INTERNATIONAL LAW ASSOCIATION

SYDNEY CONFERENCE (2018)

RECOGNITION/NON-RECOGNITION IN INTERNATIONAL LAW

Members of the Committee

Professor Wladyslaw Czaplinski (Polish):*Chair*
Professor Christopher Borgen (American): *Co-Rapporteur*
Professor Aziz Tuffi Saliba (Brazilian): *Co-Rapporteur*

Dr Valentina Azarova (Headquarters)
Professor Chun-i Chen (Chinese (Taiwan))
Alternate: Professor Pasha Hsieh
Dr Aristotle Constantinides (Hellenic)
Professor Gerhard Hafner (Austrian)
Professor Shotaro Hamamoto (Japanese)
Professor Matthew Happold (British)
Mr Daud Ilyas (British)
Dr Natia Kalandarishvili-Mueller (Swiss)
Dr Khoti Kamanga (East African)
Nicholas Levrat (Swiss)
Rick Liew (Australian)
Professor Margaret McGuinness (American)
Professor Enrico Milano (Italian)
Dr Robert Muharremi (Albanian)
Professor Stefan Oeter (German)
Dr Alison Pert (Australian)
Alternate: Stephen Tully
Professor Yaël Ronen (Israeli)
Professor Brad Roth (American)
Alternate: Professor Chris Naticchia
Professor Werner Scholtz (South African)
Professor Mirjam Skrk (Slovene)
Professor Christopher Waters (Canadian)
Professor Andreas Zimmermann (German)

FOURTH (FINAL) REPORT

Introduction: Old Questions and New Problems

In the broadest sense, "recognition involves the acceptance by a State of any fact or situation occurring in its relation with other States."[1] States may recognize that another entity is itself a State or that a particular group of people and institutions are the government of a State. States may also recognize situations such as territorial change, or the administrative or judicial decisions of the organs of a government or, historically, the existence of a belligerency, although this last form of recognition has fallen out of common practice.[2]

Of these, the question of recognizing statehood is of central concern to the modern international system. The Committee on Recognition and Non-recognition in International Law was established by the Executive Council of the International Law Association (ILA) in May 2009, with the purpose of examining "whether contemporary issues of secession, break-up of States and the creation of new States have changed international law and policy with respect to recognition."

Early in its deliberation, the Committee on Recognition and Non-recognition decided to focus its efforts on the key questions of the recognition of States and the recognition of governments. The three reports preceding this final report assessed theoretical perspectives and arguments and surveyed international and domestic practice concerning the recognition of States and of governments. In doing so, the Committee not only addressed the most common and the most pressing questions of recognition and

[1] 1 *Oppenheim's International Law* §38 at 127 (Robert Jennings & Arthur Watts, eds., 9th ed. 1992)
[2] But, see, regarding belligerency, the discussion in part IV.A.1, below.

non-recognition, but also shed light on other aspects of recognition (such as the recognition of belligerency, of territorial change, and of administrative acts of a putative State or government) as an incidental matter.

The Committee first met at the 2010 ILA Conference in The Hague, Netherlands. It also held meetings at the 2011 Regional ILA Conference, in Taipei, Taiwan, in Vienna in January 2012, in the 2012 ILA Conference in Sofia, Bulgaria, in Warsaw in June 2013, at the 2014 ILA Conference in Washington, D.C. , and the 2016 ILA Conference in Johannesburg. Also, members of the Committee presented aspects of the Committee's work at the meeting of the American Branch of the ILA in October 2016.

The First Report of the Committee was presented at the 2012 ILA conference in Sofia. It focused on the fundamental aspects of recognition of States. The Second Report, presented at the ILA Conference in Washington, D.C. in 2014, focused on the international and domestic aspects of non-recognition and unrecognized entities. The Third Report, written for the 2016 ILA Conference in Johannesburg,, considered the issue of recognition of governments. For each of the first three reports, Committee members prepared memoranda addressing questions concerning theoretical issues and current practice.

Each report was largely based on memoranda submitted by Committee members. None of the reports was an exhaustive catalogue of State practice as, in each case, the number of States in the sample is small.[3] Nonetheless, we believe that the thoughtful analysis of a diverse, though small, sample of States can lead to insights and point the way to further research.

---

[3] This report is based primarily on the research and findings of the three previous reports, International Law Association Committee on Recognition/Non-Recognition in International Law, "Sofia Conference Report" (2012) [hereafter "First Report"]; International Law Association Committee on Recognition/Non-Recognition in International Law, "Washington Conference Report" (2014) [hereafter "Second Report"]; and, International Law Association Committee on Recognition/Non-Recognition in International Law, "Johannesburg Conference Report" (2016) [hereafter "Third Report"]. All reports and other Committee documents are available via the link to the Committee's webpage at <www.ila-hq.org/index.php/committees>.

All Committee member memoranda submitted in preparation of these reports included argument and analyses by the author(s) as well as a discussion of State practice. Committee member memoranda were not required to only discuss practice from their own State.

The First Report drew from examples of practice submitted in memoranda by the following members: Austria (Gerhard Hafner), Australia (Alison Pert and Stephen Tully), Belgium (Jean D'Aspremont), France (David Ruzié), Italy (Monica Lugato and Enrico Milani), Israel (Yaël Ronen), Japan (Nisuke Ando and Shotaro Hamamoto), Russia (Petr Kremnev), South Africa (Werner Scholtz), Tanzania (Khoti Kamanga), United Kingdom (Matthew Happold and Daud Ilyas), and the United States (Christopher Borgen, Margaret McGuinness and Brad Roth). Additional research was conducted on Algeria, Argentina, and Brazil.

The Second Report drew from the following memoranda Australia (Alison Pert), Austria (Gerhard Hafner), Cyprus (Aristoteles Constantinides), Greece (Aristoteles Constantinides), Israel (Yaël Ronen), Italy (Monica Lugato and Enrico Milano), Poland (Wladislaw Czaplinski), the Russian Federation (Petr Kremnev), South Africa (Werner Scholtz), the United Kingdom (Daud Ilyas), and the United States (Christopher Borgen, Margaret McGuinness, and Brad Roth).

The Third Report drew from examples of practice submitted in memoranda by the following members: Austria (Gerhard Hafner), Australia (Alison Pert), Canada (Christopher Waters), Cyprus (Aristoteles Constantinides), France (David Ruzié), Greece (Aristoteles Constantinides), Italy (Enrico Milano), Japan (Shotaro Hamamoto), Kosovo (Robert Muharremi), Palestine (Valentina Azarova), Slovenia (Mirjam Škrk), Taiwan (Chun-I Chen and Pasha Hsieh), Tanzania (Khoti Kamanga), The Netherlands (Olivier Ribbelink), United Kingdom (Daud Ilyas and Matthew Happold), and the United States (Christopher J. Borgen, Margaret E. McGuinness, and Brad Roth). Additional research was conducted concerning the practice of Brazil.

In order to avoid confusion, all further citations to these memoranda will follow the convention of citing to the author(s), year of the related Report and, in parentheses, the State or other entity whose practice is the main focus of the memo (although the memo may also discuss other theory and practice, as well). Thus, for example: Lugato and Milano 2012 Memo (Italy).

This final report summarizes, weaves together, and expands upon key ideas from the first three reports and suggests possible areas for future research. After this introduction, this report proceeds in four parts. Part I will consider the recognition of States and Part II the recognition of governments. Part III will focus on the domestic processes and domestic effects of decisions to recognize or not recognize an entity as a State or government. Part IV will briefly consider the relationship of the work of the Committee to other forms of recognition and will point to possible topics for future study. The Conclusion of the report will underscore the key doctrinal results of the work of the Committee.

I. The Recognition of States

A. Defining Statehood

1. Reassessing the Montevideo Criteria

Statehood is the "gold standard" of international relations. As Nina Caspersen put it, "[e]arlier international systems included overlapping sovereignties, colonies, and trusteeships but this has given way to a world in which 'there are states and there is little else'."[4] Committee member Yaël Ronen has written in a recent book that "[w]hat distinguishes statehood as a type of personality in international law is its universality—all entities which are states share a determined set of rights and duties, powers and immunities, which have developed through practice and are regarded as an acceptable basis for international interaction."[5] Consequently, delineating which entities are—and are not—States is a basic question for the ordering of rights and duties among actors. The Committee framed this as two related but distinct issues: The criteria of statehood and the relationship of these criteria to the law and practice of recognition.[6]

The Montevideo Convention on the Rights and Duties of States (1933) is the common starting point in discussions of the criteria of statehood.[7] Article I states that "the state as a person of international law should possess the following qualifications: (a) permanent population; (b) defined territory; (c) government; and (d) capacity to enter into relations with other States."[8]

Within a few years of the conclusion of the Montevideo Convention, jurists from around the world adopted its framing of the criteria of statehood.[9] Committee member memoranda show that the practice of

[4] Nina Casperen, *Unrecognized States* 3 (2012).
[5] Yaël Ronen, Entities that can be States, in Duncan French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* 23 (2013).
[6] See, First Report, at 5-10.
[7] Convention on the Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 U.N.T.S. 19 [hereafter "Montevideo Convention"]. The Montevideo Convention is available at < http://www.oas.org/juridico/english/treaties/a-40.html >.See, also, First Report, at 7-8.
[8] Montevideo Convention, Art. 1.
[9] See, for example, Resolution of the Institut de Droit International, "La reconnaissance des nouveaux Etats et des nouveaux gouvernments," art. 1 (1936), available at http://www.idi-iil.org/app/uploads/2017/06/1936_brux_01_fr.pdf. See also, Jessica Almqvist, "The Politics of Recognition," in Duncan French, ed., *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* 165, 167 (2013). But, see, Jean d'Aspremont, "The International Law of Statehood and Recognition: a Post-Colonial Invention," 10-13 (draft: October 29, 2017) forthcoming in *La Reconnaissance du Statut d'Etat à des Entités Contestées* (2018) (critiquing the use of the Montevideo Convention as a "formal repository of the doctrine of statehood") available at https://ssrn.com/abstract=3061371.

States that are not parties the Convention (Australia[10], Austria[11], Japan, South Africa, Tanzania,[12] and the United Kingdom[13]) as well as those from parties to the Convention (Brazil and the United States)[14] support the view that the Montevideo Convention provides the basic criteria for statehood.[15] The First Report also observed that "[a]s one looks into the responses presented by the national reporters, one may see that even in cases where there was no express mention of the Montevideo Convention, there was substantial overlap between the criteria used by different countries and the Montevideo formula."[16]

---

[10] The First Report quoted the following: "The Australian government requires satisfaction of the following criteria: a permanent population, a defined territory, a capacity for effective government and a capacity to have relations with other nation-states – in this note referred to for convenience as the Montevideo criteria..." Pert and Tully 2012 Memo (Australia); see, also, First Report, at 6, footnote 38.

[11] The First Report quoted the following: "Certain statehood criteria are unanimously required in the practice of states. They include a permanent population, a defined territory, a government and the capacity to enter into relations with the other states and are expressed in Article 1 of the Montevideo Convention. Austrian diplomatic practice has invoked these criteria in the context of statehood." Gerhard Hafner 2012 Memo (Austria); see, also, First Report, at 6, footnote 39.

[12] The First Report quoted the following: "African policy makers are no doubt familiar with the criteria of statehood as set out in the Montevideo Convention, 1933, that is to say, permanent population, defined territory, government, and finally, the capacity to enter into relations with other States." Khoti Kamanga 2012 Memo (Tanzania) see, also, First Report, at 6, footnote 41.

[13] Matthew Happold observed in his 2012 memorandum:

> The criteria which the UK Government purports to apply for the recognition of States were set out in a Written Answer dated 16 November 1989 by the then Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, and are that: "It should have, and seem likely to continue to have, a clearly defined territory with a population, a Government who are themselves able to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.
>
> Matthew Happold 2012 Memo (UK), as quoted in First Report, at 6, footnote 42.

[14] The First Report quoted Borgen, McGuinness and Roth:

> 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.' This echoes the Montevideo criteria of statehood, which, as the Reporters' Notes to the Restatement indicate, largely reflects the declaratory view: 'This section (Section 201) tends towards the declaratory view, but the practical differences between the [declaratory and constitutive views] have grown smaller. Even for the declaratory theory, whether an entity satisfies the requirements of statehood is, as a practical matter, determined by other states.'

First Report, at 6, footnote 44, quoting Christopher Borgen, Margaret McGuinness, and Brad Roth 2012 Memo (US); see, also, *Restatement (Third) of Foreign Relations Law of the United States* § 202 (1987) [hereafter "*Restatement (Third)*"] .

[15] First Report, at 6-7.

[16] See, for instance, from the memorandum of Monica Lugato and Enrico Milano:

> State practice shows adherence to certain classic criteria (effective and independent government, territory, population, [the] will to be considered a State). The demand for territorial stability has also led to a clear affirmation of the principle of *uti possidetis* in different contexts ...
>
> Monica Lugato and Enrico Milano 2012 Memo (Italy)as quoted in the First Report, at 6, footnote 45 (bracketed text added).

The memo considering Japan's State practices explained that an official document listed the criteria as "effective political authority over the population living in a certain territory." Shotaro Hamamoto 2012 Memo (Japan) as quoted in the First Report, at 9.

The First Report also stated that the memorandum on Israeli practice noted one official document referring to the "The traditional criteria for statehood." Yael Ronen 2012 Memo (Israel), citing to "Effective and independent governmental control, the possession of defined territory, the capacity to freely engage in foreign relations and effective control over a permanent population" available at <

While discussions of the criteria of statehood often begin with Montevideo Convention Article I, that does not mean that they end there. Through the course of the Committee's study of the Convention, three themes emerged: (a) critiques of a strict construction of Article I; (b) the extent to which the Montevideo criteria (and similar conceptions of statehood) were "essentially based on the principle of effectiveness;"[17] and, (c) criteria outside Article I of the Montevideo Convention that may weigh in an assessment of whether an aspirant entity has achieved statehood.

a. Critiquing Montevideo

The Committee noted that a strict construction of the Montevideo factors has been critiqued by jurists.[18] For example, in his book *Democratic Statehood and International Law*, Jure Vidmar warns of placing too much emphasis on the capacity to enter into foreign relations as that is itself "a corollary of a sovereign and independent government."[19] And James Crawford has called the capacity to enter into foreign relations a "consequence… not a criterion" of statehood.[20]

Committee members were similarly cautious about putting too much emphasis on the capacity to enter into foreign relations, explaining that it is probably "[t]he most criticized of the four elements of the Montevideo formula."[21] The report continues,[22] stating:

> There are different grounds for objection. It may be said that such capacity "is, in effect, a consequence, rather than a condition of statehood."[23] One may also argue that such capacity is not exclusive of States and, therefore, not particularly useful to distinguishing States from other entities.[24] International Organizations and, in some cases, even sub-unities of a State, such as provinces[25], *länder* or "state members of a federation", may also conclude treaties.[26]

---

http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Unilateral+Palestinian+Declaration+of+Statehood-.htm > ; see, First Report, at 6, footnote 45.

[17] James Crawford, *The Creation of States* 97 (2nd ed. 2006). See also Antônio Augusto Cançado Trindade, "States as Subjects of International Law and The Expansion of International Legal Personality, International Law for Humankind," 316 *Recueil des Cours*, 203-219 (2006), available at <http://www.nijhoffonline.nl/ >.

[18] First Report, at 6-7.

[19] Jure Vidmar, *Democratic Statehood and International Law* 41 (2013).

[20] Crawford, *The Creation of States* (n 17), at 61, as quoted by ,Vidmar (n 19), at 41.

[21] First Report, at 7, citing to Brad Roth, "Secessions, Coups, and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine," 11 *Melbourne Journal of International Law* 1, 7 (2010)

[22] The following text is from the First Report, at 7. Citations are to the sources from that report.

[23] The First Report quoted and cited to Ingrid Detter Delupis, *The International Legal Order* 43 (1994). First Report, at 7, footnote 50. It also noted that James Crawford observed that

> Capacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative. True, States preeminently possess that capacity, but this is a consequence of statehood, not a criterion for it - and it is not constant but depends on the situation of particular States.

Crawford, *The Creation of States* (n 17), at 61, as quoted by the First Report, at 7, footnote 50

[24] The First Report cited to, and quoted in the footnote, Thomas Grant, "Defining Statehood: The Montevideo Convention and its Discontents," 37 *Columbia Journal of Transnational Law* 403, 435 (1998) (arguing that "[e]ven if capacity were unique to states, the better view seems to be that, though capacity results from statehood, it is not an element in a state's creation.") First Report, at 7, footnote 51 (quoting Grant).

[25] The First Report cited to Charles-Emmanuel Coté, "La réception du droit international en droit canadien," 52 *Supreme Court Law Review* 483 (2010).

[26] The First Report quoted and cited to Grant, "Defining Statehood" (n 24), at 434.

While various jurists over the years have shown concern over placing too much weight on the capacity to enter into foreign relations, in and of itself, there has been an emphasis on the importance of the factual independence of an entity claiming statehood. Quoting Charles Rousseau, Crawford has argued that independence from other States is the "decisive criterion of statehood."[27] Moreover, Rosalyn Higgins had observed that although "[n]o state is totally without dependence on some other state… it is important that, when an entity makes its claim to be a state for a comprehensive purpose such as joining the United Nations, it is not simply an emanation of another state, lacking an essential core of independence."[28]

Taking these observations in total, the ongoing relevance of the Montevideo criteria is best understood not as a single bright-line rule of what makes a State but as a core set of attributes. The more an entity can demonstrate these attributes, then the more persuasive may be its argument for statehood. [29]

b. Effectiveness and Statehood

Paramount in any such discussion is considering the role of "effectiveness," an attribute of statehood that is often at the heart of discussions even though it is not listed in Article I of the Montevideo Convention. The First Report acknowledged that although "there are competing views of what effectiveness means, it may be understood as the 'effective control of an independent government' over a 'permanent population' and a 'defined territory.'"[30] Under this approach:

> [T]he exercise of state authority over a certain territory and population would mean "effectiveness" and necessarily amount to existence of a State. Conversely, there could not exist a State without effectiveness.[31]

The Committee was skeptical of such a conclusion. The First Report, in part drawing from the scholarship of Committee member Brad Roth as well as from Crawford's treatise, noted how State practice does not support "effectiveness" as the determinative question.[32] The Committee also noted:

---

[27]James Crawford, *Chance, Order, Chaos*, at 193-94, para. 240 (2014). For an analysis of external sovereignty as independence, Crawford points to *Customs Regime between Germany and Austria Advisory Op.* (1930 PCIJ Ser. A/B no. 41 p.57 (Judge Anzilotti).

[28] Rosalyn Higgins, *Problems and Processes: International Law and How to Use It* 41 (1994). Higgins impliedly argues that making a case for statehood, when UN membership is actually at stake, may be more difficult than claiming statehood for a more limited purpose. Higgins, at 42.

[29] But note the caveats concerning the concept of "effectiveness" in Part I.A.1.b.

[30] First Report, at 9, citing to Roth, "Secessions, Coups, and the International Rule of Law" (n 21), at 7. The First Report also explained in footnote 64 that:

> Orakhelashvili presents a similar notion: "As part of the factual criteria of statehood, *effectivité* refers to the effective exercise of state authority over the relevant territory." Alexander Orakhelashvili, Statehood, Recognition and the United Nations System: A Unilateral Declaration of Independence in Kosovo. *Max-Planck Yearbook of United Nations Law*, vol. 12, 1, 9, (2008).

[31] First Report, at 9. In addition, the Swiss Department of Foreign Affairs has written:

> According to the prevailing three-element doctrine, this requires state territory, a state people, and state power (i.e. a government that is effective and independent both externally and internally, as an expression of state sovereignty)/ Only the actual circumstances are relevant to the assessment of statehood (the "effectiveness principle").

Federal Department of Foreign Affairs of Switzerland, "The recognition of states and governments under international law," 1 available at https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/PDF_Anerkennung__en_05.pdf (accessed on June 19, 2018) [hereafter Swiss Recognition Paper].

[32] The First Report quoted the following in footnote 66:

There have been cases of effective entities which were not regarded as States as well as non-effective entities which were considered States. Rhodesia and the Turkish Republic of Northern Cyprus are examples of the former, whereas entities unlawfully annexed in the period of 1936 to 1940 (Ethiopia, Austria or Poland) are illustrative of the latter.[33]

Aside from effectiveness, the Committee also considered whether other attributes may have become criteria for statehood in modern practice.

c. Does State Practice Evidence Additional or Different Criteria than the Montevideo Criteria?

In cases as varied as the Latin American states in 19th century and the newly independent states in the 1990's, States have demanded "conditions on entities seeking recognition."[34] In light of this, the Committee decided to address whether international relations show that there are additional or different criteria for statehood from those enumerated in the Montevideo Convention.[35] The Committee warned, however, that "[o]ne must be careful… not to confuse criteria of statehood with criteria of recognition (or

---

> As independent criteria for statehood, 'permanent population' and 'defined territory' merely beg the question, since virtually all statehood claims, whether or not accepted in the international legal order, characteristically include sufficiently precise claims on behalf of a permanent population to a defined territory. What matters in the *Montevideo Convention* context is that the 'permanent population' and 'defined territory' be united by some common and distinguishing pattern of effective governance. Thus, if taken as the legal standard for international personality, the *Montevideo* criteria would confer sovereign rights, obligations, powers, and immunities on any territorially-coherent political community found under the long-term effective control of an independent government. However, such a standard falls far short of capturing the essence of traditional recognition practice.

Roth, "Secessions, Coups, and the International Rule of Law" (n 21), at 7. Higgins has written that "[w]e only have to mention Rwanda, Burundi, and Congo (Zaire) to recall that statehood, for the purpose of UN admission, was attributed even when the new governments clearly lacked effective control." Higgins (n 28), at 40.

[33] First Report at 9; citing to Crawford, *The Creation of States* (n 17), at 97. The First Report also noted that Roth has cited the Democratic Republic of the Congo in 1960, and Angola in 1975 as examples of States that have been recognized without a central government having established effective control throughout the territory. Roth, "Secessions, Coups, and the International Rule of Law" (n 21), at 7.

[34] Mikulas Fabry, *Recognizing States: International Society and the Establishment of New States since 1776* 181 (Oxford University Press 2010). The Committee noted State practice by the US and the EC in 1991 setting guidelines for recognition of the newly independent States that included, as the First Report summarized:

> respect for the provisions of the Charter of the United Nations, to the rule of law, democracy and human rights, guarantees for the rights of ethnic and national groups and minorities, respect for the inviolability of all frontiers, acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability and commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and regional disputes. Nevertheless, Grant affirms that "professed commitment to the December 16 Guidelines did not (...) translate into practice uniformly."

First Report, at 7-8 (internal citations omitted).

[35] See, for example, the discussion in Ian Brownlie, *Principles of Public International Law* 70-76 (6th ed. 2003), noting but largely setting aside other possible criteria, including, among others, a degree of permanence, willingness to observe international law, and a certain degree of civilization.

conditions of recognition)"[36] as "[t]here is no question that a State can come into existence without being democratic or having respect for minority rights…"[37]

The memorandum from the Committee members from the Australian branch posited the non-violation of international law and respect for territorial integrity of States may be "implied criteria" for the recognition of States.[38] The memorandum regarding the practice of Israel commented that it "is illegal (and invalid) to recognize statehood that follows a violation of a legal commitment. In addition, Israel holds that as a matter of policy, recognition should follow consensual rather than unilateral processes."[39] And the memo concerning Japan's practice stated that that country, in addition to demanding "effective political authority over the population living in a certain territory", also "takes into account whether the entity has the will and the capacity to observe international law."[40]

2. Conclusions

The Montevideo criteria still provide the basic framework for assessing whether an entity meets the key characteristics of a State. While the Montevideo Convention provides the terms under discussion, those terms are not applied as a mechanistic, bright-line test. Effective control—or the lack thereof—can also play a role in determining the status of an entity, but it is not a litmus test. While other possible attributes

---

[36] First Report, at 7. The Swiss Federal Department of Foreign Affairs has observed that:

> In recent state practice recognition has often been contingent on the fulfilment of certain conditions, for example compliance with the UN Charter or observance of the rule of law, democracy and human rights. From the viewpoint of international law, however, these are not criteria for recognition but conditions of a political nature, formulated in relation to the establishment of diplomatic relations…
>
> For the sake of the certainty of international law, Switzerland as a general principle refrains from setting additional conditions for recognition. It reserves the right, however, in the process of deciding whether to recognize a state, to take other factors into account, viz. the attitude of the international community of states or of a group of states with particular relevance for Switzerland.

Swiss Recognition Paper (n 31), at 2.

[37] First Report, at 7.

[38] For example, see discussion of Australia's refusal to recognize Rhodesia and the South African bantustans in Pert and Tully 2012 Memo (Australia); see, also, First Report at 8, footnote 59. It is perhaps noteworthy that Australia "has recognised Kosovo notwithstanding the lack of consent from Serbia." Pert and Tully 2012 Memo (Australia) see, also, First Report, at 8.

[39] First Report at 8, quoting Ronen 2012 Memo (Israel).

[40] First Report at 8, quoting Hamamoto 2012 Memo (Japan). The First Reports also noted that the Hamamoto 2012 Memo cites to Mr. Junichiro Koizumi, Prime Minister, Written Answer No. 322, House of Representatives, 164th Sess., June 16, 2006. <http://www.shugiin.go.jp/index.nsf/html/index_shitsumon.htm> [in Japanese, translated by the memo's author]:

> Generally speaking, in order for an entity to be recognized as a State, international law requires the entity to fulfill conditions to be a State, *i.e.* to establish an effective political authority over the population living in a certain territory. *Japan also takes into account* whether the entity has the will and the capacity to observe international law… On these bases, we have not recognized North Korea as a State.

The First Report further explained in its footnote 62 that:

> Hamamoto observes that "The first sentence of the answer quoted above suggests that the general international practice as understood by Japan sees no difference between the criteria for the recognition of States and those for statehood. The second sentence indicates that Japan takes into account an additional criterion. Japan thus considers that States are free to lay down additional criteria for recognition of States."

See, First Report at 8-9.

of statehood have been discussed by jurists, they are best understood not as additions to the criteria of statehood, but as "preconditions for recognition of statehood" by a particular State or group of States.[41]

This leads to the question of whether satisfying these criteria is all that is needed in order to be a State or if recognition is itself a necessary component of statehood.

B. Reconsidering the Constitutive/ Declaratory Debate

If an entity meets the criteria for statehood, is it a State, regardless of whether it is recognized as such by existing States? This is the heart of the debate over whether recognition "creates the international personality of a State," as hypothesized by the Constitutive Theory, or is merely "a political act that is not a necessary component of statehood," as posited by the Declaratory Theory.[42] Although the debate over whether the Constitutive or Declaratory Theory better describes the state of law and practice is well known, the Committee is skeptical of its practical relevance.[43]

As a general matter, the Declaratory Theory is ascendant. Proponents of the Declaratory Theory look to the text of the Montevideo Convention itself and note that Article 3 states that the political existence of a State is independent of its recognition.[44] Crawford has argued that since a State is not able to treat an entity that meets the characteristics of statehood as if it were not a state, then the Declaratory Theory is the stronger theory.[45] Committee memoranda concerning the practice of Australia, Austria, France, Italy, South Africa, and the United Kingdom suggested that those countries generally follow the declaratory theory.[46] The First Report also noted that Argentina, based on its statements to the ICJ in the Kosovo public hearings, also supports the Declaratory theory.

However, while the Declaratory Theory has widespread support, that support may not be deep. Many members of the Committee are wary to put too much stock in a sharp delimitation between the theories. The 2012 memorandum concerning Russian practice noted that the theories "seem to have lost their practical significance and in its pure form are unlikely to be useful."[47] A memo concerning Belgian practice also noted that "a significant number of French authors have backed away from this dichotomy."[48] The memo concerning Italian practice suggested that the dichotomy "is possibly overemphasized or altogether misleading,"[49] and one British member noted that the separation between the doctrines "may well be less stark in practice than is often supposed."[50] The memo of the U.S. Committee members questioned whether U.S. practice could fit neatly into either the Declaratory or Constitutive Theory, and the memoranda from Japanese and South African members similarly doubted that either theory was satisfactory in explaining state practice.[51]

---

[41] Borgen, McGuinness, and Roth 2012 Memo (US), at 3,11.
[42] Quotations are from the First Report, at 2 and 3. See also Crawford, *The Creation of States* (n 17), at 22.
[43] For background on the Constitutive/Declaratory debate, see, First Report, at 2-5.
[44] But see Crawford's critique, Crawford, *Chance, Order, Chaos* (n 27), at 195, para. 242 (referring to article 3 as "defectively formulated" and that it should have stated that existence is independent of the recognition of individual third-party States).
[45] Crawford, *The Creation of States* (n 17), at 27.
[46] First Report at 4; see, also, Swiss Recognition Paper (n 31), at 2 (stating "[a]ccording to present-day state practice, recognition has only a declaratory character, not constitutive (i.e. fundamental or determining).").
[47] First Report, at 4, quoting Petr Kremnev 2012 Memo (Russia).
[48] First Report, at 4, quoting Jean d'Aspremont 2012 Memo (Belgium).
[49] First Report, at 4, quoting Lugato and Milano 2012 Memo (Italy)
[50] First Report, at 4, quoting Daud Ilyas 2012 Memo (U.K).
[51] First Report, at 4-5.

Thus, while State practice is evidence of the relevance of the Declaratory Theory, there is also a strong sense that the Constitutive/Declaratory debate has been largely superseded by a third approach. As we wrote in the First Report:

> Beginning with de Visscher, some writers adopted a combined version of the Declaratory and Constitutive views. In his reply to the Committee, d'Aspremont observed that, in accordance with this third approach, "recognition is said to be neither declaratory nor constitutive. It simply is a political act which has significant legal effects in the international and domestic legal orders. This approach is premised on the idea that the dichotomy between [the] declaratory and constitutive [approaches] is insufficient to explain the complexity of the impact of recognition on the functioning of legal orders. Yet, such an approach is not exclusive of the idea that recognition occasionally has some declaratory and constitutive effects (the latter being generally reserved to effects of recognition under domestic law)."[52]

If the Constitutive/Declaratory debate in and of itself does not greatly clarify the role of recognition, a more pertinent question is whether States have an obligation to recognize or to refrain from recognizing entities as States under certain circumstances.

C. Recognition, Obligation, and Responsibility

1. Is There an Obligation to Recognize?

, Although the Second Report was focused on non-recognition, numerous Committee members also stated that there is no legal obligation to recognize an entity as a State.[53] Similarly, "[a]lmost all the

---

[52] First Report, at 3-4, quoting d'Aspremont 2012 Memo (Belgium), which, in turn, refers to the work of J. Verhoeven, *La reconnaissance internationale dans la pratique contemporain – Les relations publiques internationals* (1975) and to d'Aspremont's own book, Jean d'Aspremont, *L´Etat non démocratique en droit international. Etude critique du droit international positif et de la pratique contemporaine* (2008) (internal citations omitted.) Crawford notes that some writers, such as de Visscher, arrived at a theory that had aspects of both the constitutive and declaratory theories. Crawford, *The Creation of States* (n 17), at 27.

[53] See, Second Report, at 2-3. Examples from State practice include:

Poland. The Second Report quoted Wladislaw Czaplinski's memorandum that the:

> [o]fficial position of Poland is that there is neither political nor legal obligation to recognize states or other subjects of international law. Each State is free to decide whether it recognizes foreign States. According to the International Law and Treaty Department of the Ministry of Foreign Affairs, this stance is based upon the Opinion of the Badinter Committee No.10 of 4 July 1992. Czaplinski Memo (Poland 2014), at 1.

The UK. "Based on UK state practice and views of leading British commentators, it appears that recognition as a public act of state is an optional and political act and there is no legal duty to recognize." Ilyas 2014 Memo (UK), at 1.

The US. The Second Report cited to the memo from the US members of the Committee, which explains that "[t]hough not an official US government document, the [*Restatement of the Law (Third) of the Foreign Relations Law of the United States*] is meant to be an accurate distillation of the then-current state of the law." Borgen, McGuinness, and Roth 2012 Memo (US), at 4. It goes on to explain:

> Section 202 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987)…addresses the "Recognition and Acceptance of States":
>
> > (1) A state is not required to accord formal recognition to any other state but is required to treat as a state an entity meeting the requirements of Sec. 201 [i.e., the Montevideo Convention criteria], except as provided in Subsection (2).

memoranda show the difficulty of defining a legal principle regarding recognition and non-recognition through State action, which the States themselves say is largely political in nature."[54]

However, one Committee-member noted that, while there is no legal obligation to recognize an entity as a State, "as Brownlie points out, if an entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations."[55]

2. Premature Recognition

But what if an entity does not satisfy the criteria for statehood? May a State recognize it nonetheless? James Brierly has written:

> It is impossible to determine by fixed rules the moment at which other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.[56]

Lauterpacht argued that premature recognition is an act "which an international tribunal would declare not only to constitute a wrong but probably also to be in itself invalid."[57] Thus, according to these jurists, an act of premature recognition would be invalid and would itself be an independent violation of international legal obligations. Assuming such premature recognition would recognize as a State an entity that is attempting to secede from a pre-exiting State, then that recognition may be a violation of UN Charter article 2(4) concerning non-interference in the domestic affairs of another State, specifically the domestic affairs of the pre-existing State.[58]

The Second Report also cites to Constantinides 2014 Second Memo (Cyprus), and Constantinides 2014 Memo (Greece) (stating that both Greece and Cyprus consider the recognition of an entity as a sovereign State is a matter of political discretion).

See, also, Swiss Recognition Paper (n 31), at 1 (stating "[i]t is entirely the discretion of any state to decide to recognize another as a subject of international law.").

[54] Second Report, at 7.

[55] Ilyas 2014 Memo (UK), at 1, as quoted in the Second Report, at 3. Professor Ilyas continues:

> Thus the Arab neighbours of Israel could hardly afford to treat Israel as a non-entity, given that the majority of UN members take the view that Israel is protected and bound by the principles of the UN Charter governing the use of force. In this context of state conduct there is thus a legal duty to 'recognize' for certain purposes at least. There is however no duty to make an express, public and political determination of the question or to declare readiness to enter into diplomatic relations by means of recognition. This latter type of recognition remains political and discretionary.

Ilyas 2014 Memo (UK), at 1, as quoted in the Second Report, at 3, footnote 4.

[56] James Brierly, *The Law of Nations* 138 (6th ed. 1963, Sir Humphrey Waldock, ed).

[57] Hersch Lauterpacht, *Recognition in International Law* 9 (1947).

[58] The Swiss Department of Foreign Affairs has written:

> If a state is recognized before all the preconditions for recognition are met (premature recognition), this is contrary to international law and legally ineffective. A state that prematurely recognizes another is in breach of the prohibition of interference in the internal affairs of a state (Art. 2 no. 4 of the Charter of the United Nations).

Swiss Recognition Paper (n 31), at 1.

3. Is there an Obligation of Non-Recognition?

Proceeding from this, if there is little State practice supporting an obligation to formally recognize, is there perhaps a legal obligation of non-recognition in certain circumstances? Hersch Lauterpacht described non-recognition as "the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong."[59] In some instances, the Security Council has called on UN member States not to recognize an aspirant State.[60] But, absent a Security Council resolution, is there an obligation of non-recognition?

Article 41(2) of the ILC's Articles on State Responsibility (ARSIWA) states: "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."[61] Thus, a cornerstone for any obligation of non-recognition is the invalidity of a wrongful act under international law, including acts that purport to create title and rights over territory. The Committee explained in its Second Report that:

> Some have argued that "[t]hird States... may be prevented from according recognition as long as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State."[62]

The Second Report noted that States have withheld recognition when the entity claiming statehood was formed by means of an unlawful act, such as an illegal use of force by an existing State assisting the separatists. (There are, however, disagreements among States over which instances of the use of force were illegal.) And, in an argument that also has echoes of the discussion of the criteria of statehood, some jurists have argued that the lack of independence of an aspirant entity in relation to some other State is cause for non-recognition.[63] In the *Secession of Quebec Reference*, the Supreme Court of Canada wrote:

> As indicated in responding to Question 1, one of the legal norms which may be recognized by states in granting or withholding recognition of emergent states is the legitimacy of the process by which the *de facto* secession is, or was, being pursued. *The process of recognition, once considered to be an exercise of pure sovereign discretion, has come to be associated with legal norms.* See, e.g., European Community Declaration on the *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union*, 31 I.L.M. 1486 (1992), at p. 1487. While national interest and perceived political advantage to the recognizing state obviously play an important role, foreign states may also take into account their view as to the existence of a right to self-determination on the part of the population of the putative state, and a counterpart domestic

---

[59] Lauterpacht (n 57), at 431.

[60] The Second Report cited to Security Council Resolution 541 (1983), which calls upon states not to recognize any Cypriot state other than the Republic of Cyprus. SC Res. 541 (1983) available at http://www.un.org/Docs/sc/unsc_resolutions.html; see, also, SC Res. 550 (1984) available at http://www.un.org/Docs/sc/unsc_resolutions.html. Second Report, at 3.

[61] The International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts, art 41(2) [hereafter, "ARSIWA"]. Article 40 of ARSIWA states:

1. This Chapter applies to the international responsibility which is entailed by a serious breach by a State of an obligation arising under a peremptory norm of general international law.
2. A breach of such an obligation is serious if it involves a gross or systematic failure by the responsible State to fulfil the obligation.

ARSIWA, art 40.

[62] Second Report, at 3, quoting Karl Doehring, "Effectiveness," in 2 *Encyclopedia of Public International Law* 43, 47 (R. Bernhardt, ed. 1995).

[63] Second Report, at 3, citing to Jochen A. Frowein, "Recognition," in 4 *Encyclopedia of Public International Law* 33 (R. Bernhardt, ed. 2000).

> evaluation, namely, an examination of the legality of the secession according to the law of the state from which the territorial unit purports to have seceded. As we indicated in our answer to Question 1, an emergent state that has disregarded legitimate obligations arising out of its previous situation can potentially expect to be hindered by that disregard in achieving international recognition, at least with respect to the timing of that recognition. On the other hand, compliance by the seceding province with such legitimate obligations would weigh in favour of international recognition.[64]

Examples of widespread non-recognition of aspirant entities, both historical and ongoing, include Manchukuo, Southern Rhodesia, the Turkish Republic of Northern Cyprus, the Transnistrian Moldovan Republic, Abkhazia, South Ossetia, and the Nagorno-Karabakh Republic.

However, various memoranda, including those concerning the practice of Australia,[65] Italy,[66] Russia,[67] and the U.K.,[68] found that the practice of the states they considered did not clearly support a legal doctrine of an obligation of non-recognition.

Recent U.S. practice has included statements concerning certain recognitions being in violation of the sovereignty of the pre-existing State (as in the cases of Abkhazia and South Ossetia), and there are references to such a concept in the influential (but not binding) *Restatement (Third) of Foreign Relations Law*, dating from 1987.[69] Relatively strong statements in favor of an obligation of non-recognition existing beyond instances of a Security Council resolution were made by Austria,[70] Greece,[71] and Israel.[72] This is further supported by certain international instruments such as the concluding document of the Vienna

---

[64] Reference re: Secession of Quebec, 2 S.C.R. 217 at para. 143 (1998) [hereafter "Secession of Quebec"] (emphasis added)..

[65] The Second Report stated that "the Australian government does not accept that there is a legal obligation of non-recognition, outside of a prescription by a binding authority such as the UN Security Council." Second Report, at 4-5, citing to Pert 2014 Memo (Australia), at 10. As noted in the Second Report, Dr. Pert further explained:

> This position was reiterated by counsel for Australia in the course of arguments in the *East Timor case* (Portugal v Australia), in the context of the right to self-determination:
>
> > Australia denies that States are under an automatic obligation, under general international law, not to recognise or deal with a State which controls and administers a territory whose people are entitled to self-determination. There is no automatic obligation of non-recognition or non-dealing, even though that State may be denying the people the right to self-determination". CR 95/14, 16 February 1995 at 36, para. 5 (James Crawford) http://www.icj-cij.org/docket/files/84/5327.pdf.

Second Report, at 5, footnote 15.

[66] Second Report, at 5, citing to Lugato and Milano 2014 Memo (Italy) at 1, which stated that for Italy, "lack of recognition has been mainly based on the (often temporary) political unwillingness to enter into bilateral relations and establish diplomatic relations, rather than from the perceived existence of a legal obligation not to recognise those entities as unlawful."

[67] Second Report, at 5; see, also, Petr Kremnev 2014 Memo (Russia), at 1.

[68] Second Report, at 4. The United Kingdom report states:

> Apart from a duty of collective non-recognition of unlawful regimes as enjoined, for instance, by a UN Resolution, UK state practice does not reveal any doctrine of non-recognition. The UK's approach to issues of recognition and non-recognition has traditionally been, and remains, essentially pragmatic rather than doctrinaire, while upholding the highest principles of international law (e.g. self determination) governing the creation of states.

Second Report, at 4, quoting Ilyas 2014 Memo (UK), at 1.

[69] Second Report, at 5-6, referring to *Restatement (Third)* (n 14), at § 202(2).

[70] Second Report, at 6; see, also, Gerhard Hafner 2014 Memo (Austria), at 3.

[71] Second Report, at 6-7; see, also, Aristoteles Constantinides 2014 Memo (Greece), at 1.

[72] Second Report, at 6; see, also, Yaël Ronen 2014 Memo (Israel), at 1.

Meeting in 1989 of the Conference on Security and Co-operation in Europe on the follow-up to the Helsinki Final Act. In Principle 5 of the concluding document, the numerous participating States:

> [C]onfirm their commitment strictly and effectively to observe the principle of the territorial integrity of States. They will refrain from any violation of this principle and thus from any action aimed by direct or indirect means, in contravention of the purposes and principles of the Charter of the United Nations, other obligations under international law or the provisions of the [Helsinki] Final Act, at violating the territorial integrity, political independence or the unity of a State. *No actions or situations in contravention of this principle will be recognized as legal by the participating States*.[73]

Committee members analyzed whether the State on which they were reporting had a state policy concerning the recognition of Abkhazia, Kosovo, North Korea, Palestine, South Sudan and Western Sahara.[74] Responses provided a snapshot at the time that the memoranda were written. The memoranda support a conclusion that States often do not clearly and publicly declare their recognition (or refusal to recognize) another entity as a State. In many cases, Committee members noted that it was not clear whether an entity was recognized by the State on which they were reporting. Nonetheless, the Committee found that:

> An analysis of the grounds for recognition (or non-recognition) reveals that international legal concepts such as "territorial integrity" and "self-determination" are frequently invoked as a justification for recognizing (or not recognizing) a particular entity. While there is some agreement on the existence and content of such principles, their application to facts is often controversial.[75]

D. Conclusions

If recognition is seen as a political decision within a legal context, then one might regard political, rather than legal, considerations as the most critical determinants of the recognition of a given entity, notwithstanding that entity's fulfillment of the objective criteria of statehood. Although numerous Committee members remarked that there is no obligation to recognize an entity as a State, jurists have also noted that when an entity not only clearly meets the criteria of statehood but also is recognized as such by a substantial majority of the international community, a State puts itself at risk legally if, in Brownlie's words, it "ignore[s] the basic obligations of state relations."[76]

As to non-recognition, although certain States studied seem reluctant to proclaim a general obligation of non-recognition, there seems to be a convergence of State practice supporting an obligation of non-recognition when non-recognition is called upon by the Security Council. In addition, although there are examples of widespread non-recognition where the criteria of statehood are not met by an aspirant State,

---

[73] Concluding Document of the Vienna Meeting 1986 of representatives of the participating States of the Conference on Security and Co-operation in Europe, held on
the basis of the provisions of the Final Act relating to the Follow-up to the Conference
(Vienna 1989), Principle 5 available at https://www.cvce.eu/en/obj/concluding_document_of_the_vienna_follow_up_meeting_of_the_csce_vienna_15_january_1989-en-2a0e70b8-c4b2-4c20-a71b-f12b96776cc2.html [hereafter "Vienna 1989 Concluding Document"] (emphasis added).

[74] Responses are summarized in the First Report, at 10-17.

[75] First Report, at 16.

[76] As quoted in Ilyas 2014 Memo (UK), at 1; see, also, Second Report, at 2-3.

some Committee members viewed the non-recognition by the State they studied as being the result of a sense of legal obligation while other Committee members found that non-recognition by the State they studied was viewed by that State as a political decision not based on legal obligation or they found that it was not clearly related to a sense of legal obligation.[77]

Although State practice may be difficult to parse because (a) States may not actually proclaim the non-recognition of a particular entity and/or (b) there may be disagreement between States as to which specific situations are illegal (or why they are illegal), certain Committee members believe that there is relatively broad support in the international community for an obligation of non-recognition, especially in cases where recognition would support the breach of a peremptory norm.[78]

However, the Committee also decided that "[a]t this point, we do not have enough data to extend these observations into general claims about the state of the law…"[79]

II. The Recognition of Governments

At least three phenomena regarding State relationships with foreign regimes are frequently confused with one another: (a) the acknowledgment of a foreign government's international legal standing to exercise a State's sovereign rights; (b) the formal recognition of a foreign government – a political act that ordinarily entails, but is not requisite to, acknowledgment of the government's international legal standing; and (c) the establishment and maintenance of diplomatic relations with a foreign government, which is a political act that triggers additional international legal obligations.[80]

While there is a spectrum of interactions a State may have with an entity that aspires to be recognized as a government, the Third Report defined the recognition of a government:

> as accepting certain institutions and/or individuals as the lawful representatives of a State in its international affairs. It does not need to be formally or publicly announced and it may be "more a matter of implication than of express declaration." [81]

In considering the theory and practice of the recognition of governments, the Committee had two overarching goals: (a) to clarify whether there is a common practice at the moment for States to formally recognize the governments of other States, and (b) to elucidate the criteria for deciding whether a particular group of institutions or individuals can justifiably be recognized as the government of a particular State. In the course of its work, the Committee also commented on two related issues: the problem of recognizing a

---

[77] See, generally, Second Report, at 3-7.

[78] See, e.g., ARSIWA, art. 41(2); Secession of Quebec at para. 143; Vienna 1989 Concluding Document, Principle 5. For an example of bilateral sanctions, see, One Hundred Fifteenth Congress of the United States of America, *2017 Appropriations,* Sec. 7070, Occupation of the Georgian Territories of Abkhazia and Tskhinvali Region/South Ossetia, P.L. 115-31, 131 Stat. 135, 705-706 (May 5, 2017) available at https://www.congress.gov/115/plaws/publ31/PLAW-115publ31.pdf (authorizing the withholding funds from any government that the US Secretary of State finds has recognized the independence of South Ossetia or Abkhazia).

[79] Second Report, at 26.

[80] See Borgen, McGuinness, and Roth 2016 Memo, (US), at 1.

[81] Quoting 1 *Oppenheim's International Law* 146 (Robert Jennings and Arthur Watts, eds., 9th ed. 1992). Other internal citations omitted. See, however, the *Restatement of the Law (Third) of the Foreign Relations Law of the United States*, which regards recognition of governments as a "formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state." *Restatement (Third)* (n 14), at § 203, comment a.

government during an ongoing civil war and explaining the relationship between recognition and responsibilities under the Vienna Convention on Diplomatic Relations.

A. Do States Still Recognize Governments?

As for current State practice, the submitted memoranda "found that, in general, the States studied did not formally recognize governments as part of their standard practice."[82] For example, memoranda concerning the State practice of Australia,[83] Austria,[84] Canada,[85] Cyprus,[86] France,[87] the Netherlands,[88] and the United Kingdom[89] were summarized in the Third Report as referring to "express policies of recognizing States, not governments."[90] Moreover, the recognition practice of Poland and Israel was limited to States, not governments.[91] The memorandum concerning the practice of the United States, explained that, according to Reporters' Note 1 of Section 203 of the *Restatement (Third)*:

> Repeatedly, the State Department has responded to inquiries [about the recognition of governments] with the statement: "The question of recognition does not arise: we are *conducting relations* with the new government."[92]

Only two of the States surveyed, Brazil and Japan, found a definite policy for the recognition of governments.[93]

With so many States distancing themselves from making explicit statements of governmental recognition, one may question the importance of the topic. However, as the United States' *Restatement (Third)* explains:

> In some situations, however, the question cannot be avoided, for example, where two regimes are contending for power, and particularly where legal consequences within the United States depend on which regime is recognized or accepted.[94]

---

[82] Third Report, at 5.
[83] Pert 2016 Memo (Australia), at 2.
[84] Gerhard Hafner 2016 Memo (Austria), at 1.
[85] Christopher Waters 2016 Memo (Canada), at 3.
[86] Constantinides 2016 Memo (Cyprus), at 1.
[87] The Third Report noted that the French Minister of Foreign Affairs said on March 16, 1979:

> La pratique de la France est, en effet, d'entretenir des relations diplomatiques non pas avec des gouvernements mais avec des États. C'est ainsi qu'elle n'a accomplit pas d'acte formel de reconnaissance lorsqu'un nouveau gouvernement est instauré à la suite d'un changement de régime. Il se agit d'une position constante.

On November 25th, 1982 the French Minister of Cooperation explained: "Dans nos relations avec le Tchad, nous suivons les règles du droit international... nous reconnaissons les États et non les gouvernements"
Third Report, at 6, footnote 23, citing to Jean Salmon, *Dictionnaire de Droit International Public* (2001).
[88] Olivier Ribbelink 2016 Memo (Netherlands), at 1.
[89] Matthew Happold 2016 Memo (UK), at 1.
[90] Third Report, at 6; see, also, Swiss Recognition Paper (n 31), at 3 (stating "Switzerland's consistent practice since the end of the Second World War has been only to recognize states, not governments.").
[91] Third Report, at 7, citing to 33 Wladyslaw Czaplinski Personal communication with the co-rapporteurs via e-mail, 31 July 2016 (concerning Poland) and Yaël Ronen, Personal communication with the co-rapporteurs via e-mail, August 1st, 2016 (concerning Israel).
[92] *Restatement (Third)* (n 14), at § 203, Reporters' Note 1.
[93] Third Report, at 7. Regarding Japan, see Hamamoto Memo (Japan 2016). Brazil state practice was researched directly for the Third Report and incorporated into that document.
[94] *Restatement (Third)* (n 14), at § 203, Reporters' Note 1.

Thus, although the practice of the recognition of governments has declined, the Committee turned to the question of criteria for such recognition to better understand factors considered.

B. Criteria for the Recognition of a Government

In its discussion of the recognition of states, the Committee considered effectiveness as a possible addition to, or root of, the Montevideo criteria and noted some of its limits. However, with regard to the recognition of governments, effectiveness seems to be a criterion for such recognition in the view of "almost all" legal sources consulted in preparing the Third Report.[95]

The Third Report also added that "[m]any authors also include *stability* as [another] criterion for recognition."[96]

However, the Third Report also qualified its emphasis on effectiveness and stability, stating that "states may withhold recognition of a government until the regime fulfills certain conditions, which are 'extraneous to its quality as a government in the international law sense.'"[97]

Both Brazil and Japan included effective control over the territory of the State and the willingness to observe international law/international obligations as criteria for the recognition of a government. Brazil also included two further criteria: the consent of the government to be recognized and the democratic and constitutional nature of the governmental transition in question.[98] Japan, for its part, notes that even if its criteria are met, it is under no legal obligation to recognize the government in question.[99]

C. Current Issues and State Practice

---

[95] Third Report, at 3. Among sources considered, the Third Report cited to Eduardo Jiménez de Aréchaga, *Derecho Internacional Publico* 57 (vol.II 1995); David Feldemann, International Personality, 191 *Recueil des Cours* 400 (1985); Gemma Scipione, Les gouvernements de fait, 4 *Recueil des Cours* 337 (1924); Patrick Dailler, Mathias Forteau and Alain Pellet, *Droit International Public* (8th ed. 2009) (stating "[l]a reconnaissance de gouvernement est une competénce de chaque État, competénce qu'il exerce de façon discrétionnaire, mais en se fondant, en principe, sur l'effectivité du gouvernement nouveau."); and, Pierre-Marie Dupuy, *Droit International Public* 100 (2002) (stating"[L]a conduite la plus conforme au respect de la règle de non-ingérence dans les affaires intérieures d'un État consiste pour un État tiers à ne subordonner sa reconnaissance qu'à la seule exigence de l'effectivité des pouvoirs du gouvernement considéré, ce qui constitue d'ailleurs la position classique défendue en principe par la France."). See, also, Swiss Recognition Paper (n 31), at 3 (stating "[t]he only precondition for the recognition of a government under international law is its effective exercise of sovereign power (first and foremeost, control of a substantial part of the territory and of the apparatus of administration).")

[96] Third Report, at 4, citing to Scipione (n 95), at 337; Santiago Benadava, *Derecho Internacional Publico* 113 (2001), and Julio Barboza, *Derecho Internacional Publico* 185 (2004); Manuel Diez de Velasco *Instituciones de Derecho Internacional Público* 272 (15th ed. 2005).

[97] Third Report, at 5, quoting Hans Martin Blix, "Contemporary Aspects of Recognition," 130 *Recueil des Cours* 643-44 (1970).

[98] Third Report, at 8, citing to telegram sent by the Ministry of Foreign Relations of Brazil to the Brazilian Embassy in Washington, about the Brazilian Position in Matters of Recognition of Government. 14 October 1975, quoted in *Brazilian Foreign Policy Handbook: 1961-1981* 180-181 (2nd ed. 2012).

[99] Third Report, at 8, referring to Shotaro Hamamoto Memo (Japan 2016), at 2, which in turn cites to Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, at 8 [translated by Hamamoto].

The issue of governmental recognition can arise, even for States that do not generally have a practice of formally recognizing governments, in cases of contested governmental transitions. The cases of Libya and Syria are particularly stark examples from recent practice.

In the case of Libya, the question for each State was how to frame its relationship with the National Transitional Council (NTC) during its struggle against the Qaddafi regime. The memoranda analyzing the practices of Austria, Canada and Slovenia explained that these States did not recognize the NTC as a government. Some States such as Austria, Canada, and Slovenia did recognize the NTC as the legitimate *representative* of the Libyan people but not as the government of Libya.[100] Citing to Stefan Talmon, the Third Report notes that "[s]imilar statements concerning the status of the NTC were made by France, Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany."[101] The United States also made a similar statement, but used the terminology "legitimate governing authority," and also stated that it no longer recognized the government of Muammar Qaddafi.[102] The authors of the memorandum on U.S. practice explained:

> We note that the U.S. government did not state that it was recognizing a "government" but a "legitimate governing authority." Whether there is a legal significance to the difference [in] terms remains to be borne out in further practice. However, please note the similar practice concerning the Syrian Opposition Coalition, ...which explicitly stated that in that case, recognizing a legitimate representative of the people was not tantamount to recognizing a government.[103]

Regarding Syria, one of the key issues at the time of the Third Report was the status of the Syrian Opposition -Coalition.[104] Again, States avoided declaring that the Coalition was recognized as a government. See, for example, the reports concerning Australia,[105] Japan,[106] Slovenia,[107] Netherlands,[108] and the United Kingdom.[109] Some States explicitly said that this was distinct from the recognition of a government:

---

[100] See, Hafner 2016 Memo (Austria), at 1 (citing to Tichy Helmut/Schusterschitz Gregor/Bittner Philip, *Recent Austrian practice in the field of international law. Report for 2011*, ZÖR 67 (2012), 175) ; Waters 2016 Memo (Canada), at 1; and Mirjam Škrk 2016 Memo (Slovenia), at 1.

[101] Stefan Talmon, Recognition of the Libyan National Transitional Council, *ASIL Insights*, vol. 15, issue 16 (June 2011) available at < https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council >. According to Talmon, France was the first country to recognize the NTC as "the legitimate representative of the Libyan people."

[102] Christopher Borgen, Margaret McGuinness, and Brad Roth 2016 Memo (US), at 10-11; citing to *Digest of United States Practice in International Law 2011* (CarrieLyn D. Guymon, ed.)(hereinafter "Digest 2011") at 276, available at http://www.state.gov/s/l/2011/index.htm; see, also, U.S. Department of State Office of the Historian, "A Guide to the United States' History of Recognition, Diplomatic, and Consular Relations, by Country, since 1776: Libya" available at https://history.state.gov/countries/libya; "US recognizes Libyan rebels as Libyan government" Matthew Lee, Associated Press (July 15, 2011) available at http://news.yahoo.com/us-recognizes-libyan-rebels-libyan-government-124658625.html?.

[103] Borgen, McGuinness, and Roth 2016 Memo (US), at 11

[104] Third Report at 10-11.

[105]Alison Pert 2016 Memo (Australia), at 7 (citing to Australian Minister for Foreign Affairs, "Syrian Opposition Council", media release 13 December 2012. < http://foreignminister.gov.au/releases/2012/bc_mr_121213.html >)

[106] Hamamoto 2016 Memo (Japan), at 7 (citing to. The Fourth Ministerial Meeting of The Group of Friends of the Syrian People, Marrakech, Chairman's conclusions (12 December 2012)).

[107] Škrk 2016 Memo (Slovenia), at 1.

[108] Ribbelink 2016 Memo (Netherlands), at 1.

[109] Matthew Happold 2016 Memo (UK), at 10, citing to, among other sources, United Kingdom House of Commons, Parliamentary debates, vol. 553, 20 November 2012, cs. 445-450, reprinted in: United Kingdom Materials on International Law, 83 *British Yearbook of International Law* 358 (2012); United Kingdom House of Commons,

> The U.S. Department of State announced at the Friends of the Syrian People meeting in December 2012 that the United States was recognizing the Syrian Opposition Coalition ("SOC") as the legitimate representative of the Syrian people. The United States does not recognize the SOC as the government of Syria.[110]

The Libyan and Syrian cases point to the emerging practice of declaring or even "recognizing" an entity as a "legitimate representative" or a "legitimate governing authority" or some other new term. However, the Third Report concluded that:

> …the real meaning of the expression "the legitimate representative of the people" remains unclear.[111] The Australia report affirms that "[...] it is merely a political expression of support for a particular group."[112] On the other hand, the Slovenian report states that these declarations "[...] concern the recognition of the legitimacy of relevant political movements or coalitions in the chaotic circumstances due to the dissolution of the previous regime or, in case of an internal armed conflict (civil war)."[113] The Dutch report mentions that recognizing a regime as the legitimate representative of the people "[...] is a political matter without international law implications."[114] From the practice of the studied states it is not possible to extract a definitive conclusion. We can only say that the evolving use of such "legitimate representative" terminology is one area of evolving state practice in relation to the law of recognition.[115]

D. Recognition and the Vienna Convention on Diplomatic Relations

The Third Report also observed that "[d]espite the relevance of the issue, little has been written on the potential link between diplomatic relations and recognition of governments."[116] The memoranda submitted to the Committee indicate no uniform State practice concerning whether and how formal recognition of governments affects diplomatic relations. "Thus, the maintenance (or severance) of diplomatic relations and the acceptance (or rejection) of credentials under the Vienna Convention on Diplomatic Relations do not necessarily mean that a new regime in the sending state had been or had not been recognized by the receiving states." [117]

Parliamentary debates, vol. 541, 28 February 2012, c. 266W, reprinted in: United Kingdom Materials on International Law, 83 *British Yearbook of International Law* 356 (2012).

[110] Office of the Legal Adviser United States Department of State, *Digest of United States Practice in International Law* 281 (CarrieLyn D. Guymon , ed., 2012) available at < http://www.state.gov/s/l/2012/index.htm >, as quoted in Borgen, McGuinness, and Roth 2016 Memo (US), at 12. Regarding State practice concerning Syria, the Third Report also cited to Hamamoto 2016 Memo (Japan), at 8; Škrk 2016 Memo (Slovenia), at 1; Pert 2016 Memo (Australia), at 8.

[111] The Third Report cited to Hamamoto 2016 Memo (Japan), at 7, stating:

> The Japanese report says that the meaning of the expression "the legitimate representative of the people" "[...] remains ambiguous".

Third Report at 11, footnote 64.

[112] Pert 2016 Memo (Australia), at 6.

[113] Škrk 2016 Memo (Slovenia), at 1.

[114] Ribbelink 2016 Memo (Netherlands), at 1.

[115] The preceding excerpt is from the Third Report, at 11 (internal citations have been renumbered and edited to conform with the numbering and format of this current report).

[116] Third Report, at 17.

[117] Third Report, at 18.

E. Conclusions

The Committee has concluded that:

- The practice of the small sample of States indicates that formal recognition of governments seems to no longer be a widespread international practice. In cases of competing claims of legitimacy, "States frequently offer political support to one of [the aspirants] by treating it as the legitimate representative of the local people or the rightful authority. The word 'government' is deliberately not used in order to avoid any contraction in the position of not recognizing governments."[118]

- There are varying criteria for deciding which regime to support, including, "*inter alia*, effectiveness, national interest, the position adopted by regional and international organizations, and respect for democratic and constitutional procedures."[119] The analysis is on a case-by-case basis, with little evidence of a grand, overarching, theory of governmental recognition.[120]

- The memoranda submitted to the Committee do not indicate a uniform State practice concerning whether and how formal recognition of governments affects diplomatic relations. "Thus, the maintenance (or severance) of diplomatic relations and the acceptance (or rejection) of credentials under the Vienna Convention on Diplomatic Relations do not necessarily mean that a new regime in the sending state had been or had not been recognized by the receiving states." [121]

III. Domestic Processes and Effects of Decisions of Recognition and Non-Recognition

A. Overview

Questions of recognition are in part about States trying to manage the membership of the community of States. But recognition decisions are shaped by domestic decision-making structures and can have significant domestic legal implications. The Committee's Second Report focused on the domestic processes behind decisions to recognize or not recognize an entity as a State or a government.[122] The Committee explored the domestic effects of recognition, an explicit policy of non-recognition, or silence as to the status of an entity. The Second Report addressed:

1. The relationship between the executive/government and the courts on issues of recognition;
2. Jurisdictional immunities;
3. Other jurisdictional issues;
4. The ability to access domestic courts and standing to sue;
5. The recognition of judgments and other acts of unrecognized entities;
6. Immigration and asylum issues;
7. Judicial notice of *de facto* separation or secession;
8. Domestic legislation meant to address specific unrecognized entities; and
9. Miscellaneous other examples.

There were varying levels of State practice related to each of these topics. The Second Report noted:

[118] Third Report, at 18.
[119] Third Report, at 18.
[120] Third Report, at 18.
[121] Third Report, at 18.
[122] The focus of the Second Report was primarily on domestic aspects of the recognition of States but, in domestic practice, this was often combined with the recognition of governments.

> While numerous memoranda noted the paucity or complete lack of cases concerning the acts of unrecognized entities before the domestic courts of the states reviewed, when such cases do exist, they are often part of a complex interplay of executive, legislative and judicial power and prerogatives. [123]

Moreover, State practice concerning the effects of non-recognition may be difficult to accurately compile when it is in the form of administrative or bureaucratic decisions from around the world that may not be publicly reported.

B. Domestic Processes and Effects

The Second Report found domestic practice to be "varied and at times complex, especially if the unrecognized entity is part of the juridical territory of that pre-existing State," and touched on topics including civil procedure, extradition, the recognition of educational degrees, and trade.[124]

Crawford has argued that although many contend that courts and executives should speak with "the same voice" on matters of recognition:

> in the international sphere the intimate connection established by nineteenth century doctrine between recognition and statehood has done much harm. A tension is thereby created between the conviction that recognition is at some level a legal act in the international sphere, and the assumption of political leaders that they are, or should be, free to recognize or not to recognize on grounds of their own choosing.[125]

While Crawford has observed that many courts decline to decide issues of statehood if the executive has not provided guidance,[126] there was some variation in practice among the States surveyed. State practice in at least one State evidenced significant independence by courts in questions of recognition,[127] another noted deference to the views of the executive.[128] The U.S. memo emphasized the distinction courts make between an affirmative executive statement of recognition or non-recognition and absence of a clear statement from the executive.. In the latter case:

> at least one of the federal circuit courts has found that the issue becomes a legal inquiry into whether the entity meets the requirements of statehood. Absent an executive statement favoring a policy of non-recognition (or of recognition), the entity in question is merely unrecognized. This distinction

[123] Second Report, at 8, citing to Constantinides 2014 Memo (Greece), at 5 (stating "[t]here do not seem to be any cases before the Greek courts…") Petr Kremnev 2014 Memo (Russia), at 1 (stating "[i]n Russia till this time there are no any court examinations or legal decisions of other administrative agency (at any rate I could find such) concerning the rights or status of non-recognized state or its legal entities and individuals."); Pert 2014 Memo (Australia), at 11 (stating "[t]here is limited Australian domestic case law concerning aspirant States."); Scholtz 2014 Memo (South Africa), at 2 (stating "I have not found any cases that dealt with an aspirant State which is not recognised.").
[124] Second Report, at 19-20.
[125] Crawford, *The Creation of States* (n 17), at 18-19.
[126] Crawford, *The Creation of States* (n 17), at 17.
[127] See, e.g., Italian practice as discussed in Lugato and Milano 2014 Memo (Italy), at 4 (observing that "Italian courts tend to maintain a high degree of independence toward the executive,… including questions concerning recognition of a putative State"); Second Report, at 8.
[128] See, for example, the practice of the UK, as discussed in Ilyas 2014 Memo (UK), at 1; Second Report, at 8.

between non-recognized and unrecognized seems to be material for at least one federal circuit, although the terminology may not always be clear or consistently used.[129]

Regarding jurisdictional immunities for entities that have not been recognized, there was a range of responses, exhibiting nuances in practice. The memoranda discussing the practice in Italy and Greece found that such entities would not be granted immunities.[130] Other memoranda framed this as an issue of deference to the executive (such as the U.K. and Australia), while the U.S. memorandum observed a variety of approaches across the federal circuits, including, as noted above, at least one that would allow a court to assess whether an entity warrants a grant of immunity if the U.S. executive branch has not made an affirmative statement of recognition or non-recognition.[131] Israeli practice gives the Minister of Foreign Affairs the ability to designate that an entity shall receive sovereign immunity, even if it does not meet the criteria for statehood; in this way, an entity that is unrecognized may nonetheless be entitled to a claim of sovereign immunity before the courts, but this would be due to deference by the courts to the executive.[132]

The memoranda concerning the practices of Italy, Russia, and the U.S. each stated that their courts could give effect to acts of unrecognized entities related to ministerial or private law matters.[133] Australia's memo made a similar statement but with a different emphasis: courts in that jurisdiction may disregard the judgments of courts of an aspirant State.[134] Moreover, among other things, an Australian statute provides for the recognition of foreign judgments from certain jurisdictions, without reference to whether those jurisdictions are recognized.[135]

Some Committee member memoranda also noted the existence of domestic legislation in the States surveyed that addressed specific situations, especially Hong Kong, Taiwan, and Palestine.[136]

Although primarily covered in the Second Report, the Third Report also discussed various cases of domestic effects of the recognition (and, implicitly, the non-recognition) of a government, such as "access to the domestic courts of the recognizing State, control of state property located abroad (such as bank accounts), possibility to claim certain privileges and immunities and the attribution of legal value to foreign official acts and documents."[137]

---

[129] Second Report, at 8-9.

[130] Second Report, at 10-11; see, also, Lugato and Milano 2014 Memo (Italy), at 5-6; Constantinides 2014 Memo (Greece), at 6.

[131] Second Report, at 11-13; see also Ilyas 2014 Memo (UK) at 1; Pert 2014 Memo (Australia), at 12; Borgen, McGuinness, and Roth 2014 Memo (US) at 14-15.

[132] See, Second Report, at 14; see, also, Ronen 2014 Memo (Israel), at 4.

[133] Second Report at 15-16, citing to Lugato and Milano 2014 Memo (Italy), at 4 (recognition of acts and legislation related to private international law); Petr Kremnev 2014 Memo (Russia), at 1 (noting the recognition of birth, death, and marriage certificates); and Borgen, McGuinness, and Roth 2014 Memo (US) at 8 (noting that US courts have given effect to acts "dealing solely with private, local and domestic matters," within the territory of the unrecognized entity).

[134] Second Report, at 16; see, also, Pert 2014 Memo (Australia), at 11.

[135] Pert 2014 Memo (Australia) at 11-12.

[136] Second Report, at 18-19; see, also, Pert 2014 Memo (Australia) (concerning Hong Kong and Taiwan) and Borgen, McGuinness, and Roth 2014 Memo (US) (concerning each of these three cases).

[137] Third Report, at 12, citing to in Borgen, McGuinness, and Roth 2012 Memo (US), at 5 and Khoti Kamanga 2012 Memo (Tanzania), at 1. See, in this regard, Peterson, who states that "Differences of treatment persist in three fields: a new government's ability to sue in foreign courts, suits involving governmental acts having extraterritorial effect, and possession of state property located abroad." M.J. Peterson, "Recognition of Governments Should Not Be Abolished," 77 *American Journal of International Law* 31, 36 (1983).

C. Conclusions and Legal Framework

Key conclusions concerning domestic effects of being unrecognized include:

- Regarding the domestic aspects of non-recognition and the treatment of unrecognized entities there is a strong tradition of deference by courts to the executive regarding whether or not an entity is recognized as a state, especially in the common law countries among the States surveyed.[138]

- Jurisdictional immunities (such as sovereign immunity) are the subjects in regard to which non-recognition has the most significant effect in domestic practice. [139]

- Other domestic effects of recognition of a government or a State are quite varied and potentially complex,[140] including the control of state property within that jurisdiction, trade regulation, and the ability to maintain privileges and immunities.[141]

IV. Looking to the Side and Looking Forward

A. Relationship of the Work of the Committee to Other Forms of Recognition

There were a series of issues that, although peripheral to the focus of the Committee's work, proved to be important topics. While these were tangential to the Committee's main work, the Committee did touch upon these issues.

1. The Recognition of Belligerency

In the nineteenth and early twentieth centuries, States could recognize belligerent parties that did not rise to the level of statehood and were not the government of an existing State. This neither recognized the existence of a State nor of a government, but only that the aspirant entity claimed to be a State and was *de facto* making war as such.[142] James Crawford explained that recognition of belligerency "formalized the legal status of the insurgents;… gave rise to a duty of non-intervention with respect to both parties and… entailed the acceptance of the exercise of belligerent rights by both."[143] According to at least one scholar, "[b]y the mid-20th century, the belligerency doctrine was soundly discredited."[144] States were concerned

[138] Second Report, at 26.
[139] Second Report, at 26.
[140] Second Report, at 19-20, 26.
[141] See, Third Report, at 12-16.
[142] Lauterpacht (n 57), at 176.
[143] Crawford, *The Creation of States* (n 17), at 381 quoting Wheaton. *But see,* Crawford's discussion at 380-81 that belligerency gave rise to a duty of non-intervention with respect to either party but also noting that "[i]n nineteenth century international law non-intervention in such cases was an option rather than a duty."
[144] Jorge L. Esquivel, "Latin America," in *The Oxford Handbook of the History of International Law* 557 (Bardo Fassbender & Anne Peters eds. 2012); regarding the narrow use of recognition of belligerency by the US in the nineteenth century, see Joseph H. Beale, "The Recognition of Cuban Belligerency," 9 *Harvard Law Review* 406, 411 (1896). But, see, Christopher J. Borgen, "Conflict Management and the Political Economy of Recognition," in *Complex Battlespaces: The Law of Armed Conflict and the Dynamics of Modern Warfare* (forthcoming 2018) (stating "[r]ecent practice, however, has used new terminology that has adopted aspects from both the recognition of

that the doctrine, rather than emphasizing neutrality and nonintervention, could actually increase violence.[145]

But States responded to the conflicts in Libya and Syria with a form of recognition of representatives of the people that was neither the recognition of a State nor the recognition of a Government. Keeping in mind Crawford's observation that "belligerent recognition was sometimes used as a substitute for, rather than an intermediate step towards, recognition of the entity in question as a State."[146] some aspects of recent practice echo the older practice of recognition of belligerency. The shape of this new practice is discussed at length in the Second and Third Reports.

2. The Recognition of Territorial Change

The question of recognizing territorial change is not usually an especially complex legal matter, given the UN Charter. Paragraph 6 of the commentary to ARSIWA article 41 traces the history of the "principle that territorial acquisition brought about by the use of force are not valid and must not be recognized," from the Stimson Doctrine during the Manchurian crisis of 1931, through the first principle of the UN General Assembly's Friendly Relations Declaration, and to the ICJ's Nicaragua decision.[147]

Actual disputes concerning territorial change tend to be less about the law and more about facts and how to properly characterize a given situation. This was brought to the forefront by arguments over whether the situation in Crimea was a territorial annexation by Russia or a merger of States. Russia's recognition of Crimea as an independent State is characterized by many other States as having been premature and itself a violation of international law. The question of describing that recognition itself defines whether the real issue is one of the recognition of statehood or of territorial change.

3. The Non-Recognition of Illegal Situations

In addition to the scenario of illegal territorial change, discussed in the preceding section, there is, more generally, the non-recognition of illegal acts. The issues are discussed in Crawford's commentary to ARSIWA article 42.

4. The Recognition of Official Acts

While this can be a separate topic of recognition—in particular, the recognition of foreign judgments—the recognition of other official acts (such as marriage licenses) was discussed in the Second Report concerning the domestic effects of recognition and non-recognition. The work of the Committee however did not look to the broader questions of recognition of acts by *recognized* entities.

governments and the recognition of belligerency fashioning them together in a new practice that attempts to respond to the current strategic environment.").

[145] Esquivel (n 144), at 557.

[146] Crawford, *The Creation of States* (n 17), at 381.

[147] James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries,* Art. 41, comment (6) (2002)

B. New Directions for Study and for Rulemaking

James Crawford has written: "In truth, the best theory of recognition may be none at all."[148] Given the ability of theories of recognition to confuse more that clarify, Crawford may have a point. Nonetheless, what can be said about where we are and where to go? Following are thoughts as to next steps as this Committee's work draws to a conclusion.

1. Other Forms of Recognition

Further study may be made of the forms of recognition beyond the recognition of States and governments. The issues discussed in the preceding section of this report may guide some endeavors at further research and analysis. In particular, the effect of the conflicts of Libya and Syria on recognition practice may be an indication of things to come.

This Committee's reports emphasized the innovative recognition practice in these conflicts and the Second Report described some ways in which these new practices are similar to certain aspects of the older practice of recognizing belligerencies.

The perennial problem of civil wars and how new recognition practice includes aspects of old strategies is a topic that warrants further consideration.

2. Recognition and International Organizations: The Question of Collective Recognition

Although the Committee's work focused on individual State practice, there is a long history of suggestions for institutionalization of recognition made by jurists such as Phillip Jessup, who favored the UN General Assembly as a forum for recognition decisions, Quincy Wright, who also emphasized the idea of collective recognition, and Hersch Lauterpacht.[149]

How do the UN and other international organizations affect the practice of recognition by States, and, in particular, of member states of the international organization in question?

3. Recognition and Diplomatic Relations

As discussed in the Third Report, this is a topic that is under-analyzed.

[148] Crawford, *Chance, Order, Chaos* (n 27), at 194, para. 241.
[149] Almqvist, "The Politics of Recognition" (n 9), at 165.

Conclusions

Over the course of the Committee's previous three reports, we have considered the practice of a small, though diverse, group of States and other entities, as well as the literature concerning recognition and non-recognition more broadly. With the caveat that these reports are not exhaustive catalogues of State practice and that much of the nuance and context supporting the general conclusions are in the main text of this Final Report and, even more so, in the discussions of the three preceding reports, following is a summary of our core conclusions:

The Recognition of States

Criteria for Recognition

- Although critiqued for being either over or under-inclusive, the Montevideo criteria nonetheless continue to provide the basic framework for assessing whether an entity meets the key characteristics of a State. While the Montevideo Convention provides the terms under discussion, those terms are not applied as a mechanistic, bright-line test.

- Effective control—or the lack thereof—can also play a role in determining the status of an entity, but it is not a litmus test. Various entities that have lacked effective control have been recognized, while entities that have demonstrated effective control have not been recognized.

- While other possible attributes of statehood have been discussed by jurists, they are best understood not as additions to the criteria of statehood, but as "preconditions for recognition of statehood" by a particular State or group of States.

The Constitutive/ Declaratory Debate

- Although the Declaratory Theory has widespread support in the statements of States and of scholars, the depth of the support seems limited. Many members of the Committee were wary of putting too much stock in a sharp delimitation between the theories and noted that State practice is more complex than either the Constitutive or Declaratory theory.

- The Committee members did not generally view the Constitutive/Declaratory debate as being helpful in addressing current issues in State practice. Various commentators, in and out of the Committee have noted that too much focus on the debate can obscure rather than clarify issues of recognition.

- The Committee noted the rise of a "third approach" based on the idea that the Constitutive/Declaratory dichotomy is insufficient to explain the complex effects of recognition. This approach views recognition as a political act which has significant legal effects in the international and domestic legal orders. This theory holds that recognition occasionally has certain constitutive effects, although these effects are generally in domestic legal systems.

Support for View That There is No Obligation of Recognition of Statehood

- A number of Committee members stated that there is no legal obligation to recognize an entity as a State. However, jurists have also noted that when an entity clearly meets the criteria of statehood and is recognized as such by a substantial majority of the international community, a State puts itself at risk legally if, in Brownlie's words, it "ignore[s] the basic obligations of state relations."

The Obligation of Non-Recognition of Certain Entities as States

- Although certain States studied seem reluctant to proclaim a general obligation of non-recognition, there seems to be a convergence of State practice supporting an obligation of non-recognition when non-recognition is called upon by the Security Council. In addition, although there are examples of widespread non-recognition where the criteria of statehood are not met by an aspirant State, some Committee members viewed the non-recognition by the State they studied as being the result of a sense of legal obligation while other Committee members found that non-recognition by the State they studied was viewed by that State as a political decision not based on legal obligation or they found that it was not clearly related to a sense of legal obligation.

- Some States support a legal obligation of non-recognition when the aspirant State was formed by a breach of international law. This should be considered in relation to article 41(2) of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts, which states that "[n]o State shall recognize as lawful a situation created by a serious breach" of a peremptory norm, "nor render aid or assistance in maintaining that situation."

- Although State practice may be difficult to parse because (a) States may not actually proclaim the non-recognition of a particular entity and/or (b) there may be disagreement between States as to which specific situations are illegal (or why they are illegal), certain Committee members believe that there is relatively broad support in the international community for an obligation of non-recognition, especially in cases where recognition would support the breach of a peremptory norm.

- However, the Committee also decided that "[a]t this point, we do not have enough data to extend these observations into general claims about the state of the law…"

The Recognition of Governments

Formal Recognition is Rare

- The practice of the small sample of States indicates that formal recognition of governments seems no longer to be a widespread international practice.

- However, in cases of competing claims of legitimacy, States have offered political support to one of the aspirants by treating it as the legitimate representative of the local people or the rightful authority. The word "government" is deliberately not used.[150]

Criteria for the Recognition of Governments

- There are varying criteria for deciding which regime to support, including, "*inter alia*, effectiveness, national interest, the position adopted by regional and international organizations and respect for democratic and constitutional procedures." The analysis is done on a case-by-case basis, with little evidence of a grand, overarching, theory of governmental recognition.[151]

Domestic Procedures and Effects of Decisions of Recognition and Non-Recognition

Domestic Procedures Tend to Defer to the Executive

- Regarding the domestic aspects of non-recognition and the treatment of unrecognized entities there is a strong tradition of deference by courts to the executive regarding whether or not an entity is recognized as a state, especially in the common law countries among the States surveyed.[152]

Domestic Effects of Decisions of Non-Recognition

- The Committee considered a range of possible domestic effects of recognition or non-recognition of a government or State, including:

    1. Jurisdictional immunities and other jurisdictional issues;
    2. The ability to access domestic courts and standing to sue;
    3. The recognition of judgments and other acts of unrecognized entities;
    4. Immigration and asylum issues;
    5. Judicial notice of *de facto* separation or secession; and
    6. Domestic legislation meant to address specific unrecognized entities.

- Jurisdictional immunities (such as sovereign immunity) are the subjects in regard to which non-recognition has the most significant effect in domestic practice. [153]

[150] Third Report, at 18.
[151] Third Report, at 18.
[152] Second Report, at 26.
[153] Second Report, at, 26.

- Other domestic effects of recognition of a government or a State are quite varied and potentially complex,[154] including the control of state property within that jurisdiction, trade regulation, and the ability to maintain privileges and immunities.[155]

Areas for Possible Further Research

Other Forms of Recognition

- Recent State practice related to the conflicts of Libya and Syria and in Crimea may be an indication of how the practice of recognition may be evolving. Although these situations were considered by the Committee in its study, their ongoing evolution, and the addition of new State practice leads to possible areas for further research, especially in issues related to the theory and practice of the recognition of belligerency, the recognition of territorial change, and the non-recognition of illegal situations.

.

Recognition and International Organizations: The Question of Collective Recognition

- Although the Committee's work focused on individual State practice, there is a long history of suggestions for the institutionalization of recognition by jurists such as Phillip Jessup, who favored the UN General Assembly as a forum for recognition decisions, Quincy Wright, who also emphasized the idea of collective recognition, and Hersch Lauterpacht. While the Committee's work was focused on the practice of States as opposed to that of international organizations, it notes that this is an important area for further study.

Recognition and Diplomatic Relations

- The Committee memoranda concerning the small set of States reviewed does not indicate a uniform State practice concerning whether and how formal recognition of governments affects diplomatic relations. "Thus, the maintenance (or severance) of diplomatic relations and the acceptance (or rejection) of credentials under the Vienna Convention on Diplomatic Relations do not necessarily mean that a new regime in the sending state had been or had not been recognized by the receiving states." [156]

[154] Second Report, at 19-20, 26.
[155] See, Third Report, at 12-16.
[156] Third Report, at 18.