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RECOGNITION/NON-RECOGNITION IN INTERNATIONAL LAW

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SECOND (INTERIM) REPORT

MARCH 2014

Co-Rapporteurs: Christopher J Borgen
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Introduction

The Committee on Recognition/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." The Committee first met at the 2010 ILA Conference in The Hague, Netherlands. It also held meetings in the 2011 Regional ILA Conference, in Taipei, Taiwan, in Vienna in January 2012, in the 2012 ILA Conference in Sofia, Bulgaria, and in Warsaw in June 2013.

The First Report of the Committee was presented at the 2012 ILA conference in Sofia. It was focused on the fundamental aspects of recognition of States.

Based on our discussions in Warsaw (and previously), the Committee decided to focus this second report on the international and domestic aspects of non-recognition and unrecognized entities. In preparation for this report, the members of the committee prepared memoranda addresses the following issues:

- a) Please give any examples of your State not recognizing another entity as a State. Is this indicative of a legal obligation of non-recognition?
- b) If you would like, please elaborate further the question of whether there may be a legal obligation of non-recognition based on your own views, the views of leading commentators, the State practice of other States, and/or the practice of international organizations.
- c) Have the courts in the State on which you are reporting considered cases concerning an aspirant State that is not recognized by the State on which you are reporting? Topics that may be considered include (but are not limited to) immunity, recognition of judgments, jurisdiction, the status of contracts, property ownership, extradition, customs and trade.

- d) What are the rights, responsibilities and immunities (if any) of an aspirant State under the domestic law and administrative practices of the State on which you are reporting if that State has not recognized the aspirant State?

Members of the committee provided, whenever possible, pertinent diplomatic, administrative, judicial or parliamentary practice of the countries on which they were reporting. (As the focus of the Second (Interim) Report is on domestic practice, this report does not focus on cases before international courts and tribunals.) Members could also add their own views concerning non-recognition as long as they made clear what constituted State practice and what was their own position on the issue.

Responses were submitted by the following branches (and members): Austria (Gerhard Hafner), Australia (Alison Pert), Cyprus (Aristoteles Constantinides), Greece (Aristoteles Constantinides), Italy (Monica Lugato and Enrico Milano), Israel (Yaël Ronen), Poland (Wladislaw Czaplinski), Russia (Petr Kremnev), South Africa (Werner Scholtz), United Kingdom (Daud Ilyas), and the United States (Christopher J. Borgen, Margaret E. McGuinness, and Brad Roth).¹

This report is largely based on the work of these members and the memoranda they had written. We note at the outset that this report is not an exhaustive catalogue of State practice. Although it includes examples from a variety of States, that sample is small. Moreover, not all of the details of these memoranda are able to be reflected within the length of this report. (However, certain memoranda will be available on the Committee's webpage and Committee-members are encouraged to post their memoranda on the Social Science Research Network.²) The role of this interim report is to add to the analysis of the first report and point to research to be undertaken in preparing the final report.

This Second (Interim) Report has three main parts. Part I considers the theory and practice of non-recognition at the international level. It draws from the committee members answers to question (a). Part II focuses on the domestic aspects of non-recognition by addressing how issues of unrecognized entities come before domestic judiciaries, are addressed by legislatures, and how the courts, legislatures, and the executive interact. This part draws from answers to questions (c) and (d). Part III consists of any individual statements by members of this Committee that were included in the answers to question (b). The main text to the report includes a brief conclusion.

I. The Theory and Practice of Non-recognition

A. Non-recognition as a Legal Concept

There is general consensus among the States studied for this report that there is no legal obligation to recognize an entity as a State.³ However, one Committee-member noted that, while there is no legal obligation to

¹ Christopher J. Borgen, Margaret E. McGuinness, and Brad Roth, U.S. Domestic Practice Concerning Non-recognition and Unrecognized Entities (March 2014); Aristoteles Constantinides, Non-recognition in the practice of the Republic of Cyprus (January 2014); Aristoteles Constantinides, Memorandum concerning practice of Greece (January 2014); Wladislaw Czaplinski, Memorandum concerning practice of Poland (February 2014); Gehrhard Hafner, Memorandum concerning practice of Austria (November 2013), Daud Ilyas Memorandum concerning practice of the United Kingdom (November 2013), Petr Kremnev, Memorandum concerning practice of the Russian Federation (October 2013); Monica Lugatio and Enrico Milano, Practice concerning non-recognized entities (Italy) (November 2013); Yael Ronen, Israel's policy on recognition and non-recognition (December 2013); Alison Pert, Note on Australian Practice (December 2013); Werner Scholtz, Memorandum concerning practice of South Africa (November 2013).

² Homepage for the International Law Association Committee on Recognition/Non-recognition in International Law, available at <http://www.ila-hq.org/en/committees/index.cfm/cid/1032>; the Social Science Research Network, available at <http://www.ssrn.com>.

³ For examples drawn from the Committee member memoranda: "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 at 1.

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 at 1. See also Constantinides, Cyprus memo, at 1 and Constantinides, Greece memo, at 1 (stating that both Greece and Cyprus consider the recognition of an entity as a sovereign State a matter of political discretion)

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.”⁴

While recognition is largely viewed as a political decision existing within a legal framework, is there a legal requirement of non-recognition? Sir Hersch Lauterpacht wrote that non-recognition “is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong.”⁵ One possible reason for not recognizing an entity as a State is that it was formed through a territorial change from a use of force by one existing State against another. 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,”⁶ or that the lack of independence of an aspirant entity in relation to some other State is cause for non-recognition.⁷

We have seen many examples of widespread non-recognition of aspirant entities, such as Manchukuo, Southern Rhodesia, the Turkish Republic of Northern Cyprus, the Transnistrian Moldovan Republic, Abkhazia, South Ossetia, and Nagorno-Karabakh. In some instances, the Security Council called on UN member States not to recognize an aspirant State.⁸ However, although there are examples of widespread non-recognition, does this signify an actual legal duty not to recognize an aspirant State in certain instances? Can the act of recognition become a breach of international law?

B. Non-recognition and State Practice

The question of recognition and non-recognition was put into sharp contrast in the debate over the future of Kosovo. On 17 February 2008 members of the Parliament of Kosovo issued a statement declaring “Kosovo to be an independent and sovereign state.”⁹ The declaration of independence was contested by Serbia, the pre-existing state. In a letter to the UN Secretary-General dated 19 February 2008, President Tadic wrote:

the Republic of Serbia demands that all States Members of the United Nations fully respect the sovereignty and territorial integrity of the Republic of Serbia, in accordance with their obligations under international law, the United Nations Charter, and Security Council resolution 1244 (1999), and thereby reject the so-called independence of the Republic of Serbia’s southern province of Kosovo and Metohija.¹⁰

The memo from the U.S. members of the Committee explains that “[t]hough not an official U.S. 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/ Roth at 4.

Section 202 of the *Restatement (Third) of Foreign Relations Law of the United States* (1987) [hereinafter *Restatement (Third)*] 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).

For more on the jurisprudence of recognition, see the First Report.

⁴ Ilyas at 1. 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.

Id.

⁵ Hersch Lauterpacht, *Recognition in International Law* 431 (1947).

⁶ Karl Doebring, “Effectiveness,” in 2 *Encyclopedia of Public International Law* 43, 47 (R. Bernhardt, ed. 1995).

⁷ Jochen A. Frowein, “Recognition,” in 4 *Encyclopedia of Public International Law* 33 (R. Bernhardt, ed. 2000).

⁸ For example, Security Council Resolution 541 (1983) 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.

⁹ Full text: Kosovo declaration, BBC News (Feb 17, 2008), available at <http://news.bbc.co.uk/2/hi/europe/7249677.stm>.

¹⁰ UN doc. A/62/703-S/2008/111

Immediate international reaction to the declaration of independence was mixed. There was almost immediate formal recognition of the statehood of Kosovo by the U.S., the U.K., France, Germany, and certain other EU member states, as well as a host of other countries.¹¹ However, other states, including, for example, Algeria, Brazil, Russia, and Spain, argued against the separation of Kosovo and/or its recognition.¹² With time, the number of recognitions increased. As of March 23, 2014, 107 States have recognized Kosovo as an independent State.¹³ However, as the recent dispute over Crimea has shown, the example of Kosovo remains a touchstone for debates over non-recognition in modern international law and state practice.

Turning to the practice of the States reviewed for this interim report, many of the memoranda submitted found that the States they studied did not perceive a general legal obligation of non-recognition. 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.¹⁴

Similarly, 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.¹⁵ The Australia report explains:

¹¹ A useful resource for keeping track of recognitions of Kosovo is *Kosovo Thanks You*, available at <http://www.kosovothanksyou.com/>.

¹² Algeria's Foreign Minister said: "Nous ne pouvons pas encore reconnaître le Kosovo en tant qu'Etat indépendant. Il existe des lois internationales et elles doivent être respectées. Nous suivons la situation de très près." "Le gouvernement dénonce l'ingéranbcaméricaine," *Le Soir d'Algerie* (March 8, 2008) available at <http://www.lesoirdalgerie.com/articles/2008/03/03/article.php?sid=65238&cid=2>.

According to the Brazilian Ministry of Foreign Affairs, the relevant:

United Nations resolution concerning the situation in Kosovo defended the territorial integrity of what came to be Serbia, which at the time was still in fact Yugoslavia. This was ignored by this unilateral declaration. This is something which is happening without the participation of [the] United Nations - indeed it ignores a United Nations resolution - and we do not find this to be a good precedent. On the other hand, it is clear that on the street the great majority of the people of Kosovo actually want this. But you have to balance these questions because if we are to seek - if each ethnic group or each culture, or each language or even each dialect were to seek - to create our own nation-state, this would be a recipe for anarchy in international relations. So how do you balance the need for more democracy in international relations with respect for the territorial integrity of States? This is a great challenge. The case of Kosovo is complex and Brazil has not recognized Kosovo's independence because it feels that the Security Council's decision has not been completely respected. *Brazilian Foreign Policy Handbook: positions adopted by Brazil in 2008-2009*, Brasília, 2010, pp. 90-91.

According to the Russian Ministry of Foreign Affairs "Kosovo's Provisional Institutions of Self-Government declared a unilateral proclamation of independence of the province, thus violating the sovereignty of the Republic of Serbia, the Charter of the United Nations, UNSCR 1244, the principles of the Helsinki Final Act, Kosovo's Constitutional Framework and the high-level Contact Group accords", hence Russia's full support for the territorial integrity of Serbia. *Statement by Russia's Ministry of Foreign Affairs*, 17 February 2008, available at www.mid.ru/bdomb/brp_4.nsf/e78a48070f128a7b43256999005bcbb3/041c5af46913d38ac32573f30027b380!OpenDocument (last visited 23 September 2013).

The Spanish Ministry of Foreign Affairs stated the day after Kosovo's declaration of independence:

The Spanish government will not recognize the unilateral act proclaimed yesterday by the Kosovar assembly, and it will not recognize it because we do not believe it respects international legality [...] The Spanish government has always defended respect for international legality. It defended it when it decided to withdraw troops from Iraq, and it defends it again now when talking about the secession of a state.

The Financial Times online, available at www.ft.com/intl/cms/s/0/890b8142-de18-11dc-9de3-0000779fd2ac.html#axzz2fQ6f8mjE (last visited 23 September 2013).

¹³ *Kosovo Thanks You*, available at <http://www.kosovothanksyou.com/>.

¹⁴ Ilyas at 1.

¹⁵ Pert at 10. Dr. Pert further explains:

In 1986, for example, the Australian government stated that it did not acknowledge a legal obligation of non-recognition when territory was acquired by the use of force. Australia recognised Indonesian sovereignty over East Timor, and in discussing the relevance of the 1970 UNGA Friendly Relations Declaration (Res 2625 (XXV)) to Australia's negotiations with Indonesia over natural resources in the Timor Gap, the Minister for Resources and Energy stated that:

“Senator GARETH EVANS: ... It is our understanding that there is no binding international legal obligation not to recognise the acquisition of territory that was acquired by force.”¹⁶

For many countries, though, clear statements concerning whether or not there is a legal obligation of non-recognition may not exist. In the case of 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.”¹⁷ And, while the Russian Federation has chosen not to recognize certain entities, this may be driven by the “impossibility to establish official bilateral relations with [such a] non-recognized entity.” In the view of the author of the memorandum on Russia's practice this cannot be seen to create a legal obligation of non-recognition because under further State practice, that entity may become generally recognized.¹⁸

While the United States has made reference to certain recognitions being violations of State sovereignty (such as the recognition of Abkhazia and South Ossetia being a violation of Georgia's sovereignty¹⁹), the U.S. has not specifically enunciated a broad principle of a duty of non-recognition. However, according to the *Restatement (Third) of the Foreign Relations Law of the United States*:

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>.

Australia went on to note that recognition of Indonesia's actions did not signify approval of the circumstances surrounding East Timor's acquisition of East Timor's territory. (Citing to AJJ de Hoogh, “Australia and East Timor: Rights Erga Omnes, Complicity and Non-Recognition”, 1999 *Australian International Law Journal* P3 at 68.) Australia placed emphasis on the absence of new Security Council or General Assembly resolutions, arguing that the existing resolutions were dated and could not be considered to be of indefinite validity. (Citing to Portugal v Australia, Oral Pleading of Australia CR 95/14, 16 February 1995 at 10.) It argued that there must first be a finding on the legality or illegality of Indonesia's occupation of East Timor before Australia's recognition of Indonesian sovereignty could be examined. (Citing to Portugal v Australia, Oral Pleading of Australia CR 95/8, 7 February 1995 at 55, available at <http://www.icj-cij.org/docket/files/84/5315.pdf>).

Id. at 10 (footnotes converted to parentheticals)..

¹⁶ Commonwealth of Australia, Senate, 20 March 1986 at 1377, available at <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansards%2F1986-03-20%2F0165%22>.

¹⁷ Lugato/ Milano at 1.

¹⁸ See, e.g., Kremnev at 1 (stating the refusal to recognize certain entities as states “can not create a legal obligation of non-recognition, because further international standpoint of non-recognizing state can change.”)

¹⁹ See, for example, *Russia recognises Georgian rebels*, BBC News online, available at http://news.bbc.co.uk/2/hi/in_depth/7582181.stm, which stated:

Late on Monday [August 25, 2008], the US state department had warned that recognition of the two provinces' independence would be “a violation of Georgian territorial integrity” and “inconsistent with international law”.

In a statement, it said President George W Bush had called on Russia's leadership to “meet its commitments and not recognise these separatist regions”.

Id. See, also, *Press Statement, Visit by Russian Officials to Abkhazia and South Ossetia*, Apr. 30, 2011, available at http://georgia.usembassy.gov/latest-news/official-statements-2011/russian_officials_abkhasia_s_ossetia.html (statement of

A state has an obligation not to recognize or treat as a state an entity that has attained the qualifications for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.²⁰

The *Restatement (Third)* is not an official government document, however it has significant persuasive authority. Regarding non-recognition, *Comment d* to Section 202 states that “other states may refuse to treat [an entity] as a state when circumstances warrant doubt that it will continue to satisfy requirements of statehood,” such as in certain cases of secession, and that “[i]n such circumstances, refusing to treat it as a state may not be only justified but required, since premature acceptance is a violation of the territorial integrity of the state theretofore in control of that territory.”²¹ *Comment f* further elaborates, explaining that treating an unqualified entity as a State “is an improper interference in the internal affairs of the parent state” and may rise to a being a violation of the Charter of the United Nations.²²

This idea of an obligation against premature acceptance is similar to the observation in the memorandum on Israel’s practice, which brings together the issues of recognition and the requirements of statehood:

In 2000 Israel presented its views on the legal and policy requisites for statehood and for recognition in a document on whether a unilateral Palestinian declaration of statehood should be recognized. The document does not distinguish the question of statehood from that of recognition.²³

Similarly, the memorandum on Austrian practice lists examples of non-recognition, then explains: “The reason for non-recognition in these latter cases resulted mostly from the lack of statehood insofar as it was thought that not all conditions for statehood had been satisfied.”²⁴ In an elaboration contained in the individual statement included in Part III, below, Professor Hafner further posits:

Certainly, there is a legal obligation of non-recognition insofar as it is not a State in the sense of international law and recognition as a State would usually amount to an unlawful interference in the internal affairs of one or more other State. The prohibition of recognition results from the consequences of this recognition and that amount to a breach of international law. Accordingly, the answer to this question depends on whether or not the relevant entity satisfies the condition for statehood.

A particular issue is the duty not to recognize situations that were created by unlawful acts; in this regard Article 41(2) of the Articles on State Responsibility is very clear:

2. 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.²⁵

Other memoranda perceive a legal obligation of non-recognition beyond adhering to a Security Council resolution. The memorandum on Greek practice, for instance, found that:

a legal obligation of non-recognition exists when the creation of an entity and the ensuing declaration of independence has been connected with the unlawful use of force, or other egregious violations of norms of general international law, in particular those of a peremptory

Mark C. Toner, Acting Deputy Spokesman) (stating “Russia’s recent efforts to conclude formal state-to-state agreements with the “de facto” authorities in Abkhazia and South Ossetia during a visit this week to those separatist regions are inconsistent with the principle of territorial integrity and Georgia’s internationally recognized borders.”)

²⁰ *Restatement (Third)* § 202(2).

²¹ *Restatement (Third)* § 202, comm. d.

²² *Restatement (Third)* § 202, comm. f.

²³ Ronen at 1 (citations omitted). The document that is referred to is Israel Ministry of Foreign Affairs, ‘A Unilateral Palestinian Declaration of Statehood-’, August 29, 2011, <http://www.mfa.gov.il/MFA/Peace+Process/Guide+to+the+Peace+Process/A+Unilateral+Palestinian+Declaration+of+Statehood-.htm>.

²⁴ Hafner at 3.

²⁵ See Part III, below.

character, and/or has been condemned by a resolution of the United Nations Security Council.²⁶

Similarly,

[t]he paramount consideration of the Republic of Cyprus in deciding whether to grant recognition or not to such entities is respect for the sovereignty and territorial integrity of the affected state and a solution based on consensual process. The policy of Cyprus is to refrain from recognizing any separatist entity that has unilaterally declared independence without the consent of the affected state.²⁷

Almost all the 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. For example, the South Africa memorandum considered that country's non-recognition of Abkhazia, and concluded by noting the difference between legal theories of non-recognition and the realities of State practice:

It is possible to argue that the non-recognition of Abkhazia may be indicative of a legal obligation of non-recognition. The doctrine of non-recognition is founded on the principle of *ex injuria jus non oritur*. The violation of the territorial integrity of Georgia and the use of force means that the creation of the independent state is null and void. Hence, states have a duty not to recognise such acts. Resolutions, such as 1808, may serve as a confirmation of the existing duty of non-recognition of states.

However, the aforementioned statement must be viewed against the context of the influence of political considerations in the recognition and non-recognition of states. A chasm seems to exist between legal scholarship (based on the basic legal norms on recognition/non-recognition) and state practice.²⁸

C. Non-recognition and Premature Recognition

One other concept related to non-recognition is "premature recognition." James Brierly had 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.²⁹

Lauterpacht describes premature recognition as an act "which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid."³⁰ Situations that would amount to premature recognition show a relative likelihood of non-recognition. Recognition may be a political choice but, as discussed in the First Report, it is one that exists within a legal context. In this case, we can see that non-recognition seems to be more likely when recognition would be premature.

II. Unrecognized Entities and Domestic Practice

²⁶ Constantinides, Greece memo, at 1

²⁷ Constantinides, Cyprus memo, at 1.

²⁸ Scholtz at 1 (citations omitted). He also explained:

South Africa did not recognise Abkhazia and the Permanent Representative of South Africa to the United Nations, based the non-recognition on "the need for countries to resolve differences through negotiations". Thus, "a resort to the use of force diminished the chance for a lasting solution to a situation and it increased the suffering of all the people involved". Security Council 5969th meeting of 28 August 2008.

Id.

²⁹ James Brierly, *The Law of Nations* 138 (6th ed. 1963, Sir Humphrey Waldock, ed).

³⁰ Lauterpacht, *Recognition*, at 9, (internal citations omitted). See, also, David A. Ijalaye, "Was Biafra At Any Time a State in International Law?" 65 *Am. J. Int'l L.* 551, 559 (1971).

In analyzing the domestic aspects of recognition and non-recognition, one has to take into account a variety of domestic constitutional practice. Different States have struck different balances between executive, judicial, and legislative power in how they address recognition and non-recognition. This Second (Interim) Report surveys the practice of the States of the responding committee members in order to take a snapshot across a variety of constitutional systems.

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,³¹ when such cases do exist, they are often part of a complex interplay of executive, legislative and judicial power and prerogatives. This section will consider certain relatively common examples of such interplay:

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 the standing to sue;
5. The recognition of judgments and other acts by 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;
9. Miscellaneous other examples.

Many of these topics may only have reported examples from one or two States, but it is our hope to show the range of domestic issues that may be implicated in various constitutional systems.

1. Relationship between Courts and the Executive

While the domestic effects of recognition or non-recognition often involve an interplay of the executive/ government, the courts, and the legislature, the interaction of the executive and the courts tends to be most pronounced. At issue is what amount of deference courts give to the government and under what circumstances.

The memorandum on practice in Italy explained that “Italian courts tend to maintain a high degree of independence towards the executive also when issues of international relations of the Italian State are involved, including questions concerning recognition of a putative State.”³²

However, the memorandum on United Kingdom practice notes a more deferential role:

The UK Courts are as a matter of public law obliged to follow the advice of the executive...

...when it comes to recognition, the British Courts would normally defer to the views of the British Government. As noted, recognition is a political matter in the power of the British Government; it is a public act of state which is both optional and political.³³

Courts in the United States defer to the executive when there is an affirmative statement or act of recognition or non-recognition, such as a diplomatic pronouncement or a statement of interest in a litigation.³⁴ But if the executive has not stated a policy of recognition or non-recognition regarding a particular entity, at least one of the federal circuit courts has found that the issue becomes a legal inquiry into whether the entity meets the

³¹ See, e.g., Constantinides, Greece memo, at 5 (“There do not seem to be any cases before the Greek courts...”); Kremnev at 1 (“In 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 at 11 (“There is limited Australian domestic case law concerning aspirant States.”); Scholtz at 2 (“I have not found any cases that dealt with an aspirant State which is not recognised.”).

³² Lugato/ Milano at 4.

³³ Ilyas at 1.

³⁴ Regarding statements by the executive in U.S. practice, see, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 124 S.Ct. 2240, 2255, 159 L.Ed.2d 1 (2004) (noting that the State Department has retained authority to file “statements of interest suggesting that courts decline to exercise jurisdiction in particular cases implicating foreign sovereign immunity”).

requirements of statehood.³⁵ Absent an executive statement favoring a policy of non-recognition (or of recognition), the entity in question is merely unrecognized. This distinction 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.

Section 205 of the *Restatement (Third) of Foreign Relations Law*, “Effects of Nonrecognition: Law of the United States,” states, in part:

Under the law of the United States:...

- (1) an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States;...
- (3) courts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.³⁶

In a case that implicated the recognition of the government of Cuba, the Supreme Court of the United States found that “[p]olitical recognition is exclusively a function of the Executive.”³⁷ This likely applies to the recognition of states as well.³⁸

The *Restatement (Third)* also states that a Presidential decision of non-recognition “is binding on State as well as federal courts.”³⁹

³⁵ See discussion in Part II.2, below.

³⁶ *Restatement (Third)* § 205 (1), (3). Section 205 states in full:

Under the law of the United States:

- (1) an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States;
- (2) a regime not recognized as the government of a state is not entitled to property belonging to that state located in the United States;
- (3) courts in the United States ordinarily give effect to acts of a regime representing an entity not recognized as a state, or of a regime not recognized as the government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

Restatement (Third) § 205.

³⁷ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 410, 84 S.Ct. 923, 930, 11 L.Ed.2d 804 (1964).

³⁸ One trial court summarized the practice of recognition in the United States and the reasons for Executive deference as follows:

Recognition of a foreign entity of a sovereign state, or of a regime as the government of a state, may be effectuated by express declaration of the executive branch, by bilateral agreement with the foreign state, by the presentation of credentials by the United States to the authorities of the state and by the United States receiving the credentials of the diplomatic representatives of the foreign state. ... Recognition may also be found to be implied, for example, through a vote by the United States to admit a foreign entity to membership in an international body open only to sovereign states. ... While recognition is a matter of which courts may take judicial notice, ..., the “possible incongruity of judicial ‘recognition’,” ..., would constitute an unwarranted arrogation of power. This constraint on judicial authority is especially compelling because the political discretion to recognize foreign states and governments carries with it “the power to determine the policy which is to govern the question of recognition.” Hence, “recognition is not always absolute; it is sometimes conditional.” ... Accordingly, the manner, means and timing that define the terms of any such conditions of recognition of a purported sovereign or its representatives are matters clearly beyond the realm of judicial competence.

Knox v. PLO, 306 F. Supp. 2d 424, 440 (S.D.N.Y. 2004).

³⁹ *Restatement (Third)* § 205 comm. a, citing to *U.S. v. Belmont*, 301 U.S. 324, 331, 57 S.Ct. 758, 768 (1937); *U.S. v. Pink*, 315 U.S. 203, 223, 62 S.Ct. 552, 562 (1942). The President’s prerogative regarding recognition and non-recognition stems from the executive being recognized as the “sole organ” of foreign affairs. *U.S. v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 318-20, 57 S.Ct. 216, 220-21 (1936). Although the idea that Congress and the courts do not have a significant role to play in foreign affairs is inaccurate, the quote from *Curtiss-Wright* does reflect the central role of the executive and the significant deference by the other branches. At no time is this greater than where there is an explicit commitment of power

2. Immunity

One of the most significant issues in domestic practice concerning non-recognition is whether an unrecognized entity may nonetheless be entitled to sovereign immunity. The memo on Italy explains that “Italian courts have refused to recognise any specific privileges and immunities associated with statehood to non-recognized entities...”⁴⁰ In 2004 the Italian Court of Cassation, having been advised by the Italian Foreign Ministry on the international status of Montenegro and the 2003 Constitution of the Union of Serbia and Montenegro, denied recognition of statehood to the Republic of Montenegro, and thus held its President did not satisfy the requirements for personal immunity under customary international law.⁴¹ Also, in a case concerning the PLO, the Italian Court of Cassation has upheld the declaratory theory and denied recognition of personal immunities on the basis of the lack of effectiveness of the purported entities.⁴²

The Montenegro case shows the interplay of the government and the courts in addressing a case where the status of an entity is in question. The memorandum on Italian practice further notes:

As to diplomatic immunity, the Ministry of Foreign Affairs has suggested that the accreditation of the entity in the diplomatic list is the necessary condition for the enjoyment of diplomatic immunity; if the entity is not recognized there will be no accreditation in the diplomatic list and therefore no immunity; no cases are registered.⁴³

If a dispute actually arose between Italy and an unrecognized entity, the Italian Ministry of Foreign Affairs has indicated that

it would be dealt with as if it were a private law litigation: no notifications through the diplomatic channels, the “Cerimoniale diplomatico della Repubblica” would not engage in any good offices activity, it would not be possible for the Attorney General (*Avvocatura dello Stato*) to intervene “ad adiuvandum” on behalf of the interested state; no immunity from jurisdiction or execution would be recognized; so far disputes of this kind have arisen with “organisations” such as Knight’s Island, rather than with any of the States that are not recognized by Italy (like TRNC, SADR [the Saharawi Arab Democratic Republic or “Western Sahara”], Taiwan).⁴⁴

Even when there are quasi-diplomatic functions undertaken by the office of an unrecognized entity, they will not necessarily receive diplomatic or other official immunity. Consider the practice in Greece:

to the executive in the Constitution’s text. Besides vesting “all executive power” in the President, the U.S. Constitution confers on the President the power nominate and, with the advice and consent of the Senate, appoint Ambassadors to foreign countries and also to receive ambassadors “and other public Ministers” from foreign countries. See U.S. Constitution, Art II, Sec. 1 (The executive Power shall be vested in a President of the United States of America.”); Sec. 2 (“He shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors...”); and Sec. 3 (“he shall receive Ambassadors and other public Ministers...”)).

Taken together, these give a constitutional basis for deference to the executive on matters of recognition or non-recognition of foreign States and governments.

⁴⁰ Lugato/ Milano at 4.

⁴¹ Italian Court of Cassation (III *sezione penale*), 17 September 2004, case n. 49666; see, also, Lugato/ Milano at 5.

⁴² See, Italian Court of Cassation, 28 June 1985, Judgment n. 1981, concerning the sovereign immunities of the PLO leadership from criminal prosecution. The Court highlighted the lack of territorial sovereignty exercised by the PLO over the Palestinian territories and the fact that Italy maintained with the PLO *sui generis* relations not to be equated with the ordinary diplomatic relations maintained with another State. At any rate, with regard to nature and value of full *de jure* recognition granted by other States the Court added that:

Transl.: “In this regard, the referral to the recognition made by some governments, whether *de jure* or *de facto*, is irrelevant. One must in fact deny the constitutive effect produced by recognition upon international legal personality as it belongs to the realm of politics and it is devoid of any legal consequence.”

(Professors Lugato and Milano provided the translation.)

⁴³ Lugato/ Milano at 5.

⁴⁴ Lugato/ Milano at 6.

A Taipei Representation Office functions in Greece which enjoys no diplomatic or consular status, given that Greece does not recognize Taipei as a sovereign entity. It should be noted that the DDR before its recognition by Greece, operated a Commercial Representation in Athens. As to Palestine, since 1990, the Diplomatic Representation of the PLO in Athens has been renamed to “Diplomatic Representation of Palestine” and Greece applies in this respect, by analogy, the 1961 Vienna Convention on Diplomatic Relations and, therefore, grants to the head of the mission and members of its personnel diplomatic privileges and immunities under the above Convention. However, Greece has not formally recognized Palestine as a state.⁴⁵

But, consider in contrast to this, Poland’s practice in the case of Taiwan:

Special rights were granted to Taiwan, which is not formally recognized but is bound with Poland by informal ties. Those include an establishing of a commercial representation of the ROC (Taiwan) in Poland which is granted consular rights (including issuing passports and visas), as well as its members enjoy diplomatic privileges and immunities.⁴⁶

For Cyprus, the main case is the separatist crisis over Northern Cyprus. Under Cypriot practice, the leaders of Northern Cyprus would not receive diplomatic or other any other sort of immunity.⁴⁷

In United Kingdom practice, courts “follow the advice of the executive.” If that advice is that an entity is not recognized as a state or government, then:

the unrecognized state or government cannot claim immunity from jurisdiction, obtain recognition for purposes of conflict of laws of its legislative or judicial acts, or sue in the local courts as plaintiff. These are the normal consequences of non-recognition in British courts.⁴⁸

Similarly, in Australia,

an entity not recognised as a State by Australia will have no rights or responsibilities beyond those which would apply to a private natural or legal person. Thus if the aspirant State has legal personality under some other basis (which is unlikely), then subject to the usual rules of

⁴⁵ Constantinides, Greece memo, at 6.

⁴⁶ Czaplinski at 2. Professor Czaplinski continues by citing two cases of related interest:

The judgment of the Supreme Administrative Court of 21 December 2010 (case No. I GSK 481/09) stating that Taiwan can issue a certificate of origin of goods exported to Poland; And the judgment of the Administrative Court in Łódź of 8 October 2013 (case No. II Aka 147/13) declaring that a person damaged was a national of the Republic of China (Taiwan). One could conclude that the Court stated that Taiwan is a State (as it has its own nationality), although it is not recognized by Poland...

Id.

Although, he notes that the second of these two cases should not be overly-relied upon as stating a policy shift.

⁴⁷ Constantinides, Cyprus memo, at 8.

⁴⁸ Ilyas at 1. To contrast the treatment of recognized and unrecognized entities, note the case *The Arantzazu Mendi* [1939] AC 256, as described in the UK memorandum:

In *The Arantzazu Mendi*, the possession of a Spanish vessel (registered in Bilbao) under arrest in British waters was claimed both by the Nationalist authorities under General Franco and by the Republican Government. Upon enquiry being made at the direction of the Court, the Foreign Office stated, inter alia, that British Government recognized Spain as a foreign sovereign state and recognized the Republican Government as the only *de jure* Government of Spain. However, it also stated that the British Government recognized the Nationalist Government (led by General Franco) as exercising *de facto* administrative control over the larger portion of Spain, and that the Nationalist Government had effective administrative control over all the Basque Provinces of Spain, including Bilbao where the vessel was registered. The House of Lords (the highest court of appeal) held that the Foreign Office letter established that the Nationalist Government of Spain was a foreign sovereign state and could not be impleaded. The Court stated that by 'exercising *de facto* administrative control' or 'exercising effective administrative control', the Nationalist Government exercised all the functions of a sovereign Government, and there was no difference for the present purposes between a recognition of a state *de facto* as opposed to *de jure*.

Id. at 2.

court concerning jurisdiction, it could sue and be sued in Australia, and would be subject to all relevant Australian laws...⁴⁹

However, state immunity in Australia is governed by the *Foreign States Immunities Act* 1985, which uses a restrictive form of sovereign immunity.⁵⁰ For the purposes of the act, a “Foreign State” is defined as “a country” (undefined) that is:

- (a) an independent sovereign state, or
- (b) a separate territory (whether or not self-governing) that is not part of an independent sovereign state.⁵¹

According to the Act, a “foreign State” does not need to have recognition as such from Australia. Rather, as the memorandum on Australia’s practice explains:

[The Act] provides that the Minister for Foreign Affairs may certify in writing that a specified country is, or was at the relevant time, a foreign State for the purposes of the Act, and such a certificate is conclusive on the point. The Act does not say that this is the only method by which it may be established that a particular entity is or is not a foreign State for the purposes of the Act, *but it is treated so in practice, at least where there is any uncertainty as to the entity’s status.*

It follows that an aspirant but unrecognised State and its representatives do not benefit from any state immunity under Australian law.⁵²

Consequently, “an aspirant State and its representatives are not entitled to and do not benefit from any diplomatic immunity under Australian law.”⁵³

In United States practice, while unrecognized entities have not commonly received immunity from suits before U.S. courts, the possibility exists that an unrecognized entity may receive immunity. The key issue is whether the executive has stated an affirmative policy of non-recognition, or simply has remained silent, in which case the courts may treat the entity as simply unrecognized.

The “Foreign Sovereign Immunities Act” (FSIA), Section 1602 is the key enunciation of U.S. domestic law concerning sovereign immunity. The relevant provision states:

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.⁵⁴

The Anti-Terrorism Act (ATA) is another U.S. federal statutory provision in which sovereign immunity may be applied.⁵⁵ In both statutes, the court must determine what is a “foreign state” for the purpose of immunity from

⁴⁹ Pert at 12.

⁵⁰ *Id.* citing to *Foreign States Immunities Act* 1985 (Cth) http://www.austlii.edu.au/au/legis/cth/consol_act/fsia1985288/.

⁵¹ *Id.* citing to *Foreign States Immunities Act* 1985 (Cth) ss.9 and 3(1).

⁵² *Id.* at 12-13 (internal citation omitted).

⁵³ *Id.* at 13 Dr. Pert further explains:

The Vienna Convention on Diplomatic Relations 1961 is implemented in Australian law by the *Diplomatic Privileges and Immunities Act* 1967. Although its application is not expressly made conditional upon Australia recognising the State concerned, in practice this will be the case since the application of the Convention, and therefore the Act, depends on the existence of a diplomatic mission in (or extending in its coverage to) Australia: this of its nature requires the consent of the Australian government and such consent would only be granted in respect of a State recognised by Australia.

Id. (internal citations omitted). But see Part II.9 below, concerning special arrangements for Hong Kong and Taiwan.

⁵⁴ The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, §1604.

⁵⁵ Suits against Government Officials (18 U.S.C.A. § 2337). The ATA is concerned with the subset of cases concerning alleged terrorism. In relevant portion, it reads:

No action shall be maintained under section 2333 of this title against...

- (2) a foreign state, an agency of a foreign state, or an officer or employee of a foreign state or an agency thereof acting within his or her official capacity or under color of legal authority.

suit.⁵⁶

Although there are “divergent approaches” across the different federal jurisdictions as to the treatment of unrecognized entities,⁵⁷ at least one federal circuit has found that, in the absence of an affirmative statement of recognition or non-recognition by the executive, a U.S. court could assess whether an entity met the requirements of statehood, which “is a legal, not a political inquiry,” and thus determine whether the entity is entitled to sovereign immunity under the relevant statutes.⁵⁸

However, the commonality among all these approaches is deference to the executive in when it makes a political determination regarding the status of unrecognized states.⁵⁹

Ungar shows that, while U.S. courts will follow the lead of the executive concerning recognition or non-recognition, absent an affirmative and clear executive statement, at least one federal circuit has found there are judicially manageable standards that courts may apply to decide whether an unrecognized entity should be accorded sovereign immunity under the FSIA or the ATA.⁶⁰

⁵⁶ The Supreme Court has stated that “‘henceforth’ both federal and state courts should decide claims of sovereign immunity in conformity with the Act’s principles.” Altmann at 2249. There is no indication that the term “foreign state” means something different in Title 18 of the United States Code than in Title 28. *Knox v. PLO*, 306 F. Supp. 2d 424, 430 (S.D.N.Y. 2004); see also *Efrat Ungar et al. v. Palestine Liberation Org.* 420 F.3d 274, 282-83 (1st Cir. 2005).

⁵⁷ The trial court in *Knox* surveyed practice across jurisdictions in the United States and discerned at least four “divergent approaches” to issues related to unrecognized entities:

1. Unrecognized entities are denied comity and therefore denied access to courts and to property held in the U.S;
2. Unrecognized entities are generally accorded *de facto* juridical personality for commercial transactions, private rights and giving effect to judicial and ministerial acts within its territory;
3. Courts defer to the Executive policy and statements when determining immunity of unrecognized entities;
4. In the absence of an Executive policy or Statement, courts permit jurisdiction over unrecognized entities if it does not violate public policy or the interests of justice.

Adapted from *Knox* at 441-43; see, also, discussion in Borgen/ McGuinness/ Roth at 14-15.

⁵⁸ Borgen/ McGuinness/ Roth at 11-12. In *Efrat Ungar et al. v. Palestine Liberation Org.* (1st Cir. 2005) the Federal Appeals Court of the First Circuit stated

Both sides agreed that the definition of a “state” under the relevant statutes was informed by an objective test rooted in international law and articulated in the *Restatement (Third)* of Foreign Relations. Under these circumstances, the determination of whether the defendants have adduced sufficient evidence to satisfy that definition is quintessentially appropriate for a judicial body. See *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir.1995)

Ungar at 281.

After undertaking its analysis, the First Circuit declined to grant sovereign immunity because the Palestinian authority did not satisfy the international legal requirements for statehood. *Ungar* at 292.

⁵⁹ The trial court in *Knox* wrote:

When the executive branch, either by word or deed, does manifest its political determination that the courts’ exercise of jurisdiction over a particular matter involving actions or privileges and immunities of unrecognized states or governments would be inimical to United States foreign policy interests or relations with the unrecognized sovereign, or when the court on its own, from demonstrable matters of public record, may readily ascertain such fundamental conflict with public policy were it to give effect to the invocation of sovereign status of the unrecognized state or government, the courts generally accept as conclusive such declared or ascertained expression of United States international relations policy.

Knox at 443.

⁶⁰ One year prior to *Ungar*, a federal trial court in the Southern District of New York considered in *Knox* whether the PA or the PLO should receive sovereign immunity. Here, too, the trial judge held that defendants were not entitled to immunity under either the FSIA or the ATA because the defendants had failed to establish that Palestine was a State. However, going beyond Palestine being unrecognized, the court discerned what appeared to be a federal policy of non-recognition. The trial court noted that: “In fact, it is a matter of public record that the United States affirmatively opposes the notion that a sovereign Palestine presently exists.” *Knox* at 446. See, also, Borgen/ McGuinness/ Roth at 13.

The interplay of judicial and executive power in Israel also opens the possibility of a grant of immunity. Israel's Foreign States Immunity Law 2008-5769 Section 20 provides:

The Minister of Foreign Affairs, in consultation with the Attorney General and with the approval of the Government and of the Constitution and Law Committee for the Knesset, may prescribe by order that a political entity shall have immunity under Chapters Two or Three of this statute, even though its international legal status does not amount to that of a state; an order under this section may be general, for certain types of matters or for a specific matter, and may be restricted to a certain period.

The memo on Israeli practice explains that the law:

was enacted in order to allow the government some leeway in its relations with the Palestinian Authority. Although Israel does not recognize the Palestinian Authority as the government of a state of Palestine, the law's drafters considered possible that the Government of Israel would have an interest in exempting the PA from litigation initiated by third parties. The provision above allows the executive – with the overseeing of the legislature – to provide this exemption through an order on immunity.⁶¹

Although this provision may be used with respect to other entities, such as Taiwan, as of the end of 2013, no use of this provision has been made public.

3. Other Jurisdictional Issues

Besides in the application of jurisdictional immunities, the issue of statehood is also considered in other jurisdictional contexts. For example, in U.S. practice the issue of statehood is important in assessing whether there is “diversity jurisdiction.”⁶² Section 1332 of Title 28 of the United States Code provides “diversity jurisdiction” to federal courts over any civil action arising between “a foreign state ... as plaintiff and citizens of a State or of different States.”⁶³

This was discussed in *World Communications Corp. v. Micronesian Telecommunications Corporation*, where a federal trial court found that the Trust Territory of the Pacific Islands was neither a “foreign state” nor a “territory” for jurisdictional purposes.⁶⁴ The court noted that the Trust Territory of the Pacific Islands occupied a unique position under international law because, although sovereignty technically resided elsewhere, as a practical matter the United States could exercise full sovereign power over the territories. The court wrote:

[W]ithout determining exactly what status the Trust Territory occupies, I hold that it is not a foreign country entitled to immunity from suits in the United States courts.” In light of similar considerations, I now hold that the Trust Territory is not a “foreign state” within the meaning of 28 U.S.C. § 1332.

4. Standing to Sue/ Access to Judicial System

While the question of immunity may be the most obvious issue concerning unrecognized entities and domestic courts, the inverse is also contested: whether an unrecognized state may access the courts of a state and have standing to sue.

In Australia, an unrecognized entity may only sue and be sued if they have “legal personality under some other basis [than their claim of statehood] (which is unlikely).”⁶⁵

In the United States, the reported cases tend to be about governments, rather than States, that were unrecognized. In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court stated that foreign States are allowed to access U.S. courts due to comity.⁶⁶ The Court decided that courts of the U.S. may hear suits brought

⁶¹ Ronen at 4.

⁶² Article III of the United States Constitution extends the federal judicial power to “all Cases ... between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.” U.S. Constitution, art. III, § 2, cl. 1.

⁶³ 28 U.S.C. § 1332(a)(4) (1982).

⁶⁴ *World Commc'ns Corp. v. Micronesian Telecommunications Corp.* 456 F.Supp. 1122 (D. Haw. 1978).

⁶⁵ Pert at 12.

⁶⁶ The U.S. Supreme Court wrote:

by governments with which the U.S. does not have diplomatic relations.⁶⁷ This followed the jurisprudence that suits by corporations owned by unrecognized regimes may be permitted.⁶⁸ However, the language implies that if something more than diplomatic relations is held in abeyance, such as the existence of a state, then granting standing to sue is less likely.⁶⁹

There is some evidence that this inference is borne out by practice. In October 1992 the so-called “Republic of Bophuthatswana,” (ROB), a “homeland” in South Africa that the U.S. did not recognize as a separate state, filed a civil suit against two defendants in the District of Columbia.⁷⁰ Defendants moved to dismiss the ROB’s complaint on the ground that permitting an unrecognized foreign government to sue in a United States court was contrary to public policy and settled law. The District of Columbia Court of Appeals used terminology of unrecognized government, but the situation was actually that of an unrecognized state. The court concluded that any bar that once may have existed disappeared once the ROB was reincorporated into South Africa.⁷¹ Thus, here we see the reluctance of a court to allow a suit by an unrecognized entity.

5. Recognition of Acts of Unrecognized Entities

Although Italian courts do not recognize any specific privileges and immunities associated with statehood in regards to non-recognized entities, “they have tended to give effect to the acts and legislation of non-recognised entities in matters of private international law.”⁷² The practice is not always consistent, though.

In a 1975 proceeding that considered whether to recognize certain acts issued by the authorities of the German Democratic Republic (which was not recognized by Italy), the Court of Cassation focused on the issue of effectiveness and held:

“in conformity with the prevailing continental European and Italian doctrine, with regard to private international law relations (relevant to the case at hand concerning the efficacy in Italy of an act of private law issued abroad), it is irrelevant whether the State entertains normal diplomatic relations with the issuing State or whether it has recognised the issuing State. The only necessary and sufficient condition for the application of the act in question is the effectiveness of the foreign legal order (regardless of international recognition) [...]”⁷³

However, four years earlier, a lower court (Tribunal of Bolzano, Judgment of 21 May 1971) “had refused

Under principles of comity governing this country’s relations with other nations, sovereign states and allowed to sue in the courts of the United States, ... This Court has called ‘comity’ in the legal sense ‘neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.’ ...

Banco Nacional de Cuba v. Sabbatino 376 U.S. 398, 408-09, 84 S.Ct. 923, 930 (1964) (citations omitted).

⁶⁷ *Sabbatino*, 376 U.S. at 408-12, 84 S.Ct. 930-32. See, also, *Restatement (Third)* § 205, Reporter’s Note 1.

⁶⁸ *The Maret*, 145 F.2d 431, 439 (3d Cir. 1944). See, also, *Restatement (Third)* § 205, Reporter’s Note 1.

⁶⁹ The U.S. Supreme Court wrote:

Political recognition is exclusively a function of the Executive. The possible incongruity of judicial ‘recognition,’ by permitting suit, of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken.

Sabbatino, 376 U.S. at 410-11. See also *Restatement (Third)* § 205 (1) (stating “an entity not recognized as a state, or a regime not recognized as the government of a state, is ordinarily denied access to courts in the United States”).

⁷⁰ *Achievers Invs. v. Karalekas*, 675 A.2d 946 (DC April 29, 1996).

⁷¹ The District of Columbia Court of Appeals wrote:

we perceive no reason for holding that an instrumentality of an unrecognized government that sues in our courts should not be permitted to maintain the action once a recognized government acquires control over the plaintiff organization and the underlying cause of action. By reincorporation of ROB into South Africa, the posture of the case vis-a-vis the involvement of a foreign government became that which always was the official State Department position; viz., that ROB was not an independent state but instead was an integral part of South Africa. Once the unrecognized government dropped from the picture in favor of a recognized government, the policy concern that underlies the prohibition against suits by unrecognized governments was no longer an issue. *Id.* at 949.

⁷² Lugato/ Milano at 4.

⁷³ See, Lugato/ Milano at 4, which includes the original Italian.

recognition of an act of divorce issued by the authorities of the German Democratic Republic due to the lack of international recognition by the Italian government, hence the non existence of the issuing organ and of the relevant act.”⁷⁴

The memorandum on Australian practice explains that the “Australian position is influenced by the English common law; thus Australian courts may disregard judgments pronounced by the courts of an aspirant but unrecognised State.”⁷⁵ Moreover, the *Foreign Judgments Act* 1991 (Cth) provides for the recognition and enforcement in Australian domestic courts of certain judgments from countries, or parts of countries, identified by regulation, with no mention of recognition by Australia.⁷⁶ These include Hong Kong and Taiwan, as well as some Canadian Provinces.⁷⁷

The memo further explains that before 1989 it was unclear whether the laws of an entity that was not recognized by the Australian government could be applied in Australian domestic courts. To create certainty in dealings with Taiwanese corporations, in particular, the *Foreign Corporations (Application of Laws) Act* 1989 was passed.⁷⁸ It provides that when a question in an Australian court concerning a foreign corporation requires recourse to foreign law, the court should apply the law that is applied in the place of incorporation, regardless of whether Australia recognizes that place as a State.⁷⁹

The memorandum on Russian Federation practice explains that Russia recognizes the official acts issued by agencies of non-recognized states/entities:

as regards the registration of birth, death and marriages "the effects of which can be ignored only to the detriment of the inhabitants of the [non-recognised] Territory." This practice based on the Advisory Opinion of International Court of Justice of 21 June 1971 (Legal consequences for the state of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), para 125) and decision of European Court of Human Rights of 21 December 1996 (Loizidou V. Turkey, para 45).

Courts in the United States have given effect to the acts of unrecognized governments “dealing solely with private, local and domestic matters,” as opposed to “with respect to matters extending beyond the borders...”⁸⁰ There is similar practice regarding unrecognized entities that aspire to statehood. The Second Circuit wrote in *Kadic*:

Although the Restatement's definition of statehood requires the *capacity* to engage in formal relations with other states, it does not require recognition by other states...Recognized states enjoy certain privileges and immunities relevant to judicial proceedings, ... but an unrecognized state is not a juridical nullity. Our courts have regularly given effect to the “state” action of unrecognized states...⁸¹

⁷⁴ See, Lugato/ Milano at 4. Professors Lugato and Milano provide a translation:

"Art. 3, n. 2, lett. e, of the Law n. 898 of 1 December 1970, insofar as it provides for the inadmissibility of divorce when the other spouse has obtained that divorce or the annulment of the contested marriage abroad, implicitly refers to an act issued by a foreign State organ. In the case under examination, according to the view expressed by the claimant, the divorce was issued by the *Amstgericht* of the so-called democratic republic of Germany; as the latter has not been recognised by Italy, the above organ should be considered as non-existent, hence the divorce obtained by the respondent abroad should also be considered as non-existent."

⁷⁵ Pert at 11, citing to Michael Pryles, “Recognition of Taiwanese Corporations in Australia” (1991) 19 *International Business Lawyer* 342 at 342.

⁷⁶ *Foreign Judgments Act* 1991 (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fja1991192/.

⁷⁷ *Foreign Judgments Regulations* 1992 (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_reg/fjr1992301/.

⁷⁸ Michael Pryles, “Recognition of Taiwanese Corporations in Australia” 19 *International Business Lawyer* 342, 343(1991).

⁷⁹ *Foreign Corporations (Application of Laws) Act* 1989 (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_act/fcola1989414/, ss.7 and 9; Ivan Shearer, “International Legal Relations between Australia and Taiwan: behind the Façade” 21 *Australian YBIL* 113, 127 (2000).

⁸⁰ *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892, 900 (S.D.N.Y. 1968) modified, 433 F.2d 686 (2d Cir. 1970), cert. denied 403 U.S. 905, 91 S. Ct. 2205 (1971) (refusing to give effect to German Democratic Republic’s legislation concerning the Zeiss Foundation). See also *Restatement (Third) § 205*, Reporter’s Note 3.

⁸¹ *Kadic v. Karadjic*, 70 F.3d 232, 244-45 (2d Cir. 1995) (citations omitted); see also *Knox* at 439.

Although the issue of recognition of judgments and other acts has not arisen in Cypriot courts, it is important to note that “the provision in Cyprus law (echoing the relevant provisions of the Constitution) that marriages and divorces involving Turkish Cypriots are within the competence of the Turkish Cypriot communal courts [has been] suspended by Law 130(I)/2003 for so long as the ‘abnormal’ situation in Cyprus exists, that is, the situation that has resulted from the Turkish invasion and continuing occupation.”⁸²

6. Immigration, Asylum, and Related Matters

As unrecognized entities are often the locus of civil strife, it is not surprising that immigration and asylum claims bring matters of unrecognized entities to domestic courts and administrative tribunals. For example, while asylum matters related to unrecognized States have not come to the courts of Poland, “[t]here were several decisions of administrative courts and Council for the Refugees (which is an appellate body in refugee matters in Poland), concerning Chechen refugees.”⁸³ As is common in such proceedings, though, the administrative courts never had a need to actually consider issues concerning the statehood of Chechnya.

Similarly, there is a significant number of asylum claims in the United States that include some reference to an unrecognized entity. This use of judicial notice is perhaps seen most often in asylum cases. For example, in *Melkonian v. Ashcroft*, a national of Georgia sought asylum on the basis that, as an Armenian, he could not return to the separatist Abkhazian region without facing persecution. The court noted “the unique status of Abkhazia” and wrote:

[Abkhazia] operated with its own autonomous local government throughout the Soviet era, and has now reasserted total independence. Relocation from Abkhazia to Georgia, while technically “internal,” in reality is more akin to international relocation.⁸⁴

The court did not opine as to whether Abkhazia was, in fact, a state deserving recognition, simply that relocating from Abkhazia to Georgia is more complex than a standard relocation.

In another case involving the situation in Georgia, the Sixth Circuit found in *Khakhnelidze v. Holder* that the 2008 Russian invasion was not a “changed country circumstance” for the purpose of U.S. asylum law that should cause case to be reopened, as the petitioner was not from one of the areas of Russian occupation.⁸⁵ The implication was that petitioners who had fled the occupied area would have stronger claims to asylum. In *Vasilchuck v. Holder*, the Ninth Circuit affirmed a denial of asylum for a Moldovan claimant who “failed to show it is more likely than not he will be tortured if returned to Transnistria.”⁸⁶

None of these cases focused on whether any of these regimes is a state, they only noted the reality of separation.

Similarly, in the 2004 case of *VQAA v Minister for Immigration* the Federal Magistrates Court of Australia considered an application for asylum from a resident of the Turkish Republic of Northern Cyprus (TRNC).⁸⁷ In the course of examining the finding of the Refugee Review Tribunal that the applicant was a citizen of Turkey, not of the TRNC, the Court stated:

⁸² Constantinides, Cyprus memo, at 8.

⁸³ Czaplinski at 2.

⁸⁴ *Melkonian v. Ashcroft* 320 F.3d 1061 (9th Cir. 2003).

⁸⁵ *Khakhnelidze v. Holder*, 432 F. App’x 564 (6th Cir. 2011). Reviewing the Board of Immigration Appeals, the Court of Appeals for the Sixth Circuit wrote:

The country reports reveal that the war lasted one week, with fighting concentrated in two separatist regions of Georgia, Abkhazia and South Ossetia. To be sure, the materials depict general violence and citizen displacement, particularly in Abkhazia and South Ossetia but also in some adjacent areas—including the city of Gori where Marine’s aunt lost her home as a result of the hostilities. While noting that the war could have enduring effects, the country reports contained little, if anything, to suggest that Petitioners would be persecuted based on their Georgian ethnicity should they return to Tbilisi, where they once resided.

Id. at 568-69.

⁸⁶ *Nicolay Romanovich Vasilchuck v. Eric H. Holder*, 439 Fed.Appx. 607, 609 (9th Cir. June 22, 2011).

⁸⁷ Pert at 11; *VQAA v Minister for Immigration* [2004] FMCA 1061, available at <http://www.austlii.edu.au/au/cases/cth/FMCA/2004/1061.html>.

It appears that the Turkish Republic of Northern Cyprus, of which he specifically claims to be a citizen, is not a sovereign country recognised at international law. It is difficult to conclude that there is a judicially reviewable error on the part of the [Refugee Review Tribunal] with respect to this finding.⁸⁸

Here the Magistrate Court noted the apparent illegality of the TRNC, but that did not affect the result of the proceedings.

7. Judicial Notice

As shown above in the asylum and immigration context, courts at times take notice of a *de facto* separation of territory within a recognized state, without needing to opine as to whether the separated territory meets the requirements of statehood. Beyond the context of asylum and immigration, such judicial notice is also a recurrent aspect of the interaction of unrecognized entities and domestic courts. Continuing with Australian practice, while the 1973 case of *Bradley v The Commonwealth* did not directly concern the status of Southern Rhodesia as an aspirant State (the issue was the Constitutional legality of a decision to refuse delivery of postal and telecommunications services to the Rhodesian Information Centre), in the course of the judgment, the High Court took judicial notice of “the course of open and notorious international events of a public nature” that power in Southern Rhodesia “is exercised by a regime which has unlawfully usurped power.”⁸⁹

An example from U.S. practice of taking judicial notice of a *de facto* separation is the 2010 case *County of L.A. v. Ind. Lumbermens Mutual Insurance Co.* In that proceeding a California state court needed to rule on the feasibility of extraditing someone from Georgia. However, the District Attorney was not given information regarding the particular location within Georgia in which the person in question was allegedly in custody or the particular governmental agency allegedly incarcerating him.⁹⁰ The court then stated:

We note that Georgia has nine regions and two autonomous republics (Abkhazia and Ajaria) that have separate administrative centers. In addition, Georgia claims sovereignty over South Ossetia, which has its own independent government and has been recognized as an independent nation by several other countries. Thus, more specific location or agency information would appear to be necessary for the district attorney to attempt extradition.⁹¹

8. Legislation Addressing Specific Situations

Australia has enacted special arrangements under the *Overseas Missions (Privileges and Immunities) Act 1995* such that rights and privileges similar to diplomatic immunity apply to the Australian representative offices of Hong Kong and Taiwan.⁹²

The U.S. Congress has at times written legislation targeted to issues concerning specific regimes. Some statutes are used to mute the effect of an entity being unrecognized. The Taiwan Relations Act, for example, exempts the Taiwan regime from some of consequences of being unrecognized.⁹³ In *New York Chinese TV Programs, Inc., v. U.E. Enterprises*, a federal trial court found that Taiwan did not have a copyright treaty with the United States subsequent to its 1978 derecognition because a treaty can only be a contract between two states; however, the Taiwan Relations Act ensured the survivability of existing U.S. - Taiwan agreements.⁹⁴

⁸⁸ VQAA at para.7.

⁸⁹ Pert at 11; *Bradley v The Commonwealth* (1973) 128 CLR 557, 562.

⁹⁰ *County of L.A. v. Ind. Lumbermens Mut. Ins. Co.*, 2010 Cal. App. Unpub. LEXIS 2146, (Court of Appeal of California, Second Appellate District, Division One, March 25, 2010).

⁹¹ *Id.*

⁹² Pert at 13; *Overseas Missions (Privileges and Immunities) Act 1995* (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_act/omaia1995476/; *Taipei Economic and Cultural Office (Privileges and Immunities) Regulations 1998* (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_reg/teacoair1998657/; *Hong Kong Economic and Trade office (Privileges and Immunities) Regulations 1996* (Cth), available at http://www.austlii.edu.au/au/legis/cth/consol_reg/hkeatoair1996629/.

⁹³ Taiwan Relations Act, 22 U.S.C. §3301 et seq See also *Restatement (Third) § 205*, Reporter’s Note 4.

⁹⁴ *New York Chinese TV Programs, Inc., Plaintiff–Appellee, v. U.E. Enterprises, Inc., Flushing Star, Inc., Chan's Video & Trading, Inc., Gong Pictures, Inc., Dang's Video, Inc., Po Yuen, Defendants–Appellants, Queens Video Ltd., John Does 1–50, Defendants*, 954 F.2d 847 (S.D.N.Y. Jan. 24, 1992).

Congress has also legislated to make clear the consequences of non-recognition on Palestine. The Palestinian Anti-Terrorism Act of 2006 places restrictions on the Palestinian Authority to the extent that its leadership is from Hamas.⁹⁵

9. Other

The relatively small samples of these memoranda shows that the interaction of States and unrecognized entities is varied and at times complex, especially if the unrecognized entity is part of the juridical territory of that pre-existing State.

Following are a few examples of issues implicated by the interactions of States and unrecognized entities that were not mentioned earlier:

Civil procedure. In a case before the Austrian Supreme Court the question was raised whether the claimant, a company with seat in Northern Cyprus (TRNC) had to provide security to guarantee the payment of judicial costs (*cautio judicatum solvi*). The applicant denied this duty in the light of the Austrian-Turkish Agreement of 1930 (BGBl 1932/90) since TRNC should be regarded as part of Turkey. The Court dismissed this view.

In Cyprus, in the case of *Artesa Trading Co. Limited v. Credit Bank of Moscow*,⁹⁶ the Larnaca District Court found that a company registered in the Republic of Cyprus was did not exist as a legal entity because it was an assignment of a company registered in the “TRNC.” The Court held that the “TRNC” company had no legal personality and thus could not assign any right. It was obvious for the Court that the sole aim of the Cyprus company was to “legitimize” the “TRNC” company and give it standing to sue. The Court found this to be an abuse of procedure and dismissed the case.

Extradition. As extradition is “a formal procedure involving the executive and judiciary of two states,” it cannot exist as a formal matter between the Republic of Cyprus and the separatist authorities of Northern Cyprus. When practical issues of police cooperation arise, the two sides make informal arrangements, facilitated by the United Nations Force in Cyprus (UNFICYP).⁹⁷

Recognition of educational degrees. The memo on Israel’s domestic practice notes a single published case regarding the recognition of degrees. The Ministry of Education refused to recognize a degree conferred in the Turkish Republic of Northern Cyprus as equivalent to an academic degree earned in Israel.⁹⁸

⁹⁵ The Palestinian Anti-Terrorism Act of 2006, 109 P.L. 446, 120 Stat. 3318 available at <https://www.govtrack.us/congress/bills/109/s2370/text>.

⁹⁶ Case No. 870/11, Interim Decision of 29 March 2012.

⁹⁷ Constantinides, Cyprus memorandum, at 10-11. He further explains:

When practical issues of police cooperation arise, the two sides make informal arrangements, facilitated by the United Nations Force in Cyprus (UNFICYP). For instance, in 2012, UNFICYP facilitated the transfer, from the north to the south, of four persons arrested for criminal charges, three of whom were wanted on European arrest warrants. A Joint Communications Room (JCR), launched by the UN-backed bi-communal Technical Committee on Crime and Criminal Matters (TCCCM) became operational in May 2009. The JCR is a round-the-clock-operation run by Greek Cypriot and Turkish Cypriot law enforcement experts, along with UNFICYP police officers, aiming to support information exchange between the police forces in both communities on criminal matters which have inter-communal elements and are related, inter alia, to thefts, murders, drug offences and human trafficking.

⁹⁸ Institutional Claim (Jerusalem) 3179-09 *Abu Ghosh v Government of Israel – Ministry of Education and Culture* (24 April 2011), available on Nevo database. Dr. Ronen explains:

The Ministry of Education, in charge of academic accreditation, refused to recognize the degree because it did not qualify for recognition under the civil service regulations, which required that the institution in which it was earned was not academically and scientifically regulated by the competent authorities of the state in which it operates, and the university in question was not regulated by the authorities of the Republic of Cyprus. The regional labor court upheld the Ministry of Education’s decision.

Trade. A Polish court has found that Taiwan can issue a certificate of origin of goods exported to Poland.⁹⁹

Trade/ EU regulation. Cyprus is a special case as being an EU member state that also has a separatist entity on its juridical territory. Thus, in regards to EU regulations:

By reason of the suspension of EU legislation in the northern part of Cyprus, that is, in the areas in which the Government of the Republic of Cyprus does not exercise effective control, in accordance with Protocol 10 of the Accession Treaty 2003, these areas are outside the customs and fiscal territory of the EU. In order to facilitate and regulate the movement of persons and goods across the line dividing the government-controlled areas from the Turkish-occupied areas administered by the 'TRNC', the Council of the EU adopted the so-called Green Line Regulation. The Regulation, as amended, provides for special rules concerning the crossing of goods, services and persons across the Line in order to secure an equivalent standard of protection of EU security with regard to illegal immigration and threats to public order, and of its economic interests as far as the movement of goods is concerned. Under Article 4(5) of the Regulation, "Goods shall be accompanied by a document issued by the Turkish Cypriot Chamber of Commerce, duly authorised for that purpose by the Commission in agreement with the Government of the Republic of Cyprus".¹⁰⁰

In a case before the European Court of Justice (now the Court of Justice of the European Union) concerning the TRNC,¹⁰¹ the Court ruled that the phrase 'the customs authorities of the exporting State' must be understood "as referring exclusively to the competent authorities of the Republic of Cyprus".¹⁰² According to the Court, a system of checking the origin of products cannot function properly unless the procedures for administrative cooperation are strictly complied with. "However, such cooperation is excluded with the authorities of an entity such as that established in the northern part of Cyprus, which is recognized neither by the Community nor by the Member States; the only Cypriot State they recognize is the Republic of Cyprus."¹⁰³

III. Individual Committee-member Views Concerning Non-recognition

As part of the preparation of their individual memoranda, committee-members were asked:

If you would like, please elaborate further the question of whether there may be a legal obligation of non-recognition based on your own views, the views of leading commentators, the state practice of other states, and/or the practice of international organizations.

Following are the individual responses made by various committee-members:

Aristoteles Constantinides (Greece)

Recognition is a discretionary act of states unless there is a legal obligation of non-recognition. Recognition of territorial entities fulfilling the criteria of statehood may thus be withheld for political and other reasons, as is long evidenced in state practice (e.g., Western states not recognizing the DDR or Arab states not recognizing Israel etc).

Such refusal to recognize should be distinguished from the obligation of collective non-recognition of certain unlawful territorial situations and entities aspiring for statehood and ostensibly meeting some (or possibly all) of the statehood criteria. This obligation originated in the inter-war period as the so-called 'Stimson doctrine' in response to (mainly but not only) illegal annexation of territories. Non-recognition of such situations and entities

⁹⁹ Czaplinski at 3 (noting "[t]he judgment of the Supreme Administrative Court of 21 December 2010 (case No. I GSK 481/09) stating that Taiwan can issue a certificate of origin of goods exported to Poland")

¹⁰⁰ Constantinides, Cyprus memo, at 11, internal citation to Council Regulation No 866/2004 of 29 April 2004 (the "Green Line Regulation") omitted.

¹⁰¹ *The Queen v Minister of Agriculture, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others*, Case C-432/92, Judgment of 5 July 1994.

¹⁰² *Id.*, para. 54.

¹⁰³ *Id.*, para. 40.

takes the form of a sanction and rather falls within the law of state responsibility.¹⁰⁴ This obligation arises as a response of the international community to certain unlawful territorial situations that typically emerge from the violation of peremptory norms of international law such as the prohibition of aggression or the denial of self-determination.¹⁰⁵

In that regard, in the Kosovo Advisory Opinion the ICJ noted that the illegality attached to the declarations of independence in Resolutions 216 (1965) and 217 (1965) concerning Southern Rhodesia, Resolution 541 (1983) concerning northern Cyprus and Resolution 787 (1992) concerning the Republika Srpska stemmed from the fact “that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*).”¹⁰⁶ In all these resolutions the Security Council called for the non-recognition of those illegal declarations (non-acceptance in the particular circumstances of Republika Srpska’s declaration) as a consequence of their illegality.

In this vein, it should be recalled that the ICJ held in the *Namibia* Advisory opinion that the relevant decisions made by the Security Council concerning Namibia,¹⁰⁷ even though not adopted under Chapter VII of the UN Charter, “were adopted in conformity with the purposes and principles of the Charter and in accordance with its Articles 24 and 25 [and were] consequently binding on all States Members of the United Nations, which are thus under obligation to accept and carry them out”.¹⁰⁸ This conclusion should apply *mutatis mutandis* to other Security Council resolutions calling for non-recognition and using the same language, such as in the case of the ‘TRNC’.¹⁰⁹

The UN (Security Council as well as General Assembly) practice of non-recognition of situations arising from a breach of peremptory norms was duly considered by the ILC in enshrining non-recognition among the consequences of a serious breach of a peremptory norm of international law in Article 41 of the Articles on state responsibility. As stated in the commentary to Article 41, “where a serious breach [...] has resulted in a situation that might otherwise call for recognition, this has nonetheless to be withheld.”¹¹⁰

Nonetheless, the practice of the UN and/or other international organizations, pertinent as it may be in reaffirming and consolidating the obligation of collective non-recognition, should not be seen as dispositive. The Security Council may be prevented from declaring (or even addressing) the illegality of a particular situation, let alone attaching the consequence of non-recognition, due to various factors, especially when any of the permanent members are involved.

Thus, for example, the silence of the Security Council has not prevented the overwhelming non-recognition of Abkhazia and South Ossetia nor the annexation by the Soviet Union of the Baltic States in earlier practice. Other international organizations have voiced their strong opposition to these declarations and their recognition by

¹⁰⁴ C. Warbrick, ‘States and Recognition in International Law’, in M. Evans (ed.), *International Law*, 2nd ed. (Oxford, OUP: 2006) 247-48.

¹⁰⁵ Th. Christakis, « L’obligation de non-reconnaissance des situations créées par le recours illicite à la force ou d’autres actes enfreignant des règles fondamentales », in Ch. Tomuschat and J.M. Thouvenin (eds), *The Fundamental Rules of the International Legal Order: Jus Cogens and Obligations Erga Omnes* (Leiden/Boston, Martinus Nijhoff: 2005) 127-166; E. Milano, *Unlawful Territorial Situations in International Law* (Leiden/Boston, Martinus Nijhoff: 2006) 64; R. Portman, *Legal Personality in International Law* (Cambridge, CUP: 2010) 253.

¹⁰⁶ *Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, para. 81 (July 22, 2010), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

¹⁰⁷ In Resolution 276 (1970) the Security Council “Declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid” (para. 2) and “Call[ed] upon all States, particularly those which have economic and other interests in Namibia, to refrain from any dealings with the Government of South Africa which are inconsistent with paragraph 2 of the present resolution” (para. 5).

¹⁰⁸ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971, ICJ Reports 1971, p. 53, para. 115.

¹⁰⁹ In Resolution 540 (1983) the Security Council “Consider[ed] the declaration [of the Turkish Cypriot authorities of the purported secession of part of the Republic of Cyprus] as legally invalid and call[ed] for its withdrawal (para. 2) and “Call[ed] upon all States not to recognize any Cypriot state other than the Republic of Cyprus” (para. 7), and in Resolution 551 (1984) it “Reiterat[ed] the call upon all States not to recognize the purported State of the “Turkish Republic of Northern Cyprus” set up by secessionist acts and call[ed] upon them not to facilitate or in any way assist the aforesaid secessionist entity” (para. 3).

¹¹⁰ ILC Commentary to Article 41, p. 115, para. 8.

Russia. Thus, in a resolution of 2 October 2008 the Parliamentary Assembly of the Council of Europe called on all member states and states with observer status with the Organisation to “not recognise the independence of South Ossetia and Abkhazia,”¹¹¹ while in a Resolution of 11 November 2011 the European Parliament “call[ed] on Russia to reverse its recognition of the separation of the Georgian regions of Abkhazia and the Tskhinvali region/ South Ossetia, to end the occupation of those Georgian territories and to fully respect the sovereignty and territorial integrity of Georgia as well as the inviolability of its internationally-recognised borders as provided for by international law, the UN Charter, the Final Act of the Helsinki Conference on Security and Cooperation in Europe and the relevant United Nations Security Council resolutions.”¹¹²

The obligation of non-recognition as a legal consequence of a serious breach of a peremptory norm thus derives from customary law. This was rightly made clear by the Constitutional Court of Latvia in *Kariņš and ors v Parliament of Latvia and Cabinet of Ministers of Latvia, and joined case*, where the Court held with regard to the Soviet annexation of Latvia and the other Baltic States that the duty of non-recognition of unlawful situations followed largely from customary international law and was not concretized in the framework of international organizations.¹¹³

Another decision by a domestic court that explicitly referred to the legal duty of non-recognition is *Regina (Kibris Turk Hava Yollari and another) v Secretary of State for Transport*, where the UK High Court concluded that “a legal duty exists whereby the Government of the United Kingdom is obliged not to recognise the TRNC or its Government.”¹¹⁴ The Court of Appeal in this case upheld the High Court’s conclusion that granting permits for direct flights from UK airports to airports in northern Cyprus would be a breach of the United Kingdom’s obligation to respect the rights of the Republic of Cyprus under the 1944 Chicago Convention on International Civil Aviation and would in consequence be unlawful.¹¹⁵ Significantly, the Court of Appeals also held that “[t]he qualification about non-recognition of illegal situations is a strong pointer against the appellants’ reliance on the principle of effectiveness as an overarching principle of international law, at least in so far as the principle is relied on as overriding or displacing the effect of the treaty provisions relevant to this case.”¹¹⁶

Wladislaw Czaplinski (Poland)

I would say that there is a duty of non-recognition of unlawful territorial situations including establishing of new States or cases of state succession, based upon a ban of recognition provided in the Articles on State Responsibility (2001) and the Conventions on State Succession with respect to Treaties (1978) and with respect to State Property, Archives and Debts (1983). Respective provisions of those instruments reflect – in my personal opinion – customary law. It might be difficult, however, to find out what are necessary criteria (grounds) of non-recognition. Two situations that are clear is an establishing of a new State by force or under a threat of the use of force (what about Kosovo? Was it established under the military threat by the NATO? If so , a recognition would be unlawful); there is a dispute as to a legality of secession.

The obligation of non-recognition should not be limited to the obligations of States in cases of serious violations of jus cogens or obligations erga omnes, exceeding therefore a proposal by the ILC.

Gerhard Hafner (Austria)

My understanding of these questions is that the term recognition refers to the recognition by a State of another entity as a State.

- *Is there a legal obligation of non-recognition in certain circumstances?*

¹¹¹ PACE Resolution 1633 (2008) 2 October 2008 (35th Sitting) The consequences of the war between Georgia and Russia, para. 24.

¹¹² European Parliament resolution of 17 November, 2011 containing the European Parliament's recommendations to the Council, the Commission and the EEAS on the negotiations of the EU-Georgia Association Agreement (2011/2133(INI))

¹¹³ Constitutional review, Case No 2007-10-0102; ILDC 884 (LV 2007), Constitutional Court of Latvia, 29 November 2007, para. 34.3.

¹¹⁴ [2009] EWHC 1918 (Admin), 28 July 2009, para. 90.

¹¹⁵ [2010] EWCA Civ 1903, 12 October 2010, para. 69.

¹¹⁶ *Id.*, para. 66.

Certainly, there is a legal obligation of non-recognition insofar as it is not a State in the sense of international law and recognition as a State would usually amount to an unlawful interference in the internal affairs of one or more other State. The prohibition of recognition results from the consequences of this recognition and that amount to a breach of international law. Accordingly, the answer to this question depends on whether or not the relevant entity satisfies the condition for statehood.

A particular issue is the duty not to recognize situations that were created by unlawful acts; in this regard Article 41(2) of the Articles on State responsibility is very clear:

2. 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.

Accordingly, if a State was created by means of such a serious breach, i.e., breach by a State of an obligation arising under a peremptory norm of general international law, States are obliged not to recognize the State.

Nevertheless, in doubtful cases such a prohibition could also result from, e.g. a resolution of the Security Council. Once, there was a General Assembly resolution requesting the States not to recognize the Homelands as States. The most prominent case is undoubtedly the non-recognition of South Africa when representing South West Africa (Namibia); cf the advisory opinion of the ICJ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970). See also Security Council Resolution S/RES/541 (1983) regarding the illegal establishment of the "TRNC" (Northern Cyprus) and calling upon all States not to recognize any Cypriot State other than the Republic of Cyprus See also Security Council Resolution S/RES/550 (1984).

- *Can recognition be a violation of international law?*

See the answer above. Moreover, recognition can be a violation of international law if it constitutes an unlawful interference in the international affairs of a State (so, for instance, if the entity has not yet been established as a State) or contradicts any other special obligation created with regard to a specific situation. A particular duty of non-recognition emerges if the State was created in violation of a peremptory norm of international law; Article 41 (2) of the Articles on Responsibility of States for internationally wrongful acts (A/RES/65/83) reads:

2. 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.

Accordingly, a State recognizing an entity as a State that was created, for instance, by unlawful use of force violates this particular obligation incumbent on all States.

- *Can non-recognition be a violation of international law?*

There is no duty under international law to recognize a State, unless a special duty was established by a binding act.

- *What is the international legal status of an entity that has very few, if any, recognitions?*

The answer to this question depends on whether the entity in question is a State in the sense of international law and whether the State was created lawfully.

- In the affirmative case, this entity is a State albeit not recognized by many States.
- If, however, this entity is not recognized by the other States because of the lack of statehood, the entity is not a State for these States. For them, the acts of this entity can be attributed to the State on which this entity depends or that exercises control over this territory (cf case *Carl Zeiss Stiftung v Rayner and Keeler Ltd*, House of Lords 1966¹¹⁷); the entity can be regarded as part of this State (see the Loizidou case before the European Court of Human Rights, of 18 December 1996 (Application no. 15318/89).
- The absence of any recognition, however, can have the effect that this entity cannot claim to be a State.

¹¹⁷ All E.R. 536 (1966)

- If an entity created as a State in violation of peremptory norms of international law, it is arguable that this entity constitutes a State if all criteria of statehood are satisfied. However, the obligation of non-recognition makes it necessary to consider each relevant case individually. However, the advisory opinion of the ICJ on the *Legal Consequences for States of the Continued Presence of South Africa in Namibia* (1971) has to be taken into account.
- *What are the rights and responsibilities and immunities (if any) of an aspirant state under the domestic law of a state that has not recognized the aspirant state?*

The status of non-recognized States (i.e., entities that satisfy the criteria of statehood) is a little complicated: Usually, there is no contact with officials of that State so that they are not invited in such function in the non-recognizing State and the question of their immunity does not arise. However, diplomats in transit have to be accorded the necessary immunities according to the Vienna Convention on the law of diplomatic relations of 1961 (Article 40).

As to State immunity, it is conceivable that the authorities of the non-recognizing State acknowledge the statehood and grant State immunity.

The non-recognized State does incur State responsibility even towards the non-recognizing State once it breached an international obligation that is owed to that State. Whether the non-recognizing State can initiate proceedings against the non-recognized State depends on the latter since the invocation of the responsibility could amount to recognition.

In any case, the above cited advisory opinion of the ICJ is to be respected that documents regarding the rights of private persons have to be recognized. Similarly, practice shows that contacts between State officials of the two relevant States on lower level are maintained.

- *If a state chooses to recognize an entity that remains largely unrecognized by the rest of the international community, are the international relations between those two states constrained and if so, how?*

Provided the entity qualifies as a State and the statehood is not contested, the relations between these two States are nevertheless under a certain stress due to the non-recognition by other States. However, this is a political issue that depends on the individual case and does hardly permit a general answer.

It is a different matter, if the other States deny the statehood of this entity. In such a situation the relations between these the recognizing State and the entity is undoubtedly under major stress. Under present conditions of intensive and multifaceted relations among States such a situation could have a major impact on the participation in international organizations and multilateral treaties.

- *And, for all of the above questions, what examples of state practice do we have to support our contentions?*

In the Austrian perspective, a case for non-recognition is Taiwan; however, this entity that qualifies as a customs zone in the sense of the WTO is not necessarily considered as a State. Abkhazia and Southern Ossetia are still part of Georgia. Western Sahara does not qualify as a State and constitute still part of the relevant State. Kosovo and South Sudan have been recognized.

As to Palestine, Austria voted in favour of General Assembly resolution A/RES/67/19 regarding the status of Palestine as observer State like in the case of Palestine's admission to UNESCO in 2011 as a member State. However, Austria's positive vote in the General Assembly does not amount to a formal recognition of the State of Palestine.¹¹⁸ Subsequently, Austria upgraded the diplomatic status of the Mission of Palestine as of 1 December 2011. The head of the Palestine mission henceforth presents his letter of appointment to the Federal President.¹¹⁹

¹¹⁸ Tichy/Schusterschitz/Bittner, Recent Austrian practice in the field of international law. Report for 2012, ZÖR (2013).

¹¹⁹ Tichy/Schusterschitz/Bittner, Recent Austrian practice in the field of international law. Report for 2011, ZÖR (2012) 67: 157 – 193.

Monica Lugato and Enrico Milano (Italy)

State practice and the practice of international organizations indicate that the obligation of non-recognition of *de facto* entities is limited to those cases in which the international community reaches a consensus on the characterization of a certain entity as the resultant of a grave violation of a peremptory norm of international law - typically the prohibition to use force or the duty to guarantee the exercise of the right of self-determination. Such practice is in line with articles 40 and 41 adopted by the International Law Commission in 2001 and in 2011 within the context of its codification of the law of State responsibility and of the law of responsibility of international organizations, respectively, which provide for a set of consequences deriving from a gross violation of a peremptory norm including the duty of non-recognition accruing upon third parties.

Most Italian authors (Ziccardi Capaldo, Tancredi, Gioia) rule out the automatic "invalidity" of States established in violation of fundamental norms of international law: they rather construe non-recognition and non-assistance as a sanctioning measure willingly adopted by States.

Moreover, apart from the legitimate choice of the State not to enter into relations with a seceding entity, secession *per se* does not seem to entail an ensuing obligation upon third parties not to recognise the seceding entity: the case of Kosovo seems to confirm the latter proposition, in that even those States that have decided not to recognise the new State have done it for political reasons and because of the alleged violation of international law that Kosovo's unilateral declaration of independence entailed, not because they felt compelled to do so as a matter of legal obligation. The 2010 ICJ advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Kosovo* suggests that an obligation of non-recognition may accrue upon third parties only in those situations in which secession is accompanied by a grave violation of a peremptory norm, such as was the case with Southern Rhodesia, the TRNC and the secessionist entities in Bosnia and Herzegovina during the war in the 1990s.

Resolutions 277 (1970) and 541 (1983) are indeed authoritative statements adopted by the UN Security Council aimed at recalling member States of their obligation not to recognise the illegal regimes established in Southern Rhodesia and Cyprus, respectively. In the former case a grave violation of the right of self-determination of a people was involved; in the latter case a grave violation of the prohibition to use force in international relations. Both violations resulted from the self-proclaimed independence of Southern Rhodesia and of the Turkish Republic of Northern Cyprus.

The Council of the European Union has adopted on 1 September 2008 the following statement in reaction to Russia's recognition of Abkhazia: "The European Council strongly condemns Russia's unilateral decision to recognise the independence of Abkhazia and South Ossetia. That decision is unacceptable and the European Council calls on other States not to recognise this proclaimed independence and asks the Commission to examine the practical consequences to be drawn. [...] The European Council emphasises that all European States have the right freely to determine their foreign policy and their alliances, while respecting international law." As mentioned, Italy does not recognise Abkhazia. Moreover, it holds recognition by third States without justification in international law, apparently in contrast with the territorial integrity of Georgia. In the debate held at the Security Council on 28 August 2008 (UN doc. S/PV.5969) the Italian representative held that "Russian Government's decision [to recognise Abkhazia] has no basis in international law" and that "Georgia's territorial integrity is an uncontested principle, as numerous United Nations resolutions have underlined." One can see in the reaffirmation of the obligation of non-recognition a "sanctioning" measure resulting from the fact that Abkhazia's statehood was consolidated as a result of Russia's military intervention in Georgia in 2008 (see Tancredi, "Neither Authorized nor Prohibited: Secession and International Law After Kosovo, South Ossetia and Abkhazia", in *Italian Yearbook of International Law*, 2008, pp. 37-62).

Alison Pert (Australia)

As described [in the Australia memo], the Australian government in the East Timor case took the view that no obligation of non-recognition arises unless there is a Security Council resolution – or some decision of similar authority – to that effect. My own view is that this is correct, and that assertions to the contrary made in the literature are not supported by persuasive argument or authority.¹²⁰

¹²⁰ See, Alison Pert "The 'Duty' of Non-Recognition in Contemporary International Law: Issues and Uncertainties," *Chinese (Taiwan) Yearbook of International Law and Affairs*, 2014 available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2368618.

Brad Roth (United States)

There is a duty of non-recognition in instances where the statehood bid reflects an illegal situation -- in particular, a breach of a peremptory norm of international law (e.g., Rhodesia, the Bantustans, the Turkish Republic of Northern Cyprus).¹²¹ Illegal situations include inadmissible assistance of a foreign power to the secessionary efforts of a unit integral to an existing state.¹²²

Where a unit integral to an existing state has purported to secede through its own efforts, without inadmissible assistance of a foreign power, a foreign state's issuance of a declaration of recognition or opening of official diplomatic relations may be "premature," in that the unit may not (yet) satisfy internationally acknowledged criteria of statehood, as reflected in the *opinio juris* prevalent within the international community of states. In such a case, the secession attempt is generally neither legal nor illegal under international law. A state that "recognizes" the seceding unit prematurely has traditionally been considered to engage in unlawful intervention by the mere issuance of a declaration of recognition or by the sending or receiving of an ambassador.¹²³ Although there is little recent evidence of premature recognitions alone drawing substantial condemnation, a state that engages in premature recognition undoubtedly violates international law where it acts upon such recognition to disregard the existing state's sovereign prerogatives in respect of the territory (e.g., by providing military assistance to the seceding unit's authorities or by establishing military bases on the territory at the invitation of the seceding unit's authorities).

Conclusion

Although the States studied in this report seemed generally reluctant to proclaim an obligation of non-recognition, there seems to be a convergence of state practice supporting non-recognition (a) when called upon by the Security Council and (b) where the bases of statehood are not met by the aspirant State. Some States also support a legal obligation of non-recognition when the aspirant State was formed by a breach of international law.

At this point, we do not have enough data to extend these observations into general claims about the state of the law. Rather, this suggests areas for further empirical research in the next phase of the work of the Committee. The analysis of this report, together with the compiled memoranda serve as a basis to build a broader data-set concerning the international practice of non-recognition. We also note that the current (at the time of this writing) situation in Crimea will likely renew the discussion over whether and when there is a legal obligation of non-recognition.

As for the domestic aspects of non-recognition and the treatment of unrecognized entities, the report focused on the interplay of executive, judicial, and legislative action. There is a strong tradition of deference to the executive regarding whether or not an entity is recognized as a state, especially in the common law countries among the States surveyed. However, even where there is deference to the executive, there is at times still room for judicial activity. In at least one federal circuit in U.S. state practice, for example, there is a distinction between the levels of deference when the executive has made an affirmative statement of non-recognition as opposed to instances in which the executive is silent, although the entity in question is unrecognized.

While sovereign immunity and other jurisdictional immunities bring the issues of non-recognition into sharpest contrast in domestic practice, the domestic aspects of interrelations with unrecognized entities are actually quite varied. Issues include the ability to access domestic courts and the standing to sue, the recognition of judgments and other acts by unrecognized entities, and issues related to immigration, asylum, and extradition. At times, the effects of non-recognition are mitigated through legislation focused on a specific unrecognized entity.

¹²¹ *Advisory Opinion on Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, para. 81 (July 22, 2010), available at <http://www.icj-cij.org/docket/files/141/15987.pdf>.

¹²² Declaration on the Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), (24 October 1970) ("Friendly Relations Declaration") ("Every State shall refrain from any action aimed at the partial or total disruption of the national unity and territorial integrity of any other State or country.").

¹²³ See, e.g. H. Lauterpacht, "Recognition of Insurgents as a *De Facto* Government," 3 *Modern L. Rev.* 1, 6-7 (1939); Quincy Wright, "Some Thoughts about Recognition," 44 *Am. J. Int'l L.* 548, 556 (1950) ("premature recognition constitutes in principle a violation of the rights of the parent state").

