjust acts cannot create law").[70] As is demonstrated above, the main feature characteristic for certain state-like entities as *de facto* regimes is not any deficiency in factual control over territory and people (which is to say the lack of an empirical basis for any claim regarding statehood), but rather legal obstacles that hinder such regimes from being recognised as states. There may have been a unilateral secession that fails to gain the consent of the holder of territorial sovereignty, but there may also have been an illegal use of force by third states playing its decisive role in establishing the *de facto* regime as a separate political entity. In the latter case in particular, there is a principled obligation of non-recognition, since the *jus cogens* character of the prohibition on the use of force obliges all states to not recognise the product of any violation of such a *jus cogens* duty.[71] However, while a change in territorial status brought about by an illegal use of force triggers an obligation of non-recognition, a question still arises as to whether there remains leeway to establish formal relations with a territorial entity that should not exist in legal terms. In other words, is the stated obligation of non-recognition open to a measure of flexibility in international relations that is sought with the doctrine of *de facto* statehood? Is it really possible to on the one hand state that the creation of a territorial entity violated a *jus cogens* rule, and that such a regime should not therefore be recognised, but on the other to act in such a way that international relations are put in place, with treaties even concluded, just below the level of formal recognition?

A rigid perspective on *ex iniuria ius non oritur* would probably insist on such a result being incompatible with the need to uphold formal legality (at least symbolically).[72] As a result, a flexible approach oriented towards establishing open relations with such *de facto* regimes would be excluded. This would result in a problem, given that most of the prominent cases of *de facto* regimes reflect illegal interventions by armed force. It suffices here to think of cases such as the TRNC, Transnistria, Abkhazia, South Ossetia and Nagorny Karabagh. Should they be excluded from any type of international relations for so long as there remains no consensual solu-

[70] Concerning the application of such principle to international law *see* A. Lagerwall, *Le principe "ex injuria jus non oritur" en droit international*, Bruylant, Bruxelles: 2016; *see also* S.L. Cohn, *Ex Injuria Jus non Oritur: A Principle Misapplied*, 3 (1) Santa Clara Law Review 23 (1962).

[71] *See* A. Pert, *The 'Duty' of Non-Recognition in Contemporary International Law*, 30 Chinese (Taiwan) Yearbook of International Law and Affairs 48 (2012); Ronen, *supra* note 32, pp. 71–101; Talmon, *supra* note 23, pp. 214–258; D. Turns, *The Stimson Doctrine of Non-Recognition*, 2 (1) Chinese Journal of International Law 105 (2003).

[72] Concerning the normative dilemma underlying the application of the *ex injuria* principle, *see* C.R. Rossi, *Ex Injuria Jus non Oritur, Ex Factis Jus Oritur, and the Elusive Search for Equilibrium After Ukraine*, 24 (1) Tulane Journal of International & Comparative Law 143 (2015).

tion achieved with the holder of territorial title? Despite legal intuition suggesting precisely that, certain question marks remain that need to be taken seriously. Does such a rigid exclusion of "illegal regimes" from the international system really make sense? Has the entire doctrine of "*de facto* statehood" (or *de facto* regimes) not arisen with a view to some degree of flexibility being added to a legal framework that risks becoming caught in the dead end of an overdriven precedence of legality over facticity?

In cases of flagrant violations of *jus cogens*, symbolic insistence on legality may often offer the sole possibility by which basic tenets of the legal order can be defended.[73] Nevertheless, it is risky to build an isolated parallel world of (pure) legality that loses sight of the realities of international relations. Such a complete disjuncture between legality and facticity would pose a risk of international law becoming isolated (or insulated) in a nice, but fictitious, niche of normative ideals, with any (presumably toxic) interface with the realities of international relations then being avoided. *De facto* states are obviously out there, and consideration needs to be given to them, as efforts are made to bring order to the social environment of the "anarchical society of states." The Introduction-section's example of the more and more untenable non-recognition policy that the Federal Republic pursued in regard to the GDR gives a hint in that direction. While there may have been valid legal grounds for the FRG to insist on its legal position, in factual terms of diplomacy this became untenable as political circumstances changed.[74]

The option of (legally dubious) entities being dealt with by reference to categories of de facto regime was obviously put in place as a tool by which insistence on legality might be kept up, while there was simultaneous pursuit and development of a pragmatic approach helping political realities to be faced up to. While non-recognition of sovereign statehood is here upheld in formal terms, the doctrine of the *de facto* regime at the same time helps build productive intercommunal relations at the level of practical politics, with day-to-day issues between interlinked political entities then capable of being regulated.

The background to the separation between formal recognition and the pragmatic establishment of international relations is the passage of time that risks driving apart the parallel universes of international legality and international politics. Inevitably, that passage of time will often lead to growing consolidation of a *de facto* regime. While its authority over a certain territory and the people living there will become established firmly, the governmental apparatus (and constitutional structure) will develop a strong semblance of stability. For their part, the people living

[73] *See also* K. Zemanek, *The Metamorphosis of Jus cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?*, in: E. Cannizaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford University Press, Oxford: 2011, pp. 381–410.

[74] *See* Nolte, *supra* note 1, pp. 716–719.

in such a consolidated *de facto* state will become accustomed to it, perceive it as legitimate, and develop a specific sense of collective solidarity that moulds that political entity's citizenry into a specific "people."

At a certain moment in time a question will arise as to why the population of an established political entity – a population that has been born into the regime, grown up in it and spent (at times had no choice but to spend) all its life there – is denied any self-determination? Such changed circumstances might require a change of legal assessment. Should the legal vice that characterised the original act creating the political entity hold sway over the fate of the people living in that territory for ever and ever?

In fact, both the spirit and purpose of the right of self-determination speaks against such a construction of static and immutable legality. The legal status of the kind of entity under consideration here – as an independent, self-determining collectivity – may still be under dispute. But the right of the collective (as a people) to determine its fate will lead to a strengthening claim that the autonomy of the political unit embodying such self-determination must be respected.[75] By accepting it – in *de facto* terms – as a separate subject of international law below the status of full statehood, political (and legal) interaction in terms of *de facto* statehood allows for at least pragmatic integration in the web of legal relations of the international community. Such integration is important for the peace-preserving function of international law and provides for the addressing of populations' practical needs (as often underpinned by human rights). In particular, the real exercise of social, economic and cultural rights is largely dependent on statehood functions, but also on the functioning of a complex web of international transactions today underpinning that statehood's operation at national level.

Conclusions

The phenomenon of *de facto* statehood and the resulting legal institution of the state-like political entity known commonly as the *de facto* regime creates a kind of legal "in-between," situated below the threshold of full and sovereign statehood, but far above the status of non-state actors exercising some degree of control over territory and population (such as belligerents in a civil war). The doctrine recognises that, in factual terms, such *de facto* regimes meet more or less all the requirements for statehood that international law sets out as the empirical basis for qualification as a "state." At the same time, however, there may be good reasons of a normative nature standing in the way of third states' recognising such a "quasi-state" as a full member of the community of states.[76]

[75] *See* in this direction – with a perspective on Taiwan – J. Crawford, *The Creation of States in International Law*, 2nd ed., Clarendon, Oxford: 2008, p. 220.

[76] *See* Frowein, *De Facto Regime*, *supra* note 1, paras. 1–2.

From an empirical point of view the *de facto* regime looks like a state and operates like a state – but in legal terms it should not exist, since its creation violated primordial rights of another state. Accordingly, the basic tenet that distinguishes a *de facto* state from a fully sovereign one is the lack of formal recognition extended by other states. Without such recognition, the *de facto* state cannot become a fully-fledged member of the community of states.

The resulting limbo situation creates a significant problem for the international system. We have a political entity that is (*de facto*) performing all the functions of a state, but that is nevertheless going unintegrated into the fabric of the international legal system. Relegated to a complete "pariah" existence, a state's being maintained in such an outsider position paradoxically poses a threat to the proper functioning of the international legal order. In some ways it may actually be seen as a "cop-out" for a state to factually discharge all the functions of a modern state without having to bear the not inconsiderable burden of rights and duties of statehood that that entails. The danger is then of "black holes" forming in the web of international legal relations.

Hence, normative reasons speaking for non-recognition notwithstanding, such state-like entities must be integrated into the normative array of the community of states to a certain degree at least, must be assimilated more and more into normal statehood despite its legal position. This obviously becomes a matter of ever-greater importance the longer such regimes continue to exist. The international community might easily ignore such state-like entities for a limited, transient period, but consolidation of factual statehood and the growing intensity of (trans-border) interactions and interdependence with the rest of the world will make upholding the complete denial of any political and legal relations ever-more-difficult as time passes.

Indeed, the empirics of international relations demonstrate that *de facto* regimes can survive over long periods of time. The "Republic of China (Taiwan)" has continued in existence as a separate political subject for nearly 70 years now, and will probably continue to do so for quite some time to come. Such passage of time is not – cannot be – without its consequences.

Stability over time usually indicates a certain legitimacy of the authority exercised by the *de facto* regime, not least in the face of ever-greater consolidation of citizenry as a separate "people" asserting its right to self-determination. The legal institutionalisation of *de facto* regimes as (special) subjects of international law thus corresponds to functional needs of the international community. The *de facto* regimes exercise the functions of a state over a given territory and population, and in such functioning will need to be integrated into the international legal system at least to some minimal degree. That is why doctrine accords to such *de facto* regimes an international legal personality that goes along with their being bound by customary law and being vested with the basic rights and duties of states

under international law, including as regards the (non-) use of force and state responsibility. If there is need, they can also be integrated into the web of treaty relations gradually, in line with willingness of third states to conclude treaties with them. There are techniques that uphold formal non-recognition as a sovereign state, while sustaining growing institutionalisation of bilateral and multilateral legal relations with them in the context of treaty regimes.

The long-term prospects for *de facto* regimes differ considerably. *De facto* statehood is a transitory status, though the transitional phase in question may be of undetermined length, with the final stage of transition remaining an open matter.[77] Some *de facto* regimes might transit to full statehood at a certain stage. Kosovo might be such a case, as there is some likelihood that Serbia will accept, in the context of its accession to the EU, the independent statehood of its former province, and recognise it as a sovereign state, thus giving rise to acceptance as a UN Member State by the (still large) number of states so far objecting to recognition.

Other *de facto* regimes might transit to a special status as regards autonomy inside the state from which they separated originally. Such special arrangements (with some degree of international guarantee) are proposed in the negotiations on Transnistria, Abkhazia and Nagorno-Karabagh. It is completely open whether these proposals will find the necessary support, but they constitute the most plausible option by which the "frozen" conflicts linked to these regimes might be pacified. In some other cases, a (re-)integration into the former state from which the breakoff occurred may constitute a solution. If all goes well with the peace negotiations on Cyprus, the TRNC might join the Republic of Cyprus, as constituent subject of a federative, bi-communal Cypriot state. The negotiations on a consensual solution might also fail, at a certain moment or forever, and the "in-between" of factual statehood without formal recognition might continue for the time to come. In these cases, *de facto* statehood might end up becoming a very stable, long-term "provisional solution."

It is in these cases that the doctrine of *de facto* statehood is needed most urgently, as the human cost of excluding political collectives from the international legal system for an indefinite time might become too high. In these cases, there is a need for a legal arrangement that mitigates the normative grounds once speaking for non-recognition with the practical need that there be gradual inclusion of political collectives into the international legal order, with political entities factually discharging the functions of statehood over a given territory.

As international law cannot simply ignore such entities over a long period of time, it becomes essential to accept their inclusion, at some basic level at least, into the web of international legal relations. The doctrine of *de facto* regimes that

[77] *See* L. Anderson, *Reintegrating Unrecognized States: Internationalizing Frozen Conflicts*, in: N. Caspersen, G. Stansfield (eds.), *Unrecognized States in the International System*, Routledge, London/New York: 2011, pp. 183–206.

developed over a very long time throughout the 20th century meets these functional needs to a great extent, while respecting the continued demand for non-recognition of some past act by which separate statehood was established illegally. The basic tenets of the legal status of such *de facto* regimes have become more or less clear, even if a number of uncertainties remain. However, as the problems linked with the phenomenon of *de facto* statehood will not just go away, it falls upon lawyers to continue with attempts to achieve further clarification of matters surrounding the position of *de facto* regimes. Although *de facto* statehood constitutes a legal grey zone by definition, the functional need to improve the doctrinal understanding of the status, rights and duties of *de facto* regimes remains clear.

Abstract: *De facto* statehood is a phenomenon with some salience in international relations, but with very limited attention paid in international legal doctrine. There was some interest in the phenomenon and its legal aspects throughout the 1970s and 1980s in Germany, due to the very specific situation of the two German states – and the special regime of bilateral relations created with the "Foundational Treaty" (*Grundlagenvertrag*) of 1973. However, the phenomenon has not lost its practical significance in more recent decades. Kosovo may be mentioned as an example, but also Transnistria, Abkhazia, Somaliland and the Turkish Republic in Northern Cyprus. This paper therefore revisits the doctrinal fundaments of the concept of "*de facto* statehood," seeking in so doing to map the constructive potential, but also the limits, of such a doctrinal construction. For this purpose, the phenomenon is first circumscribed, with the basic tenets of the doctrinal construct of "*de facto* regime" described, before certain ideas surrounding the major consequences of the construct are sketched out. Certain reflections on grey zones and limits of the concept in terms of legal policy are then offered as a third aspect of the study.

Keywords: *de facto* statehood, non-recognition, civil war fragments, legal status of Germany before 1991, Kosovo, elements of statehood, international legal personality, human rights, non-use of force, the *ex iniuria ius non oritur* principle, the Stimson doctrine, self-determination

Forms of Recognition

*Przemysław Saganek**

1. Explicit and implied recognition

Recognition is usually described in terms of its being express or tacit.[1] This found its place in manuals relating to international law, in the second half of the 19th century. This place has been maintained all the way through to the present day. As for the division itself, that is to be discerned from the works of D. Anzilotti[2], F. Pfluger[3], P. Guggenheim[4]; J. Spiropoulos[5], N. Quoc Dinh[6] and P. -M. Daupuy.[7] However, here I confine my considerations to those who take a position on recognition in general.

There can be some disagreement over the naming of recognition that is not explicit. It may be called implied,[8] implicit,[9] tacit, presumed or silent recognition. It may also be associated with acquiescence. Thus K. Skubiszewski underlines that acquiescence and silence may lead to tacit recognition.[10] Interestingly enough,

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[1] The present text develops the ideas presented by the author in his work: P. Saganek, *Unilateral Acts of States in Public International Law*, Brill, Leiden: 2016, *see especially* pp. 475–477, 551–562.

[2] D. Anzilotti, *Cours de droit international*, translated by Gilbert Gidel, Sirey, Paris: 1929, p. 348.

[3] F. Pfluger, *Die einseitigen Rechtsgeschäfte im Völkerrecht*, Schulthess, Zürich: 1936, p. 144.

[4] P. Guggenheim, *Traité de droit international public. Avec mention de la pratique internationale et suisse*, Vol. I, Librairie de l'Université, Georg et Cie, Genève: 1953, p. 147.

[5] J. Spiropoulos, *Traité théorique et pratique du droit international public*, LGDJ, Paris: 1933, pp. 231–232.

[6] N. Quoc Dinh, P. Daillier & A. Pellet, *Droit international public*, LGDJ, Paris: 1994, p. 529.

[7] P.-M. Dupuy, *Droit international public*, Dalloz, Paris: 1993, p. 251.

[8] W. Góralczyk, *Prawo międzynarodowe publiczne w zarysie*, PWN, Warsaw: 1989, p. 155.

[9] Ch.G. Fenwick, *International Law*, Appleton-Century-Crofts, Inc., New York and London: 1948, p. 137; A. Ross, *A Textbook of International Law: General Part*, Longmans, Green and Co., London, New York, Toronto: 1947, p. 120.

[10] K. Skubiszewski, *Unilateral Acts of States*, in: M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, UNESCO/Martinus Nijhoff, Paris/Dordrecht: 1991, p. 227.

R. Mullerson writes that other states either expressly recognised or acquiesced in recognition to Russia's taking the seat of the USSR at the UN.[11] N.S.M. Antunes reserves the term recognition for affirmative consent, opposing that with acquiescence.[12] It must nevertheless be observed that the term "acquiescence" is almost never used with respect to the recognition of states or governments.

W. Góralczyk defines tacit recognition as the behaviour of a state giving rise to a presumption that the latter recognises a given organisation.[13] By the latter term he means mainly a state, a government, insurgents or belligerents.

Tacit recognition of states and governments is the main topic of the present text. There is no possibility of limiting the scope of tacit recognition to the latter, however. The 1900 Resolution of the Institute of International Law confirmed that recognition of belligerency may be express or tacit.[14] What is more, the case-law of the World Court refers to several instances of tacit recognition of territorial changes or territorial rights.

Thus, for example, in the case of the Temple of Preah Vihear, the ICJ referred to a visit made by a Cambodian Prince. It found as follows: "Looking at the incident as a whole, it appears to have amounted to tacit recognition by Siam of the sovereignty of Cambodia (under the French Protectorate) over Preah Vihear, through a failure to react in any way on an occasion that called for a reaction in order to affirm or preserve title in the face of an obvious rival claim. What seems clear is that Siam either did not in fact believe she had any title – and this would be wholly consistent with her attitude all along, and to the Annex 1 map and line – or else she decided not to assert it, which again means that she accepted the French claim, or accepted the frontier at Preah Vihear as it was drawn on the map."[15]

In this case the ICJ used the phrase "recognized by conduct."[16]

In the case concerning the right of passage over Indian territory, the ICJ ruled as follows: "Thus Portuguese sovereignty over the villages was recognized by the

[11] R. Mullerson, *The Continuity and Succession of States by Reference to the Former USSR and Yugoslavia*, 42 (3) International and Comparative Law Quarterly 473 (1993), pp. 477–478.

[12] N.S.M. Antunes, *Estoppel, Acquiescence and Recognition in Territorial and Boundary Dispute Settlement*, University of Durham, International Boundaries Research Unit, Durham: 2000, p. 3.

[13] Góralczyk, *supra* note 8, p. 156.

[14] Institut de Droit International, *Droits et devoires des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection*, Session de Neuchâtel 1900: "Le gouvernement d'un pays où la guerre civile a éclaté peut reconnaître les insurgés comme belligérants, soit explicitement par une déclaration catégorique, soit implicitement par une série d'actes qui ne laissent pas subsister de doute sur ses intentions." On the recognition by the mother government – Art. 4 § 3 of the Resolution speaks of recognition by means of acts which do not leave doubts as to the intention of a given state.

[15] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, 15 June 1962, ICJ Rep 1962, pp. 6, 30–31.

[16] *Ibidem*, pp. 32–33.

British in fact and by implication and was subsequently tacitly recognized by India. As a consequence the villages comprised in the Maratha grant acquired the character of Portuguese enclaves within Indian territory."[17]

This is, however, an appropriate place in which to refer to more general questions. Lawyers are used to attempting to answer questions as to "how" and "when." These are very pertinent with respect to the recognition of new states and governments. If Poland does not want to recognize Abkhazia it is important to know which acts should be avoided to prevent such recognition being afforded. If Poland has recognised South Sudan and actually effected several acts with respect to it, it may turn out to be important to know the precise moment of that recognition. Further parts of the present text will then discuss technicalities connected with several acts leading to recognition, or those which do not lead to it, despite views presented in earlier literature or popular views on recognition. But, useful as they are, these questions carry certain dangers of their own, of which the most important involves a lawyer writing on recognition who behaves like a historian or a journalist – recording dates and facts.

The proper question to be asked in this context is therefore "Why?". Or specifically, why can recognition be not only express, but also tacit? This is a question very seldom asked – a circumstance that should encourage us to dwell on it in the present place.

The question is all but easy and the answer is all but certain. What is more, it depends on the level of discussion. Where a very general discussion on international acts is held, it seems reasonable to start with the statement that international law is not formalistic. International agreements could be concluded in writing or orally. An international waiver can result from action or inaction; this action may be unilateral, bilateral or multilateral. In this context the variety of forms of recognition could be seen as confirmation of a wider principle.

We can also look at recognition from a historical perspective. While recognition of states *par excellence* may be seen as a relatively new (19th-century) phenomenon, more venerable examples have to do with recognition of titles of sovereigns and their territorial rights. It is visible that there was often a correlation between the two. So recognition of the King of Denmark as King of Norway meant recognition given to the fact Norway had become a part of Denmark, or at least was being governed by the same King. Recognition of the King of Sardinia as King of Italy in turn meant recognition of a new title for that monarch, recognition of a new state, or possibly recognition of a new name for a state (if the state is the same), as well as recognition of a fundamental change vis-à-vis territorial scope.

The same or at least a similar phenomenon is visible when express recognition of a government of a new state is qualified as implied recognition of that state. In

[17] ICJ, *Case concerning Right of Passage over Indian Territory*, Merits, Judgment, 12 April 1960, ICJ Rep 1960, pp. 6, 39.

this sense it is logics that requires us to see recognition of X in some elements other than an express declaration regarding the recognition of X.

Last but not least, state practice must be referred to. Some states prefer to make unilateral declarations on recognition, or to insert express recognition clauses into agreements concluded with the beneficiary of recognition. Others want to effect other transactions with the participation of a new entrant without using the word "recognise." What is more, it is the new entrant which may be most interested in the avoidance of this very word. In this sense the task of the doctrine is to reflect state practice, rather than to try to impose doctrinal views, wishes and expectations on states.

2. Express and tacit recognition of states and governments

2.1. Diversity of modes of recognition

If the division of recognition (in general) into express and tacit is referred to frequently, we must say that such division of recognition of states and/or governments is one of the most stable elements of the scholarship of international law. Indeed, references to this can be found in all or almost all general works on international law. Suffice to invoke here such authors as: A. Rivier[18], E. Nys[19], J. de Louter[20], F. von Liszt[21], E. von Waldkirch[22]; A. Hold-Ferneck[23]; J. Devaux[24]; V.D. Mahajan[25], E. von Ullmann[26], Ch.G. Fenwick[27], A. Ross[28] and L. Oppenheim.[29]

On the basis of a very detailed analysis of American practice, G.H. Hackworth writes that the modes of recognition of a state[30] are:

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[18] A. Rivier, *Principes du droit des gens*, vol. I, A. Rousseau, Paris: 1896, pp. 58–59.

[19] E. Nys, *Le droit international. Les principes, les theories, les faits*, vol. I, A. Castaigne, Bruxelles/Paris: 1904, p. 74.

[20] J. de Louter, *Le droit international public positif*, vol. I, Oxford University Press, London: 1920, p. 222.

[21] F. von Liszt, *Das Völkerrecht systematisch dargestellt, zwölfte Auflage bearbeitet von M. Fleischmann*, Häring, Berlin: 1925, p. 91.

[22] E. von Waldkirch, *Das Völkerrecht in seinen Grundzügen dargestellt*, Helbing & Lichtenhahn, Basel: 1926, p. 124.

[23] A. Hold-Ferneck, *Lehrbuch des Völkerrechts*, Part I, Felix Meiner, Leipzig: 1930, p. 182.

[24] J. Devaux, *Traité élémentaire de droit international public (droit des gens)*, Recueil Sirey, Paris: 1935, p. 85.

[25] V.D. Mahajan, *International Law*, Lucknow, Eastern Book Co., Delhi: 1958, p. 149.

[26] E. von Ullmann, *Völkerrecht*, J.C.B. Mohr, Tübingen: 1908, p. 128.

[27] Fenwick, *supra* note 9, p. 137.

[28] Ross, *supra* note 9, p. 120.

[29] L. Oppenheim, *International Law: A Treatise.* Vol. I – *Peace*, 8th ed. by H. Lauterpacht, Longmans, Green & Co., London/New York/Toronto: 1955, p. 146.

[30] G.H. Hackworth, *Digest of International Law*, vol. I, Government Printing Office, Washington: 1940, p. 167.

- formal note of a diplomatic representative to the Ministry of Foreign Affairs of a recognised state (e.g. the recognition of Bulgaria in 1909, Albania, Estonia, Lithuania, Latvia and Egypt in 1922, and Saudi Arabia in 1931);
- formal note of the Department of State to the diplomatic representative of a recognised state in the USA (as with the recognition of Armenia in 1920, and Finland and Yugoslavia in 1919);
- a telegram to the head of the recognised state (Poland 1919);
- the formal reception of a mission of a recognised state by the US President (Afghanistan);
- formal announcement (the Czechoslovak National Council);
- the establishment of relations with a recognised subject (Czechoslovakia);
- accrediting of an American diplomatic representative in a state (Iraq in 1931);
- the concluding of certain bilateral treaties (Iceland).

It is difficult to treat the above list as a full and logical classification. Rather it represents a kind of general overview of richer practice. Certain doubts could concern the two first examples. They assume the existence of a diplomatic representative in a state which is not yet recognised. In fact, the sending of the representative is itself treated as recognition.[31]

As regards the means of recognition of a government, G.H. Hackworth cites as a point of reference the Memorandum of Second Assistant to Secretary of State Bryan of 28 March 1913.[32] According to that Memorandum, recognition of a new government results from one of six methods, listed as follows:

- by formal note of a diplomatic representative to the Ministry of Foreign Affairs of a state in which a change of a government has taken place (as a rule a diplomatic representative of that state in the USA is informed about this);
- by the US President's acknowledgment of a letter received from a new head of another state;
- by the US President's receiving of a new diplomatic representative of a state in which a change of a government has taken place (by way of the handing over of credentials);
- by the US President's receiving of a hitherto diplomatic representative of a state in which a change of a government has taken place, with a view to oral information on that change of a government being accepted;
- by an American diplomatic representative's delivery of a message from the US President concerning recognition, or of a congratulatory Resolution from the US Congress,
- by the supplementation of temporary recognition of a government with a formal announcement on recognition from an American diplomatic representative.[33]

[31] *See infra*.

[32] Hackworth, *supra* note 30, pp. 167–168.

[33] *Ibidem*, p. 168.

With respect to this catalogue, it is possible to repeat the same critical remarks as before concerning the lack of completeness and mutually exclusive character of several elements present. These relate more to the modalities of expressing and conveying the will to recognise than they do to forms of recognition in any precise meaning of the term.

The latter issues have attracted the attention of the doctrine of international law since the second half of the 19th century.

Besides the list of forms, which are going to be examined in the further part of the present text, a more general question concerns the relationship between forms of recognition of states on the one hand and governments on the other. As early as in 1887, T. Funck-Brentano and A. Sorel wrote that the forms of recognition of states and governments are the same.[34] This position has also been adopted by other authors.[35]

However, the indistinctive treatment of the recognition of states and governments was heavily objected to by Ch.G. Fenwick.[36] For him, this was a source of confusion. Furthermore, the simple comparison of the above-presented lists made by Hackworth rightly reflects the separate character of recognition of a state and of a government. In fact, recognition of a government takes place with respect to a state already recognised (otherwise recognition granted concerns as a rule both state and government at the same time[37]). In both cases, however, the forms used are similar, and connected either with some declarations or with diplomacy. It must be kept in mind that a government has certain specific qualities requiring additional remarks. Having said that, the majority of remarks that follow may be addressed to both objects of recognition at the same time.

T. Funck-Brentano and A. Sorel identify such forms of recognition of states and governments as: the concluding of a treaty with a state (or a state represented by a government thereby being recognised) or a "special declaration of recognition" (both forms are designated as formal and express forms of recognition), but also by "acknowledgement in a public act of the existence" of a new state or government, negotiations with it, the receiving of its representative or the sending of such a representative to it.[38] In this context, the majority of authors known to me refer to the concluding of treaties (all or some at least) or to the sending or receiving of diplomats.[39] K. Gareis refers to express or implied transactions, including the formal

[34] T. Funck-Brentano, A. Sorel, *Précis du droit des gens*, E. Plon, Nourrit et cie, Paris: 1887, p. 211.

[35] F. Despagnet, *Cours de droit international public*, L. Larose et L. Tenin, Paris: 1910, p. 106; J. Spiropoulos, *Traité théorique et pratique du droit international public*, R. Pichon et R. Durand-Auzias, Paris: 1933, p. 52.

[36] Fenwick, *supra* note 9, p. 157.

[37] Hackworth, *supra* note 30, p. 167.

[38] Funck-Brentano, Sorel, *supra* note 34, p. 211.

[39] E.C. Stowell, *International Law: A Restatement of Principles in Conformity with Actual Practice*, Isaac Pitman & Sons Ltd., London: 1931, p. 43; Ross, *supra* note 9, p. 120; D.P. O'Connell, *International Law for Students*, Stevens & Sons Ltd., London: 1971, p. 58.

receiving or sending of an accredited represen- tative, as well as giving *exequatur* and the fact of certain treaties being concluded.[40]

Ch.G. Fenwick associates tacit or implicit recognition with a situation in which "the older member enters into official intercourse with a new member by sending diplomatic representatives to it, concluding treaties with it, acknowledging its flag or otherwise entering into formal relations with it."[41]

One of the longest lists of forms of recognition can be found in several editions of the manual of Oppenheim.[42] In this context, the fourth edition (the work of A.D. McNair) lists the concluding of a bilateral treaty with a new state, the concluding of a collective treaty between a group of states with a new one, admission into the League of Nations, the sending or receiving of a diplomatic agent, a unilateral declaration,[43] a collective note or declaration, admission to an international congress or conference,[44] or the formal appointment of – or issuance of an *exequatur* to – a consul.

A few transactions present in the lists presented above would now seem to have succumbed to negative verification, in the sense that they are no longer presented as forms of recognition. It is sufficient to compare this list with that from the 8th edition of Oppenheim's work. Indeed, what is really long in the latter is the list of acts deemed not to lead to recognition "in the absence of an unequivocal intention to the contrary."[45]

2.2. The significance of treaties

Only some treaties are in fact involved here, as the doctrine is not ready to attribute recognition to the very fact that a treaty (in the sense of each and every treaty) has been concluded.[46]

K. Gareis was thus ready to see recognition in the conclusion of treaties, but only in matters he dubs *hoheitsrechtliche*.[47] On the other hand, he did not attribute the effect at all to treaties in several different categories, including in respect of

[40] Translation of this term is difficult. It could be attempted as "something other than of a technical nature."

[41] Fenwick, *supra* note 9, p. 137.

[42] L. Oppenheim, *International Law: A Treatise*, vol. I – *Peace*, 4th ed. by A.D. McNair, Longmans, London/New York/Toronto: 1928, pp. 145–146, ft. 2.

[43] The recognition of Finland by the UK is cited as an example.

[44] The admission of Poland to the Peace Conference convened on 18 January 1919 is cited as an example.

[45] Oppenheim, *supra* note 29, pp. 146–147. *See* also *infra*.

[46] H. Lauterpacht, *Implied Recognition*, 21 British Yearbook of International Law 123 (1944), p. 127; *see* also *idem*, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, pp. 371ff.

[47] Translation of this term is difficult. It could be attempted as "something other than of a technical nature."

trade and border cooperation, as well as those concluded in the interest of the whole of humanity with fighting groups, but in the context of their not prejudging the state of future relations with the latter.[48] A. Ross treats as a form of recognition the "formal conclusion of treaties," but he is not very conclusive on this matter.[49]

What are involved first and foremost are multilateral treaties.

T.-Ch. Chen extends this kind of analysis to common participation in a conference negotiating a given treaty. He cites Fauchille, according to whom the independence of the Congo was recognised by "son admission a la discussion et au vote de l'acte general de la conference de Berlin, 26 fevrier 1885."[50] Another cited author is Temperley, for whom the date of participation in the Peace Conference was the date of recognition of Poland, the Serb-Croat-Slovene State and Czechoslovakia.[51] Chen does not seem convinced by these views. However. noting that: "as a matter of theory, there is no reason why co-participation in an international conference should imply recognition."[52] All the same, he presents a high level of uncertainty and of caution on the part of states that want to abstain from recognising a new regime (be it a state or government).[53] This is especially the case of states hosting international conferences. This is just a part of real international life, reflecting the lack of certainty and relatively great scope for intuitive decisions and assessments.

Some authors are stricter in this matter, claiming that common participation in a conference does not lead to recognition.[54] H. Lauterpacht rightly notes that "if a signature of or adherence to a multilateral treaty to which an unrecognised State is a party does not amount to recognition, it is difficult to see how participation in a conference, which normally leads to such treaties, can amount to recognition."[55] This could be extended to the conferences not necessarily involved in drafting international agreements.

It is more complicated to qualify common participation in a treaty as such as recognition or not. T.-Ch. Chen distinguishes between simultaneous signing and subsequent adherence. According to him, "It is believed that the simultaneous signing of a treaty gives rise to a stronger presumption of recognition than the subsequent adherence to it."[56]

[48] K. Gareis, *Institutionen des Völkerrechts*, Emil Roth Verlag, Giessen: 1901, pp. 65–66.

[49] Ross, *supra* note 9, p. 120.

[50] P. Fauchille, *Traité de droit international public*, Rousseau, Paris: 1921–1926, Vol. I, Part I, t. I, p. 325, cited on the basis of T.-Ch. Chen, *The International Law of Recognition: With Special Reference to Practice in Great Britain and the United States*, Nabu Press, London: 1951, p. 201, ft 56.

[51] H.W.V. Temperley, *History of the Peace Conference of Paris*, vol. 5, Oxford University Press, London: 1920, pp. 158–159; cited on the basis of Chen, *supra* note 50, p. 201, ft 57.

[52] Chen, *supra* note 50, p. 203.

[53] *Ibidem*, pp. 201–203.

[54] Lauterpacht, *Implied…*, *supra* note 46, p. 131.

[55] *Idem*, *Recognition…*, *supra* note 46, p. 380.

[56] Chen, *supra* note 50, p. 204.

Lauterpacht takes a negative stance as to that matter and states that "(…) neither signature nor adherence on the part either of the non-recognizing or the unrecognized State result by themselves in bringing about recognition. Any reservation disclaiming the intention to recognize must be regarded as appended *ex abundante cautela*."[57]

This view should be accepted.

A very special category of multilateral treaties are the ones establishing international organizations. A question is again put here as to whether joint participation in an international organisation constitutes a form of recognition. It is rather the negative view that prevails here. A further question revolved around how to qualify the act of voting on a given actor becoming a member, as such. A lot speaks in favour of the view that sees in this a sign of recognition. However, a few qualifications must be made. Firstly, this does not extend to treaties not limited to states, but also open to what are called countries or territories. So, for example, the mere presence of a given body in the WTO does not say much about its international recognition as a state, or government of an entire state. Likewise the very technical character of an organisation may offer a sign in favour of the thesis that even positive voting on a new member does not necessarily have to denote the recognition thereof. In any case, reservation of non-recognition would be sufficient.

A very special position is reserved for the United Nations. V. Lowe rightly calls the admission of an entity as a Member State of the UN as "in practice the definitive seal of the Statehood of the new State."[58]

A different attitude is adopted with respect to bilateral treaties. For example, as early as on 1 December 1825, G. Canning wrote that the very signature of a treaty with the new Latin-American Republics "was in itself an effective and valid recognition of that State by His Majesty, and as valid as if the word "His Majesty recognizes" were *totidem litteris* introduced into it."[59]

T.-Ch. Chen notes however that "[t]here have been numerous cases in which States, although they have entered into agreements with new entities, have nevertheless insisted that no recognition had been accorded."[60] He rightly states: "A temporary local arrangement with an unrecognised body is compatible with the status of a belligerent community, and need not even presuppose the existence of a State or government."[61]

This is especially the case when a state concluding a treaty issues a reservation that it does not recognise the other party. B.R. Bot notes that the thesis equating

[57] Lauterpacht, *Recognition*…, *supra* note 46, p. 374.

[58] V. Lowe, *International Law*, Oxford University Press, Oxford: 2007, p. 163.

[59] C.K. Webster, *Britain and the Independence of Latin America, 1812-1830*, vol. I, Oxford University Press, Oxford: 1938, p. 291; cited on the basis of: Lauterpacht, *Recognition*…, *supra* note 46, p. 379.

[60] Chen, *supra* note 50, p. 193.

[61] *Ibidem*, p. 194.

the conclusion of a bilateral treaty with recognition has lost much its rigidity, in particular after the Second World War. All the same, his point of departure remains the thesis that recognition results from conclusion of a permanent treaty (though a temporary treaty has no such effect), a political treaty or a treaty subject to normal ratification procedure in both states.[62] As an example of treaties with unrecognised regimes, the treaties cited are *inter alia*, a treaty of 23 March 1935 between the governments of Manchukuo and the USSR. In addition Soviet Russia concluded several treaties with states which did not recognise it at the time.[63] In this context, O'Connell cites the conclusion by the UK, with Soviet Russia, of a treaty on prisoners of war. This preceded recognition, taking place on 16 March 1921, when a trade agreement was concluded.[64]

2.3. Recognition and acts from the field of diplomatic and consular law

Authors treating the establishment of diplomatic relations as a form of recognition have already been cited.[65] As T.-Ch. Chen notes: "That the exchange of diplomatic representatives constitutes recognition is in principle open to less dispute than any other form of implied recognition. As evidence of the existence of the power recognised, it is irrefutable."[66]

H. Lauterpacht likewise writes that "[t]he formal appointment or reception of diplomatic representatives is properly regarded both as a mode of and as an irrebuttable presumption of recognition."[67]

This view is defended by the authors of manuals of diplomatic law. For example, B. Sen notes that "opening of diplomatic relations with a community which emerged as a state would conclusively prove its admission into the community of nations."[68] As regards new governments, he is ready to see recognition in the change of credentials, with the mere preservation of the diplomats assigned up to that point not taken to amount to recognition.[69]

It is difficult to argue with this line of argumentation. What is more, recognition will result from the very act of establishing diplomatic relations, even if not followed by the establishment of permanent missions or the appointment or reception

[62] B.R. Bot, *Nonrecognition and treaty relations*, A.W. Sijthoff/Oceana Publications, Leyden/Dobbs Ferry, N.Y.: 1968, p. 67.

[63] Lauterpacht, *Implied…*, *supra* note 46, p. 128; *see* also *idem*, *supra* note 46, p. 376.

[64] O'Connell, *supra* note 39, p. 58.

[65] One can add to them: Liszt, *supra* note 21, p. 91; Lauterpacht, *Implied…*, *supra* note 46, p. 131; *idem*, *Recognition…*, *supra* note 46, p. 381.

[66] Chen, *supra* note 50, p. 196.

[67] Lauterpacht, *Recognition…*, *supra* note 46, p. 381.

[68] B. Sen, *A Diplomat's Handbook of International Law and Practice*, Martinus Nijhoff, Dordrecht/Boston/London: 1988, p. 531.

[69] *Ibidem*.

of diplomatic representatives. In this context, it is worthwhile invoking the 15 December 1978 Joint Communiqué on the Establishment of Diplomatic Relations between the USA and the PRC.[70] It stated that: "The United States of America and the People's Republic of China have agreed to recognize each other and to establish diplomatic relations as of January 1, 1979."

The USA recognises the Government of the People's Republic of China as the sole legal Government of China. But within this context, the people of the United States maintain cultural, commercial and other unofficial relations with the people of Taiwan.

The USA and PRC have reaffirmed the principles agreed on by the two sides in the Shanghai Communiqué, emphasising once again that: "The Government of the United States of America acknowledges the Chinese position that there is but one China and Taiwan is part of China."[71]

Interestingly enough, the American legal doctrine justifies the power of the USA President to recognize other states as flowing from Article II, Section 3 of the USA Constitution, which provides that the President "shall receive Ambassadors and other public Ministers." [72]

As L. Dembinski noted, the traditional rule on the dependence of diplomatic relationships on recognition is valid only as regards diplomatic relations *sensu stricto*.[73] The author seemed to be very impressed by several liaison offices. He invoked the examples of the representative of the Swiss Federal Department of Foreign Affairs to the Foreign Ministry of the Democratic Republic of Vietnam (when diplomatic relations were maintained only with South Vietnam); as well as the 1973 US-China exchange of liaison offices.[74] However, such offices are neither instruments of recognition nor diplomatic missions.

By analogy, we may ask whether transactions governed by consular law also amount to recognition.

The doctrine emphasises that the very preservation of consular officers (where *exequatur* is neither asked for nor received) is recognition neither of a new state nor of a new government.[75] This is all the more certain inasmuch as such officers were as a rule sent with the approval (express or tacit) of the previous sovereign, and simply continue their activities in a given area. In addition, as with diplomatic law, so too the sending of new officers without *exequatur*, as well as the

[70] C.L. Gable, *Taiwan Relations Act: Legislative Re-Recognition*, 12 Vanderbilt Journal of Transnational Law 511 (1979), p. 512.

[71] *Ibidem*.

[72] *Ibidem*, p. 513.

[73] L. Dembinski, *External Missions of States and International Organizations*, Martinus Nijhoff, Dordrecht/Boston/Lancaster: 1988, p. 30.

[74] *Ibidem*.

[75] Lauterpacht, *Implied*…, *supra* note 46, p. 134, *see* also Lauterpacht, *Recognition*…, *supra* note 46, p. 383.

tolerating of such officers sent by an unrecognised regime, does not amount to recognition.[76]

There is less certainty as regards a request for *exequatur.* Reference has already been made to voices that see a form of recognition in this. However H. Lauterpacht analyses this issue as follows:

"[T]here is no compelling reason of logic why a request for a consular exequatur should signify general recognition, i.e. an admission other than that the requested authority is in power in the territory in question and that it is in the position to ensure the conditions necessary for the normal performance of consular functions. (…) The importance and the character of exequatur and the consul function in general would not seem to make it a proper or natural instrument of recognition. However, in view of the preponderance of opinion that a request for exequatur implies recognition, a government making that request and wishing to avoid any such implication will be acting wisely in entering a caveat calculated to prevent that effect."[77]

As to the issuance of exequatur – H. Lauterpacht takes a less clear position.[78] At the beginning, he refers to his remarks concerning the making of a request for exequatur. However, in the very next sentence he writes that "(…) such scant practice and expression of opinion as exist in the matter clearly favour the implication of recognition."[79] This is also the position of A. Ross.[80]

B.R. Bot also seems to see recognition in the grant of *exequatur.*[81]

J. Charpentier speaks against a demand for exequatur being treated as an implied recognition.[82] This is especially so with respect to a demand made under the pressure exerted by a new actor (claiming to be a new state or government). All the same, he is ready to extend this conclusion to other transactions of consular law. He seems obliged to concede that the chancelleries seem to have another view.[83] This is rather an expression of helplessness and the lack of a clear rule.

The presentation of B. Sen also gives account of the diversities of views on the matter.[84] That author limits his remarks to the request for exequatur only; that is a request of an established international actor to a newcomer. It makes the topic of its grant even more interesting. It means the situation in which it is a newcomer that is allowed to establish consular officers in a well-established state. For the editor

[76] Lauterpacht, *Recognition*…, *supra* note 46, pp. 383–384.

[77] *Ibidem*, p. 387.

[78] *Ibidem*.

[79] *Ibidem*.

[80] Ross, *supra* note 9, p.120.

[81] Bot, *supra* note 62, p. 31.

[82] J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Pedone, Paris: 1956, pp. 253–254.

[83] *Ibidem*, p. 254.

[84] Sen, *supra* note 68, p. 532.

of the 8th edition of the work of Oppenheim, the issue of exequatur is "probably" a means of recognition.[85]

Suffice to say that the practice did not allow the doctrine to formulate very precise rules in this field.

2.4. Other forms of contact

As has been noted, T. Funck-Brentano and A. Sorel identify – among the forms of recognition of a state or a government – "acknowledgement in a public act of the existence" of a new state or a government, or even negotiations therewith.[86] There are also some arguments that mere participation in the inauguration ceremony of a new Head of a State may be treated as recognition. For example, G.H. Hackworth invokes a letter from Secretary of State Kellogg to Senator Pepper of 15 January, 1927, concerning the inauguration of President Diaz in Nicaragua. It states that the American *chargé d'affaires* participated in the inauguration, thereby effecting recognition of the government of Diaz. Mr. Kellogg also offered the opinion that the participation in the ceremony of the representatives of the UK and Honduras also constituted an expression of their recognition of the government.[87]

A greater amount of caution was employed by the Americans during the Napoleonic Wars. When Madrid was controlled by the Supreme Junta fighting in defence of the rights of the Bourbons, the American *chargé d'affaires* was instructed "to be careful not to commit his Government."[88] This obviously expressed a fear about giving grounds for a claim that the USA recognized the Junta as the new Spanish government. The representative of the Junta in the USA, Chevalier de Onis, was told that "as it was 'found to be impossible' to give 'a formal written answer' to his communications without recognising in some degree his public character as well as that of the Supreme Junta (…), such an answer could not be given."[89]

A few decades proved sufficient for the USA to change its attitude to this matter. It is easy to see this in the course of US conduct with respect to the unrecognised government of General Guzman Blanco, who came to power in Venezuela in 1879. US Secretary of State Evarts, in his instructions to the American Minister (diplomatic representative) in Venezuela, ordered him to "cooperate in all proper ways (short of formal recognition until so instructed) in the good work of preserving intact the friendly relations between the two countries."[90]

In the further part of his instruction, the Secretary of State wrote that: "Pending formal recognition, however, it is not to be supposed that any of the customary

[85] Oppenheim, *supra* note 29, p. 148.

[86] Funck-Brentano, Sorel, *supra* note 34, p. 211.

[87] Hackworth, *supra* note 30, p. 170.

[88] J.B. Moore, *Digest of International Law*, vol. I, Government Printing Office, Washington: 1906, p. 132.

[89] *Ibidem.*

[90] *Ibidem*, p. 150.

business relations or civil courtesies are abruptly terminated. The actual formula of recognition is unmistakable, and, short of that evident step, the diplomatic fiction of 'officious intercourse' or 'unofficial' action is elastic enough to admit of continuing ordinary intercourse (...)"[91]

The Secretary of State criticised the diplomat for not having taken part in a banquet given by General Blanco. The action was said to have been based "on the mistaken assumption that your position is one of non-intercourse rather than of 'officious' or 'unofficial' and friendly intercourse."[92]

An attempt to treat any contact with an unrecognised regime (aspiring state or government) as recognition is unacceptable and unrealistic. In fact a number of contacts are held with belligerents or insurgents. Similarly, it would make no sense to treat the conclusion of a treaty or sending of a diplomatic representative to a given body as its recognition, if the slightest contact with it would already amount to such recognition.

However, Lauterpacht writes that an "official and solemn admission to an international conference may be a convenient way of granting recognition, but there must be persuasive evidence of an intention to grant recognition in that way."[93]

As I wrote a few years ago, "once again the very flexible character of recognition comes to the fore. Nobody can force a state to confess that by concluding a technical treaty with a given person it recognized the latter as a state or a government. Nobody, however, can force a state *not* to believe that it effected recognition by means of voting in favour of admission of certain persons to an international conference, greeting it at such conference, or speaking with it on a peer-to-peer basis, while avoiding the very 'paternalistic' formula 'we recognize that and that.' What is decisive is the evaluation by the interested state itself."[94]

All the same, contemporary practice speaks against the necessity for such care as was shown in 19th-century dealings. As C.L. Gable summed up the relationship between the US Government and that of communist China: "Without recognizing each other the United States government and the People's Republic of China government had many contacts: they served together as members of international organizations; both agreed to the text of joint communiqués; they exchanged visits of political leaders; they exchanged diplomatic representations through the establishment of liaison offices in each other's capital and became co-signers of multilateral treaties."[95]

On the other hand, it is often emphasised that addressing an unrecognised government or other organ with protests and measures of protection of nation-

[91] *Ibidem*, p. 151.
[92] *Ibidem*, pp. 151–152.
[93] Lauterpacht, *Recognition*…, *supra* note 46, p. 380.
[94] Saganek, *supra* note 1, pp. 557–558.
[95] Gable, *supra* note 70, p. 520.

als of a given state are not forms of recognition.[96] This conclusion should be accepted.

3. Traditional doctrine and the contemporary practice of recognition/ non-recognition

3.1. The four groups of actors

The contemporary practice of recognition and non-recognition has to do with four groups of political actors. The first comprises entities recognised by no other state or a very small number of states. This includes: Somaliland, Nagorno-Karabakh, Transnistria, the Donetsk People's Republic (DPR), the Luhansk People's Republic (LPR), the TRNC, Abkhazia and South Ossetia. Somaliland, Nagorno-Karabakh, the Donetsk People's Republic, the Luhansk People's Republic and Transnistria are recognised by no other state, while the TRNC is recognised by one state only (Turkey), Abkhazia and South Ossetia are recognised by a small and even shrinking number of states (at present four).

The second group could be reserved for the case of Taiwan.

The third group would serve to include entities claiming to be states and recognised by a substantial number of states. It would include Kosovo and Palestine (despite the practical and fundamental differences in their factual situations).

The last group would include new entities claiming to be states which obtained general recognition in a relatively short time. To be referred to here are: Montenegro, Timor-Leste and South Sudan. There is and can be no doubt as regards the latter being dubbed states; the use of this term with respect to the former bodies (claimants) may depend on the author (be it a recognising or non-recognising state, or an independent lawyer or political scientist) and the circumstances of the case (Taiwan once again being a case to itself).

It must be said that all the entities listed above bar one aspire to be states. That is why the delimitation between the modes of recognition of a new state and government are of no great relevance. Taiwan is once again an exception or even an exception in exception. Firstly, its case had to do with recognition of a government but in circumstances completely different from the typical situations of two governments competing for power of one state.

The situation of Catalonia and Kurdistan is in too early a stage (or maybe at the same time too late a stage[97]) to sustain any serious attempt at classification.

[96] Lauterpacht, *Implied…*, *supra* note 46, p. 141. As to protests, *see*: *idem*, *Recognition…*, *supra* note 46, pp. 393–394.

[97] It was just at the moment the present text was being finished (in October 2017) that the autonomy of Catalonia was suspended (*see Catalonia crisis: Spain moves to suspend autonomy*, BBC News, 19 October 2017, available at: http://www.bbc.com/news/world-europe-41678086 (accessed 31 October 2017)); while Mr Barzani resigned from his office in the Kurdish Autonomy

3.2. Diplomatic relations

What finds extremely strong support in contemporary practice is the idea that diplomatic relations are impossible to conduct where a new state is not recognised. It must be stressed once again that there is no obligation for those relations to be initiated in cases of recognition. What really matters is just the opposite situation – if there is no recognition of (or even a non-recognition policy adopted with respect to) a given entity, only for diplomatic relations to be initiated with it subsequently, the latter act in and of itself is treated as recognition. In other words, non-recognition of a new state is incompatible with the presence of diplomatic relations therewith.

There are no diplomatic missions involving Somaliland, Nagorno-Karabakh, the Donetsk People's Republic, the Luhansk People's Republic or Transnistria in any UN Member State. On the other hand, no UN Member State has any diplomatic mission in the territories of any of those entities.

This reservation is necessary, as non-recognised entities do recognise each other, sometimes establishing among themselves what they deem to be diplomatic relations. Transnistria, Abkhazia and South Ossetia recognise one another, for example.[98] Abkhazia and South Ossetia have their respective Embassies on each other's territory. It is also possible to find information that both Abkhazia and South Ossetia have their representative offices in Transnistria, the latter having such an office in the former two entities.[99] Interestingly enough, the term Embassy is not used here. Nagorno-Karabakh, Abkhazia and South Ossetia also engage in mutual recognition. There are no hints about any offices – be they called Embassies or otherwise.

The presence of a very limited scope of recognition justifies the presence of diplomatic relations and – sometimes – diplomatic missions. The latter may be

(*see* R. Jalabi, M. Chmaytelli, *Kurdish leader Barzani resigns after independence vote backfires*, Reuters, 29 October 2017, available at: https://www.reuters.com/article/us-mideast-crisis-iraq-kurds-barzani/kurdish-leader-barzani-resigns-after-independence-vote-backfires-idUSKBN1CY0KR (accessed 31 October 2017)).

[98] C. Filippini, *Constitutions and Territorial Claims: Lessons from the Former Soviet Space*, in: M. Nicolini, F. Palermo & E. Milano (eds.), *Law, Territory and Conflict Resolution: Law as a Problem and Law as a Solution*, Brill/Nijhoff, Leiden: 2016, p. 182.

[99] Wikipedia, *List of diplomatic missions in Transnistria*, available at: https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_Transnistria (accessed 31 October 2017). It is easy to confirm this fact with respect to Abkhazia: *Abkhazia Embassies & Consulates*, available at: https://www.embassypages.com/abkhazia (accessed 31 October 2017). It is more difficult to confirm it with respect to South Ossetia: *South Ossetia Embassies & Consulates*, available at: https://www.embassypages.com/southossetia (accessed 15 October 2017). This is rather due to the outdated character of the latter. The website of the Office of South Ossetia is available at: *Oficjalnoje Predstawitielstwo Respubliki Južnaja Osetija w Pridniestrowie* [Official Representation of the Republic of South Ossetia in Transnistria], available at: http://ryuo-pmr.org (accessed 31 October 2017).

physically present in a given body or possibly in another state. If they are limited to recognising states only, we have to do with a confirmation of the traditional doctrine. It is just the case. So Abkhazia and South Ossetia are recognized by four states: Russia, Nicaragua, Venezuela and Nauru.[100] Russia has Embassies in both Abkhazia and South Ossetia. We also have information on the Embassy of Venezuela to Abkhazia (but not to South Ossetia).[101] On the other hand, the Ambassador of Nicaragua to Abkhazia was said to reside in Moscow. Furthermore, we have evidence as to the existence of Ambassador of South Ossetia to Nicaragua and of Abkhazia to Venezuela, as well as an Ambassador of the latter to Abkhazia (it not being entirely clear where the latter resides).

Similarly, the TRNC has its Ambassador in Ankara, and Turkey has its Ambassador in the TRNC.[102]

The ROC is recognised by 19 states.[103] These are: Burkina Faso, Swaziland, the Dominican Republic, Haiti, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Kiribati, the Marshall Islands, Nauru, Palau, the Solomon Islands, Tuvalu, Belize, El Salvador, Guatemala, Honduras, Nicaragua and Paraguay. The 20th subject recognising it is the Holy See (which is often treated as a subject of law separate from states). The ROC has an Embassy in each and every one of the above-listed states (including the Holy See).[104] This therefore achieved the world record as regards the ratio between the number of recognising states and the number of Embassies.

In Taipei, there are 19 Embassies (Vanuatu being the only state without a permanent diplomatic mission in the ROC).[105]

What must be distinguished strictly is the presence of so-called representative offices of unrecognized *de facto* regimes in several other states. According to media information, Somaliland has such offices in the 5 African states of Djibouti, Ethiopia, Kenya, South Africa and South Sudan, as well as 2 American states (the USA and Canada) and 5 European ones (Belgium, France, Norway, Sweden and the UK).[106] The official website of the Ministry of Foreign Affairs would suggest

[100] Wikipedia, *Foreign relations of South Ossetia*, available at: https://en.wikipedia.org/wiki/Foreign_relations_of_South_Ossetia (accessed 31 October 2017).

[101] *Abkhazia Embassies & Consulates*, *supra* note 100.

[102] Turkish Republic of Northern Cyprus, Deputy Prime Ministry and Ministry of Foreign Affairs, *Missions Abroad*, available at: http://mfa.gov.ct.tr/consular-info/missions-abroad/ (accessed 31 October 2017).

[103] Wikipedia, *Foreign relations of Taiwan*, available at: https://en.wikipedia.org/wiki/Foreign_relations_of_Taiwan (accessed 31 October 2017).

[104] *ROC Embassies and Missions Abroad*, available at: http://www.taiwanembassy.org/portalOfDiplomaticMission_en.html#ALL (accessed 31 October 2017).

[105] Wikipedia, *List of diplomatic missions in Taiwan*, available at: https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_Taiwan (accessed 31 October 2017).

[106] Wikipedia, *List of representative offices of Somaliland*, available at: https://en.wikipedia.org/wiki/List_of_representative_offices_of_Somaliland (accessed 31 October 2017).

somewhat different numbers,[107] implying a total of 22 missions – in 5 African, 2 American, 9 European and 5 Asian states, as well as Australia.

Unfortunately, the website in question is completely unhelpful as regards foreign offices in Somaliland. If we are to treat seriously the source used most frequently, but cited very rarely by academia, we would arrive at only one office already in Somaliland (of Denmark), as well as one that is to be opened (by Kenya).[108] We thereby leave aside the question of Consulates, which will be discussed in the next section.

The official website of the TRNC refers to 26 official offices abroad.[109] 7 of them are outside our interest, as they are one Embassy and 6 Consulates-General – all in Turkey. The remainder are in the form of 15 representatives and 4 Heads of Mission (in Stockholm, Budapest, Helsinki and Muscat). Of interest is the presence of two representatives in the USA – in Washington and New York, given that this attests to the impossibility of equating these offices with Embassies. The official website refers to offices of 5 states in the TRNC; i.e. Australia, the USA, the UK, Germany and France. Their names range from Cultural Office (France), High Commissioner (Australia and the UK), Information Office of Embassy (Germany) through to "US Ambassadorship Office." The two last ones would suggest the presence of diplomatic relations, which is not true. This is why it is rather a question of names of offices that are not of diplomatic rank.

The official website of the DPR refers to three "representative offices" – in Italy, Greece and France.[110]

The presence of offices not seen to be of a diplomatic character is very typical for Taiwan. The establishment of bodies whose formal status does not extend beyond associations is the so-called Japanese formula. Adopted in 1972 by Japan, it was followed by several states, including the USA, France and Australia.[111] It is reported that "Taiwan has non-diplomatic, unofficial governmental relations with the European Union and at least 47 states, recognizing the PRC, that maintain 'Economic, Trade and/or Cultural' (or similar) offices in Taiwan."[112] The official website of the Ministry of Foreign Affairs of the ROC refers to a larger number, namely to 78 states in which offices of the ROC are present (including the Holy

[107] Republic of Somaliland, Ministry of Foreign Affairs & International Cooperation, *Representatives Abroad*, available at: http://www.slforeign.com/missions-abroad.html (accessed 31 October 2017).

[108] Wikipedia, *List of diplomatic missions in Somaliland*, available at: https://en.wikipedia.org/wiki/List_of_diplomatic_missions_in_Somaliland (accessed 31 October 2018).

[109] TRNC, *supra* note 102.

[110] Available at: http://mid-dnr.su/en/pages/Minsk_Agreements/?page=4 (accessed 31 October 2017).

[111] Ch. Attix, *Between the Devil and the Deep Blue Sea: Are Taiwan's Trading Partners Implying Recognition of Taiwanese Statehood*, 25 California Western International Law Journal 357 (1995), p. 357.

[112] Wikipedia, *supra* note 103.

See, but not counting the EU given its non–state status).[113] If we subtract from this number twenty Embassies of the ROC,[114] we arrive at 58 states in which non-diplomatic offices of the ROC are present. The number is greater, as there are states in which more than one office is present. Suffice to say that there are 12 offices in the USA, 4 in Germany, and 3 in Canada. The names used are somewhat differentiated. Usually they are "Taipei Economic and Cultural Offices" (USA, Poland, Canada). Sometimes the name "Representative Office" is used (as in Denmark, Finland, The Netherlands and Slovakia). We also encounter the term "Mission" (Latvia, Korea), "Trade Mission" (Papua New Guinea), and "Commercial Office" (Dubai).

We may find information on the existence of 50 non-diplomatic offices in the ROC.[115] As one of these belongs to Hong Kong and another to the EU, we arrive at a figure of 48 states having their non-diplomatic (and non-consular) offices in Taiwan.

As Ch. Attix put it, those unofficial trade and cultural relations with Taiwan "which are still operating today, were painstakingly crafted in such a way as not to imply recognition of the government of Taiwan, but to amount, nonetheless, to diplomatic relations in all but name."[116] As was said several times, however, it is the names that are most important in this respect.

3.3. Consular offices

The case of Taiwan supports very strongly the older and more orthodox theses regarding the interrelationship between recognition and consular relations. No state which denies recognition of the ROC keeps any consular office in Taiwan. As almost all states which recognise the ROC have their Embassies in it, there is no necessity to establish separate consular offices; it being natural that the Embassies perform consular functions.

We also have no hints regarding any consular offices of Nagorno-Karabakh, the Donetsk People's Republic or the Luhansk People's Republic. Likewise, information is lacking as regards any foreign consular offices in territories controlled by any of these entities. The same applies to Abkhazia and South Ossetia.

All the same, the presence of such an office of a recognising state would rather be a confirmation of, than a challenge to, the above-mentioned orthodox view. This is just the situation of the TRNC. Its 6 Consulates-General in Turkey have been mentioned already, but to complete the picture we may add that Turkey may establish or not establish one of its Consulates, in line with its will. So far. a Turkish Embassy seems sufficient. Both it and the Embassy of the TRNC in Turkey are able to perform consular functions.

These facts should be seen in their proper context, and in that regard, this would seem to be a proper place to refer to basic facts on the sizes and importance of non-

[113] *ROC Embassies and Missions Abroad*, *supra* note 104.
[114] *Ibidem*.
[115] Wikipedia, *supra* note 105.
[116] Attix, *supra* note 111, p. 364.

recognised actors. The population of Nagorno-Karabakh is estimated at less than 147,000[117], while that of the Donetsk People's Republic exceeds 2.3 M.[118] The Luhansk People's Republic would have more than 1.5 M people,[119] Abkhazia in excess of 240,000[120] and of South Ossetia – about 53,500.[121] The lack of consular offices in any of these does not have to be a decisive argument for recognition or non-recognition.

What may look like a challenge is the reported presence of three Consulates General in Somaliland. These are of: Djibouti,[122] Ethiopia and Turkey.[123]

Their legal situation is anything but certain. On the one hand, they were established long after Somaliland began to function, so they cannot operate without the latter's agreement. On the other hand, neither Somaliland nor any of those three states presents the situation as an element prejudging recognition.

What is more, there are some signs concerning the Turkish Consulate not only not speaking in favour of recognition, but actually achieving the opposite effect. The *Qarannews* agency reported that: "The Turkish Consul in Somaliland Mr. Muzaffer Yuksel has declined to comment on the news that the consulate does not issues visas on Somaliland's passport, and only on foreign passports such as those of the United Kingdom, other EU and African passports, including the one issued by the federal administration in Mogadishu, Somalia. Speaking to Himilo newspaper, Consular Yuksel stated that the issue of the visas was a political matter and can only be addressed by the Turkish Foreign Ministry in Ankara and the Turkish Embassy in Mogadishu."[124]

There are no such stories (humiliating for Somaliland as they are) regarding the Consulate of Djibouti.[125] What is more, there are reports of a higher level of involvement as with: "Somaliland's president, Ahmed Mohamed Mohamoud Silanyo, officially welcomed the new Djibouti Consul, Husein Omar Kawaliye, to Hargeisa

[117] Google Maps, *Nagorno-Karabakh*, available at: https://tinyurl.com/yabjxgoj (accessed 31 October 2017).

[118] Wikipedia, *Doniecka Republika Ludowa*, available at: https://pl.wikipedia.org/wiki/Doniecka _Republika_Ludowa (accessed 31 October 2017).

[119] Wiki Uzbrojenie, *Ługańska Republika Ludowa (ŁRL)*, available at: http://pl.uzbrojenie.wikia. com/wiki/%C5%81uga%C5%84ska_Republika_Ludowa_(%C5%81RL) (accessed 31 October 2017).

[120] Google Maps, *Abkhazia*, available at: https://tinyurl.com/y9uoz936 (accessed 31 October 2017).

[121] Google search results, *South Ossetia number of population*, available at: https://tinyurl.com/yakqrmh9 (accessed 31 October 2017).

[122] Somalilandtribune, *Djibouti opens consulate in Hargeisa*, available at: http://www.somalilandtribune.com/djibouti-opens-consulate-in-hargeisa/ (accessed 31 October 2017).

[123] Wikipedia, *supra* note 108.

[124] Available at: https://qarannews.com/somaliland-turkish-consul-demurs-on-visa-issue-the-somaliland-passport/ (accessed 31 October 2017).

[125] *Djibouti opens a consular office in Somaliland*, The Economist 24.08.2015, available at: http://country.eiu.com/article.aspx?articleid=103448794&Country=Djibouti&topic=Politics&subtopic=Forecast&subsubtopic=International+relations&u=1&pid=813945265&oid=813945265&uid=1 (accessed 31 October 2017).

in late August. The presence in Somaliland of Mr Kawaliye, a long-term member and former Deputy Speaker of Djibouti's Parliament, has been expected since Mr. Silanyo reached an agreement to exchange representatives in 2013 with the Djibouti President, Ismaël Omar Guelleh. Somaliland's representative to Djibouti, Mohamed Ali Warsame, also attended the Consulate's opening."[126]

There are also no doubts that the Consulate of Ethiopia accepted Somaliland passports.[127] As will be shown, this fact does not of itself mean recognition. It is an important element of the picture all the same.

It is impossible to find any information about exequatur. However, this situation manifests itself in two ways. On the one hand, no information on its exequatur is supplied by Mogadishu, while on the other no information about its exequatur is being given by Somaliland.

All the same I find it very doubtful that exequatur was given by Mogadishu – at least where the consulates of Ethiopia[128] and Djibouti are concerned. Nor did I find any such information about the Turkish one.[129]

There is also no hint of Somaliland having any consulate in any of those states. This would be a step of great importance. Accepting a new claimant to sovereignty as competent to dispatch consular officers was treated by many authors as equivalent to recognition. On the other hand, the lack of reciprocity (really uncommon) would speak against the existence of such consulates being treated as a sign of recognition. What is decisive is that none of the three states having their consulates in Hargeisa is ready to confirm this recognition being given.

Another important challenge to the traditional doctrine lies in the fact that, despite not officially recognising Transnistria's independence, Russia is said to have established a Consulate in the disputed territory. In this case we have access to a message from Minister Lavrov, according to whom: "I have explained to our Moldovan counterparts that opening a consulate should not be seen as recognition of Transnistria."[130] Once again, a question of exequatur is unclear. What is more, if information on the Russian-language website is to be treated seriously, we rather

[126] *Ibidem*.

[127] Available at: http://www.somalilandinformer.com/somaliland/ethiopian-consulate-in-hargeisa-suspends-visa-issuance-to-somaliland-travel-documents/ (accessed 31 October 2017).

[128] *Consulate General of Ethiopia in Hargeisa, Somaliland*, available at: https://www.embassypages.com/missions/embassy13839/ (accessed 31 October 2017) clearly distinguished missions in Somaliland from those in Somalia. I am fully aware that this can hardly be treated as a proof of decisive importance.

[129] It is difficult to treat so the reports on lack of sympathy for Somaliland or at least support for the unity of Somalia, *see Turkey sides with Somalia over Somaliland on June 26 independence debate*, The National, 3 July 2017, available at: http://www.thenational-somaliland.com/2017/07/03/turkey-sides-somalia-somaliland-june-26-independence-debate/ (accessed 31 October 2017).

[130] *Russia: Opening a consulate in Transnistria does not mean recognizing its independence*, 30 March 2013, available at: http://www.moldova.org/en/russia-opening-a-consulate-in-transnistria-does-not-mean-recognizing-its-independence-236048-eng/ (accessed 31 October 2017).

have to do with a "point of travel-connected consular service of the Embassy to Moldova," which has its physical situation in Transnistria.[131]

As was said, there is no longer any necessity of recognition being seen – even in the presence of a Consulate – in the full meaning of the term; all the more so where this recognition is expressly excluded.

This is a proper place to refer to some important technical problems connected with the passports of nationals of unrecognised regimes.

A set of such problems faced by the inhabitants of Abkhazia is referred to in the media. They cover the following facts[132]:

- "In October 2006, the American Embassy denied a visa to Minister for Foreign Affairs of Abkhazia Sergei Shamba, who was to attend a UN SC discussion in New York City on the United Nations Observer Mission in Georgia."
- "In February 2009, the Indian Embassy denied visas to two Abkhazian women employed by the Ministry of Foreign Affairs, who had been invited by the Jawaharlal Nehru University to attend an international conference."
- "On 17 March, the Spanish Embassy in Moscow refused visas for members of the Abkhazian Futsal team, which was to take part in the first *Copa de les Nacions de Futsal* in Catalonia."
- "On 13 May 2009, the German Embassy in Russia initially denied a visa for a sick 16-year-old Abkhazian boy, who was to undergo a complicated operation in a Munich clinic. Foreign Minister of Abkhazia Sergei Shamba said 'such actions are out of line with universal humanitarian principles and are a direct violation of Abkhazian residents' rights.' However, the next day the German Embassy in Moscow issued the visa, stating that the delay was due to the need to coordinate with their consulate in Tbilisi, which normally handles visas."

The evaluation of these incidents is anything but easy. One may see that there is a danger of a special kind of vicious circle in discussions on recognition. On the one hand, we are ready to deny the practical importance of several instances of non-recognition. On the other, when facing such practical difficulties, we may have tendency to hide behind statements that those effects are incidental, could be present in some cases but absent in others and therefore do not deserve to be inserted into the very definition of recognition.

[131] *Informacija konsulskowa otdela posolstwa Rossii w Moldowie dlja żitjelej Pridniestrowja, żelajuszczih oformić graždanstwo RF* [Information from the consular department of the Russian Embassy in Moldova for the inhabitants of Transnistria wishing to obtain the citizenship of the Russian Federation], Nowosti Pridniestrowja 12.12.2015, available at: https://novostipmr.com/ru/news/15-12-12/informaciya-konsulskogo-otdela-posolstva-rossii-v-moldove-dlya (accessed 31 October 2017).

[132] All four cases are reported on the basis of Wikipedia, *Foreign relations of Abkhazia*, available at: https://en.wikipedia.org/wiki/Foreign_relations_of_Abkhazia (accessed 31 October 2017).

The worst is that both statements are true. For example, it is a fact that Taiwanese passports will be accepted by states such as Poland. However, this does not mean recognition of Taiwan as a state, or of Taiwanese authorities as the authorities of one China. This is so, despite the understandable inclination to speak in this context about "recognition of passports." In any case, recognition of passports does not mean recognition of a state or government which issued those passports. On the other hand, in normal circumstances, the inhabitants of a non-recognised regime have no practical chance to access consular officers of other states.

The Australian practice emerged as both inspiring and well-explained. When asked about treatment of passports issued by the TRNC the government explained that: "As the Australian Government does not recognize the 'Turkish Federated State of Cyprus,' it follows that it does not recognize travel documents which purport to have been issued by that regime and will not place Australian visas in them. No such difficulty arises in respect of passports issued by the Government of Turkey, and persons in Cyprus possessing such documents may be granted Australian visas in them, subject of course to compliance by the holder with the requirements applicable to the category of visa sought."[133]

On the other hand, the reported cases involving Abkhazian inhabitants in fact refer to decisions handed down by consulates in Russia adopted with respect to persons invoking their Russian nationality. In this sense, they were rather signs of policy of non-recognition, that is demonstrating an unfriendly relationship to persons identified with a regime which is deliberately not recognised as a product of a foreign intervention or possibly a denial of the *uti possidetis* principle (or possibly the right to self-determination).

3.4. Other forms of contact

There is a visible tendency for claimants to independence (or at least to being the government of a recognised state) to overestimate any form of conduct.

So we may find information concerning the fact that, in March 2009, President Lukashenka referred to Abkhaz President Sergey Bagapsh as "the President of Abkhazia" in an official statement when the two met in Moscow.[134] This does not change the fact that Belarus actually continues to withhold recognition of Abkhazia (as well as South Ossetia).

At the same time, it is possible to find some signs of care and hesitation which resemble those from the 19th century. For example, when Australia established diplomatic relations with the PRC in 1972, the government introduced restrictions on travel to Taiwan. In line with those from 1983:

[133] Editors, *Australian Practice in International law: Recognition*, 10 Australian Year Book of International law 280 (1981–1983), p. 280.

[134] Wikipedia, *supra* note 132.

"Ministers of the Australian Government are not permitted to visit Taiwan or make any scheduled transit stops there. Federal parliamentary officers are similarly asked not to visit Taiwan or make any scheduled transit stops there. While members of Parliament and senators may visit Taiwan in their private capacities, they may not, of course, use diplomatic or official passports – ordinary passports must be used."[135]

It is possible to speculate whether this is more a question of politics or of legal precautions when non-recognition occurs. And, in the opinion of the author, it is rather the former that is true.

On the other hand, the movement of post is perceived at as a matter having no implications for recognition. When the Australian government was asked whether *Australia Post* accepted mail bearing stamps of the "Turkish Federated State of Cyprus," on 17 March 1982, the Minister for Communications answered: "Such mail is accepted by *Australia Post* because it does not act to impede communications between residents of Cyprus and Australia, for humanitarian and practical reasons."[136]

The self-confidence of a new actor may depend on tens of technical elements, which are hardly present in the analyses of lawyers. For example, it is worthwhile referring to Internet country domains.[137] Among the entities discussed in more detail in this section, only Taiwan and Palestine have their domains. Kosovo is mentioned, but no code has been assigned to it. The TRNC has a very specific domain – .nc.tr (.tr being a code for Turkey). Somaliland is also mentioned, but its code ".so" is the same as that of Somalia.

Only Palestine and Kosovo had their teams in Summer Olympic Games (the ROC appearing for the last time in 1972).[138]

It is visible that even events that can hardly be treated as instruments of recognition are looked at with suspicion and counteracted by the mother-state of a given *de facto* entity. A good example is the fact that "Georgia blocked the opening of an Abkhazian Cultural Institute in Rome in 2016, and an Abkhazian stall was shut down at a Montenegro tourism expo in April 2016, after Georgian officials intervened."[139]

3.5. Agreements

It is also interesting to look at agreements concluded by entities not recognised generally. It goes without saying that these can conclude agreements with states

[135] Editors, *supra* note 133, p. 284.

[136] *Ibidem*, pp. 280–281.

[137] *Internet country domains list*, available at: https://www.worldstandards.eu/other/tlds/ (accessed 31 October 2017).

[138] Wikipedia, *List of participating nations at the Summer Olympic Games*, available at: https://en.wikipedia.org/wiki/List_of_participating_nations_at_the_Summer_Olympic_Games (accessed 31 October 2017).

[139] *Georgia blocks agreement between Abkhazian and Italian towns*, OC Media 5 May 2017, available at: http://oc-media.org/georgia-blocks-agreement-between-abkhazian-and-italian-towns/ (accessed 31 October 2017).

that have recognised them, but such agreements are not of much interest from our perspective. What are interesting are agreements capable of being seen as instruments that either imply recognition or cast doubt on an adopted policy of non-recognition.

In the above sense, it is easy to eliminate from consideration such agreements as the military one between Abkhazia and Russia,[140] as well as several other agreements between Russia and Abkhazia,[141] as well as Russia and South Ossetia.[142]

Likewise of little significance here are the agreements (if any) predating recognition and aimed at stopping fighting. These should merely be mentioned to leave it clear that recognition has not been given rise to in this way. A good example is the 1993 Abkhazian Ceasefire Agreement,[143] which refers to fighting parties and is signed by "the Georgian side," "the Abkhaz side" and the Russian Federation. Where Nagorno-Karabakh is concerned, the 1994 Bishkek Protocol might be mentioned,[144] as well as a cease-fire agreement.[145] This was signed by the Minister of Defense of Azerbaijan, the Minister of Defense of Armenia and the Nagorno-Karabakh Army Commander. Suffice to say that this agreement may serve as a recognition, but only of insurgency, and hence with no implications for statehood. It should be added that even Russia did not recognize Abkhazia until 2008.

It was impossible for me to find any data on bilateral agreements concluded with non-recognising states by such entities as Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, the TRNC, the DPR or the LPR. Furthermore, it is obviously difficult to treat as important from our perspective such agreements as the one between the DPR and South Ossetia.[146]

On the other hand, there are reports on a few agreements involving Somaliland. The first, concluded by Ethiopia and the Somaliland Administration on 19 November 2014, relates to trade and infrastructure. In the stated view of Ethiopia's

[140] L. Harding, *Georgia angered by Russia-Abkhazia military agreement*, The Guardian 25.11. 2014, available at: https://www.theguardian.com/world/2014/nov/25/georgia-russia-abkhazia-military-agreement-putin (accessed 31 October 2017).

[141] *Law on ratification of Russia-Abkhazia agreement on joint group of forces*, 22 November 2016, available at: http://en.kremlin.ru/acts/news/53291 (accessed 31 October 2017).

[142] *Putin approves army deal with Georgia's South Ossetia*, Al Jazeera, 14 May 2017, available at: http://www.aljazeera.com/news/2017/03/putin-approves-army-deal-georgia-south-ossetia-17031 4154927196.html (accessed 31 October 2017).

[143] Agreement on a Cease-Fire in Abkhazia and Arrangements to Monitor its Observance, UN Doc. S/26250, Annex I.

[144] Nagorno Karabakh Republic, Ministry of Foreign Affairs, The Bishkek Protocol, available at: http://www.nkr.am/en/the-bishkek-protocol/43/ (accessed 31 October 2017).

[145] *Idem*, Cease-fire Agreement, available at: http://www.nkr.am/en/ceasefire-agreement/147/ (accessed 31 October 2017).

[146] Available at: https://dninews.com/article/dpr-and-south-ossetia-sign-agreement-friendship-and-cooperation-0 (accessed 31 October 2017).

signatory – Minister for Finance and Economic Development Sufian Ahmed – the agreement will enhance the economy of the Somaliland Administration and Ethiopia, and the appointed technical committee will make sure of the accomplishment and realization of the provisions of the signed agreement.[147]

Another such agreement pertains between Somaliland and the United Arab Emirates, and was reported on 19 March 2017. This grants the latter the right to establish a military base in Berbera in exchange for wide-ranging cooperation on economic, political, security and foreign relations between the two sides. Pursuant to the agreement, the Somaliland government grants permission to UAE forces to use the existing airport facilities in Berbera. The UAE was to construct a new international airport there, for civilian aviation and cargo use, as well as the 250-km Berbera-Wajaale asphalt road. The agreement also refers to projects relating to education, power, energy and health, as well as to the opening up of the UAE labour market to Somaliland nationals. The Republic of Somaliland and the United Arab Emirates are also to cooperate on security issues.[148] Suffice to say that the UAE does not treat this agreement as an instrument of recognition.

In this regard, it is visible that even agreements that can hardly be taken seriously as instruments of recognition are looked at with suspicion, and counteracted, by the mother-state of a given *de facto* entity. A good example is the Georgian reaction to an agreement signed between Sukhumi (Sukhum) and Santa Maria Del Cedro in Italy in early May 2017.[149] The same applies to contacts between Syria and Abkhazia.[150]

Multilateral treaties would provoke a similar reaction, but I cannot point to a single one to which Abkhazia, South Ossetia, Transnistria, Nagorno-Karabakh, the TRNC, the DPR or the LPR are parties. D.C.K. Chow presents problems faced by the ROC in gaining access to multilateral environmental treaties.[151] On the other hand, recognition of the PRC by the US did not lead to the extinction of treaties

[147] *Ethiopia: Somaliland signed strategic trade and infrastructure agreement*, Geeska Afrika Online, 19 November 2014, available at: http://www.geeskaafrika.com/6468/ethiopia-somaliland-signed-strategic-trade-and-infrastructure-agreement/ (accessed 31 October 2017).

[148] All citations are based on: *Somaliland and UAE officially signed Military base Agreement*, Horn Diplomat, 20 March 2017, available at: http://www.horndiplomat.com/2017/03/20/somaliland-and-uae-officially-signed-military-base-agreement/ (accessed 2 May 2017). Information on this agreement could also be found in *Somaliland, UAE sign historic economic and military pact*, The National, 31 March 2017, available at: http://thenational-somaliland.com/ 2017/03/21/somaliland-uae-sign-historic-economic-military-pact/ (accessed 31 October 2017).

[149] *Georgia blocks*…, *supra* note 139.

[150] *Abkhazia establishes contact with Syria, Georgia protests*, JAM News, 31 August 2017, available at: https://jam-news.net/?p=56645 (accessed 31 October 2017).

[151] D.C.K. Chow, *Recognizing the Environmental Costs of the Recognition Problem: The Advantages of Taiwan's Direct Participation in International Environmental Law Treaties*, 14 Stanford Environmental Law Journal 256 (1995), pp. 276–277. He criticises the attitude of the UN, according to which Taiwan is to respect all treaties concluded by the PRC. *See ibidem*, p. 280.

concluded by the USA with the ROC.[152] However, both circumstances can be seen as reflecting the very special situation of Taiwan.

The present practice shows that states are careful and full of reserve when it comes to allowing non-recognised regimes into treaties, even (or maybe especially?) those of a multilateral character.

This conclusion may be criticised. What is exceptional is that the fact that all of the above-mentioned entities are recognised by no other state, or by not more than four states. What is more, they are relatively small, some of them are completely inaccessible, some may be seen as agents of a foreign power, and some are engaged in war. The present situation may thus be that other states do not need and do not want to make treaties with regimes of this kind, rather than feeling more generally obliged to abstain on account of the rules on recognition.

4. *De facto – de jure* recognition

Forming part of every discussion on recognition is some longer or shorter reference to the distinction between *de facto* and *de jure* recognition, where the latter is deemed full and definitive, and the former of nothing more than a partial and temporary nature.[153]

It is no coincidence that the most proper object of these two kinds of recognition is territorial change. All the same, the *de facto* recognition of governments has a much longer history. Indeed, Lauterpacht associates the beginnings of the said institution with revolutions in Latin America. For him it was "*de facto* recognition" that was bent on "reconciling the practical necessity of recognition with the legitimist pretensions of Spain and Portugal"; and hence recognition that "did not purport to express an attitude with regard to the legal merits of the claim to independence and to the title of the parent State."[154] Lauterpacht goes on to confess that "in the further course of the 19th century, while frequent reference is made to '*de facto* governments," there appear to be no clear instances of *de facto* recognition."[155] Where the latter is concerned, he is able make the relevant association with two instances – i.e. one concerning Panama and the de facto government in Mexico in 1915.[156]

Ch.G. Fenwick uses the term "*de facto* recognition" rather than recognition of a *de facto* government.[157] For him, the term applies to "qualified or provisional recognition," making it "possible to continue without interruption the ordinary business relations between the two countries and to obtain protection for life and property when

[152] V.H. Li, *The Law of Non-Recognition: The Case of Taiwan*, 1 Northwestern Journal of International Law & Business 134 (1979), p. 134.

[153] Góralczyk, *supra* note 8, p. 156.

[154] Lauterpacht, *Recognition…*, *supra* note 46, pp. 330–331.

[155] *Ibidem*, p. 331.

[156] *Ibidem*, p. 332.

[157] Fenwick, *supra* note 9, pp. 174–175.

circumstances may arise making it necessary to appeal for special protection."[158] This author is in fact very strict in drawing a sharp distinction between recognition of states on the one hand and of governments on the other. The cited fragment of his work deals with governments, and could hardly be applied with respect to states.

It would be very tempting to reserve the term *de facto* for governments, and to claim it contrary to logic to refer to a state as being recognised *de facto* only. If so, history is against such a proposition as – for example – Oppenheim refers to *de facto* and *de jure* recognition of both states and governments.[159] The cited examples refer to Finland, Latvia and Estonia after the First World War.[160] W. Góralczyk likewise applies the term to both states and governments.[161] As Lauterpacht put it, "The subject of *de facto* recognition is a somewhat elusive topic of the law of recognition. There is no consensus of opinion as to its precise legal meaning."[162]

A. Ross also underlines that the distinction between *de facto* and *de jure* recognition "has hardly any legal significance."[163] However, this does not mean that it may be excluded from practice. Indeed Ross associates *de facto* recognition with either "an atmosphere of reservation with respect to the further development" or "actual ill-will."[164]

Clearly, it may be difficult for unanimity in this respect to be found.

It is possible to gain the impression that Lauterpacht's main aim is to show that the differentiation of the above two kinds is of political importance only. However, he is actually in a position to point to instances in which this differentiation indeed emerged as somewhat important legally. Cases in point relate to Haile Selassie,[165] given that only the government recognised *de jure* was allowed to obtain the gold reserves of a state. Important as this conclusion was, it may serve to illustrate how important the differentiation in question may turn out to be *in concreto*, rather than as an element to the classical definition of *de jure* (as opposed to *de facto*) recognition.

What deserves attention is the widespread tendency for the term "*de facto* recognition" to be made use of. It was reported that "On 29 September 2010, the SADR Minister for African Issues Mohamed Yeslem Beyssat said referring to South Ossetia: Western Sahara *de facto* recognizes the independence of South Ossetia. Now we have to formalise relations de jure, including the establishment of diplomatic relations."[166]

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[158] *Ibidem*, p.174.

[159] Oppenheim, *supra* note 29, pp. 134–136.

[160] *Ibidem*, p.135.

[161] Góralczyk, *supra* note 8, p. 156.

[162] Lauterpacht, *Recognition…*, *supra* note 46, p. 329.

[163] Ross, *supra* note 9, p. 120.

[164] *Ibidem*, pp. 120–121.

[165] *See* also Oppenheim, *supra* note 29, p. 136.

[166] Wikipedia, *International recognition of Abkhazia and South Ossetia*, available at: https://en.wikipedia.org/wiki/International_recognition_of_Abkhazia_and_South_Ossetia (accessed 31 October 2017).

It is in this context that we can read other media reports. One of them reads that "[o]n 30 October 2011, Libya and Northern Cyprus signed the Cooperation on Health Services Protocol. The Protocol included reserving 250 beds at the Near East University hospital in North Nicosia for the treatment of injured Libyans."[167] What is striking is one of the comments stating that Libya recognized the TRNC[168] *de facto*. All the same, the fact is that the agreement was signed by the Rector of a University, and for this reason alone can hardly treated as a sign of recognition.

In my opinion, what we are dealing with in both cases is the fact of consideration being given to the objective existence of a given effective actor controlling a given territory. This may be or may not be recognition. In this sense we can use the term "*de facto*" with respect to the beneficiary of *de facto* recognition, but also to an actual (factual) state of affairs, a new unrecognised actor[169] and even an actor recognised as something else than a state or a government.[170] For V.H. Li, this was the situation applying to the PRC in the eyes of the US before 1 January 1979.[171]

Conclusions

Recognition now forms the subject of an extensive literature and several doctrinal concepts. Their main characteristic is that they are mutually exclusive and completely dependent upon capricious statements from states. If states declare that they have not recognised something, it is difficult to argue with them. Equally, if they say they have recognised something, it is almost impossible to argue with them.

The doctrine on implied recognition can be looked at as a very stable element of international scholarship. What is visible is a narrowing list of transactions which the doctrine would be ready to qualify as a sign of recognition.

On the other hand, states may sometimes look more strict and self-restrained with respect to new *de facto* regimes. It may appear as if a revival of very old orthodox doctrines sees recognition in several transactions.

To some extent this may be due to a bad perspective. Entities which are denied recognition nowadays are recognised either by no states at all, or by a very limited number of them. So states do not effect many transactions with their participation, for political and economic reasons, rather than legal rules connected with recognition.

However, the attitude to recognition can be seen to be evolving in a manner that necessitates a rethink in respect of the phenomenon's very essence. For Ch.G.

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[167] Wikipedia, *Foreign relations of Northern Cyprus*, available at: https://en.wikipedia.org/wiki/Foreign_relations_of_Northern_Cyprus (accessed 31 October 2017).

[168] *Libya KKTC'yi fiilen tanıdı*, NTV, 31 October 2011, available at: https://www.ntv.com.tr/dunya/libya-kktcyi-fiilen-tanidi,X1TtbP-kMkSdvdpuryPe0Q (accessed 31 October 2017).

[169] For Ch. Hille about Nagorno Karabakh, *see idem*, *Recognition of South Ossetia and Abkhazia Two Years Later: Unicum or Trendsetting*, 21 Security and Human Rights 153 (2010), p. 155.

[170] Li, *supra* note 152, p. 135.

[171] *Ibidem*, p. 139.

Fenwick, for example, recognition of a state is "the formal acknowledgment by an existing member or by existing members of the international community that a state or political group hitherto not holding membership in the community is now entitled to it, and as an incident of membership, to all of the rights and privileges of other members of the community."[172]

Seeing the essence of recognition in acknowledgment of the existence of a new actor may suggest a very careful attitude to all contacts with a body to be not recognised. However, there may be signs whereby a state is seen to be ready to acknowledge the existence of the said actor, by showing an intention not to recognise it. Such an act of acknowledgment would have no legal consequences at all or at least no consequences of recognition.

It would be in line with a famous statement by Secretary Dulles according to which: "[W]e accord [recognition] when we think it will fit in with our national interest, and if it doesn't, we don't accord it."[173]

I have the impression that the contemporary practice is closer to Dulles than to Fenwick.

What is more, one can expect the highest level of certainty connected with recognition. To a great extent this is true. If Poland was recognised in 1918-1920s, it would be difficult for a foreign state to come back to this question and contemplate any withdrawal of recognition. All the same, we have some elements casting some shadow on that level of certainty, and these have to do with withdrawals of recognition.

We can cite in this context the fact that, in 1983, Bangladesh and Pakistan withdrew their recognition of the Turkish Republic of Northern Cyprus in the wake of UN SC Resolution 541 and international pressure.[174] In this respect, the Resolution in question may be seen to have represented a sufficient justification for such an uncommon step as withdrawal of recognition. More difficult to justify by reference to the same categories is a withdrawal of recognition of Abkhazia and South Ossetia by Vanuatu and Tuvalu.[175]

Similarly, the context of recognition of governments also supplies an important challenge to the doctrine. It is worth recalling how the USA recognised the communist government of China as far as back as in 1979.[176] This despite the fact that the situation in China was not noticeably different in 1979 from in 1971 or 1968. Yet it is difficult to deny this kind of power to make assessments on the part of a

[172] Fenwick, *supra* note 9, p. 136.

[173] Gable, *supra* note 70, p. 519.

[174] Wikipedia, *supra* note 167.

[175] M. Marsili, *The Birth of a (Fake?) Nation at the Aftermath of the Decomposition of USSR: The Unsolved Issue of Post-Soviet 'Frozen Conflicts'*, X (10) Proelium 161 (2016), p. 164, available at: http://academiamilitar.pt/images/site_images/Revista_Proelium/11__Marco_Marsili.pdf (accessed 31 October 2017).

[176] Gable, *supra* note 70, p. 512.

recognising state. Suffice to say that a state that has denied recognition for a long time is not deprived of the power to agree to recognise later on.

That said, the present state of affairs may be treated as an argument to be readily taken up by supporters of the constitutive view of recognition. And, given that I am not among the latter, I can reasonably deplore that development.

Abstract: The division of recognition into express and tacit is one of the most stable elements of international law scholarship on this issue. The doctrine was in a position to summarise the practice of tacit or implied recognition. What is visible is a narrowing of the list of transactions treated as implied recognition. The establishment of diplomatic relations is believed to provide irrefutable presumption of recognition, and recent relevant practice is seen to confirm that thesis. It also leaves its practical importance much more limited, given the widespread use of several types of unofficial or official, but not diplomatic offices. The attitude of the traditional doctrine to consular relationships was much less clear. Recent practice reveals a great deal of hesitation over the establishment of such relationships with entities denied recognition. However, it is doubtful whether this is for legal or political reasons, or may simply reflect lack of interest and necessity. The doctrine has also developed a quite sophisticated set of rules on the significance of treaties for recognition, but the unequivocal confirming or denying of this is impossible in the circumstances of such a scarcity of recent practice. It is also in this respect that doubts as to the proper perspective emerge. Entities which are denied recognition nowadays are either recognised by no state at all, or by a very small number of them. So states not engaging in many transactions are in that situation for political and economic reasons, rather than on account of the legal rules connected with recognition. However, there can be no doubt that states reserve substantial room for themselves, with a view to contacts with unrecognised regimes being ongoing, even where actual recognition is still withheld.

Keywords: recognition, implied recognition, express recognition, diplomatic relations, consular relations, treaties, representative offices.

A Requirement of Conformity with International Law in Cases of State Succession

*Galina Shinkaretskaia**

Introduction

State succession is closely connected with State recognition when it comes to the subsequent development of international relations. A very good illustration of this is provided by the history of the Soviet Union's breakup, and the subsequent development of the new Russia's international relations. The Soviet Union broke up in 1991, though this was in fact a break that required a long process lasting several years.

1. The onset of the USSR's disintegration

A few words are first necessary on the subject of the USSR itself, if the latter's process of disintegration is to be made clearer. Under the 1977 Constitution,[1] the USSR was officially a union of independent states.[2] Each Union Republic thus retained the right to secede freely from the USSR.[3] Every Union Republic also had its own constitution,[4] parliament,[5] government[6] and Ministry of Foreign Affairs.

Yet in reality the USSR was a unitarian state. The USSR Constitution said that the territory of the USSR was a single entity and comprised the territories of the Union Republics, with the sovereignty of the USSR extended throughout its territory.[7] Some

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[1] *See* this version of the USSR Constitution available at: https://www.departments.bucknell.edu/russian/const/1977toc.html (accessed 15 March 2018).

[2] Article 76: "A Union Republic is a sovereign Soviet socialist state that has united with other Soviet Republics in the Union of Soviet Socialist Republics."

[3] Article 72.

[4] *See e.g.* the Constitution (Fundamental Law) of the Russian Soviet Federative Socialist Republic, 4 Review of Socialist Law 259 (1978).

[5] Article 104 of the RSFSR Constitution provides that: "The supreme body of state power of the RSFSR is the Supreme Soviet of RSFSR."

[6] Article 122: "The Government of the RSFSR is the supreme executive and administrative body of the state power of the RSFSR."

[7] Article 75 of the USSR Constitution.

other data confirming this are set out in the Constitution's Article 74, whereby the laws of the USSR shall have the same force in all Union Republics. In the event of a discrepancy between a Union Republic law and an All-Union law, the law of the USSR shall prevail.[8] The Russian Soviet Federative Socialist Republic (RSFSR) Constitution in its turn declared that the state budget of the RSFSR is an integral part of the single state budget of the USSR.[9] Most indicative here is the process of legislation: the central parliament, the Supreme Soviet of the USSR, was used to adopt "Bases of Legislation," for example, Bases of Civil Legislation. Only after all that did the Republics' parliaments adopt Republican Civil Legislation. Thus the Union took as many competences as it liked, with any remaining then going to the republics. Article 74 of the USSR Constitution of 1977 provided that: "The laws of the USSR have the same force in the territories of all Union Republics. In the case of a discrepancy between a law of a Union Republic and an all-Union law, the law of the USSR shall have effect." The sovereignty of the Republics was nevertheless confirmed by Article 72, which is worded: "Every Union Republic retains the right to freely exit out of the USSR."

At the end of the 1980s, a movement began in all Republics, not with a view to actual independence being achieved, but rather seeking real acquisition of the sovereignty proclaimed in the Constitutions. In the event, the centre would not give up, hence the disintegration of the USSR.

The Baltic Republics – Latvia, Lithuania and Estonia – were the first of the Union Republics to strive for a departure from the USSR. By 1988, the movement towards independence had become broad and organised, the basic idea being that the very inclusion of the three republics in the USSR was not legal, with its basis being the agreement between Stalin and Hitler of 1944. The result took the form of decisions of the highest representative bodies of the Republics.[10]

After that, it was the turn of Azerbaijan, whose Supreme Soviet on 23 September 1989 adopted a constitutional law "On the sovereignty" of the Republic.[11]

It was in 1990 that most Declarations were adopted by Supreme Soviets of the Republics: of Georgia, on 9 March,[12], of Russia on 12 June,[13] of Uzbekistan on 20

[8] Article 74 of the USSR Constitution.

[9] Article 158 of the RSFSR Constitution.

[10] *See* Declarations on state sovereignty: Latvia – 32 Ведомости Верховного Совета и правительства Латвийской ССР [Vedomosti Verhovnogo Soveta i pravitelstva Latviyskoi SSR] 452 (1989); Litva – 15 Ведомости Верховного Совета и Правительства Литовской ССР [Vedomosti Verhovnogo Soveta i pravitelstva Litovskoi SSR] 167 (1989); Estonia – 48 Ведомости Верховного Совета и Правительства Эстонской ССР [Vedomosti Verhovnogo Soveta i pravitelstva Estonskoi SSR] 685 (1988).

[11] 18 Ведомости Верховного Совета Азербайджанской ССР [Vedomosti Verhovnogo Soveta Azerbaidjanskoi SSR] 144 (1989).

[12] 3 Ведомости Верховного Совета Грузинской ССР [Vedomosti Verhovnogo Soveta Gruzinskoi SSR] 52 (1990).

[13] 2 Ведомости Съезда Народных депутатов и Верховного Совета РСФСР [Vedomosti Siezda Narodnych deputatov i Verhovnogo Soveta RSFSR] 22 (1990).

June,[14] of Moldova/Moldavia, on 23 June,[15] of Ukraine on 16 July,[16] of Belorussia, on 27 July,[17] of Turkmenistan, on 22 August,[18] of Tajikistan on 24 August,[19] of Kazakhstan, on 25 October,[20] and of Kirgizia, on 15 December.[21] However, at that stage the only establishment of actual independence involved Armenia, which achieved the fear by virtue of several legislative acts of 23 August 1990.[22]

The content of the Declarations was mostly the same; with no Republic except Armenia actually referring to an exit from the USSR. Every Republic qualified itself as a sovereign Socialist Republic within the Union. The relations between the Republics and the Union were to be based on a treaty, while those with other Republics relying upon the principles of international law. Every declaration established priority for the republican legislation over that of the Union.

A clause on recognition was included in every Declaration, as the Republics declared that they recognised other Union Republics in the capacity of sovereign states, and expressed their readiness to build relations on the basis of generally-recognised norms and principles of international law. No requests were put forward as a precondition for recognition.

Nevertheless, the Kirgizian Declaration included an appeal to the governments and parliaments of states around the world, to recognise Kirgizia as an independent state.

Thus there was an act of individual recognition on the part of emerging states. Though nothing was said explicitly about reciprocity, one can feel the taste of reciprocity. The experience was quite new for each of the Republics, with the level of knowledge of the law in general and of international law in particular, being regrettably low, as indeed was the level of respect for law. So the Republics were looking at each other in an effort to guess the intents expressed both in legal clauses and politics pursued.

[14] 26 Ведомости Верховного Совета Узбекской ССР [Vedomosti Verhovnogo Soveta Uzbekskoi SSR] 307 (1990).

[15] 8 Ведомости Верховного Совета Молдавской ССР [Vedomosti Verhovnogo Soveta Moldavskoi SSR] 192 (1990).

[16] 31 Ведомости Верховного Совета Украинской ССР [Vedomosti Verhovnogo Soveta Ukrainskoi SSR] 429 (1990).

[17] Указов Президиума Верховного Совета Белорусской ССР, Постановлений Совета министров Белорусской ССР [Postanovleniy Soveta Ministrov Belorusskoi SSR], 22 Собрание законов Белорусской ССР [Sobranie zakonov Belorusskoi SSR] 432 (1990).

[18] 15–16 Ведомости Верховного Совета Туркменской ССР [Vedomosti Verhovnogo Soveta Turkmenskoi SSR] 152 (1990).

[19] 16 Ведомости Верховного Совета Таджикской ССР [Vedomosti Verhovnogo Soveta Tadjikskoi SSR] 236 (1990).

[20] 44 Ведомости Верховного Совета Казахской ССР [Vedomosti Verhovnogo Soveta Kazachskoi SSR] 40a (1990).

[21] 21 Ведомости Верховного Совета Киргизской ССР [Vedomosti Verhovnogo Soveta Kirgizskoi SSR] 318 (1990).

[22] 16 Ведомости Верховного Совета Армянской ССР [Vedomosti Verhovnogo Soveta Armianskoi SSR] 256 (1990).

In parallel with the process of sovereignisation, another process was underway – that involving the conclusion of a new Union treaty, since the Republics were striving to achieve an international treaty basis for the new Union.

In June 1990 plenipotentiary representatives of the Union Republics (other than the Baltic Republics) met in Moscow to define the process whereby a new Union treaty would be formulated. So it began. The negotiation about the new Union treaty is an interesting phenomenon: there must be two parties to any negotiations, and here – there were representatives of the Republics (other than the Baltic Republics), including Russia, and on the other side – Mr. Gorbachev, as President of the Union, which is in fact all the Republics taken together. But we have also take into account the fact that Mr. Gorbachev was simultaneously the General Secretary of the CPSU, such that his leading ideas had to be taken from decisions of the Communist Party fora. The most important of the latter was the so-called "Platform of the KPSU Central Committee for the XXVIII CPSU Congress." In fact the negotiations around the Union treaty were a struggle of the peoples of the whole USSR against the rule of the CPSU.

In the same period several international treaties were concluded between the Republics. Let us recall at this point that the countries involved here were still formally Republics of the Soviet Union, with only two of them having declared independence, albeit behaving in just the same way as the other Republics. But every Republic declared that it would recognise the others, and this was how the situation looked at the end of 1990 and beginning of 1991.

The treaties can be classified into three groups: treaties with the Baltic republics, treaties with Kirgizia and Moldavia who declared independence, and treaties with other Union Republics. The treaties with the Baltic Republics were entitled in the same way – as Treaties on *the bases of interstate relations*, while the treaty with Kirgizia was entitled Treaty on *the development of interstate relations;* and that with Moldavia – Treaty on *the principles of interstate relations.* Treaties with Ukraine, the Kazakh Republic and Belorussia did not have any special title.

The forms of all the Treaties correspond with the criteria offset out for an interstate treaty, not deviating from the Vienna Convention clauses in regard to typical structure, with preamble, declaration of mutual rights and obligations, and concluding clauses.

The difference between these various groups lies in the fact that, in the Treaties with the Baltic Republics there is no indication of plans to construct a Commonwealth or a Union, while the preambles to the Treaties with other Republics do contained clauses of this kind. On the other hand, every preamble declares the intent to develop relations on the basis of international law principles.

As to the contents of the Treaties, Article 1 of every one of them declares mutual recognition of other Republic as sovereign states. In other articles, the parties declare their intention to proceed with measures by which state succession might be achieved in accordance with international law.

Returning to the matter of the Union Treaty, it can be noted that four drafts had been formulated by June 1991. The most contradictable clause was that on the status of the Union. The centre, i.e. Mr. Gorbachev's side, insisted on a formula whereby both the Union and each Republic were deemed to be sovereign states, something like Matrioshka. The representatives of the Republics insisted that only Republics should be sovereign states.

The general mood in the country was hostile enough towards the centre, and in the August of 1991 the attempt at a coup-d'état was made (via the State Committee on the Extraordinary Situation). However, not a single Republic recognised the Committee, and in three days the coup was over.

A waterfall of declarations of independence followed:

24 August 1991 – Ukraine;
25 August 1991 – Belorussia;
26 August 1991 – Kirgizia
27 August 1991 – Moldavia/Moldova
31 August 1991 – Uzbekistan;
9 September 1991 – Tajikistan
21 September 1991 – Armenia;
18 October 1991 – Azerbaijan;
27 October 1991 – Turkmenistan;
16 декабря 1991 – Kazakhstan;
Georgia had declared its independence earlier than the others, on 9 April 1991.

Russia did not adopt a special act of independence. The main elements of sovereignty were laid down in the Declaration on State Sovereignty of 12 June 1990. In summer 1990, a row of normative acts were adopted to create the new legal system of the country. There was a severe struggle between the legislative bodies of the USSR and Russia, but in any case the creation of a new Russian State was completed by the summer of 1991, and after the coup no major changes were needed.

Thus during the three years of the first stage of destruction of the USSR, the actors were mainly the Union Republics, whose leaders understood fully that they might only enter international society if they promised to adhere closely to international law. And so they did. Not a single document from the 1989–1991 can be found to deviate from international law.

1.1. Multilateral recognition

This kind of recognition of the former Soviet Republics was made manifest in the Agreement on the Founding of the Commonwealth of Independent states. As such, this was adopted on 8 December 1991 by three states – Russia, Belorussia and Ukraine. On the 21 December a Protocol to the Agreement was adopted, signed by eleven republics, including Russia, Belorussia and Ukraine (Georgia joined later).

Notwithstanding its title, the Agreement was about the demise of the USSR. It is rather small (running to just 14 articles), and the main idea are that the USSR

has completed its existence, while the new union is a Commonwealth consisting of sovereign states building their relations upon the norms and principles of international law.

Within one year, on the 21 January 1993, the Charter of the CIS was adopted. Its main difference from the Agreement is that the Charter envisages the creation of organs of the CIS. Ukraine, Turkmenistan and Moldova did not sign up to the Charter, however; so we can say that Ukraine has never been a member of the CIS.

The period between the Agreement and the Charter was a time of delight or madness, depending on the point of view. More than one thousand treaties and agreements, bi- and multilateral, were adopted.

2. General recognition of the USSR obligations

Commitment to the USSR's international obligations was first expressed in the Union Republics' acts on sovereignty or independence. Then, in the Agreement on the Founding of the CIS a collective recognition was worded as follows: "The High Contracting Parties guarantee implementation of international obligations stemming for them from treaties and agreements of the former USSR." However, both obligations accepted unilaterally and multilaterally were actually towards what might be termed "the world outside," as opposed to the former Republics. Anyway, mutual recognition as sovereign states ensured that international law was in operation between them.

3. Recognition of separate elements of state-succession

3.1. Borders

In the Treaties concluded between the Union Republics in 1990 the same Article 6 was included, declaring recognition and respect of territorial integrity of the parties within borders "now existing in the USSR framework." This was therefore mutual recognition of both territories and borders. The clear recognition of the same values is also expressed in the Agreement on the Founding of the CIS: "The High Contracting Parties recognize and respect the territorial integrity of one another and the inviolability of the existing borders in the framework of the Commonwealth." So the territorial integrity and inviolability of the borders were twice confirmed by the Republics.

The borders between the Republics were in fact the former administrative lines delimiting the territories of federative subjects of the USSR, and earlier, of the provinces of Tsarist Russia. Anyway, these were administrative lines. In the Republics' constitutions there was not a word about borders, only about territories; and the borders were thus the limits of the territories. No agreements were concluded between the Republics, neither was there any single act of the USSR relating to the borders between the Republics.

All the Soviet constitutions featured a clause to the effect that the territory of a Union Republic could not be changed without the consent of that Republic. A procedure by which consent might be formulated was not provided for, while territories did change several times as the Politburo thought necessary, with some disturbances in relations between Republics arising as a result. Since the State was unitarian, and the legal order throughout the Union was the same, the population did not pay much attention to either borders or territories.

After the fall of the Soviet Union, the arbitrary lines of administrative delimitation between Union Republics became the borderlines of different states. The Republics then declared in their acts on sovereignty or independence that the constitution or legal order applies "on the whole territory."

We know that Article 11 of the Vienna Convention on state succession in respect of treaties declares that "A succession of States does not as such affect: (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary."

From the preparatory materials of the UN ILC, which *inter alia* prepared the Draft Convention on state succession in respect of treaties; as well as from discussions held at the Conference as such, we can understand that Article 11 does not forbid succession as such, but a succession on the principle of *tabula rasa,* regarding instant and (possibly) full revision of obligations connected with borders.[23] Article 11 provides for unconditional succession of obligations in respect of borders. There are always some such obligations, since most borders are an object of a treaty or a custom.

Here the concept of *uti possidetis iuris* comes to the floor. This concept from Roman law was back then used to denote the praetor's order that disputed property belongs to the owner up to the time of settlement of a dispute. The concept was made active use of in the 19th century, in order for the destiny of borders of Spanish colonies in Latin America to be determined.

There is no agreement between those who wrote on the concept as to the legal nature thereof. Of course, it is taken from civil law and concerns private persons, and it has not offered a solid guarantee against wars over borders (Ch.Ch. Hyde). Some say that it is a political means to avoid war. Yet, when we look at state practice, we see reiteration of the measure in Asia, Africa and Latin America. The concept was analysed by international arbitration[24] and by the ICJ,[25] with both defining its normative character.

[23] United Nations Conference on the Succession of States in Respect of Treaties. Resumed Session: Vienna, 31 July – 23 August 1978, Official Records Volume II, UN Doc. A/Conf. 80/16.

[24] India and Pakistan: Award in the Rann of Kutch Arbitration, 7 (3) International Legal Materials 633 (1968), pp. 633–705.

[25] ICJ, *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, 15 June 1962, ICJ Rep 1962, p. 6.

Nevertheless, the CIS countries may rather opt to apply one of the Helsinki Principles relating to the inviolability of borders.

Notwithstanding differences of opinion regarding the concept of *uti possidetis,* an additional legal brick in the basement of border legitimacy is somehow provided here. The concept serves an auxiliary prescription for a state, indicating a way of acting. But, on the other hand, some international principles cannot act without machinery provided by the concept of *uti possidetis.* We nevertheless remain aware that the concept is strictly temporary. The recognition of delimitation achieved by another sovereign is only of importance at the moment of state succession. Immediately after the completion of that process, the machinery begins to act just the same as by delimitation *ad nova*. This happens from the moment the obligation of peaceful settlement comes into force in place of the *uti possidetis* principle.

The Union Republics' approach to the recognition of state borders was thus in conformity with international law.

4. Continuity of legal personality of the USSR or RSFSR?

The question of continuity arose even before the breakup of the USSR, given the international community's concern for the fate of Soviet nuclear weapons, as well as the future of the Soviet Union's obligations in the sphere of strategic weapons. The American administration suggested that a single centralised control must be preserved, preferably in the hands of Russia.[26] No less important was the question of the USSR's membership in UNO; and the UN SC in particular.

On 21 December 1991, Heads of the CIS states adopted a Decision[27] reading: "States participants of the CIS support Russia in that it continues the USSR membership in the United Nations Organization, including the UN SC, as well as other international organizations."[28] Russian President B. Yeltsin informed the UN in regard to the Decision, explaining that Russia was determined to implement all obligations of the USSR.[29]

The words "continues the membership" were repeated in the official note to diplomatic representatives, with information that the Russian Federation continues with the USSR's membership of the UN and other international organisations.[30]

The position of the Russian Federation was confirmed and explained in the Editorial to "the Diplomatic messenger": "The international community was interested

[26] *See* Soviet Nuclear Threat Reduction Act of 1991, 22 U.S.C. § 2551,

[27] Decision of the Council of the Heads of State of the Commonwealth of Independent States. In fact this was a treaty signed by all Heads of State, and ratified by parliaments.

[28] The text of the Decision was published in Rossiyskaia Gazeta (official publication of the Russian Government) on 24 December 1991 – 1 Дипломатический вестник [Diplomaticheskiy vestnic] (1992), pp. 48–49 ("Diplomatic messenger" – official publication of the Russian Ministry of Foreign Affairs).

[29] 1 Дипломатический вестник (1992), p. 13.

[30] 2–3 Дипломатический вестник (1992), p. 34.

in that the juridical termination of the USSR not entailing the end of its relations with the world. It is quite natural that the legal personality of the USSR proceeded to Russia, as to the state which could actually give effect to the obligations of the former USSR."[31] Some authors have explained that the Western partners of Russia were concerned with preserving the status-quo in the world, for which it was necessary to guarantee implementation of the USSR's international obligations, especially in the sphere of security.[32]

The words "continuing state" appeared in only one normative act, that is the Order of the President of Russia on the property of the USSR abroad.[33] Very few Western countries also recognised that status of Russia.[34]

Thus the concept of Russia as a state continuing with the legal personality of the USSR has not gained general recognition. Different expressions are used in the documents on the establishment of diplomatic relations between different states and Russia, with some of these recognising the continuing status, and not find it necessary to recognise Russia anew.

Thus, though the notion of continuity is characterised as purely political and invented for practical purposes, it did not play a significant role in the regulation of international relations. Those states which recognised Russia in any capacity have had the full right to require implementation of those international obligations which Russia itself accepted, be it a continuing state or not.

Neither the State Succession Convention of 1978 nor the Convention of 1983 lay out explicit criteria for the discontinuation of a state. Let us take into account the position of the former Soviet Republics. In the Agreement on the Founding of the CIS of 8 December 1991 (in the Preamble), the former Union Republics declared: "We ascertain that the Union of SSR terminates its existence as a subject of international law and geopolitical reality." Thus, in the opinion of the Republics, Russia among them, there is no more USSR. Even more clear is the position expressed in the Alma-Ata Declaration.[35]

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[31] 2–3 Дипломатический вестник (1992). pp. 28–29.

[32] *See e.g.* M. Bothe, Ch. Schmidt, *Sur qelques questions de succession posées par la dissolution de l'URSS et celle de la Yougoslavie*, 96 Revue générale de droit international public 811 (1992), pp. 811–840.

[33] 7 Собрание актов Президента и Правительства Российской Федерации [Sobranie aktov Prsidenta i Pravitelstva Rossiyskoi Federatsii] 560 (1993).

[34] *E.g.* Treaty with France of 7 February 1992, 1 Бюллетень международных договоров [Buleten mezhdunarodnyh dogovorov] (1994).

[35] Whereas the Agreement on the Foundation of the Commonwealth of Independent States of 8 December 1991 was signed by only three states (Russia, Belorussia and Ukraine), the Alma-Ata Declaration which actually repeated the text of the Agreement was signed by 11 former Soviet Republics (i.e. all the former Soviet Republics except the three Baltic ones, which were officially recognised as independent by the Soviet Congress of People's Deputies). The Agreement on the Foundation of the Commonwealth of Independent States (adopted 8 December 1991, entered into force 8 December 1991) 31 International Legal Materials (1992) 138; Protocol to the Agreement

Then, 20 March 1992 brought the adoption of a document called the "Decision of the Council of CIS Heads of State." In fact, this was an international treaty: signed by all Heads of State with the indication: "for Armenia," "for Belorussia," making it clear that signatories to the Decision were in the capacity of Heads of State, rather than Members of the Council. The Decision said: "We acknowledge that all states members of the Commonwealth of Independent States are states successors of rights and obligations of the former Union of SSR." Thus the Heads of State agreed that all the former Union Republics were on the same footing, Russia being simply one among others.

The decision of the CIS countries that Russia should continue with the USSR's membership of the UNO and other international organisations referred to a very particular question, so it would be awkward to interpret it in a broader way. A State cannot be a successor and a continuing state at the same time.

So we can state more or less that the former Union Republics were eager to conform with international law in the period of discontinuance of the USSR. Still some points of tension appeared due to legal nihilism or underestimation of the law in such a dictatorial state as the USSR. The territory of the country has several times been reshaped for the sake of, for example, adding proletariat masses to a Republic (as was the case with northern Kazakhstan in 1936), adding Party members to a Republic (Eastern Ukraine) and notoriously famous the Peninsula of Crimea was taken from Russia and given to Ukraine in 1954.

However, Russia recognised Ukrainian territory by several international treaties, i.e. the Treaty on Friendship and Cooperation of 1990, the Agreement on the Founding of the CIS of the 8th and 21st December 1991, and Treaty on Friendship, Cooperation and Partnership of 1997.

5. Unrecognised Republics appearing after the discontinuance of the USSR

At the end of the 1980s several so called "self-declared" Republics emerged on former USSR territory, i.e. Transnistria, Abkhazia, South Ossetia and Nagorno-Karabakh.

The history and specific features behind the formation of each of these "Republics" differ greatly; but each can be considered to feature bloodshed and the horrors of war.

Abkhazia was involved in a hostile ethnic war of 1992–1993 that was mainly fought between Abkhaz and Georgian people. While 4000 Georgians were killed

on the Foundation of the Commonwealth of Independent States (the Alma-Ata Declaration)," *International Law & World Order: Weston's & Carlson's Basic Documents*, Brill, Leiden, available at: http://referenceworks.brillonline.com/browse/international-law-and-world-order.

and 1000 were left missing, the Abkhaz death toll was 4000. About 250,000 thousand ethnic Georgians (almost half of Abkhazia's population) fled into Georgia.[36]

Where *South Ossetia* is concerned, Ossetians have been a divided nation since the Stalin era, residing partly in Northern Ossetia in Russia and partly in South Ossetia in Georgia. At the time of the armed conflict of August 2008, 15,000 ethnic Georgians (more than 80% of Georgian population) fled the country, as did 34,000 ethnic Ossetians (or more than 70% of the Ossetian population).

Nagorno-Karabakh is an enclave on the territory of Azerbaijan with mainly an ethnic Armenian population. The so called Karabakh conflict was in fact a full-scale interstate war. As a result of it, 11,000 Azerbaijanis were killed and about 30,000 wounded. 6000 Armenians were also killed, and about 20,000 wounded. About 250,000 Armenians fled Azerbaijan; with about 200,000 Azerbaijani now refugees and about 500,000 classified as displaced persons.[37]

Transnistria is in turn a strip of territory between Ukraine and Moldova. From 1956 on a large military contingent in the shape of the 14th Army of the USSR was situated here, ready for use in the case of a conflict in the South-eastern part of Europe. After the discontinuation of the USSR, the Army as such was transferred to Russia, but most of the arms and munitions were left in Transnistria. The armed conflict here was not as severe as in other places, yet it still resulted in the deaths of 320 Moldovan soldiers and 425 Transnistrians.

Each of these self-declared Republics has tried to consolidate its statehood. All conducted elections, elected presidents, composed parliaments and governments and adopted constitutions. All could thus be called "states" from the point of view of formal signs of statehood.

Three years ago two new "Republics" were added to the group. They are the so-called Lugansk People's Republic and Donetsk People's Republic, self-declared in April 2014 following Russia's takeover of Crimea, and its annexation into Russian territory. The two "Republics" provided both parliaments and constitutions for themselves, but, as neither has a viable economy, both exist with the humanitarian assistance of Russia, and with Russian money used to pay salaries and pensions.

The questions of recognition in the above cases have been decided differently. First come the 4 polities referred to above. After they declared independence, Russia installed consulate points in Abkhazia and South Ossetia, and began with the replacement of the passports of citizens of the USSR, which every person in the USSR possessed prior to 1991. As the Soviet passports were replaced by Russian ones, these were still not internal state passports, but rather foreign ones. The point

[36] Human Rights Watch, *Georgia/Abkhazia: Violations of the Laws of War and Russia's Role in the Conflict*, 1 March 1995, p. 5, available at: https://www.hrw.org/report/1995/03/01/georgia/abkhazia-violations-laws-war-and-russias-role-conflict (accessed 30 October 2017).

[37] *Azerbaijan: Seven Years of Conflict in Nagorno-Karabakh Human Rights*, Human Rights Watch, Helsinki: 1994, p. 108 (118).

here is that one kind of passport is made use of on the territory of the Russian Federation, while another kind is needed for travel abroad.

The awkward thing here is that the people from Abkhazia and South Ossetia could only use their passports to travel to places near the borders of their Republics, not further away. So residents of Abkhazia could sell their fruit in Sochi and other nearby cities, and residents of South Ossetia could visit their relatives in North Ossetia.

These two Republics were recognised by Russia in August 2008, following the Russian-Georgian war. They were also recognised by Nicaragua and Venezuela. Tuvalu and Nauru also recognised them initially, only to withdraw this recognition later on. Currently the two have international contacts with Russia only, though they are also recognised by the Sahara Arab Republic, the Lugansk People's Republic and the Donetsk People's Republic.

Nagorno-Karabakh is recognised by Abkhazia and South Ossetia, which in turn, are recognized by Nagorno-Karabakh. In the media we can also encounter news that Nagorno-Karabakh is recognized by the Basque Country and several USA states.[38]

Transnistria is recognized by Abkhazia and South Ossetia, Nagorno-Karabakh, and the Lugansk and Donetsk People's Republics.

In turn, the Lugansk and Donetsk People's Republics are not recognised by Russia, but only by the other unrecognised "Republics" on the territory of the former USSR.

All these "unrecognised Republics" are indeed going unrecognised by every single state member of the CIS, though the question always arises at Sessions of the Council of State Heads.

It is clear that, due to their weak economies, the so-called "unrecognised Republics" cannot develop cooperation with each other. Yet, formally, alongside mutual recognition there is also a status as members of a Commonwealth of Unrecognised States declared in 2000.

6. The question of recognition of the status of Crimean Peninsula

The jubilee of 300 years of unity between Russia and Ukraine was celebrated in 1954, and the then Head of the Party, Mr. Khrushchev, decided to make a present to Ukraine. A Decree of the Praesidium of the Supreme Soviet of the RSFSR was thus adopted in regard to the transfer of the Crimea region to the Ukrainian SSR. Later the Decree was approved by Decree of the Praesidium of the Supreme Soviet of the USSR and the Law of the Supreme Soviet of the USSR. The transfer was not fully legitimate as, under the Constitutions of the USSR and RSFSR, the Praesidia of the

[38] *See* independent internet publication: http://www.kavkaz-uzel.eu (accessed 30 March 2018).

Supreme Soviets had no remit to consider territorial questions. Only the Soviets themselves had such competences.

We have already indicated that in the period 1990-1997 saw Russia expressing its recognition for the territory and borders of Ukraine, and we know that a subsequent norm cancels a previous one, so the priority is with the recognition.

After the breakup of the USSR, the question of the Black Sea Fleet arose. The main base was near the city of Sevastopol, and Russia insisted on dividing up the fleet. The Agreement on dimensions to the division of the Black Sea Fleet was adopted on 28 May 1997.

Under the said Agreement, a part of the Fleet was to be transferred to Russia, with up to 25,000 personnel of the Russian Navy permitted to reside permanently in Sevastopol. A special Ukrainian-Russian Commission consisting of diplomats and lawyers was established to decide upon any questions that might emerge.

In March 2014, when the then Ukrainian President Victor Yanukovich fled his country, Russian people (we do not know who, exactly) – with the support of Russian military forces – organised a Referendum among the population of Crimea with a question regarding the status of Crimea. Namely, should it stay in Ukraine or join Russia? About 95% of those voting apparently answered that they want to join Russia. So Crimea was accepted into Russia.

Not a single CIS state recognised this move; while among UN Member States only Bolivia and Venezuela did so. In fact, a new series of imposed sanctions followed.

Conclusion

Life itself led to an experiment on post-Soviet territory. This can be seen to have involved two groups of entities seeking recognition. First, there were the former Union Republics of the USSR enjoying the formal status of State under their own constitutions, and recognised by UN Member States following the breakup of the USSR. These States made it a requirement that international law be conformed with, though the Republics seeking recognition did indeed express their readiness to conform. The second group comprises former parts of the Union Republics. These are not recognised currently, though they also express their readiness to conform with international law. However, the international community evidently does not accept the circumstances of their birth as conforming with international law.

Abstract: At the end of the 1980s, it became clear that the Soviet Union was no longer viable, and the Union Republics began the process of acquiring independence. Initially, they tried to obtain the rights provided for in the Soviet Union's Constitution; and the search for a new Union treaty developed over more than a year. After the attempted *coup-de-etat* in August 1991, declarations of independence followed. The Agreement on

the Founding of the CIS was adopted on 8-21 December 1991. The process of mutual recognition of the newly-independent states and of succession of USSR obligations began. All the former Union Republics recognised the obligations. Some problems appeared that were not fully regulated by international law, the question of borders, of the continuing state and of strategic weapons among them. Territorial claims between the new states led to the appearance of some unities which declare themselves states, but have not gained recognition on the part of the international community (like South Ossetia, Abkhazia, Transnistria and Nagorny Karabakh).

Keywords: breakup of the Soviet Union, former Union Republics, the Agreement on the Founding of the CIS, mutual recognition of newly-independent states, state succession, continuing state, territorial claims, unrecognised states.

Status of Unrecognised Subjects: Recent Practice of "Collective Recognition": Admission to or Granting a Status in an International Organisation

*Shotaro Hamamoto**

Introduction

Collective recognition is not a term of art well accepted in international law. Joe Verhoeven, in his exceptionally rich thesis on recognition published in 1975, stated: "Si l'on entend par reconnaissance collective celle qui résulte d'un acte collectif transcendant la seule juxtaposition de volontés individuelles, (…) [t]elle est (…) la problématique de la reconnaissance par les organisations internationales (…). Cette problématique est toutefois intrinsèquement celle d'une reconnaissance individuelle (…). Tout au plus y aurait-il en pareille perspective juxtaposition organisée de reconnaissances individuelles ; l'on ne saurait à proprement parler y découvrir une reconnaissance collective."[1]

More recently, in 2002, David Raič declared that: "there is no such thing as 'collective recognition'" because "there is no sufficient ground to conclude that the recognition process has been collectivized through the admission procedure of the United Nations."[2]

As early as in 1950, the United Nations Secretary-General Trygve Lie issued a memorandum that maintained that the admission of a new member to the United Nations[3] would not necessarily involve the recognition of the admitted member

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[1] J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine*, Pedone, Paris: 1975, pp. 526–527.

[2] D. Raič, *Statehood and the Law of Self-determination*, Kluwer, The Hague: 2002, p. 47.

[3] The question as to whether admission into an international organisation involves the recognition of the State requesting admission by all Member States of the organisation was raised as soon as in the early years of the League of Nations, without being settled. Graham regrets that the records of the relevant organs of the League are so inadequate or deficient that it is difficult to reconstitute the debates that took place in the League. M.W. Graham, *The League of Nations and the Recognition of States*, 3 (1) Publications of the University of California at Los Angeles in Social Sciences 1 (1933), pp. 24–25.

as a State by the existing Member States.[4] The UN GA adopted a Resolution to the same effect in the same year.[5]

However, we need to think twice before jumping to the conclusion that collective recognition has no place in international law. First of all, it is often argued that a new Member "State" admitted to an international organisation *ipso facto* enters into international law relations with all the other Member States within the framework of the organisation.[6] Secondly, since only States qualify for admission to the United Nations,[7] the admission of a new member to the UN is generally considered to constitute the recognition of the admitted member as a State by those Member States that voted in favour of the admission.[8] Thirdly, in line with the widely accepted declaratory theory of recognition, it is now a commonplace to point out that, with admission to the United Nations being positive proof of the possession of the quality of statehood,[9] non-recognising Member States are at risk if they ignore the basic rights of existence of the new member that they do not recognise as a State.[10]

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[4] *Memorandum on the Legal Aspects of the Problem of Representation in the United Nations*, 8 March 1950, U.N. Doc. S/1466, pp. 2–3: "From the standpoint of legal theory, the linkage of representation in an international organization and recognition of a government is a confusion of two institutions which have superficial similarities but are essentially different. The recognition of a new State, or of a new government of an existing State, is a unilateral act which the recognizing government can grant or withhold. (…) [T]he United Nations does not possess any authority to recognize either a new State or a new government of an existing State. To establish the rule of collective recognition by the United Nations would require either an amendment of the Charter or a treaty to which all Members would adhere. (…) [R]ecognition of either State or government is an individual act, and either admission to membership or acceptance of representation in the Organization are [sic] collective acts (…)."

[5] UN GA Resolution 396 (V) of 14 December 1950, A/RES/396(V), para. 4. The UN GA "declares that the attitudes adopted by the General Assembly (…) concerning any question [of representation] shall not of itself affect the direct relations of individual Member States with the State concerned."

[6] É. Wyler, *Théorie et pratique de la reconnaissance d'État*, Bruylant, Bruxelles: 2013, p. 81.

[7] Article 4 of the Charter of the United Nations provides that "Membership in the United Nations is open to all other peace-loving states" (UN Charter (adopted 26 June 1945, entered into force 24 October 1945) 16 UNTS 1 (1945)). As the ICJ reiterates, "to be admitted to membership in the United Nations an applicant must (…) be a State" (ICJ, *Admission of a State to the United Nations (Charter, Art. 4)*, Advisory Opinion, 28 May 1948, ICJ Rep 1948, pp. 57, 62).

[8] P.-M. Dupuy, Y. Kerbrat, *Droit international public*, 13th ed., Dalloz, Paris: 2016, p. 36.

[9] T. Chen, *The International Law of Recognition*, Stevens & Sons, London: 1951, p. 215. "[T]oday, when nearly all communities with a reasonable claim to statehood are Members of the United Nations, it is difficult to resist the view that membership provides evidence of the legal personality of States" (J. Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, RCADI, 2013, vol. 357, p. 64).

[10] J. Crawford, *Brownlie's Principles of Public International Law*, 8th ed., Oxford University Press, Oxford: 2012, p. 150.

It follows from these considerations that collective recognition must have some effect, and thus a *raison d'être* in international law. In the present paper, following an overview of recent practice on collective recognition (1), we will examine the effect of the admission of an entity to, or granting the entity a status in, an international organisation – to the States that continue not to recognise the entity (2).

Before entering into the discussion, a few remarks are needed on the definition of the subject of the paper and on its scope. The term "collective recognition" is used in the present paper in a stricter sense to mean recognition collectivised through the admission procedure of an international organisation,[11] though it is often used to include recognition granted by a group of States acting together or in concert.[12] In other words, questions to be discussed here are: whether the admission to an international organisation constitutes recognition by (at least some of) the Member States of the organisation, and; whether the admission affects the statehood of the newly-admitted Member. As for the scope of the examination, the present paper concentrates on collective *recognition*, and will not deal with questions relating to collective *non-recognition*, which have been studied extensively,[13] and recently attracted much attention once again following Russia's (attempted) incorporation of Crimea, and the adoption of UN GA Resolution 68/262.[14] That said, questions

[11] The present paper does not deal with issues relating to the participation by unrecognised entities in multilateral treaties other than constitutive documents of international organisations, which we have examined elsewhere: S. Hamamoto, *Multilateral Treaties and Recognition of States: The Japanese Case Law on the Applicability of the Berne Convention and the Patent Cooperation Treaty between Japan and the Democratic People's Republic of Korea*, 29 Chinese (Taiwan) Yearbook of International Law and Affairs 104 (2011). *See* also S. Sakran, M. Hayashi, *Palestine's Accession to Multilateral Treaties*, 25 Journal of International Cooperation Studies 81 (2017).

[12] For example, Frowein states that "The Berlin Congress (1878) amounted to the collective recognition of territorial changes and the independence of several States formerly under Turkish sovereignty." J.A. Frowein, *Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 October 2017), para. 4.

[13] *See e.g.* V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law*, Nijhoff, Dordrecht: 1990, p. 278; J. Dugard, *Collective Non-recognition: The Failure of South Africa's Bantustan States*, in: *Boutros Boutros-Ghali Amicorum Discipulorumque Liber*, vol. I, Bruylant, Bruxelles: 1998, p. 383; T. Christakis, *L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales*, in: C. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order*, Nijhoff, Leiden: 2006, p. 127; S. Talmon, *The Duty not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation*, in: Tomuschat, Thouvenin, *supra*, p. 99; M. Dawidowicz, *The Obligation of Non-Recognition of an Unlawful Situation*, in: J. Crawford *et al.* (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford: 2010, p. 677.

[14] The Resolution "call[ed] upon all States (…) not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol (…) and to refrain from any action or dealing that might be interpreted as recognizing any such altered status." UN GA Resolution 68/262 of 27 March 2017, A/RES/68/262, para. 6. On collective non-recognition of Russia's purported annexation, *see* J. O'Mahoney, *Proclaiming Principles: The Logic of the Nonrecognition of*

relating to non-recognition necessarily arise in the present paper because issues concerning the relationship between the admission to an international organisation and recognition is meaningful only where there exist one or more States that refuse to recognise the newly admitted member as a State.

1. Recent practice of collective recognition

Since discussions on collective recognition are meaningful only where one or more non-recognising States exist, the three cases examined in this section are those of the admission of the Democratic People's Republic of Korea to the United Nations (A.); the granting of the status of observer State to Palestine by the UN GA, and Palestine's admission to UNESCO (B.); and the admission of Kosovo to the International Monetary Fund and to the World Bank Group organisations (C.).

The granting of the status of observer State in the United Nations is evidently not admission to the Organization. However, it falls within the scope of the present section because the UN GA, by its *collective* decision, granted Palestine the status of observer *State*.

1.1. Democratic People's Republic of Korea

The Democratic People's Republic of Korea (DPRK) was admitted to the United Nations on 17 September 1991 by UN SC Resolution 702 (1991) and UN GA Resolution 46/1, both adopted by consensus. However, in a press conference held on the following day, the Chief Cabinet Secretary of Japan stated that the DPRK's admission to the UN was "a separate question" from its recognition by Japan.[15] Asked in the Diet whether Japan was going to recognise the DPRK as a State, Mr. Shunji Yanai, Director-General of the Treaties Bureau, Japanese Ministry of Foreign Affairs, replied: "The first condition of State recognition is the establishment of a political authority effectively governing the population in a given territory. It is clear that the DPRK fulfills this condition. The second condition is the will and

the Spoils of War, 2 Journal of Global Security Studies 204 (2017), p. 204; J. Bering, *The Prohibition on Annexation: Lessons from Crimea*, 49 New York University Journal of International Law and Policy 747 (2017); T.D. Grant, *Annexation of Crimea*, 109 American Journal of International Law 68 (2015), p. 68; C. Marxsen, *International Law in Crisis: Russia's Struggle for Recognition*, 58 German Yearbook of International Law 11 (2015); R. Bismuth, *Odyssée dans la conundrum des réactions decentralisées à l'illicite*, 141 Journal du droit international 719 (2014); E. Milano, *The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question*, Questions of International Law, Zoom out I 35 (2014); T. Christakis, *Les conflits de la sécession en Crimée et dans l'est de l'Ukraine et le droit international*, 141 Journal du droit international 733 (2014); C. Beaucillon, *Crise ukrai-nienne et mesures restrictives de l'Union européenne*, 141 Journal du droit international 787 (2014).

[15] The Asahi Shimbun, 18 September 1991, evening edition, p. 1 [in Japanese].

ability to respect international law. Since the DPRK has been admitted to the UN, this condition has also been fulfilled. (…) However, the admission to the UN or a vote in favor of the admission does not necessarily constitute recognition. State recognition is a bilateral matter between North Korea and Japan and, at the end of the day, it is a unilateral act to be decided by Japan. (…) State recognition being a unilateral act of the recognizing State, there is no obligation of recognition even if the conditions for State recognition has been fulfilled."[16]

Japan still maintains that it has not recognized the DPRK as a State.[17] At the same time, it considers that the United Nations Charter applies to its relations with the DPRK, as it has repeatedly criticised the latter for "flagrant violations" of relevant UN SC resolutions.[18] Thus, the absence of recognition in no way hinders the application of the UN Charter between Japan and the DPRK, even from the perspective of a Japan that continues to refuse to recognise the DPRK as a State.

1.2. Palestine

1.2.1. Granting of the status of observer State in the United Nations

1.2.1.1. *The adoption of UN GA Resolution 67/19*

The UN GA adopted Resolution 67/19 on 29 November 2012, with this according Palestine "non-member observer State status in the United Nations."[19] Jean Salmon maintains that this is an example of collective recognition by an international organisation.[20] However, the renowned Belgian international lawyer does not explain what was recognised under this Resolution; and it is difficult, to say the least, to identify the object of "recognition" in this Resolution.[21] As rightly pointed

[16] Committee on Foreign Affairs, House of Representatives, 121th Session, No. 3, 2 October 1991, p. 22.

[17] *E.g.* Mr. Masaki Noke (Director-General of the Consular Policy Division, Ministry of Foreign Affairs), Committee on Foreign Affairs and Defense, House of Councillors, 190th Session, No. 16, 10 May 2016, p. 23.

[18] *E.g. The Adoption of a Resolution by the United Nations Security Council concerning North Korea's nuclear test and other activities (Statement by Foreign Minister Taro Kono)*, 12 September 2017, available at: http://www.mofa.go.jp/press/release/press4e_001719.html (accessed 15 October 2017).

[19] UN GA Resolution 67/19 of 4 December 2012, A/RES/67/19, para. 2. The idea of making Palestine an observer State had already been suggested in the Committee on the Admission of New Members, a subsidiary organ of the UN SC: *Report of the Committee on the Admission of New Members concerning the application of Palestine for admission to membership in the United Nations*, 11 November 2011, U.N. Doc. S/2011/705, para. 20.

[20] J. Salmon, *La qualité d'État de la Palestine*, 45 Revue belge de droit international 13 (2013), p. 19 ("II. La reconnaissance collective par des organisations internationales").

[21] It is to be noted that Salmon argues that the admission to the UN does not constitute individual recognition by the existing Member States (J. Salmon, *La reconnaissance d'État*, Armand Colin, Paris: 1971, p. 25).

out by Yaël Ronen, the Resolution does not refer to the "State of Palestine" and speaks of "a permanent two-State solution" as a goal yet to be achieved.[22]

Resolution 67/19 was adopted by a majority of 138-9-41.[23] Among the 138 States voting in favour, Armenia, Austria, Belgium, Denmark, Eritrea, Finland, France, Greece, Ireland, Italy, Jamaica, Japan, Liechtenstein, Luxembourg, Mexico, Myanmar, New Zealand, Norway, Portugal, Saint Kitts and Navies, the Solomon Islands, Spain and Switzerland had not recognised Palestine as a State.[24] Some of them explained their votes, suggesting that they did not consider Palestine a State despite their affirmative votes. France stated that it is to the "projet étatique palestinien" that the UN GA granted "reconnaissance internationale."[25] For Germany, "a Palestinian State can be achieved only through direct negotiations between Israelis and Palestinians."[26] Italy also emphasised that "a comprehensive negotiated peace settlement (…) remain[ed] the only possible path to Palestinian Statehood."[27] Japan[28] and Greece[29] manifested a similar position. The most explicit statement came from Switzerland, which declared that the Resolution "n'engage pas une reconnaissance bilatérale d'un État palestinien, laquelle dépendera notamment des négotiations de paix à venir."[30] Belgium,[31] Denmark,[32] Finland[33] and New Zealand[34] all delivered similar statements.

The attitude of the States that voted for the Resolution while continuing not to recognise Palestine as a Statem is well summarised in the statement made by

[22] Y. Ronen, *Recognition of the State of Palestine: Still too much too soon?*, in: C. Chinkin, F. Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford*, Cambridge University Press, Cambridge: 2015, p. 237.

[23] UN GA Official Records, Sixty-seventh Session, 44th Plenary Meeting, 29 November 2012, U.N. Doc. A/67/PV.44, p. 12.

[24] *See* Permanent Observer Mission of the State of Palestine to the United Nations, *Diplomatic Relations*, available at: http://palestineun.org/about-palestine/diplomatic-relations/ (accessed 15 October 2017).

[25] M. Araud (France), U.N. Doc. A/67/PV.44, p. 15 (in the French version). To this statement, Ronen addresses a criticism that unfortunately strikes wide of the mark, probably because of her reliance on the English translation. Ronen, *supra* note 22, p. 241.

[26] Mr. Wittig (Germany), U.N. Doc. A/67/PV.44, p. 15.

[27] Mr. Ragaglini (Italy), *ibidem*, p. 19.

[28] Mr. Kodama (Japan), UN SC Provisional Records, Sixty-eighth year, 6906th meeting, 23 January 2013, U.N. Doc. S/PV.6906 (Resumption I), p. 11.

[29] Mr. Mitsialis (Greece), U.N. Doc. A/67/PV.44, p. 19.

[30] M. Seger (Suisse), U.N. Doc. A/67/PV.44, p. 17 (in the French version).

[31] "La vote d'aujourd'hui constitue une avancée significative vers la création d'un État de Palestine (…). Pour la Belgique, la résolution adoptée aujourd'hui par l'Assemblée générale ne constitue pas encore une reconnaissance d'État au sens complet du terme" (M. Grauls (Belgique), U.N. Doc. A/67/PV.44, p. 17) (in the French version).

[32] Mr. Staur (Denmark), U.N. Doc. A/67/PV.44, p. 18.

[33] Mr. Viinanen (Finland), *ibidem*, p. 20.

[34] Mr. McLay (New Zealand), *ibidem*, p. 20.

Finland: "We have witnessed how the Palestinian Authority now has institutions that pass the threshold of what one can expect from a modern State. That achievement deserves our full recognition. (…) However, Finland's [affirmative] vote does not imply formal recognition of a sovereign Palestinian State. That is a separate question."[35]

Norway made a similar statement.[36] These examples suggest that States are free to withhold recognition even where they consider that the entity in question fulfills the "criteria" of statehood. The clearest statement to that effect was delivered by the Japanese Minister for Foreign Affairs in Japan's Diet. Asked why Japan would not recognize Palestine as a State even after its affirmative vote in UN GA Resolution 67/19, Mr Kishida replied: "As for the question whether or not Japan is going to recognise Palestine as a State, although international law are certainly important, a comprehensive analysis, including whether such recognition will enhance the peace process, is also needed."[37]

1.2.1.2. *The effect of the Resolution*

Pursuant to paragraph 7 of UN GA Resolution 67/19, the Secretary-General submitted a report to the UN GA on the steps taken regarding the change of Palestine's status at the United Nations. The report indicates four major changes in the United Nations. *Primo*, the designation "State of Palestine" is now used in all UN documents.[38] *Secundo*, the United Nations' publication *Permanent Missions to the United Nations* (the *Blue Book*) now lists Palestine under category II as a "Non-member State having received a standing invitation to participate as observer in the sessions and the work of the UN GA and maintaining permanent observer mission at Headquarters."[39] *Tertio*, pursuant to Article 35(2) of the UN Charter, the State of Palestine may place items on the provisional agenda of the UN SC and the UN GA.[40] *Quarto*, with respect to conferences convened under the auspices of the UN GA and other UN conferences, the State of Palestine may participate fully and on an equal basis with other States at conferences that are open to members of specialised agencies or that are open to all States.[41]

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[35] Mr. Viinanen (Finland), *supra* note 33.

[36] Mr. Pedersen (Norway), U.N. Doc. A/67/PV.44, p. 21.

[37] Mr. Fumio Kishida (Minister for Foreign Affairs), Committee on Foreign Affairs, House of Representatives, 189th Session, No. 6, 17 April 2015, p. 18 [in Japanese, translated by Hamamoto].

[38] *Status of Palestine in the United Nations*, Report of the Secretary-General, 8 March 2013, U.N. Doc. A/67/738, para. 3.

[39] *Ibid.*, para. 4. *See also Protocol and Liaison Service*, available at: https://protocol.un.org/dgacm/pls/site.nsf/BlueBook.xsp (accessed 15 October 2017).

[40] Report of the Secretary-General, *supra* note 38, para. 6. *See also* Rule 13(h) of the Rules of Procedure of the General Assembly, U.N. Doc. A/520/Rev.18.

[41] Report of the Secretary-General, *supra* note 38, para. 7.

In addition to these changes *in* the United Nations, GA Resolution 67/19 produced some legal effects that go beyond the framework thereof. The Secretary-General is depositary of a number of treaties, some of which are open to "all States." To cope with the difficult question as to how the Secretary-General is to determine which entities are States when exercising the function of depositary, the UN GA adopted a recommendation, which constitutes an understanding by the UN GA, in 1973, when it adopted the Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons. The recommendation reads as follows: "It is the understanding of the General Assembly that the Secretary-General, in discharging his functions as depositary of a convention with an 'all States' clause, will follow the practice of the General Assembly in implementing such a clause and, whenever advisable, will request the opinion of the General Assembly before receiving a signature or an instrument of ratification or accession."[42]

Although the UN GA did not refer to the legal basis of this understanding, it is apparently based on Article 10 of the Charter.[43] On the basis of that recommendation/understanding, the Secretary-General accepts the documents transmitted by Palestine relating to its accession to a number of multilateral treaties of which the Secretary-General is the depositary.[44] As of March 2018, the Secretary-General has accepted Palestine's accession with respect to 46 multilateral treaties.[45] Canada, Israel and the United States systematically send communications to the Secretary-General to express their understanding that Palestine is not qualified to accede to

[42] Draft Convention on the Prevention and Punishment of Crimes against Diplomatic Agents and Other Internationally Protected Persons, Report of the Sixth Committee, U.N. Doc. A/9407, para. 158; adopted by the UN GA, UN GA Official Records, Twenty-eight session, 2202nd Plenary Meeting, 14 December 1973, UN Doc. A/PV.2202, para. 201. *See* also *Summary of Practice of the Secretary-General as Depositary of Multilateral Treaties*, U.N. Doc. ATR/LEG/7/Rev.1, p. 23.

[43] Article 10, UN Charter: "The General Assembly may discuss any questions or any matters within the scope of the present Charter or relating to the powers and functions of any organs provided for in the present Charter." It is generally considered that the UN GA possesses the power to make legally binding decisions on organisational matters in the United Nations. *See* M. Divac Öberg, *The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ*, 16 European Journal of International Law 879 (2005), pp. 883–884, 895.

[44] *Note to correspondents – Accession of Palestine to multilateral treaties*, 7 January 2015, available at: https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspo nd ents-accession-palestine-multilateral (accessed 15 October 2017). Mindua points out that the determination by the UN GA of the statehood of an entity "is binding or at least authoritative for the UN Secretary-General." A. Kesia-Mbe Mindua, *Statehood of Palestine, the United Nations and the International Criminal Court*, 1 L'Observateur des Nations Unies 111 (2016), p. 127.

[45] *See Multilateral Treaties Deposited with the Secretary-General*, available at: https://tinyurl.com/y8ceesnw (accessed 15 October 2017).

the treaty in question whenever Palestine deposits its instrument of accession to the Secretary-General.[46] They do not consider that the relevant treaties do not enter into force between them and Palestine.

A well-known example of such treaties is the Rome Statute of the International Criminal Court.[47] Palestine deposited its instrument of accession to the UN Secretary-General on 2 January 2015.[48] Important for the purpose of the present paper is the attitude of the States Parties to the Rome Statute that have not recognised Palestine as a State. Among the 123 States Parties to the Rome Statute, the states in the aforesaid situation are: Andorra, Australia, Austria, Belgium, Canada, Colombia, Croatia, Denmark, Estonia, Fiji, Finland, France, Germany, Greece, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Mexico, Moldova, Nauru, the Netherlands, New Zealand, Norway, Panama, Portugal, Republic of Korea, Saint Kitts and Nevis, Samoa, Slovenia, Spain, Switzerland and the United Kingdom.[49]

[46] *See e.g.* United States of America: Communication, 15 May 2014, U.N. Doc. C.N.259.2014. TREATIES-IV.1. "The Government of the United States of America does not believe the 'State of Palestine' qualifies as a sovereign State and does not recognize it as such. Accession to the Convention is limited to sovereign States. Therefore, the Government of the United States of America believes that the 'State of Palestine' is not qualified to accede to the Convention [on the Prevention and Punishment of the Crime of Genocide] and affirms that it will not consider itself to be in a treaty relationship with the 'State of Palestine' under the Convention."

Israel: Communication, 22 May 2014, U.N. Doc. C.N.297.2014.TREATIES-IV.11. "'Palestine' does not satisfy the criteria for statehood under international law and lacks the legal capacity to join the aforesaid convention both under general international law and the terms of bilateral Israeli-Palestinian agreements. The Government of Israel does not recognize 'Palestine' as a State, and wishes to place on record, for the sake of clarity, its position that it does not consider 'Palestine' a party to the Convention [on the Rights of the Child] and regards the Palestinian request for accession as being without legal validity and without effect upon Israel's treaty relations under the Convention."

Canada: Communication, 23 January 2015, U.N. Doc. C.N.57.2015.TREATIES-XVIII.10. "[T]he Permanent Mission of Canada notes that 'Palestine' does not meet the criteria of a state under international law and is not recognized by Canada as a state. Therefore, (…) 'Palestine' is not able to accede to this convention, and that the Rome Statute of the International Criminal Court does not enter into force, or have an effect on Canada's treaty relations, with respect to the 'State of Palestine'."

Canada delivered a statement to the same effect in the Assembly of States Parties. W.R. Crosbie, Legal Adviser, Foreign Affairs, Trade and Development Canada, 18 November 2015, available at: https://asp.icc-cpi.int/iccdocs/asp_docs/ASP14/GenDeb/ASP14-GenDeb-Canada-ENG-FRA.pdf (accessed 15 October 2017).

[47] Adopted 17 July 1998, entered into force 1 July 2002; 2187 UNTS 3 (2004). Its Article 125(3) provides: "This Statute shall be open to accession by all States. Instruments of accession shall be deposited with the Secretary-General of the United Nations."

[48] *State of Palestine: Accession*, U.N. Doc. C.N.13.2015.TREATIES-XVIII.10.

[49] *See supra* note 24 and Multilateral Treaties Deposited with the Secretary-General, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&clang=_en (accessed 15 March 2018).

Canada made it clear that it did not consider Palestine to be a State Party to the Rome Statute.[50] Despite this protest, the International Criminal Court held a ceremony to welcome Palestine as a State Party on 1 April 2015.[51] Palestine paid contributions in conformity with Articles 115(a) and 117 of the Rome Statute[52] and the Assembly of the States Parties adopted annual budgets including the contributions paid by Palestine.[53]

It is also important to note that a certain number of the States Parties to the Rome Statute that have not recognised Palestine as a State nevertheless consider Palestine as a State Party to the Statute. The official website of the French Ministry of Foreign Affairs[54] and an official document of the Dutch Government[55] explicitly state that Palestine is party to the Rome Statute. More implicitly, Annual Report 2015–2016 of the Attorney-General's Department of Australia states that "[i]n June 2016, 124 countries were States Parties to the Rome Statute,"[56] which indicates that Australia considers Palestine to be a State Party to the Statute. A similar implicit account can be found in the official website of the Ministry of Foreign Affairs of Japan.[57]

Another example of treaties establishing international organisations with respect to which Palestine deposited its instrument of accession to the UN Secretary-General is the United Nations Convention on the Law of the Sea.[58] Palestine

[50] Canada: Communication, *supra* note 46. Neither Israel nor the USA is party to the Rome Statute.

[51] *ICC welcomes Palestine as a new State Party*, Press Release, 1 April 2015, ICC-CPI-20150401-PR1103, available at: https://asp.icc-cpi.int/en_menus/asp/press%20releases/Pages/pr1103.aspx (accessed 15 October 2018).

[52] *See* Annex II: Status of contributions as at 15 September 2017, Report of the Committee on Budget and Finance on the work of its twenty-ninth session, 3 November 2017, ICC-ASP/16/15.

[53] Resolution ICC-ASP/16/Res.1, 14 December 2017.

[54] France Diplomatie, *Présentation des Territoires palestiniens*, available at: https://www.diplomatie.gouv.fr/fr/dossiers-pays/israel-territoires-palestiniens/presentation-des-territoires-palestiniens/article/presentation (accessed 15 March 2018).

[55] Mid-Term Strategic Review "SAWASYA" *Programme Final Report*, 28 April 2016, available at: https://www.government.nl/ministries/ministry-of-foreign-affairs/documents/reports/2016/10/18/mid-term-strategic-review-sawasya-programme (accessed 15 October 2018), p. 3. According to the Dutch Government (https://www.government.nl/ministries/ministry-of-foreign-affairs/organisational-structure/ministry-of-foreign-affairs-evaluations/decentral-evaluations-foreign-affairs (accessed 15 October 2018)), this review was carried out by IOB, a department of another ministry of the Dutch Government. *See* Directie Internationaal Onderzoek en Beleidsevaluatie (IOB), https://www.iob-evaluatie.nl/ (accessed 15 October 2018).

[56] Appendix 5, Annual Report 2015-16, available at: https://www.ag.gov.au/Publications/AnnualReports/Pages/default.aspx (accessed 15 October 2017). As of June 2016, Burundi was still Party to the Statute. *See* Multilateral Treaties Deposited with the Secretary-General, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18& clang=_en (accessed 15 March 2018).

[57] Ministry of Foreign Affairs of Japan, *Kokusai Keiji Saibansho [Intern. Criminal Court]*, June 2016, p. 2, available at: http://www.mofa.go.jp/mofaj/files/000162093.pdf (accessed 15 October 2017).

[58] *Multilateral Treaties Deposited with the Secretary-General*, available at: https://treaties.un.org/Pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXI-6&chapter=21&Temp=mtdsg

participates in the Meeting of States Parties,[59] is considered to be a Member State of the International Seabed Authority[60] in conformity with Article 156(2) of the Convention[61] and required pay assessed contributions as such.[62]

On 28 September 2018, Palestine filed an application with the ICJ against the United States, arguing that the relocation of the US embassy to Jerusalem was in breach of relevant provisions of the Vienna Convention on Diplomatic Relations (VCDR), which required the sending State to establish a diplomatic mission "in the receiving State" to perform its functions and demanded that the diplomatic mission perform its functions while respecting the rule of law, especially international law.[63] Palestine acceded to the VCDR and its Optional Protocol concerning the Compulsory Settlement of Disputes respectively on 2 April 2014[64] and 22 March 2018[65]. It also made a declaration to accept the competence of the ICJ in conformity with Article 35(2) of the Statute of the ICJ and UN SC Resolution 9 (1946) on 4 July 2018.[66] The case was entered in the General List, which suggests that the Registrar, acting under the supervision of the President[67] did not consider that the application by Palestine did clearly not fulfill the formal requirements under the ICJ Statute and the ICJ Rules,[68] including the one that "[o]nly states may be parties in cases before the Court."[69] In November 2018, the Court ordered that the written pleadings to be submitted by the Parties should first be addressed to the question of the jurisdiction of the Court and that of the admissibility of the

3&clang=_en (accessed 15 March 2018). Article 305 of the Convention that it is open to States and some other entities but Palestine does not fall within any of the categories of non-State Parties.

[59] *See* Report of the Credentials Committee, 15 June 2017, SPLOS/315, para. 4; Report of the twenty-seventh meeting of the Meeting of States Parties, 10 July 2017, SPLOS/316, para. 11.

[60] "[T]he Secretary-General [of the Authority] welcomed the State of Palestine as the 167th member of the Authority." *Statement by the President on the work of the Assembly of the International Seabed Authority at its twenty-first session*, 5 August 2015, ISBA/21/A/11, para. 6.

[61] "All States Parties are *ipso facto* members of the Authority."

[62] Report of the Finance Committee, 16 July 2015, ISBA/21/A/6-ISBA/21/C/15, para. 37; Decision of the Assembly relating to financial and budgetary matters, 24 July 2015, ISBA/21/A/10, para. 9. It is not clear from available documents whether Palestine paid its assessed contributions. *See* Report of the Finance Committee, 7 August 2017, ISBA/23/A/8-ISBA/23/C/10, para. 34.

[63] Application instituting proceedings in the ICJ, *State of Palestine v. United States of America*, 28 September 2018, paras. 36–49.

[64] *State of Palestine: Accession*, 2 April 2014, C.N.176.2014.TREATIES-III.3. Article 50 VCDR provides that it shall remain open for accession by any State belonging to any of the four categories mentioned in Article 48, which include "all States Members (…) of any of the specialized agencies." As discussed below 1.2.2.1, Palestine was admitted to UNESCO in 2011.

[65] *State of Palestine: Accession*, 22 March 2018, C.N.149.2018.TREATIES-III.5.

[66] <https://www.icj-cij.org/en/states-not-parties>

[67] Article 26(1)(b), Rules of Court.

[68] *See* S. Yee, *Article 40*, in: A. Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary*, 2nd ed., Oxford University Press, Oxford: 2012, p. 963.

[69] Article 34(1), Statute of the ICJ.

Application.[70] The United States, which does not consider Palestine to be party to the VCDR[71] or its Optional Protocol,[72] declared that it would not participate in the proceedings.[73]

1.2.2. Admission to international organizations

1.2.2.1. *UNESCO*

Palestine was admitted to the United Nations Economic, Social and Cultural Organization (UNESCO) by General Resolution 76 adopted on 31 October 2011,[74] by a majority of 107-14-52.[75] Art. 2(2) of the Constitution of UNESCO[76] provides that "states not members of the United Nations Organization may be admitted to membership of the Organization, upon recommendation of the Executive Board, by a two-thirds majority vote of the General Conference." Since only "states" are qualified to be admitted to UNESCO,[77] one might expect that the Member States voting in favour of Palestine's admission considered it to be a State. However, the was not necessarily the case. Among the 107 Member States which voted in favour, Armenia, Austria, Belgium, Finland, France, Greece, Iceland, Ireland, Luxembourg, Myanmar, Norway, Saint Lucia and Spain had not recognised Palestine as a State.[78] When explaining their votes, Austria,[79] Belgium[80] and France[81] implicitly suggested

[70] *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)*, Order, 15 November 2018.

[71] *United States of America: Communication*, 13 May 2014, C.N.256.2014.TREATIES-III.3

[72] *United States of America: Communication*, 12 October 2018, C.N.487.2018.TREATIES-III.5.

[73] Order, *supra* note 70.

[74] UNESCO, *Records of the General Conference, 36th session, Paris, 25 October – 10 November 2011*, Vol. 1: Resolutions, p. 79.

[75] UNESCO, *Records of the General Conference, 37th session, Paris, 2015*, vol. 2: Proceedings, 11th plenary meeting, para. 57.

[76] Constitution of the UNESCO (adopted 16 November 1945, entered into force 4 November 1946) 4 UNTS 275 (1947).

[77] Art. 2(3) of the UNESCO Constitution provides that "[t]erritories or groups of territories which are not responsible for the conduct of their international relations may be admitted as Associate Members." Palestine was not admitted under this provision as it was admitted as a full Member.

[78] *See* Permanent Observer Mission of the State of Palestine, *supra* note 24.

[79] Ms. Plassnik (Austria): "Austria's yes vote today is a vote in favour of the Palestinian Authority and Palestinian people gaining full access to the valuable work of UNESCO. We hereby underline that the application of Palestine for membership of the United Nations is being dealt with by the Security Council according to the established procedures." UNESCO, *supra* note 75, para. 78.

[80] Mme Chainaye (Belgique): "[La vote] reflète le fait que l'Autorité palestinienne a considérablement progressé sur la voie de la constitution d'un État (…). L'admission à l'UNESCO n'est cependant qu'une étape sur cette voie," UNESCO, *Records of the General Conference, 36th session, Paris, 2015*, vol. 2: *Proceedings*, 11th plenary meeting, paras. 80.2–80.3.

[81] M. de Canson (France) : "Sur le fond, la France dit oui. Oui, la Palestine a le droit de devenir membre de l'UNESCO. (…) La France a toujours été, est aujourd'hui et restera demain du côté

that their votes did not constitute recognition, while Norway[82] delivered an explicit statement to the same effect.[83] In addition, Armenia, Greece, Ireland, Luxembourg, and Myanmar continue to refrain from recognising Palestine as a State, even after its admission to the UNESCO.[84]

1.2.2.2. *Admission to the Permanent Court of Arbitration*

The Permanent Court of Arbitration (PCA) was established on the basis of the Convention de 1899 pour le règlement pacifique des conflits internationaux[85] as well as the revised 1907 Convention.[86] If a "Puissance," to follow the classical language of the Convention, wishes to accede to the Convention, it sends its instrument of accession to the Government of The Netherlands (art. 93(2), 1907 Convention).[87] The conditions of accession shall be determined by the existing Parties to the Convention (Article 94).[88]

Palestine deposited its instrument of accession with the Dutch Government on 30 October 2015.[89] The Dutch Government indicated on its website that Palestine

de la paix. Elle soutient les responsables palestiniens, au premier rang desquels le Président de l'Autorité palestinienne, dans leurs efforts pour l'édification d'un État palestinien (…)" (*ibidem*, paras. 116.3–116.5). For the French position on the recognition of Palestine, *see* also Assemblée Nationale, *Résolution portant sur la reconnaissance de l'État de Palestine*, texte adopté nº 439, 2 décembre 2014, available at: http://www.assemblee-nationale.fr//14/ta/ta0439.asp (accessed 15 October 2015).

[82] Mr. Eriksen (Norway): "Our vote, a yes, is consistent with the need to recognize the legitimacy of Palestinian aspirations and needs as regards the protection of this heritage. Our national procedures to formally recognize the State of Palestine are still pending." UNESCO, *supra* note 75, para. 120.

[83] In conformity with Article 2(2) of the Constitution, the General Conference took its decision upon the recommendation of the Executive Board. None of the EB members stated that the admission would constitute recognition of Palestine as a State. *See* Executive Board, 187th session, Summary Records, 187 EX/SR.6.

[84] Iceland and Saint Lucia recognised Palestine after its admission to UNESCO. *See* Permanent Observer Mission of the State of Palestine, *supra* note 24.

[85] Adopted 29 July 1899, entered into force 4 September 1900; the text of the Convention is available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1899-Convention-FR.pdf (accessed 15 October 2017).

[86] Adopted 18 October 1907, entered into force 26 January 1910; the text of the Convention is available at: available at: https://pca-cpa.org/wp-content/uploads/sites/175/2016/01/1907-Convention-FR.pdf (accessed 15 October 2017).

[87] Art. 93(2): "La Puissance qui désire adhérer notifie par écrit son intention au Gouvernement des Pays-Bas en lui transmettant l'acte d'adhésion qui sera déposé dans les archives dudit Gouvernement."

[88] Art. 94: "Les conditions auxquelles les Puissances qui n'ont pas été conviées à la Deuxième Conférence de la Paix, pourront adhérer à la présente Convention, formeront l'objet d'une entente ultérieure entre les Puissances contractantes."

[89] This paragraph is based on the information available at: Overheid.nl, *Treaty Database*, https://treatydatabase.overheid.nl/en/Verdrag/Details/003316_w.html (accessed 15 October 2018).

had become Party to the Convention on 29 December 2015,[90] despite the fact that The Netherlands itself had not recognised Palestine as a State.[91] Upon protest by the United States,[92] the Dutch Government struck Palestine of the list of Parties. Canada and Israel also addressed similar protests to the Dutch Government. However, the Administrative Council[93] of the PCA decided as follows on 14 March 2016: "By a vote of 54 in favour and 25 abstentions, the Council concluded its consideration by taking note that the State of Palestine is a Contracting Party to the 1907 Hague Convention for the Pacific Settlement of International Disputes, and a Member of the Permanent Court of Arbitration, in accordance with the letter of the depositary of the Convention, the Ministry of Foreign Affairs of The Netherlands, dated 13 November 2015. Palestine has thereby become the 118th Member State of the PCA on 29 December 2015."[94]

On the same day, the Dutch Government again posted Palestine on its website as a Party to the Convention.

1.3. Kosovo

Kosovo declared its independence on 17 February 2008 but remains unrecognised as a State by a number of States. As neither China nor Russia has granted it recognition, Kosovo has no chance of being admitted to the United Nations.[95] However, it has been admitted to the International Monetary Fund (IMF) and to the five international organisations that constitute the World Bank Group, *i.e.* the International Bank for Reconstruction and Development (IBRD), the International Development Association (IDA), the International Financial Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA) and the International Centre for Settlement of Investment Disputes (ICSID) – since 29 June 2009.[96] It is for

[90] The Convention enters into force sixty days after the deposit of the instrument of accession (Article 95).

[91] *See supra* note 24.

[92] "On the basis of [the] subsequent agreement of the parties to the Convention [arrived at on 3 March 1960], eligibility to accede to the Convention has been extended to UN member states. The Government of the United States is not aware of any subsequent decision of the parties to the Convention to extend eligibility to accede to the Convention to entities that are not members of the United Nations. The 'State of Palestine' is not a member of the United Nations. Further, the Government of the United States does not believe the 'State of Palestine' qualifies as a sovereign State and does not recognize it as such."

[93] The Administrative Council is composed of the representatives of the States Parties and decides all questions of administration (Article 49).

[94] PCA, *New PCA Member State: Palestine*, 15 March 2016, available at: https://pca-cpa.org/en/news/new-pca-member-state-palestine/ (accessed 15 October 2017).

[95] *See* art. 4 (2) of the UN Charter, which requires a recommendation of the UN SC.

[96] The website of the IMF Office in Kosovo: http://www.imf.org/en/Countries/ResRep/UVK (accessed 15 October 2017); World Bank, *Member Countries*: http://www.worldbank.org/en/about/leadership/members#1 (accessed 15 October 2017).

the Board of Governors of the IMF to decide whether to admit a "country" to the Fund.[97] Since the Articles of Agreement of the IMF gives each Member a voting power basically proportionate to the amount of its quota,[98] it is not difficult for States that have recognised Kosovo as a State, which include the largest contributing States such as the United States, Japan and Germany, to constitute a majority in the voting.[99] The IBRD's membership is open to all IMF Members[100] and that of the other organizations of the World Bank Group is open to all IBRD Members.[101]

Kosovo has been admitted also to the PCA following a process similar to the abovementioned case of Palestine's accession.[102]

2. Analysis

The practice summarised in the preceding section indicates that the admission of an entity to an international organisation[103] is irrelevant to recognition being granted to the entity by the existing Member States (A.), produces constitutive effects *erga omnes partes* within the organisation (B.), and produces certain effects beyond the organisation (C.).

2.1. The irrelevance of admission to international organisations to recognition

As mentioned in the Introduction of the present paper, it is generally understood that admission to an international organisation does not constitute recogni-

[97] Art. II, Section 2, Articles of Agreement of the International Monetary Fund (adopted 27 December 1945, entered into force 27 December 1945) 2 UNTS 39 (1947).

[98] Art. XII, Section 2(e) and Section 5(a).

[99] Decisions are taken by a majority of the votes cast (art. XII, Section 5(c)). *See* also IMF, *IMF Members' Quotas and Voting Power, and IMF Board of Governors*, available at: http://www.imf.org/external/np/sec/memdir/members.aspx (accessed 15 October 2017).

[100] Art. II, Section 1, Articles of Agreement of the International Bank for Reconstruction and Development, <http://go.worldbank.org/Q53G3UP520>

[101] Art. II, Section 1, Articles of Agreement of the International Financial Corporation, available at: http://www.ifc.org/wps/wcm/connect/corp_ext_content/ifc_external_corporate_site/about+ifc_new/ifc+governango/articles/about+ifc+-+ifc+articles+of+agreement+-+article+ii (accessed 15 October 2017); art. II, Section 1, Articles of Agreement of the International Development Association, available at: http://ida.worldbank.org/sites/default/files/IDA-articles-of-agreement.pdf (accessed 15 October 2017); art. 67, Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (1968); art. 4(a), Convention Establishing the Multilateral Investment Guarantee Agency (adopted 11 October 1985, entered into force 12 April 1988) 1508 UNTS 99 (1988).

[102] PCA, *New PCA Member State: Kosovo*, available at: https://pca-cpa.org/en/news/new-pca-member-state-kosovo/ (accessed 15 October 2017); Overheid.nl, *Treaty Database*, available at: https://treatydatabase.overheid.nl/en/Verdrag/Details/003316_w.html (accessed 15 October 2017).

[103] It is to be recalled that the admission includes the granting of the status of observer State for the purposes of the present paper.

tion of the newly-admitted member as a State by the existing Member States voting against. The recent practice confirms this general understanding, but goes a little further, in that even the Member States voting in favour of, or refraining from blocking the consensus on, the admission do not necessarily recognise the newly admitted Member as a State.

When Palestine was admitted to UNESCO, a number of the existing UNESCO Member States voted in favour of the admission, while making it clear that their votes did not constitute their recognition of Palestine as a State, despite art. 2(2) of the UNESCO Constitution that provides that only States qualify to be granted to UNESCO membership (1.2.2.1. above).

How would it be possible to explain this apparently contradictory attitude? One possible explanation would be that the "State" in the sense of the UNESCO Constitution is different from the State in the sense of general international law. Such an acrobatic interpretation of the term "State" in the UNESCO Constitution is not absolutely impossible but is admittedly far from "the ordinary meaning to be given"[104] to the term. The acrobatic character of the interpretation is magnified by the fact that Palestine has already acceded to or ratified nine treaties that are open to all UNESCO Member States.[105] If we accept that the meaning of the "State" under the UNESCO Constitution is different from the one under general international law, we are therefore bound also to accept that there exist at least ten treaties (the said nine treaties and the UNESCO Constitution) that adopt an original meaning of such a fundamental term as "State." It is to be noted that there are some thirty more treaties that are open to all UNESCO Member States.[106]

Another possible explanation can be made from the perspective of the declaratory theory of recognition of States. Since that asserts that statehood is not dependent upon recognition,[107] it is possible for Palestine to fulfill the criteria for statehood irrespective of the lack of recognition by other States. In addition, there is no obligation of recognition[108]: States that consider an entity to fulfill the criteria of statehood are under no international obligation to recognise it as a State.[109]

[104] Art. 31(1), VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 332 (1980).

[105] *See* Palestine, *Ratified Conventions*, available at: http://www.unesco.org/eri/la/conventions_by_country.asp?contr=PS&language=E&typeconv=1 (accessed 15 October 2017).

[106] *See* Palestine, *Non-ratified Conventions*, available at: http://www.unesco.org/eri/la/conventions_by_country.asp?contr=PS&language=E&typeconv=0 (accessed 15 October 2017).

[107] Résolution de l'Institut de droit international, „La reconnaissance des nouveaux Etats et des nouveaux gouvernements," Annuaire de l'Institut de droit international, 1936-II, p. 301. "Article 1 (…) (2) La reconnaissance a un effet déclaratif. (3) L'existence de l'Etat nouveau avec tous les effets juridiques qui s'attachent à cette existence n'est pas affectée par le refus de reconnaissance d'un ou plusieurs Etats."

[108] *Ibid*. "Article 1 (1) La reconnaissance d'un Etat nouveau est un acte libre."

[109] *Contra* H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1948, pp. 12–22. It is to be noted that the learned author advocates the constitutive

When an existing UNESCO Member State votes for the admission of Palestine to the UNESCO, it is deemed to regard Palestine as fulfilling the criteria of statehood, since only States can qualify for UNESCO membership. However, such an existing Member State is in no way obliged to grant recognition to Palestine in the absence of the obligation to recognise. There is thus no contradiction between voting in favour of the admission of Palestine as a Member State of the UNESCO and withholding recognition of Palestine as a State.

This second explanation finds support in Japan's position with respect to the DPRK. As we observed in 1.1 above, while Japan considers that the DPRK fulfills the criteria of statehood and did not block the consensus in the UN GA deciding to admit the DPRK into the UN, it continues not to recognize the DPRK as a State because "there is no obligation of recognition even if the conditions for State recognition has been fulfilled."[110] The second explanation is also in line with the practice of France, The Netherlands, Australia and Japan, which regard Palestine as a Member State of the ICC despite the fact that all of them continue to make it clear that they have not recognised Palestine as a State; as well as with the practice of those UN Member States that voted in favour of granting Palestine the status of observer State and nevertheless continue to refuse to recognise it as a State (1.2.1 above).

It is often argued that States do not deem themselves free to grant or refuse recognition to new States in an arbitrary manner, by exclusive reference to their own political interests, and regardless of legal principle.[111] However, the recent practice examined in this paper indicates that, as far as the refusal of recognition is concerned, States enjoy complete freedom.[112] Such unfettered discretion causes little problem in practice, as States that have not recognised an entity as a State do enter into international law relations with it irrespective of their withholding recognition, if they consider that the entity in question fulfills the criteria of statehood. In other words, the effect of recognition is purely declaratory.

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theory of recognition. He is in fact doing nothing more than arguing that States are not in a position to prevent a State from coming into existence by withholding recognition. *Ibid*, p. 74. In any case, it is well known that Lauterpacht's plea for a duty of recognition has no basis in State practice. J. Crawford, *Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 22.

[110] Committee on Foreign Affairs, *supra* note 16.

[111] R. Jennings, A. Watts, *Oppenheim's International Law*, 9th ed., vol. 1, Longman, London: 1992, pp. 132–133.

[112] Maia concludes, after a careful analysis of State practice, that the most of the States that have not recognized Palestine as a State do not deny the existence of a State of Palestine but consider that the granting of recognition at this moment is politically untimely. C. Maia, *Les positions politiques et les justifications juridiques des Etats au regard de la reconnaissance (ou non reconnaissance) de la qualité d'Etat de la Palestine*, in: T. Garcia (ed.), *La Palestine. D'un Etat non membre de l'Organisation des Nations Unies à un Etat souverain ?*, Pedone, Paris: 2016, pp. 141–142.

2.2. The constitutive effect *erga omnes partes* of the admission within the international organization

On the other hand, the admission of a new Member State into an international organisation has constitutive effects, in that the admission creates rights and obligations valid and applicable under the constitutive document of the organisation (*e.g.* the UNESCO Constitution). The legal effects arising from the admission (or the granting of the status of observer State) apply *erga omnes partes* in that no member State of the organiaation (*i.e.* no State Party to the constitutive document) has any legal means to escape from the legal effects of the admission of (or the granting of the status of observer State to) an entity which it does not recognise as a State.

As we mentioned above, the budget of the ICC has been adopted by consensus. It follows that Canada, who sent a communication to the UN Secretary-General to make it clear that it did not regard Palestine as a State Party to the Rome Statute because Palestine did not meet the criteria of a state under international law from the Canadian perspective,[113] did not block the decision-making procedure in which Palestine participates as a State Party. As a matter of practice, it is difficult for Canada, or for any other States that have not recognised Palestine as a State, to exclude Palestine from the decision-making procedure in the Assembly of States Parties because they will find little support in such an attempt in an Assembly in which the majority consider Palestine a State. It is to be recalled that Palestine's instrument of accession was accepted by the Secretary-General because of UN GA Resolution 67/19. In practice, a minority that was not able to prevent the adoption of a resolution in the UN GA would not constitute the majority in the Assembly of States Parties.[114] Therefore, although neither the UN Secretary-General[115] nor (the majority of) the States Parties to the Rome Statute are in a position to ob-

[113] *See* Canada: Communication, *supra* note 46.

[114] Art. 112(7) of the Rome Statute provides that if consensus cannot be reached in the Assembly of States Parties, decisions on matters of substance are taken by a two-thirds majority and those on matters of procedure are taken by a simple majority. If the question arises whether a matter is one of procedure or of substance, the decision is ultimately taken by a simple majority (Rule 64, Rules of Procedure of the Assembly of States Parties, available at:https://asp.icc-cpi.int/iccdocs/asp_docs/Publications/Compendium/RulesOfProcedureASP-ENG.pdf (accessed 15 October 2017)).

[115] "In conformity with the relevant international rules and his practice as a depositary, the Secretary-General has ascertained that the instruments received were in due and proper form before accepting them for deposit, and has informed all States concerned accordingly through the circulation of depositary notifications. (…) This is an administrative function performed by the Secretariat as part of the Secretary-General's responsibilities as depositary for these treaties. It is important to emphasize that it is for States to make their own determination with respect to any legal issues raised by instruments circulated by the Secretary-General." UN Secretary-General, *Note to correspondents – Accession of Palestine to multilateral treaties*, 7 January 2015, available at: https://www.un.org/sg/en/content/sg/note-correspondents/2015-01-07/note-correspondents-accession-palestine-multilateral (accessed 15 October 2017).

jectively determine that Palestine is a State, the States Parties that do not regard Palestine as a State Party to the Statute are, in practice, bound to treat Palestine as such.[116]

The same observation applies to the PCA, the IMF or the World Bank Group organisations, wherein some Member States continue to refuse to recognize Palestine or Kosovo as States. Irrespective of their refusal of recognition, they have no legal means to escape from the legal effects arising from Palestine's or Kosovo's membership. For example, the IMF and the World Bank have been conducting various projects in and concerning Kosovo.[117] Although quite a few of their members – such as Brazil, China, India, Russia, South Africa or Spain – have not recognized it as a State, they have no legal means to block these activities.

Another example, though hypothetical for the moment, is the election of judges at the International Tribunal for the Law of the Sea (ITLOS). If a judge nominated by Palestine is elected,[118] could Canada challenge him/her in a proceeding in which it is a disputing party – suppose that Palestine requests the prompt release of a Palestinian ship arrested by the Canadian authorities in Canada's exclusive economic zone[119] – for the reason that he/she was not nominated by a "State Party"?[120] The decision on such a challenge is to be taken by the majority of the other members of the Tribunal present.[121] It is wholly unrealistic that the majority of the judges vote in favour of the challenge, since the targeted judge was, by definition, elected by the majority of the States Parties to the United Nations Convention on the Law of the Sea (UNCLOS). Canada will thus simply be obliged to plead before the bench including a judge nominated by Palestine, which it refuses to regard as a State Party to UNCLOS.

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[116] *See* J.-C. Martin, *Le statut de la Palestine dans les organisations internationales*, Annuaire français de droit international 213 (2016), p. 221.

[117] IMF, *Republic of Kosovo : 2017 Article IV Consultation*, available at: http://www.imf.org/en/Publications/CR/Issues/2018/02/05/Republic-of-Kosovo-2017-Article-IV-Consultation-Press-Release-Staff-Report-and-Statement-by-45612 (accessed 15 October 2017); IBRD & IDA, *Kosovo: Competitiveness and Export Readiness Project*, available at: http://projects.worldbank.org/P152881/?lang=en&tab=overview (accessed 15 October 2017); IFC, *Kosovo KEDS Privatization*, available at: http://www.ifc.org/wps/wcm/connect/4fdd9c3c-bae3-4774-b588-cd8f4fa60341/KosovoKEDSPrivatization_Booklet_FINAL.pdf?MOD=AJPERES (accessed 15 October 2017); MIGA, *RBI Central Bank Mandatory Reserves Coverage*, available at: https://www.miga.org/pages/projects/project.aspx?pid=3634 (accessed 15 October 2017).

[118] Art. 4(4), Statute of the International Tribunal for the Law of the Sea: "The persons elected to the Tribunal shall be those nominees who obtain the largest number of votes and a two-thirds majority of the States Parties present and voting, provided that such majority includes a majority of the States Parties." Annex VI to United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (1994).

[119] Articles 73(2) and 292 of UNCLOS.

[120] Art. 4(1), Statute of the International Tribunal for the Law of the Sea: "Each State Party may nominate not more than two persons having the qualifications prescribed in article 2 of this Annex. The members of the Tribunal shall be elected from the list of persons thus nominated."

[121] Art. 8(4), Statute of the International Tribunal for the Law of the Sea.

States participating in an international organisation are bound by the decisions taken following the procedure to which they have given their consent by becoming Members.[122] If they nevertheless wish to escape from the legal effects of such decisions, all they can do is to withdraw from the organisation.[123]

2.3. Effects of the admission beyond the international organisation

In the previous section, we argued that the admission to – or granting of the status of observer State in – an international organisation produces legal effects upon all Member States, including those that continue to refuse to recognise the new Member as a State. What about the *external* legal effects of the admission or the granting of the status of observer State, *i.e.* legal effects not based on the constitutive document of the organisation? It goes without saying that the admission or the granting of the status of observer State will be taken into account when examining whether it fulfills the criteria of statehood.[124] Is there anything more than that?

As indicated in 1.2.1.2 and 2.1 above, Palestine is now party to a number of treaties of which the UN Secretary-General or the UNESCO Director-General is depositary. These treaties are open to non-members of the UN or UNESCO, and are legally independent of the UN Charter or the UNESCO Constitution. It suffices to pick up a few examples to illustrate the legal situation. Palestine deposited its instrument of accession to the International Convention on the Elimination of All Forms of Racial Discrimination on 2 April 2014.[125] Canada, Israel and the United States are all parties to the Convention and sent communications indicating that they do not consider that the Convention enters into force between them and Palestine.[126] What if Palestine brings a matter in relation to any of them to the Committee,[127] in conformity with Article 11?[128] The Committee will certainly fol-

[122] J. Charpentier, *La reconnaissance internationale et l'évolution du droit des gens*, Pedone, Paris: 1956, p. 331.

[123] In its statement of the withdrawal from UNESCO, the United States referred to "continuing anti-Israel bias at UNESCO," suggesting that Palestine's admission to UNESCO resulted in its withdrawal. Press Statement, *The United States Withdraws from UNESCO*, 12 October 2017, available at: https://www.state.gov/r/pa/prs/ps/2017/10/274748.htm (accessed 15 October 2017).

[124] "[M]embership [of the UN] provides evidence of the legal personality of States." Dugard, *supra* note 9, p. 64.

[125] Convention on the Elimination of All Forms of Racial Discrimination, State of Palestine: Accession, U.N. Doc. C.N.183.2014.TREATIES-IV.8.

[126] Canada: Communication, 14 May 2014, U.N. Doc. C.N.265.2014.TREATIES-IV.2; Israel: Communication, 16 May 2014, U.N. Doc. C.N.293.2014.TREATIES-IV.2; United States, Communication, 13 May 2014, U.N. Doc. C.N.258.2014.TREATIES-IV.2.

[127] Art. 8 of the Convention: "There shall be established a Committee on the Elimination of Racial Discrimination."

[128] "1. If a State Party considers that another State Party is not giving effect to the provisions of this Convention, it may bring the matter to the attention of the Committee. (…) 3. The Committee shall deal with a matter referred to it." International Convention on the Elimination of All Forms

low the understanding of the UN GA (1.2.1.2) and deal with Palestine's communication. Canada, Israel or the United States will ignore Palestine's communication even if the Committee requests them to participate in the procedure. Although the Committee's report embodying its findings and recommendations[129] has no legally binding character, "great weight"[130] will be ascribed to them. A more significant example is again UNCLOS. If Palestine brings a dispute against Canada to an arbitral tribunal,[131] the tribunal will be composed and render its award, which is legally binding upon Canada,[132] even if Canada refuses to participate in the proceedings for the reason that it does not regard Palestine as a State Party to UNCLOS.[133] In these cases, the admission to or the granting of the status of an observer State in an international organisation will produce legal effects beyond the framework of the constitutive document thereof.

Conclusions

The recent practice of collective recognition examined in the present paper endorses the declaratory theory of recognition. "L'existence de l'État souverain est indépendante de sa reconnaissance par les autres États."[134] If the existence of a State is independent of its recognition by other States, the latter can, if they wish to, refrain from recognising the former as a State even where they consider it to fulfill the criteria for statehood. As Japan stated, "there is no obligation of recognition even if the conditions for State recognition has been fulfilled."[135] Therefore, nothing prevents States that vote in favour of the admission of an entity to an international organisation that only States are qualified to join, from withholding recognition of the new Member as a State.

On the other hand, the admission of an entity to an international organisation as a Member State (or the granting of the status of observer State to an entity) produces constitutive legal effects *erga omnes partes*. Canada, who not only refuses

of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195 (1971).

[129] Art. 13(1) of the Convention: "When the Commission has fully considered the matter, it shall prepare and submit to the Chairman of the Committee a report embodying its findings on all questions of fact relevant to the issue between the parties and containing such recommendations as it may think proper for the amicable solution of the dispute."

130 *See* ICJ, *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, 30 November 2010, ICJ Rep 2010, p. 639, para. 66.

[131] Articles 286 and 287 and Annex VII, UNCLOS.

[132] Art. 296(1), UNCLOS.

[133] Art. 288(4), UNCLOS. *See Arctic Sunrise (Netherlands v. Russia)*, PCA Case No. 2014-02, Award on the Merits, 14 August 2015, para. 10; *South China Sea (Philippines v. China)*, PCA Case No. 013-19, Award, 12 July 2016, para. 1180.

[134] A. Rivier, *Principes du droit des gens*, t. 1, Arthur Rousseau, Paris: 1896, p. 57.

[135] Committee on Foreign Affairs, *supra* note 16.

to recognize Palestine as a State but also considers it to fail to fulfill the criteria of statehood under international law, is nevertheless bound by collective decisions taken by the organisation on the basis that Palestine is one of its Member States (or an observer State).

This is because Canada, by joining and remaining a Member State, has accepted institutional rules of the organisation, including the 1973 UN GA recommendation/understanding, which instructs the UN Secretary-General as depositary of multilateral treaties to follow the decision of the UN GA with respect to the question of whether an entity is a State. Palestine's membership of the ICC being nothing but the result of the application of this rule, Canada cannot escape from the legal effects of Palestine's membership of the ICC.

This role of institutional rules represents the specificity of the questions discussed in the present paper. Dionisio Anzilotti, in defending the constitutive theory of recognition, asserted that recognition constitutes a "premier accord" or "accord initial" by which the recognised entity becomes a subject of the decentralised international legal order. Since it is an agreement, it has a constitutive character and is not opposable to non-parties.[136] In contrast, in the institutionalised legal order based on the constitutive document of an international organisation, such a "premier accord" or "accord initial" is constituted by the combination of an application by a potential member and of the collective decision of the organisation to admit it. Members of the organisation are not in a position to escape from the legal effects entailed by such collective decision, unless the institutional rules of the organisation provide otherwise.

Abstract: It is generally considered that the admission of an entity to an international organisation open only to States constitutes recognition of the entity as a State by existing Member States voting in favour of its admission. However, recent practice indicates that even those existing Member States do not consider that they have recognised a new Member as a State by their affirmative votes. The recent practice thus endorses the declaratory theory of recognition. On the other hand, the admission of an entity to an international organisation produces constitutive legal effects *erga omnes partes*. In the institutionalised legal order based on the constitutive document of an international organisation, a "premier accord" or "accord initial" (D. Anzilotti) is constituted by the combination of an application by a potential member and the collective decision of the organisation to admit it.

Keywords: collective recognition, admission to international organisations, Democratic People's Republic of Korea, Palestine, Kosovo.

[136] D. Anzilotti, *Cours de droit international*, translated by G. Gidel, Sirey, Paris: 1929, p. 161.

State Responsibility for Unlawful Recognition

*Władysław Czapliński**

On 5 December 2017, President of the USA Donald Trump declared that he recognised Jerusalem as the capital city of Israel, and decided (on principle) that the seat of the US Embassy would move from Tel Aviv to Jerusalem. Actually achieved on 14 May 2018, this transfer was contrary to numerous resolutions issued by political organs of the UN. According to the Ministry of Foreign Affairs of Israel, a transfer of location of diplomatic representation is not a precondition for Jerusalem to be recognised as the capital. Other States opposed the US position, though the only action taken came in the form of a suit brought by Palestine, claiming that the relocation of the Embassy was contrary to the 1961 Vienna Convention on Diplomatic Relations which required that a diplomatic representation be situated in the territory of the receiving State. The dispute revolves around several questions of importance regarding the statehood of Palestine and the status of Jerusalem. The proceedings make reference to the issue of unlawful recognition.

1. Rules on state responsibility in international law

As UN GA Resolution 56/83 of 12 December 2001 confirms, Articles on state responsibility (ARSIWA) gain the universal acceptance of the international community as a codification of customary law. In accordance with them, there are two preconditions relating to international responsibility: a violation by a state of an international obligation incumbent upon it, and an attribution of a specific action/omission to a state. The former condition is preliminary, as it will first need to be established whether a state has in fact failed to meet its international obligation. The same is true of recognition. The latter condition will be fulfilled automatically in a case of unlawful recognition, as the recognition is always granted by an agency empowered to act on behalf of the state, i.e. a head of State, head of government or Minister of Foreign Affairs. While in practice, declarations amounting to recog-

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nition (usually *de facto*) are often issued by Parliaments, their international legal importance is limited.

Our consideration here is restricted to the recognition of states and governments, as the most sensitive issues. The recognition afforded states also covers the recognition of territorial changes, and mostly therefore issues of the acquisition of territory by the threat or use of force, or situations contrary to the right to self-determination. In the international law on recognition, it is possible to find one important positive obligation: recognition of a subject failing to meet the criteria for statehood, i.e. lacking at least one element thereof in line with the definition of a state under the Montevideo Convention of 26 December 1933 on the Rights and Duties of States.[1] In its Art. 1, the Convention indicates that a state is to meet four criteria, regarding territory, population, government (public authority) and the ability to establish international relations with other states. As a result of the evolution of international law, the last of the requirements mentioned here has been abandoned, with the result that the so-called three-element definition of the state has gained general acceptance. As international law developed, some additional criteria were suggested (especially in legal writing). However, these were less concerned with the state as a subject of international law, and participant in international relations, and more with conditions for recognition. For example, the doctrine mentions the requirement that there be a democratic form of government, respect for the human rights and the rule of law, admission to a particular international organisation, the holding of a referendum on sovereignty and independence, sufficiently broad recognition by the international community, a minimum territory and population, certain political obligations (under Art. 4 of the UN Charter, requiring members to be peace-loving, as well as the general ability to meet obligations imposed by the said Charter), etc.[2]

While an entity[3] that does not meet the criteria set out in the Montevideo Convention should not gain recognition, that is obviously a hypothetical position. In the absence of a central law-applying agency, each state evaluates a legal situation itself. Since recognition is voluntary and political, it should be assumed that a given acting state will maintain that, from its point of view, the criteria for statehood have been fulfilled. This idea will scroll in further considerations of the work. An excellent manifestation of such a policy came in the form of the Guidelines for European Political Cooperation dated December 16, 1991. These defined the conditions to be met in order for the EEC Member States to recognise new states established on the territory of the former Yugoslavia and the former USSR.[4] In line with the opinion

[1] LNTS vol. 165, p. 19.

[2] Cf. E. Wyler, *Théorie et pratique de la reconnaissance d'Etat*, Bruylant, Bruxelles: 2013, p. 36ff.

[3] We deliberately do not refer to a "State" here.

[4] On the activities of the Badinter Commission – the advisory committee of lawyers founded within the framework of European Political Cooperation with a view to resolving legal questions associated with the collapse of Yugoslavia, *see* P. Radan, *Post-secession international borders: A*

of the Commission at least, Bosnia and Herzegovina did not meet the aforementioned conditions (opinion no. 4 – no referendum on independence was held in Bosnia and Herzegovina), and Croatia neither (opinion no. 5 – no legislation on the protection of minorities had been introduced).[5] In spite of this, Germany and Austria recognised both former Republics as independent states, forcing further recognition by other EEC Member States, and recognition that was in fact granted very promptly. At the same time, reference was made to the right to self-determination, vested in the populations of the two former Republics on the basis of international law and the constitutional law of the SFR of Yugoslavia. However, this argument is not convincing, because the recognition concerned states, not peoples / nations. On the other hand, it had already been decided that the central government in Belgrade had lost control over Croatia.[6]

In the doctrine of international law, the notion of premature recognition appears in this context, i.e. where some state recognises an entity that does not meet the criteria for statehood. The case of Panama, which declared independence on 3 November 1903, and was recognised by the USA 10 days later, notwithstanding the fact that the process shaping independence had only just started, was referred to as an example of recognition that was premature,. However, the purpose was to apply pressure on Colombia in line with American interests relating to the construction of the Panama Canal. Interestingly, the US agreed to pay Colombia reparation for unlawful recognition (this remaining the only case of this kind). Less clear-cut were earlier cases of the recognition of former Spanish colonies in Latin America after 1810, by the United Kingdom and the USA, long before they gained the recognition of Spain. While Argentina was recognised by the USA in 1822, it was only recognised by Spain in 1863. In those cases, the argument of the loss of effective power by Spain was put forward. Protests by Spain were not neglected. The last examples are the recognition of the secession of Belgium by the European Concert of Powers in 1831 and by The Netherlands in 1839, as well as the recognition of Israel by the US and the USSR in May 1948, despite the fact that its territory was still occupied by the United Kingdom and France. In each case, recognition was condemned in the verbal sphere, but no attempt was made to retaliate. This means

critical analysis of the opinions of the Badinter Arbitration Commission, Melbourne UnivLR 24 (2000), p. 50; A. Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, EJIL 3 (1992), p. 178; W. Czapliński, *Działalność Komitetu Arbitrażowego do spraw Jugosławii*, 12 PiP 49 (1994), p. 74.

[5] Some authors referred to the fact that Lithuania did not meet the criteria for statehood at the time it gained international recognition. The same was true with respect to Georgia before March 1992, Tatarstan, Chechenya, etc.

[6] According to J. Dugard, *The Secession of States and Their Recognition in the Wake of Kosovo*, RCADI 357 (2011), p. 161, the function of recognition was reversed. It seems that recognising States intended not to recognise Kosovo as a State that met the requirements of statehood, but instead to ensure the fulfilment of these requirements by their act of recognition.

that recognition can be premature if the predecessor country effectively controls the new state (which has seceded). The assessment of whether the new state meets the postulated criteria remains subjective; moreover, the competence to recognise the state is discretionary, as clearly emphasised by the US in the Israeli case.[7]

2. Establishing a state under international law – some criteria

Traditionally, the view prevailing in international law was that the creation of a state represents a legal fact not subject to assessment from the point of view of legality. This position evolved, however, and with the passage of time there began to be an indication that the succession of states, including inevitably the establishing of a state, must accord with international law, and – as is generally suggested by the authors – with peremptory norms. We have doubts as to the narrow interpretation of the law.

We identify two situations in which the creation of a state may be incompatible with international law. First, if territorial changes arose as a result of the use of force; secondly, if the creation of a state is incompatible with the right to self-determination.

The prohibition on the use of force in contemporary international relations is not questioned seriously. Sometimes a dispute arises as to whether the prohibition on the use of force is absolute (i.e. applicable in all situations, except those provided for in the UN Charter), or whether the prohibition applies only to the use of force against the sovereignty or territorial integrity of the state, or otherwise signals incompatibility with the UN Charter in respect of Art. 2 (4) thereof. Regardless of which stance we adopt, the use of force cannot be the basis for the violation of the territorial integrity of a state, or for interventions in internal relations (in matters reserved for the exclusive competence of the state). It should be assumed that recognition of a state or government created as a result of the use of force would be an internationally wrongful act. However, the situation begins to grow complicated if we consider cases of the use of force whose legality is not fully explained. This is especially true of the use of force by a third country to help groups fighting for the exercise of the right to self-determination (traditionally referred to as national liberation movements), and to create a state as a result of humanitarian intervention, also by third states.

In the first case, the condition of legality is the recognition of the subjectivity of an international legal group fighting for self-determination. The very possibility of support for armed movements was not formulated in Resolution 1514 (1960) on the granting of independence to colonial peoples, but only in the later Resolution 2105 (1964) concerning support for colonies subjected to the domination of Portugal, South Africa and Rhodesia. This Resolution recognised the legitimacy of the struggle of a colony's population for self-determination, and called upon all states to provide material and political support. It is not obvious, however, whether

[7] *Ibidem*, p. 145.

UN GA had in mind the armed struggle (as so many of the UN Member States maintained), or whether support given to such a fight could be of a military nature. Authoritative, and considered a legal interpretation of the UN Charter, Resolution 2625 (XXV) did not comment on this matter, limiting itself to the obligation of states not to use force against people struggling for self-determination. Peoples who opposed this type of activity could seek international support. Similarly, we find ambiguous wording in Resolution 3314 (XXIX) – definition of aggression – and in numerous UN SC resolutions. However, while some UN instruments from the 1980s referred to the law acting in support of armed struggle (such as UN GA Resolution 36/103 – Declaration on inadmissibility of intervention), such terminology was abandoned after 1991. The dispute has gone unresolved through to the present day, and differences of interpretation were made manifest in, for example, the different positions states adopted in the proceedings before the ICJ concerning *the wall on Palestinian territory*. It should also be remembered that the already-cited Resolution 2625 forbade states from organising, encouraging, assisting with or participating in civil war or terrorist acts in other countries, including also the organisation of such activities where improper use of force was deemed to have occurred.

It is also difficult to imagine a situation in which the purpose of humanitarian intervention (assuming legality and admissibility) would be support for the secession of a part of national territory (we will return to this matter below). Admittedly, this was the result of India's intervention in East Pakistan, which led to the creation of Bangladesh. Similarly, if the NATO countries had not intervened in defence of the people of Kosovo in 1999, Kosovo would not be established (although in this case the connection between NATO's military operations and independence is more difficult to detect). The popular concept of responsibility for protection also requires the consent of the UN SC, and the actions of the Council must comply with international law, and thus cannot lead to violation of the territorial integrity and sovereignty of other states. If armed actions are taken on the basis of a decision of the UN SC, these can be assumed to be lawful. If they result in a change of government, their recognition will be completely justified, albeit non-mandatory. The problem of the illegality of recognition and its evaluation does not therefore arise.[8]

Since the entry into force of the UN Charter, the provisions of which have been confirmed by Article 1 of the International Covenants on Human Rights, the normative nature of the right to self-determination has had to go unquestioned. And it also proves important for the determination of international legal personality. A further decisive question concerns whether the right to self-determination is vested

[8] By way of analogy, we might note that the legal assumption would involve the recognition of a government arising as a result of armed conflict with the consent of the UN SC on another basis, e.g. in the defence of a legal government or democratic system – as was in fact the case for the intervention in Haiti by virtue of Resolution 875 (1993).

only in peoples exercising the right to create their own state, or also nations, that is, the population of the state (which in the German doctrine is described aptly as *Staatsvolk*). However, from our point of view, there are some important issues relevant to the subject of the reflection. First of all, the right to self-determination has a territorial dimension, i.e. it is enjoyed by the population of a specific territory, and not people in the ethnic understanding (as commonly understood and associated). Secondly, contrary to the view disseminated in the first half of the 1990s, during the breakup of Yugoslavia and the USSR, the right to self-determination is vested, not only in groups of individuals living in federal states, but also in the population of unitary states (as the example of Kosovo makes clear). Thirdly, the right to self-determination is vested in peoples, not minorities only entitled to autonomy. However, international law has not arrived at a universally accepted formulation where minorities are concerned (like with the definition of a people), with this matter being left to the states themselves. Thus, international legal status and subjectivity remain conditional on recognition by third countries. Fourthly, classical international law distinguished several types of non-state actors, including the belligerent and the grouping leading the national liberation struggle. All these entities in fact shared a common feature: they sought to pursue the right to self-determination, be it internal or external. Also, their personality was secondary, dependent on the will of States, but from the point of view of the state most concerned (in which the armed struggle took place or there was a non-international conflict), this legal personality was denied. In this context, the term "terrorism" is often abused, while the term "word of mouth" has a meaning not defined in international law in connection with the lack of a universally accepted definition of terrorism. And in this case, we are left with qualifications regarding entities recognised by the international community (third countries and international organisations). If these entities are recognised, we may have a violation of international law in the form of interference in the internal affairs of a state.

Another case will entail recognition in violation of the obligation not to recognise unlawful situations. ARSIWA mentions the obligation not to recognise illegal situations as one of the consequences of a serious violation of *jus cogens* standards. This, however, narrows the real significance of the obligation not to recognise illegal situations. There are no grounds for the effects of the *ex iniuria ius non oritur* principle, which undoubtedly has the status of a general rule of law, to be limited to the most serious infringements of standards of fundamental importance to the international community.

3. Secession

In the doctrine of international law, a prevailing view holds that law is neutral in relation to secession, which is to say that the latter is neither forbidden nor supported. However, states approve of secession with reluctance, trying to avoid

it.[9] Such an opinion is, in fact, illogical and contradictory. On the one hand, it seems to confirm the idea that the creation of a state is a matter of fact (having certain legal consequences, as mentioned above). On the other hand, it indicates that states are doing everything to avoid secession – which is understandable, because they are afraid that each of them may become the subject of a similar division in the future. If we analyse the process of creating customary law in this context, we must say that these distanced positions of states mean nothing other than *opinio iuris* expressing the lack of acceptance for secession.[10] There are of course exceptions, but even in situations such as the emergence of Kosovo,[11] the international community is strongly divided (we can talk about a 50:50 division, despite the significant support from many states playing an important role in international relations).

The scepticism of states in relation to secession contrasts with the universal recognition of the principle of territorial integrity of states as one of the basic principles of international law. It is enough to point to Article 2(4) of the UN Charter, Article 1 of the OAS Charter and Article 3(b) of the African Union Charter, the CSCE Final Act, UN GA Resolutions 1514 (XV)[12] and 2625 (XXV)[13]; and the Resolution of the World Summit. The practice of international bodies also makes clear the illegality of interventions in the internal affairs of the state. The ICJ was *inter alia* invoked in the context of the *Nicaragua* and *Corfu Channel* rulings,[14] as was the Badinter Committee in its opinion No. 2.[15] However, this does not mean that secession engaged in with the consent of the home state (predecessor) is unacceptable. An example would be the separation of Montenegro from Serbia in 2006, carried out in accordance with the union contract; others are Eritrea and South Sudan. From the point of view of international law, the conformity of the secession

[9] A. Tancredi, *Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia*, ItYBIL 18 (2008), pp. 37ff, and the literature cited there.

[10] *See* reactions Catalonia's attempt to declare its independence in October 2017, https://www.politico.eu/tag/catalan-independence.

[11] In the literature, and also in the proceedings before the ICJ in the case concerning the *legality of the Unilateral Declaration of Independence in respect of Kosovo*, it was emphasised that the specifics of Kosovo reflected the existence of a long-term and bloody ethnic conflict that gave rise to documented fatalities in excess of 13,500, with the expulsion of some 200,000 people also taking place. Another matter was that a conflict of this kind well enough known to history produced such heavy losses but did not prove a matter for international intervention. Thus argumentation as to the exceptional nature of Kosovo's situation does not stand up to criticism.

[12] Any attempt aimed at the partial or total disruption of the national unity and territorial integri-ty of a country is incompatible with the Purposes and Principles of the UN Charter.

[13] Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.

[14] Respectively ICJ Rep. 1986, pp. 111, 128, as well as 1949, p. 35.

[15] In the cited opinion, the Committee indicated that the Serb-inhabited Republika Srpska in Bosnia-Herzegovina and Croatian Krajina had the right to autonomy within the respective states, but no right to self-determination and secession.

process with the national law of the country concerned is also irrelevant. It seems otherwise that constitutions will rarely contain any legal regulations enabling or facilitating the secession of parts of national territory,[16] and this is confirmed by judicial decisions.[17]

It follows from the above considerations that states definitely place territorial integrity above the right to secession. A question arises, however, as to whether territorial integrity protects the state against external intervention, or whether it also guarantees protection in the case of separatist movements. Support for internal movements by foreign entities will be tantamount to recognising them as the subject of the right to self-determination, and will thus represent support for interference in the internal affairs of a state. Recognition will therefore constitute an international law tort. However, if this separatist movement is not supported by external factors, then there is an internal conflict that falls under the exclusive jurisdiction of the state.

Numerous examples can be pointed to, in which the recognition of a secessionist state was treated as an unfriendly act (and in former times even a *casus belli*). The most famous case was France's recognition of US independence (1778), which led to the British-French war. A further example of a spectacular character was Hallstein's doctrine, according to which the FR of Germany was ready to break off relations with all countries that recognized the GDR. Finally, an example from the more recent period may also be mentioned, as in 2017 Sweden recognised the state of Palestine; in response, Israel broke off relations with Sweden.

Another possibility would be a formal international claim on non-recognition of secessionist movements (when, for example, the state concerned concludes agreements with its neighbours obliging them not to support such movements). Recognition in such a situation would have to be treated as a violation of the obligation – although the tort would not entail recognition as such, but rather violation of an international agreement.

Another example could be the recognition of an entity proceeding with secession against the position of a predecessor state. We mention this above. In this case also it is possible to distinguish between two possibilities: recognition despite a formal commitment to the state of the predecessor or recognition in the absence of such a commitment. Delict will then entail intervention in the internal affairs of the predecessor, in some cases in violation of the territorial integrity of that state.

[16] On the exceptional regulation of the 1974 Yugoslavian Constitution, *see* R. Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 1 EJIL 4 (1993), pp. 38–39.

[17] *See* the Judgment of the Supreme Court of the USA in the case *Texas v. White* [1869], in which it was held that the state of Texas had never left the USA (the secession of the Southern States had been ineffective and impermissible), https://constitutionallawreporter.com/2016/11/15/historical-texas-v-white/; also as regards Canada's Supreme Court in the matter of secession by Quebec [1998], https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do.

4. The obligation to not recognise unlawful situations. Does the principle of *Ex iniuria ius non oritur* apply in international law?

In practice, there are numerous examples of instruments adopted within the framework of an international organisation and involving an obligation of non-recognition of illegal situations. Without resorting to the Stimson Doctrine as the root of non-recognition policy, it suffices to refer to two important declarations of the UN GA, i.e. Resolutions 2625(XXV) and 3314(XXIX), which confirm non-recognition as an important element and consequence of the principle of the non-use of force in international relations ("no territorial acquisition resulting from the threat or use of force shall be recognized as lawful"). Non-recognition was embodied as a typical element of resolutions adopted by the UN SC in connection with armed conflicts – reference can be made to Resolution 242 (1967) concerning the Israeli-Arab conflict, Resolutions 541 (1983) and 550 (1984) concerning the TRNC, and Resolution 662 (1990) concerning the occupation of Kuwait by Iraq.

Let us also cite UN GA Resolution 68/262 of 27 March 2014 on the situation in Ukraine, in connection with the referendum in the Crimea and the use and threat of use of force against the territorial integrity of Ukraine. This Resolution was adopted because Russia's veto made it impossible for the UN SC to pass Resolution (draft S/2014/189). The UN GA:

1. affirms its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders;
2. calls upon all States to desist and refrain from actions aimed at the partial or total disruption of the national unity and territorial integrity of Ukraine, including any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means;
   (…)
6. calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status.

Jurisprudence of international courts confirms the importance of the obligation not to recognise unlawful acts. We could refer to the *Namibia* advisory opinion of the ICJ, the advisory opinion on the *Palestinian Wall* and – to a lesser extent, due to the unclear character of the decision – to the judgment of the same Court in the *East Timor* case. In the former case, the Court affirmed that the illegality of the presence of South Africa in Namibia did not result from the apartheid policy, but was connected with the expiration of the mandate system of the League of Nations. All states are to look upon the continued presence of the RSA in Namibia as illegal and invalid. The ICJ emphasised that States should avoid any relations

with South Africa, including any act of presumed recognition of the effectiveness of activities carried out by South Africa towards Namibia, such as the conclusion of international agreements, the accreditation of diplomatic and consular missions, or the maintenance of diplomatic relations leading towards a strengthening of the presence of South Africa on the territory of Namibia. The obligation of non-recognition and its implications were also discussed by Judge R. Higgins in her separate opinion in *Palestinian Wall*. Finally, in the latter case, the majority of the Hague judges stressed that Australia could not violate the principle of non-recognition, as no resolution of the UN SC imposed an obligation of non-recognition on the Indonesian annexation of East Timor. However, two judges (Weeramantry and Skubiszewski) stated that the obligation as regards non-recognition was independent of the decisions of the political organs of the UN. We could also quote a number of judgments passed by the ECHR and the ECJ. There is no need to multiply well known examples.

The obligation not to recognise unlawful situations is therefore well-established. It is the expression of the above-mentioned maxim *ex iniuria ius non oritur*. The location of this principle in the system of sources of international law poses some difficulties.[18] International practice indicates that it can be treated as a general rule of law. Numerous references to this principle, especially in the context of assessment of the legality of actions of entitiesin international law and the consequences of finding illegality, also allow the usual view of the *ex iniuria* standard to be defended. Recognition of an illegal situation would be a violation of this principle. On the other hand, it should be noted that international law, like an illegal situation, hates a vacuum. There is often a situation in which illegal activities are legitimate, and the instrument for legitimacy is recognition (even not necessarily *de jure*, but *de facto*). A solution similar to that applied to the annexation of the Baltic states by the USSR in 1940 is rare, when Western states (in particular the USA) have repeatedly and on various occasions indicated that this annexation cannot be recognised because of the underlying breaking of the law. Another thing is that there have been actions by third countries capable of being regarded as *de facto* recognition.

There is no doubt that recognition by the state in violation of international obligations will be illegal, especially when the obligation of non-recognition results from the order of an international organisation. The assessment of such activities will depend on the statutes of the organisation involved. Undoubtedly, states should adapt to judgments and (already less strongly) consultative opinions of the ICJ, ECHR and other international courts. In turn, the significance of a UN SC resolution is linked to the provisions of Article 25 of the Charter, which obliges Member States to act upon a Council decision unreservedly. Because the Council

[18] *See* G. Distefano, *L'ordre international entre legalité et effectivité. Le titre juridique dans le contentieux territorial*, Pedone, Paris: 2002; A. Lagerwall, *Le principe ex injuria jus non oritur en droit international*, Bruylant, Bruxelles: 2016.

is a political body, its resolutions are questioned more and more often and made subject to attempts at judicial review. In such circumstances, the liability of the State in the event of unlawful recognition will be based on non-compliance with the obligation in relation to the relevant international organisation.

In sum, cases of international responsibility for unlawful recognition are extremely rare. The reason for this lies in the way that recognition is a highly political and discretionary act. However, as to the rule it does not constitute a breach of the international obligations of States. Moreover, the breach is connected with the primary obligations of respective States, and not with recognition itself.

Abstract: Under international law, there are two premises for international responsibility in respect of internationally wrongful acts, i.e. the committing of an international delict or the attribution of an act to a given state. Recognition is thus a political act of legal importance. It can be unlawful if the entity to be recognised comes into being in a manner contrary to international law (e.g. due to the unlawful use or threat of use of military force, and with the right to self-determination being violated. Furthermore, recognition is illegal if exercised contrary to an obligation not to recognise, as imposed by international agreements or by the instruments international organisations have adopted.

Keywords: international law, recognition, obligation of non-recognition, self-determination, secession.

Responsibility for the Acts of Unrecognised States and Regimes

*Szymon Zaręba**

Introduction

The importance of an answer being provided for a question as to whether a given entity may be responsible for its own acts or whether these should be attributed to another subject of international law lies in the way the existence of responsibility usually serves as one of indications of international personality. This ensures that any relevant findings provide valuable guidance as to whether the entity in question is an international person or is merely pretending to be one.

Given that circumstance, the present article seeks to investigate the impact of international recognition on international responsibility and its enforcement, taking as examples unrecognised States and regimes (i.e. State-like actors not universally considered States by the international community). It is argued here that the absence of recognition of a State or regime does not have any direct bearing on the responsibility itself, even if it does much reduce the chance of successful enforcement. The consequence of this is the clear tendency in contemporary international law for already-existing and recognised States to be made responsible for the acts of the entities under consideration here.[1]

This article is divided into four parts, of which the first deals with the responsibility of unrecognised States and regimes as such. The second part then discusses whether and when international law allows the so-called parent State to be held responsible for violations committed by unrecognised entities controlling some parts of its territory. The third part addresses the possibility of acts of unrecognised regimes being attributed to third States that act in support of them to a greater or lesser extent. Finally, the fourth section provides a summary of the conclusions arrived at in the present study.

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[1] This article operates deliberately in leaving aside a question as to the responsibility of international persons towards unrecognised States or regimes, on the basis that this matter deserves separate treatment as a topic in itself.

1. The responsibility of unrecognised States and regimes as such

Under the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the UN ILC in 2001 (hereinafter: "the 2001 Articles"), international responsibility arises if a State commits an internationally wrongful act (Article 1). For an act to be wrongful, it must constitute a breach of an international obligation of the State and must be attributable to the State under international law (Article 2).[2] These two provisions, repeated nearly verbatim in Articles 3 and 4 of the ILC's 2011 Draft articles on the responsibility of international organizations,[3] reflect the core customary rules of general international responsibility.[4]

Although strikingly general at first sight, these rules have some serious consequences for the issues under discussion. First, for an entity to be responsible internationally, that entity needs to enjoy international personality, and (as will emerge further on below) it is ideal but not essential for that personality to be as a State. In other circumstances such an entity's action or omission may not be deemed "internationally wrongful." Second, the entity in question must violate an international obligation already binding upon it. Third, an act in violation of the said obligation needs to be attributable to this entity from the legal point of view. As none of these three conditions links up explicitly with international recognition between the wrongdoer and the injured party, there is no direct relationship between recognition and the conditions just presented. Nevertheless, any verification as to whether this is the case requires that international practice be looked into, with a check made as to whether lack of recognition is actually regarded as a possible bar to responsibility.

[2] ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Yearbook of the International Law Commission, vol. II, Part Two (2001), p. 26.

[3] The "State" is substituted by an "international organization" in the text of both provisions which is fully understandable taking into account the subject matter of the 2011 draft, *see* ILC, *Draft Articles on the Responsibility of International Organizations*, Yearbook of the International Law Commission, Vol. II, Part Two (2011), p. 40. One needs also to mention in this context the definition of "international responsibility" in draft Article 2 of the 2017 First Report on succession of States in respect of State responsibility prepared by the ILC's Special Rapporteur, professor Pavel Šturma, which fully corresponds with Article 1 of the 2001 Draft Articles, *see* ILC, *First report on succession of States in respect of State responsibility by Pavel Šturma, Special Rapporteur*, 31 May 2017, UN Doc. A/CN.4/708, paras. 74, 75.

[4] J. Crawford, *State Responsibility*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 31 October 2017), para. 17, calls the general principles spelled out in these articles "well established, even axiomatic." C.J. Tams, *All Is Well That Ends Well: Comments on the ILCs Articles on State Responsibility*, 62 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 759 (2002), pp. 765–766 argues that they are "generally accepted." D.M. Bodansky, J.R. Crook, *Symposium: the ILC's State Responsibility Articles: Introduction and Overview*, 96 (4) American Journal of International Law 773 (2002), p. 782 consider articles 1 and 2 as "essentially tautological" – in the sense that they state the obvious.

One of the earliest cases mentioned in the legal literature in this respect is the *Macedonian*, as decided by the Belgian King as arbitrator in 1863. In this case, the Master of an American ship sought to recover a large sum of money seized by Chilean soldiers in May 1821, eight months prior to Chile's recognition by the US.[5] In the event, the umpire considered the complaint well-founded, in a decision whose most crucial feature from the present perspective was that it was completely silent on the absence of recognition of Chile at the time of the illegal seizure.[6] This then amounted to implicit acknowledgment that an unrecognised State might violate its obligations under international law towards a non-recognising State – and, as a consequence, could be held responsible for the breaches concerned.[7]

It is worth noting that, with respect to two other cases of illegal seizures of property of American citizens in Chile which occurred just days before the one under review in the *Macedonian*, US agents had put forward claims as early as in 1821 – even though Chile was still not recognised by the US at that point. While the Chilean government accepted its responsibility and settled the claims as early as in 1822,[8] this was nevertheless shortly after US recognition of Chile has taken place.

The possible impact of recognition between States on international responsibility was also downplayed by the ICJ in its preliminary judgment in the *Genocide* case (*Bosnia and Herzegovina v. Serbia and Montenegro*) issued in 1996. In this case, the Court was asked to declare, *inter alia*, on whether the Federal Republic of Yugoslavia (FRY) had breached its obligations under the 1948 Genocide Convention in regard to Bosnia and Herzegovina, and – if so – to determine the appropriate form of reparation for damages caused.[9] The proceedings were instituted in 1993, at a time when Bosnia and Herzegovina and then the FRY had failed to recognise each other, but they lasted through to 2007, when the Court delivered its final judgment on the merits of the case – at a time well after the effecting of recognition at the end of 1995, by virtue of the signing of the Dayton Peace Agreement.[10]

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[5] A. de Lapradelle, N. Politis, *Recueil des arbitrages internationaux*, vol. 2, A. Pedone, Paris: 1923, p. 215.

[6] *Ibidem*, pp. 203–205.

[7] J. Charpentier, *La reconnaissance internationale et l'evolution du droit des gens*, Pedone, Paris: 1956, p. 47.

[8] Mixed Commission established under the Convention between the United States and Chile of November 10, 1858, *Case of the Brig "Macedonian,"* 15 May 1863, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States has been a Party*, vol. II, Government Printing Office, Washington: 1898, pp. 1449–1450, Lapradelle, Politis, *supra* note 5, pp. 183–186.

[9] ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia),* 11 July 1996, ICJ Rep 1996, pp. 600–602.

[10] *See* M. Škrk, *Recognition of States and Its (Non-) Implication on State Succession: The Case of Successor States to the Former Yugoslavia*, in: M. Mrak (ed.), *Succession of States*, Martinus Nijhoff Publishers, The Hague: 1999, pp. 3, 26. The Dayton Peace Agreement (Dayton General Framework Agreement for Peace in Bosnia and Herzegovina), was signed on 14 December 1995 and entered into force on that day. It marked the end of the war in the former Yugoslavia.

The intriguing aspect of this case was that, in its pleadings, the FRY at least twice invoked its non-recognition of what it termed the "so-called Republic of Bosnia and Herzegovina." This happened first in the course of written proceedings, in which inadmissibility of the application was claimed.[11] Later, in the course of the oral proceedings, the party called into question the very existence of obligations towards Bosnia and Herzegovina under the Genocide Convention, by virtue of the non-recognition of Bosnia and Herzegovina by the FRY at the time purported violations had taken place.[12]

Interestingly, in its judgment, the Court did pronounce on the first argument alone, even though it was withdrawn later in the oral proceedings.[13] It held that the absence of recognition between the parties to the dispute back in 1993 did not render the Bosnian application inadmissible, since the Genocide Convention entered into force for Bosnia and Herzegovina and the FRY, at the very least, on the day of the conclusion of the Dayton Peace Agreement. As regards the second argument, the ICJ mentioned merely in passing that it did not find it necessary to "settle the question of what the effects of a situation of non-recognition may be on the contractual ties between parties to a multilateral treaty."[14] Still, its later findings in the 2007 judgment on the merits[15] suggest that it did not consider the absence of recognition between the parties to the same multilateral treaty to have any effect on their obligations under such a treaty.

Alongside the two decisions just referred to, there have been many cases in international State practice where non-recognising States urged unrecognised States or regimes to observe specific rules of international law, submitted their complaints to them or even asked them to compensate for damage caused. One of the cases cited most often in the literature in this regard is the British protest addressed to Israel in the aftermath of the shooting down of five British aircraft by Israeli forces over Egyptian territory in January 1949.[16] The planes in question were carrying out a reconnaissance mission to monitor the withdrawal of Israeli troops from the Sinai peninsula, following the Egyptian-Israeli cease-fire signed earlier on the day

[11] ICJ, *supra* note 9, pp. 604, 607.

[12] *See* the arguments presented by E. Suy (pleading for the FRY) in: ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia),* Oral Proceedings, Public sitting held on Monday 29 April 1996, at 3 p.m., at the Peace Palace, President Bedjaoui presiding, 29 April 1996, Compte Rendu 96 (6), pp. 24–27.

[13] T.D. Grant, *Territorial Status, Recognition, and Statehood: Some Aspects of the Genocide Case (Bosnia and Herzegovina v. Yugoslavia)*, 33 (2) Stanford Journal of International Law 305 (1997), p. 307.

[14] ICJ, *supra* note 9, pp. 612–613.

[15] *See* chapter 3 of the present study.

[16] *See e.g.* J.L. Brierly, *The Law of Nations*, Clarendon Press, Oxford: 1963, p. 139, n. 1, K. Marek, *Identity and Continuity of States in Public International Law*, Librairie Droz, Genève: 1968, p. 144 or T.D. Grant, *The Recognition of States. Law and Practice in Debate and Evolution*, Praeger Publishers, Westport: 1999, pp. 20–21.

of the incident.[17] In the protest notes handed over to a Jewish representative to the United Nations and a representative of the Israeli Foreign Office in Haifa, the British Government expressed its "grave view of the events," and reserved all its rights "both with regard to claims for compensation and to all possible subsequent actions."[18] The notes, however, were soon handed back by the Israeli side, as the protest was directed to "the Jewish authorities at Tel-Aviv" and not to the "Israeli Provisional Government"[19] – and, supposedly, no compensation has ever been paid.

Another case revolved around the so-called Simba rebellion of 1964-1965, an insurrection which established an unrecognised State called the People's Republic of the Congo across a large part of the territory of Congo-Zaire. Throughout the hostilities between the rebels and the central government, the US government provided the rebel authorities with constant reminders as to the way in which it considered them directly responsible for the safety and well-being of its citizens under their control. These reminders included radio communiqués issued to the leader of the insurgency by the US Ambassador to nearby Kenya.[20]

To be mentioned among other cases involving non-recognition and international responsibility are numerous accusations of violation of international law, calls for compliance and claims addressed to North and South Vietnam and to Israel and Arab States.[21] Notwithstanding non-recognition, the whole period of the 1960s saw the UK and France claim compensation repeatedly, for injuries sustained by their citizens and for the seizure of their property from the North Vietnamese authorities. The demands were usually made through consular offices located in North Vietnam's capital, Hanoi, which remained there after the establishment of the new State. Judging by the scale of the practice, it may be assumed that at least some of these demands were successful.[22] In the Vietnamese context, reference must also be made to numerous claims and counter-claims brought in the 1950s and 1960s by North and South Vietnam before the International Control Commission, a body set up in 1954 to oversee the implementation of the Geneva Accords establishing a cease-fire in the Vietnam War. These charges – raised, it needs to be stressed, by one unrecognised State against another – included mutual allegations of violations of the prohibition on hostilities or the ban on the introduction of

[17] P.L. Hahn, *The United States, Great Britain, and Egypt, 1945–1956: Strategy and Diplomacy in the Early Cold War*, University of North Carolina Press, Chapel Hill: 2014, p. 73.

[18] *See* the full text of the note reprinted in one of the British newspapers issued at the time, *Protest to Israel. British Government's 'Grave View'*, The Scotsman, 10.01.1949.

[19] *See ibidem*, p. 5 and *Protest Boycotted. Israeli Delegate to U.N. Refuses to Transmit It*, The Scotsman, 10.01.1949.

[20] J.A. Frowein, *Das de facto-Regime im Völkerrecht*, Carl Heymanns Verlag, Köln–Berlin: 1968, p. 78.

[21] *See e.g.* D.J. Devine, *Status of Rhodesia in International Law (part 2)*, 1973 Acta Juridica 1 (1973), pp. 100–101 and I. Brownlie, *Principles of Public International Law*, Oxford University Press, Oxford: 2008, p. 87.

[22] Frowein, *supra* note 20, pp. 77–78.

additional military personnel or any reinforcements to the territories of the States, violations of the demarcation line between them, complaints regarding insufficient compliance with the provisions of the Accords on the inspections by the Commission, etc.[23] A large part of these accusations gained subsequent confirmation in reports adopted by the Commission. No attention was paid there to the absence of recognition between North and South Vietnam, as regards both the existence of infringements and responsibility.[24]

The case of Israel and the Arab States is even more instructive, as it involves the world's most universal international organisation, the United Nations, and a much larger group of States. After its creation in 1948/1949 and admittance to the UN in May 1949, Israel continued to go unrecognised by all its Arab neighbours, i.e. by Lebanon, Syria, Jordan and Egypt. Tensions between them led to frequent border clashes and exchanges of fire. From as early as in 1950, both the Arab States and Israel brought before UN organs numerous charges and counter-charges, revolving around the idea that the other side had violated the demarcation line established by Armistice agreements. These were duly noted and taken account of, mostly by the UN SC, which issued many resolutions reminding the warring parties of their obligations under the agreements and the UN Charter, and calling upon them to comply with their commitments.[25] In some cases, the calls made by the UN SC also mentioned other treaties or sources of international law, such as the "international conventions safeguarding civil aviation" and the "principles of international law."[26] The absence of proper recognition between addressees was never taken account of by, or even noticed in, the resolutions in question. It can reasonably be argued that this indifference to the possible impact of non-recognition on responsibility was also a feature of individual States.[27] To be indicated in this context are five draft resolutions aiming to stabilise the post-conflict situation after the 1967 Six-Day War between Israel and the non-recognising Egypt, Syria, Jordan and Iraq. Each of these drafts, submitted by the USSR, the US, Albania, Afghanistan and sixteen Afro-Asian States, and twenty Latin-American States, regarded Israel as having certain international-law obligations flowing from the Charter and the Armistice

[23] These and other claims are listed in E.D. Hawkins, *An Approach to Issues of International Law Raised by United States Actions in Vietnam*, in: R.A. Falk (ed.), *The Vietnam War and International Law*, Princeton University Press, Princeton: 1969, pp. 183–185, including n. 77.

[24] As can be inferred from *ibidem*, pp. 185–186.

[25] UN SC Resolution 92 (1951) of 8 May 1951, S/RES/2130 and UN SC Resolution 93 (1951) of 18 May 1951, S/RES/2157, addressed both to Syria and Israel; UN SC Resolution 106 (1955) of 29 March 1955, S/RES/3378; UN SC Resolution 111 (1956) of 19 January 1956, S/RES/3538 and UN SC Resolution 228 (1966) of 25 November 1966, S/RES/228, concerning Israeli violations of the UN Charter and the armistice agreements with respect to Egypt, Syria and Jordan respectively.

[26] In a Resolution adopted after the hijacking of a Lebanese civilian airliner by the Israeli Air Force from Lebanon's airspace, *see* UN SC Resolution 337 (1973) of 15 August 1973, S/RES/337.

[27] Devine, *supra* note 21, pp. 101–102.

agreements with respect to the Arab States participating in the conflict, notwithstanding its non-recognition by these States.[28]

Far from comprehensive as it may be, the above overview of judicial decisions and State practice, still allows several interim conclusions to be drawn. Of these, the first and most general holds that, as they work to achieve their practical goals, e.g. the ensuring of proper treatment of their nationals or the obtainment of compensation for damages sustained, States generally leave aside the controversial issues of the statehood and recognition of the entity to which they direct their claims.

Furthermore, in a number of cases, like the downing of British aircraft by Israeli forces or the claims addressed to the People's Republic of Kongo, non-recognising States level their allegations and put forward their demands without any explicit reference to relevant international norms or international responsibility. This leaves them with as much room for political manoeuvre as possible, while at the same time allowing them to voice their concerns and use opportunities to obtain redress for their grievances.[29]

On the other hand, in cases where a State brings charges of breaches of international law against another State or similar entity, there can be no doubt that it treats the latter as an international person bound by at least some international norms, and does not dispute the attribution of the violations of these norms to this entity. However, this does not mean, contrary to some views expressed in the literature,[30] that such an entity must necessarily be a State.[31] If an action against an unrecognised State could allow such a conclusion to be arrived at, it is most probable that the majority of non-recognising States would not pursue claims at all. Attempts to hold a State responsible for violations of certain norms of international law, even if successful, do not amount to recognition of statehood, or even to its factual

[28] *See ibidem*, pp. 102 for references.

[29] Frowein, *supra* note 20, p. 80, observes that in only two of the cases he analysed did there appear any official references to international law as legal basis for the claims put forward (in 1861–1865, between the UK and the Confederacy during the American Civil War, and in 1940, between the UK and the PRC, unrecognised at that time). He then concludes that States which try to hold unrecognised entities responsible for specific wrongs in general do not raise arguments based on international law. As may be inferred from several cases discussed in the present study, his conclusion obviously suffers from the selection he made.

[30] *See particularly* I. Brownlie, *Recognition in Theory and Practice*, 53 British Yearbook of International Law 197 (1982), p. 199 who argues that "charges of breaches of international law carry the very strong implication that the entity concerned is a State capable of bearing State responsibility."

[31] As rightly observed by J. Crawford, *The Creation of States in International Law*, Clarendon Press, Oxford: 2006, pp. 43–44: "That an entity has rights and obligations under international law or may be responsible for conduct that is internationally wrongful does not make it a State: international organizations, insurgent or devolving governments, the International Committee of the Red Cross and a range of other entities are accounted subjects of international law, generally or for particular purposes."

acknowledgment by the claimant.[32] The only recognition to be spoken about in this context is that involving the recognition of a certain kind of international personality.[33] This personality is a direct consequence of the fact that the entity in question exercises physical control over a certain territory. It is this particular factor which really matters in the cases discussed here, and which serves as a basis for any possible responsibility.[34]

In this respect, attention should be paid to a passage from the ICJ's 1971 *Namibia Opinion* in which the Court, arguing that South Africa's lack of title to administer Namibia did not release it from obligations and responsibilities with regard to that territory, stated: "Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability [*sic*] for acts affecting other States."[35] This, it is argued, relates, not only to established and recognised States, but also to entities whose statehood is not yet certain or the subject of universal confirmation. Support for this argument is to be found in the 2001 Draft Articles, wherein Article 10 provides that: "the conduct of a movement, insurrectional or other," which succeeds in establishing a new State ought to be considered the act of that new State. This reference to an unspecified movement once again justifies the assertion that, when it comes to international responsibility, the exact label of the entity in question is not the most crucial issue, to say the least. If it cannot be considered a fully-fledged State, it may be held responsible for its acts on other grounds, provided that it exerts some degree of territorial control.

Finally, one needs to emphasise that it is the enforcement of responsibility upon which the absence of recognition has the most adverse impact. Still, the exact extent of this effect varies depending on the legal regime. In the case of claims based on general international law, effectiveness of enforcement is usually very low. Reparation for a wrongful act is ordinarily either made with great delay, often only after recognition takes place, or not at all. There are many reasons for the above state of affairs, but the most important one would seem to be that if the injured party and wrongdoer diverge as regards the scope or form of reparation for a wrongful act, non-recognition greatly complicates the prospects for an agreement between parties being concluded, or one that would allow for the referral of a dispute to

[32] *See* H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 1947, pp. 393–394 and Frowein, *supra* note 20, pp. 73–74.

[33] For the sake of convenience, one could in fact speak in this context about recognition and responsibility of "territorial units." For reasons, *see* below.

[34] *Similarly* J. Verhoeven, *La reconnaissance internationale dans la pratique contemporaine: Les relations publiques internationales*, Éditions A. Pedone, Paris: 1975, p. 718 and J.A. Frowein, *Non-Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 31 October 2017), para. 17.

[35] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, 21 June 1971, ICJ Rep 1971, para. 118.

an international court or another international body.[36] In cases in which a multilateral treaty regime is in place – to which both the non-recognising State and the unrecognised State or regime are parties – the average chance of responsibility being enforced and compliance achieved is much higher. This is because such legal regimes often provide for some form of compulsory settlement of disputes, either by judicial or political bodies – like the ICJ, the UN SC or the International Control Commission mentioned earlier. In the absence of specific provisions of the given treaty, these bodies are usually reluctant to take into account non-recognition between parties when assessing the claims based on the treaty itself. This is commendable, since recognition issues might otherwise reduce greatly the effectiveness of the overall levelof protection offered by the treaty.[37]

2. The responsibility of the parent State

Serious practical difficulties with the enforcement of the international responsibility of unrecognised States and regimes led injured States to look for other ways to ensure that the damage incurred by them would not go uncompensated. The most obvious choice for a State harmed by a wrongful act committed by such a State or regime was to try to hold responsible the State which was generally recognised as having sovereignty over the area, and which continued to consider it as its own, despite the temporary loss of control to another entity. The target was thus the so-called parent State.[38] This practice was fairly common in the 19th century – in fact much more so than attempts to obtain redress directly

[36] For instance, *the Macedonian* case discussed above went undecided for more than 40 years – the Master of the ship submitted his protest against the seizure of its precious cargo to the Chilean government just a few days after the incident (in May 1821), asking for restitution of confiscated money. The case was referred to the prize court in October 1821, and this decided in a manner unfavourable to the claimant. After twenty years, in May 1841, the US representatives in the then-recognised Chile submitted the complaint once again. The Chilean government refused to honour it in 1843. After years of negotiations, both parties finally agreed in 1858 to submit the dispute to the King of Belgium as an arbiter, who decided it in May 1863. *See* Lapradelle, Politis, *supra* note 5, pp. 186–191, 202–205.

[37] Cf. in this regard a passage from the judgment of the ECHR which dealt with the issue of the non-recognition by Turkey of the Republic of Cyprus (as a government): "recognition of an applicant Government by a respondent Government is not a precondition for (…) the institution of proceedings (…). If it were otherwise, the system of collective enforcement which is a central element in the Convention system could be effectively neutralised by the interplay of recognition between individual Governments and States." *See* ECHR, *Loizidou v. Turkey* (App. No. 15318/89), Preliminary Objections, Grand Chamber, 23 March 1995, para. 41.

[38] This is obviously only a working definition. The term itself is used in this meaning, although without being defined, by many scholars, like Lauterpacht, *supra* note 32, pp. 9, 27 (*mother country*, *parent State*), Verhoeven, *supra* note 34, p. 569 (*la "mère patrie"*) or A. Verdross, *Règles générales du droit international de la paix*, RCADI, 1929, vol. 30, pp. 325–330 (*la mère patrie*), to name a few.

from the unrecognised States or regimes themselves – and a significant number of claims in such cases were brought before arbitration tribunals. A careful analysis of their decisions and of the works of the most renowned scholars of the time allows for the tracing of three conflicting trends in the period starting from the early nineteenth century and continuing through to the end of the Second World War.

In line with the first trend, followed mostly by international law scholars and foreign affairs departments, a State could be held responsible for violations of international law by a regime which controlled a part of its territory, unless this State or the injured State recognised that regime – either as a belligerent or a State. Thus, responsibility of the parent State was seen as default and responsibility of the group which controlled a part of its territory was in a way subsidiary and strictly conditional upon recognition. Only if the regime occupying the area in question was recognised could the parent State be considered free from any obligations with respect to this part of its territory.[39]

One of the best-known cases cited by proponents of said view concerned the position taken by the US government during the American Civil War, with respect to claims raised by the British and French. Since both the UK and France recognised the Confederacy as a belligerent (as the American side argued), the United States was released from any responsibility towards them. Any claims for redress for wrongful acts which occurred on the territory of the Confederacy could only be addressed to authorities recognised by both States.[40] A similar view was also reflected in an important draft of articles aiming to provide guidelines for States in their disputes concerning international responsibility which was prepared by the Institute of International Law in 1927. Its Article VII provided that the responsibility of a State by reason of acts committed by "insurgents" ceased after it recognised the latter as a belligerent party, and "in regard to States which have recognized them as such."[41] Of course, the same article could *a fortiori* be applied to recognition as a State.

[39] In legal literature, this view was expressed by, *inter alia*, W.E. Hall, *International Law*, Clarendon Press, Oxford: 1880, pp. 25–27, E.M. Borchard, *The Diplomatic Protection of Citizens Abroad*, The Banks Law Publishing Co., New York: 1925, pp. 210–211 or J.L. Kunz, *Die Anerkennung von Staaten und Regierungen im Völkerrecht*, Verlag von W. Kohlhammer, Stuttgart: 1928, pp. 185, 206.

[40] *See e.g.* an excerpt from the conversation between the British Foreign Secretary, Earl Russell, and the US minister to England, Mr. Adams, held on 12 June 1861, and a fragment of a note sent on 12 January 1864 by US Secretary of State Seward to the US minister to France, cited in: H. Silvanie, *Responsibility of States for Acts of Unsuccessful Insurgent Governments*, Columbia University Press, New York: 1939, pp. 152–153.

[41] *See* Annex 8, Draft on "International Responsibility of States for Injuries on Their Territory to the Person or Property of Foreigners" prepared by the Institute of International Law (1927), reproduced in: ILC, *Report on International Responsibility by Mr. F.V. Garcia-Amador, Special Rapporteur*, 20 January 1956, UN Doc. A/CN.4/96, p. 228.

A similar point of view is to be found in an influential draft convention on international responsibility for damage done to the person or property of foreigners prepared in 1929 by the Harvard Law School. Its Article 13 b) stipulated that the State was not responsible for an injury to an alien resulting from an act by "revolutionists" committed after their recognition as belligerents by this State or the one of which the alien was a national.[42] Once again, recognition of a certain group as a State was not given express mention in this provision, but it seems reasonable to argue that the same logic would apply.

The second of the three trends observed in the period discussed was much more present in the case-law of international arbitral tribunals and was fundamentally at odds with the one just presented. Although entirely concerned with the recognition of governments, it influenced the discussion on the relationship between recognition and international responsibility so much that it needs to be presented here at least briefly. This view held that the refusal to recognise an insurgent group as a government of another State excluded any subsequent possibility of the latter being held responsible for the acts of such a group. Its underlying assumption was that no State could demand from another that it be held responsible for acts of authorities which in its own eyes did not deserve formal recognition.[43]

The blatant inconsistency of the two points of view presented thus far made necessary the determination of a satisfactory solution to the question as to whether responsibility could be conditional on recognition, and if so, under what circumstances. The challenge was taken up by another group of international arbitrators who maintained that a State which lost control over a certain part of its territory could simply not be held responsible for violations of international law by the authorities controlling that area. Accordingly, recognition or non-recognition of these authorities, in whatever capacity, had nothing to do with responsibility, either of their own or of the parent State. They were completely distinct matters and there was no direct link between them.[44]

The origins of this new third trend can be traced back to the second half of the 19th century. One of the first signs marking its onset involved concurring opinions

[42] *See* Annex 9, Draft Convention on "Responsibility of States for Damage Done in Their Territory to The Person or Property of Foreigners" prepared by Harvard Law School (1929), reproduced in: *ibidem*, p. 229.

[43] *See e.g.* Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868, *Charles J. Jansen v. Mexico*, 11 July 1876, in: J.B. Moore, *History and Digest of the International Arbitrations to which the United States Has Been a Party*, vol. III, Government Printing Office, Washington: 1898, pp. 2973ff, American-Venezuelan Mixed Claims Commission, *Jarvis case*, 1903, in: J.H. Ralston, *Venezuelan Arbitrations of 1903*, Government Printing Office, Washington: 1904, pp. 145ff.

[44] Among the pre-war scholars supporting this view one may mention, *e.g.* Silvanie, *supra* note 40, pp. 154–155 and N.D. Houghton, *The Responsibility of the State for the Acts and Obligations of Local de Facto Governments and Revolutionists*, 14 Minnesota Law Review 251 (1929–1930), p. 261.

of the Commissioners in the case *Salvador Prats v. the United States of America*, decided in 1868 by the Mexican-American Mixed Claims Commission. Mr. Prats, a Mexican national, sought an award in his favour for goods of his seized by the fleet of the Confederacy during the American Civil War. Both Commissioners agreed that the fact that Mexico did not recognise the Confederacy as a State or belligerent could not affect in any way the potential responsibility of the US for its acts. They also rejected the US argument that recognition of a rebel group which opposed the sovereign power in a given territory absolved this power from any international responsibility in respect of the given area. As was emphasised by Commissioner Wadsworth, the absence of responsibility of the US resulted from the fact of belligerency itself.[45]

The most important ruling in this regard was nevertheless the one issued in *Tinoco*, a case decided by arbiter Taft in 1923, which related to recognition of governments and not of States. It concerned the cancellation by the Costa Rican government of a concession to explore for oil in Costa Rica that had been granted to a British company, as followed by a refusal on the part of the same government to pay off a significant loan taken out with another British company. Both the indebtedness and the concession were annulled on the grounds that they were acts of the previous revolutionary government of Frederico Tinoco which governed the country for about three years before being replaced. One of the main objections raised by the defendant was that the UK did not recognise the Tinoco government while it was in power, with the British government in consequence being estopped from claiming on behalf of its subjects that the acts of Tinoco's government could validly create any obligations for Costa Rica. The arbiter in the case did not uphold the objection. Instead, he criticised several previous arbitration awards which linked the recognition or non-recognition of a group having control over a given territory with matters such as responsibility or the rule of estoppel. Recognition, he said, may be of great evidential value as important proof of the existence of international personality, but that was where its role ended. Neither recognition nor non-recognition has any bearing on the question of responsibility. What really mattered in this regard were the factual circumstances, i.e. the degree of independence and control of an entity whose responsibility was to be decided upon.[46]

The rules pronounced in the award given in the *Tinoco* case gained more and more prominence with the passage of time. Their application to the responsibility

[45] Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868, *Salvador Prats v. the United States of America*, 11 July 1876, in: Moore, *supra* note 43, pp. 2886 et *seq.* Still, one can also find in these opinions some contradictory references, like a passage where the same Commissioner declared that recognition of the fact of belligerency by a government would be conclusive evidence of its existence, and would operate as an estoppel with regard to that government, *ibidem.*

[46] W.H. Taft (arbitrator), *Aguilar-Amory and Royal Bank of Canada claims (Great Britain v. Costa Rica) – Tinoco case*, 18 January 1923, Reports of International Arbitral Awards, vol. I, pp. 369ff.

of parent States led to the conclusion that, as a rule, a State which had no control over a certain part of its territory could not be held responsible for violations of international law occurring in such an area.

It might safely be argued that, since the end of World War II at least, a broad consensus on this matter did emerge.[47] Of course the rule also had application as regards the responsibility of parent States for wrongful acts of unrecognised States or similar regimes. It must be emphasised here that in international judicial practice at the time there was no clear division between the responsibility for the acts of groups claiming to be new States or aspiring to create such new States, those wishing to overthrow existing governments and those who opposed central governments for any other reasons. At least several expressions were in use for such entities – including, *inter alia*, local *de facto* governments, belligerents, insurgents, revolutionaries and rebels – and little attention was paid to their real aspirations. Once again, what was crucial was the fact that they exercised their powers over a certain area in place of the existing government.[48]

It must nevertheless be noted that there was an important exception to the rule in question, one which also had its roots in the international awards and decisions issued in the nineteenth century: a State could be held responsible for actions or omissions of entities having control over a part of its territory if it could be proved that it acted in bad faith or that it was negligent in the prevention or suppression of the acts in question, or in the punishment of their perpetrators.[49]

When it came to the obligation of prevention, this did not mean that the State would be responsible if it did not take every possible precaution to prevent the secession or rebellion which led to the loss of control of a given area.[50] The duties of the parent State were in fact limited solely to the prevention of the wrongful act capable of giving rise to responsibility on the part of such a State. This rule gained express confirmation in, *inter alia*, the case of *Home Missionary Society* of 1920 as

[47] *See e.g.* the works of Lauterpacht, *supra* note 32, pp. 247–249; T.-Ch. Chen, *The International Law of Recognition*, Frederick A. Praeger, New York: 1951, pp. 145–149, 344–345; Marek, *supra* note 16, pp. 143–145; Charpentier, *supra* note 7, pp. 46–52; 55; Ch. de Visscher, *La responsabilité de l'État du chef des actes et engagements d'un gouvernement local de fait, en cas d'echec de ce gouvernement*, in: *Album Professor Fernand van Goethem*, Standaard-Boekhandel, Antwerpen: 1964, pp. 187–188; Frowein, *supra* note 20, pp. 70–72.

[48] That is why no distinction is drawn in the present chapter between judgments relating to the unrecognised entities claiming to be States, unrecognised governments and other regimes.

[49] *See* Ch.Ch. Hyde, *International Law. Chiefly as Interpreted and Applied by the United States*, vol. 1, Little, Brown and Co., Boston: 1922, pp. 511–513; Borchard, *supra* note 39, pp. 217–219, 228–239; de Visscher, *supra* note 47, p. 193; M. Akehurst, *State Responsibility for the Wrongful Acts of Rebels – An Aspect of the Southern Rhodesian Problem*, 43 British Yearbook of International Law 49 (1968–1969), p. 49.

[50] Akehurst, *supra* note 49, pp. 50–51 rightly observes that no State has ever been held responsible for its negligence in prevention of the loss of control over a part of its territory, even if such an argument was brought up before certain arbitration tribunals.

it related to an 1898 native rebellion in Sierra Leone, which was then under British colonial rule. It was observed there that, even if the rebellion was a response to certain British actions in the area, which to a large extent led to its outbreak, there was no neglect on the part of the UK, since it simply acted in the legitimate exercise of its sovereignty and it thus was for it alone to determine the course of its policy and system of administration.[51]

The obligation to suppress wrongful acts was interpreted rather more rigorously. The State claiming title to an area under the control of another entity was expected, not only to bring about the cessation of ongoing violations to the extent possible, but also to take all reasonable measures to regain its control over the area.[52] However, in practice States were given much leeway in their decisions on how to bring a rebellion or insurgency to an end. With a view to their relieving themselves of responsibility, this meant they were not necessarily expected to achieve a speedy and total victory, but were nevertheless to be pursuing this objective actively, regardless of the results.[53] For example, in the *Home Missionary Society* case already mentioned, the UK was found not guilty of negligence in suppression of the insurrection in line with the several factors making that difficult, i.e. a simultaneous outbreak of fighting in many isolated places remote from one another, heavy losses incurred at the outset necessitating additional reinforcement, and difficulties with communicating over long distances. In the view of the arbitration commission which dismissed the claim, although the revolt had lasted for several days, the time spent in dealing with it could not be deemed excessive. Accordingly, there was no responsibility for losses and damages the claimant had sustained.[54]

Support for this approach can also be found in numerous cases relating to the responsibility for the acts of insurgents aiming to overthrow a government, as with the *Santa Clara Estates* case, decided in 1903. The umpire who gave the award there decided that Venezuela could not be considered responsible for the wrongful acts of the Matos revolutionaries, since its military and financial resources were largely depleted after several successive lesser revolutions, and since in a little over a one-year period of rebellion there had been dozens of armed clashes between the forces of the government and the rebels, resulting in several thousand casualties. It was stressed that "more dependence should be placed upon the actual diligence applied

[51] British-American Arbitral Tribunal constituted under the Special Agreement of August 18, 1910, *Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States v. Great Britain)*, 18 December 1920, Reports of International Arbitral Awards, vol. VI, p. 43.

[52] *See e.g.* the opinion of Commissioner Palacio in: Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868, *supra* note 45, pp. 2894–2895.

[53] One may therefore conclude that it was a so-called obligation of conduct, not of result.

[54] The British-American Arbitral Tribunal constituted under the Special Agreement of August 18, 1910, *supra* note 51, p. 44.

by the titular government to regain its lost territory and to suppress the revolutionary efforts than upon the mere question of time taken to accomplish that end,"[55] noting that it took the UK seven years to consent to the independence of the US and that the US fought for more than four years to defeat the Confederacy but neither had been held responsible for the acts of the insurgents who opposed them on the grounds of supposed negligence.[56]

Finally, the obligation that wrongdoers be punished was enforced in the strictest way of all the three. A State had to prosecute and judge those responsible for the commitment of wrongful acts if they came under its jurisdiction.[57] Particular emphasis was put on the effectiveness of the measures taken: the penalty had to be proportionate to the seriousness of the infringement and imposed without undue delay. Moreover, the granting of amnesty to the perpetrators of a wrongful act was usually seen as a State's assumption of responsibility for a wrongful act.[58] These rules were applied, *inter alia*, in the 1875 award given in the *Montijo* case. In that case, Colombia was sued for damages accruing from the occupation of an American steamer *Montijo* by a revolutionary group led by one Tomas Herrera, for two months in 1871. Due to an amnesty granted by the Colombian administration to the revolutionaries, no judicial proceedings were instituted against them and no compensation for the injuries paid to the owners of the *Montijo*. The umpire had no doubt that Colombia was responsible for the acts of the Herrera group. He stated that, by virtue of the amnesty granted to the wrongdoers, the Colombian State had assumed responsibility vis-à-vis the owners of the ship.[59]

The above considerations demonstrate that cases in which claimants tried to hold the parent State responsible for the wrongful acts of entities out of its control were relatively common before World War II. However, the situation would go on to change dramatically after the war. Indeed, in the literature there are no mentions

[55] British-Venezuelan Mixed Claims Commission, *Santa Clara Estates case – Supplementary Claim*, 1903, in: J.H. Ralston, *Venezuelan arbitrations of 1903*, Government Printing Office, Washington: 1904, pp. 398–400. *See also* a similarly lenient (but understandable) attitude in Italian-Venezuelan Mixed Claims Commission: *Sambiaggio case*, 1903, in: *ibidem*, pp. 680, 692.

[56] British-Venezuelan Mixed Claims Commission, *supra* note 55, p. 398.

[57] *See e.g.* Swedish-Norwegian-Venezuelan Mixed Commission, constituted by virtue of the protocol signed at Washington on March 10, 1903, *Bovallins and Hedlund Cases*, 1903, in: Ralston, *supra* note 55, pp. 952–953.

[58] However, Borchard, *supra* note 39, p. 230 argues that this was not necessarily a rule at the time, citing some other awards. Akehurst, *supra* note 49, pp. 58–59, argues, on the other hand, that only the amnesty which extinguishes civil liability makes the State responsible for not punishing the offenders.

[59] R. Bunch (arbitrator), *Case of the 'Montijo'*, 26 July 1875, in: Moore, *supra* note 8, pp. 1438–1439. *See also* dissenting opinion of Commissioner Andrade in: Commission under the Convention between the United States and Venezuela of January 19, 1892, *Claim of the Venezuela Steam Transportation Company*, 26 March 1895, in: *ibidem*, p. 1730.

of similar cases under the review of any international courts in the whole period from the end of the War through to the beginning of the 2000s.[60]

Thus nobody tried holding the Democratic Republic of the Congo responsible for violations committed by the separatist authorities of Katanga, or to address to Nigeria any claims relating to the acts of the regime in Biafra in the 1960s. No State tried seriously to enforce responsibility on the part of the UK for unlawful acts of the illegal regime present in the then Southern Rhodesia in the 1960s and 1970s, and there were no efforts made to enforce the responsibility of China for the acts of the Taiwanese authorities in the 1970s or 1980s, or later.

It seems probable that, in the light of the rigidity of the case-law just presented, States did not consider claims against parent States effective means of obtaining redress for injuries they suffered. Discouraged in this respect, they looked for other opportunities to ensure a cessation of wrongful acts committed by groups not controlled by central governments, and to obtain reparation for the consequences of such acts. This was probably the main reason for the subsequent adoption of a practice of the responsibility of third States (supporting States) being enforced, which is the subject of discussion in the next chapter.

It is possible to find remains of past practice in the ILC's commentary to Article 23 of the 2001 Draft Articles, as these concern one of the circumstances precluding wrongfulness of the acts of States, namely *force majeure*.[61] Still, this refers solely to the basic rule discussed above, namely the one that a State may not be held responsible for violations of international law occurring in a part of its territory under the control of insurgents.[62] The two exceptions to Art. 23 provided for in the draft are more general than the three customary exceptions discussed previously– they provide that *force majeure* cannot serve as a proper defence "if the situation of *force majeure* is due," at least partly, "to the conduct of the State invoking it" or if the State "has assumed the risk of that situation occurring."[63] Although both appear not entirely compatible with ones from the more distant past, in the absence of any State practice the relationship between them remains unclear.

Finally, it needs to be stressed how the period from the early 2000s onwards brought a return to the practice of the enforcement of the responsibility of parent

[60] There is also no reference to any decision or award given after 1945 which would relate to these matters in the official commentary of the ILC to articles 10 and 23 of the 2001 Draft Articles, *see* ILC, *supra* note 2, pp. 50–52, 76–78.

[61] This was at times noticed expressly by arbitration commissions, tribunals or their members, *see e.g.* the dissenting opinion of Commissioner Andrade in: Moore, *supra* note 8, pp. 1438–1439. *See* also dissenting opinion of Commissioner Andrade in: Commission under the Convention between the United States and Venezuela of January 19, 1892, *supra* note 59, p. 1729 and the opinion of Commissioner Palacio in: Mixed Commission established under the Convention concluded between the United States of America and Mexico on 4 July 1868, *supra* note 45, p. 2895 (mentioning *vis major*).

[62] ILC, *supra* note 60, p. 76.

[63] ILC, *supra* note 2.

States before international bodies, or, more precisely, one body – the ECHR. The seminal judgment in this regard was that issued in 2004 in *Ilaşcu and Others v. Moldova and Russia* (*Ilaşcu*). The applicants, Mr Ilie Ilaşcu and three other persons convicted by a court in Transnistria, an area of Moldova ruled by an unrecognised separatist regime, were imprisoned and subjected to ill-treatment. Since Transnistria itself was not a party to the European Convention on Human Rights (the European Convention), the applicants decided to lodge their application both against Moldova, as the parent State still claiming that Transnistria was a part of its national territory, and Russia, as the supporting State exercising overall control over the Transnistrian regime.[64]

The Court upheld the claim, holding that Moldova did not fully discharge its obligations towards the applicants and, accordingly, that its responsibility was engaged. As the judges observed, responsibility under the Convention is conditional upon the existence of jurisdiction over a given individual.[65] Normally, such jurisdiction is presumed to be exercised without limitations over all individuals in the State's territory; but in certain circumstances the State may be unable to exercise it fully. This was for instance deemed to happen when a State lost effective control (authority) over an area to a separatist regime.[66] In such cases, the jurisdiction of the parent State becomes reduced, with this in turn limiting the scope of its responsibility for infringements of so-called "positive obligations."[67] The latter are twofold: on the one hand, the State in question must take all measures at its disposal to regain control over the territory controlled by the separatist regime, while on the other it must take all appropriate measures within its power to ensure respect for the rights and freedoms of individuals in the contested area.[68]

The *Ilaşcu* judgment and subsequent judgments of the ECHR in cases against Moldova and Russia[69] raise many issues pertinent to the present study. The conclu-

[64] The claims put forward against Russia will be analysed in the next chapter.

[65] D. Rossi d'Ambrosio, *The Human Rights of the Other – Law, Philosophy and Complications in the Extra-territorial Application of the ECHR*, 2 (1) SOAS Law Journal 1 (2015), pp. 8–22 rightly argues that the "territoriality" of the ECHR's jurisdiction is overemphasised by many scholars, since the most essential is "the relationship of power between the state and the individuals involved."

[66] ECHR, *Ilaşcu and Others v. Moldova and Russia* (App. No. 48787/99), Grand Chamber Judgment, 8 July 2004, para. 312.

[67] This expression was already present in the jurisprudence of the Court, *see* W.A. Schabas, *The European Convention on Human Rights: A Commentary*, Oxford University Press, Oxford: 2015, pp. 90–91 but in *Ilaşcu* the Court expanded its meaning.

[68] ECHR, *supra* note 66, paras. 339–340.

[69] At present, there are around a dozen judgments of the ECHR relating to the issue of responsibility of the parent State, *inter alia*: ECHR, *Ivanţoc and Others v. Moldova and Russia* (App. No. 23687/05), Judgment, 15 November 2011; ECHR, *Catan and Others v. Moldova and Russia* (App. No. 43370/04, 8252/05, 18454/06), Grand Chamber Judgment, 19 October 2012, ECHR, *Mozer v. The Republic of Moldova and Russia* (App. No. 11138/10), Grand Chamber

sion of the Court that the loss of effective control by the parent State reduces the scope of its jurisdiction and obligations, and, as a consequence, also its responsibility, became an issue contested even by the judges sitting on the bench in the case. Some of them argued that a State which is unable to exercise its authority in a part of its territory because of a separatist regime does not have any jurisdiction over the area in question and is not responsible for any infringements of the Convention.[70] In contrast, certain other judges argued that the scope of jurisdiction over the territory of a State was always the same, with only responsibility capable of being limited.[71] In the light of international judicial practice and Article 23 of the 2001 Draft Articles,[72] the latter approach seems to the more proper. In general international law, the temporary inability of a State to exercise its effective control over an area does not affect the scope of its obligations or jurisdiction, doing nothing more than limiting the scope of its responsibility.

As regards the concept of "positive obligations," in its consequences it is to a large extent similar to the three customary exceptions from the rule that a State is not responsible for the acts of a group which is out of its control discussed above; which is to say the obligations as regards preventing and suppressing wrongful acts and punishing wrongdoers. In any case, two differences remain. The first and most crucial one from the theoretical point of view is that, in the case of the violation of "positive obligations," the Court, unlike the arbitration bodies of the past, does not attribute responsibility for the wrongful acts of a separatist regime to the State. It makes it clear that it only holds the State responsible for its own acts and omissions with respect to the applicants.[73] The second difference between the two concepts of responsibility of the parent State is a difference with respect to the efforts that are enough to free a party of responsibility. And this is something that deserves further consideration.

The obligation to re-establish control over an uncontrolled territory is treated by the Court even less rigorously than by the arbitration tribunals in the past. A valuable summary of the ECHR's approach in this regard can be found in two passages

Judgment, 23 February 2016. Several others, starting from ECHR, *Turturica and Casian v. The Republic of Moldova and Russia* (App. No. 28648/06, 18832/07), Judgment, 30 August 2016, were issued by the Second Section of the Court and are much less instructive.

[70] *See* Partly Dissenting Opinion of Judge Sir Nicolas Bratza, joined by Judges Rozakis, Hedigan, Thomassen and Panțîru, paras. 7–8 and 27 to ECHR, *supra* note 66, and Partly Dissenting Opinion of Judge Loucaides to *ibidem*.

[71] Partly Dissenting Opinion of Judge Ress, paras. 1–2 to *ibidem*, and to some extent Dissenting Opinion of Judge Kovler, point III to *ibidem*.

[72] Which, according to the 2001 Draft Articles, is one of the circumstances precluding wrongfulness, not limiting the scope of the obligations.

[73] *See e.g.* ECHR, *supra* note 66, para. 333: "the undertaking given by the State under Article 1 must be considered by the Court only in the light of the Contracting State's (!) positive obligations towards persons within its territory" and para. 352: "Moldova's responsibility could be engaged under the Convention on account of its failure to discharge its (!) positive obligations with regard to the acts complained of."

from the *Ilaşcu* judgment. In the first, the Court stated: "It is not for the Court to indicate the most appropriate measures Moldova should have taken or should take to that end [to re-establish its control over Transnistria – author's note], or whether such measures were sufficient.' In turn, in the second, the Court admitted that, 'when confronted with a regime sustained militarily, politically and economically by a power such as the Russian Federation [supporting the regime – author's note], there was little Moldova could do to re-establish its authority over Transdniestrian territory.'[74] This lenient attitude is very common to all the judgments in question. In fact relief from from responsibility is deemed to be achieved even where a state confines itself to mainly symbolic gestures, such as repeated protests to the States supporting the separatist regime, with calls for it to withdraw its troops,[75] complaints at various international fora such as the UN, the Council of Europe, the EU and the OSCE,[76] the prohibition of the import and export of goods from and to the area,[77] or improvement of *de facto*-border controls.[78] There is no expectation of military measures being resorted to,[79] which may be understandable from the point of view of the general prohibition on the use of force in international relations, but contrasts greatly with the expectations of the arbitrators in the past. What is more, some of the measures approved by the Court, like the improvement of border controls, appear more like signs of acceptance of the current *de facto* situation than actions conducive to the re-establishment of control.

As regards the obligation that appropriate steps be taken to ensure respect for the rights and freedoms within the separatist territory, this in fact goes much further than did customary norms expressed in the past. In *Ilaşcu*, the ECHR found Moldova responsible for its failure to discharge its positive obligations with regard to the applicants, on account of the lack of any effort to reach an agreement with the Trasnistrian regime with a view to the Convention rights of the applicants being guaranteed, as well as the refusal to raise the issue of the fate of Mr Ilaşcu and his fellow inmates in the context of bilateral Moldovan relations with Russia that was acting in support of the regime.[80]

Later, in the case of *Ivanţoc* decided in 2011, the Court observed that the positive obligations towards the same applicants were discharged towards the appli-

[74] *Ibidem*, paras. 340, 341.

[75] ECHR, *Ivanţoc and Others v. Moldova and Russia*, *supra* note 69, paras. 16, 29–30, 108.

[76] ECHR, *supra* note 66, para. 341; ECHR, *Mozer v. The Republic of Moldova and Russia, supra* note 69, para. 86.

[77] ECHR, *Ivanţoc and Others v. Moldova and Russia, supra* note 69, para. 19.

[78] ECHR, *Mozer v. The Republic of Moldova and Russia, supra* note 69, para. 86.

[79] The ECHR's insistence on the use of solely peaceful means to re-establish effective control over a separatist territory is rightly stressed by A. Cullen, S. Wheatley, *The Human Rights of Individuals in De Facto Regimes under the European Convention on Human Rights*, 13/4 Human Rights Law Review 691 (2013), pp. 703–704.

[80] ECHR, *supra* note 66, paras. 348–352.

cants because Moldova had started to raise the question of the applicants' release systematically, as well as that of respect for their rights, in negotiations pursued with Transnistrian leaders, and in bilateral talks with Russia. Also appreciated were Moldova's efforts to seek the assistance of other State and international organisations.[81] To be mentioned among measures recognised by judgments as capable of freeing Moldova from its responsibility is the institution of criminal investigations into the violations of the rights of applicants by the unrecognised authorities,[82] the initiation of proceedings for the annulment of sentences issued by the courts of the regime before own courts,[83] or the awarding of financial assistance to the applicants.[84]

The most unique feature of the regime regarding the responsibility of parent States before the ECHR is the Court's clear insistence on at-least limited cooperation with a view to respect for the rights of applicants being secured. This requirement appears both demanding, and hardly compatible with the obligation that control over the area under the authority of an unrecognised entity be re-established. For example, the Court was unambiguously critical of the Moldovan government for the latter's failure to enter into certain agreements with the Transnistrian authorities in order that respect for the rights of the applicants might be secured.[85] In the same way, it welcomed contacts with the regime initiated with a view to observance of these rights being ensured, for instance by way of letters sent to such authorities.[86] In some cases, the burden imposed was particularly heavy, as in the *Catan* case decided in 2012 in regard to the closure of Latin-script schools on Transnistrian territory by the unrecognised authorities thereof. The Court commended the "considerable efforts" Moldova had made through its relocation of the schools in question (since some were in fact relocated to buildings rented from the separatist authorities in another area, while another was set up in the area controlled by the Moldovan government with an arrangement made for everyday transfer

[81] The organisations contacted in this regard were the ICRC, the OSCE and even the NATO, *see* ECHR, *Ivanțoc and Others v. Moldova and Russia, supra* note 69, paras. 24, 109–111. The practice of raising international awareness about a certain case before the Council of Europe, the OSCE and the EU was also noted with approval by the Court in ECHR, *Vardanean v. The Republic of Moldova and Russia* (App. No. 22200/10), Judgment, 30 May 2017, paras. 12 and 42.

[82] ECHR, *Draci v. The Republic of Moldova and Russia* (App. No. 5349/02), Judgment, 17 October 2017, paras. 15, 61; ECHR, *Vardanean v. The Republic of Moldova and Russia, supra* note 81, paras. 12, 42; ECHR, *Eriomenco c. République de Moldova et Russia* (App. No. 42224/11), Judgment, 9 May 2017, paras. 32–33, 60; ECHR, *Paduret v. The Republic of Moldova and Russia* (App. No. 26626/11), Judgment, 9 May 2017, para. 8. It must be remarked with surprise that the Court did not pay attention to the suspension or discontinuation of the proceedings without any real progress achieved, as in the cases of *Vardanean* and *Paduret*.

[83] ECHR, *Draci v. The Republic of Moldova and Russia, supra* note 82, para. 16.

[84] ECHR, *Vardanean v. The Republic of Moldova and Russia, supra* note 81, paras. 13, 42.

[85] Like in *Ilașcu* already cited.

[86] ECHR, *Eriomenco c. République de Moldova et Russia, supra* note 82, paras. 34–35.

of pupils and teachers from and to Transnistria).[87] Obviously, these actions enabled schools to continue to provide necessary education to the children, but at the same time involved a degree of cooperation with the Transnistrian regime, up to and including the latter's being provided with certain funding in the form of rents. One can therefore conclude that the ECHR's concept of the positive obligations reinterprets the previous customary norms regarding negligence and bad faith as possible sources of responsibility for acts by authorities out of control of the parent State.[88]

3. The responsibility of the supporting State

The difficulties encountered in enforcing responsibility of unrecognised States and regimes or parent States, due to the factors analysed above, led certain States to start considering whether they might manage to hold responsible the third States acting in support of the given entities to a greater or lesser extent; and in most cases contributing to their creation. The early origins of this fairly new tendency – only as compared to the two previous ones, of course – came in the late inter-War period. In February 1932 Japan, set up the puppet regime of Manchukuo, with a view to alleviating international concerns regarding its conquest of Chinese Manchuria less than a year before. Although dressed up as an exercise of the right of self-determination by the Manchurian people, the creation of Manchukuo met with an adverse reaction from the Assembly of the League of Nations, which adopted a Resolution refusing to recognise the purported new State.[89]

Although completely dependent on Japan, Manchukuo was still regarded widely as a separate entity responsible for its own affairs, as confirmed *inter alia* by a report prepared by an Advisory Committee of the Assembly in 1933, the aim then being to determine the consequences of non-recognition of Manchukuo for the Member States of the League.

While the title of the aforementioned report related to the "Sino-Japanese dispute," the Committee recommended no measures being taken against Japan, despite this being the State contributing greatly to the setting-up of the regime.[90]

In this context, an incident occurring in 1938 looks more influential than it was. This was the USSR's complete halting of all parcel and postal services with both

[87] ECHR, *Catan and Others v. Moldova and Russia, supra* note 69, paras. 49, 56, 61–62, 147.

[88] V.P. Tzevelekos, *Reconstructing the Effective Control Criterion in Extraterritorial Human Rights Breaches: Direct Attribution of Wrongfulness, Due Diligence, and Concurrent Responsibility*, 36 (1) Michigan Journal of International Law 129 (2014), pp. 162, 165.

[89] M.O. Hudson, *The Report of the Assembly of the League of Nations on the Sino-Japanese Dispute*, 27 (2) American Journal of International Law 300 (1933), pp. 301–302.

[90] Comité consultatif de la Société des Nations, *Mesures proposées par le Comité consultatif concernant la non-reconnaissance du 'Mandchoukuo'*, report no. C.L.117.1933.VII in: Societé des Nations, Journal Officiel, Supplément Spécial, vol. V no. 113: *Actes de la session extraordinaire de l'Assemblée convoquée en vertu de l'article 15 du Pacte à la demande du gouvernement chinois*, *passim*.

Manchukuo and Japan, as a reprisal for the detention of a Soviet mail plane with its load and crew in the territory of Manchukuo. A Japanese plane was also forced down and held hostage.

In the course of the Soviet-Japanese negotiations with a view to the dispute being resolved, the Japanese party asked the Soviet government to refer to Manchukuo on the question of the plane. However, the Soviets expressed the view that their contacts with the Manchukuo authorities were unsatisfactory, and insisted on a settlement with the Japanese.[91] As this case makes clear, even before the War there were isolated cases in which States considered supporting States responsible for certain wrongful acts of unrecognised regimes.

The growing popularity of the idea of making States responsible for the actions and omissions of formally separate but largely dependent and unrecognised regimes was presumably a direct consequence of the increasing number of such entities, and the fact that in many cases these were only seen as a disguising of occupying powers' annexation of the respective territories. In this regard, scholars at the time pointed to the creation of "puppet States," such as Nazi Slovakia and Croatia, established in 1939 and 1941 respectively by Nazi Germany. It was argued that such regimes derived their existence from the will of occupants leading their creation, that they had no independent status in international law, and that they should have been regarded as mere organs of the States operating in support of them.[92]

The idea that the acts of entities whose independence is doubtful should be considered attributable to the third States who helped create those entities started to gain real popularity after the War. One of the first well-known cases of this being applied was the case of the GDR, in the wake of its creation in 1949. The new State continued to go unrecognised by the Western powers through to the 1970s, largely due to the so-called Hallstein doctrine adopted by its rival, the FRG, in accordance with which the FRG considered itself the only State authorised to speak in the name of the German people, and broke off diplomatic relations with every State that recognised the GDR.[93] When asked about this, some Western powers expressed the view that the GDR was not a sovereign and independent State, but an agent acting on behalf of the USSR.[94]

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[91] K.B. (anonymous author), *Few New Aspects to Soviet-Japanese Friction*, 7 (11) Far Eastern Survey 128 (1938), pp. 129–130. A less-detailed account of events in Frowein, *supra* note 20, p. 75.

[92] *See e.g.* R. Lemkin, *Axis rule in occupied Europe: laws of occupation, analysis of government, proposals for redress*, Carnegie Endowment for International Peace, Washington: 1944, p. 11.

[93] R. Bierzanek, *La non-reconnaissance et le droit international contemporain*, 8 Annuaire français de droit international 117 (1962), pp. 117–118.

[94] This was the expression used by the US Secretary of State John Foster Dulles, *see* F.A. Mann, *Germany's Present Legal Status Revisited*, 16/3 International and Comparative Law Quarterly 760 (1967), p. 773.

The question of the status of the GDR became the subject of judicial attention in the *Carl Zeiss* case, decided by the British House of Lords in 1966. The claimant, the Carl Zeiss company located in the GDR, sought to restrain the respondent, a company under of similar name located in the FRG, from passing off its goods under the former's trade name. Since both claimed to be the legal successors of the pre-war Carl Zeiss company, it became necessary to decide who was actually entitled. However, as the UK did not recognise the GDR at that time, it appeared that the court could not give force to the decrees of the East German government. According to a certificate issued by the British Foreign Office received by the court, the UK did not grant "any recognition *de jure* or *de facto*" to the GDR, with it therefore being the USSR that was "*de jure* entitled to exercise governing authority in respect of the zone."[95] This led the Lords to conclude that the acts of the GDR could and should have been treated, not as the acts of "a sovereign State," but as "acts done by a subordinate body which the USSR set up to act on its behalf."[96] This effectively meant that the GDR was equated with an agent of the Soviet Union,[97] to which all acts of the latter could be attributed.[98] The whole "Carl Zeiss formula" was therefore based on legal fiction.[99]

The same reasoning was applied once again in 1986, in another British judgment, *Gur Corporation v. Trust Bank of Africa Ltd*., decided by the Court of Appeal. The plaintiff had contracted to build a hospital and two schools in Ciskei, a territory in South Africa (the RSA), which had been declared an independent State but gone unrecognised by the whole international community other than the RSA itself. A payment guarantee was issued by the London Branch of the Trust Bank of Africa Ltd. in favour of the client, the Department of Public Works of the Republic of Ciskei. As security for the guarantee, the contractor deposited a sum of money with the bank. In the end, the bank declined both to pay the guarantee and to return the deposit, so the contractor decided to bring an action against it. The

[95] United Kingdom, House of Lords, *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, 18 May 1966, 43 International Law Reports 23, pp. 45–46.

[96] *Ibidem*, p. 50.

[97] Or, in the words of one of the judges, lord Reid, "as a dependent or subordinate organization through which the USSR is entitled to exercise indirect rule," *see ibidem*, p. 47.

[98] This consequence of the conclusions drawn by lord Reid was noticed by Mann, *supra* note 94, p. 775 and was one of the reasons of his harsh criticism of the judgment.

[99] *See ibidem*, pp. 772–775, and J. Crawford, *Brownlie's Principles of Public International Law*, Oxford University Press, Oxford: 2012, p. 159. The latter argues that this fiction operates on the basis of an imputed agency, i.e. that the acts of the unrecognised entity are considered performed under powers delegated to it by the legitimate sovereign. A wholly different approach, similar to that discussed in the first chapter, was taken by one of the US courts at the time, which found the government of the GDR to be a "'*de facto* government" in control of a territory occupied by the Soviet Union," *see* United States, Supreme Court of New York, Appellate Division, First Department, *Upright v. Mercury Business Machines Co.*, 11 April 1961, 32 International Law Reports 65, particularly pp. 65–66 and 69.

government of Ciskei sought to join as a third party, and bring a counterclaim.[100] In the first instance, the British High Court decided that. in the light of its non-recognition by the UK, Ciskei had no standing to sue or be sued in an English court. This finding became a point of contention before the Court of Appeal. Since the certificate of the Foreign Office confirmed that the UK did not recognise Ciskei as a State, it had to be treated as if South Africa had not granted it independence.[101] Thus, the court chose to view Ciskei as an administrative unit set up by South Africa to which the latter delegated certain powers, or, in the words of the presiding judge "a subordinate body set up by the Republic of South Africa to act on its behalf."[102] This effectively meant that Ciskei was considered an agent of the South African State.[103]

The approach adopted by the British courts in both cases just discussed, although undoubtedly controversial from the point of view of national law, was a step towards the enforcement of the responsibility of supporting States for the acts of unrecognised States and regimes. After all, if such entities could be considered agents of supporting States, i.e. those who act under the direction, instigation or control of the proper organs of the State,[104] then there was no reason why the latter should not be held responsible for any possible wrongful acts of the former.[105] This assumption was verified after 1990 by three influential international judicial bodies: the ECHR, the ICTY and the ICJ. Surprisingly, each of these reached a different conclusion regarding the specific rules on attributing acts from unrecognised regimes acting as agents of respective States.

The approach of the ICJ emerged as the most restrictive, as evidenced by the judgment on the merits in the *Genocide* case decided in 2007. As mentioned above, the applicant in the case, Bosnia and Herzegovina, sought to hold Serbia and Montenegro[106]

[100] England, Court of Appeal, *Gur Corporation v. Trust Bank of Africa Ltd.*, 22 July 1986, 75 International Law Reports 675, pp. 675–676.

[101] *Ibidem*, pp. 695–696.

[102] *Ibidem*, p. 696.

[103] This was, once again, a legal fiction, as rightly observed by F.A. Mann, *The Judicial Recognition of an Unrecognised State*, 36/2 International and Comparative Law Quarterly 348 (1987), p. 349 and A. Beck, *A South African Homeland Appears in the English Courts: Legitimation of the Illegitimate?*, 36/2 International and Comparative Law Quarterly 350 (1987), pp. 359–360.

[104] *See* a working definition of an "agent of the State" provided in the ILC commentary to Chapter II of its 2001 Draft Articles, ILC, *supra* note 60, p. 31.

[105] As observed by the Permanent Court of International Justice in PCIJ, *Certain Questions Relating to Settlers of German Origin in the Territory Ceded by Germany to Poland,* Advisory Opinion, 10 September 1923, PCIJ Reports Series B, pp. 6ff, 22: "States can act only by and through their agents and representatives."

[106] At the time when the acts in question were committed, Serbia was known under another name, "the Federal Republic of Yugoslavia." However, while proceedings were still ongoing, it changed its name to "Serbia and Montenegro"; while becoming simply "Serbia" after its split with Montenegro in 2006. Thus, for the sake of simplicity, the State in question will be further referred to simply as "Serbia."

responsible for violations of the 1948 Genocide Convention, with respect to Bosnian nationals. One of the most contentious issues in the case was the attributability of the acts of genocide which took place at Srebrenica and were committed by the troops of the so-called Republika Srpska to Serbia.[107] At the time the infringements occurred, Republika Srpska was an unrecognised regime, exercising its control over am extensive part of Bosnian territory for nearly four years – between the time of a declaration of independence at the beginning of 1992 and the signing of the Dayton agreements at the end of 1995 (as marking the end of any separate existence).

In its judgment, the ICJ conducted a thorough analysis of possible ways of attributing acts of Republika Srpska to the Serbian State. It concluded that none of the situations other than those referred to in Articles 4 and 8 of the 2001 Draft Articles could match the circumstances of the case in regard to the possibility of Srebrenica genocide being attributed to the respondent.[108] So the only available options to assess the violations in question were to try to treat Republika Srpska either as a *de facto* organ of Serbia (Article 4) or as an agent of that State, i.e. an entity acting on the instructions of, or under the direction or control of that State, in carrying on with certain conduct (Article 8). This means that the Court did not consider Republika Srpska a State, since both articles are contained in Chapter II of the draft relating to the acts of various non-State entities, organs and groups.

In determining whether the troops and other organs of Republika Srpska could engage Serbia's responsibility through their actions or omissions, the ICJ applied two "tests," i.e. the "strict control" test and the "effective control" test.[109] The strict control test was used to assess whether the forces of Republika Srpska could be considered *de facto* organs of Serbia. It provided that the acts of a group could be attributed to a State only if it was "completely dependent" on that State and was under its "strict control."[110] This meant that the group's independence had to be "purely fictitious," and it could not have any "real autonomy."[111] According to the Court, these conditions were not fulfilled in the case, *inter alia* because there were

[107] This was noticed even by the Court itself, *see* ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Merits, Judgment, 26 February 2007, ICJ Rep 2007, pp. 43 *et seq*., para. 202.

[108] *Ibidem*, para. 404.

[109] The exact names of both tests differ, but nowadays most scholars agree that there were (and are) two of them, *see* S. Talmon, *Responsibility of Outside Powers for Acts of Secessionist Entities*, 58 (3) International and Comparative Law Quarterly 493 (2009), pp. 497–503, O. De Schutter, *International Human Rights Law: Cases, Materials, Commentary*, Cambridge University Press, Cambridge: 2010, p. 375, J.M. Rooney, *The Relationship between Jurisdiction and Attribution after Jaloud v. Netherlands*, 62 (3) Netherlands International Law Review 407 (2015), pp. 422–423. It needs to be stressed that both tests were applied for the first time by the ICJ in its 1986 judgment in the case of Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*).

[110] ICJ, *supra* note 107, paras. 392–393 and 391, respectively.

[111] *Ibidem*, paras. 392–394.

differences as regards certain strategic options between the governments of Serbia and Republika Srpska and because the officers of the unrecognised entity were politically and operationally subject to its political leadership, appointed by its President and exercising authority on behalf of the Republika Srpska, not of Serbia.[112]

The second test – the effective control test – was used to evaluate the possibility of troops and other organs of Republika Srpska being qualified as agents of Serbia.[113] The ICJ noted that this could be possible only if it was proven that Serbia directed or enforced the perpetration of specific acts by Bosnian Serbs in violation of its international law obligations. To consider a group as an agent of a State, it had to be "effectively controlled" by it.[114] That meant that the State not only had to be aware of the actions of the unrecognised regime and provide it with aid of a political, military and financial nature, but also at the same time had to effectively direct it, by taking an active part in the planning of its actions and the constant monitoring of if and how they are carried out.[115] According to the ICJ, the applicant did not provide sufficient evidence in this regard. As a consequence, the attribution of the acts of genocide committed by Republika Srpska to Serbia was impossible. Serbia was found guilty only of its failure to fulfil its obligations in regard to the prevention and punishment of acts committed by a third party, by reference to the Genocide Convention.

Although the ICJ did not treat Republika Srpska as a State, it nevertheless regarded it as an entity separate from Serbia, without trying to establish its status precisely. Its two brief remarks that Republika Srpska "was not and has not been recognized internationally as a State" but at the same time "had de facto control of substantial territory, and the loyalty of large numbers of Bosnian Serbs" are perfect evidence of this attitude.[116] Its disregard of the claims to statehood by Republika Srpska can also be found in a brief reference made to Articles 16 of the 2001 Draft Articles, which the Court only found indirectly relevant because the provision in question concerns a situation "characterized by the existence of relations between two States."[117] These remarks of the ICJ provide additional evidence that it did not treat Republika Srpska as a State. However, other findings do suggest that it perceived this entity as capable of engaging its own responsibility, since the acts of

[112] *Ibidem*, paras. 394 and 388 respectively.

[113] For a different view – that this test was used, not in order to attribute to a State the acts of another entity, but to establish a State's own responsibility for its support for such an entity – *see* A. Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 (4) European Journal of International Law 649 (2007), p. 652, including note 8.

[114] ICJ, *supra* note 107, para. 399.

[115] Talmon, *supra* note 109, p. 503 sums this requirement up as follows: "It is argued that the outside power must be able to control the beginning of the operation, the way it is carried out, and its end." For a critical view, *see* Cassese, *supra* note 113, p. 654.

[116] ICJ, *supra* note 107, pp. 233–235.

[117] *Ibidem*, para. 420.

the latter, while not attributed to Serbia, were still declared acts of genocide thereby. This approach was in line with the practice of international judicial bodies deciding on the responsibility of unrecognised States or regimes in the past, as described in two previous chapters.

Responsibility of Serbia for the acts of Republika Srpska was also an issue of interest for another international body, the ICTY, in the *Tadić* case, which was decided by the ICTY's Appeals Chamber in 1999.[118] Even though the ICTY's primary task was to decide on the individual responsibility of the accused, Mr Duško Tadić, it found it necessary to inquire into questions regarding general international responsibility, in order to determine whether Tadić's acts were committed in the course of an international or non-international conflict, and, consequently, if the Geneva Conventions were applicable in full or just in a small part related to all conflicts, the common Article 3.[119] If the acts of Republika Srpska were attributable to Serbia, the argument went, the conflict between Bosnia and Herzegovina and Republika Srpska in early 1990s would be an international one, and the crimes committed by Tadić as a member of the Bosnian Serb paramilitary forces could be assessed in the light of the Geneva Conventions as such.

The Appeals Chamber ruled that the degree of control needed to attribute to a State the acts of non-State groups in international law could vary according to the circumstances. The rules on the attribution of the acts of individuals to a State are more rigid than those relating to "organised and hierarchically structured groups," such as a military units, armed bands of irregulars or rebels. In the case of the latter, contrary to what the ICJ said, there was no need to prove that a State issued specific instructions regarding the acts in question – instead, it was sufficient to provide evidence that the group "as a whole" was "under the overall control of the State."[120] According to the judges of the Appeals Chamber, exercise of overall control could be implied if the group was supported by the State, through financial, military and other means; while at the same time the State had a role in organising, coordinating and planning the actions of the group.[121] The ICTY underlined that there was no requirement for any instructions for the commission of specific acts contrary to international law to be issued – but if they were, the State would be responsible

[118] The approach adopted by the ICTY's chamber having original jurisdiction, the Trial Chamber, in 1997, did not differ significantly from the one of the ICJ and therefore will not be discussed further here for the sake of brevity.

[119] This approach was criticized by many scholars, mostly because of scepticism over whether it was necessary for the Tribunal to resort to international responsibility to provide an answer if an armed conflict was international or not, *see e.g.* M. Milanović, *State Responsibility for Genocide*, 17 (3) The European Journal of International Law 553 (2006), p. 581. Even the ICJ itself decided to voice its criticism, *see* ICJ, *supra* note 107, paras. 402–406.

[120] ICTY, *Prosecutor v. Duško Tadić aka "Dule"*, Merits (App. No. IT-94-1-A), Appeals Chamber, 15 July 1999, paras. 117–120.

[121] *Ibidem*, paras. 130–137.

for the acts of the group, whether the latter followed its orders or not.[122] In the case at hand, the Tribunal found several arguments in favour of holding Serbia responsible: a significant influence of the Serbian Army over the choice of political and military objectives of the forces of Republika Srpska, an identical command structure of both armies, payment of salaries to Bosnian Serb officers by Serbia, extensive financial, logistical and other assistance received by the forces of Republika Srpska from Serbia, and finally, the fact that Serbia represented Republika Srpska in the negotiations leading to the conclusion of the Dayton Peace Agreement, signed that Agreement on its behalf, and pledged to ensure the compliance of the Bosnian Serbs with this treaty.[123] For the ICTY, all this meant that Serbia exercised overall control over Republika Srpska and, accordingly, the latter could be considered an agent of Serbia at the time.[124]

Unlike the ICJ, the ICTY did not even take into account the possibility that the acts of Republika Srpska could be assessed on the basis of norms relating to the responsibility of States for the actions and omissions of other States. Moreover, the standard set by the Tribunal with respect to the attribution of responsibility for the acts of what it considered a non-State entity was much less rigorous than the one defined by the ICJ. This was made even more obvious by the similar factual circumstances of the cases reviewed by the two judicial bodies. Still, the views of these bodies, even if widely diverging, were consistent to the extent that both considered the support provided to an entity by a State, even if comprehensive, as insufficient in itself to engage responsibility on the part of that State.

This was not the case in the jurisprudence of the ECHR relating to the third States supporting unrecognised States or regimes. Its starting point were two landmark judgments issued by the Court in the *Loizidou* case – in 1995 (on preliminary objections) and 1996 (on merits). The Court was tasked with deciding the responsibility of Turkey for the acts of the authorities of the TRNC, an unrecognised regime established in 1983 in the Turkish-occupied northern part of Cyprus. The applicant claimed that she was continuously prevented from gaining access to her home and other properties in the northern part of the island as a result of the Turkish occupation of the area in 1974, and subsequent actions of the Turkish Cypriot authorities. Turkey objected to that, arguing that the acts complained about had been commit-

[122] *Ibidem*, paras. 121 and 131.

[123] *See ibidem*, paras. 150–151, 160–161.

[124] Interestingly, some national courts adopt a wholly different attitude to such cases (though, it is argued, a wrong one). A great example is another judgment which concerned the responsibility for the Srebrenica genocide, in *Kadić v. Karadzić*, issued in 1995 by the US Court of Appeals. Having regard to the criteria of statehood proposed in the literature, the Court held that Republika Srpska was a State and, despite its non-recognition, it and its leaders were responsible for violations of the customary international law of human rights. *See* United States Court of Appeals, 2nd Circuit, *Kadić v. Karadzić; Doe I and Doe II v. Karadzić*, 13 October 1995, 104 International Law Reports 135, p. 158.

ted by the organs of the TRNC, a sovereign and independent State recognised by Turkey, which could not be a party to the proceedings since it was not a party to the European Convention.[125]

In response to Turkish claims, the ECHR referred to the resolutions of the UN and the Council of Europe condemning the proclamation of independence by the TRNC and calling all States not to recognise it, as well as to similar statements announced by the European Community and the Commonwealth. It stressed that the only internationally recognised and sole legitimate authority in Cyprus was the Republic of Cyprus; and it refused to accept objections relating to the purported statehood of the Turkish Cypriot regime.[126] It also observed, as it would several years later in *Ilaşcu*, that in certain special circumstances jurisdiction of a State-party to the European Convention could also be exercised beyond its national territory, e.g. over an area effectively controlled by it as a consequence of military action. It underlined that such "effective control" could be exercised either directly or through "a subordinate local administration."[127] As to the conditions necessary to confirm the existence of such control, the Court underlined that it was not necessary to find out whether Turkey actually "exercised detailed control over policies and actions" of the TRNC. Turkish effective control[128] over the Northern part of Cyprus was "obvious," judging by the large number of Turkish troops stationed in Northern Cyprus and engaged in active duties (more than 30,000 soldiers), and the existence of several Turkish military facilities there, including naval bases and military airports. This, it was concluded, entailed Turkish responsibility for the policies and actions of the TRNC as a whole.[129] As a result, Turkey was found responsible for the

[125] *See* ECHR, *supra* note 37, paras. 10–13, 47 and ECHR, *Loizidou v. Turkey* (App. No. 15318/89), Grand Chamber Judgment, 18 December 1996, para. 51.

[126] ECHR, *Loizidou v. Turkey,* Merits, *supra* note 125, paras. 42–45.

[127] *Ibidem*, paras. 52, citing its earlier findings made in ECHR, *supra* note 37, para. 62. The expression in inverted commas may be seen as a clear reference to the British cases cited above, namely *Carl Zeiss* and *Gur Corporation*, although the Court did not expressly mention them in these two or further judgments.

[128] The Court used an expression "effective overall control" here, *see* ECHR, *Loizidou v. Turkey,* Merits, *supra* note 125, para. 56; but in the light of its whole case-law it seems that it meant the "effective control." Still, the former term is used to describe the ECHR's test by many scholars, among others, Talmon, *supra* note 109, *passim* and M. Milanović, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, Oxford University Press, Oxford: 2011, p. 42. The latter even argues that the ECHR prefers to use the term "effective overall control," but does not substantiate his claim. However, recent judgments leave no doubt that it is the "effective control" which is preferred, *see*, *inter alia*, ECHR, *Mozer v. The Republic of Moldova and Russia, supra* note 69 or ECHR, *Draci v. The Republic of Moldova and Russia, supra* note 82.

[129] ECHR, *Loizidou v. Turkey,* Merits, *supra* note 125, paras. 16, 56–57. It seems reasonable to see this conclusion of the Court as a confirmation that "effective control" was used as a test of attribution of the acts of an unrecognised regime to a State-party to the Convention. *See* e.g. A. Cassese, *supra* note 113, p. 658 note 17, A. Orakhelashvili, *Restrictive Interpretation of Human Rights Treaties in the Recent Jurisprudence of the European Court of Human Rights*, 14 (3) The

denial of access to the applicant's property and consequent loss of control thereof, in violation of the European Convention.

Over the years, the concept of "effective control" underwent considerable evolution. At the beginning, when assessing whether a State-party to the Convention had effective control over another entity, the Court focused exclusively on military factors. This was evident in *Loizidou*, and was subsequently confirmed in further cases relating to Northern Cyprus. But when the first case concerning Transnistria – the already mentioned *Ilaşcu* case – came before the Court, it emerged that this approach was no longer tenable. The presence of the forces of the third State supporting the regime, namely Russia, was much more limited, since in an area slightly larger than the whole TRNC territory there were only about 1500 Russian soldiers. Although there was a considerable amount of equipment at their disposal, including tanks, armoured personnel carriers, cannons, mortars, helicopters, etc., this was still a few times lower in every category compared with the equipment and weapon stocks in Northern Cyprus.[130]

Aware of that, the Court put much more emphasis on certain less tangible factors, like the fact that Russian military, political and economic support provided to the Transnistrian authorities enabled them to survive in the early years of its existence despite Moldova's efforts to subdue them,[131] the "military importance in the region" and the "dissuasive influence" of the remaining Russian forces in Transnistria, the failure to withdraw them in violation of Russia's international commitments,[132] the continuing deployment of troops of the Transnistrian regime in the security zone with Moldova which was controlled by the Russian forces, and Russia's acquiescence to the illegal manufacture of arms and weapons by the Transnistrian authorities.[133] It also pointed to economic factors, in particular the financial support enjoyed by Transnistria in the form of a significant reduction in the size of its debt owed to Russia, and the supply of gas on terms more advantageous than those offered to the remaining part of Moldova.[134] All these factors combined, the Court argued, were sufficient to prove that the Trasnistrian regime remained under the effective control of Russia and, accordingly, that the acts of the former engaged Russia's responsibility.[135]

A very similar approach was adopted by the ECHR in its first case related to another unrecognised regime, i.e. that of Nagorno Karabakh – namely *Chiragov*,

European Journal of International Law 529 (2003), pp. 540 and 545. *Contra* Milanović, *supra* note 128, pp. 46–51.

[130] ECHR, *supra* note 66, para. 131, the latter was underlined by Russia itself, *ibidem*, para. 355.

[131] *Ibidem*, paras. 380–382.

[132] *Ibidem*, para. 387.

[133] *Ibidem*, para. 391.

[134] *See* these and other arguments *ibidem*, paras. 382, 390, 156–159.

[135] *Ibidem*, paras. 382 and 394.

as decided in 2015. The circumstances of the case were very similar to those in *Loizidou*: Mr. Elkhan Chiragov and five other applicants claimed they were unable to enjoy their property located in Nagorno Karabakh, a region of Azerbaijan which had declared independence in 1991 and survived by virtue of support provided by neighbouring Armenia. However, in its assessment of the existence of Armenian jurisdiction over Nagorno Karabakh and responsibility for the acts of this entity, the Court once again took account of a much broader range of factors than in the case-law concerning the Northern Cyprus. First, it underlined the close military cooperation between Armenia and the unrecognised regime resulting from their defence alliance signed in 1994[136] – intelligence sharing, visits of senior officers, joint military exercises,[137] the provisioning of military equipment and expertise,[138] and in particular the fact that Armenian conscripts could perform their military service in the military forces of Nagorno Karabakh.[139] Without this broad support, it argued, the army of the separatist entity could not reasonably have been expected to defend itself against the much larger Azerbaijani forces in the early 1990s.[140]

Still, the ECHR also referred to other factors which, in its view offered proof of Armenian responsibility for the acts of the authorities in Nagorno Karabakh. Some of these factors were economic, like the "inter-state loans" provided by Armenia to the authorities in Nagorno Karabakh, which covered around 60% of its budget year after year and had not been repaid for a long time[141] or the significant financial assistance provided by the Hayastan All-Armenian Fund, an "NGO" established by presidential decree.[142] Other arguments were of a different nature. For instance, the Court highlighted that a number of politicians assumed highest offices in Armenia after holding similar positions in respective bodies in Nagorno Karabakh,[143] and stressed that Armenia generously provided residents of the unrecognised State with its own passports for travel abroad.[144] In conclusion, the ECHR declared that all the above facts had provided sufficient evidence that Nagorno Karabakh survived "by virtue of the military, political, financial and other support given to it by Armenia," with this then enabling the latter to exercise effective control over it. Accordingly, Armenia had jurisdiction over the

[136] ECHR, *Chiragov and Others v. Armenia* (App. No. 13216/05), Grand Chamber Judgment, 16 June 2015, paras. 74–75, 175 and 178. Simultaneously, the Court tried to downplay the importance of inquiry into the exact number of Armenian troops stationed in the disputed area (with numbers ranging from 1500 up to 10,000. *See ibidem*, para. 180.

[137] *Ibidem*, para. 75.

[138] *Ibidem*, para. 180.

[139] *Ibidem*, paras. 75 and 175.

[140] *Ibidem*, para. 174.

[141] *Ibidem*, paras. 80–81.

[142] *Ibidem*, para. 184.

[143] *Ibidem*, paras. 78 and 181.

[144] *Ibidem*, para. 83.

area claimed by the unrecognised regime and was responsible for violations of the European Convention occurring there.[145]

While the early approach of the ECHR to the attribution of acts of unrecognised regimes seemed superficial and one-sided, due to its focus on military aspects, later developments indicate that the Court noticed this flaw in its initial reasoning and tried also to take account of a wide array of non-military factors. This evolutionary change was confirmed expressly by the Court in *Catan*, in which it announced that, in determining whether effective control exists, it would "primarily have reference to the strength of the State's military presence in the area," but might also draw on other relevant facts, "such as the extent to which its military, economic and political support for the local subordinate administration provides it with influence and control over the region."[146] However, this did not make its test of "effective control" much clearer, since in fact, as evidenced by the examples already discussed, in its cases on Transnistria and Nagorno Karabakh, it put more stress on "influence and control" than on the size of the military forces. Moreover, some of its non-military arguments were simply not convincing.[147]

Surprisingly, in the opinion of the Court, the supporting State may be responsible for violations of the European Convention committed by an unrecognised entity, even if it takes action to stop them, with positive results. This conclusion may be drawn by reference to the judgment in *Catan*. In the course of the proceedings in that case, the Russian government argued that it was not aware that the Trasnistrian authorities were going to violate the right of education of the applicants by closing schools teaching in Latin script; but when they did, Russia tried actively to resolve the school crisis. The mediation efforts by Russian, Ukrainian and OSCE mediators led to amelioration of the crisis and allowed a solution, albeit imperfect, to be found and implemented.[148] The Court confirmed these facts explicitly, but held that Russia's responsibility was engaged regardless, simply because in the period in question that state had exercised effective control over Transnistria.[149] Russian efforts were not taken account of, even as a mitigating factor in determining the amount of compensation to be awarded to the applicants.[150]

[145] *Ibidem*, para. 186. *See also* another case concerning Nagorno Karabakh, ECHR, *Muradyan v. Armenia,* (App. No. 11275/07), Judgment, 24 November 2016, para. 126.

[146] ECHR, *Catan and Others v. Moldova and Russia, supra* note 69, para. 107. *See also* a summary of the Court's case-law on jurisdiction and responsibility provided by the ECHR itself in ECHR, *Al-Skeini and Others v. the United Kingdom* (App. No. 55721/07), Grand Chamber Judgment, 7 July 2011, para. 139.

[147] Like the one regarding the provision of Armenian passports to some inhabitants of Nagorno Karabakh, invoked as evidence of Armenia's effective control over that unrecognised entity in ECHR, *supra* note 136, para. 182. *See* a very critical opinion of the attitude of the Court in this respect in: Dissenting opinion of Judge Pinto De Albuquerque, paras. 31–34 to *ibidem*.

[148] ECHR, *Catan and Others v. Moldova and Russia, supra* note 69, paras. 66 and 49.

[149] *Ibidem*, paras. 149–150.

[150] *Ibidem*, paras. 163–166.

What is undisputed is that the ECHR does not consider it necessary to prove that the supporting State has any real impact over the decision-making process of the "subordinate local administration," that there exists between them a relation of subordination or dependence. According to the Court, it does not matter whether the State supporting the unrecognised entity participates in the process of organisation, planning or coordination of its actions, whether it issues any specific instructions to them, and whether these instructions are followed or not. The State remains responsible for all proven violations occurring in the area it controls through the subordinate administration, without exception.[151] This can be the reason why, in some cases, the ECHR did not even bother to settle the issue of whether an act was committed by the organs of the "subordinate local administration" or by the State effectively controlling it.[152] Finally, the State is also responsible for the acts of persons acting in a private capacity, provided that they violated the Convention rights of the applicants with the acquiescence or connivance of the State or the unrecognised authorities.[153] One must therefore conclude that the test applied by the ECHR to attribute responsibility of unrecognised territorial regimes departs greatly from the tests applied by the ICTY, and particularly the ICJ, and is much more permissive.[154]

Conclusions

The findings of this study allow several important conclusions to be drawn. First, as such, the international responsibility of States and other similar regimes does not depend directly on their recognition. International practice confirms that whether recognised or not, they enjoy at least limited international personality – as a direct consequence of the control they exercise over a certain area – they are bound by the norms of general international law and by the treaties concluded in whatever capacity, and their actions and omissions may be attributed directly to them. Still,

[151] *See e.g.* ECHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber Judgment, 10 May 2001, para. 77; ECHR, *supra* note 66, para. 316; ECHR, *Al-Skeini and Others v. The United Kingdom, supra* note 146, para. 138; ECHR, *Muradyan v. Armenia, supra* note 145, para. 126. *See* also the opinion of S. Talmon, *The Legal Consequences of (Non)Recognition: Cyprus and the Council of Europe*, in: M.D. Evans (ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe*, Dartmouth Publishing, Aldershot: 1997, p. 68.

[152] *See e.g.* some cases regarding Northern Cyprus, wherein the Court held that it would "proceed on the assumption that Turkey is responsible for the acts complained of, even if performed by the authorities of the 'Turkish Republic of Northern Cyprus'," *see* ECHR, *Christodoulidou v. Turkey* (App. No. 16085/90), Judgment, 15 November 2011, paras. 29–30 and ECHR, *Lordos and Others v. Turkey* (App. No. 15973/90), Judgment, 2 October 2010, paras. 31–32.

[153] ECHR, *Cyprus v. Turkey,* Merits, *supra* note 151, para. 81; ECHR, *supra* note 66, para. 318.

[154] As regards the comparison between the approaches of the ICJ and the ECHR, *see* Rooney, *supra* note 109, pp. 422–423.

the frequency and success rate of steps taken to enforce their responsibility and achieve their compliance depends greatly on the framework within which such steps are taken. Both are notably higher for treaty-based claims than for the claims based on general international law. This is mostly due to the fact that the treaties, and particularly the founding documents of international organisations, often provide for some forms of coercive measures which may be taken against the non-compliant party, or establish some bodies tasked with supervision over compliance with these treaties.

The difficulties with enforcing claims against unrecognised States or regimes led some injured States to try to hold other States responsible for the acts of these entities, namely the parent States and the supporting States. As is demonstrated above, this practice evolved greatly over two centuries. In the nineteenth and early twentieth centuries and though to the time of outbreak of World War II, claims were almost always brought against the parent State. These were hardly ever successful, since the arbiters at the time realised quite early on that holding someone responsible for the acts of another not under the first party's control would be far from being fair or reasonable. So the State unable to control a given territory was hardly ever considered responsible for violations committed therein, in the absence of negligence or bad faith on its part. After the War, the practice of the enforcement of responsibility of parent States virtually disappeared, just to resurface to a modest extent from the end of the 20th century onwards. However, the approach to the responsibility of parent States in this second period differs greatly from the one in the past. Undeniably, the main difference is that the parent State is nowadays seen as responsible, not for the unlawful actions or omission of the unrecognised State or regime as such, but simply for its own failure to suppress them or mitigate their consequences. The second important one is that, in some cases, the parent State may even be required to cooperate with the unrecognised regime to a certain extent in order to free itself of responsibility.

In the second half of the twentieth century, and particularly in the period starting from the 1990s, the focus of injured States shifted clearly to the States which supported the unrecognised regimes and allowed them to resist the attempts of the parent State to regain control. Claims lodged against the latter, inconceivable in the first period, began to be accepted by some national courts, and, most importantly, by international courts and tribunals. The unrecognised entities started to be perceived as mere agents of the States which supported them. Still, the modalities of attribution of violations committed by such regimes varied greatly. Some international courts required the claimants to provide comprehensive evidence of a relationship of subordination and dependency between the State and an unrecognised regime, others maintained that it was sufficient to demonstrate the existence of overall control, others again that it was only necessary to establish that the entity committing the violations gained the strong support of the State. It can safely be as-

serted that the rules regarding the attribution of the wrongful acts of unrecognised States or regimes continue to be contested and it is not possible to draw a general rule in this regard.

It may therefore be concluded that, under current international customary or treaty law, the parent State and the supporting State may bear subsidiary responsibility for the acts of unrecognised States or regimes.[155] After all, if the prospects for effective enforcement of compliance or obtaining adequate reparation are poor, there may be no other choice but to try to hold them responsible if justice is to be done. However, in practice this is still rather the exception than the rule.

Abstract: This article explores the relationship between international recognition and international responsibility, taking as an example the responsibility of unrecognised States and regimes. It argues that, even in the absence of its recognition as a State, an entity may be held responsible for the wrongful acts it commits, provided it has at least limited international personality. However, the absence of recognition is seen to greatly limit the range of measures which may be used by injured States to enforce the responsibility of such an entity, and to affect negatively the effectiveness of such measures. As a consequence, States look for other ways to pursue claims for reparation for the injuries they have suffered. The first way is to try to achieve a holding to account of a State recognised as having the right to the territory of a given State or regime by at least a part of the international community and still considering the territory in question its own (i.e. the parent State). Although fairly common in the past, this method has lost much of its popularity due to its low rate of success, save where negligence or bad faith can easily be proved. The alternative means of seeking reparation for wrongful acts of an unrecognised regime is to argue that the entity in question is an agent of a State which supports it and exercises over it some kind of control (the supporting State). While there is no uniform standard of attribution of responsibility in such cases, the jurisprudence of international courts confirms the presence of a developing trend among States for this opportunity to be used.

Keywords: state responsibility, regime, wrongful act, Draft Articles on Responsibility of States, attribution of responsibility, parent state, supporting state, strict control, effective control, overall control.

[155] It seems that there is no gross inconsistency between the existence of a subordination/dependence relationship and subsidiary liability (or, it is argued, also responsibility) for certain wrongs. *See, inter alia*, the wording of Principle IV of Recommendation No. R (84) 15 of the Committee of Ministers to Member States relating to Public Liability, as adopted by the Committee of Ministers of the Council of Europe in 1984: "the right to bring an action against a public authority should not be subject to the obligation to act first against its agent" (which means that it is apparently possible to act against both).

Collective Recognition? The Case of the European Union

*Natividad Fernández Sola**

Introduction

The recognition of States has always been a vague concept. However, following the Montevideo Convention on the rights and duties of States (entering into force as long ago now as in 1933), the traditional criteria for considering an entity to be a State are possession of territory, a permanent population and a stable government able to maintain relations with other States.[1] The recognition of States is an institution of the practice of States, and this makes possible the clarification as regards status of an entity claiming to be a State.[2]

Quite rightly, Crawford has pointed out that the definition at stake here has been ambiguous, biased and incomplete. Two main shortfalls relate to the references to independence (the essential criterion underpinning the condition of being a State), and to the role of international law, which can grant or exclude the said condition. Thus, recognition has been denied to certain entities, effective though they may be, if contrary to international law, while recognition has been extended to other polities that are not fully effective, like Kuwait after its invasion by Iraq.[3]

The EU role as regards the recognition of States has not been the object of analysis, even if specific cases have been considered. This contribution will therefore have as its objective a delimitation of the said role, and its impact on Member States' recognition practices, and *vice versa*. Is the EU entitled to recognise new States? If so, under what conditions can this be achieved? Is it suitable for agreeing rules as regards EU/Member States recognition of States? We will show if the conceptualisations arrived at for the role of States can also apply to an EU whose role has evolved, with innovative diplomatic practice *inter alia* being developed.

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[1] Montevideo Convention on the Rights and Duties of States (adoption 26 December 1933, entry into force 26 December 1934) 165 League of Nations Treaty Series 19.

[2] J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 27

[3] *Idem*, *Chance, Order, Change: The Course of International Law*, RCADI, 2013, vol. 365.

This research will compare relevant cases in the Balkans with the most recent ones involving South Sudan, as well as the traditional refusal to extend recognition to Palestine and Western Sahara.

The hypothesis this research supports is that, within a global governance system, as promoted by the EU, its own actions of recognition should follow certain normative guidelines that govern the will of the Member States. These EU constitutional principles are both inherent to the EU's nature, and the driving force for multilevel governance, of which the EU is an essential pillar.

The consequent proposal is that the recognition of States at European level is evolving into collective recognition and even EU recognition, under European principles that can lead to general application in the international community.

1. Highlighting some concepts as regards recognition, and entities that have gone unrecognised

Even if the recognition of States has been a common topic in international-law studies, the recent status of the EU as unique international actor demands analysis of the sense of its actions in this field, and the consequences of non-recognition. Ultimately, its growing presence in the international arena raises questions as to its role in the recognition of States.

According to a classical definition, "Reconnaissance est l'opération juridique autonome par laquelle un État s'engage de façon discrétionnaire à respecter une modification de l'ordre juridique international à laquelle il n'a pas eu de participation."[4] Which is to say that recognition is one of the most frequent international unilateral acts. The consequent obligation is do not question the legitimacy of what has been recognised.[5]

The discussion about the constitutive or declarative character of the recognition of States, or its legal or political qualification, will not be addressed here. Even if it has, traditionally, been qualified as a political act,[6] it is necessary to clarify at this point that, as a unilateral act, the recognition of States is a legal act, with legal consequences. Only the decision to recognise is a political one, as it is usual for political reasons to underlie it.[7]

[4] J. Charpentier, *La reconnaissance international et l'évolution du droit des gens*, Pedone, Paris: 1956, p. 315.

[5] N. Quoc Dinh, P. Daillier & A. Pellet, *Droit international public*, LGDJ, Paris: 1992, p. 351.

[6] According to the *Institut de Droit International's* Resolution of 1936 (Brussels Session, April 1936), or the Montevideo Convention on the rights and duties of States of 1933, recognition does not attribute sovereignty, but rather conditions some of its legal effects.

[7] ILC, *Guiding principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto*, Yearbook of the International Law Commission, vol. II, 2006, vol. II, Part Two (2006) – definition of a unilateral act (p. 1), and the legal consequences thereof (p. 3).

Recognition implies the acceptance of a new State's personality, with the rights and duties provided for in International Law (Art.13, Buenos Aires Protocol).

Recognition is a political act, in the sense that is at the discretion of one State to recognise or not recognise, even if the entity in question is actually a State. Recognition will in turn depend on the opportunity or the convenience for the author of it. Therefore, recognition has only a relative effect.

Nevertheless, international law has tried repeatedly to submit States facing the recognition of a new State to certain rules. Thereby, if there is no legal prescription on recognition, nor an obligation of non-recognition,[8] at least, the legal act involved should respect the effectiveness of the power of the recognised State. However, international law is little constraining as regards the conditions for recognition, as long as each State decides what "effectiveness" means.

Historically, almost the whole international community refused to recognise the Bantustans, in South Africa, and the South African presence in Namibia.[9] The reason for the first non-recognition reflected this being a consequence of South Africa's apartheid policy; while in the second case what were involved were obstacles to independence and practical self-determination. Both cases were against international imperative norms.

Currently, international norms as the guiding principles applicable to the unilateral declarations of States capable of creating legal obligations, state that: "A unilateral declaration which is in conflict with a peremptory norm of general international law is void."[10]

This invalidity *ab initio* derives, *mutatis mutandis*, from the analogous rule contained in Article 53 of the VCLT.[11] Peremptory norms are a limit on States'

[8] Opinion No. 10, *Conference on the Yugoslavia Arbitration Commission: Opinions on Questions, Arising from the Dissolution of Yugoslavia*, 33 International Legal Materials 1488 (1992).

[9] While in 1976 the United States did, the United Kingdom Foreign Minister stated that the UK, along with other countries apart from South Africa, did not recognise Transkei, Bophuthatswana, Venda and Ciskei as independent and sovereign States. In consequence, British officials would not celebrate negotiations with nobody pretending to represent the so-called governments: *see* G. Marston, *United Kingdom materials on international law*, 53 (1) British Year Book of International Law 337 (1982), p. 359. On Namibia, UN GA Resolution 2145 (XXI) of 17 November 1966, A/RES/2145 declared to be terminated the mandate of the Republic of South Africa and its administration over South West Africa. Five years later, the ICJ declared illegal the continued presence of South Africa in Namibia and the obligation of the former to withdraw immediately, as well as the obligation of all Member States of the UN not to recognise as valid any act performed by South Africa on behalf of Namibia. (ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971, p. 16).

[10] ILC, *Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations*, 2006, para. 8.

[11] ICJ, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, 3 February 2006, ICJ

power to formulate unilateral acts, such as the UN Charter or some essential conventions, like those against slavery or genocide. Consequently, a unilateral act whose content was against a peremptory norm should evoke protests from other States.

It follows, said Cassese, *inter alia*, that whenever an entity possessing all the attributes of a State has arisen as a result of aggression or an act thereof, or is based on the systematic denial of human rights or of minorities, other States are legally obliged to refrain from recognising it.[12]

However, the practice in this sense is almost inexistent.[13]

Moreover, some scholars refuse to apply the principles of the Law of the Treaties as regards *ius cogens* to unilateral acts.[14]

A growing number of States oppose the adoption of norms by other States if they fail to conform to certain non-derogable rules. But the big question would be, who has legitimation to declare nullity; and in line with which procedure in international law? The answers to those questions are not clear, yet greater legal security would be contrary to the essence of a unilateral act, which would thus be subject to a regime rejected by treaties, under the Vienna Convention, in 1969.

In the same vein as the Guidelines for unilateral acts, draft articles on international responsibility provide that States shall abstain from recognising as legal a situation that has arisen out of a grave violation of a peremptory norm.[15]

Opinion No. 10 from the Badinter Commission, concerning the recognition of the Yugoslavia Federative Republic (Serbia and Montenegro) and dated 4 July 1992 holds that recognition is not a constituent element of a State and has declarative effect only. It is thus a discretionary act that other States can pursue at the moment – and in the form – they see fit, and freely, with the sole reservation that the peremptory norms of general international law be complied with, and most especially those that prohibit the use of force in relations with other States, or that guarantee the rights of ethnic, religious or linguistic minorities.

Rep 2006, p. 6. This judgment did not exclude preclude a unilateral declaration by Rwanda being invalid in the event that it was in conflict with a norm of *Ius Cogens*.

[12] A. Cassese, *International Law*, Oxford University Press, Oxford: 2001, p. 144.

[13] The refusal of recognition *vis-à-vis* the Republic of Crimea and its referendum choosing to join Russia; and the practice by Western countries constitute a recent exception. UN GA Resolution 68/262 of 27 March 2014, A/RES/68/262.

[14] P. Weil, *Le droit international en quête de son identité*, RCADI, 1996, vol. 237, p. 282. In the opposite trend, on the effects of *Ius Cogens* on Unilateral Acts, *see* U. Linderfald, *The Creation of Ius Cogens making sense of article 53 of the Vienna Convention*, 71 *ZaöRV* 359 (2011), and D. Costelloe, *Legal Consequences of Peremptory Norms in International Law,* Cambridge University Press, Cambridge: 2017, pp. 152–183.

[15] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries*, Yearbook of the International Law Commission, Vol. II, Part 2 (2001).

Imperative norms thus become limitations on freedom of recognition, as the most controversial unilateral act.[16]

Of course, the problem is that the delimitation of the *Ius Cogens* concept is not clear, as was noted previously.

2. Are there principles guiding EU action regarding the recognition of States?

Notwithstanding its status as the subject of many analyses in international law, recognition has received hardly attention from European Union law, mainly because consideration of the matter represents an act engaged in by States relative to other States. The consequences of non-recognition have not yet been studied either.

The first question to answer concerns whether or not the EU can perform unilateral acts. According to the ILC guiding principles applicable to the unilateral declarations of States (2006), any State has the capacity to take on legal obligations through unilateral declarations (Principle 2). The legal effects of such declarations then depend on their content, on all the factual circumstances in which they were made, and on the reactions they give rise to (Principle 3), with unilateral declarations capable of being addressed to the international community as a whole, to one or several States, or to other entities (Principle 6).

These Principles refer to States alone, so can an international organisation be the author of a unilateral declaration? Even without recognition of such a faculty, one may at least agree on an international organisation's role as a possible legitimising body for new States or/and as a lobby operating in support of recognition or non-recognition. Thereby, the United Nations plays a relevant role in both senses even if it is generally recognised that acceptance as a member of the Organisation does not imply recognition by the members thereof.

The European Union has been the passive subject of recognition and of the refusal of recognition by certain third States. Immediately after its creation, the European Community started to conclude trade agreements. The consequence of this conventional activity was an implicit recognition of the EC partners. However, for decades, the EC suffered a refusal of recognition on the part of the Soviet Union and its satellite countries.[17] More recently, the EC/EU suffered the rejection of several international organisations as consequence of the mistrust of States members of these organisations, and even of their own member states. It was in the case of

[16] *See* J. Verhoeven, *La reconnaissance internationale: déclin ou renouveau?*, 39 Annuaire Français de Droit International 7 (1993), pp. 34–39.

[17] J. Ker-Lindsay, *The Foreign Policy of Counter-Secession: Preventing the Recognition of Contested States*, Oxford University Press, Oxford: 2012, p. 130 and N.F. Sola, *El reparto de competencias entre la Comunidad Europea y sus Estados miembros en el ámbito de las relaciones exteriores, con especial referencia a los acuerdos internacionales*, Ed. Cometa, Zaragoza: 1988.

the FAO, but also the Council of Europe that the status of the EU has largely received discussion.[18]

Even if international organisations do not of themselves recognise new States or contested States, they usually offer a suitable framework for their legitimization, or for lobbying against their recognition if their creation violates the principles of international law. The UN plays the main role in this sense, but other international organisations can equally prove relevant. In particular, we can say that for the new (or pretending new) States in Europe, the EU plays a role similar to that the UN plays at global level.

In order to answer the question on EU competence as regards unilateral acts, it is necessary to recall some basic considerations about those competences, and the division of powers among Member States.

2.1. A Member State competence; a functional EU competence?

There is no provision in either the EU Treaty or the Treaty on the Functioning of the EU that could form the basis for an EU competence in the field of State recognition. Art. 3.5 TEU provides that the Union declares its contribution to the respect and development of international law, and in particular to UN principles. In the same vein, Articles 21.1 and 2 use the expression the "EU's integrity," and express the will for peace to be preserved, in line with the principles of the UN Charter and the Helsinki Final Act. The conclusion that can be drawn from these articles is that the EU functions in the international arena, following principles as regards States' sovereign equality, respect for their territorial integrity and their national unity, and self-determination, as interpreted by the Declaration on Principles of International Law, approved by the UN GA by virtue of its Resolution 2625 (XXV).[19]

It would seem that, in line with the "attribution of competences" principle that applies in the EU, the recognition of States would not be among the powers attributed by Member States to the EU. This reflects its nature as an essential part of sovereignty.

However, a theoretical question would concern the EU's capacity to come out with unilateral acts of recognition that are of mandatory value. An answer to this

[18] A.-L. Chané, J. Wouters, *The European Union in United Nations Economic Governance Fora*, Working Paper no. 182, Leuven Centre for Global Governance Studies, Institute for International Law, March 2017, pp. 11–13, available at: https://ghum.kuleuven.be/ggs/publications/working_papers/2017/182chanewouters (accessed 1 April 2018), and F. Hoffmeister, *Outsider or Frontrunner? Recent Developments under International and European Law on the Status of the European Union in International Organizations and Treaty Bodies*, 44 Common Market Law Review 41 (2007).

[19] UN GA Resolution 2625 (1970) of 24 October 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter or the United Nations", A/RES/25/2625.

question would first entail deep study of the powers attributed by the Member States in this field, in ways other than via constitutional treaties.

In this sense, the question was not even raised before the Single European Act. The conclusion of trade agreements took place with States with which the Member States already had such agreements prior to the creation of the European Community. They all agreed on the conventional relationship; the recognition of the partner should therefore be deduced by the recognition offered by all Member States and, consequently, by the Community itself.

The situation were clear at the beginning of the 1980s: "(…) dans l'état actuel de l'intégration européenne, les normes internationales en matière de reconnaissance restent complétement applicables et lesdites reconnaissances appartiennent à la compétence exclusive de chaque Etat membre," as the Council appeearing before the European Parliament put it.

Nevertheless, the Member States agreed on a common position as regards the non-recognition of the Turkish Republic on North Cyprus, in this way following on from successive condemnations by the UN.[20]

On the other hand, there was no recognition of the Western Sahara or of Palestine, as these State claims proved controversial in the dimension between Member States.[21]

From another point of view, EU membership *de facto* implied – for some States – the recognition of third States as EC/EU partners. This effect can be included as evidence of the Europeanisation of the foreign policy of Member States and candidates. In addition, it is possible to offer a constructivist explanation, as long as EU membership produces *de facto* modification of States' preferences and political choices. This was the case for Spain in relations with Israel. If, for historical reasons, Spain had not recognised Israel, the existence of an EC-Israel trade agreement made recognition a prior requirement for accession to the EC.[22]

2.2. A certain EU power

Before the entry into force of the TEU, the crash of Yugoslavia and of the Soviet Union left the EU faced with a situation in need of a stance. The Ministers of Foreign Affairs of the Member States thus made a statement in the framework of European Political Cooperation (EPC),[23] as regards the guidelines for the recognition of

[20] N. Navarro Batista, *La práctica comunitaria sobre el reconocimiento de Estados. Nuevas tendencias*, 22 (1) Revista de Instituciones Europeas (Madrid) 475 (1995), p. 478. The history of the fight for the Turkish Republic of the North of Cyprus, in J. Ker-Lindsay, *EU Accession and UN Peacemaking in Cyprus*, Palgrave, Basingstoke: 2005.

[21] Later we will talk about the current situation facing these State entities.

[22] Date of recognition and so on.

[23] Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, 31 International Legal Materials 1485 (1992). The second declaration was

States arising from the former Soviet Union and the former Yugoslavia, whose aim was to facilitate recognition by Member States on the basis of the same criteria, thus allowing for collective recognition.

Legally, the Declarations were EPC Common Positions, and hence in the nature of Recommendations to the Member States, serving as criteria by which their actions in the area of the recognition of States might be guided. The EC thereby exerted an orienting influence on Member States as they exercised their international competences.

The above interpretation is confirmed by the text of the Declarations, in line with which the fulfillment of the conditions included as guidelines "ouvre la voie à la reconnaissance des nouveaux États par la Communauté et par ses États membres."

The qualification of this so-called collective recognition can probably be better explained as a *joint* or *agreed* recognition, as the recognition power is not transferred to the EU. The Union, and more precisely the Member States coordinated under the CPE, issued the guidelines, and a further unilateral act from those should follow from them.

Nonetheless, after the 1991 EPC Declarations, the differences with the previous EC position from the 1980s were clear. At that moment, it was stated that recognition was an exclusive competence of the Member States, and there was nothing more at European level than voluntary coordination thereof.

However, in the 1991 Declarations, consultation resulted in certain conditions that new States had to meet for recognition by EU countries to be achieved. If the said conditions gained fulfilment, Member States might then proceed with recognition (though they were not obliged to do so).

This "collective recognition," or recognition by the then-twelve Member States, was more relevant politically for the new States than single unilateral recognitions. It was also more relevant for the EU than the European Community, because it was a common position on a topic traditionally under the discretionary power of States. While it continued to be a Member State competence, the issuance of common guidelines to be followed allowed those States to speak with a single voice in the face of international issues touching directly upon the security and instability of the European continent. On the other hand, collective recognition was also of great importance for the new States as, by fulfilling the criteria set out in the guidelines, they might obtain the recognition of the twelve. At the same time this was even more important for new States willing to become members of the EC in the future.

In this way, the EPC was the tool for an intergovernmental concertation at European level to deal in common with the emergence of new States.

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adopted on 17 December 1991. Related to the recognition of the former Yugoslav Republics and the former Soviet Union Republics. *See* J. Charpentier, *Les Declarations des Douze sur la reconnaissance des nouveaux États*, 96 RGDIP 343 (1992), p. 345.

It was rightly pointed out that, the reason for the EU (EC at that moment) to have conditioned recognition of the new States was to keep Yugoslavia's integrity and stimulate negotiation among parties in conflict, as well as guaranteeing European security.[24] Hence the requirement, not only to respect democracy and human rights, but also, in accordance with the Helsinki Final Act and Paris Charter respectively, to ensure respect for the minority rights and the right of peoples to self-determination.

Concerted action was thus necessary in the face of a dismemberment processes of uncertain outcome. The conditions agreed up sought to achieve control over the risks by ensuring subordination of the support from the Member States, while at the same time guaranteeing the continuation of international relations. Most of the conditions were intended to ensure respect for commitments already entered into by the USSR and Yugoslavia, e.g. as regards the inviolability of territorial limits, disarmament and non-proliferation. In fact, requirements as regards the Helsinki Final Act and the Paris Charter differ, as both documents contain references to the rule of law, democracy and minority rights.[25] There was no general will for these ideas and some Member States were not comfortable, because they did not accept these principles as criteria upon which new States might be recognised. They were sceptical as regards new conditions whose only effect would be to complicate the political act of recognition.

This is the reason why these documents did not include legal obligations. The two Declarations were the basis of an EC recognition policy. They would allow for normative orientation nuances and be pragmatic.

One of the "eye-catching" things about the two declarations under the EPC is the lack of explicit reference to the effectiveness of the new States, given that effectiveness represents an essential principle States adhere to as they consider the recognition of an entity pretending to be a State.[26] The Arbitral Commission, in its opinion No. 1, emphasised that the existence or disappearance of a State is a question of fact (implicit reference to effectiveness). However, no such reference is included in the opinion concerning the requests for recognition from the Republics formerly forming part of the Yugoslav Federation. In this case, there was no verification of the effectiveness of the new entities. However, the opinions were favourable to their recognition (only Slovenia was clearly effective). Therefore, we can describe the recognitions received by the former Yugoslav Republics as premature. From an international-law point of view, this qualification implies the lawfulness of the unilateral acts in question. The hesitation as regards the lawfulness of

[24] N. Navarro Batista, *supra* note 20, p. 479; Danilo Türk considers these conditions excessive as they delayed recognition, for example, in the case of the Slovenia: D. Türk, *Recognition of States: A Comment*, 4 European Journal of International Law 66 (1993), pp. 68–69.

[25] F. Mariño Menéndez, *El reconocimiento de los nuevos Estados nacidos del desmembramiento de Yugoslavia y de la URSS*, 23 Tiempo de Paz 61 (1992).

[26] D. Türk, *supra* note 24, pp. 66–71.

these acts arises with regard to their opposition to the principle of non-intervention in the internal affairs of States enshrined in the UN Charter and confirmed in UN GA Resolution 2625 (XXV), wherein we find a prohibition on direct or indirect intervention in the internal affairs of States. The role of premature recognition by the EC and its Member States would have favoured the configuration of a new political structure in Yugoslavia. However, European states hid themselves politically and morally behind the principle of self-determination of peoples,[27] also enshrined in Resolution 2625 (XXV). This Resolution represented a first application of the self-determination principle beyond a colonial context. In this regard, the EC Common Position on the recognition of the new States made a reference to that principle, invoking the liberal theory of secession, in line with which secession will be allowed if a population expresses itself democratically in this sense.[28] This pretends to be the legal justification for the premature recognition of most of the Republics arising from the disintegration of Yugoslavia.[29] The consequence would be the invocation of the popular will, exercised by the populations concerned, as shown through referenda or proclamations of independence.

From the legal point of view, this would imply that premature recognition, which is in principle contrary to international law (standing against the prohibition on interference in the internal affairs of a State), would legitimise and consolidate the new State through the principle of self-determination.[30] This principle was invoked once the Yugoslavian armed forces had attacked some positions. There was no other possibility for these attacks to be considered aggression but through recognition of the entities being attacked as States. Recognition could not be used as a fourth constitutive element of a State. It would work mainly as a condition under which still-ineffective States might conclude their struggle for free determination. States could make the recognition conditional upon certain compensations, in particular regarding a peaceful and negotiated dismemberment, where possible. From the international law point of view it seems clear that recognition is an unconditional act, as it is discretionary for a State to engage in it, with the new state already existing from the moment the constituent elements are in place. However, as a political act, it is possible, and common in practice, for conditionality of recognition to be deployed in order that certain behaviours may be obtained from the State concerned. Thus, the EU has imposed conditions *sine qua non* as regards both territory and political power in order to favour a certain model of state similar to the European model.

The conditions for recognition settled by the two EPC Declarations were stricter for Yugoslavia than for the Republics arising from the Soviet Union. The reason,

[27] J. Roldán Barbero, *Democracia y Derecho Internacional*, Civitas, Madrid: 1992.

[28] H. Beran, *A Liberal Theory of Secession*, 32 Political Studies 21 (1984).

[29] In this context *see* Opinion No. 4, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions, Arising from the Dissolution of Yugoslavia*, 33 International Legal Materials 1488 (1992).

[30] Navarro Batista, *supra* note 20, p. 501.

probably, is that the dissolution of the USSR was peaceful, but the end of Yugoslavia entailed several bitter conflicts.

The Agreement of the Republics belonging to the USSR to bring the latter to an end on 31 December 1991, allowed the European Member States to presume fulfillment of the conditions established in the EPC Declaration of the Twelve, on 16 December. These Republics have even been recognized "on condition of the next signing of the Nuclear Non-Proliferation Treaty," which clearly was a requirement for their gaining recognition.[31] Respect for human rights or minority rights was not even mentioned then – a laxity that allows the political character of the recognition to be appreciated. The Twelve were not in a position to establish conditions on the different Republics once belonging to Yugoslavia, as they had already taken a decision in regard to the latter's dismemberment, and the resulting States had already recognised each other.

The most exacting requirement for Yugoslavia is clear, given the imposition of an Arbitration Commission (the Arbitral Commission of the European Commission, also known as the Badinter Commission), acting as an advisory body of the EC, which would be responsible for verifying the degree of application of the conditions for recognition, and the necessary guarantees. The five Members of this Commission came from Constitutional Courts of the EC Member States. It checked the situation in Slovenia, Croatia, Macedonia and Bosnia and Herzegovina. Despite the rigour of the Arbitral Commission's assessment, the Member States recognized new Republics, i.e. Croatia, without waiting for guarantees on the protection of minorities, urged by Germany. They were not obliged to follow the advice of the Arbitral Commission, and the competence to recognise remained entirely with them. With Macedonia, and having the positive opinion of the Arbitral Commission, they paused with recognition given pressures imposed by Greece. Six European States recognised first, showing the political differences among the Member States.

The European Community guidelines for the recognition of States were a legal and political precedent on the issue, even if they confirmed the States' discretionary power at the time of recognition.

Later, the Badinter Commission confirmed that the six Yugoslav Republics, as recognised by the 1974 Constitution, had the right to self-determination, but this was not the case for the two autonomous provinces of Kosovo and Voivodina.[32]

Meanwhile, Serbia asked the Arbitral Commission if the Serbian populations from Croatia and Bosnia also had the right to self-determination.

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[31] *Ibidem*, p. 486.

[32] A. Pellet, *The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples*, 3 (1) European Journal of International Law 178 (1992), pp. 178–185. *See* Ker-Lindsay, *supra* note 17, p. 33.

The Arbitral Commission stated that international law was not clear about the consequences of that right; however, it was clear that the right does not imply an automatic change of borders, except in the circumstances of all the parties involved agreeing on this. This was tantamount to a reaffirmation of the *uti posidetis* doctrine.[33] However, the Arbitral Commission confirmed that the self-determination right covered religious, ethnics or linguistic groups having their rights recognised; and also that international law's imperative rules imposed on every one of the six new Republics an obligation to respect minorities' identities and members' human rights.

As will be seen below, the practical application of these guidelines was guided by political considerations and was ignored almost completely in the exceptional case of the recognition of Kosovo, more than a decade later.

The entities involved did not manifest the features of States when the EC, and consequently other States, decided to continue with the recognition process during early 1992. Recognition at this time was used to reinforce the independence aims of Croatia and of Bosnia. As a result, the legitimation deriving from the principle of sovereignty was given to *de facto* entities that were unprepared for it, and the internal legitimacy of the governing groups was questionable. This, naturally, had consequences for the declaratory or constitutive nature of the recognition.[34]

According to Koskenniemi, the use of recognition as a means of pressure was a tragic mistake, because that forced the international community to deal with the Balkan conflict as aggression between States, thereby entailing the right to legitimate defence and to the invocation of the territorial integrity of Croatia and Bosnia, which stood in the way of compromise. The non-recognition of these entities by the most relevant EC Member States, before they reached a peaceful transition and guaranteed human and minority rights, would have opened the door to a new, realistic and politically sensitive recognition doctrine.

Since that time, EU practice has evolved; and there are now cases in which the action of the Union amounts to a recognition, even tacit, of new State entities. This raises questions as to the legal nature of these recognitions by the European Union.

The evolution of the European integration process also had consequences as regards foreign-policy competences. Notwithstanding what has been said so far, the European Union's replacement of the European Community, assumption of foreign-policy responsibilities and far-reaching enhancement of external powers, coincided with more and more occasions on which the EU had to pronounce on the emergence of new States. For the CFSP, in accordance with Article 24.1 TEU, "(…) shall cover all areas of foreign policy (…)" So is the recognition of

[33] M. Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice,* 43 International and Comparative Law Quarterly 241 (1994), pp. 249, 267.

[34] *Ibidem*, p. 268.

States to be considered an area of foreign policy? Or simply as a sovereignty feature?[35]

In fact, the EU was engaged in a process of collective recognition, perhaps the only one possible for the Union; and we will seek to determine the consequences of this process.

Criticism has in fact surrounded the qualification made by the ILC Special Rapporteur for the Unilateral Acts of States vis-à-vis the 1991 EC Declarations, as exemplifying collective recognition.[36] However, this criticism seems to have failed to understand the real essence of the said Declarations, that did not by themselves constitute any kind of recognition by the EU. Rather, they were just a basis for collective recognition on the part of Member States following guidelines drawn by the Declarations.

Stricto sensu, it is not possible to speak of States gaining recognition from the EU. Since the CFSP does not imply a conferral of competences to the Union, the latter is required to act jointly with the Member States; even it can work to boost a common position the latter have arrived at. Nevertheless, collective recognition will not arise unless every State agrees to recognise. This meant Member States' engagement in efforts to achieve coordination of their positions within the organization, which – for example – was in no way possible in cases like Kosovo, given the lack of any common position within the EU (Art. 34 TEU). The same problem arises with decisions to open Member States' diplomatic missions or Consulates, or else EU Delegations, when there is no unanimity over the recognition of a State (Art. 35 TEU).

Recognition by EU Member States acting in a collective manner has political and legal consequences that are not always clearly differentiable. If there is no EU recognition, it will be impossible for conventional relations to be maintained. Much less could an unrecognised entity aspire to Candidate status. Furthermore, it would not be possible for an entity going unrecognised by the EU to participate in R+D programs, to received financial support for development or to receive EIB financial aid. In contrast, the lack of collective recognition does not imply an obstacle to bilateral relations between the new State and Member States that recognise the latter, should there be any.

Even if an entity does gain the recognition of one or several EU Member States, the above advantageous conditions are reserved for States recognised by all Member States, or even by the Union, except where Member States opposed to the given recognition decline to oppose advantageous treatment of this kind.

[35] In line with the Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations, with commentaries thereto (Yearbook of the International Law Commission, vol. II, Part Two (2006)), every State can engage in unilateral acts with self-compulsory effects. But does that mean that States alone can do that?

[36] D. Bondia, *Regimen juridico de los actos unilaterales de los Estados*, Bosch ed., Barcelona: 2004, p. 100.

As a legal consequence of the recognition by the EU and by the Member States, the recognized State is not only subject to international law, but also meets conditions for its activity within the international community to develop. For as long as the number of recognitions grows, this activity will grow likewise.

In summary, the EU engagement in such a process was possible as, from 1991 onwards, perfect conditions were in place for European "management" of the recognition of new States, or else for collective recognition. Member States gave political guidance for recognition; political though of legal significance. However, the disintegration of the Yugoslav Republic broke the will for EU action. At that moment, Member States following their national interests and in line with their traditional "domestic evils," put aside principles already defined. This drift led to the pernicious recognition of Kosovo.

Even indirectly, belonging to the EU can be said to ensure a political conditioning of the recognition of new States, with Member States forced to recognise the will of EU partners. However, even if the will to coordinate positions over a collective recognition exists in some cases, certain Member States are still inclined to break the deal.

Following these considerations about the EU's ability to recognise States, and the phenomenon of collective recognition initiated by the Union, we will see how EU principles are implemented in regard to the recognition of States.

3. Cases showing the evolution of European practice regarding the recognition of states

Much has been written about the international recognition of the former Republics once included within Yugoslavia.[37] Undoubtedly, the most relevant case is Kosovo, which exemplifies the political use of recognition, and the most flagrant case of ignorance on the part of the EU vis-à-vis its own guidelines for recognition.

Years after the Balkan War, and in line with the 1995 Dayton Accords,[38] the EU had the opportunity to pronounce on the rights recognised for the Srpska Republic. Prior to parallel special relations being brought in between the Federal Republic of Yugoslavia and the Srpska Republic of Bosnia-Herzegovina, the EU emphasised

[37] *E.g.* Pellet, *supra* note 31, p. 178; R. Rich, *Recognition of States: The Collapse of Yugoslavia and the Soviet Union*, 4 European Journal of International Law 36 (1993); D. Türk, *Recognition of States: A Comment*, 4 European Journal of International Law 66 (1993); M. Weller, *The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia*, 86 American Journal of International Law 569 (1992). On the specific topic of recognition between the entities recognized as States, *see* S. Hille, *Mutual Recognition of Croatia and Serbia (+Montenegro)*, 6 European Journal of International Law 598 (1995).

[38] The General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement) (adopted 14 December 1995, entered into force 14 December 1995) available at: https://www.state.gov/p/eur/rls/or/dayton/ (accessed 23 March 2018).

that full transparency, as well as respect for the sovereignty, territorial integrity and political independence of the State of Bosnia and Herzegovina should form the basis for all aspects of the special relations in question.[39] At that moment, it was the EU and not the Member States who pronounced on the topic.

If the EU Member States accepted the independence and recognised as a new State Bosnia-Herzegovina (in the name of the right to self-determination), they refused to do the same with the Srpska Republic, this time in the name of respect for sovereignty and territorial integrity.

This contradictory EU approach had consequences at the time of the first contacts with Bosnia-Herzegovina with a view to future accession. Then, the President of the Srpska Republic made visible his lack of interest in this, since negotiations were absolutely not aiming in that direction. Without excluding the possibility of integration in the EU, he recalled that the final decision would require the support or the Srpska Republic, which is less and less interested in it, mainly because the proposed reforms for that entail suppression of that Serbian republic of Bosnia-Herzegovina. However, the Srpska Republic would actually like to reinforce its autonomy by way of integration with the EU.

The inconsistency of the EU position was once again revealed when Montenegro decided to split off from Serbia in 2006. The Republic of Montenegro, a small country with less than 700,000 inhabitants, remained together with Serbia after the disintegration of the Yugoslav Republic. The separation was a peaceful independence process, allowing Montenegro, eventually, to join the EU. For that reason, the Union was asked to play an arbitrating role between Serbs and Montenegrins, and decide under which conditions the independence of Montenegro could be recognised. Because of the previous failure to intervene in the Balkan crisis, the EU was trying to be more efficient in preventing conflicts in the region,[40] conscious that the new States have a certain place in the EU in the future, even if the standing point of view was that a joint state should be maintained.[41]

The EU decided, not only that a referendum would be required, but also that at least 55% of votes cast should be positive. It did this fearing a destabilisation of the country, an undermining of the democratic progress in Serbia and/or a

[39] Déclaration de la présidence au nom de l'Union européenne sur l'etablissement de relations parallèles spéciales entre la République fédérale de Yugoslavie et la Republika Srpska de Bosnie-Herzégovine, 5 March 2001, 6747/01 (Presse 88), available at: http://europa.eu/rapid/press-release_PESC-01-48_fr.pdf (accessed 23 March 2018).

[40] M. Dragasevic, *The Newest Old State in Europe: Montenegro Regain Independence*, Zentrum für europäische Integrationsforschung/ Centre for European Integration Studies, Rheinische Friedrich-Wilhelms-Universität Bonn, Discussion Paper C174 (2007). The author underlines the breaking by the EU of the rules of representative democracy and the right of people to decide for themselves as it puts in place the rule regarding 55% of votes cast.

[41] The result of the EU pressures was the signing by the Montenegrin President of the Belgrade Agreement, in March 2002, creating the State Union of Serbia and Montenegro; a kind of confederal structure with a new Constitutional Charter.

proclamation of independence by Kosovo. In the event the positive answer received 55.53% of the vote, and the EU Member States recognized Montenegro. For its part, the European Council of Ministers recognised Montenegrin independence on 12 June 2006.

Today, Montenegro is a candidate country for membership of the EU.

3.1. South Sudan, after the experience of Kosovo

The EU approach to South Sudan was defined by the involvement of several Member States, and mainly the United Kingdom, complicity with US foreign policy and indifference on the part of a large majority of European countries.

The South Sudan secession was the result of two civil wars, the last one lasting 22 years, as ended by the Naivasha peace agreement signed on 9 January 2005. This recognised for South Sudan a high degree of autonomy, with a self-determination referendum foreseen after 6 years.

Some months after the peace agreement, at the request of the African Union (AU), the EU launched a civilian-military mission to support the AU peace force for Sudan/Darfur, AMIS II.[42] The EU decided to provide "all possible support for military, police and civilian efforts in response to the requests for assistance made by the African Union's President, Alpha Oumar Konare.[43]

This was followed by EUFOR Chad/CAR, deployed at the border with Sudan – despite the pressure exerted by France and the UK for a location within Sudan – from January 2008 to March 2009. The European Union in this way showed its support for the peace process, and for the UN peace force deployed in Sudan.

Apart from the support extended to the AU and UN prior to independence, in July 2010 the Council had already approved the provision of €85M for South Sudan. The European Ministers were ready to support the referenda in South Sudan and the Abyei region with technical and financial aid, as well as the implementation of the peace agreement, releasing an agreement on the post-referendum issues. There was already a pre-vision of problems that independence could not fix, but the engagement was only to contribute to the reinforcement of the capacities of South Sudan, in order that it might face up to the challenges it needed to solve. In May 2011, the Council added €200M for the country's development, under the 9th EDF. The EU even planned to open a Delegation in Juba, prior to independence.

[42] Council Joint Action 2005/557/CFSP of 18 July 2005 on the European Union civilian-military supporting action to the African Union mission in the Darfur region of Sudan, [2005] OJ L 188. It came to an end on 31 December 2007 when AMIS handed over to the African Union / United Nations hybrid operation in Darfur (UNAMID).

[43] Council Decision 2007/690/CFSP of 22 October 2007 implementing Joint Action 2005/557/CFSP on the European Union civilian-military supporting action to the African Union missions in the Darfur region of Sudan and in Somalia, [2007] OJ L 282.

In some way, we can consider EU participation as witness to the signing of the Comprehensive Peace Agreement (CPA), as well as an early statement on diplomatic relations, as an implicit recognition by the EU, autonomously, of the existence of South Sudan.

From 9 January to 15 January 2011, the referendum on independence was held, the results of which were affirmative to the tune of 98.83%, with more than 80% participation. The EU paid for the referendum and deployed an electoral observation mission. After that, though before the independence declaration, the Union also devised a joint development plan for Sudan and South Sudan 2011–2013.

The official declaration of independence took place on 9 July 2011, and South Sudan gained widespread recognition. On the eve of the independence declaration, Sudan and Germany recognised South Sudan. Once again, a Member State anticipated others taking the initiative for recognition before the due time. The recognition took as a reference point the January 1 1956 borders. The then 27 EU member States accepted South Sudan's independence officially, even if differences among them concerning Kosovo's recognition, and potentially that of Palestine, continued.[44]

In a statement made on 9 July 2011, *the EU and its Member States*[45] welcomed the Republic of South Sudan as a new independent State. In this way, the statement can be interpreted as a formal act of recognition, even if the terms used do not speak expressly of that; or as a functional recognition, as long as the EU acts in a manner limited by its own competences. It is a collective recognition, for the first time, not only by all the Member States, but also by the EU as such. As Sudan had previously recognised the new State, there was an agreed secession, or "co-ordinated declaration of independence," after years of fratricidal civil war, which ended in 2005 with the peace agreement. In the opinion of the EU, the celebration of the referendum on independence imbued the new State with democratic legitimacy, given demands that pluralism and diversity with a view to an inclusive society be respected.[46] These conditions favoured collective recognition.

However, there is no reference in the 2011 Statement to the Guidelines for the recognition of new States issued in respect of the former Yugoslavia as, for the Union, each recognition is an autonomous act. This could mean the rejection of the 1991 Declarations as general principles to be followed by the EU over the recognition of new States.

A few days after its declaration of independence, South Sudan officially became the 193rd Member State of the United Nations. At the end of that same month, it became the 54th member of the AU; while in April it joined the International Monetary Fund and the World Bank.

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[44] *See* V. Pop, *EU countries recognise South Suda*n, EU Observer, 11.07.2011.

[45] Is the author who underlines.

[46] The result of the referendum in January 2011 showed support for independence among 98% of the southern population (*ibidem*).

Ethiopia did not recognise South Sudan until 2012 because of its fear of secessionist movements in its south-western region inhabited by common ethnic groups. The condition for recognition was that arms should not be sold to these populations and that the border should be subject to controls.

Immediately, various border disputes with Sudan and Kenya were emerging. With Khartoum, because of the proximity of Federated States at the border (Blue Nile, South Kordofan and Abiyé). With Kenya, in the Ilemi Triangle administered by the latter country but claimed by South Sudan.

The logic of the general recognition of South Sudan and the interests of certain Member States led to the conclusion of an establishment agreement with the EU, which is considered an important step in the process of global recognition. The agreement marked the establishment of formal diplomatic relations between the EU and the Republic of South Sudan and laid the groundwork for this bilateral relationship.

Security assistance also seemed to be needed and so, as the UN SC Resolution 1996 did in setting up the UN Mission for South Sudan (MINUSS), so the EU agreed on a crisis management concept for a civilian mission in South Sudan that secured Juba Airport. This gained approval in June 2012,[47] in the midst of armed clashes between the two countries. However, after a war between the two, at the end of 2013 a civil war broke out in South Sudan.[48] Amid accusations of human rights violations and attacks on UN forces there followed yet-more-serious accusations of genocide; and the UN SC reacted by way of Resolution 2206 (2015) imposing an individual sanctions regime. The sanctions against military chiefs were endorsed by the EU (on 9/7/2015),[49] and the war continues.

The recognition of South Sudan and the enormous previous EU support for the secession can be assessed as unnecessary, and probably premature and counterproductive. Support for the peace process and the stability of the region might be an EU security concern. However, to cope with this, the promoting of secession and recognition of the new country were not necessary, at least unconditioned. There was no proven (or at least public) evaluation of alternatives carried out in any detail. More seriously, the EU knew the risks inherent in its involvement in the region, after the independence declaration. Indeed, good proof of that is provided by the

[47] The Council of the EU on 23 January 2012 agreed on the concept of the mission; i.e. the EUAVSEC South Sudan Mission, approved by the Council on 18 June 2012. It could not start until November, due to a disagreement with the UN over funding. In January 2014, the EUAVSEC Mission was brought to an end.

[48] The UN SC decided on a MINUSS temporal reinforcement, on 24 December 2013, until 14,000 blue helmets had been deployed. Several days later, the IGAD appointed a mediation team.

49 Council Implementing Decision (CFSP) 2015/1118 of 9 July 2015 implementing Decision 2015/740/CFSP concerning restrictive measures in view of the situation in South Sudan, [2015] OJ L 182.

discussion taking place within the Council on 20 June 2011. Worried about the growing violence in South Kordofan and Abyei, Ministers called upon the parties to agree in some way as a substitute for completing the peace agreement (CPA). By the time of the independence declaration, Sudan and South Sudan should have agreed on the delimitation of borders, on the status of Abyei region, on the statuses of populations from one State living on the territory of the other, and on the final distribution of oil revenues. In fact, most of these dossiers were still open.

The actual meaning of South Sudan's recognition by the EU and its Member States can in fact be called into question. If support for the peace process is understandable, the notorious EU involvement in the secession and in the recognition proved to be a wrong political decision. The EU would have done better to make recognition conditional upon firm engagement in respect of international law, and especially the norms concerning the protection of minorities and Humanitarian Law. Acting in such a way, the EU would have served as an example for other UN States, thereby improving its normative impact and its constructive contribution to a lasting peace.

In the former Yugoslavia and in South Sudan the EU showed the interest of its Member States in rapid recognition. Palestine and Western Sahara are examples of just the opposite, even if normative action by the European Union would there contribute to peace and justice, and thereby to stability and European security.

3.2. Palestine

Relations with Palestine began in 1975, in respect of the PLO. Today, EU relations are with the Palestinian Authority.

The European Union, like other important international actors, is engaged with a future viable, independent and sovereign Palestinian State capable of living alongside Israel in peace and security. From the Venice Declaration of 1980 onwards to the 2002 Roadmap for Peace, or the 2007 Annapolis Process, the EU endorses principles included in the EU Action Strategy for Peace in the Middle East.[50]

[50] *The Venice Declaration of 1980*, 13 June 1980, available at: http://eeas.europa.eu/archives/docs/mepp/docs/venice_declaration_1980_en.pdf (accessed 23 March 2018), adopted within the EPC. The Berlin Declaration of 1999 included an explicit commitment to the creation of a Palestinian state and to the recognition of a Palestinian state, as appropriate (Berlin European Council 24 and 25 March 1999, *Presidency Conclusions*, Part IV – *Other Declarations: Middle East Peace Process*, available at: http://www.europarl.europa.eu/summits/ber2_en.htm (accessed 23 March 2018)). Declaration by the EU on the Middle East (*Seville European Council*, 21–22 June 2002), available at: https://unispal.un.org/DPA/DPR/unispal.nsf/0/592C1C6421404B2985256C7500575367 (accessed 23 March 2018). In 2002, the EU co-sponsored the Roadmap for Peace, formally approved one year later, (US Department of State, Bureau of Public Affairs, *Roadmap for Peace in the Middle East: Israeli/Palestinian Reciprocal Action, Quartet Support*, 16 July 2003, available at: https://2001-2009.state.gov/r/pa/ei/rls/22520.htm (accessed 23 March 2018). Annapolis Middle East Peace Conference took place on 27 November 2007; A. Schiff, *The 'Annapolis Process': A Chronology of*

Between the EU and the Palestinian Authority there is a partnership, the Euro-Mediterranean Partnership, as well as the European Neighbourhood Policy, as governed by the principles of mutual accountability, transparency and deep democracy that are essential for the establishment of a future democratic Palestinian state. Member States tend to accept this request. Mutual trade is governed by the Interim Trade Association Agreement and the Agreement for further liberalisation of various agricultural and fish products dating from 2012.

But the question of the recognition of the Palestinian state is a sensitive issue. Even when Palestine appears in a document, the Member States reserve their positions to avoid implicit recognition.[51]

The position of the European Union is to call on both parties to resume direct negotiations to achieve the effective creation of a sovereign and viable State of Palestine, as based on the 1967 lines, or with possible exchanges of territory. The EU is maintaining its commitment to the establishment of economic and institutional bases for a future State of Palestine.

In the meantime, the EU is focusing its efforts on two areas of action. The first is participation in the process that promotes peace in the Middle East, primarily through the Quartet (with the USA, Russia and the United Nations around the UN roadmap); the second is the European Neighborhood Policy.

As regards the first, the peace process, we generally know the position of the EU pursuing the objective of a Palestinian state alongside Israel. On specific issues concerning the final status of Palestine, the EU wants the future borders of the state to be safe and secure. This will involve an Israeli retreat from territories occupied since 1967.; Pursuing the same line as, for example, Russia, the EU will only accept slight territorial modifications if they are approved, and always in accordance with Resolutions CS 242, 338, 1397 and 1515, and with the principles of the Madrid Process.

When it comes to the Israeli settlements on Palestinian territory, the EU is against the expansion of these settlements in the West Bank, East Jerusalem included, because, in addition to their being illegal under international law, they are also an obstacle to negotiations and to the viability a two-state solution.

In line with the EU position, Jerusalem must be the capital of both states in the future. The EU will not recognise the changes to the 1967 borders, including Jerusalem. In this vein, the Union is working to strengthen institutions in East Jerusalem, particularly in the areas of health, education and justice. However, some

Failure, 19 (4) Israel Affairs (2013); EU Action Strategy for Peace in the Middle East, available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressdata/en/reports/97949.pdf (accessed 23 March 2018); M. Asseburg, *European Conflict Management in the Middle East: Towards a More Effective Approach*, 14 Carnegie Papers (2009).

[51] The clause used is "Palestine: Cette dénomination ne saurait être interprétée comme une reconnaissance d'un État de Palestine et est sans préjudice de la position de chaque État membre sur cette question."

Member States seem not share completely the EU position, as showed on the occasion of the US Embassy move to Jerusalem.[52]

The EU also seeks a negotiated solution on Palestinian refugees, and supports the UNRWA (UN agency for Palestinian refugees). By condemning all acts of violence, the EU recognises Israel's right to protect its citizens from attacks, while respecting international law commitments. The EUPOL COPPS mission (mission to Ramallah, since 2006) contributes to a strengthening of Palestinian police and judicial institutions.

Since trade is very much limited by the close-off of Gaza in 2012, the EU Council declared that social and economic developments in Area C were of critical importance to the viability of the future Palestinian State, because Area C is its main reserve. It therefore asked Israel to work jointly with the Palestinian Authority to allow better and more frequent access to this area by the Palestinians. Since 2005, a border assistance mission between Palestine (Gaza) and Egypt has helped to reach international standards. It is a measure of trust between the government of Israel and Palestine. But the Hamas government in Gaza acted to ensure the closure of the border crossing in Rafah in 2007.

As regards the second area of action, the European Neighbourhood Policy Instrument (ENPI)[53] provides the financial support to Palestine for the implementation of the ENP initiatives in line with the Action Plan, in which political and economic reforms, and the priorities for assistance, are included. The EU funds infrastructure projects, a judicial and financial reform initiative, and programmes supporting Palestinian security, health and education systems.

We can therefore say that the EU is actively involved in institution-building and State-building activity, as well as in the economic recovery of Palestine, in order to enhance the strength and viability of the future Palestinian State. However, and even if there were critical voices on the US policy towards the conflict,[54] since 2009 it has decided to support US initiatives in the region.

In 2012, UN GA granted non-member Observer State status to Palestine,[55] and UNESCO accepted it as member. Some months before, when the Quartet proposed looking for a way to convince the Palestinians to give up their plan to ask for the recognition of the UN, the EU was confronted with a division between Member

[52] N. McCarthy, *The countries that attended the US Embassy opening in Jerusalem*, Forbes, 15 May 2018. Austria, Romania, Czech Republic and Hungary attended this event, showing different degree of discontent with the EU position.

[53] Currently, under ENI 2014-2020.

[54] M. Emerson, N. Tocci, *What should the European Union do next in the Middle East?*, 112 CEPS Policy Brief (2006), available at: http://aei.pitt.edu/7353/2/7353.pdf (accessed 23 March 2018).

[55] UN GA Resolution 67/19 of 4 December 2012, A/RES/67/19. 138 States voted in favor, 9 against (USA, Israel, Canada, Czech Republic, Panama, Palau, Micronesia, Nauru and the Marshall Islands) and 41 abstained.

States into a camp that was pro-Palestinian (comprising Belgium, France, Ireland, Portugal, Spain and Sweden) and another that was pro-Israel (the Czech Republic, Germany, Greece and The Netherlands). However, when the UN GA finally recognised Palestine as a non-member Observer State, by a large majority, nothing happened, although this implied a certain recognition from the UN of the sovereignty of the Palestinians in the territories occupied since 1967.

However, the situation proved different before the UN SC, which was unable to approve a resolution on the acceptance of Palestine as a UN member.

As a matter of fact, France's position had been expressed on 21 September 2011 in front of the UN GA. It considered "a realistic solution allowing Palestine to have its status raised to that of a non-member Observer State of the UN, in order to advance the international existence of Palestine in the perspective of a two-State solution." France agrees with the Palestinian aspiration whose legitimacy is indisputable. However, the country admits that, at the UN SC, the request has no possibility of succeeding, given the opposition of the USA. To avoid the risk of confrontation, France announced that it would have no choice but to abstain at the Security Council. Therefore, non-member Observer State status is recognised by UN GA, but not by the UN executive body. This statement is revealing of the position of the rest of the European States too, and consequently has an impact on the EU's position.

The situation is so difficult for a multiple-member entity, such as the EU is, that it continues to make all efforts for a peace agreement. As an example, in December 2013, the Foreign Affairs Ministers were ready to provide unprecedented political, economic and security support to Israel and Palestine, included a Special Privileged Partnership, in the context of a final status agreement.

Today, the majority of the world countries, also the more important examples among them, like China, Russia, India, Pakistan, Algeria, South Africa, Indonesia, or all Arab countries, have recognised Palestine. No fewer than 136 countries recognise it and have full relations with it.

The ten EU Member States recognising Palestine are Cyprus, Bulgaria, Greece, Hungary, Malta, the Czech Republic, Romania, Slovakia, Poland and Sweden[56]; while it is a full member of the Union for the Mediterranean. Candidate countries such as Albania, Turkey, Bosnia and Serbia also recognise Palestine.

The current situation can be criticised from a conceptual point of view, since Palestinian statehood is clearer than that of Kosovo, for example, as far as its having the character of a state is concerned. However, the EU and its Member States are not as proactive in its recognition, given the fact that that would imply a contradiction with the political position of the US (i.e. a situation opposite to that applying to

[56] 25 Member States recognised Palestine, either by diplomatic means, or by non-diplomatic ones. Most of the National Parliaments passed non-binding resolutions for a recognition of Palestine.

Kosovo). Palestine has a population, political power and a territory threatened and occupied to a large extent by a power that prevents it from exercising jurisdiction as a state. It is true that, without the help of the EU, Palestine would have a hard time getting by as a state, but that is because of secular intervention and conflict.

Only political reasons justify this resistance when it comes to recognising Palestine; and the discourse in a opposite direction, together with the differences between Member States, prove determining factors when the time comes to recognise a third effective State. Moreover, there is not coherent support for the "two States solution" given that there is refusal to recognise one of them. Furthermore, a declaration that the Israeli settlements are illegal looks incoherent when set against the continuing trade with these that is ongoing.

Even though recognition is a Member State's competence, the European Parliament approved a Resolution in principle supporting the recognition of the Palestinian State and the two-state solution, alongside peace negotiations based around the right to self-determination and full respect for international law.[57] In this way, the European Parliament wanted to support the diplomatic efforts of the EU. A new initiative came from the French government, inviting Palestinian and Israeli diplomats to attend an international peace summit in Paris to discuss Palestinian recognition.[58]

UN SC Resolution 2334 (2016)[59] could be a turning point, and would totally change the negotiations within the Quartet, making them more difficult, even impossible. In this new international environment it would have been favourable had the EU taken the step towards Palestinian recognition as a mean of boosting the peace process.[60] At the same time, it would be the moment to highlight that its strategy is different, in terms of how it seeks to manage the process. It has the tools to do it, with clear support from the European Parliament. Major economic links with Israel can play a relevant role, too.

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[57] European Parliament Resolution of 17 December 2014 on the recognition of Palestine's statehood 2014/2964(RSP).

[58] M. Dalton, F. Schwartz, *France hosts international meeting on Israeli-Palestinian peace process*, The Wall Street Journal, 5.06.2016.

[59] UN SC Resolution 2334 of 23 December 2016, S/RES/2334, adopted unanimously with US abstention, condemning the Israeli settlements. As a consequence, Israeli Prime Minister Netanyahu forbade their ministries from travelling to the 12 countries voting for the Resolution, i.e. Spain, Russia, France, United Kingdom, China, Japan, Egypt, Uruguay, Angola, Ukraine, Senegal and New Zealand.

[60] Statement of A. Juppé to JForum.fr, the Jewish francophone website, available at: http://www.jforum.fr/alain-juppe-la-reconnaissance-de-la-palestine-par-lue-serait-bienvenue.html (accessed 23 March 2018) on the motion for a Parliamentary Resolution, as proposed by Socialist deputies, for the recognition of Palestine and in favor of a joint decision of the EU. A few days after, Sweden was the first European country to recognise Palestine (available at: https://www.courrierinternational.com/dessin/2014/10/30/la-suede-premier-pays-europeen-a-reconnaitre-la-palestine, accessed 23 March 2018).

If at the beginning of his mandate, President Trump seems less strict and clear with Israel, the move of the US Embassy is a decisive change of the former political position. Therefore, Tel Aviv is ramping up settlement in the West Bank, leaving the prospects for the peace plan presented by Trump looking unenthusiastic.[61] Meanwhile, the EU remains paralysed in terms of the recognising of Palestine.

3.3. Western Sahara (SADR)

The official position of the European Union and its Member States regarding one of the last colonial situations in Europe is clear: they do not recognise that Western Sahara belongs to Morocco, as the pretension lacks legal foundation. However, and for pragmatic reasons, a conviction that the stability of the region depends on this country leads the EU to non-recognition of either the Polisario Front or demands that there should be an independent State, as the Sahrawi Arab Democratic Republic (SADR). There is therefore no admission of Western Sahara as a partner in this case, in contrast to what is seen with the African Union.

That said, the EU's conduct can sometimes be defined as ambiguous and, in some ways, contradictory to the principles governing the external action of the organisation (Article 21 TEU). This is particularly the case in respect of the UN Charter and international law.

Under resolutions of the UN GA, since Resolution 2070 of 1965, the resolutions after 1975, and most especially 33-31, of 1978, the people of Western Sahara are deemed to enjoy the inalienable right to self-determination and independence. The UN SC and the advisory opinion of the ICJ from 16 October 1975 both confirm this assessment.[62]

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[61] P. Jacobs, *Israel appears to be listening to Trump and making a move that could destroy peace talks*, Business Insider, 19.10.2017.

[62] UN GA Resolution 2070 of 16 December 1965, A/RES/2070; UN GA Resolution 2229 of 20 December 1966, A/RES/2299; UN GA Resolution 2354 of 19 December 1967, A/RES/2354; UN GA Resolution 2428 of 18 December 1968, A/RES/2428; UN GA Resolution 2591 of 16 December 1969, A/RES/2591;UN GA Resolution 2711 of 14 December 1970, A/RES/2711; UN GA Resolution 2938 of 14 December 1972, A/RES/2938; UN GA Resolution 3162 of 14 December 1973, A/RES/3162; UN GA Resolution 3292 of 13 December 1974, A?RES/3292; UN SC Resolution 377 of 22 October 1975, S/RES/377; UN SC Resolution 379 of 6 November 1975, S/RES/379; UN SC Resolution 380 of 30 November 1975, S/RES/380; UN GA 3458 of 10 December 1975, A/RES/3458; UN GA 31/45 of 1 December 1976, A/RES/31/45; UN GA Resolution 32/22 of 28 November 1977, A/RES/32/22; UN GA Resolution 33/31 of 13 December 1978; A/RES/33/31, UN GA 34/37 of 4 December 1979, A/RES/34/37; UN GA 35/19 of 11 November 1980, A/RES/35/19; UN GA 36/46 of 24 November 1981, A/RES/36/46; UN GA Resolution 37/28 of 23 November 1982, A/RES/37/28; UN GA Resolution 38/40 of 7 December 1983, A/RES/38/40; UN GA 39/40 of 5 December 1984, A/RES/39/40; UN GA Resolution 40/50 of 2 December 1985, A/RES/40/50; UN SC 621 of 20 September 1988, S/RES/621; UN SC Resolution 658 of 27 June 1990, S/RES/658; ICJ, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding UN SC Resolution 276 (1970), Advisory Opinion, 21 June 1971, ICJ Rep 1971, p. 16.

The framework of analysis for the relationship with Western Sahara is the association of the EU with the Maghreb countries. Since 1972, the European Community has emphasised the relevance of the relationship with the countries of the southern Mediterranean. In 1976, it concluded cooperation agreements on the basis of former Article 238 TCEE (Association Agreements), the implementation of which was accompanied by financial protocols by which it paid large amounts of money to these countries, with a view to their development being supported. Finally, the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part, was concluded in 1996.[63] The Community approach to the Maghreb countries has evolved with the renewed Mediterranean policy and the neighborhood policy in its "Southern Partnership" strand. The ultimate goal is the establishment of a free trade zone, but also, especially after the Arab Spring, social justice, human rights and the stability and security of the region.

The political dialogue established by the Euro-Mediterranean partnership concerns, *inter alia*, "the conditions necessary to guarantee peace, security and regional development by supporting the efforts of the co-operation, particularly within the whole Maghreb" (Art. 4). This objective would call for European action in line with the position of the United Nations and international law, and aims at the Saharawi people's exercise of their right to self-determination.

In this context, as already noted, the position of the European Union with respect to Western Sahara and its representative the Polisario Front, is clear. However, in line with the EU's diplomatic and conventional activity, the Union seems to recognise Morocco as the authority that administers the Western Sahara. Does this prejudge the position in relation to the colonial situation?

The first Europe/Africa summit of 2000 formally declared that the Sahara conflict was a major obstacle to regional stability. At this time, and during the second summit in 2007, Algeria was subject to European pressure to abandon its plan to build the Saharawi State, and its support for the Polisario Front. Nothing is included in the Declaration from the 4th summit in 2014.

The European Union only targets the humanitarian aspects of the five Saharawi refugee camps in Algiers, south of Tindouf, which have very limited access to basic services. Refugees are therefore largely dependent on international aid. Since 1993, the EU has contributed to these needs with food aid to combat malnutrition, drinking water, the supply of medicines and, recently, the start of income-generating activities in order to reduce dependency as regards food. Humanitarian aid decreased by half in 2003 due to accounting in respect of the number of refugees and Moroccan indictments regarding the embezzlement of humanitarian

[63] The Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part (adopted 26 February 1996, entered into force 1 March 2000) [2000] OJ EC L70/2.

aid (these are anomalies identified by reports prepared by the UNHCR inspection offices).

But as an international player, the EU subscribes to international agreements in the areas of its competence, and even agriculture and fisheries. When it concluded the fisheries agreement with Morocco in 2005, important criticisms arose from the Polisario Front. Sovereignty over the territorial waters of the Sahara is alleged. Similarly, it was in 2012 that the Council concluded an Agreement in the form of an Exchange of Letters between the EU and Kingdom of Morocco on reciprocal liberalisation measures for agricultural products, processed agricultural products, fish and fish products. Fisheries are affected by the replacement of Protocols No. 1, 2 and 3 and their annexes, and the amendment of the Association Agreement with Morocco.[64] The decision that was the subject of a request for annulment by the Polisario Front was resolved by the judgment of the Court of 10 December 2015.[65]

Under these circumstances, and with the idea that Morocco offers a guarantee of stability, the Union has claimed that the Alawite country is the *de facto* administering power of Western Sahara. In this way, the Union justified the legitimacy of the negotiations.

It is obvious to any jurist that the institution of "*de facto* administering power" does not exist in international law. The Tribunal quashed the decision to conclude the cited agreement. In particular, it considered that the Council had failed in its obligation to examine, before the conclusion of the agreement, whether there were indications of exploitation of the natural resources of the territory of Western Sahara under Moroccan control likely to be to the detriment of its inhabitants, and to result in an undermining of their fundamental rights. It is easy to see that the reasoning of the Tribunal is too technical, and did not want to address the essential question of the impossibility for a State to include in an international treaty a territory that does not belong to it. The Tribunal is reluctant to say that Morocco occupies Western Sahara militarily, and speaks instead of "the dispute between the Polisario Front and Morocco that the UN tends to resolve" or "a peace process under the auspices of the UN."[66]

Even though the Commission correctly interpreted UN GA Resolution 2625 (XXV), and considers that a non-self-governing territory is not part of the adminis-

[64] Council Decision 2012/497/UE of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalization measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part Décision du Conseil, [2012] JO L 241.

[65] Case T-512/12 *Front populaire pour la libération de la saguia-el-hamra et du rio de oro (Front Polisario) v. Council of the European Union* [2015] ECLI:EU:T:2015:953.

[66] *Ibidem*, paras. 58–59.

tering power, it recognises that exports from Western Sahara benefited "de facto" from preferences, and that relations with that territory were of a purely technical nature. It also confirmed the presence on the list of approved exporters of companies located in Western Sahara but that, for "convenience," the list in question referred to the regions as defined by Morocco; but this was in any case a sign of recognition of an annexation.[67] The Council has even affirmed that, with Morocco as the *de facto* power pursuing administration of Western Sahara, this would mean that the Union must address the Moroccan authorities with regard to the territory in question.[68] The Court recalls its jurisprudence on exports from Israel excluding those in the West Bank, and considers that the EU institutions could have insisted on including – in the text approved by the contested decision – a clause excluding the application of the agreement to the territory of Western Sahara.[69]

Although the Tribunal declares that the agreement does not imply recognition by the Union of Moroccan claims to Western Sahara, it uses wise language. However, the Council has lodged an appeal before the Court of Justice against the judgment of the General Court. AThe conclusion of the Advocate General was even clearer than that of the Tribunal in 2015: Western Sahara is not part of the territory of Morocco and, therefore, contrary to what was found by the Court, neither the EU-Morocco Association Agreement not the liberalisation agreement are applicable to it.[70] The judgment by the Court concerning the appeal to the previous General Court judgment, declares that the controversial agreement cannot be understood as applying to Western Sahara as it is not part of Morocco.[71] Legally perfect, the Court decision ignores the practical interpretation and application that the Alawi Kingdom follows.

As early as after the judgment of 2015, Morocco officially suspended its relations with the EU institutions, though these were already frozen *de facto*. According to Morocco, the decision of the Court annulling the decision on the trade agreement on agricultural products concluded in 2012 is contrary to international law (sic).[72]

No EU Member State, in agreement with the UN, has recognised the annexation of Western Sahara by Morocco, although if the EU conducts negotiations with Morocco on Saharawi natural resources, it *de facto* recognises implicitly – even

[67] *Ibidem*, paras. 82, 84, 86.

[68] *Ibidem*, para. 82.

[69] *Ibidem*, paras. 95, 102. The Brita case is being referred to (Case C-386/08 *Firma Brita GmbH v. Hauptzollamt Hamburg-Hafen* [2010] ECLI:EU:C:2010:91).

[70] Court of Justice of the European Union, Press Release No. 94/16, Advocate General's Opinion in Case C-104/16 P *Council v. Polisario Front*, 13 September 2016, available at: https://curia.europa.eu/jcms/upload/docs/application/pdf/2016-09/cp160094en.pdf (accessed 23 March 2018).

[71] *See* Case C-104/16 (Grand Chamber) judgment 21 December 2016, ECLI:EU:C:2016:973.

[72] *Le Maroc suspend ses relations avec l'Europe*, Le Figaro, 25.02.2016, available at: http://www.lefigaro.fr/flash-eco/2016/02/25/97002-20160225FILWWW00313-le-maroc-suspend-ses-relations-avec-l-europe.php (accessed 23 March 2018).

by expressly denying it – the legitimacy of the Moroccan presence. Sweden has been on the verge of recognizing SADR, but it stepped back from that when Morocco paralysed the construction of several IKEA stores there. Norway, a non-EU member is thinking about it. The rest remain silent even though The Netherlands, Sweden and (outside the EU) Iceland, Liechtenstein and Norway, as well as the US, have made it clear that their respective free trade agreements with Morocco are not applicable in Western Sahara, exactly because Morocco does not exercise internationally recognised sovereignty over the territory.

According to a complaint made at the European Parliament, instead of implementing ECJ decisions, the European Commission would be negotiating with Morocco over Western Sahara without even consulting the Polisario Front. Any trade negotiation in this sense is in direct contravention of the ECJ ruling and breaches basic principles of international law. Actually, the EU is assisting the Moroccan government in developing infrastructure in a territory that the ECJ consider outside Morocco's internationally recognised borders.[73] Thereby, the EU normalises an illegal occupation that no State recognises, and that includes the 28 Member States. As a consequence, the EU role of supporting the peace process hardly seems credible.

Excluding the agricultural products from Western Sahara when applying the Agreement with Morocco would make the export into the EU less attractive financially, given that entities operating in Western Sahara and Morocco would be confronted with declining economic profitability of its annexation policy.

New legal challenges lie ahead in two more cases pending before the ECJ regarding the EU-Morocco Fisheries Partnership Agreement (FPA), which secures EU fishing rights in Moroccan and Western Saharan waters in exchange for Morocco receiving 40M euros annually. Instead, the European Commission would be better negotiating an agreement with the Polisario concerning the Saharan fishing bank.

In the meantime, Morocco condemns Sahrawi human rights activists for using its flag, and the UN Relator against torture denounces the systematic practice of torture in the occupied Sahara.[74]

In both cases, Palestinian and Moroccan, there are serious concerns about the legality under international law of the EU's trade agreements covering occupied

[73] The Greens/Europe Free Alliance in the European Parliament, *Stop the rogue EU trade talks with Morocco over Western Sahara*, 25.09.2017, available at: https://www.greens-efa.eu/en/article/news/stop-the-rogue-eu-trade-talks-with-morocco-over-western-sahara/ (accessed 23 March 2018).

[74] C. Gall, *Spanish judge accuses Moroccan former officials of genocide in Western Sahara*, The New York Times, 10.04.2015, available at: https://www.nytimes.com/2015/04/11/world/europe/spanish-judge-accuses-moroccan-former-officials-of-genocide-in-western-sahara.html (accessed 23 March 2018). The European Parliament visited the refugee camps in Algeria six years earlier and did not denounce human rights violations as an international delegation did: J. Hillary, *Western Sahara activists feel full force of Moroccan intimidation*, The Guardian, 25.02.2014, available at: https://www.theguardian.com/global-development/poverty-matters/2014/feb/25/western-sahara-saharawi-activists-moroccan-intimidation (accessed 23 March 2018).

territories. The EU practice seems against the obligations under *Ius Gentium*, which ask for the occupant power to respect the usufructurary principle precluding exploitation of the natural resources of an occupied territory by the occupier for its own benefit. Consequently, the third parties, in the face of this unlawful conduct, have the obligation to promote the right of self-determination and those of non-recognition and non-assistance.[75]

This brings to light the inherent tension between the logic focused on law and that focused on international politics. In its economic dealings, the EU adopted a profit-seeking approach concerning the labelling of products originating from the occupied territories to the detriment of these. Two interpretations can be made of this behaviour. According to one, diplomacy should be the exclusive domain of politicians and diplomats, leaving it as suitable for the ECJ to abstain or pronounce in affairs considered foreign policy, following on from Article 24 TEU.[76]

The second interpretation considers the rule of law a fundamental principle on which the EU is based. Following this logic, the EU is constrained by legal considerations, and its choices are amenable to judicial review. Accordingly, the EU attitude to occupied territories gravely undermines the international credibility and legitimacy of the EU's external action.[77]

Conclusions

The recognition of States has always been an elusive theme for international law. In the words of S. Hille, "as the Yugoslavian crisis shows, recognition under public international law has developed from a purely formal point of view based on facts, to one based on political discretion and is – as such – becoming a tool for political action. Whereas, under classical doctrine it was only asked if the four criteria (…) had been fulfilled, political realities are now taken into account."[78] Perhaps this vision of the classical doctrine is too idealistic as the political component is a "genetic" one of the recognition of States.

However, the EU presence on the international scene gave a voice on the possibility of this State power being submitted to certain criteria that take account of the strategic consequences the recognition can have. The fledgling EU practice with the 1991 guidelines for recognition allowed for collective recognition by the Member States on the basis of certain objective criteria.

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[75] E. Kassoti, *Trading with Settlements: The International Obligations of the European Union with Regard to Economic Dealings with Occupied Territories*, T.M.C. Asser Institute for International & European Law, 02 Policy Brief 2017.

[76] L. Lonardo, *The EU's diplomatic accident with Morocco shows the perils of judge-led foreign policy*, EUROPP: European Politics and Policy, available at: http://blogs.lse.ac.uk/europpblog/2016/03/07/the-eus-diplomatic-accident-with-morocco-shows-the-perils-of-judge-led-foreign-policy/ (accessed 23 March 2018).

[77] Kassoti, *supra* note 72.

[78] Hille, *supra* note 37, pp. 598–611.

Our answer to the question as to whether the rules applicable to States are also applicable to the recognition of States by the EU should be negative, as the States mainly follow political opportunity considerations, with the European Union advocating standards for doing that which, if not international, are at least European. Those standards are found in the 1991 Council decisions, adopted under the CPE umbrella, and are the same that the EU should follow in its external action, according to the TEU (arts. 2 and 21.1). However, the practice followed by Brussels is far from this statement, and it has its consequences.

The recognition of Kosovo by the majority of the Member States, following an independence process supported by some of them and by the EU, did not want to be an international precedent, but was. A political decision to recognise, ignoring the EU's own guidelines and the effectiveness of the new entity pretending to be an independent State has undesired legal and political consequences. From a legal point of view, the recognition as a State of an entity not in full control of its territory, poses serious problems for the mutual recognition between the seceded entity and the State of origin. In the case of Croatia, the criterion of effective control over its territory was interpreted in a wide sense, since Croatia did not have direct control over a third of its territory. What effects does this development have on the mutual recognition between Zagreb and Belgrade? Recognition has become much more uncertain and unpredictable.[79] This is a consequence of the above development, which leaves recognition subject to the political realities of each given case.

Recent EU practice thus shows a growing gap between its rhetoric identity as a promoter of global fundamental values and international law, and *realpolitik*.

Our hypothesis that, within a global governance system promoted by the EU, its actions of recognition should follow certain normative guidelines that govern the will of the Member States can be accepted, once the results of the recognitions that ignore the above are seen. These EU constitutional principles are inherent to the EU's nature and the driving force for multilevel governance, of which the EU is an essential pillar. Institutionalising the recognition of States by the EU, following its constitutional principles, is suitable, not only for collective recognition by EU Member States, and even for EU functional recognition, but also because it can lead to general uses in the international community. This trend, which can be reflected in the formation of a regional or general customary norm, would be convenient for the preservation of the current international system of sovereign States, and to avoid the proliferation of unrecognised States and their use as means of coercive diplomacy.[80]

[79] *Ibidem*.

[80] E. Souleimanov, E. Aslan, E. Abrahamyan & H. Aliyev, *Unrecognized states as a means of coercive diplomacy? Assessing the role of Abkhazia and South Ossetia in Russia's foreign policy in the South Caucasus*, Southeast European and Black Sea Studies, available at: http://www.tandfonline.com/doi/full/10.1080/14683857.2017.1390830 (accessed 23 March 2018).

Not being a State but an artificial creation to cope with interdependency, and without an ideology, apart from the free market, the European Union needs moral values, in a broad sense. With religious morality ruled out by the prevailing secularism, we are left with ideas regarding justice, respect got the rule of law, and the principles and norms of international law. Otherwise, a collective or joint recognition of States, based solely on political criteria, will demonstrate the futility of having a European Union behaving in the same way as States would do.

Abstract: The recognition of states has always been one of the most controversial issues for international lawyers. Discussions on its very nature or on possible conditions providing for it continue. The international doctrine, but also States and the institutionalised international community have tried to subject this unilateral act on the part of States to certain universal or regional rules. These rarely consider international organisations as active subjects of recognition. However, the fact that the European Union has assumed certain responsibilities in the field of foreign policy raises a question as to the EU's role in the recognition of States. This paper will therefore follow the evolution of EU powers as regards external relations, and its role when it comes to the recognition of new States. To do this, it will pay attention to theories relating to the EU's power, and international norms applicable to it, but also to EU practice, with a choice made of certain relevant cases that reveal contradictions in European foreign policy vis-à-vis the recognition of States. The hypothesis this research tries to advance is that, within the kind of global governance system the EU promotes, the Union's actions regarding recognition should follow certain normative guidelines that govern the will of the Member States. These EU constitutional principles are inherent to the EU's nature, and are a driving force underpinning multilevel governance, of which the EU is an essential pillar.

Keywords: Recognition of State actors, the EU as a global actor, normative guidelines for the EU's recognition of States, Europeanisation of national recognition policies, intergovernmental decisions; division of powers between the EU and the Member States.

The UN SC, Unrecognised Subjects and the Obligation of Non-recognition in International Law

*Maurizio Arcari**

Introduction

To first frame the issue, we need to achieve a preliminary qualification of the notion of "unrecognised subjects," referred to in the title of this paper. The latter expression is intended to cover the situation characterising those entities which present the factual characteristics sufficient for statehood to be claimed. The "unrecognised" status of such entities is then due to the circumstance that their factual existence has consolidated in concomitance with, or as an effect of, an egregious breach of some fundamental norms of international law, such as the prohibition on the use of force, the prohibition of racial discrimination, or the principle of self-determination of peoples.

The role performed by the UN SC in respect of situations qualified in the above way[1] is potentially prominent, insofar as the Council can use its resolutions to condemn explicitly or nullify the claims to statehood put forward by entities consolidated through gross violations of international law, by requiring of the UN Member States that they do not recognise the situation created by such entities, and/or the effects of their actions. Relevant instances are limited to a bundle of precedents, which include: *i*) the call not to recognise the Unilateral Declaration of Independence made by the illegal racist minority regime in Southern Rhodesia, as contained in Resolution 216 (1965) of 12 November 1965[2]; *ii*) the call not to recognise the declaration of the Turkish Cypriot

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[1] For a more general assessment of the role of the UN SC with respect to statehood, *see* C. Chinkin, *The Security Council and Statehood*, in: C. Chinkin, F. Baetens (eds.), *Sovereignty, Statehood and Responsibility: Essays in Honour of James Crawford*, Cambridge University Press, Cambridge: 2015, pp. 155–171.

[2] S/RES/216. In particular with this Resolution, the UN SC decided "to condemn the unilateral declaration of independence made by a racist minority in Southern Rhodesia" (para. 1), and called upon all States "not to recognize this illegal racist minority regime in Southern

authorities of the purported secession of the northern part of the Republic of Cyprus (with the ensuing establishment of the TRNC), as contained in Resolution 541 (1983) of 18 November 1983[3]; *iii*) the affirmation, contained in Resolution 787 (1992) of 16 November 1992, that "any entities unilaterally declared or arrangements imposed in contravention thereof [the territorial integrity of the Republic of Bosnia and Herzegovina] will not be accepted,"[4] referring to the purported non-recognition of the territorial entity created by the Serbs of Bosnia (the so-called "Republika Srpska"). To these three clear-cut examples, we may add the resolutions through which the UN SC endorsed previous UN GA resolutions, by calling upon all Governments "to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with so-called independent Transkei or other bantustans."[5]

Beyond such examples, other well-known cases in which the UN SC referred to the issue of non-recognition do not directly coincide with the situation of unrecognised entities claiming statehood, but with the purported invalidation of the legal effects of (wrongful) acts carried out by States in contravention of some fundamental norms in international law. Egregious examples arising in this respect are Resolution 276 (1970) of 30 January 1970, by which the UN SC declared illegal the continued presence of South Africa authorities in Namibia, and hence illegal and invalid all acts taken by South Africa on behalf of or concerning Namibia[6]; or Resolution 661 (1990) of 6 August 1990, wherein States are called upon not to recognise any regime set up by Iraq in the occupied territory of Kuwait.[7] While these instances do not, strictly speaking, fall within the category of cases concerning "unrecognised subjects," they do nonetheless provide relevant insights into

Rhodesia and to refrain from rendering any assistance to this illegal regime" (para. 2). *See* also the subsequent UN SC Resolution 217 (1965) of 20 November 1965, S/RES/217 condemning "the usurpation of power by a racist settler minority in Southern Rhodesia" and regarding "the declaration of independence by it as having no legal validity" (para. 3).

[3] S/RES/541. *See* in particular paras. 2 and 7 of the UN SC Resolution 541 (1983), where the UN SC respectively considers the declaration by the Turkish Cypriot authorities purporting to create an independent State in Northern Cyprus as "legally invalid," and "calls upon all States not to recognize any Cypriot State other than the Republic of Cyprus." *See* also the subsequent Resolution 550 (1984) of 11 May 1984, S/RES/550, reiterating the call upon all States "not to recognize the purported State of the 'Turkish Republic of Northern Cyprus' set up by secessionist acts" and calling upon them "not to facilitate or in any way assist the aforesaid secessionist entity" (para. 3).

[4] S/RES/787. *See* para. 3 of the UN SC Resolution 787 (1992).

[5] *See* UN SC Resolution 402 (1976) of 22 December 1973, S/RES/402, para. 1.

[6] S/RES/276. *See* para. 2 of the UN SC Resolution 276 (1970). On the legal implications this Resolution *see* ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep. 1971, p. 16 (hereinafter: the Namibia Advisory Opinion).

[7] S/RES/661. *See* in particular para. 9(b), where the UN SC calls upon all States "not to recognize any regime set up by the occupying Power."

the question of non-recognition as interpreted in UN SC practice; and are for this reason worth considering in the present context.

In the same vein, reference will also be made, where appropriate, to some recent cases – such as the annexation of Crimea by Russia or the announcement by the current US Presidency of the transfer of the United States Embassy in Israel to Jerusalem – in which the UN SC has considered the issue of non-recognition, albeit without any ultimate adoption of a specific Resolution on the matter in question.[8]

While the cases above, together with indirect UN SC contributions to the issue of non-recognition, have been explored extensively in the legal literature,[9] room for uncertainty remains as to the proper systematisation of this subject. A first critical issue in this respect is that of grasping the correct role and function of the UN SC with reference to the existence of the collective obligation for States not to recognise certain (illegal) situations, and the legal consequences arising therefrom. The issue at stake here is to ascertain whether a collective obligation of non-recognition can arise under general international law, independently of a prior statement to that effect made by the UN SC. In fact, as recalled in the 2014 ILA Report on recognition/non-recognition in international law, there are still Governments challenging the possibility that a legal obligation of non-recognition may arise outside of a prescription by a binding authority such as the UN SC.[10]

[8] *See* references *infra*, notes 33–40 and accompanying text.

[9] The legal literature on the subject is abundant and cannot be listed exhaustively here; *see* among others, J. Dugard, *Recognition and the United Nations*, Grotius Publications, Cambridge: 1987, pp. 81–163; V. Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia*, Martinus Nijhoff Publisher, Dordrecht: 1990, pp. 273–361; T.D. Grant, *East Timor, the U.N. System, and Enforcing Non-Recognition in International Law*, 33 Vanderbilt Journal of Transnational Law 273 (2000); S. Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force of Other Serious Breaches of a Jus Cogens Obligation: An Obligation without Real Substance?*, in: C. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes*, Martinus Nijhoff Publishers, Leiden/Boston: 2006, pp. 99–125; T. Christakis, *L'obligation de non-reconnaissance des situation créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales*, in: C. Tomuschat, J.-M. Thouvenin (eds.), *The Fundamental Rules*..., *supra*, pp. 127–166; E. Milano, *The Doctrine(s) of Non-Recognition: Theoretical Underpinnings and Policy Implications in Dealing with De Facto Regimes*, ESIL Research Forum 2007, available at: www.esil-sedi.eu/fichiers/en/Agora_Milano_060.pdf (accessed 15 October 2017); M. Dawidowicz, *The Obligation of Non-recognition of an Unlawful Situation*, in: J. Crawford, A. Pellet & S. Olleson (eds.), *The Law of International Responsibility*, Oxford University Press, Oxford: 2010, pp. 677–686; A. Pert, *The 'Duty' of Non-recognition in Contemporary International Law: Issues and Uncertainties*, 30 Chinese (Taiwan) Yearbook of International Law and Affairs 48 (2012); A. Saltzman, *Developing the Principle of Non-recognition*, 43 Ohio Northern University Law Review 1 (2017).

[10] *See* ILA, Washington Conference (2014), *Recognition/Non-recognition in International Law*, Second (Interim) Report, March 2014, pp. 4–5. This is the position put forward by Australia in the proceedings before the ICJ concerning the East Timor case, and maintained consistently thereafter: *see infra*, notes 20–22 and accompanying text.

A second relevant issue worth considering relates to the content of the obligation of non-recognition. Insofar as the existing international legal texts endorsing a general duty of non-recognition of situations created in breach of fundamental norms of international law often leave the material scope and consequences of such an obligation undetermined, it could be interesting to consider the contribution the UN SC has made in clarifying the issue at stake. Useful insights on this point may be drawn from the attitude taken by the Council vis-à-vis unrecognised entities *after* the initial determination of their illegality and the call made to UN Member States for collective non-recognition. In this vein, it may be of interest to consider the long-term management of *de facto* illegal entities, up to the stages of negotiation/conclusion of comprehensive peace agreements aimed at the definitive settlement of the situation arising from serious violations of international law.

1. The UN SC and the existence and triggering of the (collective) obligation of non-recognition

As a matter of fact, the existence in international law of a customary (general) obligation not to recognise situations (including entities claiming statehood) created by a serious breach of norms of fundamental importance is far from being uncontroversial. An outlook at the relevant international practice brings into evidence trends authorising what are certainly different, if not quite truly contradictory, conclusions.

At one end of the spectrum it is possible to find the venerable precedent offered by the Stimson Doctrine – formulated in 1932 by the then US Secretary of State in reaction to the Japanese invasion of Manchuria and the ensuing establishment of the puppet State of Manchukuo – which is very often referred to as the first manifestation of a general duty of non-recognition of an illegal situation in international law.[11] Another authoritative reference, deemed to reflect the modern *opinio iuris* of States concerning the foundational principles of international law, is provided by the Declaration on "Friendly Relations" adopted by the UN General Assembly on 24 October 1970, wherein it is affirmed starkly that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal."[12] The same prominent statement appeared

[11] For a recent assessment of the Stimson Doctrine and its importance to the consolidation of the doctrine of non-recognition in international law, *see* D. Turns, *The Stimson Doctrine of Non-recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 Chinese Journal of International Law 105 (2003).

[12] *See* UN GA Resolution 2625 (1970) of 24 October 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter or the United Nations," A/RES/25/2625, under Principle 1, tenth paragraph.

in the subsequent UN General Assembly Definition of aggression of 14 December 1974.[13]

More recently, a definitive restatement on this matter has been offered by the ILC 2001 Draft Articles on the Responsibility of States for internationally wrongful acts. Article 41, para. 2, of that instrument, considering the particular consequences of a serious breach of an obligation arising under peremptory norms of general international law (as defined by the previous Article 40), provides that "No State shall recognize as lawful a situation created by a serious breach within the meaning of Article 40, nor render aid or assistance in maintaining that situation."[14]

In its 2004 advisory opinion on the *Wall in the Occupied Palestinian Territory*, the ICJ endorsed the logic behind the ILC text, without however mentioning it expressly: in particular, the Court drew – from the *erga omnes* character and importance of the rights and obligations involved – an obligation that all States should not recognise the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, as well as an obligation not to render aid or assistance in maintaining the situation created by such construction.[15]

This being said by way of illustration of the precedents supporting the existence under customary international law of a general obligation not to recognise as legal situations arising from (or consolidating) serious breaches of rules of fundamental importance, it must be pointed out that there are other elements authorising a different interpretation. According to the latter interpretation, the collective obligation of non-recognition would depend on, and would only be triggered by, an objective determination made by an authoritative body, such as the UN SC. In this respect, one may recall that, in its 1971 ICJ Advisory Opinion on Namibia, the ICJ stated that "it would be an untenable interpretation to maintain that, once such a declaration [of illegality] had been made by the UN SC under Article 24 of the Charter, on behalf of all Member States, those members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it."[16] The Court then added that "a binding determination made by a competent organ of the United Nations to the effect that a situation is illegal (…) cannot remain without consequence."[17] Hence, the Court rather ambiguously seemed to allude to the fact that, while an objective determination of the illegality of a certain

[13] *See* UN GA Resolution 3314 (XXIX) of 14 December 1974 "Definition of Aggression," A/RES/3314, Annex, Article 6, para. 3, stating that "No territorial acquisition or special advantage resulting from aggression is or shall be recognized as lawful."

[14] *See* ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Yearbook of the International Law Commission, Vol. II, Part Two (2001), p. 29 (hereinafter: ILC 2001 Draft Articles).

[15] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, pp. 136, 200, para. 159.

[16] *See* Namibia Advisory Opinion, *supra* note 6, para. 112.

[17] *Ibidem*, para. 117.

situation cannot but have *erga omnes* effect,[18] the specific consequences arising therefrom (including the obligation for UN Member States not to recognize the illegal situation) can only be attached to a binding decision to that effect taken by the UN SC.[19]

This reading of the Namibia Advisory Opinion was developed by Australia as it pursued its plea before the ICJ in respect of the *East Timor* case.[20] Replying to the Portuguese argument that the Court was not required to determine the legality of Indonesia's presence in East Timor, Australia submitted that no definitive conclusion on that point could be drawn from relevant UN SC resolutions; and maintained that "in cases where there is no binding UN SC resolution prescribing specific measures of non-recognition, every State is necessarily left to determine for itself what attitude it will adopt."[21] In its judgment on the case, the Court declared it had not been persuaded that the relevant UN SC resolutions went so far as to oblige States not to recognise any authority on the part of Indonesia over the territory of East Timor; but nevertheless abstained from addressing in more general terms the scope of the obligation of non-recognition in international law.[22]

To the same effect, it may be recalled that, during the early phases of the ILC work on State responsibility, many precedents permitting the establishment as a matter of *lex lata* or *ferenda* of an obligation that States not recognise situations arising from serious violations of international law (at the times called crimes of States) were drawn from the UN GA and the UN SC practice referred to in the introduction to the present paper.[23] It is noteworthy that the two ILC

[18] *See* Milano, *supra* note 9, pp. 1–3.

[19] *See* Pert, *supra* note 9, pp. 63–65.

[20] *See* in particular ICJ, *East Timor (Portugal v. Australia)*, Rejoinder of the Government of Australia, 1 July 1993, pp. 131–132, para. 230, specifically referring to the interpretation of the Namibia Advisory Opinion on this point.

[21] *Ibidem*, p. 124, para. 222. *See* also para. 221, concerning the impossibility of drawing – from UN SC Resolutions 384 (1975) and 389 (1976) concerning East Timor – definitive conclusions as to the unlawfulness of Indonesia's occupation, and the obligation for States not to recognise the legality of the acts of Indonesia in relation to East Timor.

[22] ICJ, *East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Rep. 1995, pp. 90, 103, para. 31. The Court then drew from this a necessity for it to rule upon the lawfulness of Indonesia's conduct as a prerequisite for deciding on Portugal's contention that Australia violated its obligation to respect Portugal's status as administering Power in East Timor (*ibidem*, p. 104, para. 33). This was the decisive factor precluding the exercise of the Court's jurisdiction in the case in hand (*ibidem*, p. 106, para. 38). The reasoning of the Court on non-recognition was severely criticised in the dissenting opinion of Judge Skubiszewski (pp. 261–265).

[23] *See* in particular para. 2 of the Commentary to Article 53 ("Obligations for all States") of the Draft articles on State Responsibility adopted on First Reading by the ILC in 1996 (providing that "An international crime committed by a State entailed an obligation for every other State: (a) not to recognize as lawful the situation created by the crime (…)"), Yearbook of the International Law Commission, Vol. 2, Part Two (1996), p. 72.

Special Rapporteurs first contributing to the framing of the obligation of non-recognition of illegal situations within the Draft on State Responsibility, i.e. W. Ripaghen and G. Arangio-Ruiz, were both prominent in linking such an obligation to a previous determination by the UN SC (or the UN GA) that a serious breach/crime had been committed.[24] This approach was abandoned during the last phases of the codification effort, when the ILC endorsed the suggestion of the last special rapporteur on the topic, J. Crawford, to sever the link between State responsibility and the UN system of collective security.[25] The outcome of this dissociation was the actual wording of Article 41, which envisages collective non-recognition of situations created by serious breaches of *jus cogens* as a (secondary) obligation arising for States under general international law.[26] However some States, in their comments on the final versions of the Draft articles, criticised the latest approach adopted by the ILC, arguing that the competence to deal with violations of international law attaining the level of "serious breaches of *jus cogens*" was better left to the UN SC than to the customary rules on State responsibility.[27]

Faced with this controversial picture, one may legitimately wonder what kind of contribution can be expected from the scant and selective practice of the UN SC in matters of non-recognition. However, some tentative conclusions can be drawn from recent instances of pertinent case-law, in which States felt themselves committed to deny or contest the legal effects of situations created in violation of international law, notwithstanding the failure by the UN SC to adopt a specific resolution calling for the non-recognition.

A first relevant example relates to the 2008 crisis ignited by the Russian military intervention in Georgia. In the context of that crisis, the two Georgian secessionist territorial entities of Abkhazia and South Ossetia, both falling under overt Russian political and military control, proclaimed their independence. No

[24] *See* respectively W. Ripaghen, *Third Report on the Content, Forms and Degrees of International Responsibility*, Yearbook of the International Law Commission, Vol. II, Part One (1982), p. 48 (draft Article 6); G. Arangio-Ruiz, *Seventh Report on State Responsibility*, Yearbook of the International Law Commission, Vol. II, Part One (1995), pp. 16, 22–24, 29–30 (draft articles 18–19).

[25] *See* the general presentation of the issue made by Special Rapporteur Crawford during the 2533rd Meeting of the ILC in 1998, Yearbook of the International Law Commission, vol. I, 1998, p. 97 (holding that "In particular, it was not possible to force on the UN SC a system of crimes which would, in important respects, qualify the existing provisions of the Charter of the United Nations").

[26] *See* paras. 5 and 6 of the commentary to Article 41 of the ILC Draft Articles on State Responsibility adopted on Second Reading in 2001 (ILC 2001 Draft Articles, *supra* note 14, p. 114).

[27] *See* for example the comment of United States Government to (2000) Draft Articles 41 and 42, in: *Comments and Observations Received from Governments*, UN Doc. A/CN.4/515, p. 69, para. 2.

explicit Resolution condemning such unilateral declarations of independence was adopted by the UN SC, due to the obvious threat of a Russian veto. Moreover, during the UN SC meeting on the situation in Georgia held on 28 August 2008, the representative of Russia read the texts of two Decrees issued by the President of Russian Federation concerning the recognition of the declarations of independence of both Abkhazia and South Ossetia.[28] On the same occasion, the majority of the Members of the Council reacted by affirming that such acts of recognition had no basis whatsoever in international law, and amounted to an egregious example of acts aimed at impairing the territorial integrity of a State.[29] It is here important to note that, in all its precedent-setting Resolutions devoted to the Georgian situation, the UN SC was consistent in upholding the "commitment of all Members States to the sovereignty, independence and territorial integrity of Georgia within its internationally recognized borders."[30] It can therefore be presumed that, in the case at hand, the Members of the UN SC felt themselves duty-bound to deny any legitimisation to the declarations of independence issued by secessionist entities in Abkhazia and South Ossetia, though not out of a previous determination by the UN SC calling for non-recognition of such entities, but rather due the fact that the same declarations amounted to a clear impairment of Georgia's territorial integrity, realised through an egregious violation of the prohibition on the use of force.[31]

Further insights can be drawn from the 2014 crisis, which brought about the *de facto* annexation of the Ukrainian region of Crimea by Russia.[32] As an attempt to react to the referendum on the status of Crimea, announced by local separatist authorities enjoying the support of the Russian military presence, on 15 March 2014 a draft resolution was tabled before the UN SC. Having first reaffirmed the illegality of any territorial acquisition resulting from the threat or the use of force as well as the commitment to the sovereignty, independence and territorial integrity of Ukraine, this text declared that the planned referendum concerning the status of Crimea could have no validity, and called upon all States not to recognise any alteration of the status of Crimea on the basis of this referendum.[33] This draft resolution

[28] *See* UN SC Provisional Records, Sixty-third year, 5969th Meeting, 28 August 2008, UN Doc. S/PV.5969, p. 9.

[29] *See* for example the statement of the representative of Italy, *ibidem*, p. 10.

[30] *See* for example UN SC Resolution 1808 (2008) of 15 April 2008, S/RES/1808, operative para. 1.

[31] *See* for this conclusion A. Tancredi, *Neither Authorized nor Prohibited? Secession and International Law after Kosovo, South Ossetia and Abkhazia*, 18 Italian Yearbook of International Law 37 (2008), pp. 59–61.

[32] For an overall assessment of this case *see* the contributions gathered in the volume W. Czapliński, S. Dębski, R. Tarnogórski & K. Wierczyńska (eds.), *The Case of Crimea's Annexation under International Law*, Scholar Publishing House, Warsaw: 2017.

[33] *See* Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland,

failed to gain adoption because of the veto cast by Russia,[34] and the purported referendum was celebrated the following day, giving rise to the unilateral declaration of independence of the autonomous Republic of Crimea and Sevastopol, and ensuing annexation by Russia, as completed on 21 March 2014. These events generated a wave of international protests, most of which were prominent in denying any legal effects to the secessionist referendum in Crimea.[35] This wave of reactions is conveniently epitomized in General Assembly Resolution 68/262, adopted on 27 March 2014, which reiterates the main themes of the failed UN SC text, *inter alia* by calling upon all States to desist with, and refrain from, actions aimed at the total or partial disruption of the national unity and territorial integrity of Ukraine (including "any attempts to modify Ukraine's borders through the threat or use of force or other unlawful means"); and not to recognise any alteration of the status of Crimea on the basis of the above-mentioned referendum.[36] Commenting on the latter text before the General Assembly, the Head of the Delegation of the European Union stated that the Resolution confirmed the importance of the fundamental principles of the Charter – notably the obligation to refrain from the use of force in international relations – and on this basis announced that the European Union would not recognise the illegal annexation of Crimea.[37] As perspicuously pointed out by one author, the non-recognition practice following the Crimea case "has surely reinforced non-recognition as a reactive measure to grave violations of fundamental legal principles."[38] We may add that, in the wake of the Crimea case, such a reactive measure is available to States over and above any express determination to that effect made by the UN Security Council.

Finally, a quick reference can be made to the international reactions following the very recent Proclamation from the President of the United States dated 6 December 2017 – the one that recognised Jerusalem as the capital of Israel and gave

Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution, 15 March 2014, UN Doc. S/2014/189, Preamble and paras. 1 and 5.

[34] *See* UN SC Provisional Records, Sixty-ninth year, 7138th Meeting, 15 March 2014, UN Doc S/PV.7138, p. 3.

[35] For an overview of the non-recognition practice ensuing from the referendum in Crimea and the Russian Annexation of this territory, *see* E. Milano, *Reactions to Russia's Annexation of Crimea and the Legal Consequences Deriving from Grave Breaches of Peremptory Norms*, in: Czapliński, Dębski, Tarnogórski & Wierczyńska, *supra* note 32, pp. 203–206.

[36] *See* UN GA Resolution 68/262 of 1 April 2014, A/RES/68/262, paras. 2 and 6.

[37] *See* the summary records of the meeting of the UN GA during which Resolution 68/282 was adopted, UN GA Official Records, Sixty-eighth Session, 80th Plenary Meeting, 27 March 2014, UN Doc. A/68/PV.80, p. 4.

[38] *See* Milano, *supra* note 35, p. 219.

effect to the relocation of the US Embassy to that city.[39] In this case likewise, a draft resolution – declaring null and void any decisions and action purported to alter the status of the Holy City of Jerusalem and calling upon all States to refrain from establishment of diplomatic missions in Jerusalem, and to recognise any action contrary to previous resolutions of the UN SC relating Jerusalem – was introduced before the Council, but not adopted because of the US veto.[40]

The latter call for non-recognition was obviously intended specially to cover the implementation of the earlier UN SC Resolution 478 (of 1980), which invites UN Member States to prevent effect being given to the "basic law" adopted by Israel in 1980; and to withdraw their diplomatic missions from Jerusalem. However, it is noteworthy that the preamble to the failed draft resolution made express reference to the principle of the inadmissibility of the acquisition of territory by force, and that this draft text was qualified by some of the representatives intervening at the UN SC meeting of 8 December 2017 as an attempt "to reaffirm our collective commitment *to international law*, including the Resolutions of the Council."[41]

The precedents reviewed above seem to offer support for the conclusion that an obligation to not recognise situations created by grave breaches of rules of fundamental importance can exist and arise for States under general international law, and also gain implementation in the absence of a previous determination by the UN SC.

2. The UN SC and the scope of the non-recognition obligation

After having clarified that the obligation not to recognise entities consolidated through serious violations of international law can be grounded in general international law, the problem remains to determine the specific content of such an obligation as well as the legal consequences of its breach. In fact, non-recognition has been criticised as an obligation "without real substance," on account of the fact that it may only operate in very circumscribed situations, and with very limited consequences.[42]

It is submitted here that the UN SC may be prominent in elucidating the content of the obligation of non-recognition, as well as in managing its actual implementa-

[39] *See* The White House, *Presidential Proclamation Recognizing Jerusalem as the Capital of the State of Israel and Relocating the United States Embassy to Israel to Jerusalem*, 6 December 2017, available at: www.whitehouse.gov/presidential-actions/presidential-proclamation-recognizing-jerusalem-capital-state-israel-relocating-united-states-embassy-israel-jerusalem/ (accessed 15 March 2018).

[40] *See* the text of the draft resolution – Egypt: draft resolution, 18 December 2017, UN Doc. S/2017/1060. However, on 21 December 2017 an almost identical Resolution was adopted by the UN GA: *see* UN GA Resolution ES-10/19 of 22 December 2017, A/RES/ES-10/19.

[41] *See* UN SC Provisional Records, Seventy-second year, 8128th Meeting, 8 December 2017, UN Doc. S/PV.8128, p. 6, the statement of the representative of France (emphasis added).

[42] *See* especially in this sense Talmon, *supra* note 9, p. 125. *See* also Dawidowicz, *supra* note 9, pp. 679, 684–685.

tion. The potential role accruing to the UN SC in this respect was evidenced in general terms by the ICJ in the 1971 Namibia Advisory Opinion. It is worth recalling that the Court delineated very lucidly the minimum requirements arising from the obligation of non-recognition, the general aim of which is to preclude States from those dealings which may imply any endorsement of the illegal situation created by a serious violation of international law.[43] In the case in hand, the Court established, first, that States must abstain from entering into treaty relations with South Africa in all cases where the Government of South Africa purported to act on behalf of Namibia; second, that States must abstain from diplomatic relations which may imply recognition of South African authority over Namibia; and third, that States must avoid entering into economic or other forms of relationship or dealings with South Africa on behalf of or concerning Namibia that might consolidate control by South Africa over this territory.[44]

The Court then qualified the three above "negative requirements" in light of what later become famous as the "Namibia exception": by setting forth a general condition which might limit any policy of non-recognition, namely, that it "should not result in depriving [the local population of the targeted territory] of any advantages derived from international cooperation."[45] In the case in hand, this meant for example that the prohibition to entertain treaty relations with South Africa might not be applied to conventions of a humanitarian character, the non-performance of which might affect the people of Namibia adversely[46]; or that, while official acts performed by South Africa in Namibia are to be considered illegal and invalid by third States, this invalidity cannot be extended to acts formed to the benefit of the local civilian population, such as the registration of births, deaths and marriages.[47]

Having outlined the basic content of the obligation of non-recognition, the Court pointed out that "the precise determination of the acts permitted or allowed (…) is a matter which lies within the competence of the appropriate political organs of the United Nations, acting within their authority under the Charter,"[48] thereby

[43] *See* Namibia Advisory Opinion, *supra* note 6, pp. 54–55, paras. 119, 121: "The Member States of the United Nations are (…) under obligation to recognize the illegality and invalidity of South Africa continued presence in Namibia. They are also under obligation to refrain from leading any support or any form of assistance to South Africa with reference to its occupation of Namibia (…) The Court will in consequence confine itself to giving advice on those dealings with the Government of South Africa which, under the Charter of the United Nations and general international law, should be considered as inconsistent with the declaration of illegality and invalidity made in paragraph 2 of Resolution 276 (1970) because they may imply a recognition that South Africa's presence in Namibia is legal."

[44] *Ibidem*, pp. 55–56, paras. 122–124.

[45] *Ibidem*, p. 56, para. 125.

[46] *Ibidem*, p. 55, para. 122.

[47] *Ibidem*, p. 56, para. 125.

[48] *Ibidem*, at 55, para. 120.

enhancing the critical role of the UN SC in this regard. A look at the relevant practice confirms that the UN SC has been effective in performing the task envisaged for it under the Namibia Advisory Opinion. With reference to the very same case, the UN SC had already spelled out in Resolution 283 (1970) of 29 July 1970 some of the steps required of States if effect is to be given to the general obligation of non-recognition of the South African presence in Namibia. These included, *inter alia*, the call to terminate or withdraw any diplomatic or consular mission or representative residing in Namibia, to discourage their nationals or companies from investing or obtaining concessions in Namibia, and to discourage the promotion of tourism and emigration to Namibia.[49] In the same time span, with reference to the different context of the Southern Rhodesia crisis, the UN SC included in the scope of the obligation of non-recognition on the part of UN Member States, a commitment to ensure that competent domestic organs do not accord in any manner any form of recognition, *including judicial notice*, to acts performed by officials and institutions of the illegal racist regime.[50] Interestingly enough, the latter requirement was a source of concern among some States, which took pains to underscore, at the relevant UN SC meetings, the independence granted to their courts in judicial matters.[51]

Indirectly at least, the latter point brings to the fore certain delicate issues capable of arising from the practical implementation of the obligation of non-recognition, especially when applied to contested entities resulting from serious breaches of international law. Regardless of how effective the UN SC has been in spelling out the details of what is permitted or forbidden to States in implementing non-recognition, it is evident that the Council's calls cannot *per se* achieve the legal nullification of an unrecognised entity's existence.[52] Practice demonstrates that, notwithstanding stigmatisation by the UN SC and the international community at large, an unrecognised entity may prove successful in consolidating its factual existence over a long period of time, and in performing effective governmental functions over a certain territorial context: in latter situations, it would be a legal fiction to consider as a juridical nullity all the acts adopted and performed by the unrecognised entity. A conspicuous case law confirms that the legal implications and effects of these sit-

[49] *See e.g.* paras. 3, 7, 11 of UN SC Resolution 283 (of 1970) (S/RES/283).

[50] *See* para. 3 of Resolution 277 (1970) of 18 March 1970, S/RES/277. For an account of the steps required of States as they implement the general obligation of non-recognition in relevant cases, *see* V. Gowlland-Debbas, *The Security Council and Issues of Responsibility under International Law*, RCADI, 2012, vol. 353, pp. 248–253.

[51] *See* UN SC Provisional Records, Twenty-fifth year, 1535th Meeting, 18 March 1970, UN Doc. S/PV.1535, the reservations expressed by the representatives of the United States and France, respectively at p. 5, para. 37, and p. 11, para. 95.

[52] *See generally* on this point A. Tancredi, *Some Remarks on the Relationship between Secession and General International Law in the Light of the ICJ's Kosovo Advisory Opinion*, in: P. Hilpold (ed.), *Kosovo and International Law: The ICJ Advisory Opinion of 22 July 2010*, Martinus Nijhoff Publishers, Leiden/Boston: 2012, pp. 98–99.

uations are often brought to the attention of domestic and regional Courts, which are often compelled to elaborate practical solutions for escaping the conundrum created by UN SC resolutions qualifying as null and void the acts of unrecognised entities.[53] A case in point entails the generous (if not sometimes overstretched) interpretation of the "Namibia exception" made by the ECHR with regard to the situation of the TRNC.[54]

Leaving aside the aforesaid difficulties, it is worth considering that the UN SC may be called upon to manage the long-term existence of unrecognised entities under a different perspective. As a matter of fact, while surely not a short-term measure, non-recognition cannot be conceived as an open-ended obligation.[55] Even if its termination in principle presupposes a successful return to the *status quo ante*, non-recognition can hardly be accepted as permanently divorced from the situation on the ground, and from the practical responses of the international community to that situation. In other words, we cannot preclude the UN SC's being called upon, sooner or later, to manage the temporal element inevitably accompanying the obligation vis-à-vis collective non-recognition. This would mean that, when the times are ripe for the definitive settlement of the situation on the ground through the conclusion of appropriate peace agreements, the UN SC could be willing to reconsider the scope of the obligation of non-recognition, as well as its implications.

If a revision of the regime of non-recognition is to be allowed in line with the evolution of the underlying factual situation over time, this revision might imply the UN SC having to deal with the same unrecognised entities that have been the object of previous stigmatisation thereby. The relevant practice reveals that the UN SC, while not refraining from efforts to cope with the issue, has handled it with great prudence. Hence, in Resolution 463 (of 1980), the UN SC called upon "all the parties" to comply with the Lancaster House Agreement on the Constitution

[53] *See* a short account of this case law in A. Orakhelashvili, *The Dynamics of Statehood in the Practice of International and English Courts*, in: C. Chinkin, F. Baetens (eds.), *Sovereignty, Statehood and Responsibility: Essays in Honour of James Crawford*, Cambridge University Press, Cambridge: 2015, pp. 177–179.

[54] *See* for example ECHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber, 10 May 2001, where the ECHR held that it cannot disregard the judicial organs set up by the TRNC, that it was in the very interests of the inhabitants of the TNRC to be able to seek the protection of such organs, and that they may therefore be regarded as "domestic remedies" which the inhabitants of the territory of the TRNC may be required to exhaust (paras. 98–102). In the recent case *Güzelyurtlu and Others v. Turkey* (App. No. 36925/07), Grand Chamber, 4 April 2017, the Court condemned the unwillingness of the Government of Cyprus to cooperate with the judicial authorities of the TRNC, as driven by the fear of lending any legitimacy to the TRNC, by excluding the notion that steps taken to achieve judicial cooperation with a view to furthering an investigation in criminal matters would amount to recognition, implied or otherwise, of the TRNC (para. 291).

[55] *See* Talmon, *supra* note 9, pp. 122–123; Pert, *supra* note 9, pp. 66–67. The point was also raised by Australia in its pleadings before the ICJ in the *East Timor* case, *supra* note 20.

for a free and independent Zimbabwe, thereby also addressing the representatives of the former authorities governing Southern Rhodesia.[56] In turn, in its Resolution 1022 (1995), endorsing the Dayton Peace Agreement for a comprehensive peace in Bosnia-Herzegovina, Bosnian Serbs are mentioned repeatedly as addressees of the obligations flowing therefrom, notwithstanding their formal absence from among the signatories of the relevant texts.[57] Finally, while avoiding reference to the authorities of the TRNC, the "Turkish Cypriot leaders" are commended explicitly in UN SC Resolution 2338 (of 2017), for the good progress made in negotiations concerning the solution of the situation in Cyprus.[58]

This case law would seem to demonstrate how the UN SC may temper the content of the obligation of non-recognition, by introducing leeway in its application. With all the due caution, it can be suggested that the contours of the obligation of non-recognition as delineated by the ICJ in the Namibia Advisory Opinion can be further disposed of by the UN SC, as it acts to promote negotiation or the conclusion of peace treaties intended to put an end to the very illegal situation prompting non-recognition in the first place. From a legal point of view, this outcome is far from astonishing, given the recalled Declaration on Friendly Relations recalled above, provided that the duty not to recognise as legal the territorial acquisition resulting from the use of force shall not be construed as affecting the powers of the UN SC under the Charter[59]; or that the 2001 ILC Draft Articles of State Responsibility as a whole (inclusive therefore of Article 41 on the duty of States not to recognise situations resulting from serious breaches of *jus cogens* obligations) are qualified by the final clause contained in Article 59, whereby the same articles are "without prejudice to the Charter of the United Nations."[60]

Conclusions

In conclusion, it is possible to maintain that, if the obligation of non-recognition stands out as an autonomous legal tool provided by general international law with a view to egregious violations of norms of fundamental importance being responded to, the UN SC may take a prominent role in determining terms and conditions as regards its practical implementation. In the same vein, the UN SC can also play a critical role in managing over time the condition of those contested entities that have been consolidated by way of serious infringements of international legality.

[56] *See* para. 3 of the UN SC Resolution 463 (1980) of 2 February 1980, S/RES/463.

[57] *See* paras 2, 3 and 4 of Resolution 1022 (1995) of 22 November 1995, S/RES/1022.

[58] *See* the fourth and ninth paragraphs of the Preamble to UN SC Resolution 2338 (2017) of 26 January 2017, S/RES/2338.

[59] *See* A/RES/25/2625, *supra* note 12.

[60] *See* ILC 2001 Draft Articles, *supra* note 14, p. 30.

Abstract: The paper considers the role of the UN SC in respect of the so-called "unrecognised subjects," i.e. those entities which present the factual characteristics for claiming statehood, but have consolidated as a result of a grave breach of international norms of fundamental importance. Two issues are particularly explored, namely: whether a previous determination of the UN SC is needed to trigger a collective obligation of non-recognition of these entities; and what can be the contribution of the UN SC in shaping the scope and the content of the obligation of non-recognition. The paper suggests that, while an obligation of collective non-recognition applies under customary international law to entities consolidated in breach of *jus cogens* and *erga omnes* obligations, the UN SC can play a prominent role in managing the practical implementation of this obligation, especially in cases of unrecognised entities of long-term duration.

Keywords: UN SC; statehood; fundamental norms of international law; collective non-recognition; state responsibility.

An Unrecognised State? Recent Practices of the Republic of China on Taiwan

*Chun-i Chen**

Introduction

Certain writers have persisted in describing the ROC on Taiwan[1] as an unrecognised State.[2] However, Taiwan represents a different type of case. The ROC government effectively governs the island of Taiwan, the Pescadores and the islands of Kinmen and Matsu,[3] having a population of approximately 23.5 million, maintaining diplomatic relations with 20 states,[4] with a *per capita* income of approximately US $ 24,857 in 2017,[5] and enjoying the status of 16th largest exporting country in the world.[6] The ROC's Constitution asserts a claim to sovereignty over all of China, and the government maintains that it has never been unequivocal in asserting Taiwan's status as an independent state.[7]

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[1] In this article, the names "Republic of China," "Republic of China on Taiwan," "ROC (Taiwan)," "Taiwan," and "ROC" are used interchangeably, depending upon the context. The terms "Mainland China" and "PRC" will be used interchangeably, too.

[2] *E.g.* P.L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 Michigan Journal of International Law 765 (2007); B.R. Roth, *The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order*, 4 East Asia Law Review 91 (2009).

[3] For general geographical information on Taiwan *see Executive Yuan*, The Republic of China Yearbook 36 (2016), pp. 36–43, available at: https://issuu.com/eyroc/docs/the_republic_of_china_yearbook_2016 (accessed 15 November 2017).

[4] MOFA, *Diplomatic Allies*, available at: https://www.mofa.gov.tw/AlliesIndex.aspx?n=0757912EB2F1C601&sms=26470E539B6FA395 (accessed 15 November 2017).

[5] Statistic Bureau, *National Statistics, Republic of China (Taiwan)*, available at: https://eng.stat.gov.tw/point.asp?index=1 (accessed 22 November 2017).

[6] CIA, *Taiwan, the World Factbook*, available at: https://www.cia.gov/library/publications/the-world-factbook/geos/tw.html (accessed 15 November 2017).

[7] *See e.g.* Article 4 of the Constitution of the Republic of China. ("The territory of the Republic of China within its existing national boundaries shall not be altered except by a resolution of the National Assembly"); J. Hu, *Evolution of Concepts and Principles of Contemporary International Law: The ROC as a Case Study*, 16 Chinese (Taiwan) Yearbook of International

Application of factors listed in Article 1 of the Montevideo Convention on Rights and Duties of States[8] to the case of Taiwan ensures the ready resolution of the recognition problem. Here is a state of defined territorial extent and permanent population, under the control of its own government, and engaging in, or having the capacity to engage in, formal relations with other such entities. This denotes that the ROC on Taiwan should be recognised as a state in the international community, and should be represented in all major international organisations. But the reality is that the ROC on Taiwan has failed to gain recognition by most countries of the world and is not represented in the United Nations and its affiliated agencies. Why is that?

Obviously, the modern doctrine of non-recognition originating with the Stimson Doctrine[9] against the statehood of Manchukuo cannot be applied in the case of Taiwan.[10] The recognition problem of Taiwan was not created by acts violating international law, but emerged as a result of the ROC government losing the Chinese Civil War to the Communist Party of China in 1949.[11]

Three views on why ROC on Taiwan is not recognised generally are summarized here. First, in reflection of the official position of the PRC,[12] the Taiwan question is by definition an internal Chinese affair, with Taiwan lacking any separate legal status from the PRC, given that the latter succeeded the ROC as the government of China on 1 October 1949. The PRC claims that Taiwan cannot have a separate legal status after that date, as either or a government. In the view of the PRC, the Preamble to its own Constitution points to Taiwan as part of its territory.

Law & Affairs 80 (1998), pp. 80–87 (discussing the ROC's quasi-state status under international law); M. Ying-Jeou, President of the Republic of China (Taiwan), *Address at the 2011 International Law Association Asia-Pacific Regional Conference (May 30, 2001)*, available at: http://english.president.gov.tw/Default.aspx?tabid=491&itemid=24496&rmid=2355(accessed 15 November 2018) (distinguishing between the ROC's "constitutional sovereignty" over mainland China and its authority to govern there). *See also* Ch. Chen, *Legal Aspects of Mutual Non-Denial and the Relations Across the Taiwan Straits*, 27 Maryland Journal of International Law 111 (2012).

[8] *See* Article 1 of the Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force, 26 December 1934) 165 League of Nations Treaty Series 19.

[9] J. Dugard, *Recognition and the United Nations*, Cambridge University Press, Cambridge: 1987, pp. 29–35.

[10] A. Hsiu-an Hsiao, *The International Legal Status of Unrecognized Claimants to Statehood: A Comparative Analysis of Taiwan and the Turkish Republic of Northern Cyprus*, 47 Issues and Studies 1(2011).

[11] The long and complex history that has given rise to the problem of Taiwan's recognition has been well-documented. *See e.g.* Hsiao, *supra* note, pp. 12–17; H. Chiu (ed.), *China and the Taiwan Issue*, Praeger, New York: 1979; J. Crawford, *The Creation of States in International Law*, 2nd edition, Oxford University Press, Oxford: 2006, pp. 198–221.

[12] *See* Taiwan Affairs Office & Info. Office of the State Council, *The One-China Principle and the Taiwan Issue (2000)*, available at: http://english.gov.cn/official/ 2005-07/27/content_17613.htm (accessed 15 November 2018).

In addition, Article 2 of the Anti-Succession Law of the PRC of 2005 stipulates: "There is only one China in the world. Both the mainland and Taiwan belong to one China (…) Taiwan is part of China. The state shall never allow the "Taiwan independence" secessionist forces to make Taiwan secede from China under any name or by any means."[13]

A second aspect, as suggested by Prof. Hungdah Chiu,[14] is that the international law of recognition does not necessarily reflect the reality of international politics. Although international law sets out certain criteria for determining recognition of a state or a government, and generally agreed recognition of states[15] or governments[16] should be only to verify a factual situation, and should not signify either approval or disapproval of the recognised state, its government or its policies. However, the practice of most states shows that the law of recognition is a highly politicised part of public international law. And, as Prof. Chiu has pointed out, a classic case of this is the ROC on Taiwan.[17]

Third, many Western writers have asserted that Taiwan cannot be regarded as a State under international law, because it has not asserted a separate legal status from the *State of China* unequivocally, even though it appears to comply with the criteria of statehood.[18] Former President of the American Society of International Law Lori Damrosch explains "the issue of Taiwan has typically been treated in international law textbooks as a problem of recognition of government rather than of statehood (…) Texts and treaties on international law avoided the troublesome topic of 'self-determination' in relation to Taiwan by observing that the authorities on Taiwan made no claim regarding the existence of separate statehood for the entity."[19]

[13] Article 2 of the Fan Fen Lie Guo Jia Fa [Anti-Secession Law], promulgated by the Standing Committee of the National People's Congress on 14 March 2005.

[14] H. Chiu, *The International Legal Status of the Republic of China*, 8 Chinese (Taiwan) Yearbook of International Law & Affairs 1 (1982).

[15] In addition to Article 1 of the Montevideo Convention on Rights and Duties of States, Section 201of the Restatement (Third) of the Foreign Relations Law of the United States defines a state as: "an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." *See Restatement (Third) of Foreign Relations of the United States,* The American Law Institute § 201 (1987).

[16] As to whether a government can represent a particular state in the international community, some argue that the decisive legal standard is whether an entity effectively controls the territory of the state and its population." Other authorities like the 1991 Conference on Security and Cooperation in Europe (CSCE) Declaration, suggest that domestic legitimacy does matter. *See* L.F. Damrosch, S.D. Murphy, *International Law, Cases and Materials*, 6th edition, West Academic Publishing, New York: 2014, pp. 291–296.

[17] Chiu, *supra* note 14, p. 1. Oxford University Press, Oxford: 2012, p. 746.

[18] *See e.g.* B. Ahl, *Taiwan*, in: R. Wolfrum (ed.), *Max Planck Encyclopedia Public International Law*, Oxford University Press, Oxford: 2012, p. 746.

[19] Damrosch, Murphy, *supra* note 16, pp. 341–344.

Under such a circumstance, Prof. von Glahn has indicated that "from a factual standpoint, the Republic of China continues to exist as an independent entity, recognized by about two dozen members of the family of nations."[20] Professor James Crawford observed that "Taiwan is not a State because it still has not unequivocally asserted its separation from China and is not recognized as a State distinct from China. Its origins as a consolidated local *de facto* government in a civil war situation continue to affect it."[21] Professor Brownlie further recalled: "Since 1972, the UK, like most other governments, has recognised the Government of the PRC as the sole government of China, and it acknowledges the position of the PRC that Taiwan is a province of China. No government has managed to sustain a recognition policy based on two Chinese states. The question whether Taiwan is a 'country' may nevertheless arise within particular legal contexts; it is also 'fishing entity' for law of the sea purposes, and, as a separate customs territory, it is a WTO member. Though not recognized as a state, it has an international legal identity."[22]

The legal status of the ROC or Taiwan under international law and in international affairs has always interested scholars and practitioners around the world[23]; and much has been written on issues such as the One-China principle,[24] relations between Mainland China and Taiwan,[25] and Taiwan's territory sovereignty.[26] This article will focus on the recent practices of the ROC on Taiwan on its international legal status, and see how the ROC maintains its foreign relations and international legal status through unorthodox channels in international law.

The Taiwan question may be thought to comprise two issues: is Taiwan island part of the ROC's territory? and what is the international legal status of the ROC on Taiwan?

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[20] G. von Glahn, J.L. Taulbee, *The Law Among Nations: An Introduction to Public International Law*, 10th edition, Routledge, New York: 2016, p. 152.

[21] Crawford, *supra* note 11, p. 22.

[22] J. Crawford, *Brownlie's Principles of Public International Law*, 8th edition, Oxford University Press, Oxford: 2012, p. 125.

[23] *See generally* Chiu, *supra* note, p. 14; A. Hernández-Campos, *The Criteria of Statehood in International Law and the Hallstein Doctrine: The Case of the Republic of China on Taiwan*, 24 Chinese (Taiwan) Yearbook of International Law & Affairs 75 (2006); T. Lee, *The International Legal Status of the Republic of China on Taiwan*, 1 UCLA Journal of International Law & Foreign Affairs 351 (1996).

[24] *See e.g.* P.L. Hsieh, *The Taiwan Question and the One-China Policy: Legal Challenges with Renewed Momentum*, 84 Die Friedens-Warte. Journal of International Peace and Organization 59 (2009).

[25] *See e.g.* Chen, *supra* note, p. 7; J.I. Charney, J.R.V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 American Journal of International Law 453 (2000).

[26] J.-M. Henckaerts (ed.), *The International Status of Taiwan in the New World Order: Legal and Political Considerations*, Kluwer Law International, The Hague/Boston: 1996; J.F. Copper, *Taiwan: Nation-State or Province?* 2nd edition, Westview, Boulder, CO: 1996; *Taiwan Communiqué and Separation of Powers: Hearings before the Subcommittee on Separation of Powers of the Comm. on the Judiciary*, 97th Congress 2nd Session (1983).

1. The question of territorial sovereignty over Taiwan

The Question of Territorial Sovereignty over Taiwan arose from the fact that neither the San Francisco Japanese Peace Treaty,[27] nor the Sino-Japanese Peace Treaty[28] provides explicitly for the return of Taiwan to China. For example, US Secretary of State Dulles, at a press conference held on 1 December 1950, stated "that technical sovereignty over Formosa and the Pescadores has never been settled."[29]

However, the lack of explicit provisions on the transfer of Taiwan to China in the two Peace Treaties does not necessarily mean that China could not acquire *de jure* sovereignty over Taiwan. This view has also gained support from some Western scholars of international law.[30] For instance, Professor O'Connell has said that, after the Japanese renunciation of the island, it is "doubtful…whether there is any international doctrine opposed to the conclusion that China appropriated the *terra derelicta* of Formosa by converting belligerent occupation into definite sovereignty."[31] Similarly, Dr. Frank P. Morello has argued that the ROC could acquire *de jure* sovereignty over Taiwan through prescription.[32] Prof Hungdah Chiu concludes "so far as the ROC is concerned, it may reasonably be argued that Taiwan has been incorporated into its territory in accordance with the principle of occupation in international law."[33]

The ROC government position[34] is that Taiwan was a part of China before it was ceded to Japan in 1895. The Cairo Declaration of 1943 explicitly stated that Taiwan "shall be restored to the Republic of China."[35] The term of this declaration were incorporated into the 1945 Potsdam Proclamation[36] and accepted by Japan in its instrument of surrender.[37] In 1952, the ROC-Japan bilateral peace treaty reaffirmed

[27] Treaty of Peace with Japan (adopted 8 September 1950, entered into force 28 April 1952), 136 UNTS 45 (1952).

[28] Treaty of Peace between the Republic of China and Japan (adopted 28 April 1952, entered into force 5 August 1952), 138 UNTS 38 (1952).

[29] M.N. Whiteman, *Digest of International Law*, vol. 3, Department of State, Washington D.C.: 1962, p. 564. On 4 February 1955, the British Secretary of State for Foreign and Commonwealth Affairs also said in the House of Commons that the *de jure* sovereignty over Formosa and the Pescadores is uncertain or undetermined. *See ibidem*, p. 565.

[30] H. Chiu, *The Principle of One China and the Legal Status of Taiwan*, 7 American Journal of Chinese Studies 177 (2000), pp. 179–181.

[31] D.P. O'Connell, *The Status of Formosa and the Chinese Recognition Problem*, 50 American Journal of International Law 405 (1956), p. 415.

[32] F.P. Morello, *The International Legal Status of Formosa*, Martinus Nijhoff Publishers, The Hague: 1966, p. 92.

[33] Chiu, *supra* note 11, p. 181.

[34] MOFA, *Q & A on The Treaty of Peace between The Republic of China and Japan*, available at: https://www.mofa.gov.tw/en/cp.aspx?n=32DA7197FA3FD5D7 (accessed 15 November 2017).

[35] Cairo Declaration of 1 December 1943, 3 Bevans 858 (1969).

[36] Potsdam Proclamation of 26 July 1945, 3 Bevans 1204 (1968).

[37] Japanese Instrument of Surrender (adopted 2 September 1945, entered into force 2 September 1945) 139 UNTS 387 (1945).

Taiwan had become the *de jure* territory of the ROC.[38] Therefore, the MOFA claims: "The ROC restored its territorial sovereignty over Taiwan and Penghu in accordance with the provisions of the three agreements and commitments. On 25 October 1945, the ROC government formally restored the sovereignty over Taiwan from the Japanese governor of Taiwan and has exercised its rule there ever since. Seven years later the ROC-Japan Peace Treaty of 1952 once again reaffirmed, in the form of a peace treaty, the ROC'S territorial sovereignty over Taiwan."[39]

2. The international legal status

The practices of Taiwan show the ROC no longer competes with the PRC for the right to represent all of China, but can still exercise its own foreign relations powers and enter into international agreements with other states. With respect to participation in international organisations, it will be possible for Taiwan to bind its territory as a party to various conventions. The ROC government still maintains that its Constitution claims sovereignty over all of China, and it has never unequivocally declared that Taiwan itself is an independent state different from the State of China. In theory, countries in the world should recognise the ROC as a state, regardless of the status of cross-strait relations, because recognition has nothing to do with the domestic structure or policy of the recognised state.

2.1. The legal foundations

The ROC's Constitution, domestic legislation, and Constitutional Court interpretations clearly support the ROC as being a State. Article 4 of the 1947 ROC Constitution[40] states "the territory of the Republic of China according to its existing national boundaries shall not be altered except by resolution of the National Assembly." On 1 May 1991, additional articles were added to the 1947 ROC Constitution ("1991 Additional Articles") as revisions,[41] with these stating that the territory of Mainland China continues to be treated as territory of the ROC.[42] As they

[38] This interpretation of the legal status of Taiwan is confirmed by several Japanese court decisions such as the case of *Japan v. Lai Chin Jung*, decided by the Tokyo High Court in 1956, which stated that "Formosa and the Pescadores came to belong to the Republic of China, at any rate on August 5, 1952, when the [Peace] Treaty between Japan and the Republic of China came into force (…)" *See* United Nations, *Materials on Succession of States 70 (*1967).

[39] MOFA, *supra* note 34.

[40] The ROC was established on 1 January 1912. Between 1912 and 1945, various versions of the constitution were drafted and enacted, but it was not until 25 December 1946 that the constitution was adopted by the elected National Assembly. On 25 December 1947 the present ROC Constitution entered into force. *See* H. Chiu, *Constitutional Development and Reform in the Republic of China on Taiwan*, 2 Occasional Papers/Reprints Series Contemporary Asian Studies 1 (1993), pp. 5–14 (discussing constitutional development in the ROC on Taiwan).

[41] *Ibidem,* p. 31.

[42] *See* art. 4 of the Constitution of the ROC.

do this, the 1991 Additional Articles describe the ROC as comprising two areas, i.e. the "free area" and the "mainland area."[43] Recognising the reality of the PRC, and envisaging that cross-strait relations may be regulated by special laws, the 1991 Additional Articles authorise the government to enact a law to regulate relations on interchanges between Taiwan and Mainland China. Article 11 of the Additional Articles provides that "The relationship of rights and obligations between the people of the mainland China and those of the free area, and the disposition of other affairs shall be specially regulated by law."[44]

It is for the above reasons that the Act Governing Relations between the People of the Taiwan Area and the Mainland Area (Cross-Strait Statute) was enacted. Passed by the Legislative Yuan in 1992, the Cross-Strait Statute governs the relations between the people of Taiwan and the Mainland, covering administrative, civil, and criminal matters arising from cross-strait interactions.[45] The Statute defines the "Taiwan Area" as area over which the ROC government exercises its effective control[46] and the "Mainland Area" as ROC territory outside the Taiwan Area. The statute also lays down a conflict of laws rule applicable to civil matters between the Mainland and Taiwan.[47]

The Constitutional Court of the ROC[48] also found opportunities to address the problem of relations between Taiwan and Mainland China. In 1993, the Court received a request that the outer boundaries of the national territory of the ROC should be determined. In its interpretation no. 328, the Constitutional Court avoided the issue and asserted that "the delimitation of national territory according to its history is a significant political question and thus it is beyond the reach of judicial review."[49]

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[43] *See* art. 11 of the 1991 Additional Articles, the Constitution of the ROC. *See also* Hsieh, *supra* note 24, p. 67.

[44] *See* art. 11 of the 1991 Additional Articles, the Constitution of the ROC.

[45] *See* H. Chiu, *Koo-Wang Talks and the Prospect of Building Constructive and Stable Relations Across the Taiwan Straits (with Documents)*, 29 Issues & Studies 1 (1993), p. 6.

[46] This includes Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the ROC government. *See* art. 2 of the Act Governing Relations between the People of the Taiwan Area and the Mainland Area (August 2004) (including Taiwan, Penghu, Kinmen, Matsu, and any other area under the effective control of the ROC government), available at: http://www.unhcr.org/refworld/pdfid/43a2945d4.pdf (accessed 15 November 2017).

[47] Ch. Chung, *International Law and the Extraordinary Interaction between the People's Republic of China and the Republic of China on Taiwan*, 19 Indiana International & Comparative Law Review 233 (2009), p. 236.

[48] The Court has jurisdiction to interpret the Constitution with respect to matters relating to uncertainties regarding the application of the Constitution, the constitutionality of laws or orders, and the constitutionality of local government laws. *See* Justices of the Constitutional Court, Judicial Yuan, *Petitions and Procedures for Interpretation*, available at: http://www.judicial.gov.tw/constitutionalcourt/en/p02_01_01.asp (accessed 28 November 2012).

[49] Justices of the Constitutional Court, Judicial Yuan, *Judicial Yuan Interpretation No. 328* (26 November 1993), available at: http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno =328 (accessed 28 November 2017).

Immediately following interpretation no. 328, the Court was asked to decide whether four agreements between Chairman Koo Chen-fu of Taipei's Straits Exchange Foundation (SEF) and Chairman Wang Tao-han of Beijing's Association for Relations Across the Taiwan Straits (ARATS)[50] were "international agreements."[51] The Court in Interpretation no. 329 held that they were not.[52]

Article 11 of the 1991 Additional Articles and legislation enacted under it confirms that the ROC is an independent state which has never surrendered sovereignty over Mainland China.

2.2. Bilateral relations

As of November 2017, only twenty states recognised the ROC on Taiwan. No country has so far been able to recognise and establish diplomatic relations with the PRC government without severing its ties with the ROC government. This limited international recognition can be attributed to objections from the PRC.

To those states that recognise the ROC on Taiwan, the latter enjoys full international legal personality, including the capacity to enter into diplomatic relations, conclude treaties and enjoy state immunity. Besides, these countries frequently conduct high-ranking official visits with Taiwan.[53]

To many of the states that recognise the PRC as the government of China, "semi-official" relations are established with Taiwan. According to Taiwan's official data, in 2016 Taiwan maintained 94 representative offices in 58 countries.[54] Conversely, 48 of Taiwan's non-diplomatic allies and the European Union maintained 56 representative offices in Taiwan in 2017.[55] Although these representative offices

[50] To facilitate relations between Taiwan and Mainland China, both sides created semi-official organizations to deal with cross-strait affairs. Taiwan created the SEF and the PRC created the ARATS. On April 29, 1993, three agreements and a joint accord were signed between Chairman Koo Chen-fu of the SEF and Chairman Wang Tao-han of ARATS. *See* Chiu, *supra* note 45, pp. 14–15.

[51] These agreements are: the Agreement on the Use and Verification of Certificates of Authentication Across the Taiwan Straits; Agreement on Matters Concerning Inquiry and Compensation for [Lost] Registered Mail Across the Taiwan Straits; Agreement on the System for Contacts and Meetings between the SEF and the ARATS; and Joint Agreement of the Koo-Wang Talks. Chiu, *supra* note 45, pp. 28–36 (alteration in original) (collecting translated versions of the agreements).

[52] Justices of the Constitutional Court, Judicial Yuan, *Judicial Yuan Interpretation No. 329* (24 December 1993), available at: http://www.judicial.gov.tw/constitutionalcourt/en/p03_01.asp?expno=329 (accessed 28 November 2017).

[53] MOFA, *Foreign Policy Report, 9th Congress of the Legislative Yuan, 1st Session* (7 March 2016), 34 Chinese (Taiwan) Yearbook of International Law & Affairs 241 (2016), pp. 241–242 (2016).

[54] *See* The Executive Yuan, *Embassies and Missions abroad*, The Republic of China Yearbook 2016, p. 79, e-book available at: https: http://ws.ey.gov.tw/001/Eyupload/oldfile/UserFiles/YB%202016%20all%20100dpi.pdf (accessed 4 April 2018).

[55] *See* Ministry of Foreign Affairs, Republic of China, *The Foreign Missions in the Republic of China*, available at: https://www.mofa.gov.tw/OfficesInROC.aspx?n=8CEB2B5F5436B997&sms=8EBFADC1592C7BFE (accessed 18 November 2017) (in Chinese).

on both sides purport to be "unofficial," they are commonly staffed by officials from government agencies, including foreign and trade ministries. Most of the Taiwanese offices abroad also perform typical diplomatic and consular functions.

The US has adopted a unique legislative measure to treat Taiwan as a "state" for domestic law purposes. The Taiwan Relations Act (TRA),[56] passed in 1979, provides that "the absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan," as they applied before de-recognition,[57] and that the laws of the US that relate to "foreign countries, nations, states, governments, or similar entities" shall apply also with respect to Taiwan.[58] The Taiwan Relations Act further provides that treaties in force between the US and Taiwan prior to the date of de-recognition are to continue in force.[59]

Regarding Taiwan's treaty-making capacity, on a bilateral level, the entity maintains normal treaty relations with its diplomatic partners. It has also concluded numerous agreements with states that do not recognise it as a state or government. The latter category covers a wide range of functional subject matter (including aviation services, fisheries cooperation, trade and taxation), which normally involve the question of sovereignty and are agreements concluded between states. Formally, such agreements are not concluded at the "official" or diplomatic levels. However, they are usually negotiated and entered into by agencies duly authorised by the respective governments concerned.[60] And the ROC on Taiwan is deemed to be an equal party to bilateral agreements it has entered into.

2.3. International organisations

Before 25 October 1971 most Western nations and the United Nations regarded the ROC government as the sole legitimate government of China. However, in 1971 the UN GA voted to give China's seat at the United Nations to the PRC.[61] Since then, the nation has been excluded from participation in the meetings, mechanisms, conventions, and activities of the UN and its specialised agencies.

Concerning separate participation in international organisations or multilateral treaty fora, as of the end of December 2016, the ROC on Taiwan retained membership in 37 international governmental organisations and their subsidiary bodies.[62]

[56] Public Law No. 96–8, 93 Stat. 14 (1979) (codified at 22 USC §§3301–3316 (1982)).

[57] TRA § 4 (a).

[58] *Ibidem*, § 4 (b) (1).

[59] *Ibidem*, § 4 (c).

[60] *See e.g. Treaties/Agreements Concluded by the Republic of China (Taiwan) with Other Countries and Organizations in 2016, Compiled by Chun-i Chen, Pasha L. Hsieh, and Pei-Lun Tsai*, 34 Chinese (Taiwan) Yearbook of International Law & Affairs 395 (2016).

[61] *See* UN GA Resolution 2758, of 25 October 1971, A/RES/2758(XXVI).

[62] *See Contemporary Practice and Judicial Decisions of the Republic of China (Taiwan) Relating to International Law, 2016, Compiled by Chun-i Chen & al.*, 34 Chinese (Taiwan) Yearbook of International Law & Affairs 296 (2016).

Those organisations are mostly of an economic or functional nature, and do not limit membership to states. The most significant examples are memberships of the WTO, the Asian Development Bank (ADB),[63] and Asia-Pacific Economic Cooperation (APEC).[64] Within these organizations, Taiwan enjoys almost equal status and rights to other full members including the PRC, although compromises had to be made in order to allow parallel participation. In addition, the ROC on Taiwan participates in various international fisheries regimes as a "fishing entity."[65] It also had been invited to attend the WHA as an observer, under the name Chinese Taipei from 2009 to 2016.[66] In 2013, 42 years after withdrawing from ICAO, Taiwan was invited by the president of ICAO's Governing Council to attend the 38th ICAO Assembly as a guest under the name Chinese Taipei CAA (Civil Aeronautics Administration).[67] However, the Director General of Taiwan's CAA was not invited to attend the 2016 meeting.[68]

Arguably, Taiwan's extensive participation proves that the international community recognises its separate identity and competence under international law.

3. Recent foreign municipal courts

As mentioned before, US de-recognition of the ROC on Taiwan on 1 January 1979 was followed by enactment of the Taiwan Relations Act (TRA) of 1979, offering a basis for Taiwan to be treated as a state, and its governing authorities as a

[63] Taiwan continued to participate as a full member when the PRC was admitted to the membership of the ADB in March 1986. The ADB decided to refer to it as "Taipei, China" and the ROC protested against this illegal change of name, while remaining within the international organisation. Since 1988, the ROC has attended the annual meetings under protest, making it clear that participation at meetings does not imply ROC acceptance of the name change to "Taipei, China." *See ibidem*, p. 298.

[64] Taiwan, Hong Kong and the PRC were admitted to APEC in 1991. Taiwan acceded to APEC as an economic entity under the name of "Chinese Taipei." Currently, there are 21 members and 3 observers. *See ibidem*, p. 298.

[65] M. Sheng-ti Gau, *The Practice of the Concept of Fishing Entities: Dispute Settlement Mechanisms*, 37 Ocean Development and International Law 221 (2006), pp. 221–243.

[66] On April 28, 2009, Taiwan received its first ever invitation from the WHO Director-General to attend the 62nd World Health Assembly meeting in an observed capacity. *See* http://www.mofa.gov.tw/enigo/cp.aspx?n=D509C3C9F6F496FD (accessed 15 November 2017).

[67] On Taiwan's participation of the WHA, *see e.g.* Office of the President, President's Statement Regarding Invitation to Taiwan to Participate in the World Health Assembly, 27 Chinese (Taiwan) Y.B. Int'l L. & Aff. 244–248 (2009); For the ROC's position on Taiwan's lack of invitation to attend the 2017 World Health Assembly, *see* MOFA, *ROC government expresses deep dissatisfaction that Taiwan has not received invitation to WHA*, available at: https://www.mofa.gov.tw/en/News_Content.aspx?n=8157691CA2AA32F8&sms=4F8ED5441E33EA7B&s=46EF053392C47C5C (accessed 15 November 2017).

[68] MOFA, *ROC Regrets That It Has Not Been Invited to Once Again Take Part in the ICAO Assembly*, 34 Chinese (Taiwan) Yearbook of International Law and Affairs 303 (2016).

government; despite the lack of formal recognition for the ROC on Taiwan. Cases in the United States under the TRA have generally been faithful to the Congressional intent and policy concerning Taiwan. Thus, Taiwan has been held capable of acting in a public capacity for the purposes of sovereign immunity, and to have a government system with the authority to promulgate laws.[69]

In other states, recent cases have generally also emphasized, not just that Taiwan is more than a geographical location or community of human beings, but also that Taiwan has state-like attributes in terms of both its local political organisation and its relations with foreign countries. The Canadian case of Parent and Others v. Singapore Airlines Limited and the Civil Aeronautics Administration[70] offers a vivid example. In the Parent case, Singapore Airlines was sued by passengers injured in an accident that occurred at an airport under the control of the Civil Aeronautics Administration ("CAA"). Singapore Airlines, in its turn, commenced an action in warranty against the CAA, arguing that liability for the accident should be borne by the latter, as it was responsible for the management of the airport. The CAA claimed it was entitled to immunity from the jurisdiction of Canadian courts under Canada's State Immunity Act of 1982. Singapore Airlines argued that the Canadian Minister of Foreign Affairs and International Commerce should refuse to issue a certificate under Section 14 of the Act, to establish "whether Taiwan is indeed a foreign state."

The Quebec Superior Court, having determined that the absence of a certificate meant that it was for the courts to make their own enquiry, went on to consider whether Taiwan was indeed a "foreign state" for the purposes of the Act. It found that Taiwan fulfilled the criteria for statehood set out in Article 1 of the 1933 Montevideo Convention. It also found numerous examples of official dealings between Canada and Taiwan submitted as evidence, including exchanges of letters and agreements signed for different purposes between the two. In particular, the court seemed to be attaching much weight to one statement made in 1968 by the Foreign Minister of Canada, recognising the "effective political independence" of Taiwan. This led the Court to conclude that Taiwan was a "foreign state" for the purposes of the Act and, therefore to dismiss SAL's action in warranty.[71]

[69] *See* L.F. Damrosch, *The Taiwan Relations Act after Ten Years*, 4 Maryland Series in Contemporary Asian Studies 1 (1990), available at: http://digitalcommons.law.umaryland.edu/mscas/vol1990/iss4/1 (accessed 15 November 2017).

[70] *Parent and others v. Singapore Airlines Ltd and Civil Aeronautics Administration*, Decision of Superior Court of Quebec, 2003 IIJ Can 7285 (QC CS), 133 ILR 264 (2003) (Que SC). The main points of interest arise when the judgment in Parent is compared with those from the High Court and the Court of Appeal of Singapore. While the facts and the positions of the parties in both sets of cases were similar in all material respects, the judgments in the two jurisdictions reached divergent conclusions with regard to the status of Taiwan. *See* O.A. Elia, *The International Status of Taiwan in The Courts Of Canada And Singapore*, 8 Singapore Yearbook of International Law 93 (2004).

[71] For an introduction to the Parent Case, *see* Elia, *supra* note 70, pp. 94–95.

The case *Andrew Wang and others v. Swiss Office of Justice*[72] is another case to affirm Taiwan's legal status.[73] In Andrew Wang, the Swiss Office of Justice agreed to provide for assistance in a criminal case relating to the sale by France of six frigates to the ROC on Taiwan, the Defendant Wang therefore appealed to the Swiss Supreme Court, arguing that assistance could not be granted to the ROC because it is not recognised as a state by Switzerland, and this assistance would hamper diplomatic relations with the PRC.[74]

The Court, dismissing the defendant's argument on the lack of state capacity, granted assistance to the ROC based upon the following opinions. First, the Court noted that the ROC presents all the characteristics of a State, but without declaring itself to be one.[75] The Court further emphasised that the granting of mutual assistance in the field of criminal matters to Taiwan would not amount to recognition; and what matters about that decision is the material ability of the authority to exercise powers similar to those exercised by a state. Finally, the Court concludes that it is the government of Taipei that is able to exercise effective authority on Taiwan, with the result that unrecognition of such a government at the diplomatic level did/does not prevent the Swiss authorities from cooperating in relation to particular criminal proceedings.[76]

The above two cases show that the courts in major counties find that, as the ROC on Taiwan possesses "characteristics of a state," lack of recognition does not affect the rights to which a state is entitled. Taiwan is widely regarded as a separate bearer of rights and responsibility under international law.

Conclusion

It cannot be denied that Taiwan has failed to become a member of any international organisation wherein a requirement for membership is enjoying the status of a State. Moreover, only very few countries recognise the ROC government. Nevertheless, the further truth is that Taiwan has participated actively in such international organisations as lack such a membership requirement, such as the WTO and Asian Development Bank. Furthermore, although most countries in the world do not recognise Taiwan as a separate State from China, Taiwan has established economic ties and cultural-exchange relations with most countries worldwide. And these extensive relations between ROC on Taiwan and other states have demon-

[72] *Case Wang et consort v. Office des juges d'instruction fédéraux*, Swiss Supreme Court, 1st Court of Public Law, 3 May 2004, ATF 130 II 217, available at: http://www.servat.unibe.ch/dfr/c2130217.html (accessed 22 November 2016).

[73] *See* M. Henzelin, *Mutual Assistance in Criminal Matters between Switzerland and Taiwan*, 3 Journal of International Criminal Justice 790 (2005).

[74] *Ibidem*, p. 791.

[75] *Ibidem*, p. 793.

[76] *Ibidem.*

strated that Taiwan could be independently capable of bearing rights and duties, being a party to treaties or other international agreements, enjoying full membership or other separate status in various international functional regimes, and having locus standi in foreign domestic courts.

These state practices have confirmed that it is a realistic for countries not recognising Taiwan to treat the ROC on Taiwan as a *sui generis* entity[77] which could bear responsibility for matters under its effective control. Taiwan's practices also demonstrate its official position that Taiwan island is an integral part of the ROC, with the ROC on Taiwan therefore needing recognition from all countries in the world.

Abstract: The ROC on Taiwan (Taiwan) has been termed an unrecognised State by certain writers, but the case is in fact a different one. This article will focus on the recent practices of Taiwan in regard to its international legal status, and reveal how the ROC government is maintaining its foreign relations and international legal status by way of unorthodox channels in international law. To this end, three approaches are taken. Firstly, this article shows the ROC's Constitution, domestic legislation, and Constitutional Court interpretations all acting in clear support of the idea that the ROC is a State. Secondly, this article looks at the status of Taiwan in the domestic legal systems of selected States, finding that the lack of recognition does not usually stand in the way of semi-official or unofficial relations being established between Taiwan and the non-recognising States. The third focus of this paper is on the status of Taiwan vis-à-vis selected inter-governmental organisations, and on its participation therein; and observes that Taiwan has been an active participant international organisations, such as the WTO and Asian Development Bank. The paper concludes that Taiwan could be capable of bearing rights and duties independently, being a party to treaties or other international agreements, enjoying full membership or other separate status in various international functional regimes, having a *locus standi* in foreign domestic courts, and bearing a responsibility for matters under its effective control.

Keywords: ROC, PRC, Taiwan, unrecognised State, recognition, international legal status, WTO, Asian Development Bank (ADB), Taiwan Relations Act (TRA), cross-Straits relations, China, non-recognition.

[77] Damrosch, Murphy, *supra* note 16, p. 321.

Is the Duty Not to Recognise "States" Created Unlawfully Challenged by States' Practice and ECHR Case Law?

*Anne Lagerwall**

Introduction

Originally known as the Stimson doctrine,[1] the duty not to recognise entities created in violation of international law has gained general acceptance from States and international organisations. Though practice was rather unsteady at the beginning of the 20th century, the duty has been applied more systematically since the Second World War. In the last few decades, States have refused to recognise numerous so-called "states" emerging in situations stemming from unlawful military interventions or violations of people's right to self-determination. To name just a few, States did not recognize Rhodesia[2] or the Bantustans (Transkei, Ciskei, Bophuthatswana et Venda)[3]. Nor did they grant any recognition to the "Turkish Republic of Northern Cyprus,"[4] the "Republic of Abkhazia" and the "Republic of South Ossetia,"[5] the "Nagorno-Karabakh Republic," the "Pridnestrovian Moldavian

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[1] Note from Secretary of State Stimson, 7 January 1932, in: G.H. Hackworth, *Digest of International Law*, vol. I, United States Government Printing Office, Washington: 1940, p. 334. *See also* D. Turns, *The Stimson Doctrine of Non-Recognition: Its Historical Genesis and Influence on Contemporary International Law*, 2 Chinese Journal of International Law 105 (2003), pp. 107–111 and A.D. McNair, *The Stimson Doctrine of Non-Recognition – A Note on its Legal Aspects*, 14 British Yearbook of International Law 65 (1933), pp. 73–74.

[2] UN SC Resolution 216 (1965) of 12 November 1965, S/RES/216, para. 1; UN SC Resolution 217 (1965) of 20 November 1965, S/RES/217, para. 3; UN SC Resolution 232 (1966) of 16 December 1966, S/RES/232, para. 4; UN GA Resolution 2379 (1968) of 25 October 1968, A/RES/2379; UN GA Resolution 2652 (1970) of 3 December 1970, A/RES/2652.

[3] UN GA Resolution 3411 D (1975) of 28 November 1975, A/RES/3411, para. 1; UN GA Resolution 31 (VI) A (1976) of 26 October 1976, A/RES/31/6, paras. 2–3.

[4] UN SC Resolution 541 (1983) of 18 November 1983, S/RES/541 (1983), para. 7; UN SC Resolution 550 (1984) of 11 May 1984, S/RES/550 (1984).

[5] With the exceptions of the Russian Federation, Nicaragua, Venezuela and Nauru, the positions of Tuvalu and Vanuatu remaining ambiguous. *See* the statement by President of Russia Dmitry Medvedev, August 26, 2008, available at: https://web.archive.org/web/20080902001442

Republic" or the "Republic of Crimea" and its annexation by the Federation of Russia.[6]

Given this important and widespread practice, the obligation of non-recognition seems firmly anchored in customary international law today.[7] Significantly, the ILC codified it in the articles on States' responsibility for internationally wrongful acts: "No State shall recognize as lawful a situation created by a serious breach [of an obligation arising under a peremptory norm of general international law], nor render aid or assistance in maintaining that situation."[8] The Commission has since confirmed that this obligation rests upon international organisations as well.[9] The commentaries produced when both sets of draft articles were adopted make it clear how the Commission considered "states" created unlawfully to fall within the scope of application of this duty.[10]

/http://www.kremlin.ru/eng/speeches/2008/08/26/1543_type82912_205752.shtml (accessed 15 March 2018); *Le Nicaragua reconnaît l'Ossétie du Sudet l'Abkahzie*, Le Figaro, 3.09.2008; *Venezuela recognises rebel Georgian regions: Chavez*, ABC News, 11.09.2009; L. Harding, *Tiny Nauru struts world stage by recognising breakaway republics*, The Guardian, 14.12.2009; *Joint Statement on establishment of Diplomatic Relations between the Republic of Abkhazia and the Republic of Vanuatu*, the text being available on the website of *Transparency International Georgia,* http://transparency.ge (accessed 15 March 2018); *Le Tuvalu reconnaît l'Abkhazie et l'Ossétie du Sud*, Libération, 23.09.2017.

[6] With some exceptions that we will study hereunder. UN GA Resolution 262 of 27 March 2014, A/RES/68/262, para. 6.

[7] T. Christakis, *L'obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d'autres actes enfreignant des règles fondamentales*, in: Ch. Tomuschat, J.M. Thouvenin (eds.), *The Fundamental Rules of the International Legal Order: Jus cogens and Obligations Erga Omnes*, Martinus Nijhoff Publishers, Leiden/Boston: 2006, pp 127–166; J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, Oxford: 2006, p. 160; I. Brownlie, *International Law and the Use of Force*, Oxford University Press, Oxford: 1963, pp. 410–419; S.E. Himmer, *The achievement of independence in the Baltic States and its justifications*, 6 Emory International Law Review 253 (1992), p. 272.

[8] Article 41, para. 2, ILC, *Draft articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, Yearbook of the International Law Commission, Vol. II, Part Two (2001) (hereinafter: *Draft articles on Responsibility of States)*.

[9] Article 42, para. 2, *Draft Articles on the Responsibility of International Organizations*, 2011, ILC, Yearbook of the International Law Commission, Vol. II, Part Two (2011) (hereinafter: *Draft Articles on the Responsibility of International Organizations*).

[10] Commentary of Article 41 (2) to the *Draft articles on Responsibility of States* (ILC, *supra* note 8), in which the Commission refers to Rhodesia and the Bantustans (para. 8), as well as the "Turkish Republic of Nothern Cyprus" though implicitly (para. 10); Commentary of article 42 (2) to the *Draft Articles on the Responsibility of International Organizations* (ILC, *supra* note 9), in which the Commission recalls the Declaration that the European Community and its Member States made in 1991 on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union" which included the following sentence: "The Community and its Member States will not recognize entities which are the result of aggression" (Declaration on Yugoslavia and on the Guidelines on the Recognition of New States, 16 December 1991, 31 International Legal Materials 1485 (1992), para. 7).

The object and purpose of such an obligation is to resist the *fait accompli*. If a State or an international organisation were to break fundamental principles of international law, and if these violations were to result in the creation of an entity claiming statehood, the adoption of any measure likely to give effect or to consolidate the situation needs to be avoided. The obligation can thus be considered an expression of the *ex injuria jus non oritur* principle.[11] However logical and strongly established the obligation of non-recognition seems today, States have not always condemned the set up of so-called "states" and courts have sometimes accepted certain aspects of their existence.

The practice adopted by States towards the "Republic of Crimea" and its annexation by Russia may provide a good example of ambiguity at least, if not divergence. If the short-lived "Republic" and its absorption by Russia were not in general recognised by States, only half of all United Nations Member States actually came out in support of a resolution submitted to the UN GA calling upon all States "not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the (…) referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[12] Some States suggested that voting against the draft resolution or abstaining during the vote could be deemed to challenge the core principles of the United Nations lying at the very heart of the duty of non-recognition. Unsurprisingly, Ukraine asserted that the text of the draft resolution "sends a crucial message that the international community will not allow what has happened in Crimea to set a precedent for further challenges to our rules-based international framework," and underlined that "a vote against it or absention in the voting is tantamount to undermining the Charter."[13] Other States shared this view. For Costa Rica, "staying silent now, in the light of the very serious implications, risks leading to further, perhaps worse, future violations."[14] According to Japan, "whether the international community looks at what is happening in Ukraine as a bystander or chooses to stand up and take appropriate action could have a grave impact on what the international community will look like in 10 or 20 years."[15] As for Georgia, "concerted action [was] needed" because "only

[11] W. Czapliński, *The Crimean crisis and the Polish practice on non-recognition,* Questions of International Law, Zoom out I 73 (2014), p. 74; E. Milano, *The non recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question*, Questions of International Law, Zoom out I 35 (2014), p. 42; A. Lagerwall, *Le principe* ex injuria jus non oritur *en droit international*, Bruylant, Bruxelles: 2016, pp. 141–159.

[12] A/RES/68/262, *supra* note 6, para. 6.

[13] Representative of Ukraine, UN GA Official Records, Sixty-eighth Session, 80th Plenary Meeting, 27 March 2014, UN Doc. A/68/PV.80, pp. 3–4.

[14] Representative of Costa Rica, *ibidem*, p. 8; *See also* Representative of Norway, *ibidem*, p. 14: "the international community must react when such fundamental principles and rules under international law are violated."

[15] Representative of Japan, *ibidem*, p. 10.

through such action can we restore the stability of the United Nations system and prevent the annihilation of international law."[16] The fact that no more than a hundred States adopted a Resolution recalling the obligation of non-recognition can thus be perceived *a priori* as a potential challenge to its validity and general acceptance.

While international practice sometimes defies the rules of international law, it is less frequent for case-law to also do so, to a certain extent. Clearly, the ECHR is not asked to decide primarily whether a certain entity may or may not be recognised as a State. But the ECHR has sometimes been invited to examine questions closely related to the status of entities set up as a result of a military intervention which contravenes the United Nations Charter, such as the "Turkish Republic of Northern Cyprus" and the "Moldovan Republic of Trandnistria." The Court has always refused to treat these "Republics" as States, leading the ILC to affirm that the obligation of non-recognition had been "applied" by the Court.[17] If indeed the ECHR has constantly recalled that: "the international community does not regard the 'TRNC' as a State under international law and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus,"[18] it has on the contrary recognised laws, arrests and investigations pursued by police officers as well as courts and tribunals of the so-called "Republic," thus granting a form of recognition to powers of sovereign nature.[19] The ECHR has even criticised Cyprus's lack of cooperation with the Turkish and the "TRNC" authorities in the context of a criminal investigation showing links to both parts of the island.[20]

The question that might be asked, given these developments, is whether State practice and ECHR case-law impairs the validity of the duty not to recognise entities stemming from violations of fundamental principles of international law. Assuming that the significance that acts bear as to the validity of a rule can

[16] Representative of Georgia, *ibidem*, p. 12.

[17] ILC, *supra* note 8, p. 115.

[18] ECHR, *Loizidou v. Turkey* (App. No. 15318/89), Grand Chamber Judgment, 18 December 1996, para. 44.

[19] The ECHR has constantly affirmed that the courts and tribunals of the "TRNC" could be considered domestic remedies which should be exhausted before the Court is resorted to, except when proven to be ineffective, ECHR, *Cyprus v. Turkey* (App. No. 25781/94), Grand Chamber Judgment, 10 May 2001, paras. 89–92; ECHR, *Kyriacou Tsiakkourmas and others v. Turkey* (App. No. 13320/02), Judgment, 2 June 2015, paras. 157–158; ECHR, *Kallis and Androulla Panayi v. Turkey* (App. No. 45388/99), Judgment, 27 October 2009, para. 32; ECHR, *Andreou v.Turkey* (App. No. 45653/99), Judgment, 3 June 2008 and ECHR, *Adali v. Turkey* (App. No. 38187/97), Judgment, 31 March 2005, para. 186. The Court has also accepted assessment of an arrest made by police agents of the "TRNC" under the criteria set by the Convention, ECHR, *Foka v. Turkey* (App. No. 28940/95), Judgment, 24 June 2008, para. 83.

[20] ECHR, *Güzelyurtlu and others v. Cyprus and Turkey* (App. No. 36925/07), Judgment, 4 April 2017, paras. 291, 294, 296.

only be assessed in the light of the justifications accompanying these acts,[21] it will be argued that the duty is not formally put in question given the reasoning adopted by the actors apparently challenging the rule, whether these actors are States confronted with the "Republic of Crimea" and its annexation by the Russian Federation (1) or judges confronted with the "Turkish Republic of Northern Cyprus." (2)

1. A duty challenged by the relative silence of States on the "Republic of Crimea" and its annexation by the Russian Federation?

After briefly recalling the context in which the "Republic of Crimea" emerged (1.1), we will see that States unsupportive of the UN GA Resolution asking not to recognize any alteration in the status of the Ukrainian region were not expressing any defiance towards the obligation of non-recognition itself. Rather, they seemed unconvinced that such an obligation should apply in this case, either because they did not perceive that situation as unlawful (1.2), or because they found the obligation's reiteration inopportune (1.3).

1.1. The context in which the "Republic of Crimea" emerged

After Ukrainian President Viktor Yanukovich on 21st November 2013 ordered the suspension of preparations for the signing of the Ukraine-EU Association Agreement, hundred of thousands of people started demonstrating in the streets of Kiev for several months in what became known as *Euromaidan*.[22] In February 2014, the government there was overthrown, and a new one comprising opposition politicians and protest leaders was installed[23]. At the end of the month, Russia decided to protect its military interests in Crimea and backed pro-Russian separatist forces in the region, organising military exercices in areas bordering Ukraine which caused international concern.[24] Pro-Russian activists acted to take control of the local government, and armed men in unmarked uniforms believed to be members of the Russian Army started with military incursions that resulted in the seizure of airports in Simferopol and Sevastopol.[25] A referendum held in Crimea on March 16 endorsed the union with Russia, as 96.8 % of the 83 % taking part voted "yes."[26] The

[21] ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, 27 June 1986, ICJ Rep 1986, p. 14, para. 186.

[22] *Keesing's Record of World Events*, Longman, 2013, pp. 53023–53024 and p. 53080; *Keesing's Record of World Events*, 2014, pp. 53130–53131 (hereinafter: *Keesing's Record of World Events*, 2014).

[23] *Keesing's Record of World Events*, 2014, p. 53187.

[24] *Ibidem,* pp. 53187–53188.

[25] *Ibidem,* p. 53188.

[26] *Ibidem*, pp. 53241–53242.

"Republic of Crimea," which had already declared independence,[27] was proclaimed formally again by the Crimean Supreme Soviet.[28] The referendum was followed by the signing of a treaty between the Federation and the newly proclaimed "Republic," as well as the city of Sevastopol, with a stipulation that the two latter became the 84th and 85th regions of the Russian Federation.[29] This triggered virulent reactions from Western States, which imposed sanctions on Russian officials.[30] 42 States co-sponsored a draft Resolution to be submitted to the UN SC, whereby the UN SC "[n]oting with concern the intention to hold a referendum on the status of Crimea on 16 March 2014 (…) 5. *Declares* that this referendum can have no validity, and cannot form the basis for any alteration of the status of Crimea; and calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of Crimea on the basis of this referendum, and to refrain from any action or dealing that might be interpreted as recognizing any such altered status."[31]

Because it was vetoed by the Russian Federation, the Resolution could not be adopted by the UN SC. However, a similar text was submitted a few days later to the United Nations UN GA.[32] On 27 March 2014, the UN GA adopted the Resolution by which the Assembly "*Noting* that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014 was not authorized by Ukraine, 1. *Affirms* its commitment to the sovereignty, political independence, unity and territorial integrity of Ukraine within its internationally recognized borders; 6. *Calls upon* all States, international organizations and specialised agencies

[27] *Crimea parliament declares independence from Ukraine ahead of referendum*, RT World News, 11.03.2014, available at: https://www.rt.com/news/crimea-parliament-independence-ukraine086/ (accessed 15 October 2017). The text of the declaration is available online: N. Holmov, *Crimean parliament publishes declaration of independence*, Dessatalk.com, 13.03.2014, available at: http://www.odessatalk.com/2014/03/crimean-parliament-publishes-declaration-independence/ (accessed 15 October 2017).

[28] *Keesing's Record of World Events*, 2014, p. 53242.

[29] *Ibidem*, pp. 53241–53242.

[30] *Ibidem*; *Statement of G-7 leaders on Ukraine*, 12 March 2014, available at: http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/en/ec/141460.pdf (accessed 15 October 2017); *Joint statement on Crimea by the President of the European Council, Herman Van Rompuy, and the President of the European Commissin, José Manuel Barroso*, 16 March 2014, avialable at: https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/141628.pdf (accessed 15 October 2017).

[31] *Albania, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Republic of Moldova, Romania, Slovakia, Slovenia, Spain, Sweden, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland and United States of America: draft resolution*, 15 March 2014, UN Doc. S/2014/189, preamble and para. 5.

[32] *Canada, Costa Rica, Germany, Lithuania, Poland and Ukraine: draft resolution „Territorial integrity of Ukraine,"* 24 March 2014, UN Doc. A/68/L.39.

not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreteed as recognizing any such altered status."[33]

The adoption of this Resolution, as well as the debates on the previous Resolution submitted to the UN SC, can certainly be considered as relevant practice relating to the generally accepted duty not to recognise a territorial situation instaured unlawfully. The representative of the United States affirmed before the UN SC that "the draft Resolution broke no new legal or normative ground. It simply called on all parties to do what they had previously pledged through internationally binding agreements to do."[34] The French delegate before the UN SC recalled the very idea lying at the heart of the obligation of non-recognition: "To accept the annexation of Crimea would be to give up everything that we are trying to build in this Organization. It would make a mockery of the Charter of the United Nations. It would once again make the sword the supreme arbiter of disputes. The vast majority of Member States will prove, by their refusal to recognize the annexation of the Crimea, that they know that the territorial integrity of one of them is the guarantor of the territorial integrity of all."[35]

At the UN GA, the 28 Members States of the European Union as well as Montenegro, Albania, Norway and Georgia strongly condemned "the illegal annexation of Crimea and Sevastopol to the Russian Federation and will not recognize it."[36] For the United States, Ukraine "is justified in asking us not to recognize the new status quo that the Russian Federation has tried to create with its military"[37]. Liechtenstein considered the annexation of Crimea and Sevastopol "null and void" and stated that it "will not recognize it or its consequences," adopting the Resolution as a "balanced and faithful reflection of current international law."[38] Costa Rica viewed the draft resolution "as a way to reaffirm and defend the law" and affirmed that "the *fait accompli* could impose a reality on the ground, but it will not establish rights."[39] Canada considered that "relations between States must be governed by the rule of law, not the law of the jungle."[40] Turkey affirmed that "the results of the illegal referendum held in Crimea on 16 March, in violation of the Ukrainian Constitution and international agreements, do not bear legal validity" and

[33] A/RES/68/262, *supra* note 6, preamble, paras. 1 and 6.

[34] Representative of the United States, UN SC Provisional Records, Sixty-ninth year, 7138th meeting, 15 March 2014, UN Doc. S/PV.7138, p. 3.

[35] Representative of France, *ibidem*, p. 5.

[36] Representative of the European Union, A/68/PV.80, *supra* note 13, p. 4.

[37] Representative of the United States, *ibidem*, p. 6.

[38] Representative of Liechtenstein, *ibidem*, pp. 7–8. *See also* representative of Canada, *ibidem*, p. 9.

[39] Representative of Costa Rica, *ibidem*, pp. 8–9.

[40] Representative of Canada, *ibidem*, p. 10.

specified that it "does not recognize the development of *de facto* situation."[41] For Guatemala, "we cannot endorse the territorial dismemberment of any State on the basis of unilateral arguments invoking people's right to self-determination."[42] The Resolution submitted to the UN SC and adopted in similar terms by the UN GA thus clearly embodies the duty not to recognise unlawfully instaured situations and entities.

However, as mentioned before, if the Resolution enjoyed wide support with a hundred States voting in favour of the text, the other half of the United Nations Member States did not support it. 11 voted against the Resolution and 58 States abstained, while 27 States did not attend the Session. Do States, throught these different positions, express a form of defiance towards the obligation of non-recognition which might challenge its normativity?

1.2. For some States, the situation in Crimea does not stem from, but rather reacts to, a violation of international law

Most of the States voting against the Resolution, and some of the abstaining States within the UN GA, did so because they considered that the situation in Crimea could not be assessed adequately without lending attention to what had happened in Ukraine in the months preceeding the declaration of independence by the "Republic of Crimea," and its annexation to Russia. Many considered that the situation instaured in Crimea was not a violation of the UN Charter, but rather a reaction to the United States and their NATO allies' unlawful intervention in the internal affairs of Ukraine, without explaining precisely – apart from a very general reference to the peoples' right to self-determination – on what legal grounds a State could be entitled to react to such an intervention by sending agents in the region to allow and secure its secession.[43] Some of the abstaining States shared the view that the situation in Crimea was the result of foreign intervention, without considering that this justified what happened next.[44] For Ecuador for example, commenting on the events taking place during the months preceding the referundum, "those very serious events are the precedents for the referendum that took place on 16 March in the Autonomous Republic of Crimea and in the city of Sevastopol. Such precedents are of crucial importance in considering the agenda

[41] Representative of Turkey, *ibidem*, p. 11. *See also*, representative of Georgia, *ibidem*, p. 11.

[42] Representative of Guatemala, *ibidem*, p. 17.

[43] Representative of Cuba (*ibidem*, p. 7), Nicaragua (*ibidem*, p. 12), Bolivia (*ibidem*, p. 14) and the Democratic People's Republic of Korea (*ibidem*, p. 21). *See also* representative of Venezuela, *ibidem*, p. 24, expressing "its rejection of the overthrow of the democratically elected government of Ukraine by extremist groups, whose activity, which is encouraged by external powers connected to opposition groups in the *de facto* Ukrainian govenment," without referring explicitly to the rule prohibiting the interference in domestic affairs.

[44] China, S/PV.7138, *supra* note 34, p. 7.

item before us because foreign interference in the internal affairs of Ukraine began long before 16 March. Regrettably, that was not mentioned in Resolution 68/262."[45]

In the light of their speeches, it appears that States voting against the text of the draft resolution, and some States abstaining during its adoption, did not reject the duty of non-recognition in regard to unlawful situations, nor the fundamental principles of international law grounding this duty, principles which they expressly value.[46] However convincing the arguments made by these States are, their positions can hardly be perceived as a form of defiance towards the duty of non-recognition itself, so in that sense, they do not challenge its validity as a rule of international law.

Furthermore, it should be noted that these States did not always extend clear recognition to the "Republic of Crimea" and its annexation by Russia. To determine the States that have with no ambiguity aknowledged that Crimea is part of Russia is far from simple. Russian authorities and media have claimed that Armenia, Belarus, Cuba, the Democratic People's Republic of Korea, Nicaragua, Syria and Zimbabwe have[47], but available official statements do not confirm univocal recognition.[48] Only the Russian Federation recognised with no ambiguity the "Republic of Crimea" as a sovereign independent State; and welcomed it as part of the Federation.[49] In sum, if States voted against the Resolution reaffirming the obligation of non-recognition, they did not systematically adopt a behaviour which contradicts such an obligation. Even if they did, such practice remains very isolated. As Special

[45] Representative of Ecuador, A/68/PV.80, *supra* note 13, p. 25.

[46] Representative of Bolivia (*ibidem*, p. 14), of Venezuela (*ibidem*, p. 24) and Ecuador, abstaining (*ibidem*, p. 25).

[47] *Nicaragua recognizes Crimea as part of Russia*, Kyiv Post, 27.03.2014; *Who's on Team Putin?*, Slate, 20.03.2014; *Embassy in Pyongyang points to North Korean Atlas showing Crimea as Russia*, The Moscow Times, 13.10.2017, available at: https://themoscowtimes.com/news/russia-posts-reminder-that-north-korea-recognizes-crimea-as-russian-59265 (accessed 15 March 2018); *Briefing by Foreign Ministry Spokesperson Maria Zakharova, Moscow, November 3, 2016*, available at: http://www.mid.ru/en/foreign_policy/news/-/asset_publisher/cKNonkJE02Bw/content/id/2513436 (accessed 15 March 2018); *Ukraine angry as Zimbabwe minister visits Crimea*, Ukraine News Agency, 22.12.2014, available at: https://en.interfax.com.ua/news/general/241251.html (accessed 15 April 2018); *Ukraine recalls ambassador to Armenia over Crimea recognition*, Asbarez, 21.03.2014, available at: http://asbarez.com/120951/ukraine-recalls-ambassador-to-armenia-over-crimea-recognition/ (accessed 15 March 2018).

[48] Ministerio de Relaciones Exteriores de la República de Cuba, *Cuba rechazo en la Asamblea General de la ONU la intervencion de Estados Unidos y de la OTAN en los asuntos internos del pueblo ucraniano*, 28 March 2014, available at: http://www.minrex.gob.cu/es/cuba-rechazo-en-la-asamblea-general-de-la-onu-la-intervencion-de-estados-unidos-y-de-la-otan-en-los (accessed 15 March 2017).

[49] *Putin signs order to recognize Crimea as a sovereign independent State*, RT, 17.03.2014, available at: https://www.rt.com/news/russia-recognize-crimea-independence-410/ (accessed 15 March 2018).

Rapporteur Wood recalled in the second report to the ILC, "some inconsistency is not fatal."[50] For all these reasons, the customary rule can not be considered fundamentally challenged by these States.

1.3. For some States, requesting non-recognition of the situation in Crimea was politically inopportune

The abstention of an important group of Member States within the UN GA does not reveal a will to impair the validity of the duty of non–recognition either. Sometimes States even reaffirmed its importance or the importance of the very principles of international law which underpin it. For Uruguay, "any declaration that is not in line with the constitutional principles of the Ukrainian State cannot alter the internationally recognized borders, and thereore contravenes the principle of the territorial integrity of States. International legality must prevail."[51] Botswana underlined "its strong faith in the provisions of the Charter of the United Nations and the Constitutive Act of the African Union, specifically in relation to the respect for the sovereign equality, unity and territorial integrity of States"; and explained that it therefore "does not support the dismemberment of sovereign nations, either through unilateral declarations of independence or through coercion by external forces."[52] For Algeria, "Despite our abstention, we would like to reiterate our strict adherence to the principles and objectives enshrined in the Charter of the United Nations, specifically those stated in Articles 1 and 2 that refer to territorial integrity, political independence and sovereignty, as well as equal rights and self-determination."[53]

Brazil, in more general terms, recalled that it "has consistently upheld that the Charter of the United Nations must be respected under all circumstances" and underlined that its position "reflects our unflinching defence of an international system based on cooperative multilateralism and respect for international law."[54]

If States did not wish to challenge the duty of non-recognition, what bothered them in the textor in its adoption to the point that they decided not to support it? Some highlighted the necessity not to heat up a situation that was already very tense, preferring to encourage relations and dialogue between the concerned actors. For China, "in the context of ongoing diplomatic mediation efforts by the parties concerned, an attempt to push ahead with a vote on draft resolution A/68/L.39, on

[50] ILC, *Second report on identification of customary international law, by Special Rapporteur Wood*, 22 May 2014, UN Doc. A/CN.4/672, p. 42 (para. 57), pp. 36–38 (paras. 52–53) (on the generality of practice) and pp. 40–42 (paras. 55–57) (on the consistency of practice).

[51] Representative of Uruguay, A/68/PV.80, *supra* note 13, p. 16.

[52] Representative of Botswana, *ibidem*, p. 26.

[53] Representative of Algeria, *ibidem*, p. 25.

[54] Representative of Brazil, *ibidem*, p. 6; *See also* representative of San Salvador (*ibidem*, p. 16) and Jamaica (*ibidem*, p. 24).

the question of Ukraine, will only further complicate the situation."[55] In a similar vein, El Salvador affirmed that "the draft text does not promote areas of dialogue that would make it possible to reach a solution on the basis of the principles of international law and that primarily seek to de-escalate the conflict and to ensure human rights and the political, economic and social stability of the region."[56] Argentina, though supporting a similar Resolution before the UN SC, considered before the UN GA that "Resolution 68/262 goes in the direction of limiting dialogue and the peaceful resolution of conflicts."[57] These considerations were also evoked by States voting against the Resolution.[58]

More fundamentally, States questioned the motives behind the Resolution imposing here what had not always been imposed there. For Saint Vincent and the Grenadines, "Unfortunately, the nature of today's draft Resolution and the arguments of its chief proponents have called into question the universal and consistent applicability of international law in such and similar instances. Despite our real and continuing concerns over the events that have taken place in Crimea and Ukraine, we view today's draft Resolution as motivated more by the principals than by principles. Many of the major Powers on either side of that particular dispute have reversed their long-standing positions on similar conflicts and are now on record as contradicting themselves, notwithstanding their efforts to find legal and factual distinctions."[59]

This concern of seeing international relations hijacked by the major powers was voiced not only by other abstaining States,[60] but also by States voting in favour of the Resolution. Guatemala, for example, expressed concerns about "the present international environment, which seems to be the revival of a dividing fault line between East and West, which we believed was part of the past."[61]

Given these diverse justifications, it does not appear clearly that the Crimean crisis was an occasion for abstaining States to put the customary obligation of non-recognition in question.[62] In any case, such a challenge would have required

[55] Representative of China, *ibidem*, p. 11; The same position was adopted by China before the UN SC, S/PV.7138, *supra* note 34, p. 8. *See also* representative of Jamaica, A/68/PV.80, *supra* note 13, p. 24.

[56] Representative of San Salvador, A/68/PV.80, *supra* note 13, p. 16; See also, representative of Egypt (*ibidem*, p. 21), Viet Nam, in very general terms (*ibidem*, p. 21), Kazakhstan (*ibidem*, p. 23), Algeria (*ibidem*, p. 25), Botswana (*ibidem*, p. 26) and Paraguay (*ibidem*, p. 27).

[57] Representative of Argentina, *ibidem*, p. 20.

[58] Representative of Armenia, *ibidem*, p. 27.

[59] Representative of Saint-Vincent-les-Grenadines, *ibidem*, pp. 15–16.

[60] Representative of Argentina (*ibidem*, p. 20) and Egypt (*ibidem*, p. 21).

[61] Representative of Guatemala, *ibidem*, p. 18. *See also* representative of Nigeria (*ibidem*, p. 19) and Peru (*ibidem*, p. 22).

[62] *See* E. Milano, *The non-recognition of Russia's annexation of Crimea: three different legal approaches and one unanswered question*, Questions of International Law, Zoom out I 35 (2014); T. Christakis, *Les conflits de sécession en Crimée et dans l'Est de l'Ukraine et le droit international*, 3 Journal du droit international 733 (2014).

clearer terms and would have needed further confirmation in other contexts, given the wide support that the obligation of non-recognition has enjoyed so far. Such practice does not seem to emerge from recent events. International practice triggered by the US recognition of Jerusalem as the capital of Israel does not suggest that a potential undermining of the duty not to recognise unlawful situations is close to being confirmed. Quite the opposite, in fact. 14 of the 15 Members of the UN SC voted in favour of a resolution in which the Security Council "[e]xpressing in this regard its deep regret at recent decisions concerning the status of Jerusalem, 1. Affirms that any decisions and actions which purport to have altered the character, status or demographic composition of the Holy City of Jerusalem have no legal effect, are null and void and must be rescinded in compliance with relevant Resolutions of the Security Council, and in this regard, calls upon all States to refrain from the establishment of diplomatic missions in the Holy City of Jerusalem, pursuant to Resolution 478 (1980) of the Security Council; 2. Demands that all States comply with Security Council Resolutions regarding the Holy City of Jerusalem, and not to recognize any actions or measures contrary to those Resolutions (…)"[63]

As the United States vetoed the draft resolution, it was not adopted by the UN SC. A similar Resolution was thus proposed to the UN GA, during an emergency Special Session. The text was adopted by 128 votes to 9, with 35 abstentions, showing that a majority of States (greater this time in comparison with the Resolution adopted on Crimea) still consider territorial arrangements contrary to fundamental principles of international law as not capable of being recognised.

2. A duty challenged by the ECHR regarding the "Turkish Republic of Northern Cyprus"?

After briefly presenting the circumstances in which the "Turkish Republic of Northern Cyprus" proclaimed its independence; and the reasons why it cannot be recognised as a State under international law (2.1), we will see that the ECHR has accepted the validity of acts adopted by the legislative, executive and judicial authorities of the "TRNC," thus adopting a position which seems to challenge the duty not to recognise it (2.2.). However, given the justifications provided by the Court, such a practice cannot be interpreted as derogating from or contesting the duty of non-recognition vis-a-vis "TRNC" (2.3).

2.1. The context in which the "Turkish Republic of Northern Cyprus" emerged

As a reaction to the *coup* by Greek army officers on 15 July 1974 seeking to achieve the union of Cyprus with Greece, Turkey launched a military operation named *Operation Atilla* on 20 July 1974 in the northern part of Cyprus, with the aim

[63] *Egypt: draft Resolution*, 18 December 2017, UN Doc. S/2017/1060.

of protecting the Turkish-Cypriot community, an operation that Turkey claimed to be grounded in the 1960 Treaty of Guarantee. The United Nations UN SC met and adopted Resolution 353, by which it "calls upon all States to respect the sovereignty, independence and territorial integrity of Cyprus; demands an immediate end to foreign military intervention in the Republic of Cyprus (…) requests the withdrawal without delay from the Republic of Cyprus of foreign military personnel present otherwise than under the authority of international agreements, including those whose withdrawal was requested by the President of the Republic of Cyprus, Archbishop Makarios, in his letter of 2 July 1974."[64]

From 14 to 16 August 1974, another Turkish intervention resulted in Turkey controlling nearly half of the island. This prompted the partitioning of the island with significant population transfers. With no valid justifications in international law, the Turkish military interventions were generally considered to be unlawful, and drew wide condemnation. Nevertheless, the military presence increased steadily. to reach 30,000 by the mid-nineties.

In November 1983, the "Turkish Republic of Northern Cyprus" proclaimed its independence and adopted a Constitution a few months later. This proclamation was condemned by the UN SC in Resolution 541, by which the Council "considers the declaration referred to above as legally invalid and calls for its withdrawal" and "calls upon all States not to recognize any Cypriot State other than the Republic of Cyprus."[65] On 16 November 1983, the European Communities issued the following statement: "The ten Member States of the European Community are deeply concerned by the declaration purporting to establish a 'Turkish Republic of Northern Cyprus' as an independent State. They reject this declaration, which is in disregard of successive Resolutions of the United Nations. The ten reiterate their unconditional support for the independence, sovereignty, territorial integrity and unity of the Republic of Cyprus."[66]

A few days later, the Commonwealth Heads of Governement issued a press communiqué of similar content: "[The] Heads of Government condemned the declaration by the Turkish Cypriot authorities issued on 15 November 1983 to create a secessionist state in northern Cyprus, in the area under foreign occupation. Fully endorsing UN SC Resolution 541, they denounced the declaration as legally invalid and reiterated the call for its non-recognition and immediate withdrawal. They further called upon all states not to facilitate or in any way assist the illegal secessionist entity. They regarded this illegal act as a challenge to the international community and demanded the implementation of the relevant UN Resolution on Cyprus."[67]

[64] UN SC Resolution 353 of 20 July 1974, S/RES/353 (1974), paras. 1–4.
[65] S/RES/541, *supra* note 4, paras. 2, 7.
[66] Statement quoted in ECHR judgment: ECHR, *supra* note 18, para. 22.
[67] Communiqué, quoted in ECHR judgment: *ibidem*, para. 23.

The UN SC reiterated its position a few months later in Resolution 550, by which it "condemns all secessionist actions, including the purported exchange of ambassadors between Turkey and the Turkish Cypriot leadership, declares them illegal and invalid and calls for their immediate withdrawal."[68] Apart from Turkey, no State has recognised the "TRNC" as a State so far.

2.2. The ECHR recognises the laws, the police forces, and the courts and tribunals of the "TRNC"

Since the beginning of the 1990s, several cases relating to the situation in the "TRNC" have been brought before the Court of Human Rights. Though the Court is generally not concerned with the formal status of a territory on which human-rights violations have allegedly been perpetrated; and usually prefers to assess the situation in the light of its effectiveness rather than its validity under national or international law, the problematic status of the "TRNC" was evoked before the Court in relation to different preliminary objections to the Court's jurisdiction, as well as multiple questions regarding the responsibility of the concerned States, thus inviting the European judges to adopt a position towards the "TRNC" and acts adopted by its legislative, executive and judiciary branches.

It is true that since *Loizidou*, the Court has never recognised any validity to the Constitution of the "TRNC," and has constantly denied that it could confer a legal basis to the expropriation of properties located in the Northern part of the island, contrary to what Turkey argued[69]. For the Court, "it is evident from international practice and the various, strongly-worded Resolutions referred to above (…) that the international community does not regard the 'TRNC' as a State under international law; and that the Republic of Cyprus has remained the sole legitimate Government of Cyprus - itself, bound to respect international standards in the field of the protection of human and minority rights. Against this background the Court cannot attribute legal validity for purposes of the Convention to such provisions as Article 159 of the fundamental law on which the Turkish Government rely."[70]

The Court reaffirmed its findings in *Cyprus versus Turkey*, and extended them to the law which gave effect to Article 159: "This conclusion is unaffected by the operation of 'Law N° 52/1995.' It adds that, although the latter was not invoked before the Court in the *Loizidou* case, it cannot be attributed any more legal validity than its parent 'Article 159' which it purports to implement."[71]

However, this did not prevent the Court from recognising the courts and tribunals set up in the "TRNC," and the arrests made by police officers operating under

[68] S/RES/550, *supra* note 4, para. 2.
[69] ECHR, *supra* note 18, para. 35.
[70] *Ibidem*, paras. 43–44.
[71] ECHR, *supra* note 19, para. 186.

its authority; thus implicitly attributing validity to the laws grounding these courts and tribunals, as well as granting these police officers their judicial and executive powers.

Concerning the courts and tribunals set up in the "TRNC," the question asked of the Court in *Cyprus versus Turkey* was whether they could be recognised as domestic remedies that the applicants should therefore exhaust before turning to the Court, as Turkey was claiming.[72] To Cyprus, this could absolutely not be the case as "the establishment of the 'TRNC' in 1983 and its legal and constitutional apparatus stemmed directly from the aggression waged against the Republic of Cyprus by Turkey in 1974. This aggression continued to manifest itself in the continuing unlawful occupation of northern Cyprus. The applicant Government contended that, having regard to the continuing military occupation and to the fact that the 'TRNC' was a subordinate local administration of the respondent State, it was unrealistic to expect that the local administrative or judicial authorities could issue effective decisions against persons exercising authority with the backing of the occupation army in order to remedy violations of human rights committed in furtherance of the general policies of the regime in the occupied area. The applicant government stated before the Court that their primary starting-point was that the relevant applicable law in northern Cyprus remained that of the republic of Cyprus and that it was inappropriate to consider other laws"[73].

The Court was not convinced, however; and underlined that it was in the interest of the population for it to be able to refer claims to the TRNC's courts and tribunals in order to secure redress for alleged human-rights violations, and should therefore be considered domestic remedies to be exhausted, except when proven to be ineffective.[74] Not every judge on the bench shared this view. Judge Palm was joined by five fellow judges in considering – in a rather virulent dissenting opinion – that: "any consideration of remedies gives rise to the obvious difficulty that the entire court system in the 'TRNC' derives its legal authority from constitutional provisions whose validity the Court cannot recognise – for the same reasons that it could not recognise Article159 in the Loizidou Case – without conferring a degree of legitimacy on an entity from which the international community has withheld recognition. An international court should not consider itself free to disregard either the consistent practice of States in this respect or the repeated calls of the international community not to facilitate the entity's assertion of statehood. (…) the Court cannot examine the remedies of the 'TRNC' in a vacuum, as if it were a normal Contracting Party, where it can be assumed that courts are 'established by law' or that judges are independent and impartial (absent evidence to the contrary). To attribute legal validity to court remedies necessarily involves the

[72] *Ibidem*, para. 82.
[73] *Ibidem*, paras. 83–84.
[74] *Ibidem*, paras. 90, 98.

Court in taking stand on whether the courts are 'established by law' – something the Court should avoid doing if it is to respect the illegal status of the 'TRNC' regime and the declared stance of the international community. (…) More importantly, such a general conclusion has, as a direct consequence, that the European Court of Human Rights may recognise as legally valid decisions of the 'TRNC' courts and, implicitly, the provisions of the Constitution instituting the court system. Such an acknowledgment, notwithstanding the Court's constant assertions to the contrary, can only serve to undermine the firm position taken by the international community which through the United Nations Security Council has declared the proclamation of the 'TRNC's statehood 'legally invalid' and which has stood firm in withholding recognition from the 'TRNC.'"[75]

Contrary to the reasoning held in this partly dissenting opinion, the Court did not assess the validity of the 'TRNC' tribunals in the light of the unlawful character of their establishment. This position has since been slightly altered in other cases worth mentionning, where the Court has proven to be more attentive to the lawful or unlawful status of the concerned tribunals. In *Ilascu,* the Court was invited to decide, *inter alia*, whether the conviction of M. Ilascu and his comrades by the Supreme Court of the "Moldovan Republic of Transdnistria" was in conformity with the Convention. Romania as a third-party intervener, stressed that "the applicants' detention had no legal basis, since they had been sentenced by an unlawfully constituted court."[76] Addressing the question, the Court reaffirmed and refined its position: "In certain circumstances, a court belonging to the judicial system of an entity not recognised under international law may be regarded as a tribunal 'established by law' provided that it forms part of a judicial system operating on a 'constitutional and legal basis' reflecting a judicial tradition compatible with the Convention, in order to enable individuals to enjoy the Convention guarantees."[77]

To the Court, such circumstances were not present as the proceedings before the "MRT" Supreme Court could clearly be characterised as arbitrary and illustrative of a flagrant denial of justice. It should be recalled that the only persons authorised to enter the courtroom were Moldovan nationals residing in Transnistria, that police officers and soldiers were present on the stage where the judges sat, and that the applicants were not allowed to speak to their lawyers unless police officers were present. Moreover, the bench included a 28-year-old lawyer appointed to the "Supreme Court" after only one year at the Moldovan Procurator General's Office. In such circumstances, the Court found that "none of the applicants was convicted

[75] Partly dissenting opinion of Judge Palm, joined by Judges Jungwiert, Levits, Pantiru, Kovler and Marcus-Helmons, *ibidem*. *See also* L.G. Loucaides, *The Judgment of the European Court of Human Rights in the Case of Cyprus v. Turkey*, 15 Leiden Journal of International Law 225 (2002), p. 235.

[76] ECHR, *Ilascu v. Moldova and Russia* (App. No. 48787/99), Judgment, 8 July 2004, para. 458.

[77] *Ibidem*, para. 460.

by a 'court', and that a sentence of imprisonment passed by a judicial body such as the 'Supreme Court of the MRT' at the close of proceedings like those conducted in the present case cannot be regarded as a 'lawful detention' ordered 'in accordance with a procedure prescribed by law."[78]

The unlawful character of the "MRT""s Supreme Court was also brought up in relation to the alleged violation of Article 3 of the Convention prohibiting torture, inhuman or degrading treatment resulting from the conditions in which Ilascu was detained. The argument was not refered to by the applicants but by the Court itself, which considered that: "The anguish and suffering he felt were aggravated by the fact that the sentence had no legal basis or legitimacy for Convention purposes. The 'Supreme Court of theMRT' which passed sentence on Mr Ilascu was set up by an entity, which is illegal under international law and has not been recognised by the international community. That 'court' belong to a system which can hardly be said to function on a constitutional and legal basis reflecting a judicial tradition compatible with the Convention. That is evidenced by the patently arbitrary nature of the circumstances in which the applicants were tried and convicted, as they described them in an account which has not been disputed by the other parties (…), and as described and analysed by the institutions of the OSCE (…)"[79]

As both citations illustrate, the Court draws from the non-recognition of the "MRT" by the international community and its unlawful character under international law, conclusions which relate directly to its determination as to whether or not human-rights violations have occurred.

Such considerations of legality were not taken into account by the Court in relation to the "TRNC," even after the decision was adopted in the *Ilascu* case. Despite dissenting voices, the Court kept the same reasoning in *Xenides-Arestis*, in which it did not deny, as a matter of principle, the validity of an "immovable property, determination, evaluation and compensation commission" established in the "TRNC" to rule on complaints made by individuals relating to their properties. Though Mrs Xenides argued that such a mechanism could not be taken into consideration, as it had been created by virtue of a law adopted by the "TRNC""s authorities,[80] the Court rather voiced specific concerns as to the adequacy and effectiveness of this remedy, without excluding it *per se* on account of its illegal origin.[81] A new law was thus adopted and, at the stage of determining just satisfaction, the Court explicitly welcomed "the steps taken by the Government in an effort to provide redress for the violations of the applicant's Convention rights as well in respect of all similar applications pending before it," and noted that "the new compensation and restitu-

[78] *Ibidem*, para. 462. *See also* ECHR, *Ivantoc v. Moldova and Russia* (App. No. 23687/05), Judgment, 15 November 2011, paras. 132–134.

[79] *Ibidem*, para. 436.

[80] ECHR, *Xenides-Arestis v. Turkey* (App. No. 46347/99), Judgment, 2 September 2014, pp. 28–30.

[81] *Ibidem,* p. 45.

tion mechanism, in principle, has taken care of the requirements of the decision of the Court (…)"[82] It was in such a way that Mrs Xenides-Arestis's continuous challenge of the validity of this new law was rejected.[83]

This line of reasoning has since been reaffirmed by the Court in many instances, leading the Court to treat as valid the courts and tribunals set up in the "TRNC."[84]

The Court's approach to the courts and tribunals of unlawfully-installed entities may seem a little paradoxical at first glance, when one compares its case-law on the "TRNC" judicial system with that on the "MRT." This has led the Court to refine the general principles followed in this matter, in a detailed fashion. In *Mozer v. Moldova and Russia*, a case which was also concerned with the detention and conviction of a person by the "MRT" authorities, the Court held that "it cannot automatically regard as unlawful, for the limited purposes of the Convention, the decisions taken by the courts of an unrecognised entity purely because of the latter's unlawful nature and the fact that it is not internationally recognised (…). It is insufficient to declare that the Convention rights are protected on a certain territory – the Court must be satisfied that such protection is also effective. A primary role in ensuring that such rights are observed is assigned to the domestic courts, which must offer guarantees of independence and impartiality and fairness of proceedings. Consequently, when assessing whether the courts of an unrecognised entity satisfy the test established in its *Ilascu and others* judgment, namely whether they form part of a judicial system operating on a 'constitutional and legal basis' (…) compatible with the Convention, the Court will attach weight to the question whether they can be regarded as independent and impartial and are operating on the basis of the rule of law."[85]

A similar position has been taken with regards to the arrests and detentions made by the police officers of the "TRNC." In *Foka*, the applicant and the governement of Cyprus as the third-party intervener argued that "as the 'TRNC' was not a valid and recognised State under international law, no deprivation of liberty imposed by its agents might be regarded as 'lawful' within the meaning of the Convention."[86] However, the Court chose to recognise the validity of acts adopted by the *de*

[82] ECHR, *Xenides-Arestis v. Turkey* (App. No. 46347/99), Judgment (just satisfaction), 7 December 2006, para. 37.

[83] *Ibidem,* para. 19.

[84] *See also* ECHR, *Kyriacou Tsiakkourmas and others v. Turkey* (App. No. 13320/02), Judgment, 2 June 2015, paras. 157–158; ECHR, *Kallis and Androulla Panayi v. Turkey* (App. No. 45388/99), Judgment, 27 October 2009, para. 32; ECHR, *Andreou v. Turkey* (App. No. 45653/99), Judgment, 3 June 2008 and ECHR, *Adali v. Turkey* (App. No. 38187/97), 31 March 2005, para. 186. *See also* ECHR, *Asproftas v. Turkey* (App. No. 16079/90), Judgment, 27 May 2010, paras. 93–94; ECHR, *Demopoulos and others v. Turkey* (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04), Decision as to the admissibility, 1 March 2010, paras. 92–98; ECHR, *Petrakidou v. Turkey* (App. No. 16081/90), Judement, 27 May 2010, para. 90.

[85] ECHR, *Mozer v. the Republic of Moldova and Russia* (App. No. 11138/10), Grand Chamber Judgment, 23 February 2016, paras. 142 and 144.

[86] ECHR, *Foka v. Turkey* (App. No. 28940/95), Judgment, 24 June 2008, para. 81.

facto authorities of the "TRNC"in order to enable the inhabitants to engage the responsibility of Turkey for the way in which such acts were performed.[87] The Court specified that "when as in the instant case an act of the 'TRNC' authorities is in compliance with laws in force within the territory of northern Cyprus, those acts should in principle be regarded as having a legal basis in domestic law for the purposes of the Convention."[88] This findings were confirmed in other cases where the Court explicitly took into consideration "TRNC" laws as laws in force within the territory of northern Cyprus, in order to assess whether a particular deprivation of liberty was made in accordance with a procedure prescribed by law.[89]

More recently, the Court has even criticized the Republic of Cyprus for its lack of cooperation with the Turkish and "TRNC" autorities in a criminal investigation pursued with respect to several murders perpetrated on the territory under effective control of the government of Cyprus, but showing links with both parts of the island. Seven Cypriot nationals of Turkish Cypriot origin lodged a complaint against both Cyprus and Turkey, considering that they had failed to cooperate and conduct an effective investigation into the murder of their relatives who were living in the "TRNC."[90] The investigation clearly suffered from the partition of the island. As the Cypriot Attorney-General wrote in a letter to the relatives inquiring about the investigation, the Republic of Cyprus was "doing everything within its power – bearing in mind that it [did] not have effective control over the areas of the Republic occupied by Turkey (in which persons that might be involved [were at that time] and taking into account the relevant Convention case-law – to investigate the (…) murder and bring the persons responsible to trial before the Courts of the Republic."[91] However, the Court did not consider that this could justify the lack of cooperation, and found that such a lack of cooperation constitute a violation of Article 2 of the Convention under its procedural aspect[92], thus clearly encouraging Cyprus's police forces to cooperate with those of the "TRNC," in criminal matters requiring such cooperation.

As these decisions illustrate, the Court has treated as valid laws adopted and courts established by the "TRNC" authorities, and has thus invited concerned States and particularly Cyprus to do so as well, in a fashion that *a priori* contradicts

[87] *Ibidem*, para. 83. *See also* ECHR, *Asproftas v. Turkey* (App. No. 16079/90), Judgment, 27 May 2010, para. 72. *See also* ECHR, *Petrakidou v. Turkey* (App. No. 16081/90), Judgment, 27 May 2010, para. 71.

[88] *Ibidem*, para. 84. *See also* the report adopted by the European Commission of Human Rights on 8 July 1993 in the *Chrysostomos and Papachrysostomou v. Turkey* (App. No. 15299/89, 15300/89, 15318/89), paras. 143–70. *See also* ECHR, *Protopapa v. Turkey* (App. No. 16084/90), Judgment, 24 February 2009, para. 60.

[89] *See also* ECHR, *Asproftas v. Turkey*, *supra* note 89, paras. 73–74.

[90] ECHR, *Güzelyurtly v. Cyprus and Turkey* (App. No. 36925/07), Judgment, 4 April 2017, para. 3.

[91] *Ibidem,* para. 46.

[92] *Ibidem,* para. 296.

the obligation not to recognise as lawful any situation stemming from an unlawful military intervention. This is how the Court decides, when it not only accepts the validity of acts performed by the "TRNC" police, but even encourages Cyprus to cooperate with police officers in investigations requiring such cooperation.

Does this case-law challenge the obligation of non-recognition? Nothing is less certain, as the Court produces justifications that seem to leave the obligation untouched – as we will now show.

2.3. The ECHR justifies its recognition of "TRNC" legislative, executive and judicial powers in ways that do not affect the duty to not recognise unlawful entities

The Court has generally justified its recognition of "TRNC" powers in different ways that are not mutually exclusive. Firstly, the Court has affirmed that the duty not to recognise an unlawlly instaured situation is limited, and that the situations before the Court do fall outside these limits. Secondly, the Court has underlined the necessity to avoid any vacuum for the protection of human rights in the northern part of the island, reaffirming its attachment to the effectivity of the protection mechanism it has the duty to implement. These justifications, however convincing, do not thus formally affect as such the duty not to recognise unlawfully-installed entities; as we will now see.

From the very first cases brought before the Court in relation to the "TRNC," the Court did underline the limited scope of the obligation of non–recognition, and the exceptions to that obligation; referring explicitly to the advisory opinion given by the ICJ in the case relating to the *Legal Consequences for States of the Continued Presence of South Africa in Namibia*, in which the Court affirms that: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory."[93]

When the Court had to determine in *Cyprus versus Turkey* whether the "TRNC"'s courts and tribunals should be considered "domestic remedies" to be exhausted except when proven to be ineffective, the Court relied heavily on the

[93] ICJ, *Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970),* Advisory Opinion, ICJ Rep 1971, p. 16, para. 125. *See* for the reference by the ECHR, *supra* note 18, para. 45; ECHR, *Cyprus v. Turkey*, *supra* note 19, paras. 92–93.

advisory opinion of the ICJ and applied it to the case in the following terms : "the Advisory Opinion confirms that, where it can be shown that remedies exist to the advantage of individuals and offer them reasonable prospects of success in preventing violations of the Convention, use should be made of such remedies. (…). It appears evident to the Court, despite the reservations the Greek-Cypriot community in northern Cyprus may harbour regarding the 'TRNC' courts, that the absence of such institutions would work to the detriment of the members of that community."[94]

After quoting parts of the pleadings of the representatives of The Netherlands and the United States in the *Namibia* case (in which they argued that the non-recognition of South Africa's illegal authorities did not preclude account being taken of certain aspects of their exercice of powers in order to ensure the rights of the individuals, especially in matters relating to marriage, children or commercial contracts), the Court held that "these statements, by logical necessity, must be taken to extend to decisions taken by courts and relating to such everyday relations."[95] To the Court, "Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled."[96]

The reasoning of the Court based on its interpretation of the advisory opinion given by the ICJ in the *Namibia* case was not shared unanimously on the bench. For Judge Palm and the judges joining her, "The Court should not assume too readily that it is acting for the benefit of the local population in adressing the legality of such arrangements. (…) To require those subjects to the exigencies of an occupying authority to have recourse to the courts as a precondition to having their complaints of human-rights violations examined by this Court is surely an unrealistic proposition given the obvious and justifiable lack of confidence in such a system of administration of justic."[97]

For Judge Marcus-Helmons, the decision of the Court resulted in the inhabitants of the northern part of Cyprus being put in a less favourable situation, "since requiring the inhabitants of Cyprus to exhaust domestic remedies before the

[94] ECHR, *Cyprus v. Turkey*, *supra* note 19, paras. 91–92.

[95] *Ibidem,* para. 94.

[96] *Ibidem,* para. 96.

[97] Partly dissenting opinion of Judge Palm, joined by Judges Jungwiert, Levits, Pantiru, Kovler and Marcus-Helmons, *ibidem*.

'TNRC' before applying to the European Court of Human Rights when, moreover, those remedies are known to be ineffective obviously constitutes an additional obstacle for the inhabitants to surmount in their legitimate desire to secure an end to the violation of a fundamental right by applying to Strasbourg."[98]

Some States also preferred a narrow understanding of what acts adopted by entities set up unlawfully may be recognised. For Romania – expressing its views on acts performed by the authorities of the "Moldavian Republic of Transnisstria" in the *Ilascu* case – "Although certain acts of the separatist authorities, such as acts relating to the registration of births, deaths and marriages, had to be recognised so as not to worsen the situation of the inhabitants (see the ICJ's advisory opinion of 21 June 1971 on the legal consequences for States of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 276), that should not apply to all the acts of authorities not recognised by the international community, otherwise those authorities would be legitimised."[99]

Following this line of argument, it might indeed be questioned whether judicial proceedings relating to the expropriation process of Greek-Cypriots' properties going on since the occupation of the island by Turkey could be considered as causes "relating to such everyday relations" comparable to marriage, child custody or commercial contracts, as the Court suggests. Rather, the process seems inextricably linked to the foreign occupation of the northern part of the island, thus fitting unadequately with the idea that such proceedings would be part of a *normal* life for the inhabitants.

However convincing or unconvincing the reasoning of the Court, it is remarkable that it is grounded in the advisory opinion of the ICJ, and on the limits generally accepted of the obligation of non-recognition; thus showing no intention to challenge it formally. To make that position even clearer, the ECHR has stressed continuously that "recognising the effectiveness of those bodies for the limited purpose of protecting the rights of the territory's inhabitants does not, in the Court's view and following the Advisory Opinion of the International Court of Justice, legitimise the 'TRNC' in any way."[100]

This is not only the Court's interpretation of its own conduct, but the Court's interpretation of what other States should do too, in particular Cyprus. Commenting on Cyprus's unwillingness to cooperate with the police officers of the "TRNC" on a criminal investigation, the Court held that "it is evident that what drove the unwillingness to cooperation was the refusal to lend (or the fear of lending) any legitimacy to the 'TRNC.' However, the Court does not accept that steps taken with the

[98] Partly dissenting opinion of Judge Marcus-Helmons, *ibidem*.

[99] *See* the position of Romania – ECHR, *supra* note 76, para. 458.

[100] *Ibidem*, para. 92. *See also* ECHR, *supra* note 86, para. 84; ECHR, *Demopoulos and others v. Turkey*, *supra* note 84, para. 96; ECHR, *Petrakidou v. Turkey*, *supra* note 87, para. 71; ECHR, *supra* note 90, para. 197; ECHR, *Protopapa v. Turkey*, *supra* note 88, para. 60.

aim of cooperation in order to further the investigation in this case would amount to recognition, implied or otherwise of the 'TRNC.' Nor would it be tantamount to holding that Turkey wields internationally recognised sovereignty over northern Cyprus."[101]

Secondly, in order to justify its recognition of some aspects of the existence of the "TRNC" and in particular of its courts and tribunals, the Court has relied on the "need to avoid in the territory or northern Cyprus the existence of a vacuum in the protection of the human rights guaranteed by the Convention."[102] The importance of protecting human rights in these parts was firstly highlighted by the Court in order to justify Turkey being held responsible for the alleged violations occuring in the "TRNC," because the latter was to remain unrecognised by the international community[103]. However, the argument was additionally used by the Court to grant some form of recognition to the judicial apparel of the "TRNC." Quite interestingly, not to say paradoxically, the argument thus sustains two different approaches, which could be said to be irreconcilable.

For all these reasons, it might be said that, although the ECHR position towards the "TRNC" appears to put the duty not to recognise unlawful entities in question, the justifications provided to ground this position show that the duty remains unattained.

However, this is not to dismiss interrogations prompted by the attitude adopted by the ECHR, from a technical point of view, as well as from a political point of view. Technically, the path taken by the Court towards the "TRNC," endorsing some aspects of its existence and encouraging Cyprus to collaborate with its authorities to a certain extent, may be at odds with the path taken by the Court in other cases where it was confronted with unlawfully self-proclaimed States. In the context of the *Ilascu* case, the Court pinpointed that "the fact that the region is recognised under public international law as part of Moldova's territory gives rise to an obligation, under Article 1 of the Convention, to use all legal and diplomatic means available to it to continue to guarantee the enjoyment of the rights and freedoms defined in the Convention to those living there."[104] The positive obligation drawn by the Court from the valid title justifying the sovereignty of a State over a specific territory pursues objectives that can be compared with those fulfilled by the obligation not to recognise any territorial situation established or maintained in contradiction with international law. Both obligations require from States the adoption of measures necessary to oppose the consolidation of an unlawful situation, and thereby reinstate the legitimate sovereign in his rights over the occupied territories. To borrow the words of Judge Ress: "As the Court has rightly stated, this

[101] ECHR, *supra* note 90, § 291.
[102] ECHR, *Cyprus v. Turkey*, *supra* note 19, para. 91.
[103] *Ibidem*, para. 78.
[104] ECHR, *supra* note 76, para. 110.

obligation to re-establish control over Transdniestria required Moldova, firstly, to refrain from supporting the separate regime of the 'MRT' in particular after 1997 and, secondly, to act by taking all the political, judicial and other measures at its disposal, especially regarding the applicants' situation and any further violations of the Convention in relation to them."[105]

This duty to oppose the consolidation of the unlawful authority and to refrain from supporting its instances cannot be reconciled easily with the obligation to cooperate with such an unlawful authority in certain circumstances, as described by the Court in *Güzelyurtly*. Criminal jurisdiction over a territory lies at the very heart of sovereignty, and it might be extremely difficult to accept the former without endorsing the latter.

More fundamentally, one might question the belief upheld by the ECHR that the courts and tribunals of an occupying power may provide redress for human-rights violations without in any way legitimising its authority. It might not be possible nor maybe desirable to develop any clear-cut answer to such a wide interrogation. Suffice to say that it has been asked in other contexts, and that it has sometimes been asserted that such judicial mechanisms participate in consolidating the occupation. In the internationally acclaimed documentary *Law in these parts*[106], retired Israeli judges are interviewed about their work within the military courts set up in the Palestinian Occupied Territories after 1967. The documentary shows how their rulings sanctioned house demolitions or extended detention and extra-judicial killings of Palestinians. The documentary portrays Judge Meir Shamgar and shows how he truly believed that these military courts guaranteed some protection to Palestinians. At one point, he asks: "Would it be better had there been no law?" This short incursion into a cinematographic portrayal of judicial activities by no means intends to compare the situation in the Palestinian Occupied Territories to that in the northern part of Cyprus. But it does seek to question the legitimising effect that courts and tribunals may have on continuous territorial occupations contrary to international law, whether pursued by a lawful or an unlawful State.

Conclusions

The link between States' reluctance to support a Resolution asking them not to recognise any alteration in the status of Crimea consequent to the referendum held in 2014 and the ECHR' acceptance of certain acts of a legislative, executive and judicial nature adopted by the "Turkish Republic of Northern Cyprus" does not appear in obvious terms. However, both situations illustrate a certain hesitation, not to say unwillingness, to comply in absolute terms with the duty not to recognise

[105] Partly dissenting opinion of Judge Ress, *ibidem*, para. 2.

[106] The movie *The Law in these Parts* by Ra'anan Alexandrowicz and Lira Atzmor (2011), available at: https://www.thelawfilm.com/eng#!/the-film (accessed 15 March 2018).

unlawfully-created territorial situations; when there is a belief that the interests of the people affected by these situations are being taken care of. In that sense, the obligation of non-recognition may come under tension, a tension reminiscent of that potentially arising between the two different liberal aims characterising contemporary international law, one being very much attached to the structure of a legal international order relying on sovereign and equally independent States, and the other valuing respect for human rights and the choices made by people.[107] When the two aims coincide, the solidarity expressed against violations of fundamental principles of international law can adopt strong forms, as was the case towards the annexation of Kuwait by Iraq, in the course of which both Kuwait's sovereignty and its people's human rights were violated. But when the two aims do not coincide, or even seems to contradict one another, weaker forms of solidarity towards the unlawful situation will be adopted. This might explain the disinclination of certain States to condemn the annexation of Crimea. It might also help us understand the attitude of the ECHR, eager to protect human rights in the "Turkish Republic of Northern Cyprus," and ready to use all means available to make that protection effective, even if this runs the risk of endangering the protection of States' sovereignty and territorial integrity.

Abstract: The duty not to recognise entities created in violation of fundamental principles of international law – such as the prohibition on the use of force, and people's right to self-determination – is anchored firmly in customary international law. However, the recent practice of States with regard to the "Republic of Crimea" and its annexation to Russia, as well as decisions adopted by the ECHR, in particular as regards the "Turkish Republic of Northern Cyprus," would seem to challenge this duty, its validity and its compulsory character, to some extent. This article seeks to verify whether these developments have called into question, or altered, the obligation; and it argues that they have not – in the light of the justifications produced by the actors concerned, whether they be States or judges.

Keywords: unlawful use of force, non-recognition, puppet States, *ex injuria jus non oritur*

[107] E. Tourme Jouannet, *The Liberal-Welfarist Law of Nations : A History of International Law*, Cambridge University Press, Cambridge: 2012.

Non-recognition and State Immunities: Toward a Functional Theory

*Margaret E. McGuinness**

Introduction

Entities seek to be treated as states within the international community in order to accrue the benefits of statehood. Immunity from the jurisdiction of the laws and courts of foreign states is one of those benefits. Entities may also seek immunities from adjudication before international courts and other bodies, where that is available for the entity or its representatives. By ensuring that the official acts of a state and its representatives are not subject to legal jurisdiction and adjudication by foreign states, the doctrine of state immunity serves to facilitate inter-state cooperation. By extending immunity to other, co-equal states, the state members of the international community give effect to the legal principle of the sovereign equality of all states. In this way, the modern doctrine of state immunity is seen as a mechanism reinforcing an international system governed by the rule of law, not politics.[1]

Claims of state jurisdictional immunity arise in cases involving non-recognized entities[2] in scenarios whereby: (1) an entity is seeking statehood through separation from another state or other means, but is not yet recognized as a state by the forum jurisdiction; (2) an entity is not recognized as the new government of a state

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[1] *See* H. Fox, P. Webb, *The Law of State Immunity*, Oxford University Press, Oxford: 2013, p. 1.

[2] In this paper, I use the term "non-recognized entity" to describe all these scenarios, although each may raise different issues in domestic immunities law. The discussion of cases makes clear which claims involve recognition of a new state or new government.

already recognized by the forum jurisdiction;[3] or (3) two or more entities present conflicting claims to represent the government of a state already recognized by the government of the forum jurisdiction.

Each of the above situations also presents issues relating to official immunity claims for those individuals purporting to represent the non-recognized entity. Each also raises issues regarding membership, and ongoing representation of a member state, in international organizations, including potential attachment of immunities to those activities carried out in furtherance of the functions of membership.

The claim of a non-recognized entity to state immunity challenges the purported non-political nature of modern immunity law, revealing a paradox at the heart of the doctrine. An entity seeks recognition by a foreign state or international organization so that it may invoke immunity for its official acts. An entity seeking immunity is invoking a legal mechanism through which it may demonstrate that it is, in fact, a state or a government representing a state. Entities that are not recognized by a foreign state will seek immunities for the practical purpose of protecting state assets and officials from foreign judgments, but also because they seek the politically legitimizing effect that immunity bestows. An entity that accrues the obligations of statehood, without the protection of state immunity, would find any legal benefits of statehood weakened substantially. Thus judicial determinations of immunity often present the most public manifestations of contestations over recognition. The extension of immunity by a foreign court serves to validate an entity's claim to be a state, or a representative's claim to be the government of a state.

This paper surveys the current practice of leading states on questions of immunity for non-recognized entities. The rules governing the modern doctrine of state immunity are created by international law. As implemented, however, immunity law is modified by domestic law, including separation of powers doctrines and constitutional limitations on courts to engage in international relations, and therefor inconsistent. The recognition practices of states – generally engaged in by executives – are also inconsistent. While recognition and non-recognition are influenced by international law, in many of the recent questions of recognition and non-recognition, state practice reflects different interpretations of the requirements of international law, different domestic law approaches, and different political preferences.[4] Thus,

[3] For a discussion of "recognition of governments" as a legal concept, *see* ILA, *Recognition/Non-Recognition in International Law (Third Report)*, 77 International Law Association Reports 533 (2016), pp. 534–536 ("ILA Recognition Committee, Third Report 2016"). Some commentators have objected to the development of the practice of government recognition, preferring instead to require states to engage in formal legal relations with *de facto* governments of states, even where those governments come to power extra-constitutionally or in violation of international law. *See ibidem,* p. 535.

[4] This lack of a cohering international law of recognition or non-recognition is reflected in the work of the International Law Association Committee on Recognition and Non-Recognition. *See First Report*, 75 International Law Association Reports 164 (2012); *Second Report*, 76 Inter-

rather than operating as international law, recognition by most states is engaged in as a political act with legal effects. For a recognized entity, the domestic legal effect of recognition generally includes full access to courts, and the right to invoke state immunity from jurisdiction in cases where this would be applicable.[5] Inconsistencies arise in the practice of states addressing the circumstances, if any, in which a non-recognized entity is entitled to immunity or other jurisdictional benefits.

1. State Immunity under international law

The customary international law of law of state immunities has narrowed considerably in the past century, moving from an absolute immunity approach under which all activities of sovereigns were immune from adjudication by another sovereign's courts, to a restrictive approach under which only certain activities performed by states *qua* states are entitled to immunities. As described in a leading treatise by Hazel Fox and Philippa Webb, "[t]he law of State immunity relates to the grant in conformity with international law of immunities to States to enable them to carry out their public functions effectively and to the representatives of States to secure the orderly conduction of international relations."[6] State immunity is defined as "a grant by domestic courts that is *governed by international law*; applicable to states *to enable the effective carrying out of public functions* of the state; and applicable to *representatives engaging in orderly international relations*".[7] It is worth addressing each of these attributes, before turning to the particular problem of immunity and non-recognition.

1.1. Governed by international law

While modern state immunity is squarely situated within international law, historically, the source of the law on state immunity was not always articulated clearly by courts, particularly in legal systems whose immunity doctrines derived from legal doctrines preceding the emergence of the post-Westphalian international order. The application of immunity as an international law doctrine is affected by the ways in which courts incorporate international law, as, for example, in dualist constitutional systems. Additionally complicating the application of

national Law Association Reports 424 (2014), and ILA Recognition Committee, Third Report 2016, *supra* note 3. This phenomenon of fragmented, national interpretations and approaches to international law is not limited to the doctrines surrounding immunities or statehood and recognition. Anthea Roberts has argued that this is a core problem across the globe, challenging the very nature of international law. *See* A. Roberts, *Is International Law International?*, Oxford University Press, Oxford: 2017.

[5] *See* discussion at section 2.1 for summary of US practice regarding recognized entities.

[6] Fox, Webb, *supra* note 1, p. 1.

[7] UN Convention on Jurisdictional Immunities of States and their Property, UN GA Resolution 59/38 of 2 December 2004, A/RES/59/38, Annex ("UNCSI") (italics added).

state immunity has been the absence of one definitive source for international law on immunity. For centuries, the law om state immunity has been practiced as customary international law, whereby state practice is combined with state expression of *opinio juris* defining its scope and contours. The customary international law of immunity is now codified in the 2004 UN Convention on the Jurisdictional Immunities of States and their Property (hereinafter "UNCSI"), the first universal treaty to address the rules governing immunity. Though UNCSI is not yet in force, several important jurisdictions have undertaken to incorporate its rules. And, as a comprehensive multilateral convention, UNCSI may serve as evidence of *opinio juris*, and thus an up-to-date source of immunities doctrine for courts seeking definitive guidance.

Prior to the UNCSI, the customary international law of state immunities had been supplemented by treaties, including dozens of bilateral treaties entered into in the first half of the 20th Century.[8] Multilateral treaties that covered particular types of state-owned property also included immunities provisions, including, for example, specific immunities of warships, aircraft, and other vessels arising from some obligations of the Geneva Convention on the High Seas, UN Convention on the Law of the Sea, and UNESCO Convention.[9] Fox and Webb describe the treaty provisions relating to state immunity law as creating four categories of treaty practice as source law:

(i) provisions relating to a particular State, activity, or State property in respect of which the contracting parties agree not to plead immunity;
(ii) the 1926 Brussels Convention and 1934 Protocol on State Owned or Operated Ships;
(iii) the European Convention on State Immunity 1972;
(iv) projects for the codification of the law of State immunity.[10]

While the UN SCI is the culmination of the fourth category, the first three treaty categories have also informed the implementation of state immunities in the domestic law of states, as well as interpretations of the scope of immunity by courts.

[8] The first sets of treaties addressed codification of the commercial activity exception for Germany and the new states created after World War I. *See* Fox and Webb, *supra* note 1, p. 107, ft 34 (describing the provisions of the Treaties of Versailles, St. Germaine, Neuilly, Trianon, and Sevres as they prohibited immunities when "Government engages in International Trade"). The second set of treaties related to defining the scope of the commercial activities exception with the USSR and other socialist states (*ibidem*, pp. 107–108; fn. 35–37). The third set was the model "Friendship, Commerce and Navigation" bilateral treaties the US entered into with a number of states, to define both the scope of jurisdiction over the state and the execution of judgments on a reciprocal basis (*ibidem*, p. 108, n. 38). The practice was discontinued because of concerns that the treaty provisions made it easier for foreign courts to assert jurisdiction over the US; *ibidem*, n. 39, citing J. Crawford, *Execution of Judgments and Foreign Sovereign Immunity*, 75 American Journal of International Law 821 (1981), p. 827.

[9] *See* Fox & Webb, *supra* note 1 at 108–109. *See* discussion at *ibidem,* pp. 111–112.

[10] *Ibidem,* p. 106.

Finally, while the doctrine of state immunity derives from international law, the latter does not of itself resolve the application of immunity as it arises in actual cases. That is because the claim of state immunity arises in the context of domestic litigation, specifically in a plea made before a court by a party - individual or entity – claiming immunity from jurisdiction and therefore also the application of legal responsibility by the forum court. In this way, immunity is a mixed claim that arises from international and domestic law.[11] Generally, domestic law provides the jurisdictional rules, which are viewed as procedural in nature, but which also carry substantive rights. The mixed nature of the immunity pleading - international law/domestic law and substantive/procedural - means that courts adjudicating claims will draw on multiple sources, including in defining the nature of activities for which of entities are seeking immunity and in characterizing the work of an entity's representatives.

1.2. Carrying out the public functions of the state

The second element of state immunity law addresses the context in which immunity may be invoked. Courts looking to determine whether the acts of a particular state or individuals render jurisdiction over the state or individuals improper may draw on multiple theories of jurisdiction, as well as multiple definitions. The question of what activities of the state trigger the application of immunity, including through determinations as to whether activities at issue "enable the effective functions of the state," is therefore complicated by potentially conflicting sources and rationales for immunity. Fox and Webb describe the modern approach as following three different theoretical models, which are a useful starting point from which to examine the scope of the state's "public functions." These are: (1) The "absolute doctrine," under which all state activity is immune on the basis of "exclusive competence" joined by the concept of sovereign independence within a competitive world; (2) The "restrictive model," under which distinction is drawn between the private and public acts of a state; and (3) The "immunity as procedural plea" model, which focuses on the process under which immunity is raised.[12]

Shifts in state practice and codification of immunity law over the course of the 20th Century moved toward the restrictive model, which limits immunities for states to official acts beyond commercial activities. Determining what acts are commercial has proven problematic in some cases, including those involving claims over sovereign debt.[13] It is perhaps not surprising that inconsistency is a feature of court determinations of what acts constitute "public functions," and whether the act of a state covered by immunity is necessary for the "effective" discharge of those functions.

[11] *See ibidem,* pp. 17–21. *See* discussion of cases at section 2 *infra*.

[12] *See ibidem*, pp. 4-5.

[13] This has led the Supreme Court of the US to adopt the "nature" vs. "purpose" distinction in the application of the commercial activities exception of the US Foreign Sovereign Immunities Act. *See Republic of Argentina v. Weltover Inc.*, 504 U.S. 607 (1992).

For some time, criminal liability for acts in violation of international criminal or human rights law represented a clear exception to the scope of immunity that a state might enjoy before international tribunals. However, foreign courts may not extend criminal-law jurisdiction over foreign states. Recent developments are less clear on whether a foreign head of state or other official may be held criminally liable in foreign courts for official acts, and also whether those officials may be liable for civil damages.[14] However, the 2012 ICJ decision in *Germany v. Italy* made it clear that a domestic state court's jurisdiction over the sovereign itself, *i.e.,* the state *qua* state, will not attach to acts carried out as part of the state's public function – even where the acts committed amounted to international crimes.[15] Further, *Germany v. Italy* challenged the modern model by raising a fundamental technical procedural barrier (*i.e.,* the *ratione personae* jurisdiction over the sovereign state itself) in a case seeking civil damages for acts outside the scope of permissible public acts of the state.[16] This opinion complicates issues of tort compensation for violations of international criminal or human rights law brought against states in a foreign court, even where international law supplies a rule or decision establishing violations as beyond the lawful public authority of the state.[17] This raises some doubt as to whether the so-called human rights tort exception to state immunity will be incorporated into the restrictive theory of immunity.[18] And it raises the

[14] For a comprehensive discussion of immunity as it relates to state or official immunity for breaches of international criminal or human rights law, *see* R. Van Alebeek, *The Immunity of State and Their Officials in International Criminal Law and International Human Rights Law*, Oxford University Press, Oxford: 2007.

[15] Germany had conceded that the conduct of its forces was unlawful. Contra the ICJ ruling, an earlier case in Greece found immunity did not attach to such conduct for adjunct torts claims brought in domestic courts. *See* discussion of *Ditomo* case by F. De Santis di Nicola, *Civil actions for damages caused by war crimes vs. State immunity from jurisdiction and the political act doctrine: ECHR, ICJ and Italian Courts,* 2 International Comparative Jurisprudence 107 (2016), p. 108.

[16] ICJ, *Jurisdictional Immunities of States (German v. Italy, Greece Intervening)*, Judgment, 3 February 2012, ICJ Rep 2012, para. 93. Germany admitted that the acts of its military personnel during World War II were in violation of international law, and therefore not permissible state acts. The challenge was to whether Italian courts had proper jurisdiction to provide a remedy, where immunity *ratione personae* extended to the German state.

[17] The extent to which international criminal law and international investment law apply a narrower scope of immunity to states is a topic that deserves further study in the context of non-recognized entities. *See e.g.* R. Van Alebeek, *The Immunity of States and Their Officials in International Criminal Law and International Human Rights Law*, Oxford, Oxford University Press: 2007 (laying out the case for narrowing functional immunity to exclude immunity for states and officials whose acts violate international criminal or human rights law); and A.K. Bjorklund, *Sovereign Immunity as a Barrier to the Enforcement of Investor-State Arbitral Awards: The Re-Politicization of International Investment Disputes*, 21 American Review of International Arbitration 211 (2010), p. 211 (describing challenges to enforcing investment arbitration awards against states, even where immunity is waived under treaty).

[18] *See* De Santis di Nicola*, supra* note 15. As di Nicola has noted, scholars have considered human rights tort claims "another exception to the rule of State immunity from jurisdiction"

stakes for non-recognized entities seeking immunity from civil suits over "official" acts.

1.3. Orderly international relations

The extension of immunities to representatives of states has long followed an approach that takes seriously the idea that judicial equality is necessary for the smooth functioning of international relations. Coupled with the requirement that officials and representatives of states may only invoke immunity from jurisdiction in respect of their own acts carried out in pursuit of the state's public functions, the "orderly international relations" prong makes clear that immunity is driven by the functioning of an international system, and not by unilateral political considerations of legitimacy or illegitimacy reflected in recognition decisions.[19]

1.4. A note on other non-justiciability doctrines

While this paper focuses on immunities, the international law of state immunity is not the only means by which domestic courts reject adjudication of claims against states and their representatives. Non-justiciability doctrines (sometimes referred to as judicial abdication[20]) may have the same effect as state immunity, in that they result in a court's refusal to adjudicate claims in which the acts of a sovereign are at issue in a particular litigation. In the United States, the act of state doctrine performs this function and may be applied to any state that is recognized, regardless of whether the government has been formally recognized, or whether diplomatic relations exist between the United States and the entity claiming to be a government. The act of state doctrine is generally applied to measures taken by a foreign state within its own territory, the effect being the dismissal of any claims that would seek to deny those territorial actions legal effect, as with confiscatory measures.[21]

2. Non-recognized entities and claims for immunities in domestic courts

The decision to recognize or not recognize an entity claiming to be a state is generally taken as a political act by a state's executive.[22] While most states no longer

where the forum court is "awarding damages to victims of serious violations of human rights committed by a State." *Ibidem,* p. 108.

[19] Fox and Webb describe the current law governing the immunities of representatives – more specifically the "immunity of individuals acting on behalf of the State" – as conflating *ratione personae* (person) and *ratione materiae* (status) into one analysis of "immunities enjoyed by state officials." Fox, Webb, *supra* note 1, p. 537.

[20] *See e.g.* De Santis di Nicola, *supra* note 15.

[21] *See* discussion in section 2.1 *supra*.

[22] *See* ILA Recognition Committee, First Report, 2012, *supra* note 4. Some state reporters noted that the question of state recognition is a mixed question of politics and law. *See ibidem*, p. 186, and discussion notes, pp. 193–194.

engage in any formal practice of recognizing governments, the cases in which government recognition does still take place generally entail executive statements being made.[23] If a state and its government gain the explicit recognition of the state in which a court is situated, the status of the entity claiming immunity is not at issue. In those cases, courts may be confronted with the scope of the immunity claimed, or the status of individuals claiming to represent the state or its government, but not the issue of whether the entity is a state or government for the purposes of immunity. For purposes of state immunity, a recognized state is a state, and a recognized government is a government. It is cases of non-recognition that present a challenge to courts' assessment of claims of immunity.

Non-recognition of an entity by a forum state can be manifested in different ways. A state may take affirmative steps of non-recognition of an entity through a declaration or certificate, or a submission to the forum court, in which it explicitly rejects recognition of an entity's status as a state or government. A state may also takes steps that appear to represent acts of non-recognition, such as expulsion of an entity's diplomatic representatives, withdrawal of its own diplomats from the entity's state or territory, the imposition of economic sanctions, or other political measures. In some cases, a state may remain silent on the issue of recognition for reasons related to domestic or international politics or a stake in unresolved issues relating to the entity's claim to statehood or status as a government. While some general trends have emerged, the practice of courts in leading jurisdictions around the world has generated differentiated treatment of the different ways states fail to fully recognize an entity – along a continuum that begins with affirmative recognition and ends with affirmative non-recognition.[24]

The matter of the judicial status of a non-recognized entity generally arises when that entity either seeks access to the forum court as a claimant, or access to property located in the forum state, or otherwise asserts state immunity as a jurisdictional defense to a suit before the forum court. On occasion, the question also arises when two or more entities claim to be the legitimate representatives of a state already recognized by the forum government. In cases in which the non-recognized entity is a claimant, the forum court must determine whether that entity is a juridical person for the purposes of standing. Immunities are not at issue in these cases, except perhaps where a defendant to the action raises counter-claims against the entity.[25] When non-recognized entities are sued, claimants either assume, or assert

[23] *See* ILA Recognition Committee, Third Report 2016, *supra* note 3, pp. 538–541. (State practice for recognition of governments is generally one of recognition implied by the action of the executive extending diplomatic relations.)

[24] For a discussion of practice of expressing approval or disapproval of regimes through a continuum of acts that may be interpreted as political recognition or non-recognition, *see* generally ILA Recognition Committee, Third Report 2016, *supra* note 3.

[25] As discussed below, courts will often deny standing to a non-recognized entity but allow the non-recognized entity to claim immunity from jurisdiction.

in their pleadings, that the defendant entity is not entitled to immunity from jurisdiction. [26]

In terms of both the standards applied to determinations of status and the rationales for granting or denying immunity, relevant state practice as applied to non-recognized entities has tended to lack consistency from one leading jurisdiction to another. And, as the international law of state immunity has become increasingly codified, and exceptions to it have expanded across several areas of international law, courts have shifted toward a more consistent application of the relevant international law. However, the recognition and non-recognition practices of executives continue, to influence the extent to which courts will apply the international law of statehood to non-recognized entities seeking the benefits of immunity. Recognition practice thus injects additional inconsistency and uncertainty into immunities practice. However, the fact that some forum courts have embraced the *de facto* approach in determining statehood demonstrates that courts regard themselves as having the institutional competence to make such determinations of status. Nonethelss, , domestic constitutional limitations on courts may affect their full institutional capacity to make determinations on statehood, or their effective control in cases where executives in the same country have taken formal steps relating to non-recognition, or have otherwise chosen to intervene in a court's particular immunity determination.

2.1. The United States

The United States applies a dualist approach to the implementation of international law. As a result, US courts as are bound by the structural constraints of the Constitution, including federalism and the separation of powers, as they adjudicate claims arising from customary international law and from treaty. Under the Constitution, the President possesses exclusive power to extend recognition, to declare non-recognition, or not to act at all when an entity claims to be a new state, or to represent a government acting on behalf of a state.[27] The President retains

[26] For a discussion of the pleading practice of state immunity under the US Foreign Sovereign Immunities Act, *see* D.P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, Federal Judicial Center. International Litigation Guide 2013, pp. 13–25.

[27] Besides vesting "all executive power" in the President, the US Constitution confers on the President the exclusive power to nominate and, with the advice and consent of the Senate, appoint Ambassadors to foreign countries and also to receive ambassadors "and other public Ministers" from foreign countries. Taken together, the Executive Vestiture Clause, the power to name US Ambassadors (with congressional approval), and the power to receive foreign Ambassadors provide the basis for executive branch power of recognition or non-recognition of foreign states and governments. US Constitution, Art. II. ("The executive Power shall be vested in a President of the United States of America"); Sec. 2 ("He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint

other broad constitutional powers over foreign affairs, which imply an institutional interest in judicial decisions that grant or deny immunity to a foreign entity.[28] In the past forty years, adoption of the Foreign Sovereign Immunities Act (FSIA) and other legislative enactments, as well as the abandonment of the executive-branch practice of extending formal recognition to new governments, has largely – though not entirely – removed the executive branch from the judicial determination of state immunities. Through these legislative and executive moves, the US has sought to separate political considerations of recognition – and the range of diplomatic options for expressing political approval or disapproval of foreign regimes – from judicial determinations of jurisdiction and the rights of parties to litigation in US courts.

In its early years, the United States confirmed that it would respect the customary international law practice of extending absolute immunity of foreign sovereigns from the jurisdiction of US courts.[29] The US doctrine of absolute foreign sovereign immunity emerged from a combination of the common law of sovereign immunity and customary international law governing immunity of sovereigns.[30] The articulated rationale for applying absolute immunity was one of international comity, i.e. judicial respect accorded to the status of the foreign sovereign, as well as international law.[31] Recognition practice in those early decades reflected a *de facto* approach to the status of foreign regimes that was rooted in the same political philosophy regarding self-governance that had animated the United States's own

Ambassadors…"); and Sec. 3 ("he shall receive Ambassadors and other public Ministers…"). *See also Zivotofsky ex rel. Zivotofsky v. Sec'y of State*, 725 F.3d 197, 211 (D.C. Cir. 2013),*aff'd sub nom. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076 (2015) ("The Supreme Court has more than once declared that the recognition power lies exclusively with the President").

[28] The US Supreme Court in *Samantar v. Yousuf*, 130 S. Ct. 2278 (2010), held that the FSIA did not eliminate the common law claim of sovereign immunity of individual foreign officials. In so holding, the court supported the executive branch's interpretation of immunity under the common law as supplemental to the FSIA, a position that commentators have noted was reached not because of an executive act (the case did not hinge on issues of recognition), but rather an executive opinion as to the law, which had been articulated in an *amicus curiae* brief to the court. For a useful discussion of disaggregating the executive *acts* from executive *litigation positions*, *see* P.B. Rutledge, *Samantar and Executive Power*, 44 Vanderbilt Journal of Transnational Law 885 (2011), p. 909.

[29] Chief Justice Marshall's opinion in the 1812 case *Schooner Exchange v. M'Faddon* treated sovereign immunity as a self-evident feature of the international system of sovereigns when he noted, "All sovereigns have consented to a relations of that absolute and complete jurisdiction within their respective territories which sovereignty confers." *Schooner Exchange v. M'Faddon*, 7 Cranch 116 (1812).

[30] D.P. Stewart, *The Immunity of State Officials Under the UN Convention on Jurisdictional Immunities of States and Their Property*, 44 Vanderbilt Journal of Transnational Law 1047 (2011), p. 1061.

[31] *See* discussion in C.A. Bradley, L.R. Helfer, *International Law and the U.S. Common Law of Foreign Official Immunity*, 2010 Supreme Court Review 213 (2011), p. 217.

recent achievement of independence from Great Britain.[32] Thus, as new regimes declared themselves independent states in Latin America in the early 19th Century, for example, the US recognized those regimes as states and governments on the basis of *de facto* territorial control and a political acceptance of these new governments as the legitimate sovereign expression of the governed, replacing the predecessor imperial powers.[33] *De facto*ism – the recognition of the sovereignty of a state that followed from actual control and governance – was the dominant approach.[34] And for the first half of the 19th Century, the executive branch pursued a practice of issuing formal statements of recognition or non-recognition of both governments and states.[35]

Following the US Civil War, federal courts were faced with the question of whether some acts of the otherwise non-recognized and illegitimate government of the Confederacy would require judicial cognizance.[36] The courts accepted that legal respect and judicial recognition of some acts of the non-recognized entity and its courts would be required, as a matter of justice. This created a precedent for courts that would later struggle with whether and when to give judicial cognizance for acts of non-recognized entities, and made *de factoism* a choice that reflected equitable treatments of parties before the court, thus separating political legitimacy from adjudications of private claims.

Federal courts adjudicating maritime and other cases arising out of growing international commercial activity by the United States in the late 19th Century were faced with immunity claims as regards both jurisdiction over claims and the enforcement of judgments. Courts were also faced with adjudicating claims that arose from acts that took place in foreign territory, but nevertheless affected the interests of US litigants. These cases often touched on sensitive foreign-affairs questions. It was as an adjunct or supplement to jurisdictional immunities, and as a way to manage transnational litigation claims without interfering with the foreign-affairs function of the executive, that the Supreme Court adopted the act of state doctrine. As a judicial tool, this elided the question of recognition *per se*, but afforded an alternative means by which adjudicatory authority over the acts of a foreign

[32] *See* M. Fabry, *Recognizing States*, Oxford University Press, Oxford: 2010, pp. 54–57. *See also* M.B. West, S.D. Murphy, *The Impact on U.S. Litigation of Non-Recognition of Foreign Governments*, 26 Stanford Journal of International Law 435 (1990), p. 443 ("Jefferson's policy was based on the idea that a new government inevitably arose from the consent of the governed.").

[33] *See* Fabry, *supra* note 32, pp. 54–57.

[34] *Ibidem*, p. 55.

[35] *See* West, Murphy, *supra* note 32, p. 443.

[36] *See* S. Lubman, *The Unrecognized Government in American Courts: Upright v. Mercury Business Machines*, 62 Columbia Law Review 275 (1962), pp. 292-293 (discussing post-Civil War cases addressing acts of the Confederacy and its courts); West, Murphy, *supra* note 32, p. 454 (noting that in this era, "courts differentiated between acts with consequences beyond the borders of the unrecognized government, to which the courts did not give effect, and acts of unrecognized governments dealing solely with private and domestic matters, to which the courts did give effect").

sovereign might be declined. As scholars have noted, "the act of state doctrine was intertwined with considerations of immunity," but "evolved into a distinct doctrine that was grounded in considerations of separation of powers."[37]

The case of *Underhill v. Hernandez* involved the allegedly tortious acts of a Venezuelan revolutionary commander whose forces were not recognized by the United States government as the "legitimate" government of Venezuela.[38] The Supreme Court nonetheless ruled that it could not judge the acts of the revolutionary forces, as they were the *de facto* government of that territory. The Court's reasoning echoes the sovereign equality rationales of state immunity: "[E]very sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[39] Applying the reasoning to a regime that it determined to be in *de facto*, effective control, the Court underscored that the act of state doctrine could not be "confined to lawful or recognized governments."[40] Importantly, on the question of individual immunity, the Court also noted that individual officials were entitled to "immunity (…) from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or military commanders."[41]

It mattered in *Underhill* that the new Venezuelan government eventually did receive recognition from the executive branch, and the Court acknowledged that the executive had a role to play, noting that there are "facts of which the Court is bound to take judicial notice, and for information as to which it may consult the Department of State."[42] But *Underhill* demonstrated that courts viewed themselves as institutionally capable of making determinations of *de facto* control for the purposes of adjudicating cases.

During the latter half of the 19th Century, the US moved away from a pure *de facto* approach to state recognition, in the direction of a practice that looked to assurances from new states and governments that they would adhere to international legal obligations.[43] The US practice of issuing formal statements of recognition or

[37] *See* Bradley and Helfer, *supra* note 31, p. 217.

[38] *Underhill v. Hernandez*, 168 U.S. 250 (1897).

[39] *Ibidem*.

[40] *Ibidem*, p. 252.

[41] *Ibidem*.

[42] *Underhill v. Hernandez*, *supra* note 38, p. 253. The court cited the English case of *Mighell v. Sultan of Johore*, which held that the decision of recognition by the Queen of a sovereign, and certification of such by her minister to the court regarding the status of the sovereign, must be treated as dispositive. Mighell v. Sultan of Jahore [1894] 1 Q. B. 149.

[43] West, Murphy, *supra* note 32, pp. 443-444, and n. 36 (noting that Philip Jessup decried this approach of "extending recognition or withholding if from de facto governments for reasons other than those governments' factual control of their countries is not conducive to the smooth workings of international affairs; it is not conducive to Pan American amity.")(citing P. C. Jessup, *The Estrada Doctrine*, 25 American Journal of International Law 719 (1931), p. 723).

non-recognition of governments continued into the 20th Century. This set the stage for major conflicts concerning claims of immunity (as well as determinations of standing and the act of state doctrine) arising from the new Soviet government of Russia. In the 1923 case of *Wulfsohn v. Russian Socialist Federated Soviet Republic,*[44] the New York Court of Appeals (the highest court in New York State) held that the Soviet government, though expressly non-recognized by the United States, was entitled to sovereign immunity. The court separated the institutional competency and constitutional authority of the executive branch to extend or deny recognition to a foreign entity, from the judiciary's institutional competency and duty to decide the rights and obligations of the parties before it, in line with the facts.[45]

The case involved an action by plaintiff Wulfsohn as a US citizen against the Soviet government's confiscation of furs located in Siberia. While the lower court denied the Soviet government claim of immunity on the ground that sovereign immunity, as set forth in *Schooner Exchange* and its progeny, was based on a rationale of international comity, this approach was reversed by the Court of Appeals. According to the lower court, the US government's non-recognition reflected a rejection of comity.[46] In the absence of recognition, therefore, the Soviet government lacked both the standing to bring a claim in a US court and the right to claim sovereign immunity.[47] The lower court rejected the Soviet government's argument that, if it had no standing to bring a suit or to claim immunity, it also could not be considered a juridical entity for the purposes of legal liability and personal jurisdiction.[48] Citing British case law addressing an unrecognized entity's juridical status, the court held that the unrecognized entity would be treated as a "foreign corporation" by the court.[49] Much of the lower court's reasoning related to the legitimacy of the new Russian government, and the fact that it had engaged in confiscations in violation of individual property rights, i.e. acts that the US government had expressly condemned.[50]

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[44] 234 N.Y. 372 (1923).

[45] For a commentary on the *Wulfsohn* case that urges a reconsideration of its holding in the post-FSIA era, *see* J. Hines, *Why do Unrecognized Governments Enjoy Sovereign Immunity – a Reassessment of the Wulfsohn Case*, 31 Vanderbilt Journal of Transnational Law 717 (1991), p. 760.

[46] "So the right of immunity of a foreign government from suit is not based upon absolute right by virtue of its sovereignty, but upon international comity." *Wulfsohn v. Russian Socialist Federated Soviet Republic,* 202 A.D. 421, 422, 195 N.Y.S. 472, 474 (App. Div. 1922),*rev'd*,234 N.Y. 372, 138 N.E. 24 (1923)(Citations omitted).

[47] *See ibidem*.

[48] *Ibidem*.

[49] *Ibidem*. As one commentator notes, "somewhat incomprehensibly, the [lower] court added that the people of Russia remained responsible for this corporation's acts." Hines, *supra* note 45, p. 720. This reference to the Russian people's responsibility may betray the lower courts judge's view that the confiscatory acts of the new Russian government were illegitimate and illegal.

[50] For these propositions, the court cited both British case law and the words of CJ Marshall in the US Supreme Court case, *United States v. Percheman*, 7 Pet. 51–86, 8 L. Ed. 604.

The appeals court rejected the lower court's reasoning, holding that the Soviet government was the *de facto* government, and that recognition or non-recognition by the US government did not alter that fact. In so doing, the court explicitly rejected a constitutive approach to recognition: "The result we reach depends upon more basic considerations than recognition or nonrecognition by the United States. Whether or not a government exists, clothed with the power to enforce its authority within its own territory, obeyed by the people over whom it rules, capable of performing the duties and fulfilling the obligations of an independent power, able to enforce its claims by military force is a fact, not a theory. For its recognition does not create the state, although it may be desirable."[51]

The court admitted that recognition might be a relevant consideration in some cases where the actual control of the state was contested, as during active conflict between warring parties: "Again, recognition may become important where the actual existence of a government created by rebellion or otherwise becomes a political question affecting our neutrality laws, the recognition of the decrees of prize courts, and similar questions. But, except in such instances, the fact of the existence of such a government whenever it becomes material may probably be proved in other ways."[52]

The court further rejected the idea that comity, rather than the fact of statehood and the sovereign equality of states, provided the basis for immunity: "They may not bring a foreign sovereign before our bar, *not because of comity, but because he [the foreign sovereign] has not submitted himself to our laws. Without his consent he is not subject to them*.[53] As for the scope of immunity, the appeals court held there was no question that absolute immunity would extend to confiscations of property carried out by the state in its own territory. This was because, in the early part of the 20th Century, absolute immunity was the customary international law of state immunity; the international law of expropriation and investment protection was in its infancy.

That the court in *Wulfsohn* had no qualms about granting immunity to a non-recognized government that was hostile to the US reflected understandings of foreign-affairs powers during that era. The court's decision is nonetheless striking; unlike in cases in which the executive is silent, the US here had a clear, express policy of non-recognition of the Soviet government, which was not reversed until 1933.[54] This lack of deference to the executive is even more remarkable because the

[51] *Wulfsohn*, 234 N.Y. 372, 375, 138 N.E. 24, 25 (1923)

[52] *Ibidem.*

[53] *Ibidem* (italics added).

[54] The US articulated three reasons for withholding recognition from the new Bolshevik government beginning in 1917: (1) the refusal of the USSR government to honor previous Tsarist debts to the US; (2) refusal to honor prior Russian treaty obligations; and (3) the Soviet government's seizure of US citizens' property inside the USSR. *See* US State Department, Office of the Historian, *Recognition of the Soviet Union, 1933*, available at: https://history.state.

case arose, not in a US federal court, but in the state court of New York. Despite the formal federal policy of non-recognition, a great deal of commercial activity between the US and the Soviet Union continued throughout the 1920s, much of it centered in New York. The policy of the new Soviet government to expropriate private property within its territory, some of which was the property of US nationals and corporations, had resulted in a wave of litigation. New York courts were faced with how to handle the "reality" of the Soviet government as against what Professor White has called "the State Department's fiction that the 'Russian government' continued to be composed of refugee representative of the Czarist or Provisional regimes."[55]

Perhaps most important is the way in which, by rejecting comity – a judicial doctrine whose origin had been alternately interpreted as a requirement of international custom or of the Constitution, the *Wulfsohn* court rejected according political non-recognition any judicially cognizable legal effect for the purposes of immunity. *Wulfsohn* represents the high-water mark for court determinations of statehood and government status on the basis of effectiveness or *de facto* control, and has been cited in recent US and foreign court decisions in which the same *de facto* approach to questions of immunities for non-recognized entities is taken today.[56]

Wulfsohn can be seen as a judicial rebuke of executive practice at the time, something that would cause tension in foreign affairs in ways that infringed on constitutional prerogatives of the executive. But it can also be seen as a realistic assessment of the need for political approval of a regime to be decoupled from the reality of commercial engagement between that regime and US actors. Indeed, the *Wulfsohn* approach appears to be a necessary judicial response to the shift in recognition practice from one that reflected the facts of effective control over territory to one that is expressive of political disapproval.

While *Wulfsohn* represented an earlier era, what followed was an accretion and consolidation of foreign-affairs powers within the federal government, and specifically the executive.[57] Professor White has argued that the US policy of non-recognition of the Soviet government, and the lawsuits, like *Wulfsohn*, that followed, "prompted reconsideration of the principles and understandings of the orthodox constitutional regime."[58] As White observed, the pressure on courts to resolve claims

gov/milestones/1921-1936/ussr (accessed 15 April 2018). For a full discussion of the statements of non-recognition of the Soviet government from the Wilson administration to the Roosevelt administration, *see* G.E. White, *The Transformation of the Constitutional Regime of Foreign Relations*, 85 Virginia Law Review 1 (1999), pp. 77–79.

[55] White, *supra* note 54, p. 88.

[56] *See e.g. Parent and Ors v. Singapore National Airlines* (2003) (discussed below) (citing *Wulfsohn*).

[57] *See* White, *supra* note 54, p. 77.

[58] *Ibidem*, p. 78.

about "domestic distribution of assets claimed by Russian citizens, Russian and American banks, or American citizens holding property in Russia," had the effect of placing pressure on "established principles and understandings of the orthodox separation of powers and federalism paradigms [in US constitutional law.]"[59] Following these cases, the internal constitutional balance on foreign affairs questions shifted dramatically in favor of a national conception of foreign affairs power over the states and their courts, and an exclusive executive power over recognition and immunities. Judicial deference to executive preferences regarding both the status of entities and the scope of immunities to be granted would then characterize US judicial decisions through the middle of the mid-20th century.

Wulfsohn also pre-dates changes to the international law of statehood reflected in the Montevideo Convention, signed the same year as the Litvinov Agreement, which sought to formalize – and universalize – a modern doctrine of statehood. Moving from an approach considered constitutive of statehood, to one where recognition is merely declarative of *de facto* statehood, Montevideo provided criteria regarding statehood that could be ascertained by any competent judicial entity.[60] The geopolitical changes in the post-World War I period also prompted changes in state immunities law and practice in the US. At the time *Wulfsohn* was decided, immunities practice in state and federal courts was seen as an ordinary part of the common law, to be applied by judges. As Professor White has noted, the rise of executive interest in the development of a more restrictive approach to state immunity, one that, significantly, carved out exceptions for the commercial activities of states, meant that the State Department would displace the courts as "the adjudicator of foreign sovereign immunities."[61] With this shift in practice, courts looked to the executive branch for guidance, and, on a case-by-case basis, the State Department advised courts whether immunity was applicable. Where the State Department submitted such advice, the courts deferred; where the State Department was silent, the courts typically decided the issue "in conformity with the principles accepted by the Department."[62]

[59] *Ibidem*. As White notes, while US formal recognition of the USSR takes place with the 1933 Litvinov Agreement, the underlying constitutional issues are not resolved until the 1940s, when a series of cases signaled a shift in Supreme Court jurisprudence, expanding the ways in which Executive policy on issues of recognition and immunity became exclusive and binding on federal and state courts. *See ibidem*, pp. 98–146 (discussing *Curtis-Wright*, *Belmont*, and *Pink* cases).

[60] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 League of Nations Treaty Series 19 (hereinafter the "Montevideo Convention"). For a full discussion of the Montevideo criteria and state practice in applying them to recognition of states, *see* ILA Recognition Committee, First Report 2012, *supra* note 4, pp. 170–185.

[61] White, *supra* note 54, p. 146.

[62] *See* Bradley, Helfer, *supra* note 31, p. 219 (quoting *Republic of Mexico v. Hoffman*, 324 U.S. 30, 35 (1945)).

When the scope of the international law of state immunity narrowed following the Second World War, by shifting away from the former absolute sovereignty model to the restrictive model (whereby state participation in commercial activities was not entitled to immunity), so too did the State Department guidance to courts. This was made somewhat more formal in the 1952 Tate Letter process, through which the State Department would give guidance as to which activities were entitled to immunity and which were not.[63] Guiding the courts was the Tate Letter's central distinction between the acts of a state that were public and those that were not. There was no requirement for a foreign state seeking immunity to request a determination from the State Department, with the result that some cases received formal guidance, while others did not. Where the executive did provide a determination, the resulting court deference to the executive was viewed increasingly as politicized, in ways that made commercial engagement with foreign states (particularly communist states that controlled international trade within their jurisdictions) uncertain and risky for US commercial actors.[64] In turn, where the State Department did not provide guidance, courts were left to make their own determinations, with inconsistent results.

In the 1964 *Sabbatino* case, which implied recognition of the new government of Cuba, the Supreme Court of the United States found that "[p]olitical recognition is exclusively a function of the Executive."[65] This had the effect of separating "political recognition" as an act of political approval of a foreign government, from legal state recognition, which triggered the rights of the state (not the government) being sued.[66] In *Sabbatino*, application of the act of state doctrine allowed the federal court to refuse to adjudicate the legality of the new Cuban government's expropriation and nationalization of corporate assets.[67] However, the court's reasoning left it

[63] *See ibidem*, pp. 219–220 (noting that "Despite the [Tate] Letter's modesty about its potential impact on judicial decision making, courts followed the department's new restrictive immunity approach (…) [and] continued to defer to the department's case-by-case suggestions about whether to grant immunity (…)").

[64] *See e.g. ibidem*, p. 220 (discussing the ways in which the State Department was "lobbied" by foreign states seeking immunity in particular cases).

[65] *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410 (1964).

[66] "Political recognition is exclusively a function of the Executive. The possible incongruity of judicial 'recognition,' by permitting suit, of a government not recognized by the Executive is completelyabsent when merely diplomatic relations are broken." *Ibidem,* pp. 410–411.

[67] *Ibidem*, pp. 421-423. Justice Harlan noted, "If international law does not prescribe use of the [act of state] doctrine, neither does it forbid application of the rule even if it is claimed that the act of state in question violated international law." *Ibidem*, p. 422. Later, he noted: "The act of state doctrine does, however, have 'constitutional' underpinnings. It arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country's pursuit of goals both for itself and for the community of nations as a whole in the international sphere." *Ibidem,* p. 423.

uncertain whether this separation of "political recognition" of entities from judicial determinations based on statehood was a requirement of international law or a feature of the separation of powers required under the Constitution. Justice Harlan seemed to suggest that the application of the act of state doctrine reflected both a judicial competence to decide questions of law and an imperative that the judiciary should not harm the foreign relations of the US – both reflecting two values of the separation of powers.[68] However, regardless of its basis, the application of the act of state doctrine allowed the court to elide questions of commercial-activity exceptions to immunity, as well as the legality of the expropriation under international law, even where the decision not to adjudicate gave effect to the expropriation.

Despite the shift to executive deference where sovereign immunity was concerned, the issues of immunity and recognition, as reflected in the Second Restatement of Foreign Relations Law issued in 1965, appeared to follow the *Wulfsohn* approach of separating political non-recognition from legal adjudication of immunity to *de facto* states: "A claim of immunity as a foreign state may not be defeated by asserting (…) that a recognized state has no regime which is recognized as entitled to claim the immunity on its behalf."[69] This follows from the idea that a state's immunity is independent from its government status vis-à-vis the forum state, but flows from its status within the community of states and the *de facto* control of that entity of the state's territory. Recognition practice appeared to be less important as a means of opening or closing the courthouse to foreign state litigants.

But the State Department's policy of formal recognition of governments continued, as did its policy of taking a position on immunities claims. The results were inconsistent applications of immunity in cases that were otherwise similar, which made it riskier for US businesses to engage with foreign states, governments and their instrumentalities. In 1976, Congress responded to these business concerns by passing the Foreign Sovereign Immunities Act ("FSIA"),[70] which, like the European Convention on State Immunity adopted four years earlier,[71] codified the restrictive approach to immunity ushered in by the Tate Letter, and served to remove the State Department from the process of case-by-case determinations of immunity. [72]

[68] *See ibidem,* pp. 421–423. For an argument in favor of separating judicial rule-based determinations rooted in international comity from executive branch political determinations, *see* W.S. Dodge, *International Comity in American Law*, 115 Columbia Law Review 2071 (2015).

[69] Rest. 2d of Foreign Relations Law, Section 107, comment d. (1965).

[70] *See* 28 U.S.C.A. §§ 1602-11 (Jurisdictional Immunities of Foreign States) (hereinafter "FSIA").

[71] European Convention on State Immunity (adopted 16 May 1972, entered into force 11 June 1976) 74 European Treaty Series.

[72] The formal removal of the State Department from immunities determinations was announced in State Department Public Notice 507: "Under theForeign Sovereign Immunities Act, which becomes effective on January 19, 1977, the responsibility for deciding sovereign immunity questions rests exclusively with the courts. Jurisdictional attachments of foreign government property are no longer permitted, and execution on such property to satisfy a final judgment may

The FSIA provides the statutory basis for personal jurisdiction of a federal court over any foreign states and their representatives, and for removing any claims brought against foreign states from state court to federal courts, as well as the subject-matter jurisdiction over those same actors for acts that fell outside the scope of immunity.[73] As a result of the FSIA, jurisdiction over a foreign state or its representatives can only be obtained through the application of exceptions to immunity as articulated in the statute.[74] While the pre-FSIA practice of courts looked to the State Department for guidance, the US Supreme Court has stated, "'henceforth' both federal and state courts should decide claims of sovereign immunity in conformity with the [FSIA's] principles."[75]

The FSIA does not address the issue of recognition, and it does not define the term 'state."[76] But as a result of the US policy announced in 1977, as well as subsequent court practice, formal recognition is not viewed by courts as a prerequisite for a finding of statehood. Further, a statement of non-recognition is not necessarily fatal to a claim of *de facto* statehood for the purposes of immunity under the FSIA.

By the late 1970s, the US had shifted its executive practice in two ways that should have made it easier for courts to return to the *de facto* approach to non-recognition and immunity. These were: (1) the de-politicization of immunities determinations under the FSIA; and (2) the ending of the executive practice of formal recognition of governments, leaving the scope of approval or disapproval of foreign regimes to diplomatic and political acts that could more easily be separated from adjudications of a regime's status.

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be obtained only as provided in the statute." *State Department Policy on How to Treat Questions of Foreign Sovereign Immunities,* 1976 WL 351739 (Special Materials Nov. 10, 1976). In that same policy pronouncement, the State Department noted that, where it may have an interest in the litigation, it would no longer file statements of interest in immunity determinations, as such statements "would be inconsistent with the legislative intent of [FSIA]" but that the executive will "play the same role insovereign immunity cases that it does in other types of litigation – e.g., appearing as *amicus curiae* in cases of significant interest to the Government." (*Ibidem*).

[73] *See* D.P. Stewart, *The Foreign Sovereign Immunities Act: A Guide for Judges*, Federal Judicial Center. International Litigation Guide 2013, pp. 13-18.

[74] The relevant provision of the FSIA states: "subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter"; FSIA, §1604.

[75] *Republic of Austria v. Altmann*, 541 U.S. 677 (2004), p. 2249.

[76] The Supreme Court in the *Samantar* case addressed interpretation of the term "foreign state" in the FSIA as follows: "The term 'foreign state' on its face indicates a body politic that governs a particular territory." *See e.g.* Restatement § 4 [Restatement (Second) of Foreign Relations Law (1965)(defining "state" as "an entity that has a defined territory and population under the control of a government and that engages in foreign relations"). In § 1603(a), however, the Act establishes that "foreign state" has a broader meaning, by mandating the inclusion of the states' political subdivisions, agencies, and instrumentalities (*Samantar v. Yousuf*, 560 U.S. 305, 314 (2010)).

As regards cases of the non-recognized governments of *de facto* states, this simplified the job of the courts. In the 1987 Restatement of the Law (Third) of the Foreign Relations Law of the United States ("Restatement Third"), the American Law Institute reporters underscored the view that courts do not play an active role in recognition, except in limited circumstances: "Under the law of the United States (…) [c]ourts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, *if those acts apply to territory under the control of that regime and relate to domestic matters only.*"[77]

Like the Restatement Second, the Restatement Third preserved the availability of the act of state doctrine to find claims against foreign states non-justiciable, even where the regime is not recognized. The scope of immunity vis-à-vis those non-recognized entities is less clear, since the Restatement Third also notes that a presidential decision of non-recognition "is binding on State as well as federal courts."[78] The requirement appears to apply only in cases where the Executive has made an affirmative, formal statement of non-recognition. On the other hand, the Restatement Third also requires that the US "treat as the government of another state a regime that is in effective control of that state," thus explicitly adopting effectiveness as evidence of the *de facto* status of a government.[79]

The lack of clarity in the Restatement Third reflects an apparently material distinction that is not always made by courts or in commentary: the difference in US political practice towards an *unrecognized* entity as opposed to a *non-recognized* entity. In the former case, there has usually been no clear executive statement of policy, while in the latter the executive has made an express statement that the US would not recognize a supposed government or an aspiring state.[80] As regards entities claiming to be governments, the executive may also express its political approval or disapproval of the entity across a continuum of political acts, frequently reflected in the formal process of diplomatic relations.[81]

Despite the intent of the FSIA to codify and make more predictable the judicial determinations of state immunity, the statute, combined with the new executive-branch policy on recognition, did not resolve all issues coming before courts. First, the executive branch did not follow its new policy of abandoning formal declarations of recognition consistently, with the recognition of the PRC and the "de-rec-

[77] Restatement of the Law (Third) of the Foreign Relations Law of the United States ("Restatement (Third)") § 203.

[78] *Ibidem* § 205 comm. a, *citing to U.S. v. Belmont*, 301 U.S. 324, 331 (1937); *U.S. v. Pink*, 315 U.S. 203, 223 (1942).

[79] *Ibidem* § 203 (1).

[80] *See* discussion of US practice in ILA Recognition Committee, Third Report 2016, *supra* note 3, pp. 540-541.

[81] Taiwan is an important exception in US law, as discussed below.

ognition" of Taiwan being a prominent example.[82] Second, the executive's policy regarding recognition of governments did not extend to recognition of new states, an issue that, beginning in the 1990s, arose in the three significant contexts of the new states arising from the dissolution of the USSR; the new states arising following secession and armed conflict in Yugoslavia; and the post-Oslo Accords political status of the West Bank and Gaza, which an increasing number of states recognized as the state of Palestine. Third, despite the statutory provisions of FSIA to the effect that claims of foreign states to immunity be decided by courts of the United States, the executive branch has, in a small number of cases, filed an *amicus curiae* brief where the determination of immunity was deemed of particular interest to the US government.[83]

In the cases arising out of the former USSR, the executive made clear statements of recognition of the new states (some of which the US had not recognized formally as part of the USSR, even following the Litvinov Agreement of 1933).[84] In the case of the former Yugoslavia, the US extended recognition of statehood to some entities even prior to resolution of political or military conflict on the ground, while in other cases it withheld recognition until political and military uncertainties were resolved.[85]

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[82] *See* West, Murphy, *supra* note 32, at 457-458 (discussing exceptions to the new policy in the cases of the PRC, Iran, Philippines, Panama and Angola). *See also* S. Talmon, *Recognition of Governments: An Analysis of the New British Policy and Practice*, 63 British Year Book of International Law 231 (1993), p. 245 (discussing US practice to recognize or de-recognize governments in sensitive situations, including the PRC (and de-recognition of Taiwan), Panama (overthrow of government), Paraguay (overthrow), and Iran (overthrow)).

[83] The FSIA did not eliminate the prerogative and ability of the executive branch to file "statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity" *Republic of Austria v. Altmann*, *supra* note 75. *See* discussion at Fox, Webb, *supra* note 1, p. 250 and n. 62 (citing cases).

[84] On 25 December 1991, President George H.W. Bush announced publicly that the US recognized Russia as the successor to the Soviet Union, and its seat at the UN; recognized the independence of Ukraine, Armenia, Kazakhstan, Belarus, and Kyrgyzstan (and was moving to establish diplomatic relations with them); and also recognized Moldova, Turkmenistan, Azerbaijan, Tadzhikistan, Georgia and Uzbekistan (while working to receive certain assurances before establishing diplomatic relations). *See Address to the Nation on the Commonwealth of Independent States*, 25 December 1991, available at: http://www.presidency.ucsb.edu/ws/index.php?pid=20388 (accessed 15 April 2018).

[85] *See* Fabry, *supra* note 32, pp. 189–204 for a discussion of US and European recognition practice regarding the former Yugoslavia. Executive recognition practice in the case of former Yugoslavia did not prevent a federal court from determining that the unrecognized Republika Srpska was *de facto* a state for the purposes of attaching international responsibility to it for human rights legal obligations. ("Srpska is alleged to control defined territory, control populations within its power, and to have entered into agreements with other governments. It has a president, a legislature, and its own currency. These circumstances readily appear to satisfy the criteria for a state in all aspects of international law.") *Kadic v. Karadzic*, 70 F.3d 232, 245 (2d Cir. 1995).

Recent cases contesting the application of immunity have generally involved executive-branch silence regarding entities seeking to be recognized as states, or regimes seeking recognition as governments of already-recognized states.[86] These cases have involved application of immunity to the Palestinian Authority ("PA"), PLO, and related Palestinian government entities and officials. Courts have generally asserted their own institutional capacity and constitutional power to apply *de facto* analysis to the status of the entity. But the courts have almost uniformly concluded from their analysis that Palestine, despite widespread recognition by other states and membership in several international organizations, is not a state for the purposes of sovereign immunity.

The United States does not recognize Palestine as a state. The United States maintains a political relationship with the Palestinian Authority, which maintains *de facto* control over parts of the West Bank in accordance with the 1993 Oslo Accords. At the same time, the United States has never made an affirmative declaration of non-recognition of Palestine, as it sees the development of authority and autonomy within the Palestinian territories as governed by implementation of the Oslo Accords between the State of Israel and the Palestinians, and subject to a political solution on final territorial borders and control.[87] Up to the time of inauguration of Donald Trump, US policy toward the Palestinians was "marked by efforts to establish a Palestinian state through a negotiated two-state solution to the Israeli-Palestinian conflict; to counter Palestinian terrorist groups; and to establish norms of democracy, accountability, and good governance in West Bank areas administered by the Fatah-led PA."[88]

Courts facing claims of immunities raised by representatives of the PA and PLO were thus faced with a question having significant foreign policy implications. These

[86] Examples of the former include the status of the P.L.O. and Palestinian Authority as a state; examples of the latter include the status of the government of Afghanistan, the government of the Socialist Federal Republic of Yugoslavia, the government of Cambodia, the new government of the TNC in Libya. On the issue of Taiwan, the US resolved any ambiguities for the purposes of court jurisdiction by adopting the Taiwan Relations Act of 1979, discussed below.

[87] This rationale underlies the executive branch's refusal – until the Trump administration – to move the US Embassy from Tel Aviv, the city accepted by most other states within the international community as the formal capital of the State of Israel, to the City of Jerusalem, the status of which is, as per official US policy, subject to a political resolution of disputed territorial claims by both Israel and the Palestinians. For an articulation of the pre-Trump policy, *see* John Kerry's *Remarks on Middle East Peace*, 28 December 2016, available at: https://2009-2017.state.gov/secretary/remarks/2016/12/266119.htm (accessed 15 April 2018).

[88] Congressional Research Service, The Palestinians: Background and U.S. Relations, Jim Zanotti, Jan. 31, 2014, at p. 1. Following the 2007 election of Hamas in Gaza, and Hamas' effective control of the territory of Gaza, the US centered its political efforts on bolstering the leadership of Palestinian Authority (and PLO Head) Mahmood Abbas, whose party was in control of West Bank territory under the Oslo Accords (*ibidem*). While President Trump announced in 2018 that the US recognizes Jerusalem as the capital of Israel, the US retains a formal policy that even parts of Jerusalem claimed by the Palestinians may be subject to political settlement.

cases generally involved questions of the immunity of the PA or PLO from claims for damages based on alleged civil liability for terrorist acts. Under US law, these cases involved the FSIA and its amendments, including 2008 amendments that expanded exceptions to immunity to include certain state-sponsored acts of terrorism, and the Anti-Terrorism Act ("ATA"), which created a civil tort for US victims of terrorism.[89]

In the 1991 *Klinghoffer* case brought against the PLO, the federal appeals court for the second circuit rejected the PLO's claim to immunity based on its status as the government of Palestine under the PLO's 1988 Declaration of Statehood, concluding that Palestine failed to meet the *de facto* Montevideo criteria.[90] The court fully embraced the declarative, *de facto* approach to statehood, rejecting a constitutive view of recognition, in its analysis: "Despite the fact that some countries have 'recognized' the PLO, the PLO does not have the capacity to enter into genuine formal relations with other nations. This is true primarily because, without a defined territory under unified governmental control, the PLO lacks the ability actually to implement the obligations that normally accompany formal participation in the international community."[91]

While *Klinghoffer* involved an American citizen killed in a terrorist incident on the High Seas, the 2004 case, *Knox v. PLO*,[92] involved the claim of immunity of the PA and the PLO in defense against a tort case arising from the death of an American citizen in a terrorist act carried out on the territory of Israel. The trial judge, noting that the US government had not recognized Palestine as a state or the PLO or PA as a government, proceeded to apply a *de facto* analysis to whether Palestine was a state. The court concluded that the defendants had failed to establish that Palestine met the Montevideo statehood criteria "because, first, the PLO and PA do not sufficiently 'control' Palestine and, second, they do not have sufficient capacity to engage in foreign relations."[93]

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[89] *See* discussion of ATA and FSIA in terrorism tort cases in B. Van Schaack, *Finding the Tort of Terrorism in International Law*, 28 Review of Litigation 381 (2008), pp. 383–384.

[90] *Klinghoffer v. S.N.C. Achille Lauro ed Altri – Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44 (2d Cir. 1991)

[91] *Ibidem.* The PLO, having achieved Observer status at the United Nations, further argued that immunities should apply in a US court to its officials under the terms of the UN Headquarters Agreement. The court rejected that argument as well, noting that the "Headquarters Agreement extends immunity only to representatives of members of the UN, not to observers such as the PLO." *Ibidem*, p. 48.

[92] *Knox v. PLO*, 306 F. Supp. 2d 424 (S.D.N.Y. March 2, 2004).

[93] *Ibidem,* p. 434. Section 201 of the Restatement (Third) of Foreign Relations Law states: "Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities." Restatement (Third) § 201. *See also Morgan Guar. Trust Co. of New York v. Republic of Palau*, 924 F.2d 1237, 1245 (2d Cir.1991) (holding that Palau, a group of approximately 200 islands in the Southwest Pacific, was not a foreign state within the meaning of the FSIA because the United States retained "ultimate authority over the governance of Palau").

Unlike the *Klinghoffer* court, which made no mention at all of executive policy with regard to Palestinian entities, the *Knox* court made explicit reference to executive recognition policy,which may have been superfluous, in light of the court finding that Palestine was not a *de facto* state. Even assuming, for the sake of argument, that the defendants had shown Palestine met the criteria of Montevideo, the court noted that "it is a matter of public record that the United States affirmatively opposes the notion that a sovereign Palestine presently exists."[94] The court thus proceeded to include US non-recognition of Palestine as an element in its analysis of the capacity of the PA, the PLO and individuals representing them to claim official immunities for the purposes of FSIA and the ATA.[95] In this second part of its opinion, the court suggested that comity, while not the sole basis for extending immunity to foreign sovereigns, had a role to play in determinations of immunity.[96] While comity may be viewed as a nod toward customary international law, the court presented it as a constitutionally rooted principle, invoked to demonstrate deference to the exclusive power of the executive branch on questions of recognition: "Moreover, because comity is often a function of recognition, matters concerning who is recognized as the sovereign or government of a particular territory, and whether and to what extent comity is accorded to its acts and officials, are political questions *uniquely within the domain and prerogatives of the executive branch*."[97]

Notwithstanding its analysis of *de facto* statehood and the lack of intervention by the executive in the case, the *Knox* court emphasized deference to the executive when it "manifests" a political determination in cases involving the status of unrecognized entities: "When the executive branch, either by word or deed, does manifest its political determination that the courts' exercise of jurisdiction over a particular matter involving actions or privileges and immunities of unrecognized states or governments would be inimical to United States foreign policy interests or relations with the unrecognized sovereign, or when the court on its own, from demonstrable

[94] *Knox*, *supra* note 92, p. 446 (discussing US opposition to Palestine's membership at the UN as evidence of US opposition to Palestinian sovereignty).

[95] The judge wrote: "Defendants have presented no evidence, and the Court is not aware of any, establishing that Palestine, whatever its status in other jurisdictions, has been recognized, or otherwise treated as a sovereign state, by the United States. Nor is there any indication that the United States has conferred upon the PLO and PA recognition as official representatives of the government of the purported Palestinian state, thereby entitling them to assert the privileges and immunities ordinarily accorded to specified officials and agents of sovereign entities" (*ibidem*, p. 439).

[96] The court stated: "The scope of whatever effect United States courts give to the state actions or privileges and immunities of an unrecognized state is a matter ultimately determined not by juridical right or rule of law, but by whether, by application of the doctrine of comity or as a matter of public policy, it is warranted for a court, under the circumstances of a particular case, to accord any measure of respect to the asserted acts or protections of the foreign entity or government in question" (i*bidem*).

[97] *Ibidem,* p. 440 (italics added).

matters of public record, may readily ascertain such fundamental conflict with public policy were it to give effect to the invocation of sovereign status of the unrecognized state or government, the courts generally accept as conclusive *such declared or ascertained expression* of United States international relations policy."[98] The *Knox* court concluded that, because Palestine was not a *de facto* state, and also because the executive did not recognize Palestine, the defendants were not entitled to immunity.

Since US policy was to keep open the possibility of a two-state solution, the US maintained silence on the issue of recognition, while continuing, as a political matter, to treat the leadership of the Palestinian Authority as the international representatives of the Palestinian people. Courts could therefore continue to engage in *de facto* analysis of the status of Palestine, without contradicting any formal government recognition practice. In the post-Oslo era, as Palestine was recognized as a state by more and more other states within the international community, courts in the US continued to apply *de facto* analysis, and continued to find that Palestine had not yet achieved the status of state under international law.

In a 2005 case, *Efrat Ungar et al. v. P.L.O.,* the Federal Appeals Court for the First Circuit affirmed the principle that, in the absence of a statement of recognition or non-recognition by the executive, determining whether an entity is entitled to jurisdictional immunity under the FSIA or the ATA constitutes a legal inquiry, and therefore a proper subject for adjudication.[99] In determining whether the PA or PLO were entitled to sovereign immunity under the FSIA or the ATA, the court began with whether the entity represented by the PA and PLO could be considered a state: "Both sides agreed that the definition of a 'state' under the relevant statutes was informed by an objective test rooted in international law and articulated in the Restatement (Third) of Foreign Relations. Under these circumstances, the determination of whether the defendants have adduced sufficient evidence to satisfy that definition is quintessentially appropriate for a judicial body."[100]

After undertaking its analysis, the First Circuit declined to grant sovereign immunity: "We recognize that the status of the Palestinian territories is in many ways *sui generis*. Here, however, the defendants have not carried their burden of showing that Palestine satisfied the requirements for statehood under the applicable principles of international law at any point in time. In view of the unmistakable legislative command that sovereign immunity shall only be accorded to states – a command reflected in both the FSIA and the ATA – the defendants' sovereign immunity defense must fail."[101]

[98] *Ibidem,* p. 443 (italics added).

[99] *Efrat Ungar et al. v. Palestine Liberation Org.*, 402 F.3d 274 (1st Cir. 2005)

[100] *Ibidem,* p. 281 ("For jurisdictional purposes, courts must be careful to distinguish between political questions and cases having political overtones" (citing *see Kadic v. Karadzic,* 70 F.3d 232, 249 (2d Cir.1995)).

[101] *Ibidem*, p. 292. The First Circuit also invoked a declaratory view of recognition: "Under the Restatement standard, political recognition-typically thought of as "a formal acknowledgment

Ungar shows that courts will follow the lead when the executive issues an affirmative statement concerning recognition or non-recognition, but, absent a strong Executive statement – as is the case with the Palestinian territories – will engage in extensive analysis of the statehood question. The case also demonstrates that the body of domestic and international law of state immunity provides judicially manageable standards that permit US courts to decide whether an unrecognized entity should be accorded sovereign immunity under the FSIA or the ATA. Indeed, the *Ungar* court explicitly noted that the enactment of the FSIA represented a move away from executive determinations regarding immunity to one of judicial application of the international law of immunity.[102]

Other cases involving similar claims against the PA and PLO saw courts acting in the same manner: embracing judicial capacity to determine whether the entity was entitled to immunity under the FSIA, and engaging in *de facto* analysis to determine whether the PA and/or PLO represented a Palestinian state for the purposes of FSIA. A trial judge in the District Court of the District of Columbia wrote in 2005 that: "There can be little doubt that the decisions in *Ungar* and *Knox* should be accorded full preclusive effect [on the question of statehood for Palestine]. In each, the District Court fully and carefully examined the question of Palestine's statehood and reached an extremely persuasive conclusion that Palestine is not a state; the First Circuit's decision is equally meticulous and persuasive on the point."[103]

In 2008, the FSIA was amended to deny immunity in cases against a foreign state for an act of terrorism, effectively creating exceptions to immunity for those states determined by the US to be state sponsors of terrorism.[104] And in 2016, over a veto by President Obama, the US passed the Justice Against Sponsors of Terrorism Act ("JASTA"), which further eroded the availability of a state immunity defense to state-sponsored acts of terrorism.[105] The cumulative effect of these two exceptions

by a nation that another entity possesses the qualifications for nationhood," *N.Y. Chinese TV Programs, Inc. v. U.E. Enters., Inc*., 954 F.2d 847, 853 (2d Cir.1992)-is not a prerequisite to a finding of statehood. *See* Restatement (Third) of Foreign Relations § 202 cmt. b (explaining that "[a]n entity that satisfies the requirements of § 201 is a state whether or not its statehood is formally recognized by other states"). *Ibidem,* p. 283.

[102] *Ibidem.*

[103] *Biton v. Palestinian Interim Self-Government Authority*, 412 F.Supp.2d 1 (D.D.C.,2005). Similarly, in 2008, a federal court denied immunity to the PLO, based on both the lack or recognition by the United States and Palestine not meeting the definition of statehood under international law. *See Sokolow v. PLO*, 583 F. Supp. 2d. 451 (2008,

[104] *See* S.J. Schnably, *The Transformation of Human Rights Litigation: The Alien Tort Statute, the Anti-terrorism Act, and JASTA,* 24 University of Miami International & Comparative Law Review 285 (2017), pp. 358–362.

[105] *See* 18 U.S.C.A. § 2333,28 U.S.C.A. § 1605B, (amending the Anti-Terrorism Act and the Foreign Sovereign Immunities Act, respectively). *See also Congress Overrides Obama's Veto to Pass Justice Against Sponsors of Terrorism Act*, 111 American Journal of International Law 156 (2017), pp. 156–157.

has been to further narrow the scope of immunity applied by US courts to official acts carried out by foreign states and governments.

2.1.1. A Note on the US Approach to Taiwan

The United States withdrew formal recognition of Taiwan when it extended recognition to the PRC (in 1979). To address the difficulties regarding standing in cases of Taiwanese government entities bringing claims in US courts, as well as invocations of immunities of Taiwanese government entities from suit, the US adopted the Taiwan Relations Act ("TRA").[106] The TRA had the effect of maintaining the mutual international law obligations between the US and Taiwan that existed at the time of the enactment, as well as providing for a legal status of Taiwan's government under US law, and a basis for relations (not categorized as formal diplomatic relations) between the two polities. As a result, Taiwan, though a non-recognized entity, receives the same protections from suit as a fully recognized state, and the full standing to bring suits as a fully-recognized government.[107] When claims of immunity are raised by Taiwanese entities in US courts, they are addressed under the same statutory provisions and exceptions to the FSIA that apply to fully-recognized states and their governments.[108]

2.2. United Kingdom

The practice of the United Kingdom as regards immunity for non-recognized entities has shifted, like that in the US and other states, in ways that reflect changes in the international law of statehood. The UK has moved toward a practice that separates recognition practice as a political tool from the judicial effects of recognition. Over the course of the 20th century, UK practice moved away from rationales of immunity based on comity toward friendly sovereigns, to an immunity practice that responded to the need for clearly defined law of immunity and its exceptions, particularly as regards commercial activity. In the middle of the 20th Century, recognition was still salient to the question of immunity. Lauterpacht wrote in the leading international law treatise of its time that it was through recognition that a government "acquires for itself and its property immunity from the jurisdiction of the courts of law of the State recognizing it (…) an immunity which, according to English law at any rate, it does not enjoy before recognition."[109]

[106] Taiwan Relations Act, 22 U.S.C. §3301, *et seq*.

[107] *See* P.L. Hsieh, *An Unrecognized State in Foreign and International Courts: The Case of the Republic of China on Taiwan*, 28 Michigan Journal of International Law 765 (2007), pp. 788–791.

[108] *See Taiwan v. U.S. Dist. Court for the Northern Dist. of Cal.*, 128 F.3d 712, 714 (9th Cir. 1997).

[109] H. Lauterpacht (ed.), *Oppenheim's International Law*, 8th ed., David McKay Company, New York: 1955, p. 131.

Brierly critiqued this state of affairs, noting that ongoing deference to the executive in cases involving immunity would lead to injustice for private litigants – especially where, as in one case, the entity being sued over commercial transactions was itself a non-independent instrumentality of the British government.[110]

During this era of near-absolute judicial deference to executive determinations, UK courts handled at least two non-recognition cases in a way that preserved judicial competence to determine *de facto* status. *Carl Zeiss Stiftung v. Ratner & Keller, Ltd*. was a 1966 case in which the House of Lords held that the plaintiff corporation of the GDR, a state and government not recognized by the British government, was a juridical entity entitled to access UK courts, notwithstanding non-recognition.[111] This case, together with the case *GUR Corp v. Trust Bank of Africa* (involving a claim of statehood by Ciskei, a non-recognized "separate development" of the South African apartheid government), seemed to suggest that non-recognized entities could be afforded judicial cognizance for limited purposes.[112] In both these cases, the court resolved the question on the basis of the UK's recognition of the states and governments deemed to be in ultimate control of the non-recognized entities, but these cases marked the beginning of a shift toward *de facto*ism in British judicial practice.[113]

As one commentator has noted, this precedent would not apply to Taiwan, because, as a matter of history, it is in no way subordinate to the PRC. In the case of Taiwan, UK practice has not been aided by a statute, as it has in the US, but has rather been dealt with by "basing judicial interpretations of Taiwan's status on the common law." The effect of that has been to generate an approach similar to the one US courts apply under the TRA.[114] The UK extended full recognition to the PRC in 1950, while simultaneously severing diplomatic relations with Taiwan. In the subsequent 1972 Joint Communiqué with the PRC, the UK closed its consulate in Taiwan.[115] In the language of the British government, the UK "recognizes" the PRC and "acknowledges" the PRC's position that Taiwan is part of the PRC. At the same time, the UK recognizes "the existence of Taiwanese authorities and their effective control over Taiwan."[116] Under UK law, Taiwan has been entitled to immunity where its official acts are concerned.

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[110] *See* J. Brierly, *The Law of Nations*, 5th ed., Clarendon Press, Oxford: 1955, pp. 209–211 (discussing, *inter alia*, the case of *Duff Development Company v. Kelantan Government*, in which immunity was granted to a protectorate under the control of British officials.)

[111] *Carl Zeiss Stiftung v. Ratner & Keeler, Ltd.* [1967] 1 A.C. 853 (H.L.0. *See also* S. Talmon, *supra* note 82, pp. 248–261.

[112] Hsieh, *supra* note 107 (citing A. Evans, *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena* 293 F. Supp. 892, 63 American Journal of International Law 636 (1969)).

[113] Hsieh, *supra* note 107, pp. 783–784.

[114] *Ibidem*, p. 782.

[115] *Ibidem*.

[116] Talmon, *supra* note 82, p. 259, n. 161.

The UK government did adopt a statutory scheme to codify and formalize state immunity and its exceptions. It then abandoned the formal practice of recognizing governments and states.[117] The State Immunity Act of 1978 (SIA), like the FSIA, serves as the basis for jurisdiction in a UK court over a foreign state and its government and representatives. Unlike the FSIA, the SIA was adopted as a direct requirement of an international treaty, the European Convention on State Immunity of 1972. But, like the FSIA, the SIA reflects changes in the international law of state immunities and the codification of the rationales, requirements, and exceptions to immunities required under the European Convention. The SIA thus permits a court to ascertain – without input from the executive branch – whether an entity is entitled to immunity.

The SIA does not define the term 'state." However, by its terms, the SIA makes recognition or non-recognition irrelevant to the determination of immunity. Section 1(2) of the SIA states: "A court shall give effect to the immunity conferred by this section even though the State does not appear in the proceedings in question."[118] Under this provision, a state whose government has not yet been recognized, or which has failed to be represented by a government or official in the judicial proceeding, is nonetheless entitled to immunity.

UK recognition practice has also been modified to decouple the political decision of recognition from legal determinations of the status of an entity.[119] Under the earlier system, the executive would issue certificates of recognition that were determinative of the status of a state or government.[120] The UK's current practice is to extend formal recognition to states only, not governments.[121] Under the SIA, judicial notice may be taken of the status of an entity as either a state or government, or an individual's status as a representative, including as head of state.[122] In cases featuring significant doubt, as with a new government or two or more governments contesting status, Section 21 of the SIA provides an avenue for the Secretary of State to issue a certificate on the question of status of entities or persons.[123] Following a parliamentary statement in 1980, the practice of the UK government was to permit "objective assessment" by courts of entities' statuses, with decisions thereby

[117] 408 Parl. Deb., H.L. (5th Ser.) (1980), pp. 1121-22. Commentators at the time noted that this shift in policy would render the issue of recognition a matter for the courts, which could lead, in the short run, to uncertainty for litigants. *See* M. Dixon, *Recent Developments in UK Practice Concerning Recognition of States and Governments*, 22 International Lawyer 555 (1988), p. 556.

[118] State Immunity Act 1978 c. 33, UK Stat 1978 c 33, at Section 1 (2) (hereinafter: SIA).

[119] *See* R. Wilde, A. Cannon, E. Wilmshurst, *Recognition of States: The Consequences of Recognition or Non-Recognition in UK and International Law*, Chatham House, February 2010, available at: https://www.chathamhouse.org/sites/files/chathamhouse/field/field_document/Meeting%20Summary%20Recognition%20of%20States.pdf (accessed 15 April 2018).

[120] *See* Fox, Webb *supra* note 1, p. 223.

[121] *See* ILA Recognition Committee, Third Report 2016, *supra* note 3, pp. 539, 542.

[122] Fox & Webb, *supra* note 1, p. 223.

[123] *Ibidem*.

being removed from the political process.[124] The executive has preferred that such certificates remain rare, and has made it clear that any requests for them should ideally emanate from a court that has articulated the question clearly, rather than from a single party to a litigation.[125] The courts adopted criteria to be applied in cases where the question of which entity represents the government is contested.[126]

This policy of leaving determinations to courts changed in 2011, when the UK government issued an affirmative statement of recognition of the National Transitional Council (NTC) as the "sole government authority in Libya," and issued a certificate to a court considering the issue.[127] In that case, the UK government appeared eager to recognize the new Libyan government as a political and legal matter – and with real legal consequences regarding access to assets and immunities from suits – before the TNC had *de facto* control over the territory of Libya.[128]

2.3. France

France does not have a comprehensive state immunity statute in the mold of the FSIA or SIA. It is a signatory to the UNCSI, but has not adopted it as part of its domestic law (as Japan, Spain and Sweden have). Only two code provisions address limited aspects of state immunity, and these have been joined by the December 2016 adoption of a law to address the rules governing state immunity to the enforcement of judgments in France.[129]

[124] "For a period between 1980 and 2011, following a parliamentary statement, the UK government sought to remove the decision as to the criteria required for recognition of such a government from political decision to the objective assessment by English courts…" (*ibidem*, p. 224; citing HC Hansard, 5th series, vol. 983, written answers, cols 277–9, 23 May 1980, Sir Ian Gilmour MP).

[125] *See ibidem,* pp. 223–224 n. 261 (quoting letter from A. Aust, Legal Counsellor, in (1994) BYIL 66; UKMIL 647-8.)

[126] See Fox & Webb, *supra* note 1, p. 542, discussing *Republic of Somalia v. Woodhouse Drake & Carey (Suisse) SA*, High Court QBD, (1993) (criteria included whether the government was constitutional, the degree, nature and stability of territorial control, whether the UK government had dealings with it, and the extent of international recognition of the entity as a government). These criteria were applied in the later case of *Sierra Leone Telecommunications Co Ltd. v. Barclays Bank Plc* (QBD 25 Feb. 1998)

[127] *See* Fox & Webb, *supra* note 1, p. 224 and n. 267; *British Arab Commercial Bank Plc v. The National Transitional Council of the State of Libya*, (2011) EWHC 2274 (comm.).

[128] *See* discussion at Fox & Webb, *supra* note 1, pp. 226–227.

[129] Article 111-1 of the civil enforcement procedures code (immunity of domestic and foreign public entities); Article 153-1 of the monetary and financial code (of foreign central banks and monetary authorities.) *See* V. Grandaubert, *France Legislates on State Immunity from Execution: How to kill two birds with one stone?*, EJIL: Talk!, 23 Janaury 2017, available at: https://www.ejiltalk.org/france-legislates-on-state-immunity-from-execution-how-to-kill-two-birds-with-one-stone/ (accessed 15 April 2018). These were amended by the Law on Transparency, Anticorruption Measures and the Modernization of the Economy, Law No. 2016-1691, 9 December 2016, available at: https://www.legifrance.gouv.fr/affichTexte.do?cidTexte=JORFTEXT000033558528&dateTexte=&categorieLien=id (accessed 15 April 2018). The law affects the enforcement

Court practice defines the French approach to immunity, as France has abandoned the practice whereby governments are granted formal recognition. Indeed, unlike those in the US and UK, French courts have long been comfortable with the institutional capacity of courts to analyze claims of immunity from a *de facto* perspective and also recognize the necessity (from the perspective of justice for litigants) that courts should do so. Cases involving immunity claims of the unrecognized Soviet government received similar treatment to *Wulfsohn*, with immunity based on an entity's status being a factual determination to be made by a court.[130] Legal commentators in France have also long separated the concepts of recognition and immunity, with Charpentier opining that "the foundation of immunity is independent of recognition," and that the practice of formal recognition is of little importance to legal rights.[131]

This approach was applied in the 1969 case *Clerget v. Banque Commerciale pour L'Europe du Nord and Banque Commerce Extérieur du Vietnam*,[132] which involved a claim of immunity from the execution of a judgment against the assets of North Vietnam, an entity which France did not recognize as a state.[133] The court considered evidence of the state's *de facto* existence, as well as the competence of the unrecognized government to invoke international law protections of immunity from execution.[134] Since this case, French legal commentators have taken the view that, under French practice, the right to immunity from jurisdiction adheres to the state, not to the government, rendering recognition or non-recognition irrelevant to the analysis.[135]

2.4. Canada

The Canadian State Immunity Act ("CSIA") was adopted in 1982, and reflects a restrictive approach to immunity that hews closely to the US and UK statutes.[136]

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of foreign decision and arbitral awards against states, and was adopted to address "the recent variations of French case law on the issue, which have been considered by the Government as a potential risk for French diplomatic relations." *See* C. Dupoirer, A. Cannon, L. Franc-Menget, *A Law on Immunity from Enforcement in France*, Herbert Smith Freehills: PIL Notes, 1 December 2016, at: https://hsfnotes.com/publicinternationallaw/2016/12/01/a-law-on-immunity-from-enforcement-in-france/ (accessed 15 April 2018).

[130] *See* Hines, *supra* note 45, p. 726 and n. 51, 52.

[131] J. Charpentier, *La Reconnaissance internationale et l'evolution du droit des gens*, Pedone, Paris: 1956, p. 66 ("Le fondement de l'immunité est indépendant de la reconnaissance"). Charpentier looked to *Wulfsohn* and other US cases.

[132] Court of Appeals of Paris, 7 June 1969.

[133] *See* Fox and Webb, *supra* note 1, p. 341.

[134] *See* discussion at Hines, *supra* note 45, pp. 727–728.

[135] *Ibidem*, p. 728, (citing P. Bourel, *Immunities de Juridiction et d'Exécution*, 9 Juris-Classeur de Droit International, art. 14–15 § 38).

[136] State Immunity Act (R.S.C., 1985, c. S-18), available at: http://laws-lois.justice.gc.ca/eng/acts/S-18/page-1.html (accessed 15 April 2018).

Like the FSIA, the CSIA was also amended to add state-sponsored terrorism to the list of acts exempted from claims of state or official immunity.[137] While the CSIA does not address recognition or non-recognition it does retain a role for the executive in making determinations as regards the applicability of immunity to a foreign entity making claim under Section 14, which states in relevant part that "a certificate issued by the minister of Foreign Affairs (…) with respect to (…) whether a country is a foreign state for the purposes of this Act (…) is admissible in evidence as conclusive proof of any matter stated in the certificate with respect to that question (…)"[138] However, the said Ministry of Foreign Affairs is not required to issue a certificate, and in the absence of such a certificate, courts are left to adjudicate the question.

Given that Canada abandoned the formal recognition of governments in 1988, questions have been raised about the continuing significance of Section 14.[139] Canada's experience with its own, internal efforts of self-determination in the case of Quebec and indigenous persons, may make its courts particularly sensitive to the separation of powers and the role of the executive in cases involving the status of foreign entities asserting claims of immunity. Cases involving Taiwan have been particularly challenging. Canada recognized the PRC in 1970 and established a separate, non-diplomatic relationship with the government of Taiwan, similar to that of the US, through which commercial and other interactions with Taipei can take place.[140] Despite parliamentary consideration of a draft bill modeled after the US Taiwan Relations Act, Canada has not adopted legislation to regulate the status of Taiwan under Canadian Law.[141]

In the 2003 case, *Parent and Ors v. Singapore Airlines*, the Quebec Superior Court had to decide whether immunity would attach to the Taiwan Ministry of Transportation and Communication ("CAA"), which had been joined in a suit arising from an accident during the takeoff of a *Singapore Airlines* plane from the Taipei airport.[142] Pursuant to section 14 of the CSIA, the Taiwanese government had sought a certificate from the MFA, which had declined to issue one. The court noted that the case was the first in which a court was "faced with the dilemma of what to do

[137] *See* J. Harrington, *If not torture, then how about terrorism – Canada amends its State Immunity Act*, EJIL: Talk!, 12 March 2012, available at: https://www.ejiltalk.org/if-not-torture-then-how-about-terrorism-canada-amends-its-state-immunity-act/ (accessed 15 April 2018). Canada does not embrace an exception for torture, such as is created in US law under the Torture Victim's Protection Act (*ibidem*).

[138] State Immunity Act (RSC, 1985, c s-18), para. 10.

[139] *See Parent and Ors v. Singapore Airlines Ltd*, 2003 IIJ Can. 7285 (QC CS), ILDC 181 (CA 2003), 22 Oct. 2003. *See also* Talmon, *supra* note 82, pp. 247–248 (noting that Australia, the UK, Austria, France, Germany, Switzerland, Canada and The Netherlands have all abandoned the practice of recognition of governments).

[140] Hsieh, *supra* note 107, pp. 788–791.

[141] *Ibidem.*

[142] *Parent and Ors v. Singapore Airlines Ltd*, 2003 IIJ Can. 7285 (QC CS), ILDC 181 (CA 2003), 22 October 2003.

in the absence of an executive certificate."[143] While a court would be bound, under the direct text of the CSIA, to give effect to an executive certificate that an entity is to be treated as a state for the purposes of immunity, the court noted that the statute does not require a certificate, nor does it state that foreign state status may only be determined pursuant to the issuance of a certificate.[144] The court held that the absence of such a certificate "does not necessarily mean that there is no right to immunity."[145]

In its analysis, the Quebec court noted that, in cases where certificates are issued, there tend to be no political or diplomatic difficulties, as the court is statutorily required to follow the executive's certification.[146] But the court also noted that the law does not prevent the MFA from leaving it up to the court to make a determination of immunity "in light of the evidence presented."[147] Citing early 20th-century British case law, the court distinguished cases of executive recognition – where a court is bound, through comity, to give effect to the recognition of the foreign sovereign, to cases of executive silence, where "independence [of the foreign sovereign] becomes a question of proof."[148] The court should therefore determine whether ""Taiwan' is a 'foreign state' for the purposes of the Act."[149] In so concluding, the court observed that the CSIA would "achieve its objective (incorporating the principle of immunity from judicial proceedings in Canadian law, subject to its exceptions, arising out of customary international law) in respect of the principles of public international law which this immunity is based on (sovereignty, independence, dignity and equality of states)."[150]

The court proceeded to apply the Montevideo factors of statehood and concluded that Taiwan was a state for the purposes of the CSIA, and that therefore CAA was entitled to immunity.[151] In its conclusion, the court quoted legal commentator Hugh Kindred, who summed up the value of judicial application of *de facto* determination of statehood, even in the face of political non-recognition: "In pursing this course, the courts may find themselves granting a degree of respect or even immunity for a foreign regime that superficially may seem wholly out of accord with the government's declarations of diplomatic distance. But the illusion will be in the denials of recognition by the government for diplomacy's sake and no longer in the fictions of the courts."[152]

[143] *Ibidem.*

[144] *Ibidem*, p. 41.

[145] *Ibidem*.

[146] *Ibidem*, p. 46.

[147] *Ibidem*, p. 47.

[148] *Ibidem*, quoting Lord Dunedin in *Duff Development Co v. Kelantan Government*, (1924) A.C. at p. 820.

[149] *Ibidem*, p. 51.

[150] *Ibidem*, p. 55.

[151] *Ibidem,* p. 62.

[152] *Ibidem* quoting H. Kindred, *Foreign Governments Before the Courts*, 58 Canadian Bar Review 602 (1980), p. 620.

2.5. Singapore

In Singapore, the executive is empowered to pursue foreign relations, while Parliament retains law-making powers.[153] The Singapore State Immunity Act was enacted in 1979, and resembles the FSIA and SIA in codifying the restrictive approach to the international law of state jurisdiction.[154] Under the Immunity Act, a party to litigation may request a certificate from the executive as to the status of an entity that claims to be a state in the meaning of the Act.[155] Furthermore, as a common-law jurisdiction, Singapore looks to English court precedent, which in this area would include the precedents of the *Carl Zeiss* and *GUR* cases in which the judiciary made determinations of *de facto* status in cases of non-recognized entities. The government of Singapore recognizes states, but does not maintain a practice of recognizing governments. In the case of Taiwan, the Singapore government recognizes the former's territory as part of the mainland of China, and thus, *de jure*, the PRC.[156]

Singapore courts faced the same question addressed by the Canadian court in its parallel *Singapore Airlines* case, as to whether the CAA of Taiwan was entitled to immunity from the tort claim arising from the *Singapore Airlines* accident at Taipei airport. In the 2003 case, *Anthony Woo v. Singapore Airlines*[157], the CAA of Taiwan again claimed immunity, as summarized by the Singapore Court of Appeal: "Anthony Woo sued *Singapore Airlines* Limited (SIA), which in turn joined CAA, a department under the Taiwanese government, as a third party to the proceedings. CAA Claimed immunity from the jurisdiction of the Singapore courts pursuant to the Immunity Act on the grounds that it was a department of the government of Taiwan."[158]

At the trial court, both the CAA and SIA separately requested from the Singapore Ministry of Foreign Affairs a certificate addressing whether Taiwan was "a state for the purposes of the State Immunity Act."[159] The Ministry replied to the request

[153] *See* C.L. Lim, *Non-Recognition of Putative Foreign states (Taiwan) Under Singapore's State Immunity Act*, 11 Asian Yearbook of International Law 3 (2003).

[154] *Ibidem*. *See* SingaporeStateImmunityAct(Cap. 313, 1985 Rev. Ed. Sing.) (Immunity Act)

[155] The Immunity Act does not define the term state, but in section 18 provides that: "18. A certificate by or on behalf of the Minister for Foreign Affairs shall be conclusive evidence on any question – (a) whether any country is a State for the purposes of Part 2, whether any territory is a constituent territory of a federal State for those purposes or as to the person or persons to be regarded for those purposes as the head or government of a State; and (b) whether, and if so when, a document has been served or received as mentioned in section 14(1) or (5)." Immunity Act, Ch. 313 (Act 19 of 1979)

[156] *See* Lim, *supra* note 153, p. 9 n. 27.

[157] *Woo Anthony v. Singapore Airlines Limited (Civil Aeronautics Administration, Third Party)*, (2003) 3 SLR 688; 2003 SGHC 190.

[158] *Civil Aeronautics Administration v. Singapore Airlines Limited,* [2004] SGCA 3; [2004] 1 SLR 570, ILDC 86 (SG 2004) (appeals decision).

[159] *Ibidem*, para. 9

stating it was "unable to accede" to the request to issue a certificate.[160] The trial court interpreted the refusal to issue a certificate as a statement that the executive could not certify that Taiwan was a state for the purpose of immunity. On appeal, the Singapore Appeals Court agreed, denying the CAA immunity from the suit.

The Appeals Court emphasized the necessity of the executive and judiciary speaking with "one voice" on questions of foreign affairs, albeit acknowledging that the "one voice" rule "presupposes that the judiciary can understand what the executive has said."[161] In this case, where the executive's statement was a refusal to certify the CAA's right to immunity, the court concluded: "The Ministry was effectively saying that it could not certify that Taiwan is a State for the purposes of the Act. The only logical conclusion from that is that Taiwan is not a State within the meaning of the Act. We do not see how it could be asserted that, in refusing to issue a 'positive' s 18 certificate, what MFA was saying was that the matter was one for the court to decide."[162]

The Appeals Court went on to state that 'sovereign immunity is based on mutual respect and international comity," reverting to an earlier era of cases in which recognition was evidence of comity.[163] Because the MFA had stated that "Taiwan is not a State for the purposes of the Act, the court shall fall in line [with the MFA], *no matter what its views are as to the status of Taiwan under general principles of international law*."[164]

The court here appeared to be concluding that non-certification (i.e., executive "silence" on the question of recognition) was the equivalent of affirmative non-recognition, which, under the separation of powers and "one voice" approach to foreign relations, required the court not to treat Taiwan as a state, regardless of *de facto* control. But there was an important principle of immunity underlying the substantive claims of the tort suit: a state activity that had effect in private, that is tort, rights. Professor Lim sees the outcome of the decision here as having the effect of preserving the Singaporean constitutional prerogatives of the executive in foreign relations and "one voice," while also allowing the courts to enforce private rights.[165] The problem with that interpretation is that it seemed to require the court to read into the statement of the MFA language that was not present, i.e., that the MFA did not consider Taiwan a state. Moreover, as Professor Lim notes, the decision of the court had the effect of short-circuiting substantive analysis on whether the acts of the CAA in this case were entitled to the protection of immunity, or whether they

[160] *Ibidem,* para. 10

[161] *Ibidem*, para. 12.

[162] *Ibidem*, para. 13.

[163] *Ibidem*, para. 14 (citing *Duff Development Company, Limited v. Government of Kelantan* [1924] AC 797.

[164] *Ibidem* (italics added).

[165] *See* Lim, *supra* note 153, p. 8 ("The real achievement [of the opinion], however, is to serve both ends" – the enforcement of private rights and adherence of the "one voice" doctrine.)

were, in fact, within the exceptions to immunity, or whether the acts were even subject to the *ratione materiae* jurisdiction of the court.[166]

In trying to reconcile the conflicting outcomes in the Canadian and Singapore courts with regard to the CAA's claim for immunity, and the status of Taiwan in their respective jurisdictions, Judge Chao, in the Singapore opinion, stated in *dicta* that the central distinction is that the question of *de facto* statehood was open to the Canadian court, while in the Singapore court it was not, by virtue of differences in the underlying statutes and the clarity of the executive's statements.[167] But even Judge Chao seemed to recognize that statutory interpretation was in this case contingent upon the MFA's statement, adding: "This is not to say that under our Act, the approach taken by the Canadian court may not be adopted in our courts in any circumstances."[168]

Conclusions

Inconsistent approaches to immunities and recognition present a challenge to entities that seek full rights within the international system. Because some of these may be recognized as states in some jurisdictions but not others, they may be afforded jurisdictional immunities in some jurisdictions and denied them in others. Perhaps more surprisingly, courts of different jurisdictions may even reach opposing conclusions regarding adjudication of acts of a non-recognized entity, as was the case with Taiwan in the *Singapore Airlines* case, wherein the Canadian and Singaporean courts reached opposite conclusions on the applicability of immunity. This raises fundamental questions of fairness and justice for claimants.

Further, the inconsistency of state practice regarding immunities and recognition means that entities seeking recognition may use jurisdictional pleadings as a means to acquire international legitimacy through the back door. This to say that a non-recognized entity may seek to use a court's decision to apply immunity doctrines to the acts of that entity as evidence of recognition, and thereby as evidence of *de facto* statehood to be applied in other fora, and for other purposes. In this way, immunity doctrines (as well as doctrines regarding standing) may be leveraged by non-recognized entities to achieve through the courts what they are unable to achieve through political processes. Like the efforts of non-recognized entities to seek membership in international organizations as a means of achieving legitimacy through participation in international legal institutions, an immunity claim represents an alternative means by which a non-recognized entity may seek political legitimacy within the international system.

[166] *Ibidem*, pp. 14–15 for discussion of the legislative similarities between the UK's State Immunity Act and the Singapore Act on the question of subject matter jurisdiction.

[167] *Civil Aeronautics Administration v. Singapore Airlines Limited*, [2004] SGCA 3; [2004] 1 SLR 570, paras. 40–41

[168] *Ibidem*, para. 41.

In an earlier era, contestations over immunity addressed larger questions of the rule of law for market-based behavior of state-owned economic entities, which led to the end of the absolute rule of sovereignty and the rise of the restrictive approach. Judge Benjamin Cardozo, perhaps presaging this shift, suggested in the 1924 American case *Sokoloff v. National Bank*, that, while "a government that is unrecognized may be viewed as no government at all, if the power withholding recognition chooses thus to view it," this general rule "is not absolute, but is subject to self-imposed limitations of common sense and fairness."[169] Since that time, the international law of immunity has ripened into a more thoroughly codified, and narrower, set of rules, while the political practice of recognition as a tool of political approval and legitimacy has become increasingly decoupled from international law on statehood.

Today, the question of recognition and non-recognition poses a different, but similarly fundamental question for the state immunities doctrine from the one that led to the restrictive approach: What actors and what acts may *legitimately* claim immunity from jurisdiction? As with the shift from the absolute to the restrictive approach to immunity, there is here an opportunity to shift judicial assessment of immunity claims away from domestic political considerations toward a functional theory of immunities. Cardozo's "common sense and fairness," under this approach, would accommodate immunities claims by non-recognized entities who engage in public functions that further international cooperation, and deny them when they do not meet this functional test, and/or when other exceptions apply.[170] This approach has the advantage of being fully consistent with the international trend away from the practice of formal recognitions of governments, which allows courts to apply this functional analysis without interference with the work and political preferences of the executives.

Abstract: Despite the decline of the constitutive theory of recognition within international law, recognition – of states and governments – retains legal power. Entities that are not recognized as governments or states may not be entitled to the full legal benefits accorded recognized governments and states, including jurisdictional and other immunities. Immunities practice in the case of non-recognition stands at the intersection of three important international law developments: (1) the general application of *de facto* statehood to the question of new states; (2) the general trend toward abandoning the practice of formal recognition of governments, based on the rationale that political approval or disapproval of particular regimes should not affect legal determinations of rights and obligations that inhere to states; and (3) the adoption of a restrictive

[169] *Sokoloff v. National City Bank*, 145 N.A. 917 (1924).

[170] This approach will likely lead to situations where non-recognized entities may be entitled to jurisdictional immunities in domestic courts, while still falling short of establishing international legal personality in other settings and for other purposes.

approach to state immunity through the expansion of the categories of exceptions to state and official immunities – particularly in the areas of commercial and investment activities, terrorist acts, and gross violations of human rights.

This paper examines the practice of states with regard to the application of immunity to non-recognized entities. It suggests that, as they adjudicate claims of foreign state jurisdictional immunity asserted by non-recognized entities, forum courts should follow the general trend in international law, whereby recognition is deemed declarative, rather than constitutive of statehood. Following a theory of statehood (or governance) that follows a declarative approach, claims for immunity should be analyzed on the basis of whether the entity claiming the immunity is *de facto* carrying out the functions of a state or government that would otherwise be entitled to the immunity claimed. A functional approach to questions of immunities that focuses on the acts of non-recognized entities and their agents will have the effect of reinforcing a declarative approach to recognition, decoupling the political act of recognition from its legal effects, while also giving effect to the purposes of state immunity: to encourage international cooperation by respecting the judicial construct of sovereign equality.

Keywords: State jurisdictional immunities, recognition, non-recognition, Foreign Sovereign Immunities Act, Act of State Doctrine, UK State Immunities Act, Canadian State Immunities Act, Singapore State Immunities Act.

Recognition and the Use of Force: How Denial of Statehood Affects International Peace and Security

*Agata Kleczkowska**

Introduction

The act of recognition not only concerns the bilateral relations between States, but may have also far-reaching consequences for international relations in general, since it can be decisive when it comes to the application of the fundamental principles of international law, including the prohibition of the use of force.

This paper refers to the category of States termed "unrecognised" or "contested." These terms describe entities whose fulfilment of the criteria of statehood does not translate into their being recognised as such by other members of the international community. C. Henderson defines "contested States" as "entities that, while having many of the characteristics of a fully-fledged state, have failed, for one reason or another, to attract widespread recognition as one."[1] The examples of "contested States" include, but are not limited to, Palestine, the ROC, Kosovo, Western Sahara and Northern Cyprus.

A question then arising concerns potential or actual ways in which this state of "non-recognition" influences the rights and obligations of the entities involved. Among the many questions on their status, there is a further one concerning the prohibition of the use of force. Are the entities in question actually bound by the prohibition? If the answer is in the affirmative, does that mean that the full range of norms connected with the use of force, including also the right to self-defence, may be applied to them? This chapter seeks to answer such questions.

The thesis advanced in this paper is that "unrecognised States" are both bound and protected by the prohibition of the use of force. However, the position adopted by "recognised States" in this respect is very vague, given the way that denial of the status of "contested States" prevents decisive statements on their international

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[1] C. Henderson, *Contested States and the Rights and Obligations of the Jus ad Bellum*, 21 Cardozo Journal of International & Comparative Law 367 (2012–2013), p. 369.

rights and obligations. Nevertheless, understanding that the application of the prohibition of the use of force in relation to unrecognised States may be important from the standpoint of international peace and security, States attempt to include unrecognised States within the global security system under international law, even without this denoting an admission of their legal status.

The arguments in support of this thesis require first and foremost an analysis of the nature of recognition, with special reference to the constitutive and declaratory theories thereof. What is then needed, and provided here, is a discussion of the general approach adopted by international bodies and the doctrine of law concerning the recognition and the prohibition of the use of force. Finally, there needs to be a discussion regarding examples of the approach adopted by States, using the cases of the Democratic People's Republic of Korea, Palestine and the ROC.

1. Constitutive and declaratory theories of recognition

While it is not the aim of this chapter to engage in detailed discussion of the general questions of recognition, a few preliminary remarks are nevertheless required. Recognition may be understood as "willingness to deal with the new state as a member of the international community."[2] Among many concepts arising around the act of recognition, the most relevant relating to the legal consequences of recognition would seem to revolve around the so-called constitutive and declaratory theories.

Constitutive theory claims that it is an act of recognition that creates new States. The international legal personality of new States thus depends on the will and consent of States already in existence.[3] Such a solution is said to be justified by the fact that the community of States is a political community, so the acceptance of a new member requires the consent of already-existing members.[4] If to apply the constitutive theory in practice, it would follow that, without the act of recognition, an entity meeting the criteria of statehood can be neither the subject of obligations stemming from international law, nor the object of protection by international law, where the latter also extends to the prohibition of the use of force.[5] To put it briefly, an unrecognised entity would not create a State.

On the other hand, declaratory theory maintains that recognition "is merely an acceptance by states of an already existing situation."[6] Declaratory theory thus regards the creation of a State as the primary fact which is never preceded

[2] P. Malanczuk, *Akeurst's Moderin Introduction to International Law*, Routledge, London and New York: 1997, p. 83.

[3] M.N. Shaw, *International Law*, 6th edition, Cambridge University Press, Cambridge: 2008, pp. 445–446.

[4] J. Klabbers, *International Law*, Cambridge University Press, Cambridge: 2013, p. 73.

[5] Shaw, *supra* note 3, p. 446.

[6] *Ibidem*.

by the law. This leaves States' emergence as an objective phenomenon, with new States forming as soon as the conditions of statehood are fulfilled.[7] Thus, the "state" conceived in this way "objectively exists or does not exist," while "the act of recognition only verifies the existence of the state, and therefore it is a declaratory act."[8]

The declaratory position prevails in the views expressed by scholars,[9] while also gaining support in legal acts and instruments. Where the former group is concerned, reference can be made to the collective bodies presenting *opinio doctoris*, such as the *Institute de Droit International,* whose Resolution on recognition argues for the declaratory theory, with the existence of a State not therefore capable of being affected by the act of recognition on the part of other States.[10] Where legal acts and instruments are concerned, it was as early as in 1933 that the Montevideo Convention stated: "The political existence of the state is independent of recognition by the 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"[11] (Art. 3). This rule was then repeated in the American system in Art. 12 of the Organization of American States' Charter, which states that "The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law." Also the Arbitration Commission of the Conference on Yugoslavia (Badinter Commission) supported the declaratory theory, in its Opinions nos. 1 and 8, which claimed explicitly that recognition is of declaratory value only, with the existence or disappearance of States being matters of fact.[12]

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[7] T. Christakis, *The State as a 'Primary Fact': Some Thoughts on the Principle of Effectiveness*, in: M.G. Kohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, Cambridge: 2006, pp. 139–140.

[8] M. Jovanović, *Recognition of Kosovo Independence as a Violation of International Law*, 3 Annals of the Faculty of Law in Belgrade International Edition 108 (2008), p. 111.

[9] *See* Klabbers, *supra* note 4, p. 73; Christakis, *supra* note 7, p. 139; J. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford: 2007, p. 27.

[10] Article 1, Institute De Droit International, *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*, Session de Bruxelles 1936.

[11] Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934), 165 League of Nations Treaty Series 19.

[12] *Conference on Yugoslavia Arbitration Commission: Opinions on Questions, Arising from the Dissolution of Yugoslavia*, 33 ILM 1488 (1992) (hereinafter: the Badinter Commission).

The main argument against the constitutive theory is that recognition is a highly political act that leaves the question of a State's existence dependent on political will.[13] On the other hand, the arguments in favour of the declaratory theory are of a humanitarian nature, since under the constitutive theory the territory of an unrecognised State is more likely to be invaded by third States,[14] with the lack of recognition also tending to affect the lives of individuals considerably (with their passports for example being considered invalid by some States, with administrative acts they obtain not having legal effect, and so on).[15] However, even if the declaratory position is the one which is more reasonable in terms of separating law from the political element, it remains true that a State's survival in the absence of recognition is hard to achieve.[16] Thus, notwithstanding fulfillment of the criteria of statehood, a State will still find itself in a very insecure position if it is not recognised more widely. In this sense, recognition plays an important role for the newly-created States,[17] since a State going unrecognised "cannot make its voice heard in multilateral institutions."[18]

In fact, elements of the constitutive theory are present in the practice of States. M. Shaw points out that the constitutive theory appears important when States are about to decide on recognition when a new State has been formed unconstitutionally or in violation of international law.[19] However, this issue is relevant regardless of the circumstances under which a new State is created. The Committee on Recognition/Non-Recognition in International Law of the ILA asked its members about the current relevance of declaratory and constitutive doctrines in their national practice. The responses the Committee members submitted prove that, despite States lack of support for constitutive theory, this does not denote endorsement of the declaratory approach. In short, States tend to choose a third way somewhere between the other two.[20] Also the Badinter Commission, despite its support for the declaratory theory, stated that: "recognition, along with membership of international organizations, bears witness to these States' conviction that the political entity so recognized is a reality and confers on it certain rights and obligations under international law."[21] Moreover, recognition may also be deemed "constitutive" in the context of the treatment of unrecognised States within the internal jurisdic-

[13] H. Lauterpacht, *Recognition in International Law*, Cambridge University Press, Cambridge: 2012, p. 41.

[14] *Ibidem*, p. 53.

[15] Klabbers, *supra* note 4, p. 75.

[16] *Ibidem*, p. 73.

[17] Shaw, *supra* note 3, p. 449. Ch. Tomuschat, *International Law: Ensuring the Survival of Mankind on the Eve of the New Century*, RCADI 2001, vol. 281, pp. 120–121.

[18] Tomuschat, *ibidem*.

[19] Shaw, *supra* note 3, p. 448.

[20] ILA Sofia Conference (2012), *Recognition/Non-Recognition in International Law*, First Report, para. 1.

[21] The Badinter Commission, Opinion No. 8, *supra* note 12.

tion of a State, since only if a State is recognised by a third State it is immune from being sued, its legislative acts being given effect to before organs of the third State, with diplomatic representatives allowed to represent the State in question.[22] Thus, as Lauterpacht put it "[i]n foreign courts, the unrecognised State and its acts do not legally exist prior to recognition."[23]

However, do these elements of the constitutive theory allow States to act as if the unrecognised State, despite its fulfillment of the criteria of statehood, was not in fact a State? The answer should be negative,[24] especially in relation to certain areas of international law. The example of the prohibition of the use of force discussed in this paper illustrates that, while States have a discretionary right to grant recognition or refuse to recognise entities as States and then treat them accordingly in bilateral relations, the blind denial of all aspects of statehood and State sovereignty of these entities can be dangerous for international peace and security.

2. Recognition and the use of force – opinions of international bodies and doctrine of law

Bearing in mind remarks on recognition highlighting that the role of the latter in determining States' relations with an unrecognised State is complicated, consideration should be given as to how recognition affects the prohibition of the use of force.

The only legal act that mentions the relationship between unrecognised States and the law on the use of force is Resolution 3314 of the UN GA on the "Definition of Aggression."[25] There, aggression is defined as "the use of armed force by a State against the sovereignty, territorial integrity or political independence of another State, or in any other manner inconsistent with the Charter of the United Nations, as set out in this Definition." In Article (1)(a), it is further explained that: "In this Definition the term 'State': (a) is used without prejudice to questions of recognition or to whether a State is a member of the United Nations (…)." As a result, UN Members States are prohibited from aggression against unrecognised States, while, on the other hand, the latter are also obliged not to launch aggression against other members of the international community. Consequently, *a minori ad maius*, recognised and unrecognised States are prohibited from the use of force in their mutual relations. Further, since it is the UN SC that determines the state of aggression, the definition thereof included in Resolution 3314 also means that the UN SC is obliged to deal with aggression towards unrecognised entities.[26]

[22] Shaw, *supra* note 3, pp. 471–472.

[23] Lauterpacht, *supra* note 13, p. 44.

[24] Crawford, *supra* note 9, p. 27.

[25] UN GA Resolution 3314 of 14 December 1974, A/RES/3314.

[26] C. Hillgruber, *The Admission of New States to the International Community*, 9 European Journal of International Law 491 (1998), p. 497. This Author also claims that the recognised

In the context of the approach adopted by international bodies, mention should also be made of the conclusions reached by the Fact Finding Mission on the Conflict in Georgia, established by the decision of the Council of the European Union. In 2009, that Mission issued a report[27] arguing that the prohibition of the use of force was applicable to the Georgia-South Ossetia conflict. While this example may be interesting from the perspective of this paper, since South Ossetia declared independence from Georgia and is currently recognised by four States, i.e. Russia, Nauru, Venezuela and Nicaragua, the arguments presented in the report in support of this thesis are far from convincing.

In general, the thesis that the prohibition of the use of force is applicable to the conflict in question, and, consequently, to South Ossetia, is based on three agreements: one signed between Georgia and Russia, and the other two, between Georgia, South Ossetia and other actors. The first of these is the so-called Sochi Agreement.[28] The Report refers to a phrase from the Preamble to that Agreement, which confirms "the commitment to the UN Charter and the Helsinki Final Act." According to the Report, "[t]he reference to the UN Charter would not make any sense if it did not include the prohibition of the use of force, as this is the centrepiece of the Charter."[29] Consequently, even though the Sochi Agreement was concluded between Russia and Georgia and does not mention "South Ossetia" at all, the Report argues that the Agreement declares that the prohibition of the use of force is also binding between South Ossetia as such and Georgia.

Secondly, the Report refers to the 1994 Agreement "On the further development of the process of the peaceful regulation of the Georgian-Ossetian conflict and on the Joint Control Commission," which was concluded between Georgia, Russia, South Ossetia and North Ossetia. The Report quotes part of the Agreement which reads: "The Parties to the conflict reiterate pledged commitments to settle all the issues in dispute exclusively by peaceful means, without resort to force or threat of resort to force."[30] The Report claims that the 1994 Agreement was concluded in reference to the Sochi Agreement, and consequently suggests that the statement on the "resort to force" was a reference to the prohibition of the use of force from the UN Charter. Thus, by virtue of this far-reaching reference, the Report argues that the prohibition also binds South and North Ossetia.

States can be obliged to respect the prohibition of the use of force towards unrecognised entities if they are obliged to do so by the UN SC under Chapter VII (*ibidem*, pp. 496–497).

[27] *Independent International Fact-Finding Mission on the Conflict in Georgia: Report*, vol. II, pp. 239–242 (hereinafter: Independent).

[28] *Agreement on Principles of Settlement of the Georgian-Ossetian Conflict*, available at: http://peacemaker.un.org/georgia-sochi-agreement92 (accessed 15 April 2018).

[29] Independent, p. 240.

[30] Quoted after: C. Henderson, J.A. Green, *The Jus ad Bellum and Entities Short of Statehood in the Report on the Conflict in Georgia*, 59 (1) International & Comparative Law Quarterly 129 (2010), p. 132.

Finally, the Report mentions the Memorandum on Measures to Provide Security and Strengthen Mutual Trust between Sides in the Georgian-South Ossetian Conflict,[31] signed by Georgia, South Ossetia and North Ossetia. This states that its Parties have decided to "refuse to use force or the threat of force, to exert political, economic or any other form of pressure on each other," as well as to confirm the "commitment to the provisions of the UN Charter, the basic principles and decisions of the OSCE, and generally recognized norms of international law." However, despite the Memorandum mentioning the prohibition of the use of force, the status of this document remains undetermined, since it is rather of political than legal significance.

Concluding, for all that the arguments presented in the Report are very unconvincing,[32] its findings may be treated as a sign of a general trend towards broader application of the prohibition of the use of force, also in relation to actors whose statehood is not well established.

When it comes to the opinions of the doctrine of law in this regard, despite authors in general agreeing that unrecognised States have certain rights and obligations under the prohibition of the use of force, these opinions are both scarce and vague, especially regarding the factual status of unrecognised States and the sources of their rights and obligations. Thus, despite being a supporter of the constitutive theory, Lauterpacht claims that, if an unrecognised State is engaged in war, in any case, "then in all probability the mutual observance of most rules of warfare will naturally follow for reasons of humanity."[33] However, this Author further argues that if a State is unable to protect itself, the recognition will not be helpful anyway.[34] Thus, despite Lauterpacht's denial of the existence of a State unrecognised by the rest of the international community, he also argues that such an actor has certain rights and obligations under international law.

On the other hand, M. Shaw states that an unrecognised State cannot deem itself free from rights and obligations under international law. Thus, it cannot consider itself free to launch aggression against other States.[35] The same view is presented by Y. Dinstein, who claims that the previous recognition of an entity as a State is not required for the norms of international armed conflicts between the

[31] Available at: https://www.mtholyoke.edu/acad/intrel/georosse.htm (accessed 15 April 2018).

[32] Henderson, Green, *supra* note 30, p. 133. Not to mention that the Report wrongly quotes the content of art. 2 (4) of the UN Charter: "Under Art. 2 (4) of the UN Charter, the use of force is prohibited only if it is directed against 'the sovereignty, territorial integrity or political independence of another State,' or if it is 'in any other manner inconsistent with the Charter of the United Nations.'" In fact, art. 2 (4) states that "All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

[33] Lauterpacht, *supra* note 13, p. 53.

[34] *Ibidem*, p. 53.

[35] Shaw, *supra* note 3, p. 471.

parties to such a conflict to apply.[36] In this context, Dinstein claims that, notwithstanding the USA's non-recognition of the Taliban regime as the *de facto* government of Afghanistan, the fact that Talibans actually controlled the majority of the territory of that State denoted that they did indeed form the government, thereby ensuring that the armed conflict occurring in Afghanistan was of an international character.[37] Malanczuk similarly points out that, even though the United States did not recognise North Korea, this was not an obstacle to the signing of the armistice agreement after the Korean War.[38]

Probably the most practical clue regarding the status of an unrecognised State as regards the use of force is that presented by C. Tomuschat. He refers to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, which states, *inter alia*, that "Every State likewise has the duty to refrain from the threat or use of force to violate international lines of demarcation, such as armistice lines, established by or pursuant to an international agreement to which it is a party or which it is otherwise bound to respect."[39] C. Tomuschat interprets this passage as evidence that, after a State comes into being, at least its territorial integrity should be protected, regardless of recognition.[40] Moreover, due to the right to self-determination, the territory of an unrecognised State cannot be considered *terra nullus*.[41]

In this context, one can also refer to the opinion presented by C. Hillgruber, who points out that the fact that such entities as Rhodesia, Transkei, Bophuthatswana, Venda and Qskei were not recognized under international law does not mean that they were considered *terra derelicta*. They were still parts of the territory of the Republic of South Africa, ensuring that the prohibition of the use of force could be applied in relation to occurrences in these regions. However, as this Author further claims, in cases such as Macedonia after the dissolution of the Republic of Yugoslavia, it is impossible to continue to treat an entity as part of a recognised State. Rather, such an entity needs to be recognised or granted some special status, in order for it to be protected under the prohibition of the use of force.[42]

Since the UN membership is often treated as the ultimate proof of statehood, and, consequently, of the rights and obligations existing by virtue of the law on the

[36] Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, Cambridge: 2004, p. 16.

[37] *Ibidem*.

[38] Malanczuk, *supra* note 2, p. 85–86.

[39] UN GA Resolution 2625 (1970) of 24 October 1970 "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter or the United Nations," A/RES/25/2625.

[40] Tomuschat, *supra* note 17, p. 120.

[41] *Ibidem*.

[42] Hillgruber, *supra* note 26, pp. 495–496.

use of force, T.D. Grant claims that "[i]t is central to an understanding of international law as guarantor of basic public order that any particular formal status – such as membership in international organization – cannot be the prerequisite to protection from the use of threat of force: a State does not acquire license to use force at international level simply by denying the status of the target of its contemplated aggression."[43] Also in reference to the text of Art. 2 (4) of the UN Charter, C. Henderson indicates that the term "international relations" extends much further nowadays, also because of the broad meaning of the "international peace and security" phrase, as used by the UN SC, which currently also covers threats to peace domestically.[44]

The conclusion, bearing in mind all these remarks, is that, notwithstanding the clear wording of the definition of aggression, there remain expressed doubts when it comes to the binding force of the prohibition of the use of force in relation to unrecognised States. There would seem to be two sources of doubt arising around this issue. The first concerns the source of the possible rights and obligations of unrecognised States. However, since the prohibition of the use of force is binding, not only as a treaty norm, but also on customary grounds, it also binds States that are not UN Members and are not parties to the UN Charter.

The other group of problems is connected more with international politics and pragmatism. If lack of recognition is supposed to signify that some States do not deem a certain actor to be a State, and consequently do not want it to have any rights and obligations under international law, these States will not be willing to make any statements on the binding force of legal norms vis-à-vis such unrecognised entity, including also the prohibition of the use of force.

However, following the concept expressed in the definition of aggression and underpinning the work of certain authors, the prohibition of the use of force is a fundamental principle of international law that is meant to preserve the international peace and security in general, and was not formed as a privilege only for recognized States. Thus, as long as the recognition may have some constitutive effect in terms of diplomatic relations, treatment of individuals, effect of domestic judgments etc., it cannot influence the international stability.. Regardless of recognition, States are aware which actors meet the criteria of statehood and create a State with effective government over territory and population. Thus, even if political pragmatism does not allow States for the making of explicit statements on the statehood of actors in the above category, their silence at times (and at times also their conduct) may be interpreted as supporting the thesis that the prohibition of the use of force is also binding in relation to unrecognised entities. This thesis will be explored below, by reference to the examples of the Democratic People's Republic of Korea in the 1950s, the ROC and the State of Palestine.

[43] T.D. Grant, *Admission to the United Nations: Charter Article 4 and the Rise of Universal Organization*, Brill, Leiden and Boston: 2009, p. 252.

[44] Henderson, *supra* note 1, p. 382.

3. Examples of the application of the prohibition of the use of force to unrecognised States

3.1. The Democratic People's Republic of Korea

One of the earliest examples of a UN statement concerning the law on the use of force in relation to an unrecognised State was made in relation to the conflict on the Korean Peninsula in the 1950s. However, before considering that directly, it is necessary to discuss certain facts connected with the formation of the two Korean States on the Korean Peninsula.

After the Second World War, the United States and the USSR came to a decision regarding the division of the Korean Peninsula along the 38th Parallel, even though they had previously supported the self-determination of the people of Korea, and their right to create an independent State. Even though the division was supposed to be temporary only, it soon emerged that any subsequent unification into a single State would prove very difficult. Immediately, the Soviets installed their occupation forces in the North, and restricted any political activities of non-communists. On 14 November 1947, the UN GA adopted Resolution 112 (III), which established a UN Temporary Commission on Korea and ordered a nationwide election there.[45] By virtue of the Resolution, elections were indeed held in the southern part of the Peninsula, where a Constituent National Assembly was soon formed. The first Constitution of the Republic of Korea was then proclaimed as early as on 17 July 1948. However, the Soviets boycotted Resolution 112 and denied the Commission access to North Korea.

In November 1948, a Committee was formed in the North to draft a Constitution for that entity, which was adopted in April and ratified on 8 September 1948. The creation of the Democratic People's Republic of Korea was proclaimed the next day, and by the end of the December, Soviet occupation forces had withdrawn from the North.[46]

However, before that happened, on 12 December 1948, the UN GA declared that "there has been established a lawful government (the Government of the Republic of Korea) having effective controland jurisdiction over that part of Korea (…) and that this is the only such Government in Korea."[47] This therefore confirmed the existence of the State in the southern part of the Peninsula, while questioning the existence of a State in the North, despite the fact that both the Republic of Korea and the Democratic People's Republic of Korea had been established by 12 December 1948. In these circumstances, the Democratic People's Republic of Korea gained recognition solely among States of the Soviet bloc, while its existence was denied in Western States.

[45] UN GA Resolution 112 (III) of 14 November 1947, A/RES/112 – A para. 2; B, para. 2.

[46] T. An, *North Korea: A Political Handbook*, Scholarly Resources Inc., Wilmington, DE: 1983, pp. 27–31.

[47] UN GA Resolution 195 (III) of 12 December 1948, A/RES/195(III), para. 3.

Notwithstanding these findings, the 25 June 1950 invasion of the Republic of Korea by the Democratic People's Republic of Korea was an intervention gaining recognition as an armed attack.[48] Thus, UN SC Resolution 82 called the invasion "an armed attack on the Republic of Korea by forces from North Korea," and determined that these actions constituted "a breach of peace" (preamble).[49] UN SC Resolution 83 repeated these statements and added that Member States should assist to "restore international peace and security in the area"[50] (preamble). Resolution 84, apart from reaffirming the content of the two previous Resolutions, also supplied explicit recognition of the right of South Korea to defend itself (in para. 1).[51] UN SC Resolution 85 also spoke about an "unlawful attack" by "North Korean forces" (preamble).[52]

During the debate in the UN SC, the United States talked about the "unprovoked assault against the territory of the Republic of Korea," and about "breach of peace," aggression and "a threat to international peace and security." According to the USA, since the attack had been mounted against a government that the UN GA itself had brought into being, it also "strikes at the fundamental purposes of the United Nations Charter," "defies the interest and authority of the United Nations" and "concerns the vital interest which all the Member nations have in the Organization."[53] As the conflict escalated further, the USA claimed that the attack on the Republic of Korea constituted an "attack on the United Nations itself," and the most "glaring example of disregard for the United Nations and for all the principles which it represents." The USA called the northern regime "North Korea authorities."[54] The Republic of Korea in turn spoke of a "Communist-supported puppet regime of the North" that had committed a crime against humanity and the conscience of mankind.[55] For its part, China mentioned aggression carried out by the "Communist regime in North Korea,"[56] while Cuba referred to an "armed attack" launched by the "authorities in North Korea."[57] Ecuador termed the intervention a "grave case of aggression"[58] by the "authorities of North Korea"; it also named the attack an "unjustified violation of fundamental principles of our international life, principles which were laid in the Charter."[59] The representative of Egypt underlined

[48] A. Hsiu-An Hsiao, *Is China's Policy to Use Force Against Taiwan a Violation of the Principle of Non-Use of Force Under International Law*, 32 New England Law Review 715 (1997–1998), p. 726.

[49] UN SC Resolution 82 of 25 June 1950, S/RES/82.

[50] UN SC Resolution 83 of 27 June 1950, S/RES/83.

[51] UN SC Resolution 84 of 7 July 1950, S/RES/84.

[52] UN SC Resolution 85 of 31 July 1950, S/RES/85.

[53] UN SC Official Records, Fifth Year, 473rd meeting, 25 June 1950, UN Doc S/PV.473, p. 4.

[54] UN SC Official Records, Fifth Year, 474th meeting, 27 June 1950, UN Doc S/PV.474, p. 3.

[55] S/PV.473, *supra* note 53, p. 8.

[56] *Ibidem*, pp. 9–10.

[57] *Ibidem*, p. 12.

[58] *Ibidem*.

[59] S/PV.474, *supra* note 54, p. 13.

that his State is "a firm believer – like many countries – in the principles and purposes of the Charter of the United Nations and the indivisibility of international peace and security."[60] Norway talked about "unprovoked attack" and "invasion."[61] Only Yugoslavia mentioned the "Government of North Korea."[62]

These multiple references to "international peace and security," "armed attack," "aggression," the principles and purposes of the UN Charter and the right to self-defense, all denote unequivocally how States found the prohibition of the use of force applicable to the conflict, even though only one of the parties to the conflict was recognised as a State at that time.

The lack of recognition of the Democratic People's Republic of Korea resulted from the fact that the Soviet occupying powers did not agree to the provisions of UN GA Resolution 112 (III), and instead turned the northern part of the Peninsula into a communist State. This left lack of recognition as a kind of "sanction" for the adoption of a communist regime. Despite that, States considered the Democratic People's Republic of Korea to be bound by the prohibition of the use of force, while on the other hand deeming the Republic of Korea as entitled to the right to self-defence against the armed attack coming from the North. There is therefore proof of the thesis that the question of the maintenance of international peace and security prevails over the political character of the act of recognition.

3.2. The State of Palestine

The situation is much more complicated when it comes to the State of Palestine. UN GA Resolution 181, adopted on 29 November 1947, provided for the formation of both an Arab and a Jewish State. However, conflict broke out soon after the Resolution was adopted. The Jewish forces took over the major territories that were supposed to belong to the Arab State. The independence of the State of Israel was proclaimed in May 1948.[63] Since then, Israel gained broad recognition as a State. In contrast, the status of the would-be Arab State became the subject of controversy for decades thereafter, and in fact remains unresolved to this day. Neither the recognition of the right to self-determination of the Palestinian people by the UN, nor the declaration of independence of Palestine, proclaimed on 15 November 1988,[64] succeeded in attracting broad recognition for the State of Palestine.

[60] S/PV.473, *supra* note 53, p. 13.

[61] S/PV.474, *supra* note 54, p. 12.

[62] S/PV.473, *supra* note 53, p. 15.

[63] UK Border Agency, *Occupied Palestinian Territories, Country of Origin Information Report*, 15 May 2012, available at: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/310437/Occupied_Palestinian_Territories_COI_report_2012.pdf (accessed 15 April 2018).

[64] Available at: http://www.nad-plo.org/userfiles/file/Document/declaration%20of%20independence%20En.pdf (accessed 15 April 2018). However, some Authors claim that this declara-

The proclamation of independence nevertheless prompted an international reaction, since, on 15 December 1988, the UN GA adopted Resolution 43/177, by which, according to some authors,[65] it "recognised" the creation of the State of Palestine. However, for all that the latter conclusions may reasonably be thought vague, there can be no doubt as regards the meaning of UN GA Resolution 67/19,[66] which accorded "to Palestine non-member observer State status in the United Nations" (para. 2). Moreover, the UN GA expressed "the hope that the Security Council will consider favourably the application submitted on 23 September 2011 by the State of Palestine for admission to full membership in the United Nations" (para. 3).

In fact, the Palestinian application for admission to the UN has gone unexamined through to the present day, while the State of Palestine is gaining broader and broader recognition with each passing year. Today Palestine is recognised by 137 States,[67] excluding three UN SC Permanent Members, i.e. the United States, France and the United Kingdom.

Probably the document to date referred to most frequently, and indeed treated as the authoritative statement on Palestinian statehood and the use of force, is the ICJ advisory opinion on the "Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory." Israel invoked the right to self-defence set out in Art. 51 of the UN Charter as justification for its construction of the wall. The Court responded to this argument, stating that "Israel exercises control in the Occupied Palestinian Territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory."[68] It stems from this that Israel is not entitled to the right to self-defence against Occupied Territory, because this territory is under Israeli jurisdiction. Consequently, according to many commentators, the ICJ asserted that Palestine is not a State. However, the problem explored by the ICJ, as well as the Court's response to it, are far more complicated.

First of all, one needs to bear in mind that it was Israel itself that claimed that it is entitled to the right to self-defence against the attacks coming from part of the Palestinian territories. During the debate of the UN GA Emergency Session, it claimed that "a security fence has proven itself to be one of the most effective non-violent methods for preventing terrorism in the heart of civilian areas. The fence

tion of independence was not valid, at least for the reason that the PLO did not control any territory at the time (*e.g.* Shaw, *supra* note 3, p. 199).

[65] F.A. Boyle, *The Creation of the State of Palestine*, 1 European Journal of International Law 301 (1990), p. 303.

[66] UN GA Resolution 67/19 of 29 November 2012, A/RES/67/19.

[67] Permanent Observer Mission of the State of Palestine to the United Nations, *Diplomatic Relations*, available at: http://palestineun.org/about-palestine/diplomatic-relations/ (accessed 15 April 2018).

[68] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, ICJ Rep. 2004, p. 139.

is a measure wholly consistent with the right of States to self-defense enshrined in Art. 51 of the Charter. International law and UN SC resolutions, including Resolutions 1368 (2001) and 1373 (2001), have clearly recognized the right of States to use force in self-defense against terrorist attacks, and therefore surely recognize the right to use nonforcible measures to that end."[69] This statement was then confirmed in the proceedings before the ICJ in a Letter dated 29 January 2004 from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel. The letter again invoked UN GA Resolution 1373 (2001). It also referred to the statement made by the Quartet (the UN, Russian Federation, EU and USA) which on 26 September 2003 recognised "Israel's legitimate right to self-defense in the face of terrorist attacks against its citizens."[70] Given these statements, it is interesting to observe that, despite Israel having invoked the right to self-defence against "terrorist attacks," it never claimed to have invoked the said right against Palestine as a non-State actor. Moreover, since the application of the right to self-defence against terrorist attacks on the part of non-State actors is controversial under international law, it seems that, if it was the case, Israel would attempt to explain its position. As a result, the Israeli position was very vague and carefully worded, a fact that may suggest that Israeli claims did not concern Palestine as a non-State actor. Moreover, in some passages of the advisory opinion, the ICJ was not as decisive regarding the status of Palestine, claiming that "the Court does not consider that the subject-matter of the General Assembly's request can be regarded as only a bilateral matter between Israel and Palestine" (para. 49). This suggests that that are in fact "bilateral" relations between Israel and Palestine. The advisory opinion is also quite inconsistent when it comes to terminology, as it refers to "Occupied Territory" (e.g. title, paras. 17, 18, 19, 20, 24) and "Palestine" (e.g. paras. 31, 46, 48, 49) alternatively.

To sum up, the ICJ advisory opinion is in no way conclusive and should not be treated as the principle argument in a discussion over Palestinian statehood and the application of the law on the use of force towards unrecognised States.

When it comes to the problem of the use of force and Palestine in the practice of other UN organs, the situation is also quite unclear. The UN SC resolutions usually referred in general to the conflict between Palestine and Israel, and never suggested any rights and obligations of Palestine stemming from the prohibition of the use of force or the right to self-defence. For example, UN SC Resolution 1701[71] called for the "full cessation of hostilities based upon, in particular the immediate cessation

[69] UN GA Emergency Special Session, 21st meeting, 20 October 2003, UN Doc. A/ES-10/PV.21, p. 6.

[70] Letter dated 29 January 2004 from the Deputy Director General and Legal Advisor of the Ministry of Foreign Affairs, together with the Written Statement of the Government of Israel, para. 3.37, available at: http://www.icj-cij.org/files/case-related/131/1579.pdf (accessed 15 April 2018).

[71] Henderson, Green, *supra* note 30, p. 133.

by Hezbollah of all attacks and the immediate cessation by Israel of all offensive military operations" (para. 1)[72]; Resolution 1397, which demanded "immediate cessation of all acts of violence, including all acts of terror, provocation, incitement and destruction" (para. 1), was addressed to the "the Israeli and Palestinian sides" (para. 2) etc. This state of law did not change after Palestine was granted non-member observer State status under UN GA Resolution 67/19.

When it comes to the Palestinian position, even before the proclamation of independence in 1988, the PLO continued to emphasise its right to self-defence and protection in line with the prohibition of the use of force. During the debate in the UN SC on the Israeli attacks on Lebanon in 1982, the representative of the PLO claimed that: "The United States representative, today on American television, made two distortions. One was that she said that the Palestinians do not have the right to self-defence because they do not constitute a State. What strange logic! Clearly, the United States representative lives in a world that knows very little about the will of our people, which, for dozens of years, has been the target of the most savage, genocidal onslaught. (…) Of course our people has the right – indeed, it has the duty-of self-defence. No power on earth – and certainly not that of Israel and the United States – can take that right from the Palestinian people."[73] Also during the UN SC debate on the Israeli attacks in Tunisia against the PLO, the representative of Palestine claimed that: "The right to self-defence and to defence of the homeland are legitimate rights acknowledged under international laws and norms for all the peoples of the world."[74] After Palestine was named a "non-member observer State" by the UN GA, neither Palestine, nor Israel made a statement on the law on the use of force in reference to Palestine.

In the context of Palestine and the prohibition of the use of force, C. Henderson also highlights the significance of the naval blockade mounted by Israel against the Gaza Strip in January 2009. After the establishment of the blockade, Israel took various measures to uphold it, and stop vessels attempting to breach it, including also the famous incident of 31 May 2010 involving the vessel *Mavi Marmara*.[75] C. Henderson claims that, if naval blockades are only allowed in international armed conflicts, Israel, by starting one vis-à-vis the Gaza Strip, must have considered it a State-like entity.[76] This argument was also discussed in the report of

[72] UN SC Resolution 1701 of 11 August 2006, S/RES/1701.

[73] UN SC Official Records, Thirty-seventh year, 2375th Meeting, 6 June 1982, UN Doc. S/PV. 2375, paras. 86–87.

[74] UN SC Official Records, Fortieth year, 2610th Meeting, 2 October 1985, UN Doc. S/PV. 2610, para. 82.

[75] *The Public Commission to Examine the Maritime Incident of 31 May 2010: The Turkel Commission Report Part One*, paras. 1–3, available at: https://www.jewishvirtuallibrary.org/jsource/Society_&_Culture/TurkelCommission.pdf (accessed 15 April 2018) (hereinafter: the Public Commission).

[76] Henderson, *supra* note 1, p. 392, ft 127.

the Public Commission to Examine the Maritime Incident of 31 May 2010, established by virtue of a Resolution of the Israeli government, which indicated that the "international community is more willing to accept the imposition of a naval blockade within a framework of an international armed conflict." However, the Commission noted that a naval blockade may also be applied in non-international armed conflicts.[77] In this context, reference should also be made to the conclusions reached by the Panel of Inquiry on the 31 May 2010 Flotilla Incident, established by the UN Secretary-General, which, in examining the incident of 31 May 2010, did not consider whether a naval blockade might be applied to international or non-international armed conflicts, but referred directly to Arts. 2 (4) and 51 of the UN Charter, claiming that: "the Panel notes in this regard that the uncertain legal status of Gaza under international law cannot mean that Israel has no right to self-defence against armed attacks directed toward its territory."[78]

The discussion of the character of the naval blockade started in 2009 is only a part of the debate over the classification of the conflict between Palestine and Israel, since Israel itself considers that to be one of an international character. The Israeli Supreme Court in a series of judgments claimed that this position is justified by the way in which the term "international armed conflict" is taken to cover all conflicts involving cross-border violence, also in relation to occupied territories. However, even though more recent judgments claimed that the Gaza Strip is no longer occupied, in the meantime they also stated that it is subjected to the regulations of international armed conflicts, as grounded in the Fourth Geneva Convention and First Protocol Additional.[79] The Israeli position thus remains very vague – on the one hand applying measures and regulations characteristic for inter-state conflict, but on the other explaining its conduct in terms of a very specific understanding of international humanitarian law regulations.

What was probably the most accurate conclusion was that arrived at by the Secretary General's Panel, which termed the legal status of Gaza "uncertain," and decided that it should in any case be bound by the prohibition of the use of force. The example of Palestine proves that recognition is a political question, and that States are ready to deny the statehood of an entity for political reasons. Moreover, it also illustrates the thesis advanced above, that States are reluctant to assert any rights and obligations to unrecognised States, but are also in the meantime aware of facts, and consequently seek to reconcile lack of recognition with the realities of international politics and global security.

[77] The Public Commission, *supra* note 75, paras. 37–39.

[78] Report of the Secretary-General's Panel of Inquiry on the 31 May 2010 Flotilla Incident, September 2011, para. 72.

[79] The Public Commission, *supra* note 75, para. 41. The Secretary-General's Panel claimed in this context that "[t]he law does not operate in a political vacuum, and it is implausible to deny that the nature of the armed violence between Israel and Hamas goes beyond purely domestic matters" (para. 72).

3.3. The ROC

When, in 1949, communist forces formed the PRC on the mainland, the hitherto Chiang Kai-shek nationalist government had to flee to the island of Taiwan, where it continued the functioning of the ROC.[80] Even though it was initially the government of this latter entity that gained recognition as the legitimate representation of China,[81] on 25 October 1971 the UN GA adopted Resolution 2758 (XVI),[82] which replaced the representation of the ROC by the government of the PRC, within the UN. Resolution 2758 thus started a process of recognition of the PRC as the sole legitimate government of China, while the role and position of the ROC started to decline in importance.

Despite this, the institutional structure of the ROC fulfills all the criteria of statehood: the ROC's government[83] exercises effective control over the whole island of Taiwan and its population in every possible aspect, including as regards the judiciary, legislation, issuance of currency, security, public administration, taxes, etc. It is also capable of entering into international relations, since it maintains bilateral relations and participates in different international organisations, including also the WTO. Moreover, the ROC has considerable military capabilities, achieved through long-term preparation for a potential cross-strait conflict. According to the Council on Foreign Relations, in 2015 alone, the ROC bought arms at a total cost of $1.83bn from the United States. In total, the USA has delivered three-quarters of the ROC's weapons. Moreover, between 1979 and 2014, the ROC was ranked the ninth-largest recipient of arms globally.[84]

Nowadays, the ROC is recognised by about 20 States,[85] while the PRC is not only widely recognised and holding UN membership, but also has the status of

[80] B.R. Roth, *Governmental Illegitimacy on International Law*, Oxford University Press, Oxford: 2000, p. 261.

[81] UN SC Official Records, Fifth Year, 460th Meeting, 12 January 1950, UN Doc. S/PV.460, p. 3; UN SC Official Records, Fifth Year, 461st Meeting,13 January 1950, UN Doc. S/PV.461, pp. 3–4.

[82] UN GA Resolution 2758 (XVI) of 25 October 1971, A/RES/2758.

[83] The ROC declares itself a semi-presidential republic (*see* http://www.taiwan.gov.tw/content2.php?p=29&c=48 (accessed 15 April 2018)). The executive branch consists of the President and the "Executive Yuan," which includes over 30 ministries and national agencies. The "Legislative Yuan" (multicameral parliament) has 113 members and is elected every 4 years (http://www.ly.gov.tw/en/01_introduce/introView.action?id=4 (accessed 15 April 2018)). Elections are held regularly.

[84] Council on Foreign Relations, *China-Taiwan Relations*, available at: https://www.cfr.org/backgrounder/china-taiwan-relations (accessed 15 April 2018).

[85] The official website of the Ministry of Foreign Affairs of the Republic of China indicates that the ROC has established diplomatic relations with Kiribati, the Republic of the Marshall Islands, the Republic of Palau, Nauru, the Solomon Islands, Tuvalu, Burkina Faso, the Kingdom of Swaziland, the Holy See, Belize, the Dominican Republic, the Republic of Guatemala, El Salvador, Nicaragua, St. Kitts and Nevis, Saint Lucia and St. Vincent & the Grenadines. Available at: https://www.mofa.gov.tw/en/AlliesIndex.aspx?n=DF6F8F246049F8D6&sms=A76B7230ADF29736 (accessed 15 April 2018).

Permanent Member of the UN SC. In terms of mutual relations, the PRC considers Taiwan part of its territory, and claims that the ROC does not have rights to continue functioning. Since the 1970s, the PRC has been pursuing a "One China" policy. This term was in fact used for the first time by Japan, in the course of a debate at the UN GA, when the PRC government accused Japan and the United States of plotting to support the idea of the PRC and ROC being maintained as two separate States.[86]

The core of the "One China" policy has gained repetition from the PRC government in multiple instruments. For example, during the first official visit of the USA President to the PRC in 1972, the two governments issued a joint statement, known as the Shanghai Communiqué, which claimed that "(…) the Government of the People's Republic of China is the sole legal government of China; Taiwan is a province of China which has long been returned to the motherland; (…) The Chinese Government firmly opposes any activities which aim at the creation of 'One China, one Taiwan,' 'One China, two governments,' 'two Chinas,' an 'independent Taiwan' or advocate that 'the status of Taiwan remains to be determined.'"[87] This clearly all stems from the fact that, according to the PRC government, "Taiwan" constitutes part of PRC territory.[88]

This line of argumentation was then reiterated in the 1993 White Paper *The Taiwan Question and Reunification of China*,[89] which claimed*, inter alia*, that "There is only one China in the world, Taiwan is an inalienable part of China and the seat of China's central government is in Beijing." It further referred to the principle of territorial integrity under public international law. It also promoted the idea of peaceful reunification, as well as the "one country, two systems" concept, whereby, after reunification, "the main body of the nation would continue with its socialist system while Taiwan could maintain capitalism." However, despite the declaration of this kind, the White Paper also contains a statement which could, should problems with reunification arise, allow for the bypassing of peaceful negotiations. It provides that: "any sovereign state is entitled to use any means it deems necessary, including military ones, to uphold its sovereignty and territorial integrity. The Chinese Government is under no obligation to undertake any commitment to any foreign power or people intending to split China as to what means it might use to handle its own domestic affairs." These claims were then repeated in the 2000 White Paper *The One-China Principle and the Taiwan*

[86] Y. Frank Chiang, *One-China Policy and Taiwan*, 28 (1) Fordham International Law Journal 1 (2004), pp. 51–52.

[87] *Joint Communiqué of the People's Republic of China and the United States of America*, 28 February 1972, available at: http://www.china-embassy.org/eng/zmgx/doc/ctc/t36255.htm (accessed 15 April 2018).

[88] Frank Chiang, *supra* note 86, p. 48.

[89] Available at: http://www.china-embassy.org/eng/zt/twwt/White%20Papers/t36704.htm (accessed 15 April 2018).

Issue,[90] which upheld the "One China Policy," and again made a statement regarding the possibility of forcible measures being used to allow the reunification to take place. Specifically, the wording was: "While carrying out the policy of peaceful reunification, the Chinese government always makes it clear that the means used to solve the Taiwan issue is a matter of China's internal affairs, and China is under no obligation to commit itself to rule out the use of force."

Following this policy, a PRC afraid of the possible secession of the ROC, adopted its Anti-Secession Act in 2005. This statute reiterates that "There is only one China in the world. Both the mainland and Taiwan belong to one China," as well as "Taiwan is part of China. The state shall never allow the 'Taiwan independence' secessionist forces to make Taiwan secede from China under any name or by any means" (art. 2, 3). Thus, "[i]n the event that the 'Taiwan independence' secessionist forces should act under any name or by any means to cause the fact of Taiwan's secession from China, or that major incidents entailing Taiwan's secession from China should occur, or that possibilities for a peaceful reunification should be completely exhausted, the state shall employ non-peaceful means and other necessary measures to protect China's sovereignty and territorial integrity" (art. 8). It stems from this that the PRC may use force against the ROC under three circumstances.[91] First of all, this is conceivable were secessionist forces to act to effectuate the ROC's secession. This could happen, e.g. through the declaration of independence of the ROC.[92] Secondly, forcible measures may be applied in the case of a major incident leading to secession from "China." By "major incident" one may understand, for example, a foreign invasion or armed attack by the ROC against the PRC.[93] Thirdly, the use of force is allowed when all possibilities of a peaceful reunification have been exhausted.

Moreover, at the beginning of 2017, media reported that the PCR might be considering amendment of the Anti-Secessionist Act to strengthen its legal position in the case of the potential use of force against the ROC.[94] Even though it is underlined that the PRC is willing to use force "only" to prevent independence of the ROC from occurring, and not therefore to compel reunification,[95] there is still a question as to whether ROC might already be an independent State.

When it comes to the approach of the international community to the Chinese question, its ambiguous position is best represented by the example of the

[90] Available at: http://www.gwytb.gov.cn/en/Special/WhitePapers/201103/t20110316_1789217.htm (accessed 15 April 2018).

[91] L. Yulin, *Statehood Theory and China's Taiwan Policy*, 2 Tsinghua China Law Review 1 (2009), p. 3.

[92] C.N. Wei, *China's Anti-Secession Law and Hu Jintao's Taiwan Policy*, 5 Yale Journal of International Affairs 112 (2010), p. 121.

[93] *Ibidem*.

[94] *China to amend "Anti-Secession Law" to target Taiwan: report*, 8 February 2017, available at: http://m.chinapost.com.tw/taiwan/2017/02/08/491090/China-to.htm (accessed 15 April 2018).

[95] Wei, *supra* note 92, pp. 124–125.

history of relations between the ROC and the United States. It was the United States which supported the recognition of the ROC government instead of the PRC as the sole representation of China within the UN until 1971, and it was the USA which heavily contributed to the reverse process. Nevertheless, after the ROC's government was excluded from the UN, the USA government attempted to maintain some unofficial ties with the ROC. In 1979, in the aftermath of the recognition by the USA of the PRC government,[96] the US Congress adopted the Taiwan Relations Act. This declared, *inter alia*, that "the United States shall make available to Taiwan such defense articles and defense services in such quantity as may be necessary to enable Taiwan to maintain a sufficient self-defense capacity as determined by the President and the Congress" (Section 3.1), as well as that the United States shall "maintain the capacity of the United States to resist any resort to force or other forms of coercion that would jeopardize the security, or social or economic system, of the people of Taiwan" (section 2.2.6).[97] Moreover, the Act contains many reassurances that, despite the lack of official diplomatic relations, the United States will honour the people and laws of the ROC to the extent possible without recognition. Three years later, in 1982, the US issued the Six Assurances, by which the United States declared, that it would not, *inter alia*, stop arms sale to the ROC government, revise the Taiwan Relations Act or change its position on the ROC's sovereignty.

However, the current US policy seems more vague. When, in April 2017, US President Donald Trump held a phone call with ROC President Tsai Ing-wen, without prior consultation with the PRC, the harsh reaction on the part of the latter led Trump to offer immediate reassurances to the PRC, to the effect that he would not speak directly with the ROC authorities again, "without first checking with Chinese President Xi Jinping."[98] The declaration of this nature was explained in regard to the role the US sees for the PRC's engagement in negotiations with North Korea. Any suggestion on the part of the US that it could resign from support for the "One China" policy causes nervousness in Beijing and gives rise to threats regarding military invasion of the ROC.[99] On the other hand, at the beginning of 2018, the Congress passed the Taiwan Travel Act, which was further approved by President Trump. The Act allows officials at all levels of the United States Government to travel to Taiwan to meet their Taiwanese counterparts, as well as allows "high-level officials of Taiwan to enter the United States, under conditions which demonstrate appropriate respect for the dignity of such officials, and to meet with officials of the

[96] Frank Chiang, *supra* note 86, pp. 53, 56–57.

[97] Taiwan Relations Act, H.R.2479 – 96th Congress (1979–1980).

[98] E. Rauhala, *Trump now says he would check with China before another call with Taiwan's president*, The Washington Post, 28.04.2017, available at: https://tinyurl.com/yaa73pvd (accessed 15 April 2018).

[99] B. Haas, *China should plan to take Taiwan by force after Trump call, state media says*, The Guardian, 15.12.2016, available at: https://www.theguardian.com/world/2016/dec/15/china-plan-taiwan-force-trump-call-state-media (accessed 15 April 2018).

United States."[100] Thus, the Act facilitates the bilateral contacts between the Taiwanese and US officials.

Summing up, by its "One China" policy, the PRC attempts to prove that any potential conflict with the ROC would constitute an internal affair of one State, and cannot therefore be regulated by international law. On the other hand, J.I. Charney and J.R.V. Prescott argue that, no matter if the ROC is an independent State or not, "developments in international law with respect to internal conflicts establish that the dispute between Taiwan and China is governed by international law, especially in the light of the strong international concern." According to these Authors, any use of force between the PRC and the ROC would constitute a breach of the peace in the light of the UN Charter, and would be subjected to the authority of the UN SC under Chapter VII of the Charter.[101] However, what would the legal grounds for such a conclusion be, were the assumption that the ROC is not a State to hold good?

It seems that such questions are not necessary since, as was stated above, the ROC in fact fulfills the criteria regarding statehood. The major proof which supports such a conclusion is that the nature of the ROC has not changed since 1949, when the rest of the international community had no doubts as to the fact that the ROC constituted a State, despite its lack of control over mainland China. Thus, the example of the ROC offers further proof as to how politicised acts of recognition actually are, and how States need to balance their interests when deciding on recognition (the PRC breaks off diplomatic relations with those States that recognise the ROC).

Regardless of the PRC "One China" policy, a potential conflict with the ROC would not be an internal affair of one State, but would constitute the prohibited use of force. Thus, the ROC is bound by the prohibition of the use of force and is entitled to the right to self-defence under customary international law, despite the lack of universal recognition. Such a standpoint is also attested by the approach adopted by the US, especially in the Taiwan Relations Act referring to ROC's capacity to defend itself, and the threat of the use of force.

Conclusions

The act of recognition is a highly political one that depends on the will and political interests of States. Though the constitutive theory of recognition is not regarded as the binding one, States in fact apply some element of this theory to their relations towards unrecognised entities, denying their status under international law. But for all that such an approach is understandable in their bilateral relations,

[100] Taiwan Travel Act, H.R.535 – 115th Congress (2017–2018).

[101] J.I. Charney, J.R.V. Prescott, *Resolving Cross-Strait Relations between China and Taiwan*, 94 American Journal of International Law 453 (2000), p. 476.

it can endanger international peace and security if some members of the international community do not feel bound by the prohibition of the use of force towards others. Even though States are aware of that, they try to avoid any conclusive statements as to the status of unrecognised entities. This trend is illustrated by the three examples discussed in the paper: of the Democratic People's Republic of Korea, the State of Palestine and the ROC – entities of which all three meet the criteria of statehood, albeit with denied rights and obligations under international law. The vague and complex approach adopted by "recognised States" towards them proves that they do have *de facto* rights and obligations under the law on the use of force, even if in such an assertion could prove uncomfortable in political terms.

Abstract: The thesis advanced in the paper is that "unrecognised States" are both bound and protected by the prohibition of the use of force. However, the position adopted by "recognised States" in this respect is very vague, since denial of the status of "contested States" does not allow them to make decisive statements regarding their international rights and obligations. Nevertheless, understanding that the application of the prohibition of the use of force in relation to unrecognised States may be important from the standpoint of international peace and security, States attempt to include unrecognised States in the global security system under international law, even though their legal status continues to go unadmitted. The arguments in support of this thesis first and foremost require an analysis of the nature of recognition, with special reference to the constitutive and declaratory theories thereof. There is then a need to discuss the general approach adopted by international bodies and legal doctrine as regards the recognition and prohibition of the use of force. Finally, examples of the approaches adopted by States are to be discussed, using the cases of the Democratic People's Republic of Korea, the State of Palestine and the ROC as examples.

Keywords: contested States, Democratic People's Republic of Korea, recognition, ROC, State of Palestine, unrecognised States, use of force.

The Human-rights Obligations of Unrecognised Entities

*María Isabel Torres Cazorla**

Introduction

The subject matter here may be qualified as "looking for the essence of international law." That is to say that an attempt will be made to examine obligations in the field of human rights that must be acted upon by the international community as a whole – *vis-à-vis* the unrecognised entities considered in this volume – given the very fact that in some cases these are not considered States or, at least are not recognised as such. Taking into account this point of departure, certain aspects relating to this main topic will be studied. Most in fact remain unsolved questions as yet, because the doctrinal approach and practice do not present unanimous positions. Moreover, international practice will be analysed as regards the interaction between doctrine and international law, from the perspective of views on recognition and their evolution over time.

1. Today's recognition/non-recognition debate as a "pragmatic rather than doctrinaire" approach

At the outset, the views of Hans Kelsen expressed in 1941 might be referred to, in line with an admission that what he had to say remains valid today. His words were: "The problem of recognition of States and governments – and we may add, the problem of recognition, generally considered – has neither in theory nor in practice been solved satisfactorily. Hardly any other question is more controversial, or leads in the practice of States to such paradoxical situations."[1]

This perspective obviously supplies a starting point, but alongside it, another very fundamental aspect is the traditional reference to either a constitutive or declarative approach to the institution in international law that is recognition. The

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[1] H. Kelsen, *Recognition in International Law: Theoretical Observations*, 35 American Journal of International Law 605 (1941), p. 605.

relevant debate has in fact "received conflicting answers over the years,"[2] though has long been a source of fascination for international lawyers[3]; ranging from the constitutive position supported by Oppenheim[4] to the consideration of recognition "as a political act which has significant legal effects in the international and domestic legal orders."[5] This view, considered as a *tertium genus* – a combined version of the declaratory and constitutive positions – and sustained by a great number of writers after de Visscher,[6] suggest – as Crawford explained in the 1970s – "that the differences between the declaratory and the constitutive schools are less in practice than might have been expected."[7] A critical approach to this debate was supported by Brownlie, who noted that "with rare exceptions the theories on recognition have not only failed to improve the quality of thought, but have deflected lawyers from the application of ordinary methods of legal analysis."[8] So, this debate is in fact deemed to have negative consequences, such as this author explains.

So international practice related to recognition/non recognition may be qualified as a mixture of two extreme positions represented by the aforementioned constitutive and declaratory theories. Following the argument of Dugard, explaining the consequences of the application of the constitutive theory: "Another criticism levelled at the constitutive theory is that an unrecognized State has no rights and obligations vis-à-vis States that refuse to recognize it. (…) Most Arab States refuse to recognize Israel as a State, but they nevertheless accept that they have legal obligations towards Israel. Israel likewise accepts that it has legal obligations towards States that refuse to recognize it."[9]

Briefly speaking, the constitutive and declaratory theories of recognition have been used as arguments to reinforce international practice, in particular in those cases where political considerations play a substantial role. But the institution of

[2] ILA, Sofia Conference (2012), *Recognition/Non-Recognition in International Law*, Report, p. 2.

[3] *See generally* S. Talmon, *The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?*, 75 British Yearbook of International Law 75 (2004), p. 101; J. Dugard, *The Secession of States and Their Recognition*, RCADI, 2011, vol. 357, p. 45.

[4] L. Oppenheim, *International Law: A Treatise*, vol. I, Longmans, Green and Company, New York and Bombay: 1905, p. 109. In the words of this author, "a State is, and becomes, an International person through recognition only and exclusively."

[5] ILA, *supra* note 2, p. 3.

[6] Ch. de Visscher, *Teorías y realidades en Derecho Internacional Público*, translated by P. Sancho Riera (original version in French, Paris: 1955, Spanish translation published by Bosch, Barcelona: 1962, pp. 252–253). *See also* J.L. Brierly, holding that "a State may exist without being recognized," *The Law of Nations*, 6th ed. (revised by C.H.M. Waldock), Clarendon Press, Oxford: 1963, p. 139.

[7] J. Crawford, *The Criteria for Statehood in International Law*, 48 British Yearbook of International Law 93 (1976–1977), p. 106.

[8] *See* I. Brownlie, *Recognition in Theory and Practice*, 197 British Yearbook of International Law 53 (1982), p. 197.

[9] Dugard, *supra* note 3, p. 47.

recognition, in the same way as international law as a whole, has evolved considerably over time. On December 16, 1991, the European Communities adopted a set of Guidelines for the recognition of new States in Eastern Europe and in the Soviet Union, and an associated Declaration on Yugoslavia.[10] Essential principles that may be considered requirements for recognition[11] and are set out in the Declaration are:

- "(…) attachment to the principles of the Helsinki Final Act and the Charter of Paris,[12] in particular the principle of self-determination."
- "(…) respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, *especially* with regard to the rule of law, *democracy and human rights*" (emphasis added).
- "(…) *guarantees for the rights of ethnic and national groups and minorities* in accordance with the commitments subscribed to in the framework of the CSCE (Conference on Security and Cooperation in Europe)" (emphasis added).
- "The Community and its Member States will not recognize entities which are the result of aggression."

Observing recent international practice, we find cases of recognition – if by a limited number of States – in which the former ideas have been repeated. This is the case for recognition of Abkhazia and South Ossetia by the Russian Federation, following the Statement by the latter's Ministry of Foreign Affairs of 26 August 2008: "Making this decision [to recognize], Russia was guided by the provisions of the Charter of the United Nations, the Helsinki Final Act and other fundamental international instruments, including the 1970 Declaration on Principles of International Law concerning Friendly Relations among States. It should be noted that in accordance with the Declaration, every State has the duty to refrain from any forcible action which deprives peoples of their right to self-determination and freedom and independence, to adhere in their activities to the principle of equal rights and self-determination of peoples, and to possess a government representing the whole people belonging to the territory. There is no doubt that

[10] *See* these documents in 62 British Yearbook of International Law (1991), pp. 559–561.

[11] J.A. Frowein, *Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 April 2018). He states that "the guidelines show that recognition of States today may well take into account the legitimacy of a new State."

[12] In regard to international organisations, different categories of instruments apart from international treaties, emerged in the 20th century. This is true of the Helsinki Final Act and the Charter of Paris for a New Europe "which are not treaties in the formal sense" (*see* M.-C. Runavot, *The Intergovernmental Organization and the Institutionalization of International Relations*, in: R. Virzo, I. Ingravallo (eds.), *Evolutions in the Law of International Organizations*, Brill|Nijhoff, Leiden|Boston: 2015, p. 33. The Helsinki Final Act (1 August 1975) and the Charter of Paris for a New Europe (21 November 1990) are reproduced on http://www.osce.org/resources/csce-osce-key-documents (accessed 15 April 2018).

Mikhail Saakashvili's regime is far from meeting those high standards set by the international community."[13]

What is the relevance of recognition today? Is this institution governed by international law or by *realpolitik*?[14] The Kosovo case offers an example that, in its *sui generis* nature,[15] expresses the difficulties assumed by the international community when it comes to recognition,[16] and secession[17] and the role played by new actors/entities in today's field of public international law. The practice of States related to Yugoslavia, Kosovo, Abkhazia and South Ossetia, "has put an end to a period during which State practice was relatively consistent."[18] This *relative consistency* – or inconsistency, depending on the perspective formally adopted – is related to the decolonisation period (with exceptional and problematic cases involving Biafra, Katanga or Bangladesh).

What about the role of the admission of one entity to the United Nations and the recognition theories, or the consideration of this admission as a "collective recognition"? As Dugard says,[19] "no theory of law has explained the conundrum of recognition" in cases like Kosovo ("when a State is not admitted to the United Na-

[13] *See* this text in Dugard, *supra* note 3, ft 579, p. 168 and cited by C. Ryngaert and S. Sobrie, *Recognition of States: International Law or Realpolitik? The Practice of Recognition in the Wake of Kosovo, South Ossetia, and Abkhazia*, 24 Leiden Journal of International Law 467 (2011), p. 482.

[14] Ryngaert, Sobrie, *supra* note 13, p. 472.

[15] As J. Dugard states, "the claim that each case is *sui generis* – as was maintained by many States in their recognition of Kosovo – is subversive of international law. Each case is a precedent. Precedents based on principle and sound policy provide normative guidelines for future cases. In this way a coherent body of rules and principles governing secession may be developed"; *see* Dugard, *supra* note 3, p. 35. The European Union Council considered the Kosovo case as *sui generis*, such as may be seen, merely as an example, in the Presidency Conclusions of the Brussels European Council of 17 December 2007: "The European Council underlined its conviction that resolving the pending status of Kosovo constitutes *a sui generis case* that does not set any precedent" (p. 20, para. 69, emphasis added), available at: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/97669.pdf (accessed 15 April 2018). The expression "sui generis" has been strongly criticised; Crawford says that "inducing a multitude of necessary and usually unexpressed rules regarding a '*sui generis* entity' is laborious and for most purposes unnecessary." *See* J. Crawford, *State*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 April 2018), para. 36.

[16] Using the expression used by J. Dugard, an example of this was "the failure of the International Court of Justice to pronounce on the recognition of Kosovo on its 2010 Advisory Opinion on *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*." J. Dugard, *supra* note 3, p. 42.

[17] *See* the concept of secession given by M. Cohen, as "the creation of a new independent entity through the separation of part of the territory and population of an existing State, without the consent of the latter," at M. Cohen (ed.), *Secession: International Law Perspectives*, Cambridge University Press, Cambridge: 2006, p. 3.

[18] *See* Ryngaert, Sobrie, *supra* note 13, p. 471.

[19] *See* Dugard, *supra* note 3, p. 57.

tions because it falls short of the required majority in the General Assembly")[20] or Palestine ("because of a threatened veto in the Security Council").[21] However, alongside Kosovo and Palestine, other cases may be mentioned, such as "Abkhazia and South Ossetia, recognized by only a handful of States (…); Somaliland (…) meet many of the criteria of statehood but are denied both unilateral recognition by any State and membership of the United Nations."[22] Dugard states that "the fate of such entities, whether they be described as partial or quasi-States, ensures that unilateral recognition remains a crucial procedure for establishing or confirming the existence of States."[23] The State of Israel is a particular case, due to the fact that "it may therefore be argued that as the creation of the State of Israel involved a violation of the norm of self-determination, it was "illegally recognized and improperly admitted to the United Nations."[24]

In turn, dealing with the former Yugoslavia, Dugard says that "Bosnia-Herzegovina was recognized prematurely and admitted to the United Nations prematurely while a savage civil war raged in the territory and would continue to do so for another three years. Arguably the recognition policy pursued by the European Union was a root cause of the conflict in the former Yugoslavia and it failed to take account of the aspirations of different peoples with different cultures, religions and histories, living largely in demarcated ethnic enclaves, determined to exercise their right of self-determination – if necessary through the barrel of a gun. In these circumstances it is difficult to extract any coherent principles to guide the law of the secession of States from the break-up of the SFRY."[25]

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[20] Kosovo has been recognized by 116 States, following the information available at http://www.kosovothanksyou.com/ (accessed 15 April 2018). It is member of the World Bank (http://www.worldbank.org/en/about/leadership/members), (accessed 15 April 2018) and of the International Monetary Fund (https://www.imf.org/external/np/sec/memdir/memdate.htm) (accessed 15 April 2018), in both cases since 29 June 2009.

[21] By the UN GA Resolution 67/19 of 29 November 2012, A/RES/67/19, the UN GA accorded non-Member Observer State status to Palestine. Palestine joined UNESCO on 23 November 2011 (http://en.unesco.org/countries/p), (accessed 15 April 2018). It acceded to the Rome Statute of the International Criminal Court on 2 January 2015; this treaty entered into force for the State of Palestine on 1 April 2015 (https://asp.icc-cpi.int/en_menus/asp/states %20parties/asian%20states/Pages/Palestine.aspx), (accessed 15 April 2018).

[22] *See* Dugard, *supra* note 3, p. 69.

[23] *Ibidem*.

[24] *See* J. Crawford, *The Creation of States in International Law*, 2nd ed., Clarendon Press, Oxford: 2006, pp. 427, 434, ft 409. The declaration made by the President of the United States (D. Trump) in regard to the moving of the Embassy of this State to Jerusalem – together with the consequences derived from this particular fact about the recognition of Jerusalem as the capital of Israel – has shown the controversy at the United Nations. Firstly, with the veto by United States of the UN SC draft resolution of 18 December 2017 (UN Doc. S/2017/1060); secondly, by the adoption at the UN GA of Resolution ES-10/19 of 21 December 2017, A/RES/ES-10/19, with 128 in favour, 9 votes against, 35 abstentions and 21 absences.

[25] *See* Dugard, *supra* note 3, pp. 148–152 about the former Yugoslavia, in particular p. 152.

Inconsistency seems a useful word to describe recognition today; a mixture of political considerations and a case-by-case analysis seem useful in understanding recognition – as conceptualised generally – and the human-rights obligations of unrecognised entities in contemporary public international law. A pragmatic approach needs to be adopted.

2. Human-rights obligations in this field: some voices to be heard

2.1. The doctrinal approach

The so-called UN Charter of Human Rights – beginning with the UN Declaration of Human Rights and followed by a *corpus iuris* of multilateral conventions – \has transformed international law. The sovereignty of States – a basic principle of public international law – must be interpreted together with "another constitutional principle of contemporary international order: the human rights principle."[26] The *Institut de Droit International*, in a Resolution about "International protection of human rights and the principle of non-intervention in domestic affairs of States" (Resolution adopted 13 September 1989), qualified this as an *erga omnes* obligation, due to the fact that "elle incombe à tout Etat vis-à-vis de la communauté international dans son ensemble, et tout Etat a un intêret juridique à la protection des droits de l'homme."[27]

Trying to understand and define the content of the obligations derived from the so-called "human rights principle," and dealing with some ideas that may be applied to non-recognised entities, authors such as Meron,[28] and Hannikainen[29] may

[26] *See* J.A. Carrillo Salcedo, *Soberanía de los Estados y Derechos Humanos en el Derecho Internacional Contemporáneo*, Tecnos, Madrid: 2001, p. 177; *see also* Th. Meron, *International Law in the Age of Human Rights. General Course on Public International Law*, RCADI, 2003, vol. 301, p. 21.

[27] 62–63 Annuaire de l'Institut de Droit International (1990), p. 340.

[28] *See* Th. Meron, *Human Rights and Humanitarian Norms as Customary Law*, Clarendon Press, Oxford: 1989, p. 94: "It is, of course, to be expected that those rights which are most crucial to the protection of human dignity and of universally accepted values of humanity, and whose violation triggers broad condemnation by the international community, will require a lesser amount of confirmatory evidence." *Ibidem*, p. 9.

[29] *See* L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status*, University of Lapland, Helsinki: 1988, p. 428: "Thus, the UN Charter, the GA's Universal Declaration of Human Rights and the UN practice, the various Human Rights Conventions, and the very existence of the category of "crimes against humanity" appear to have generated at least a limited number of the *basic humanitarian customary obligations having a universal character*. This conclusion appears to correspond to the view of the ICJ which stated in the *Corfu Channel* case that elemental considerations of humanity (ICJ, *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, Judgment, 9 April 1949, ICJ Rep 1949, pp. 4, 22) are among the general and well-recognised principles of international law and in the Nicaragua case that the fundamental general principles of humanitarian law are

shed some light on the question; the latter, adopting a realistic perspective, says that "most human rights are not of an absolute character...(t)he conclusion appears to be inescapable that the number of peremptory obligations of States to respect human rights is *at most quite limited*."[30] He holds the view that "(t)he following gross offenses against the life, integrity and dignity of human beings are prohibited in peremptory norms in *all circumstances* (emphasis added): slavery and slave trade; genocide; severe discrimination on any grounds; collective punishment; torture and other forms of brutal and cruel treatment or punishment by which severe pain or suffering is intentionally or arbitrarily inflicted on human persons; mass extermination; arbitrary killing and summary executions."[31]

When analysing the content of human-rights obligations, one ultimately ends in rules that either form part of the *jus cogens* or are included among general principles.[32] Doctrinal opinions are referred to "obligations of States"; but what about the obligations of the international community as a whole? And what does happen when these human rights violations take place on a territory controlled by an unrecognised entity? Is there any answer to this "dilemma"?

Some examples were provided at the Washington Conference of the ILA, about surrounding questions[33] that may be considered a preliminary answer to this dilemma; notwithstanding this fact, one of the main conclusions adopted "shows that the interaction of States and unrecognised entities is varied and at times complex."[34] This complexity will be studied in the next section, focusing our attention on the ICJ's position on the topic.

2.2. The ICJ perspective (in particular, ICJ decisions dealing with human rights obligations of unrecognised entities: a "*sui generis*" debate)

An interesting way to know the opinion of international courts on the subject of human-rights obligations in international law is provided by ICJ decisions. Both contentious cases and advisory opinions contain some ideas relating to this matter;

universally obligatory in all circumstances (ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Merits, Judgment, 27 June 1986, ICJ Rep 1986, p. 14, paras. 218–220).

[30] *See* Hannikainen, *supra* note 29, p. 428.

[31] *Ibidem*, p. 717.

[32] *See* M.I. Torres Cazorla, *Rights of Private Persons and State Succession: An Approach to the Most Recent Cases*, in: P.M. Eisemann, M. Koskenniemi (eds.), *La succession d'États. La codification à l'épreuve des faits/State Succession: Codification Tested against the Facts*, Martinus Nijhoff Publishers, The Hague: 2000, pp. 667–668.

[33] ILA, Washington Conference (2014), *Recognition/Non Recognition in International Law*, Report, p. 19, para. 9, containing cases related to extradition, recognition of educational degrees or trade. Realism, taking into account the solutions provided by municipal courts is the pragmatic view to be sustained in order for certain useful conclusions to be drawn.

[34] *Ibidem*.

although this analysis is not exhaustive, there are some landmark cases to be taken into account[35]:

- In the *Corfu Channel* case,[36] the ICJ mentioned "certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."
- In the advisory opinion on the *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*,[37] it was affirmed that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation" (…) "the universal character both of the condemnation of genocide and of the odious scourge." "The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope."
- In the *dictum* concerning the *Barcelona Traction Light and Power Company Limited*,[38] the Court states that "(…) an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. (…) they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from (…) the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (…); others are conferred by international instruments of a universal or quasi-universal character."
- In obligations established by the Vienna Conventions on diplomatic and consular relations, qualifying them as imperative, there is an idea conveyed by the ICJ in the case concerning the *United States Diplomatic and Consular Staff in Tehran*[39] which hols that: "Whereas, while no State is under any obligation

[35] This position, together with a complete study of judicial decisions and doctrine, was sustained by R. Casado Raigón, *Ética y Derecho Internacional. Consideraciones acerca de los derechos humanos en el orden internacional*, in: *idem*, I. Gallego Domínguez (ed.), *Personalidad y capacidad jurídicas. 74 contribuciones con motivo del XXV Aniversario de la Facultad de Derecho de Córdoba*, Servicio de Publicaciones Universidad de Córdoba, Córdoba: 2005, pp. 323–325.

[36] ICJ, *Corfu Channel*, *supra* note 29, p. 22.

[37] *Idem*, *Reservations to the Convention on Genocide*, Advisory Opinion, 28 May 1951, ICJ Rep 1951, p. 15, para. 23.

[38] *Idem*, *Barcelona Traction, Light and Power Company, Limited*, Second Phase, Judgment, 5 February 1970, ICJ Rep 1970, p. 3, para. 32.

[39] *See idem, United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Request for the indication of Provisional Measures, Order of 15 December 1979, ICJ Rep 1979, p. 20, para. 41.

to maintain diplomatic or consular relations with another, yet it cannot fail to recognize the imperative obligations inherent therein, now codified in the Vienna Conventions of 1961 and 1963."

- In the advisory opinion on *Namibia*,[40] the Court clarifies certain aspects relating to civil status, in cases of non-recognition, by stating that: "In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international cooperation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, *this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory*" (emphasis added).

This ICJ opinion has received much attention in international practice and doctrine; Czapliński states that "[t]he problem of non-recognition of civil status acts and other acts important for the position of individuals, issued or registered by the *de facto* regime (unrecognized government) was considered by the ICJ in the *Namibia advisory opinion*. The Court suggested that the acts relating to the registration of certain facts (birth, death) of individuals should be recognized. As to other activities (including marriages or acts concerning social or economic activities, like the creation of corporations), the practice varies."[41]

This position, the so-called *Namibia Principle* after Frowein, "has been applied by the European Court of Human Rights when dealing with the legal situation in Northern Cyprus.[42] It is quite understandable that non-recognized States or governments should not have the right to sue or claim other rights of a governmental character, but it is hard to see why it should not be possible to apply their laws in a suit between private par-ties where the application of any other law would do injustice to those concerned."[43]

In its *Nuclear Weapons* advisory opinion, the Court determined that "[i]t is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity" as the Court put it in its Judgment of 9 April 1949 in the Corfu Channel case (…), that The Hague and Geneva Conventions have enjoyed a

[40] *See idem*, *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Rep 1971, p. 56, para. 125.

[41] *See* W. Czapliński, *The Crimean crisis and the Polish practice on non-recognition*, Questions of International Law, Zoom out I 73 (2014), p. 80.

[42] ECHR, *Cyprus v. Turkey (IV)* (App. No. 25781/94), Grand Chamber judgment, 10 May 2001; *Idem*, *Demopoulos and Others v. Turkey* (App. Nos. 46113/99; 3843/02; 13751/02; 13466/03; 10200/04; 14163/04, 19993/04 and 21819/04), Grand Chamber judgment, 1 March 2010.

[43] *See* Frowein, *supra* note 11.

broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law."[44]

The Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* will be analysed in detail in the following section. Notwithstanding this fact, there are certain aspects to be mentioned here, such as that related to the applicability of international human-rights instruments. The Court considers "that the International Covenant on Civil and Political Rights is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory"[45] (that is to say, in the occupied territories). Concerning economic, social and cultural rights, the Court states that "in the exercise of the powers available to it on this basis, Israel is bound by the provisions of the International Covenant on Economic, Social and Cultural Rights. Furthermore, it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities."[46]

These last arguments of the Court, reproduced in the final paragraphs of this Advisory Opinion, are essential to an understanding of the role of human rights obligations and recognition/non-recognition in international law: "Given the character and the importance of the rights and obligations involved, the Court is of the view that all States are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction. It is also for all States, while respecting the United Nations Charter and international law, to see to it that any impediment, resulting from the construction of the wall, to the exercise by the Palestinian people of its right to self-determination is brought to an end. In addition, all the States parties to the Geneva Convention relative to the Protection of Civilian Persons in Time of War of 12 August 1949 are under an obligation, while respecting the United Nations Charter and international law, to ensure compliance by lsrael with international humanitarian law as embodied in that Convention."[47]

And the Court continues by stating that "both Israel and Palestine are under an obligation scrupulously to observe the rules of international humanitarian law, one of the paramount purposes of which is to protect civilian life."[48]

[44] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, ICJ Rep 1996, pp. 226, 257, para. 79.

[45] *Idem*, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ Rep 2004, pp. 136, 180, para. 111.

[46] *Ibidem,* p. 181, para. 113.

[47] *Ibidem*, para. 159; emphasis added.

[48] *Ibidem*, p. 200, para. 162; emphasis added.

In the Case concerning *Armed Activities on the territory of the Congo*, the ICJ made a reference to *jus cogens*, and identified the prohibition of genocide as "assuredly" included on this category.[49] Within respect of the *Kosovo* case, several aspects may be referred to*:* first of all, if this case is compared with the *Namibia*[50] and *Wall Opinions*,[51] we can see that in the Kosovo case the question addressed to the Court was narrow,[52] and the answer given was a consequence of this. This explains the criticism of some ICJ judges as regards the advisory opinion finally adopted; as an example, judge Yusuf, in his Separate opinion in the Kosovo case, considered that this may be qualified such as a lost opportunity. He said: "The Court has in the past contributed to a better understanding of the field of application of the right of self-determination with respect to situations of decolonization or alien subjugation and foreign occupation. It could have likewise used this opportunity to define the scope and normative content of the post-colonial right of self-determination, thereby contributing, *inter alia*, to the prevention of the misuse of this important right by groups promoting ethnic and tribal divisions within existing States."[53]

A similar point of view is sustained by Judge Simma in his declaration: "(…) the Court could have delivered a more intellectually satisfying Opinion, and one with greater relevance as regards the international legal order as it has evolved into its present form, had it not interpreted the scope of the question so restrictively. To treat these questions more extensively would have demonstrated the Court's awareness of the present architecture of international law."[54] Judge Sepúlveda-Amor maintains the same position, saying: "Many of the legal issues involved in the present case require the guidance of the Court. (…) the effect of the recognition or non-recognition of a State in the present case are all matters which should have been considered by the Court, providing an opinion in the exercise of its advisory function."[55]

This critical approach is supported by Cançado Trindade in his separate opinion.[56] Thus Dugard states, "(…) in similar Advisory Opinions –such as *Namibia*

[49] *Idem*, *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, ICJ Rep 2006, pp. 6, 31, para. 64.

[50] *Idem*, *supra* note 40*,* p. 16.

[51] *Idem*, *supra* note 45, p. 136.

[52] *See* Dugard, *supra* note 3, p. 177. The question addressed was the following: "Is the unilateral declaration of independence by the Provisional Institutions of Self-Government of Kosovo in accordance with international law?"

[53] *See* Separate Opinion of Judge Yusuf, para. 5 to the ICJ, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, Advisory Opinion, 22 July 2010, ICJ Rep 2010, p. 403.

[54] *See* Declaration of Judge Simma, p. 480, para. 7 to the ICJ, *supra* note 53.

[55] *See* Separate opinion of Judge Sepúlveda-Amor, p. 499, para. 35 to the ICJ, *supra* note 53.

[56] *See* Separate opinion of Judge Cançado Trindade, pp. 534–538, paras. 26–34 to the ICJ, *supra* note 53.

(1971), *Western Sahara* (1975), *Legality of the Threat or Use of Nuclear Weapons* (1996) and the *Construction of a Wall in the Occupied Palestinian Territory* (2004) – the Court had used its advisory role to clarify and develop uncharted areas of international law."[57]

It would seems from this overview of the ICJ decisions, that human rights obligations are the "essence" of public international law. A subsequent problem is to identify these obligations, and to study, from a case-by-case perspective, the application of this position in selected cases involving unrecognised entities. Prior to that, reference will also be made to a recent debate about *jus cogens* in the ILC.

2.3. The debate from the UN ILC perspective

In 2016, the First Report on *jus cogens* was submitted to the UN ILC by Dire Tladi, appointed Special Rapporteur on this subject.[58] In his preliminary report, the Special Rapporteur have given notice about different cases related to international and domestic courts,[59] in which the matter of *jus cogens* in the field of human rights was studied.

The Special Rapporteur submitted certain draft conclusions relating to this topic; in particular, conclusion number 3[60] reads: "1. Peremptory norms of international law (*jus cogens*) are those norms of general international law accepted and *recognised* (emphasis added) by the international community *of States* (emphasis added) as a whole as these from which no modification, derogation or abrogation is permitted.[61] 2. Norms of *jus cogens* protect the fundamental values of the international community, are hierarchically superior to the other norms of international law and are universally applicable."

Taking this position into account, the ILC tried to offer a tentative definition of *jus cogens,* at this preliminary stage. In the same way, some States (thus far Austria, Germany, The Netherlands, Paraguay and Spain) provided examples relating to this topic, in most cases referred to municipal courts decisions in which *jus cogens*

[57] *See* Dugard, *supra* note 3, p. 192.

[58] *See* ILC, *First report on jus cogens by Dire Tladi, Special Rapporteur*, 8 March 2016, UN Doc. A/CN.4/693.

[59] *Ibidem*, pp. 26–28, referred to these cases.

[60] *Ibidem*, p. 45.

[61] After the ILC sessions of 2017, the draft of Conclusion number 3, containing a definition, says as follows: "A peremptory norm of general international law (*jus cogens*) is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." *See* ILC, *Provisional summary record of the 3382nd meeting, Interim report of the Drafting Committee (ILC(LXIX)/DC/JC/CRP.2)*, 15 August 2017, UN Doc. A/CN.4/SR.3382, p. 3.

has been analysed.[62] Some examples were provided by the Federal Constitutional Court of Germany.[63]

The decision of 26 January 1962 of The Netherlands Supreme Court of the State said that "States do not lose their immunity from jurisdiction when accused of a breach of a peremptory norm." In a decision of 13 April 2012, following the same reasoning, the Supreme Court states that "the immunity of the UN was absolute and would not yield when the UN would be accused of a breach of a peremptory norm."

Dealing with Paraguay, in judgment no. 195/2008, of 5 May 2008, the Supreme Court of Justice stated that: "Crimes against humanity, a concept that embraces not only international human rights law but also international criminal law, when it reflects – and makes possible – the universal condemnation of grave and systematic violations of fundamental and non-derogable rights (…)."

The Second Report was submitted by the Special Rapporteur on 16 March 2017[64]; and, following criticism from ILC members and delegates on the Sixth Committee, there was to be a title change to "peremptory norms of international law (*jus cogens*)." The analysis of the elements of *jus cogens*, the recognition of them and the practice of international and municipal courts may represent a good path by which final conclusions can be obtained in the near future.[65]

The aforementioned idea of *jus cogens* and the need to include this topic in the ILC agenda is a direct consequence of the inclusion of this concept into international decisions[66]; it was also identified in arbitral awards (the *maritime boundary*

[62] *See* this information at ILC, *Analytical Guide to the Work of the International Law Commission: Peremptory norms of general international law* (*Jus cogens*), available at: http://legal.un.org/ilc/guide/1_14.shtml (accessed 15 April 2018).

[63] *See* Permanent Mission of the FRG to the UN, *Decisions of German Courts Dealing with ius cogens*, available at: http://legal.un.org/docs/?path=../ilc/sessions/68/pdfs/english/jc_germany.pdf&lang=E (accessed 15 April 2018). The Federal Constitutional Court Order of 26 October 2004 (2 BvR 1038/01) referred to some constitutional complaints concerning the compatibility of expropriations within the Soviet occupation zone between 1945 and 1949 with public international law and the potential consequences of a breach of public international law for German constitutional law, gives some examples such as: "(…) provisions on the international maintenance of peace, the right of self-determination, fundamental human rights and central norms for the protection of the environment"; in the same way, the Federal Constitutional Court Order of 12 December 2000 (2 BvR 1290/99), a constitutional complaint regarding the conviction of a Bosnian Serb by a German court for crimes of genocide committed in Bosnia and Herzegovina, states that "the interdiction of genocide established by international treaty law and customary law is part of *jus cogens*."

[64] It is a document of 47 pages (*see* ILC, *Second Report on jus cogens by Dire Tladi, Special Rapporteur*, 16 March 2017, UN Doc. A/CN.4/706).

[65] *See*, in particular, para. 82 of the Second Report (*ibidem*), and the cases analysed in footnote 215 of this document.

[66] Similarly, the recent inclusion in the ILC agenda of the topic of Succession of States in respect of State responsibility, together with the appointment of a Special Rapporteur (Pavel

between Guinea-Bissau and Senegal[67]) and at the *ad hoc* International Tribunals relating to the former Yugoslavia and Rwanda.[68]

3. International practice in the field: some tentative examples relating to an open question

What about international practice on recognition/non-recognition and particular references to human-rights obligations? A pragmatic approach based around tentative examples will be applied, so conclusions reached at this preliminary stage are to be treated with caution.

In its Opinion no. 10, the *Badinter Arbitration Commission* described recognition as "a discretionary act that other States may perform when they choose and in a manner of their own choosing." This definition seems quite absolute, but the Arbitration Commission considered that recognition is "subject only to compliance with the *imperatives of general international law*, and particularly those prohibiting the use of force in dealing with other States or *guaranteeing the rights of ethnic, religious or linguistic minorities*."[69]

Are these ideas mentioned by the *Badinter Arbitration Commission* essential requirements to be accomplished for a State to be recognised? And, by analogy, are they limits to be taken into account by non-recognised entities, because they conform to the preliminary basis of general international law?

One idea seems clear: "Under contemporary international law a 'State' that comes into existence in violation of a peremptory norm of international law will

Sturma) is a consequence of the cyclical nature of this topic. *See* this information in ILC, *Summaries of the Work of the International Law Commission: Succession of States in respect of State responsibility*, available at: http://legal.un.org/ilc/summaries/3_5.shtml (accessed 15 April 2018). To understand the need to codify or not codify State Succession, *see* A. Sarvarian, *Codifying the Law of State Succession: A Futile Endeavour?*, 27 (3) European Journal of International Law 789 (2016).

[67] *See* Reports of International Arbitral Awards, vol. XX, pp. 119–213.

[68] *See*, as an example, ICTY, *Prosecutor v. Anto Furundzija*, Judgment in the Trail Chamber, 10 December 1998 relating to torture, particularly p. 59, para. 154, wherein it is held that "the *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate." Dealing with genocide, the activity of the International Criminal Tribunal for Rwanda must be taken into account. *See* Mechanism for International Criminal Tribunals, *ICTR Milestones*, available at: http://unictr.unmict.org/en/ictr-milestones (accessed 15 April 2018).

[69] *See* Opinion no. 10, *Conference on Yugoslavia Arbitration Commission: Opinions on Questions, Arising from the Dissolution of Yugoslavia*, 33 International Legal Materials 1488 (1992), p. 206 (emphasis added).

not be recognized (…) This principle has been endorsed by the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts."[70]

Some practical cases dealing with recognition/non-recognition will be studied carefully here, with a view to certain conclusions about the relationship with human-rights obligations being drawn. These may prove helpful in providing certain general ideas on the subject.

3.1. Kosovo

The Kosovo case may be taken to exemplify a complex situation determined by reference to doctrine,[71] international practice[72] and the ICJ advisory opinion. There are certain paragraphs of the reasoning of the ICJ judges that may be examined in order to supply conclusions as regards human-rights obligations in this case. In his Separate Opinion to the Advisory Opinion given by the ICJ about the unilateral declaration of independence of Kosovo, Judge Cançado Trindade, states: "The emergence and evolution of the international law of human rights came to concentrate further attention on the treatment dispensed by the State to all human beings under its jurisdiction, on the *conditions of living* of the population, in sum, on the function of the State as promoter of the common good."[73] As Judge Yusuf says, this case is "special in many ways."[74] He argues that "[t]he Court had a unique opportunity to assess, in a specific and concrete situation, the legal conditions to be met for such a right of self-determination to materialize and give legitimacy to a claim of separation. It has unfortunately failed to seize this opportunity (…)."[75]

In contrast, assuming that UN SC resolutions condemning particular declarations of independence (e.g.: 216 and 217 (1965) concerning Southern Rhodesia, 541 (1983) concerning Northern Cyprus, and 787 (1992) concerning the Srpska Republic) "were connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)," the Court considered that "in the context of Kosovo, the

[70] *See* Dugard, *supra* note 3, p. 184.

[71] *See* a historical survey and analysis of this case, in J. Summers, *Kosovo*, in: C. Walter, A. von Ungern-Sternberg & K. Abushov (eds.), *Self-Determination and Secession in International Law*, Oxford University Press, Oxford: 2014, pp. 235–254.

[72] The use of the expression "sui generis" in reference to the Kosovo case, together with splits in the international community on the recognition/non-recognition of this territory as a State are some examples of this special character.

[73] *See* Separate opinion of Judge Cançado Trindade, *supra* note 56, p. 597, para. 185 (emphasis added).

[74] *See* Separate opinion of Judge Yusuf, *supra* note 53, p. 623, para. 13.

[75] *Ibidem*, pp. 624–625, para. 17.

Security Council has never taken this position. The exceptional character of the resolutions enumerated above appears to the Court to confirm that no general prohibition against unilateral declarations of independence may be inferred from the practice of the Security Council."[76]

As a conclusion about the "value" of the Kosovo Advisory Opinion, Dugard states: "Although the Kosovo proceedings did not provide answers to many of the questions surrounding secession they did succeed in exposing the legal rules and principles involved and in highlighting the responsibility of established States in the creation of new States."[77] But, following the ideas expressed by Oeter, "(…) the Kosovo precedent has aggravated the tension over issues of recognition with regard to secession cases –and has given additional fuel to principled disputes over recognition vs. non recognition in such cases. As a result, the Kosovo precedent has definitely not brought new light into the disputed landscape of recognition policies and the underlying theoretical queries in international legal doctrine –quite to the contrary, it has added to the already visible confusion in the field."[78]

Another relevant aspect to be considered deals with the activities developed by international organisations in Kosovo with a view to certain "human rights standards" being achieved. On the United Nations Website relating to Human Rights by country, relevant documents concerning Kosovo may be found, together with an analysis of the situation in Serbia. First of all, the map of Serbia includes Kosovo, although there is a message that states: "The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations."[79] In the same way, some of the most recent reports dealing with different human rights (encompassing the territories of both Serbia and Kosovo) include a note that declares: "All the references to Kosovo in the present document should be understood to be in compliance with Security Council Resolution 1244 (1999) and without prejudice to the status of Kosovo." This is the official position of the United Nations concerning Kosovo, and the website provide information about it.

A distinction in a name – with legal implications – may be found on the same website: the reference to the Government of Serbia in the first case and, in turn, to the authorities of Kosovo, in the second. The labour of the United Nations in the field of human rights – such as is reflected in the Reports relating to specific rights – includes both of these territories (Serbia and Kosovo) in the same document. The

[76] *See* ICJ, *supra* note 53, pp. 437–438, para. 81.

[77] *See* Dugard, *supra* note 3, p. 216.

[78] *See* S. Oeter, *The Role of Recognition and Non-Recognition with Regard to Secession*, in: Walter, von Ungern-Sternberg & Abushov, *supra* note 71, p. 46.

[79] *See* the Office of the United Nations High Commissioner for Human Rights, *Serbia*, available at: http://www.ohchr.org/EN/countries/ENACARegion/Pages/RSIndex.aspx (accessed 15 April 2018).

UN Mission deployed in this zone is the same, offering proof of the official position sustained by the organisation in relation to Kosovo.[80]

The work of international organisations dealing with human-rights obligations in the case of Kosovo may be enhanced. In the regional sphere, both the OSCE and the Council of Europe provide relevant information about levels of protection of human rights. They may be qualified as a necessary complement to States' declarations, statements, or actions as generally considered in regard to the "sui generis" case of Kosovo and questions relating to human rights.

The OSCE Mission in Kosovo[81] provides useful information about the language rights, and the property and housing rights, of vulnerable groups, together with different documents and studies relating to respect for human rights on the territory.[82] The promotion of new human rights legislation in Kosovo is therefore a relevant fact that must be mentioned.[83]

As an essential instrument in this field, the Council of Europe provides useful information on the promotion and protection of human rights on the territory of Kosovo. As a curiosity, Kosovo is included on the list of "countries" visited by the Council of Europe for the purposes of the monitoring of human rights.[84] However, after the name Kosovo there follows the symbol (*), which leads to a footnote explaining that "(a)ll reference to Kosovo, whether to the territory, institutions or population, shall be understood in full compliance with United Nations Security Council Resolution 1244 (1999) and without prejudice

[80] Some examples of this are the following: Human Rights Council, *Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context on her mission to Serbia and Kosovo*, 26 February 2016, UN Doc. A/HRC/31/54/Add.2; *idem*, *Report of the Working Group on Enforce of Involuntary Disappearances*, 17 August 2015, UN Doc. Doc. A/HRC/30/38/Add.1; *idem*, *Report of the Special Rapporteur on the human rights of internally displaced persons, Chaloka Beyani*, 5 June 2014, UN Doc. A/HRC/26/33/Add.2, or *idem*, *Report of the Special Rapporteur on freedom of religion or belief, Asma Jahangir*, 28 December 2009, UN Doc. Doc. A/HRC/13/40/Add.3.

[81] A useful document about this Mission, with facts and figures, is at OSCE, *Mission in Kosovo*, available at: http://www.osce.org/mission-in-kosovo/143996?download=true (accessed 15 April 2018); and the website providing general information at *OSCE Mission in Kosovo*, available at: http://www.osce.org/mission-in-kosovo (accessed 15 April 2018).

[82] *See* the information provided at OSCE, *Human rights*, available at: http://www.osce.org/mission-in-kosovo/human-rights (accessed 15 April 2018).

[83] *See* information about this campaign promoted by OSCE at *OSCE Mission's campaign promotes new human rights legislation in Kosovo*, available at: http://www.osce.org/kosovo/281071 (accessed 15 April 2018), *Campaign to promote a human rights package of laws in Kosovo*, available at: http://www.osce.org/kosovo/280911 (accessed 15 April 2018) and *Barbara Rohmann of OSCE Mission discusses the campaign promoting human rights package of laws at Radio Television of Kosovo*, available at: http://www.osce.org/kosovo/282551 (accessed 15 April 2018).

[84] *See* Council of Europe, *Country monitoring*, available at: http://www.coe.int/en/web/commissioner/country-monitoring (accessed 15 April 2018).

to the status of Kosovo." This is therefore the exact same position adopted by the United Nations, as explained above. In other words, although Kosovo is not a "State" Member of the Council of Europe, Serbia was admitted on 3 April 2003. This circumstance justifies the activities developed in the field of human-rights protection by the Council of Europe on this territory[85]; and questions such as forced return to Kosovo,[86] promotion of cultural diversity,[87] treatment of prisoners,[88] or actions against trafficking in human beings[89] are examples to be mentioned.

The European Union is playing a relevant role in the territory of Kosovo with the support of EULEX, trying to improve institutions in many fields.[90] In line with the aforementioned examples, the case of Kosovo cannot be understood without reference to international organisations working in this territory. Human rights are enhanced by their presence and missions that must continue in the near future.[91]

3.2. Palestine

On this point, the aforementioned ICJ Advisory Opinion *on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* is essential to an understanding of questions related to human-rights obligations on this territory. It is noted that "further action is required,"[92] which is to say that there is a reproduction of the expression used by the Court, and that the role of the United Nations, the UN GA and the UN SC are essential to the settlement of the dispute.

[85] *See* an overview of this information at *idem*, *Country monitoring: Kosovo*, http://www.coe.int/en/web/commissioner/country-monitoring/kosovo (accessed 15 April 2018).

[86] *See idem*, *Children victimised when families are forced to return to Kosovo*, available at: http://www.coe.int/en/web/commissioner/blog/-/asset_publisher/xZ32OPEoxOkq/content/children-victimised-when-families-are-forced-to-return-to-kosovo-?redirect=/el/web/commissioner/blog?p_p_id=101_INSTANCE_xZ32OPEoxOkq (accessed 15 April 2018).

[87] *See idem*, *Cultural Diversity in Kosovo*, available at: http://www.coe.int/en/web/programmes/-/cultural-diversity-in-kosovo- (accessed 15 April 2018).

[88] *See idem*, *Enhancing the Protection of Human Rights of Prisoners in Kosovo*, available at: http://www.coe.int/en/web/human-rights-rule-of-law/-/horizontal-facility-enhancing-the-protection-of-human-rights-of-prisoners-in-kosovo- (accessed 15 April 2018).

[89] *See idem*, *Publication of GRETA report on Kosovo*, available at: http://www.coe.int/en/web/anti-human-trafficking/news/-/asset_publisher/fX6ZWufj34JY/content/publication-of-greta-report-on-kosovo- (accessed 15 April 2018).

[90] *See EULEX Kosovo*, available at: http://www.eulex-kosovo.eu. (accessed 15 April 2018).

[91] *See* as an example EU External Action, *EULEX and EUO/EUSR recall the importance of respect for human rights for a healthy and prosperous society, ahead of the International Human Rights Day*, 9 December 2016, available at: http://www.eulex-kosovo.eu/?page=2,10,548 (accessed 15 April 2018), giving the opinion of the Head of EULEX on human rights and the need to improve them in Kosovo, on the Anniversary of the United Nations Human Rights Declaration.

[92] *See* ICJ, *supra* note 45, p. 200, para. 160.

A document to be mentioned here is the Resolution of the UN SC adopted on 23 December 2016 in this matter.[93] Does it mean that the voice of the ICJ is beginning to be heard when it is declared that "it has a duty to draw the attention of the General Assembly, to which the present Opinion is addressed, to the need for these efforts to be encouraged *with a view to achieving as soon as possible, on the basis of international law, a negotiated solution to the outstanding problems and the establishment of a Palestinian State, existing side by side with Israel and its other neighbours*, with peace and security for all in the region"?[94]

The practice of States when it comes to the recognition/non-recognition of Palestine seems curious[95]: it ranges from non-recognition (in the cases of Australia, Israel, Italy, Japan, Russia, Tanzania, the United Kingdom and the United States) through to recognition (e.g.: Algeria, Argentina, Brazil and South Africa) together with the existence of a *tertium genus* (implying a status as a partial subject of international law, as supported by Austria).

The treatment of this case by the UNHR website differs from those involving other cases of non-recognition. It may be the fact that Palestine enjoys Permanent Observer (albeit non-member State)[96] status has something to do with Palestine's presentation on the United Nations website. There is a specific page dedicated to this territory – with no reference to another territory or mandatory power of the kind noted in other cases, supplied with relevant and recent Reports. As just one example, a reference contained in the Report of the UN Secretary-General (Doc. A/71/355) of 24 August 2016 about Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem and the Occupied Syrian Golan Heights, explains the obligations of Israel in regard to human rights in this context: "34. The extraterritorial applicability of human rights law has been recognised by the ICJ and human rights treaty bodies. Accordingly, *Israel has the duty to implement its human rights obligations within the Occupied Palestinian Territory with regard to not only Israeli citizens, but also the entire Palestinian population*. It has the obligation to exercise due diligence to prevent, investigate, prosecute, punish and remedy harm sustained by the Palestinians in H2, irrespective

[93] *See* Resolution 2334 (2016) of 23 December 2016, S/RES/2334 which paragraph 3 *underlines* "that it will not recognize any changes to the 4 June 1967 lines, including with regard to Jerusalem, other than those agreed by the parties through negotiations." On the particular status of Jerusalem, *see* Resolution A/RES/ES-10/19, *supra* note 24.

[94] *See* ICJ, *supra* note 45, pp. 200–201, paras. 161–162 (emphasis added). Palestine instuted proceedings against the United States of America (September 2018) where it "requests the Court to declare that the relocation to the Holy City of Jerusalem of the United States embassy in Israel is in breach of the Vienna Convention." The case is pending and there is a great expectation of the international community about this and the implications of an eventual solution on recognition issues.

[95] *See*, *supra* note 2, pp. 10–16 and the examples provided therein.

[96] *See* this status conferred by the UN GA Resolution 67/19 of 29 November 2012, A/RES/67/19.

of whether such harm is caused by officials or individuals, and without any discrimination."[97]

3.3. The Sahrawi Arab Democratic Republic

The situation in Western Sahara[98] is defined as an "unfinished decolonization process." As a consequence of this, some examples from the Spanish practice, particularly with direct or indirect reference to human rights for the population of the territory can be mentioned. Spanish doctrine[99] has in fact focused attention on the Sahrawi problem, given the country's responsibility following the territory's abandonment by Spanish forces in 1975.

In the United Nations context, the UN SC decided to extend the mandate of MINURSO, once again, through to April 2018.[100] On the UN website on human rights there is exactly the same reference concerning the map – but this time dealing with Morocco, given that there is no independent site referring to Western Sahara – of the kind mentioned in relation to other problematic territories. In other words, the official position of the United Nations is the following: "The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations."

Concerning nationality of private persons, the *Tribunal Supremo* (High Court) of Spain has tried, post-1998, to adopt certain "creative solutions"[101] when it comes to Sahrawi people being regarded as former Spanish citizens, and when it comes to the so-called "*posesión de estado*" (following the Spanish Civil Code). The argument here is that a person who was considered Spanish in the past and "made

[97] *See* Report of the Secretary General, *Israeli settlements in the Occupied Palestinian Territory, including East Jerusalem, and the occupied Syrian Golan*, 24 August 2016, UN Doc. A/71/355, p. 10 (emphasis added) and some relevant conclusions and recommendations on pp. 18–19 of the same document.

[98] On the question of Western Sahara, *see* the chapter of S. Simon, *Western Sahara*, in: Walter, von Ungern-Sternberg & Abushov, *supra* note 71, pp. 255–272. The use of natural resources is one of the key aspects to be considered; *see ibidem*, pp. 269–272. The history of this situation, together with the relationship between the European Union and Morocco is relevant; *see* A. Remiro Brotóns (Director), C. Martínez Capdevila (Academic Coordinator), *Unión Europea-Marruecos, ¿Una vecindad privilegiada?*, Academia Europea de Ciencias y Artes, Madrid: 2012, pp. 409–575.

[99] Some recent and collective studies may be the following: J.D. Torrejón Rodríguez, *La Unión Europea y la cuestión del Sáhara Occidental. La posición del Parlamento Europeo*, Editorial Reus, Madrid: 2014; Observatorio Aragonés para el Sahara Occidental, *Sahara Occidental. Cuarenta años construyendo resistencia,* Pregunta ediciones, Zaragoza: 2016.

[100] *See* UN SC Resolution 2351 (2017) of 28th April 2017, S/RES/2351.

[101] *See* M.I. Torres Cazorla, *Nota a la sentencia del Tribunal Supremo (Sala 1ª) de 28 de octubre de 1998: ¿Una medida alternativa para solventar una descolonización inacabada?*, La Ley n. 4758 (19 March 1999), pp. 15–16; *eadem*, *La sucesión de estados y sus efectos sobre la nacionalidad de las personas físicas*, Universidad de Málaga, Málaga: 2001, pp. 269–278.

use" of this "Spaniard" status for a period of at least ten years, may be considered a national of Spain. This decision was qualified by a sort of pirouette, with emphasis placed on the situation of the Sahrawi population and their destiny.

Another aspect to be taken into account is the situation of human rights in territories *de facto* controlled by Morocco. Non-governmental organisations and civil society are playing an important role in this field,[102] and are in fact more active than the traditional international organisations. One of the last documents to be discussed where the United Nations is concerned is the Report of the Independent Expert on Human Rights and International Solidarity on her mission to Morocco.[103] There are no relevant conclusions about human-rights protection, and this seems to be a document reflecting, not the "state of the art," but the "art of diplomacy." Dealing with the visit to Ad Dakhla – on the territory of Western Sahara under the control of Morocco – by the Independent Expert, it is noted that "(d)ue to time constraints, the Independent Expert did not have a chance to meet with members of local civil society. Therefore, further assessment may be needed in this regard."[104] The Universal Periodic Review[105] on Morocco –including Western Sahara – was discussed in the Human Rights Council on the 21 September 2017.[106]

In the field of human rights, the principle of universal jurisdiction – though extremely restricted since 2009[107] – has been the juridical base upon which certain cases have been submitted to Spanish courts, with most of these relating to grave violations of the human rights of the Sahrawi population by the authorities of the *de facto*[108] occupying power.

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[102] *See*, merely as an example, the information provided by Amnesty International at https://www.amnesty.org/en/search/?q=Morocco (accessed 15 April 2018).

[103] It was the mission to Morocco, including Western Sahara; *see* Human Rights Council, *Report of the Independent Expert on human rights and international solidarity on her mission to Morocco*, 27 April 2016, UN Doc. A/HRC/32/43/Add.1.

[104] *Ibidem*, p. 18.

[105] *See* all the information concerning the Universal Periodic Review referred to Morocco at *idem*, *Universal Periodic Review – Morocco*, available at: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/MAIndex.aspx (accessed 15 April 2018).

[106] *See idem*, *Human Rights Council Universal Periodic Review outcomes of Morocco, Indonesia and Finland*, available at: http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=22127&LangID=E (accessed 15 April 2018). Some speakers said that this situation was illegal and that "the Sahrawi people were deprived of their rights and their situation should be given attention."

[107] *See* a complete explanation of these restrictions on the application of this principle, due to successive reforms of the article 23.4 of Spanish Organic Law on the Judiciary, at A.M. Prieto del Pino, *Lessons of Spanish Substantive Criminal Law, General Part I. Scope of Application of the Spanish Substantive Criminal Law*, Thomson Reuters Aranzadi, Cizur Menor: 2017, pp. 90–97.

[108] *See* the distinction between the *de facto* and *de jure* administrative State of the Sahara territory, in the order of the National High Court (*Audiencia Nacional*) no. 40/2014, available at: http://www.poderjudicial.es/search/contenidos.action?action=contentpdf&databasematch=AN&reference=7197131&links=Sahara&optimize=20141028&publicinterface=true (accessed 15 April 2018).

Western Sahara, and especially the natural resources of this territory controlled *de facto* by Morocco, is a question that emerges, from time to time; and ambiguity would seem to be the adjective best describing the situation. A clear example of this was the "promise" made by Morocco to the Spanish authorities following the accident involving the oil tanker "Prestige" in 2002. It was in this regard that fishing activity by vessels from the Spanish region of Galicia was allowed. The maritime area described for Morocco implicitly included the waters of Western Sahara (with the attendant problems of recognition that could be derived from the acceptance of this compromise by the Spanish authorities).[109]

The Court of Justice of the European Union has recently paid attention to the situation of Western Sahara and the trade agreements adopted by Morocco and the European Union.[110] Ambiguity is once again one of the adjectives that can be applied to qualify the situation.

3.4. The TRNC

The United Nations refused to recognise the TRNC that was established in 1983 following Turkey's invasion of the island.[111] Dugard thus states, "the reasons

[109] A member of the Spanish Parliament – J.A. Labordeta – asked a question to the Spanish Government about the maritime areas where fishing was going to be permitted, if they were or were not a part of Western Sahara; *see* E. del Mar García Rico, *Las preguntas formuladas al Gobierno por J.A. Labordeta sobre la autorización de barcos gallegos para pescar en aguas del "antiguo Sáhara español": comentarios a una respuesta incompleta*, 55 (1) Revista Española de Derecho Internacional 511 (2003), pp. 511–515.

[110] *See* the Judgment of the General Court (Eighth Chamber) – Case T-512/12 *Front Polisario v. Council* [2015] ECLI:EU:T:2015:953, and the reasoning of the Court in the Judgment adopted by the Grand Chamber – Case C-104/16 P *Council of the European Union v. Front populaire pour la libération de la saguia-el-hamra et du rio de oro* [2016] ECLI:EU:C:2016:973. In the first case, the CJEU "declares that Council Decision 2012/497/EU of 8 March 2012 on the conclusion of an Agreement in the form of an Exchange of Letters between the European Union and the Kingdom of Morocco concerning reciprocal liberalisation measures on agricultural products, processed agricultural products, fish and fishery products, the replacement of Protocols 1, 2 and 3 and their Annexes and amendments to the Euro-Mediterranean Agreement establishing an association between the European Communities and their Member States, of the one part, and the Kingdom of Morocco, of the other part *is annulled in so far as it approves the application of that agreement to Western Sahara*" (emphasis added). The appeal decision mentioned "sets aside the judgment of the General Court of the European Union of 10 December 2015." *See* Judgment of the Court (Grand Chamber), Case C-216/16 at ECLI:EU:C:2018:118, saying that „neither the Fisheries Partnership Agreement between the European Community and the Kingdom of Morocco nor the Protocol between the European Union and the Kingdom of Morocco setting out the fishing opportunities and financial contribution provided for in the Fisheries Partnership Agreement between the European Union and the Kingdom of Morocco are applicable to the waters adjacent to the territory of Western Sahara."

[111] *See* UN SC Resolution 541 (1983) of 18 November 1983, S/RES/541 and the UN SC Resolution 550 (1984) of 11 May 1984, S/RES/550.

for the non-recognition of the TRNC are threefold. First, it is founded on Turkey's illegal use of force against Cyprus in 1974. Secondly, it violates the 1960 Treaty of Guarantee between Cyprus, Greece, Turkey and the United Kingdom, which guarantees the territorial integrity of Cyprus and prohibits partition of the island. Thirdly, the creation of the TRNC cannot be viewed as a genuine exercise in self-determination, as the Turkish Cypriot community arguably does not constitute a self-determination unit and the secessionist State results in an impermissible fragmentation of the territorial integrity of Cyprus."[112] Some cases submitted to the ECHR are illustrative of violations of human rights analysed in the past by the Commission,[113] by the Court in Strasbourg,[114] and by the Court of Justice of the European Union.[115]

The role played by non-recognition in this field, and the application of the aforementioned "Namibia principle" is clearly described by Frowein[116]; and the position

[112] *See* Dugard, *supra* note 3, pp. 131–132.

[113] *See* ECHR, *Cyprus v. Turkey* (App. No. 8007/77), Decision on the admissibility of application, 10 July 1978.

[114] *See idem*, *Cyprus v. Turkey (IV)*, *supra* note 42, and *idem*, *Cyprus v. Turkey (IV)* (App. No. 25781/94), Grand Chamber judgment (just satisfaction), 12 May 2014. Continuing violations of different articles of the European Convention of Human Rights on the territory controlled by Turkish authorities was declared in both cases. They are inter-State applications, but there are similar examples if we analyse individual applications. A clear example of this is the case *idem*, *Loizidou v. Turkey* (App. No. 15318/89), Grand Chamber Judgment, 18 December 1996. W. Czapliński therefore states, "[t]he Court stressed that the attribution did not amount to recognition of unlawful territorial changes, but that it was aimed exclusively at guaranteeing the *fundamental rights of the local population*" (emphasis added). *See* Czapliński, *supra* note 41, p. 76. The continuing character of the violation of some fundamental rights is described in the *Loizidou case*; as an example, para. 64 of this judgment says: "Apart from a passing reference to the doctrine of necessity as a justification for the acts of the 'TRNC' and to the fact that property rights were the subject of intercommunal talks, the Turkish Government have not sought to make submissions justifying the above interference with the applicant's property rights which is imputable to Turkey. It has not, however, been explained how the need to rehouse displaced Turkish Cypriot refugees in the years following the Turkish intervention in the island in 1974 could justify the complete negation of the applicant's property rights in the form of a total and continuous denial of access and a purported expropriation without compensation. Nor can the fact that property rights were the subject of intercommunal talks involving both communities in Cyprus provide a justification for this situation under the Convention. In such circumstances, the Court concludes that there has been and continues to be a breach of Article 1 of Protocol No. 1 (P1-1)."

[115] Case C-432/92 *The Queen and Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and Others* [1994] ECR I-3087. In this case, "the Luxembourg Court refused the recognition of certificates of origin of goods issued by the authorities of the area." *See* Czapliński, *supra* note 41, pp. 75–76. In the same way, this author mentioned the *Apostolides* case, "confirming the jurisdiction of Cypriot courts with respect to real estate situated in Northern Cyprus, even if their judgments cannot be executed" (*ibidem*, p. 76); *see* Case C-420/07 *Meletis Apostolides v. David Charles Orams, Linda Elizabeth Orams* [2009] ECR I-03571.

[116] *See* J.A. Frowein, *Non-Recognition*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 April 2018).

of the ECHR has described what should be accepted as a general limit to any policy of non-recognition. No State should cause additional hardship to the population on the basis of non-recognition, by not treating as valid legal consequences of the normal administration of a territory. In the 2001 *Cyprus v. Turkey* judgment it is stated that:

"The Court notes that the view expressed by the International Court of Justice in the context described in the preceding paragraph is by no means an isolated one. "It is confirmed both by authoritative writers on the subject of *de facto* entities in international law and by existing practice, particularly judgments of domestic courts on the status of decisions taken by the authorities of *de facto* entities. This is true, in particular, for private-law relationships and acts of organs of *de facto* authorities relating to such relationships. Some State organs have gone further and factually recognized even acts related to public-law situations, for example by granting sovereign immunity to *de facto* entities or by refusing to challenge takings of property by the organs of such entities."[117]

There is a good example of the same argument sustained by the ECHR; another case concerning Northern Cyprus "decided on 1 March 2010 that local remedies introduced by legislation in Northern Cyprus have to be exhausted before a case can be brought before it."[118] The Court said that: "In the Court's view, the key consideration is to avoid a vacuum which operates to the detriment of those who live under the occupation, or those who, living outside, may claim to have been victims of infringements of their rights. Pending resolution of the international dimensions of the situation, the Court considers it of paramount importance that individuals continue to receive protection of their rights on the ground on a daily basis. The right of individual petition under the Convention is no substitute for a functioning judicial system and framework for the enforcement of criminal and civil law. Even if the applicants are not living as such under the control of the 'TRNC,' the Court considers that, if there is an effective remedy available for their complaints provided under the auspices of the respondent Government, the rule of exhaustion applies under Article 35 § 1 of the Convention (…) The Court maintains its opinion that allowing the respondent State to correct wrongs imputable to it does not amount to an indirect legitimization of a regime unlawful under international law."[119]

The UN website contains references to the situation in Cyprus. The annexed map has the same reference aforementioned present in controversial cases.[120] The

[117] *See* ECHR, *Cyprus v. Turkey (IV)*, *supra* note 42, para. 97.

[118] *See* Frowein, *supra* note 116.

[119] ECHR, *Demopoulos and Others v. Turkey* (App. Nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04), Grand Chamber judgment, 1 March 2010, para. 96.

[120] That is to say: "The boundaries and the names shown on this map do not imply official endorsement or acceptance by the United Nations" (*see* this information at the Office of the UN

UN High Commissioner for Human Rights states: "13. The persisting division of Cyprus continues to have consequences on human rights protection throughout the whole island, including the right to life and the question of missing persons; the principle of non-discrimination; freedom of movement; property rights; freedom of religion and cultural rights; freedom of opinion and expression; and the right to education. In addition, it is important that a gender perspective be adopted when negotiating and implementing peace agreements."[121] This Report finishes by saying that "(h)uman rights do not have any borders. All stakeholders are therefore obliged to uphold the human rights and fundamental freedoms of all people. It is critical that all human rights protection gaps and underlying human rights issues in situations of protracted conflict be addressed effectively."[122]

Concerning the mandate of UNFYCIP,[123] the most recent events have been the adoption of two resolutions by the UN SC[124] relating to the Cyprus situation, and extending the mandate of UNFYCIP for a six-month period.

3.5. Final remarks about some territories under dispute: Transnistria, South Ossetia, Abkhazia and Crimea

Some territories under dispute will be analysed separately in this section, with a view to certain conclusions on the subject of recognition/non-recognition being related to them. All these cases have a common pattern: the number of States that recognise these entities as independent States – or in the case of Crimea, as a part of the Russian Federation – is small or non-existent. The latter is the situation applying to "Transnistria," an unrecognised entity of the Moldova Republic.[125] Involved here is the paradigm of a "frozen conflict,"[126] in a territory whose name is not clear,[127]

High Commissioner for Human Rights, *Cyprus*, available at: http://www.ohchr.org/EN/countries/ENACARegion/Pages/CYIndex.aspx (accessed 15 April 2018).

[121] *See* Human Rights Council, *Question of human rights in Cyprus: Report of the Office of the United Nations High Commissioner for Human Rights*, 1 February 2017, UN Doc. A/HRC/34/15.

[122] *Ibidem*, para. 61.

[123] The history of this operation, established in 1964, is explained at United Nations Peacekeeping, *UNFICYP Fact Sheet*, available at: http://www.un.org/en/peacekeeping/missions/unficyp/ (accessed 15 April 2018).

[124] *See* the UN SC Resolution 2338 (2017) of 26th January 2017, S/RES/2338, (extending the mandate until 31 July 2017), the UN SC Resolution 2369 (2017) of 27 July 2017, S/RES/2369, (extending the mandate until 31 January 2018) and the UN SC Resolution 2398 (2018) of 30 January 2018, S/RES/2398 (extending the mandate until 31 July 2018).

[125] *See* about the history and evolution of this territory B. Bowring, *Transnistria*, in: Walter, von Ungern-Sternberg & Abushov, *supra* note 71, pp. 157–174.

[126] *Ibidem*, p. 157.

[127] A case-study of the situation of human rights on this territory, as a region of the Moldova Republic, may be seen in some decisions of the ECHR (where different names are used to refer to this territory: "Moldovan Republic of Transdniestria (MRT)," "Transdniestria," or "the MRT," among others).

under discussion in certain judgments of the European Court of Human Rights.[128]

The situations of South Ossetia[129] and Abkhazia[130] are particularly interesting, and common aspects must be analysed in both cases. Both territories declared independence unilaterally (Abkhazia in 1999 and South Ossetia in 2005). The first has an estimated population of 240,000 and the second of 70,000. On 26 August 2008, Russia recognised Abkhazia and South Ossetia as independent States. As Dugard states that "a handful of other States have followed Russia in recognizing Abkhazia and South Ossetia. (…) South Ossetia is recognized by Russia, Nicaragua, Venezuela, Nauru and Tuvalu. Both South Ossetia and Abkhazia are recognized by the unrecognized States of Transnistria and Nagorno-Karabakh."[131]

Several resolutions of the UN SC were adopted in advance of the declaration of recognition by Russia, in August 2008[132]; "after the Russia's recognition, the Security Council was unable to act but other organizations immediately condemned these secessions."[133] As Dugard states, "(i)n recognizing Abkhazia and South Ossetia Russia made it clear that it relied on the precedent of Kosovo, arguing that if Kosovo was unique so were Abkhazia and South Ossetia."[134] And this author continues with a prediction that international practice seems to confirm: "(…) Kosovo – and now Abkhazia and South Ossetia too – will be invoked as a justification for recognition by secessionist movements in non-colonial situations that have been denied the right of internal self-determination and subjected to human rights violations."[135]

What is the position of the United Nations concerning these territories outside the effective control of Georgia? On the UN Website dealing with Human Rights, the map has exactly the same reference as is to be observed in the case of territo-

[128] *See* some examples such as ECHR, *Ilascu v. Moldova and Russia* (App. No. 48787/99), Judgment, 8 July 2004; *idem*, *Ivantoc and others v. Moldova and Russia* (App. No. 23687/05), Former Fourth Section judgment, 15 November 2011 and final judgment of 4 June 2012; *idem*, *Catan and others v. Moldova and Russia* (App. Nos. 43370/04, 8252/05 and 18454/06) Grand Chamber judgment, 19 October 2012; *Mozer v. the Republic of Moldova and Russia* (App. No. 11138/10), Grand Chamber judgment, 23 February 2016; *Buzadji v. the Republic of Moldova* (App. No. 23755/07), Grand Chamber judgment, 5 July 2016. On this point, *see* A. Berkes, *"Remote Areas" in International Human Rights Law*, 67 (1) Revue belge de droit international 528 (2014), p. 529.

[129] *See* Ch. Waters, *South Ossetia*, in: Walter, von Ungern-Sternberg & Abushov, *supra* note 71, pp. 175–190.

[130] On the question of Abkhazia, *see* the chapter of F. Mirzayev, in: *ibidem*, pp. 191–213; in the same way, A. Nuβberger, *Abkhazia*, Max Planck Encyclopedia of Public International Law, available at: http://opil.ouplaw.com/home/epil (accessed 15 April 2018).

[131] *See* Dugard, *supra* note 3, p. 165. Abkhazia is also recognised by Vanuatu.

[132] *See* the UN SC Resolutions 896 of 31 January 1994, S/RES/896 (1994), 1065 of 12 July 1996, S/RES/1065 (1996) and 1808 of 15 April 2008, S/RES/1808 (2008).

[133] The European Union, OSCE and NATO. *See* Dugard, *supra* note 3, p. 165.

[134] *Ibidem*, pp. 198–199.

[135] *Ibidem*, p. 199.

ries under dispute: "The boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations."[136] In the same way, the documents relating to Georgia concerning the accomplishment of specific human rights "recalls that Abkhazia and South Ossetia continue to be outside the effective control of the State Party and that this State Party is unable to exercise the jurisdiction to implement –different international Human Rights instruments- in these regions."[137] The situation of these territories has been analysed in some cases submitted by Georgia to the ICJ[138] and to the ECHR.[139]

Another situation to be taken into account is that of Crimea[140]; some facts must be emphasised: no acts of Russia with respect to individuals in the domain of private law should be accepted; the effects of non-recognition can possibly be a burden for ordinary people[141]; delivery of international mail should not be blocked. Letters should be addressed to Russia and not to Ukraine, in order to guarantee an efficient distribution of mail in Crimea, also in the interest of individuals.[142] This is a practical solution by which the problem regarding communications can be resolved.

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[136] *See* Office of the United Nations High Commissioner for Human Rights, *Georgia*, available at: http://www.ohchr.org/EN/countries/ENACARegion/Pages/GEIndex.aspx (accessed 15 April 2018).

[137] *See* the Reports at *ibidem*.

[138] *See* ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation*), Preliminary Objections, Judgment, 1 April 2011, ICJ Rep 2011. The Order of the Court indicating provisional measures states that "(b)oth Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall (1) refrain from any act of racial discrimination against persons, groups of persons or institutions; (2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations;(3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin, (i) security of persons; (ii) the right of persons to freedom of movement and residence within the border of the State; (iii) the protection of the property of displaced persons and of refugees; (4) do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination against persons, groups of persons or institutions." And that "[b]oth Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination." *See* the ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation*), Application of the Request for the Indication of Provisional Measures, Order of 15 October 2008, ICJ Rep 2008, p. 398, para. 149.

[139] *See* the case ECHR, *Georgia v. Russia (I)* (App. No. 13255/07), Grand Chamber judgment, 3 July 2014.

[140] For the facts in Crimea, prior to the Russian annexation and after, *see* E. Milano, *The non-recognition of Russia's annexation of Crimea: Three different legal approaches and one unanswered question*, Questions of International Law, Zoom out I 35 (2014), pp. 35–55.

[141] *See* Czapliński, *supra* note 41, p. 79.

[142] *Ibidem*, p. 83.

Dealing with sanctions adopted by the European Union, restrictions on commercial measures involving Crimea and Sevastopol, in sectors such as tourism and exports (transport, telecommunications and energy, and prospecting for, exploiting and producing oil, gas and mineral resources) were renewed until 15 September 2018.[143] Together with this, a case before the Court of Justice of the European Union[144] provides three conditions relating to limitations on fundamental rights (a person with economic interests in enterprises included on the black lists). The Court explains the conditions that must be satisfied to limit these rights within the framework of a legal basis (from the European Union perspective): "Consequently, in order to comply with EU law, a limitation on the exercise of the fundamental rights at issue must satisfy three conditions (…): First, the limitation must be provided for by law. (…) Secondly, the limitation must refer to an objective of general interest, recognised as such by the European Union (…). Thirdly, the limitation may not be excessive. It must be necessary and proportional to the aim sought, and the 'essential content,' that is, the substance, of the right or freedom at issue must not be impaired (…)."[145]

In relation to the human rights of local populations, the doctrine takes a position favouring respect for these rights. It is in this way that (as Prof. Milano studying the particular case of Crimea puts it): "limited exceptions would apply, especially with a view to ensuring respect for the human rights of the local population; they may normally extend to the recognition of acts of the local authorities, such as the registration of births and marriages, and to local judicial remedies for the purpose of protecting the rights of individuals."[146] This sounds quite familiar when set against the aforementioned position of the ICJ in the *Namibia* case.

[143] *See* M. Lester QC, *EU renews Crimea & Sevastopol sanctions*, 20 June 2016, available at: https://europeansanctions.com/2016/06/20/eu-renews-crimea-sevastopol-sanctions/ (accessed 15 April 2018). *See* Council Decision 2016/982 of June 2016 amending Decision 2014/386/CFPS concerning restrictive measures in response to the illegal annexation of Crimea and Sevastopol, [2016] OJ L 161, p. 40, and most recent information available at the European Council, *EU prolongs sanctions over actions against Ukraine's territorial integrity until 15 March 2018*, 14 September 2017, available at: http://www.consilium.europa.eu/en/press/press-releases/2017/09/14-ukraine-sanctions/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU%20prolongs%20sanctions%20over%20actions%20against%20Ukraine%27s%20territorial%20integrity%20until%2015%20March%202018 (accessed 15 April 2018) and the last information about this fact, available at http://www.consilium.europa.eu/en/press/press-releases/2018/03/12/eu-prolongs-sanctions-over-actions-against-ukraine-s-territorial-integrity-until-15-september-2018/?utm_source=dsms-auto&utm_medium=email&utm_campaign=EU%20prolongs%20sanctions%20over%20actions%20against%20Ukraine%27s%20territorial%20integrity%20until%2015%20September%202018 (accessed 15 April 2018).

[144] Case T-720/14 *Rotenberg v. Council* [2016] ECLI:EU:T:2016:689.

[145] *See ibidem*, paras. 171–173.

[146] *See* E. Milano, *supra* note 140, p. 52. With reference to Crimea and using as an example the aforementioned case of the ECHR, dealing with Cyprus: *Cyprus v. Turkey (IV)*, *supra* note 42.

Another illustrative – and recent – case in which the ICJ has indicated provisional measures relating to Crimean Tatars and their rights is the Order of 19 April 2017. Paragraphs therein relating to human rights are: "96. The Court notes that certain rights in question in these proceedings, in particular*, the political, civil, economic, social and cultural rights* stipulated in Article 5, paragraphs (c), (d) and (e)[147] of the Convention on the Elimination of All Forms of Racial Discrimination are of such a nature that prejudice to them is capable of causing irreparable harm. Based on the information before it at this juncture, *the Court is of the opinion that Crimean Tatars and ethnic Ukrainians in Crimea appear to remain vulnerable*."[148] Alongside this, Ukranian-language education in Crimean schools was another aspect receiving consideration.[149]

Dealing with this problem, the Government of Ukraine has also applied to the ECHR.[150] It may be that, by solving these cases, the Court will clarify certain situations relating to human-rights violations on territories under dispute.

[147] These rights are the following:
"(c) political rights, in particular the right to participate in elections, to vote and to stand for election on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service;
(d) other civil rights, in particular:
(i) the right to freedom of movement and residence within the border of the State;
(ii) the right to leave any country, including one's own, and to return to one's country;
(iii) the right to nationality;
(iv) the right to marriage and choice of spouse;
(v) the right to own property alone as well as in association with others;
(vi) the right to inherit;
(vii) the right to freedom of thought, conscience and religion;
(viii) the right to freedom of opinion and expression;
(ix) the right to freedom of peaceful assembly and association;
(e) economic, social and cultural rights, in particular:
(i) the rights to work, to free choice of employment, to just and favourable conditions of work, to protection against unemployment, to equal pay for equal work, to just and favourable remuneration;
(ii) the right to form and join trade unions;
(iii) the right to housing;
(iv) the right to public health, medical care, social security and social services;
(v) the right to education and training;
(vi) the right to equal participation in cultural activities."

[148] Emphasis added. *See Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of all forms of Racial Discrimination (Ukraine v. Russian Federation)*; Request for the Indication of Provisional Measures, Order of 19 April 2017.

[149] *Ibidem*, paras. 97–98.

[150] There are some cases concerning *Ukraine v. Russian Federation*, app. nos. 20958/14, 43800/14; 49537/14 and 42410/15). Some information about these cases, which have not yet been resolved, is available at ECHR, *European Court of Human Rights communicates to Russia new inter-State case concerning events in Crimea and Eastern Ukraine*, 1 October 2015, available at: http://hudoc.echr.coe.int/eng-press?i=003-5187816-6420666 (accessed 15 April 2018). *See* J. Koch, *The Efficacy and Impact of Interim Measures: Ukraine's Inter-State Application Against Russia*, 39 Boston College International & Comparative Law Review 163 (2016).

Where the United Nations is concerned, in the matter of Ukraine and the territory of Crimea the Organization has it that "the boundaries and names shown on this map do not imply official endorsement or acceptance by the United Nations." This is in fact the same wording as has been applied in similar cases.[151]

Conclusions

Recognition of States must be considered a traditional institution of public international law. While nobody may ignore the relevance of recognition, there are some aspects that need to be clarified; first of all, after Czapliński, "(t)here is no supranational agency deciding in a binding way whether the criteria of statehood are met (although in exceptional cases such a binding decision can be passed, e.g., by an international organization)."[152] Secondly, "(t)he practice is not coherent and does not cover all related issues."[153] It is true that the emergence of new States in the international field seems to be a residual phenomenon in a globalised world, but, notwithstanding this fact, some entities consider recognition a first step towards inclusion in the "society of States." Examples of different situations have been analysed separately (with *larga data* in the case of Palestine and Western Sahara, or established some years ago as with Kosovo, or relating to unrecognised entities claiming to be States[154]).

In drawing certain tentative conclusions as regards rights, we can say that the international community is moving between the ideas of "utopia" and the "realistic perspective." The role of supervisory bodies (international organisations like the United Nations Human Rights bodies, the Council of Europe, the OSCE, the European Union, etc.), may go hand in hand with the development of this question by international and domestic courts to allow valid options to be further enhanced.[155]

[151] *See* Office of the United Nations High Commissioner for Human Rights, *Ukraine*, available at: http://www.ohchr.org/EN/countries/ENACARegion/Pages/UAIndex.aspx (accessed 15 April 2018).

[152] *See* Czapliński, *supra* note 41, p. 78.

[153] *Ibidem*.

[154] At the time of writing, the situation of instability in the Spanish region of Catalonia might be mentioned. It cannot be ignored that a referendum of independence, followed by a unilateral declaration of independence of this territory is contrary to international law, as was established in the Declaration adopted by more than 400 Spanish Professors, as members of AEPDIRI (the Spanish Association of Professors of International Law and International Relations) – *Declaración sobre la falta de fundamentación en el Derecho Internacional del referéndum de independencia que se pretende celebrar en Cataluña*, available at: https://web6341.wixsite.com/independencia-cat (accessed 15 April 2018).

[155] *See* some of these options, related to international humanitarian law, being applied in a similar way to human rights as a whole, in G. Pinzauti, *Good Time for a Change: Recognizing Individual's Rights under the Rules of International Humanitarian Law on the Conduct of Hostilities*," in: A. Cassese (ed.), *Realizing Utopia: The Future of International Law*, Oxford University Press, Oxford: 2012, pp. 571–582.

To be seen as a major goal for the near future is the need to protect human rights in every situation, including in the context of non-recognised entities that are, in most cases, under the supervision of international institutions. Human rights are indivisible (may not be taken apart), and they should be protected.

Abstract: Human-rights obligations represent key aspects of public international law. In the case of unrecognised entities, a question therefore needing to be solved concerns the obligations as regards human rights that need to be complied with in every single case. To address this, separate study of doctrinal analysis and international practice was engaged in, given the way these represent a relevant source of information. In particular, the "voice" of international courts on the subject must be heard, with this offering insights into the evolution of the topic over recent years. Although the question remains open, international practice will offer an element to be considered as preliminary conclusions about the role played by human-rights obligations in this field are sought. A pragmatic view of the debate on recognition/non recognition provides the backdrop to further reflection on human-rights obligations, with efforts made to explore the academic perspective, together with that offered by the ICJ and the ILC, among others. This then offers a starting point for the study of some examples relating to unrecognised entities that are worthy of particular consideration.

Keywords: human-rights obligations, ICJ, Kosovo, Palestine, unrecognised entities, Western Sahara.

Hybrid Recognition of Monetary and Financial Sovereignty: Or Is It?

*Łukasz Gruszczyński, Marcin Menkes**

Introduction

The problem of state recognition is rarely, if ever, tackled directly in the context of international economic law ("IEL"[1]). This should not come as a surprise, as for the purposes of economic cooperation IEL actors tend to defer to general public international law. If a specific entity is considered as a state under the relevant rules of general international law, its existence as a subject of international law is taken for granted. In other words, once an entity has the status of a state, it may become a party to treaties regulating specific aspects of its economic relations, a member of international economic organizations, or face international legal responsibility for acts that constitute violations of its IEL obligations. On rare occasions, IEL does, however, contribute to the body of general public international law by, for example, conferring certain non-state entities with some limited international subjectivity. A notable example is provided by the law of the WTO, which stipulates that both states and separate customs territories possessing full autonomy in the conduct of their external commercial relations may become members of the organization.[2] This means that Taiwan (referred to in the WTO nomenclature as the "Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu") may be (and in fact it is) a WTO member.[3] The same is true for Hong-Kong, which from the international legal point of view is simply a part of the PRC.

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[1] IEL may be defined as the law that regulates the international economic order or economic relations among nations (*see e.g.* S.P. Subedi, *International Economic Law*, University of London Press, London: 2007, p. 21).

[2] *See* Article XII of the Agreement establishing the WTO.

[3] For detailed discussion on Taiwan *see* chapter *An Unrecognised State? Recent Practices of the Republic of China on Taiwan* by Chun-i Chen in this book.

IEL may also touch upon the problem of statehood and state recognition indirectly. In particular, IEL rules may be relevant for the continued existence of a state that has defaulted on its sovereign debt. Of course we do not argue here that such a default is paramount to a loss of the state's international subjectivity.[4] It does, however, strip the entity of its capacity to meet its financial obligations towards other states and private entities, and hence to be able to guarantee citizens' rights, including political, civil, economic, social, cultural and individual entitlements. Such an entity can thus be perceived as a fragile or failing, if not a failed, state. Although the international legal doctrine is consistent in holding that a state's inability to exercise certain powers that are part of state sovereignty (e.g. the power to conduct its own monetary and financial policy) does not deprive the state of its subjectivity, international financial isolation may, if sustained over a long period, entail a complete failure of a state and its ultimate extinction – i.e. heavily indebted states that rely on external financing may lose the liquidity necessary to finance their administration, the judiciary, police/military, and to distribute pensions. This, in turn, can lead to mass protests which, when accompanied by the loss of law enforcement capacities, can result in the ultimate disintegration of a state.

Whereas the legal scope and consequences of performing (or not) fundamental state duties falls outside the scope of this chapter, we are interested in the particular means and methods of recognising and re-establishing such an entity's capacity in the field of international monetary and financial relations. We believe that such a connection, although indirect, establishes a sufficient link between this chapter and the subject matter of the book. Moreover, we submit that the process includes a very specific type of recognition. This element also connects this chapter with the rest of the book.

Consequently, the objective of this chapter is to critically analyse the issue of sovereign default and its legal and factual consequences, as well as the process that allows a state to restore its capacity to enter into financial relations. In this context, we argue that a form of *sui generis* recognition constitutes one of the elements in this process. This *sui generis* recognition is not one that concerns recognition as such of a state (as the state still exists), but rather relates to recognition of certain of its sovereign prerogatives. Due to peculiarities of this form of recognition, we refer to it as a "hybrid recognition."[5]

This chapter proceeds as follows. The first section briefly discusses three interrelated concepts: the notion of statehood; recognition (generally as a type of a unilateral act, and not only with respect to state recognition); and monetary and financial sovereignty. Subsequently, we turn our attention to the issues of sovereign borrowing,

[4] "[O]n ne peut mettre fin à son existence [de l'État], simplement parce qu'il est insolvable," J. Fischer Williams, *Le droit international et les obligations financières internationales qui naissent d'un contrat*, RCADI, 1923, vol. 1, pp. 342–343.

[5] For a more extensive explanation of this concept, *see* section four of this chapter.

sovereign debt unsustainability, and sovereign default. The third section of the chapter examines sovereign debt restructuring and the role that is played in this process by the so-called Paris and London Clubs. This section also builds on the previous discussion and analyses the nature of the hybrid recognition, connecting it with the problem of the state's existence. The final section offers some conclusions.

1. The concepts of state, monetary and financial sovereignty, and recognition

There is no precise and fully accepted definition of a state in public international law.[6] Most of the scholars agree however that an entity, in order to be qualified as a state, needs to fulfil certain essential requirements. In particular, it needs to possess a permanent population, a defined territory, a government and – according to some authors – the capacity to enter into relations with other states.[7] The relative weights given to the specific requirements will vary from case to case, depending on a number of variables (e.g. the historical context for the emergence of a state, such as its colonial past). It should be noted again that the presence of these elements is much more important when assessing state formation. Once a state is created, it may continue to exist even if some of its elements (e.g. the existence of effective state authority over a territory and population) are temporarily lost.

While the first two requirements are not particularly problematic, the third and the fourth ones do pose certain interpretative challenges. It is indisputable that the form of the government is of no importance (i.e. the existence of an authoritarian government does not prevent the formation of a state). What is relevant is that a government has to exercise its authority over the territory and population and that exercise thereof needs to be both effective and independent. "Effectiveness" refers to the structural coherence of the government and its general capacity to maintain law and order within the area it controls or purports to control,[8] while "independence" means that the authority is generally exercised by the government independent of internal and external interferences. One may also speak about formal independence (i.e. independence that is proclaimed by relevant laws, such as constitutions), and actual independence (i.e. the degree of independ-

[6] T. Grant, *Defining Statehood: The Montevideo Convention and its Discontents*, 37 Columbia Journal of Transnational Law 404 (1998–1999), pp. 409ff.

[7] *Cf.* art. 1 of the Montevideo Convention on the Rights and Duties of States (adopted 26 December 1933, entered into force 26 December 1934) 165 League of Nations Treaty Series 19 (note that art. 1 is regarded as the most widely accepted formulation of the criteria of statehood in international law). *See* also J. Crawford, *The Creation of States in International Law*, Oxford University Press, Oxford: 2007 (in particular *Part I: The Concept of Statehood in International Law*).

[8] *Ibidem*, p. 46.

ence that is exercised in practice). Both are necessary.[9] There are some authors who equate independence with sovereignty,[10] and others who place it within the fourth criterion (for more details, see below) arguing that "without independence, an entity cannot operate fully on the international scene."[11] Irrespective of where one places independence, it is clear that it constitutes an indispensable element of statehood.

One area where the effectiveness and independence of a government are clearly visible is in its monetary and financial policies.[12] This generic phrase is conventionally understood to cover various state policies relating to the management, regulation and supervision of the national monetary system (including the issuance of a various forms of currency and the determination of its currency's value vis-à-vis foreign currencies), as well as the state's financial and payment system.[13] The right of states to regulate their own currency is a long-established principle of international law. This has been confirmed, for instance, by the English Court of Appeal in Chancery in *Emperor of Austria v. Day and Kossuth* (1861), where it was acknowledged that the Emperor of Austria Francis Joseph, in his capacity as the King of Hungary and Bohemia, had the right to issue and regulate the Hungarian currency.[14] Also the US Supreme Court recognised monetary sovereignty in *Juillard v. Greenman* (1884), *Perry v. United States* (1936) and *Norman v. Baltimore & Ohio Railroad* (1953). One could also refer in this context to cases before the Tripartite Claims Commission[15] (*Crane v. Austria* (1927)), the US Court of Claims (*Eisner v. United States* (1954)), or the US Foreign Claims Settlement Commission (*Zuk Claim* (1958)). However, the most authoritative rulings came from the Permanent Court of International Justice ("PCIJ") and later the International Court of

[9] M.N. Shaw, *International Law*, 7th edition, Cambridge University Press, Cambridge: 2014, p. 147.

[10] Crawford correctly notes, however, that sovereignty is not a criterion for statehood – it is an attribute of a State, not a precondition. At the same time, he perceives independence a separate criterion not enumerated by the Montevideo Convention (*cf.* Crawford, *supra* note 7, p. 62).

[11] D. Okeowo, *Statehood, Effectiveness and the Kosovo Declaration of Independence*, unpublished manuscript, 3 November 2008, available at: http://bit.ly/2hXi0hc (accessed 2 November 2017). *See* also Shaw, *supra* note 9, p. 147.

[12] R.M. Lastra, *Legal Foundations of International Monetary Stability*, Oxford University Press, Oxford: 2006, pp. 16–17. *See also generally* C.D. Zimmermann, *The Concept of Monetary Sovereignty Revisited*, 24(3) European Journal of International Law 797 (2013).

[13] International Monetary Fund, *Supporting Document to the Code of Good Practices on Transparency in Monetary and Financial Policies*, *Appendix III: Glossary of Key Terms*, available at: http://bit.ly/2xK5QhV (accessed 2 November 2017).

[14] *The Emperor of Austria and King of Hungary v. Day and Kossuth*, 11 Law Magazine & Law Review, or Quarterly Journal of Jurisprudence 3d ser. 142 (1861).

[15] Established by virtue of the Washington Agreement of 26 November 1924 between the United States and Austria and Hungary to adjudicate on claims for losses, damages or injuries suffered by the US or its nationals, covered by the Treaties of Vienna and Budapest.

Justice ("ICJ"). In the Serbian[16] and Brazilian[17] loans cases, the judges distinguished between the law of contract applicable to the currency of payment (*lex monetae*) and the law applicable to the debt in question. While applying French law to the denomination of bonds issued in French francs by, respectively, Serbia and Brazil, the PCIJ confirmed the right of each state to regulate its currency.[18] Also, the judges of the ICJ, while differing over whether the French claim concerning the Norwegian gold clause related merely to domestic law or was also subject to international protection of foreign assets, agreed that the bonds' gold clause *per se* was subject to Norwegian law.[19] Hence, in accordance with the reciprocity principle with respect to the recognition of jurisdiction, Norway could rely on the French reservation for matters which were "essentially within the national jurisdiction as understood by the Government of the French Republic."

Furthermore, it must be emphasised that monetary and financial sovereignty in a free-market economy carry components of both rights and duties. In other words, whereas one instinctively associates monetary sovereignty with the right to issue and regulate financial flows, without an effective exercise of this privilege – i.e. without currency – an economy could not develop beyond a barter system. Accordingly, monetary and financial powers delimit all other public policies that require any sort of accumulation of capital or exchange beyond a restricted circle of friends and neighbours (which in the contemporary world means all state policies). Last but not least, monetary and financial sovereignty has both an internal and external dimension.

Of course, the concept of monetary and financial independence is not unlimited. In the first place, it is subject to international law, which sets certain general boundaries for its exercise. Secondly, a state may transfer some of its prerogatives to international organizations or other supranational bodies. With respect to financial and monetary policies, most states have restricted their powers by joining the International Monetary Fund ("IMF"), an international organization which imposes certain requirements as to how those policies should be implemented. An even further restriction – amounting to a renunciation of autonomous monetary and currency policies – applies to states-members of a monetary union. However,

[16] PCIJ, *Case Concerning the Payment of Various Serbian Loans Issued in France*, *France v. Kingdom of the Serbs, Croats and Slovenes*, Judgment No. 14, 12 July 1929 (File E. c. XV. Docket XVI).

[17] PCIJ, *Case concerning the Payment in Gold of Brazilian Federal Loans Contracted in France*, *France v. Brazil*, Judgment No. 15, 12 July 1929 (File E. c. XVII. Docket XVI.3).

[18] PCIJ, *Serbian Loans Case*, para. 41. Curiously, the Court applied the *lex monetae* in a selective manner, disregarding the French public policy limitation of the gold clause, thus treating Serbia and Brazil more rigidly than they would have been treated in the case of a French, domestic issuance of debt.

[19] ICJ, *Certain Norwegian Loans (France v. Norway)*, Judgment, 6 July 1957, ICJ Rep 1957, p. 9.

in such cases it is the excercise of sovereignty that is transfered and not the sovereignty per se.

The substantive meaning of the last element of the statehood (i.e. the capacity to enter into relations with other states) is disputed among scholars. Some argue that it relates to the political, financial, and technical resources an entity needs to establish and maintain contacts with other states.[20] Others disagree and claim that it is enough to meet the first three criteria. The ability to enter into relations with other states is seen as a consequence of rather than a prerequisite for being a state.[21] Yet there are also those who maintain that the fourth condition relates to "the legal capacity to enter into relations subject to international law with other States [which] by definition, (…) can only be recognized by other States."[22] In other words, the capacity to enter into relations with other states may emerge only through recognition thereof by those other states.

This brings us to the discussion about the nature of such recognition, which has truly divided public international scholars. Since this issue is directly addressed in-depth in other chapters of the book, there is no need for us to repeat all the details of this debate. Suffice it to say that the so-called "declaratory theory" (i.e. statehood is independent of its recognition by other states and solely depends on the fulfilment of the above factual requirements; recognition thus has a declaratory value, merely confirming the existence of a state) seems to be the prevailing view in the contemporary legal scholarship. On the other hand, in accordance with the "constitutive theory" recognition by other states is a condition *sine qua non* for the creation of a state.[23] In practice, sometimes a middle-ground approach (which is nevertheless closer to the declaratory theory) is advocated, whereby recognition is regarded as strong evidence of fulfilment of the factual criteria.

What also needs to be addressed here is the act of recognition as such. This may be defined as "a political act whereby a subject of international law [e.g. a State] expresses its unilateral interpretation of a given factual situation. (…) recognition is a formal expression by its author about how it perceives the situation to which it extends recognition. Recognition simultaneously constitutes a means for its author to make known its own view of a situation, including the legal consequences, if any, that the author attributes to the situation and on which the author intends to base

[20] *Cf. e.g.* American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, 1987, vol. 1, para. 201.

[21] Crawford, *supra* note 7, p. 62.

[22] *See* F. Finck, *The State between Fact and Law: The Role of Recognition and the Conditions under Which It Is Granted in the Creation of New States*, 36 Polish Yearbook of International Law 51 (2016), p. 56. It should be noted that his view contains a certain contradiction. The Montevideo Convention, which enumerates four conditions, clearly states that "the political existence of the state is independent of recognition by the other states" (art. 3).

[23] Shaw, *supra* note 9, pp. 332ff.; *see* also P. Saganek, *Unilateral Acts of States in Public International Law*, Brill Nijhoff, Leiden: 2016.

its policy."[24] This may relate, for instance, to the recognition of a state, government, belligerency, insurgents.[25] Scholars also distinguish two forms of recognition – *de facto* and *de jure*. The first is of a provisional nature, reflecting doubts on the part of a recognizing state over the fulfilment of relevant criteria.[26] The second is permanent and indicates a final assessment of the recognizing state. In practice however, the difference between the two forms of recognition are political rather than legal. It should also be noted that recognition does not need to be an express one (i.e. open, unambiguous and a formal communication). It may also come in an implied form, whereby recognition is expressed indirectly by other actions of the government (e.g. establishment of diplomatic relations with a newly created state). Finally, some also speak about collective recognition, wherein the recognition is expressed by means of an international decision (e.g. through a resolution of an international organization). It is, however, disputable whether such form of recognition exists in contemporary public international law.[27]

Accordingly, while refraining at this stage from a legal characterisation of sovereign debt restructuring in terms of the international law on recognition (this matter is further discussed in section 4 below), the subsequent part analyses how the international financial community can allow (or not) an indebted-state to regain its monetary and financial sovereignty, restore its capacity to finance the functioning of the government, and return to international financial markets.

2. Sovereign default and the restoration of monetary sovereignty

2.1. Sovereign borrowing

The capacity to incur debts constitutes an important element of public finance, whether it be because a state is compelled to have recourse to an external source of financing, or because it actively stimulates economic growth (in which case the cost of money is lower compared to the return on the investment). A sovereign debt relationship may be established with either domestic or external entities. Accordingly, sovereign debts may be divided into internal and external, although in light of the ongoing evolution of the financial sector the dividing line may be very difficult to draw in practice.

Despite its significance to any state, there is no universal definition of public debt,[28] which has major legal (and economic) consequences, for instance in terms

[24] J. d'Aspermont, *Recognition (Introduction)*, Oxford Bibliographies, available at: http://bit.ly/2xSAy7G (accessed 2 November 2017).

[25] *See* Saganek, *supra* note 23, pp. 441ff.

[26] Shaw, *supra* note 9, p. 337; *see* also C. Warbrick, *Recognition of states*, 41(2) International and Comparative Law Quarterly 473 (1992).

[27] Shaw, *supra* note 9, p. 337.

[28] R. Dippelsman, C. Dziobek & C.A. Gutiérrez Mangas, *What Lies Beneath: The Statistical Definition of Public Sector Debt. An Overview of the Coverage of Public Sector Debt for 61 Countries*, IMF Staff Discussion Note SDN/12/09, 27 July 2012.

of transparency/accounting, or debt sustainability and acknowledgment of a sovereign default. From an institutional perspective, the question arises as to the legal classification of debts incurred by: state governments, local governments, and the central government (a budgetary central government like the judiciary or governmental agencies, extra-budgetary units, and social security funds). In terms of instruments, one has to take into account: loans and other financial instruments of direct borrowing, other accounts payable (e.g. trade credits or advances), Special Drawing Rights,[29] insurance and pensions, and – most importantly for the purposes of this chapter – debt securities, which are negotiable financial instruments. The latter include sovereign bonds, whose value by the mid-1990s already exceeded sovereign bank loans.[30]

As far as sovereign bonds are concerned, these are debt instruments issued by or guaranteed by public authorities (usually a central government or a central bank). By virtue of a bond instrument, the issuer undertakes an obligation to repay the debt upon maturity, usually together with interest (which is called a coupon). From a legal perspective, international sovereign bonds are particularly interesting.[31] On the one hand, sovereign borrowers are "particularly vulnerable," as they cannot rely upon insolvency mechanisms, which means they do not have the possibility of restarting their activity with a clean slate. On the other hand, sovereigns traditionally benefited from a unique legal protection. In accordance with the absolute sovereign immunity doctrine, commercial obligations (which is how debt instruments were perceived by courts) were not subject to compulsory jurisdiction. To address some of the concerns, a statement whether debt instruments are issued under domestic or foreign law, a waiver of sovereign immunity from jurisdiction, and even choice of foreign jurisdiction to settle possible claims gradually became a standard legal practice in bond instruments. Submission of bond claims to domestic law entailed embracing the private law approach to contractual claims, largely precluding defences based on public policy considerations.

Yet, even despite growing popularity of the restrictive immunity doctrine, state assets still remain under the strong protection of immunity from execution, as only commercial assets can be attached. Here the absence of a sovereign insolvency law turns out to be a double-edged sword, possibly harming creditors. Since the debtor cannot in principle disappear, a creditor loses part of the motivation to reach a mutually satisfactory restructuring agreement. In other words, unless a particular contractual mechanism like a CAC (see below) is introduced to the debt instru-

[29] Ł. Gruszczyński, M. Menkes, Ł. Nowak, *Prawo międzynarodowe gospodarcze*, C.H. Beck, Warszawa: 2016, pp. 143, 171–172.

[30] P.-F. Weber, *(Re)structuration des dettes souveraines. Où en est-on?*, 7 Revue de la stabilité financière 115 (2005), pp. 115–135.

[31] L. Buchheit, *Sovereign debt restructurings: The legal context*, in: Bank of International Settlements, *Sovereign risk: A world without risk-free assets?*, 72 BIS Papers 2013, available at: https://www.bis.org/publ/bppdf/bispap72.pdf (accessed 21 March 2018), pp. 107–111.

ment, restructuring hinges upon the acceptance of terms by all the stakeholders. This obviously strengthens the negotiation position of the "last creditor," whose claim value amounts not only to its face value (and, where applicable, interest), but to the aggregated value of the entire restructuring. This in turn means that while a majority of creditors may agree to reduce the value of their debt claim, thus retrieving a fraction of their investment rather than losing everything, the so-called last-hour creditor(s) may blackmail the entire deal by requiring to be paid back in the full amount.

For the purposes of this chapter it seems sufficient to state that because of the conditions imposed upon sovereign creditors – notably in case of debt-servicing problems and debt-restructuring – the international financial community is, on one hand, very careful in absolving any debts, while on the other the treatment of unreliable borrowers constitutes a major market force in the interactions between a very diverse and an often evolving group of stakeholders.

2.2. Sovereign debt unsustainability and sovereign default

Disputes concerning the non-payment of sovereign debts are as old as the fiscal and borrowing policies of modern states, and date back to 17th century.[32] One scholar counted 600 cases of debt restructurings in 95 developing countries since 1950 alone.[33] In most instances they were resolved through inter-state negotiations, but in earlier periods the use of force to compel the payment of debts was not unheard of. Until World War I court and arbitration dispute settlements were relatively frequent; however as the restrictive theory of sovereign immunities developed,[34] the focus of financial markets shifted towards private lending and domestic courts and investment arbitration.[35]

Financial distress, i.e. the debt unsustainability of a sovereign debtor, may lead to a complete or partial failure to make either principal or interest payments on time (beyond the grace period). Such instances are called sovereign defaults, which should be distinguished from debt restructurings.[36] In the latter case the outstanding sovereign debt instruments, like bonds, are exchanged for new debt instruments or cash through a formal process. Sovereign debt restructuring may consist

[32] M. Waibel, *Sovereign Defaults before International Courts and Tribunals*, Cambridge University Press, Cambridge: 2011, pp. 8–11.

[33] U.S. Das, M.G. Papaioannou & C. Trebesch, *Restructuring Sovereign Debt: Lessons from Recent History*, IMF Seminar Papers, August 2012, available at: http://bit.ly/2u7Jgzn (accessed 2 November 2017).

[34] M. Menkes, *Immunitety jurysdykcyjny i egzekucyjny państwa. Komentarz do Konwencji Narodów Zjednoczonych o immunitecie jurysdykcyjnym państw i ich mienia oraz Europejskiej konwencji o immunitecie państwa*, Oficyna Wydawnicza SGH, Warszawa: 2003.

[35] M. Audit, *La dette souveraine devant les tribunaux arbitraux internationaux*, X Anuario Brasileiro de Direito Internacional 39 (2015).

[36] Das, Papaioannou, Trebesch, *supra* note 33.

of two elements: debt rescheduling, that is lengthening the maturities of the outstanding debt, possibly together with lower interest rates; and/or reduction of the face (nominal) value of the debt. Both elements involve a so-called "haircut," that is diminishing the present value of creditors' claims. Some instances of sovereign defaults and sovereign debt restructurings may also qualify as "credit events" for the purposes of Credit Default Swaps (discussed below).

As was mentioned above, due to the lack of international insolvency law, sovereign defaults are legally very challenging both to the financial markets (which are unable to "clean" the situation and continue with business operations) and to states (often struggling with creditors willing to block complex debt restructuring talks in order to maximise their profit). The absence of an orderly and predictable restructuring mechanism thus exacerbates the costs for a state that has already lost its payment capacity (e.g. via restructuring delays or by draining scarce reserves). Accordingly, in 2002 the IMF proposed the establishment of a "sovereign-debt restructuring mechanism" ("SDRM") – an international counterpart to insolvency law.[37] It included the prohibition of lawsuits by creditors, and the duty on the part of the state-debtor to share information. Depending on the version, the early drafts of SDRM also provided two modes of debt restructuring, either granting decision-making capacity to a creditor (super)majority, or broadening the powers of the IMF itself. Both plans would even further increase the legal complexity of the restructuring process. Eventually, the SDRM initiative was rejected by states while the international community only managed to adopt certain soft-law rules for responsible sovereign borrowing and lending.[38]

If the power to establish, manage and operate a public monetary system is, with the exception of members of a monetary union, a crucial element of state sovereignty, then a long-term loss of such capacity, which bars a state from access to international financial markets, *de facto* amounts to a failure of the government's capacity, thus undermining one of the pillars of sovereignty. The interesting feature of this situation is that, while a repudiation of debts or a moratorium on debt-servicing is a unilateral act, the state's own declaration is neither necessary nor sufficient for a sovereign default. In other words, whether a state will be deprived of its monetary and financial sovereignty may depend upon the decision of external actors, not necessarily bestowed with international legal personality. The process of debt restructuring constitutes its mirror reflection.

Against this general backdrop of public lending (i.e. sovereign lending by other states or intergovernmental organisations like the World Bank or the IMF), it is

[37] A.O. Krueger, *Statement by IMF First Deputy Managing Director on Sovereign Debt Restructuring Mechanisms*, available at: http://bit.ly/2yVPkto (accessed 2 November 2017).

[38] M. Menkes, *Zasady odpowiedzialnego udzielania i zaciągania zagranicznych pożyczek publicznych. Wybrane aspekty*, 139 Studia Ekonomiczne – Zeszyty Naukowe Wydziałowe / Uniwersytet Ekonomiczny w Katowicach 218 (2013), pp. 220–227.

necessary to recognize the phenomenon of sovereign private lending. In the aftermath of the 1973 Oil Crisis, Western financial institutions launched a large scale "petrodollars recycling" operation, which allowed for transferring the excessive income of petrol states, mainly to developing economies. As a result, an unprecedented level of debt was incurred by states, notably in Latin America, towards foreign private companies. Carried away by the market frenzy in times of a capital glut,[39] private lenders were not particularly cautious in screening the borrowers or controlling the way the money was spend. Since a considerable amount of the funds was either invested in bad projects or simply defrauded, when Mexico declared a moratorium on servicing of its foreign debt in 1982 a chain reaction set in. As a result, Lain America fell victim to a "lost decade." Apart from the first massive private-loan restructuring, the Mexican default was also the first time that a banks' Coordination Committee was formed (which subsequently became a permanent instrument of the London Club, as described below).[40]

Accordingly, before moving on to the analysis of debt restructuring, it is necessary to acquire a general overview of the number and types of actors that could influence the previous phase, i.e. sovereign default. Settlement of Credit Default Swaps is a telling example.

2.3. Loss of monetary sovereignty – credit default swaps

A Credit Default Swap ("CDS")[41] is a derivative financial instrument designed to secure the buyer against the financial risk of an underlying financial instrument. For the purposes of this chapter we focus on CDS-based on public bonds (whether issued by a state, a government, or certain governmental bodies). CDS is a derivative, meaning that its value and the possibility of realising rights stipulated by such a contract derive from financial situation of the issuer of the underlying instrument. Hence, one could compare CDSs to an insurance policy bought by an investor against default of his investment. More specifically, the buyer of a CDS acquires financial protection in case of a pre-defined default – bankruptcy, failure to pay,[42] and other "credit events" (restructuring,[43] moratorium/repudiation of

[39] Meaning that the amount of capital exceeded the investment absorption capacity of the oil-exporter economies.

[40] E. Gaillard, *Aspects de droit international privé de la restructuration de la dette privée des États*, 9 (1988) Droit international privé. Travaux du Comité français de droit international privé 77 (1991).

[41] J. Grady, R.J. Lee, *Sovereign CDS: Lessons from the Greek Debt Crisis*, Lexology, 16 March 2012, available at: http://www.lexology.com/library/detail.aspx?g=e9c8eae6-b2ad-4fe7-9a9f-9f299cd2607f (accessed 2 November 2017).

[42] Above a certain value and upon the expiration of a grace period.

[43] Again, restructuring for the amount above a defined threshold. There are five types of revisions to the original loan terms that would trigger a CDS on this basis: (i) a reduction in the interest payable; (ii) a reduction in the principal or premium payable; (iii) a postponement or

debt[44]) with reference to specific "reference entities" (i.e. the country-issuer of the debt instrument).

The significance of such contract clauses is twofold. Most importantly for the borrower the announcement of a "credit event" will directly harm his financial position. It suffices to note that especially emerging economies tend to rely on short-term borrowing, meaning that large amounts of debt need to be rolled over (i.e. the borrower takes yet another loan to repay the previous debt).[45] Furthermore, a default (or even a downgrade of credit worthiness) may result in a chain reaction. For example, once a credit event is announced, sovereign bond values decrease and the expected losses of bondholders increase, which may undermine the financial stability of the borrower.[46] Accordingly, the capacity to influence the conditions and standard clauses in CDSs and, even more importantly, the right to interpret them, is of utmost importance.

Standard CDS contract clauses are published by the International Swaps and Derivatives Association (ISDA) – an organisation consisting of over 850 member institutions from 68 countries.[47] Although size of the ISDA may be impressive, what is important from public international law perspective, it is composed of not only governmental and supranational entities, but also of private participants in the derivatives market (including corporations, investment managers, insurance companies, energy and commodities firms, and international and regional banks) as well as other stakeholders in the market (e.g. exchanges, intermediaries, clearing houses and repositories, law firms, accounting firms and other service providers). The 2016 size of the CDS market, $10 trillion, was a mere 1/6 of the $60 trillion market from late 2007.[48] Still the sheer value of the market speaks for itself in terms of the practical importance of the only universal model clauses. ISDA standard contracts could be non-binding upon states, but the cost of issuing a non-standardized bond document (which means that potential buyers would have to conduct a specific due diligence) could prove prohibitive.

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deferral of certain payments or accrual dates; (iv) a change in ranking or priority resulting in the "subordination" of certain liabilities to others; and (v) a change in the currency of a payment to any currency that does not qualify as a "Permitted Currency." There are also additional formal requirements.

[44] A moratorium/repudiation above certain value, followed by restructuring or failure to pay (at this stage the value of the operation is irrelevant).

[45] F.A. Broner, G. Lorenzoni, S.L. Schmukler, *Why Do Emerging Economies Borrow Short Term?*, IMF Staff Paper, August 2004, available at: http://bit.ly/2zYGs6a (accessed 2 November 2017).

[46] I. Akkizidis, M. Stagars, *Marketplace Lending, Financial Analysis, and the Future of Credit: Integration, Profitability, and Risk Management*, John Wiley & Sons, Chichester: 2015, pp. 180–183.

[47] 2003 ISDA Credit Derivatives Definitions, available at: http://cbs.db.com/new/docs/2003_ISDA_Credit_Derivatives_Definitions.pdf (accessed 2 November 2017).

[48] C. White, *The rise and fall of the hottest financial product in the world*, Business Insider, 15 August 2016, available at: http://read.bi/2yXslyg (access 2 November 2017).

Whether a credit event occurs is determined by a binding decision of one of five Determination Committees (DCs). Each regional DC consists of ten sell-side (dealers) and five buy-side (non-dealer) voting firms, alongside three consulting firms and central counterparty observer members.[49] In other words, the critical entity for declaring a sovereign (*sic!*) default is composed of 19 financial companies, while ISDA acts as a secretary for each DC. Interestingly, while internal DC regulations aim at some objectivity in the appointment of their members, the ten regional dealers are chosen according to their aggregate CDS trading volumes, which means that the membership is, indirectly, purchased.

3. Hybrid "recognition" of monetary and financial sovereignty

3.1. Sovereign debt restructuring

Sovereign debt restructuring is a multi-phase process, usually launched by an announcement of restructuring or a default. Subsequently, the parties negotiate until they reach a so-called "exchange offer." The offer is then submitted to creditors, who are given a deadline to accept or reject it. If the participation threshold is met (see our comments below concerning the Collective Action Clause), the debt is exchanged.

The negotiation venue depends upon the type of creditor. In the case of bonds, parties rely upon the exchange offers. Whereas for restructuring commercial credit the most frequent recourse is to the London Club (of commercial banks), governmental debt is restructured within the Paris Club. Neither of them is an international organization; their membership fluctuates, and they have no official mandates.

The Paris Club, consisting of 22 permanent members,[50] has since 1956 hosted restructuring negotiations in respect of public debts i.e. public *sensu stricto* or guaranteed by the public sector (so-called "treated debt."[51] Talks usually concern only medium- and long-term debts, i.e. those with a maturity above one year. The institutional set-up of the Club is limited to a permanent secretariat. As the Club is an informal institution, the outcome of a meeting is not a legal agreement between

[49] ISDA, *The ISDA Credit Derivatives Determinations Committees*, available at: http://bit.ly/1OgB4Np (access 2 November 2017).

[50] Australia, Austria, Belgium, Brazil, Canada, Denmark, Finland, France, Germany, Ireland, Israel, Italy, Japan, Rep. of Korea, Netherlands, Norway, Russian Federation, Spain, Sweden, Switzerland, United Kingdom, and United States. Other creditor governments are invited on a case-by-case basis, depending on their financial stake. This means, however, that these are not (necessarily) the major creditors that may exert pressure through the semi-formal platform described in this chapter.

[51] Paris Club, *Definition of Debt Treated*, available at: http://bit.ly/2pO8xXY (accessed 2 November 2017).

the debtor and the individual creditor countries, therefore creditor countries participating in negotiations sign a so-called "Agreed Minute." The Agreed Minute recommends that creditor-countries collectively sign bilateral agreements with the debtor-state, giving effect to the multilateral Paris Club agreement.[52]

Even though the conditions of debt treatment are negotiated individually in each case, there are some model terms (concessions) that are used in practice.[53] These include: (i) "Classic terms": the least concessional standard treatment; (ii) "Houston terms": for highly-indebted lower-middle-income countries; (iii) "Naples terms": for highly-indebted poor countries; and (iv) "Cologne terms": for countries eligible for the Heavily Indebted Poor Countries initiative. Both the Classic and Houston terms imply debt rescheduling based on market rates, but Houston offers longer grace and repayment periods. Naples and Cologne terms are designed for debt reduction, which may occur either through reduction of the eligible debts and rescheduling of the remaining part, or rescheduling of the entire debt at a reduced interest rate and with longer repayment terms. Naples terms are granted only to countries eligible for assistance from the World Bank's International Development Agency, which is not required for Cologne debt reductions. A further difference is in the haircut value: between 50-67% under the former, and up to 90% of the eligible debt in case of the latter.

The conditions for benefiting from particular restructuring concessions depend on meeting the relevant criteria; for instance, whether a debtor is experiencing debt unsustainability or only financial liquidity problems. However, as there are no formal criteria for distinguishing between debt sustainability and liquidity, the arguably arbitrary decision is in the hands of the Paris Club itself.[54]

Finally, the Paris Club requires "comparability of treatment" from its members, meaning that each debtor country has to restructure its outstanding private debt under comparable terms. In other words, not only does the Paris Club coordinate sovereign debt restructurings, but indirectly imposes its terms upon third-parties. If the debtor refuses to adhere to the comparability of treatment clause, it may lose the prospect of the restructuring on this particular occasion or even any time in the future. The Paris Club thus relies on soft power. The comparability of treatment may even undermine the IMF financial assistance, i.e. a program established and implemented by a fully-fledged international organisation with the support of states, designed to spur private sector

[52] M.A. Weiss, *The Paris Club and International Debt Relief*, Congressional Research Service 7-5700, 11 December 2013, available at: https://fas.org/sgp/crs/misc/RS21482.pdf (accessed 2 November 2017).

[53] Paris Club, *Standard Terms of Treatment*, available at: http://bit.ly/2ojW8ed (accessed 2 November 2017).

[54] G. Cheng, J. Diaz-Cassou, A. Erce, *From Debt Collection to Relief Provision: 60 Years of Official Debt Restructurings through the Paris Club*, European Stability Mechanism, 20 Working Paper Series (2016).

involvement.[55] This seems to have been the case in the 1997 financial crisis with respect to Thailand and Indonesia. Such a negative effect influences not only the actual amount of financial assistance available to the debtor in question, but also increases the moral hazard risks, i.e. that some creditors will be less willing to co-operate on debt restructuring, hoping for a more beneficial share in the financial burden of the operation.

The informality of the London Club goes even further. Even its unofficial name may be misleading. Not only its ephemeral nature does not qualify it as a club, but until the early 1990s the majority of private restructurings took place in New York rather than in London. There is no permanent structure, even though the Club has managed to reach some 200 restructuring agreements.[56] Restructuring talks are usually managed through bodies, referred to interchangeably as a Bank Advisory Committee, a Steering Committee, or a Coordinating Committee.

The body consists of representatives of the banks that account for the maximum portion of the debt of the country. First, the insolvent government contacts one or two of its principal creditors, who organise and chair a Steering Committee. Subsequently the Bank Advisory Committee ("BAC") or a Creditor Committee is established. It consists of representatives of 5-20 banks, who negotiate on behalf of the entire group.[57] Usually these are senior officials of banks with the largest exposure to the sovereign. Talks end with the adoption of a "agreement in principle," signed by the debtor government and BAC members. Subsequently the document is circulated among all the banks concerned for unanimous approval in order to become effective. Coordination problems in gaining the required unanimity have been experienced in up to 30% of the restructuring attempts.[58]

3.2. Restoring monetary and financial capacity

In light of the significance of a state's acceptance by the international financial community for its subsistence, we approach the debt restructuring process from the perspective of the "re-recognition" and restoration of the financial and monetary capacity of a state.

A default of a state on its sovereign debt results in its inability to access the international financial markets. Although such a state does not lose its formal ability

[55] E. de Jong, K. van der Veer, *The catalytic approach to debt workout in practice: coordination failure between the IMF, the Paris Club and official creditors*, in: G.R.D. Underhill, J. Blom, D. Mügge (eds.), *Global Financial Integration Thirty Years on from Reform to Crisis*, Cambridge University Press, Cambridge: 2010, pp. 134–149.

[56] UNCTAD, *Debt Sustainability Analysis, II. Private Debt II.(i) Commercial Bank Lending Restructuring: The London Club*, available at: http://bit.ly/2pAHn6Z (accessed 14 October 2017).

[57] U.S. Das, M.G. Papaioannou & C. Trebesch, *Sovereign Debt Restructurings 1950–2010: Literature Survey, Data, and Stylized Facts*, IMF Working Paper WP/12/203.

[58] Das, Papaioannou & Trebesch, *supra* note 33.

to run its external monetary and financial policy, it is *de facto* deprived of such capacity. In other words, while such a state's prerogatives remain untouched, in practice it cannot use them (e.g. undertake new financial obligations towards other states or private entities such as banks). Such a situation obviously affects the internal aspect of the financial and monetary sovereignty of a state, leading in some extreme situations to its (again *de facto*) incapacity to implement specific financial and monetary policies (e.g. to determine the value of its currency against foreign currencies or to ensure the functioning of its internal financial and payment system). In the long term, however, the potential consequences go well beyond the financial and monetary sphere, and affect all state competences.

As shown in the previous section, the restoration of a state's monetary and financial sovereignty is carried out in the process of debt restructuring. At its core, debt restructuring constitutes an agreement between the debtor-state and its creditors (a group that may be composed not only of states but also private entities), whose terms are not binding upon third parties. It certainly does not compel others to extend credit to or to enter into any other financial arrangements with the state in question. At the same time, successful restructuring allows a state, from the domestic perspective, to restore its financial liquidity and the financial capacity of its government, and internationally paves the way back to foreign and international capital markets.

We argue here that the debt restructuring should be perceived as consisting of two separate acts on the part of creditors, rather than just one. One is the explicit, bilateral, private-law agreement. There is, however, also another act which resembles recognition, as it entails "unilateral interpretation of the given situation… [by virtue of which] to make known its own view of a situation, including the legal consequences, if any, that the author attributes to the situation and on which the author intends to base its policy."[59] Note that creditors, before signing an agreement, need to acknowledge the re-establishment of the debtor-state's capacity to incur international financial obligations in the form of debt restructuring (as explained above, debt restructuring is in essence a conversion of old financial obligations into new ones) and beyond. In this act of "recognition" creditors individually (and unilaterally) express their views as to the debtor's capacity – as a consequence of recommendations included in an "Agreed Minute" or an "agreement in principle" (depending on the venue in question) – to conduct its external monetary and financial prerogatives (at least in its external dimension).[60] This "recognition" constitutes a basis for a subsequent decision to sign a relevant restructuring agreement with the debtor-state and to have direct financial dealings and further fiduciary relation-

[59] Shaw, *supra* note 9, p. 332.

[60] How otherwise would it be possible to conclude a debt restructuring agreement with a state that has *de facto* lost its capacity to undertake any new financial obligations on the international market?

ships in the future. As mentioned above, it has consequences only for an individual creditor vis-à-vis a debtor state.

Of course, the above characterisation is based on a conceptual distinction which takes into account the nature and sequence of the steps that are taken in the course of the debt restructuring process. In practice an act of recognition is implied and expresses itself in the decision of a creditor to sign a debt restructuring agreement with a debtor-state. It is not clear however whether this "recognition" is of *de facto* or *de jure* character. On one hand, it is provisional and depends on the conclusion of a debt restructuring agreement (which becomes permanent only when a relevant agreement is ultimately signed). On the other hand, it is more than merely a recognition *de facto* – it constitutes the basis for a new, long-term cooperation, where the actors recognising the defaulted state carry on financial transactions with it. It does not, however, amount to recognition *de jure*, as no act is even explicitly mentioned in the restructuring process.

So why do we label the above recognition as a "hybrid" form? There are two reasons that support our approach. First, the recognition of financial and monetary capacity combines two different legal regimes (i.e. public and private), as it is expressed by both states and private entities such as banks. While recognition by states does not pose in this context any conceptual challenges, talking about recognition by private entities is problematic. As indicated in section 2 of this chapter, recognition is an international act by an entity that possesses international legal subjectivity (i.e. a state). This is not true in the case of private actors, which cannot perform acts that will create rights and obligations at the international level. Yet their actions (i.e. an act of recognizing the external dimension of a state's financial and monetary capacity) has a direct impact on the possibility of a debtor-state to become active in this policy space and to realize its sovereign prerogatives. Paradoxically, while it raises doubts whether debt restructuring involves a *sui generis* act of recognition, unlike a traditional act of recognition its constitutive character is self-evident. This is best captured by the simultaneous inclusion of the "comparability of treatment" principle in public-debt restructuring, while private-debt restructuring is conditional upon recognition of a plan for economic recovery by the IMF or the World Bank.[61] Of course, one may simply conclude that we have here two forms of recognition – a traditional one expressed by states and some new one (similar in form but very different in nature) that falls completely outside the scope of public international law. However, such an approach seems unsatisfactory, because it disregards the functional interdependence between these acts – for the reasons explained above, one cannot occur without the other.

Second, the recognition is expressed in the context of a process that mixes different levels of normativity. On one hand it involves actors and relies on concepts that are characteristic for traditional public international law (e.g. states,

[61] Gaillard, *supra* note 40, pp. 79–80.

state default, sovereignty). On the other hand, the Paris Clubs is not an international organization, its membership fluctuates, and it does not have an official mandate. It issues documents that are subsequently complied with by the parties, but which are not legally binding. And this is only part of the legal complexity of the matter. As discussed above, an agreement of public lenders of the Paris Club may depend upon a restructuring compromise reached with a private lender in the London Club. Hence, either private law actors acquire some capacity in terms of recognition under international law, or the recognition of public lenders partly depends upon the conduct of private actors. As regards the former, it entails the obvious problem of *nemo plus iuris in alium transferre potest quam ipse habet*. The latter would, however, undermine the very unilateral nature of the act of recognition.

Finally, it is worth reiterating that the Paris Club's model terms for restructuring were adopted at the G-7/G-8 meetings (respectively called the Houston, Naples and Cologne terms). We thus come across unilateral declarations by the leading economies concerning the laying down of conditions for regaining monetary sovereignty and capacity to exercise government. These legally non-binding terms set general principles that both influence the legal situation of debtor states, as well as have a major impact on the way of performing unilateral acts by lender states.

Conclusions

Although so-called megatrends shape our world, they are hardly identifiable at the beginning, in the same way that no one can identify a historical era until it is over. Accordingly, it is not surprising that lawyers, an inherently conservative group, are reticent to acknowledge any change in what defines our horizons: legal subjects, objects, and legal relations. Insofar as tempering the frantic pace of everyday life translates into greater legal certainty, this is a much desired approach, particularly so in such a fragile environment as public international law. This should not, however, lead legal scholars to turn a blind eye to changing social realities, for law should be able to regulate social interactions rather than preclude them.

In this chapter we have analysed sovereign debt restructuring from the perspective of international law of state recognition. We have come to the conclusion that this particular field is hardly classifiable using traditional categories. The act of recognition which we identified in the process of debt restructuring is arguably neither *de jure* nor *de facto* one. It is not an explicit recognition, but more than a tacit act. It is even difficult to distinguish a unilateral act that constitutes a core element of the debt restructuring process, and most strikingly, full enjoyment of an international legal personality in the area of financial law partly depends upon recognition by actors who do not enjoy the benefit of an international legal personality in their own name. Arguably it is a new category of recognition (hybrid as it is called here) that is a result of the specificity of international financial law.

Accordingly, it is possible to conclude that the result is either null, or that we are facing a megatrend which currently exceeds our current comprehension. One could argue that traditional normative categories for state recognition serve international law purposes well, hence a factual situation that does not pass the threshold of state recognition cannot be treated as such, even though it may have great indirect significance. Alternatively, our conceptual struggle with hybrid recognition may be just the tip of an iceberg. We are living in an age of international regulatory governance and the disaggregation of states,[62] when the Westphalian conceptual network becomes increasingly leaky, making it impossible to grasp numerous processes shaping our reality. While it may be too early to review the notion of international legal personality, nonetheless the fact that the capacity to be a subject of international rights and duties hinges upon ever more complex criteria and depends upon ever more diversified groups of actors should not be treated lightly, so that we do not sleep through the revolution. However, this is a subject for another article.

Abstract: This chapter critically analyses the issue of sovereign default and its legal and factual consequences, as well as the process that makes it possible to restore the capacity of a state to enter into financial relations. In this context, it is argued that sui generis recognition constitutes one of the elements of this process. This sui generis recognition does not concern the recognition of a state (as the state still exists), but rather relates to recognition of certain of its sovereign prerogatives. Due to the peculiarities of this form of recognition it is referred to as a "hybrid recognition." Its hybridity is connected with the fact that such recognition combines two different legal regimes (i.e. public and private) and is expressed in the context of a process that mixes different levels of normativity.

Keywords: recognition, monetary sovereignty, financial sovereignty, debt restructuring, sovereign borrowing, sovereign debt unsustainability and sovereign default, Paris Club, London Club.

[62] A.-M. Slaughter, *A New World Order*, Princeton University Press, Princeton: 2004.

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