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RECOGNITION/NON-RECOGNITION IN INTERNATIONAL LAW

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THIRD REPORT

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, in Warsaw in June 2013 and in Washington in 2014.

The First Report of the Committee was presented at the 2012 ILA Conference in Sofia. It focused on the fundamental aspects of recognition of States. The Second Report, presented in Washington in 2014, focused on the international and domestic aspects of non-recognition and unrecognized entities.

This third report deals with the issue of recognition of governments. In preparation for this text, the members of the committee provided reports on their respective national practices, addressing the following questions:

- Does the State on which you are reporting formally recognize governments of other State entities? If so, has it stated its criteria? Once recognition is conferred upon a government, do any domestic legal consequences flow from such act?
- What are the important examples, if any, of the State on which you are reporting recognizing or not recognizing governments or other entities?
- Are there examples of domestic legal consequences due to the recognition of the government of another State entity?
- Do governments view acceptance of credentials under Vienna Convention on Diplomatic Relations as leading to other legal obligations, and if so, what are they?
- How does the State on which you are reporting address a disputed transition of government?

Responses were submitted by the following branches (and members): Austria (Gerhard Hafner), Australia (Alison Pert and Stephen Tully), Canada (Christopher Waters), Cyprus (Aristoteles Constantinides), France (David Ruzié), Italy (Enrico Milano), Japan (Shotaro Hamamoto), Kosovo (Robert Muharremi), Palestine (Valentina Azarova), Slovenia (Mirjam Škrk), Taiwan (Chun-I Chen and Pasha Hsieh), Tanzania (Khoti Kamanga), The Netherlands (Olivier Ribbelink), United Kingdom (Daud Ilyas and Matthew Happold), and the United States (Christopher J. Borgen, Margaret E. McGuinness, and Brad Roth). Additional research was conducted on Brazil.¹ Members of the committee were asked to provide, whenever possible, pertinent diplomatic, administrative, judicial or parliamentary practice of the countries on which they were reporting.

I. The recognition of governments as a legal concept

A. Defining the recognition of governments

Ordinarily, changes in the government of a State occur in accordance with the respective legal order and there is no dispute over who the legitimate representative of that State is. However, when a new government arrives in power in a manner not prescribed by that State's domestic legal order, such as a coup d'état or a revolution, the attitude of other States towards the new authority may be of fundamental importance to ascertain its international legal standing.

States have a spectrum of possible responses towards the new regime including: refusing diplomatic relations, maintaining pre-existing diplomatic relations, or interacting with the regime on an *ad hoc* basis without clearly stating whether it views the regime as a legitimate government. The executive, legislature, and judiciary of a State may, either in concert or separately, make declarations, enact laws, or decide cases that may explicitly or implicitly address whether the regime in question is the government of a particular State.

The recognition of a government² may be defined as accepting certain institutions and/or individuals as the lawful representatives of a State in its international affairs.³ It does not need to be

¹ The co-rapporteurs acknowledge the aid of research assistants Bruno Biazatti, Mariana Ribeiro and Mariana Ferolla in the preparation of this report and of Bruno Biazatti for his preparation of the Brazilian report.

² A definition of government, in the international legal context, was formulated by KELSEN: "A government, according to the norms of international law, is the individual or body of individuals which by virtue of the

formally or publicly announced⁴ and it may be “more a matter of implication than of express declaration”.⁵ This report, however, focuses on the *formal* and express recognition of governments.

The practice of formally recognizing governments has been criticized by some commentators. For example, former International Court of Justice Judge Richard Baxter has written:

[A]n institution of law that causes more problems than it solves must be rejected and replaced by working arrangements that are flexible and realistic. The partial withdrawal of law from this area of international relations will facilitate the maintenance of relations with states in which extraconstitutional changes of government are taking place, and that in itself is a good thing.⁶

As will be discussed in Part II, below, State practice itself shows a certain ambivalence regarding the recognition of governments.

B. Criteria for recognizing governments: theoretical and historical perspectives

Jurists have long opined on when a State should (or must) recognize or refuse to recognize a regime as the government of another State.

*Effectiveness*⁷ seems to be a common requisite for almost all legal authors who wrote about criteria for recognition of governments. As put by Feldmann “it is of such great importance that

effective constitution of a state, represents the state in its relations with other states, i.e., is competent to act on behalf of the state in its relations with the community of states.” Kelsen, Hans. Recognition in International Law: Theoretical Observations. *American Journal of International Law*, vol.35, pp. 605-617, Oct., 1941, p.614-615.

³ In this sense, see Feldmann: “Recognition of a new government means that recognizing States consider it to be the only representative of this State in international affairs”. FELDMANN, David. The recognition of new governments and other types of recognition. In: _____. *International Personality*, 1985, pp. 395-405 (Collected Courses of the Hague Academy of International Law, vol. 191). In previous course, in 1933, Sir Williams stated that with the recognition of government, the State “(...) donne à entendre qu'il est prêt à accepter certains individus comme étant les agents effectifs d'un autre Etat dans toutes les activités internationales”. See WILLIAMS, John Fischer. *La doctrine de la reconnaissance en droit international et ses développements récents*, 1933 (Collected Courses of the Hague Academy of International Law, vol. 044). A resolution of the Institute de Droit International defines recognition of governments as “l'acte libre par lequel un ou plusieurs Etats constatent qu'une personne ou un groupe de personnes sont en mesure d'engager l'Etat qu'elles prétendent représenter, et témoignent de leur volonté d'entretenir avec elles des relations.” INSTITUTE DE DROIT INTERNATIONAL. *La reconnaissance des nouveaux Etats et des nouveaux gouvernements*. Session de Bruxelles, 1936. Available at < <http://www.justitiaetpace.org/> > The U.S. *Restatement of the Law (Third) of the Foreign Relations Law of the United States* explains that recognition of a government constitutes a “formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.” *Restatement (Third)* § 203, *comm. a.* The *Restatement (Third)* is a publication of the American Law Institute. Although is not a code or even an official document, it is perceived as “an accurate distillation of the state of the law” at the time of its publication. The third and most recent version of “The Restatement of the Law” was published in 1987.

⁴ JENNINGS, Robert; WATTS, Arthur. *Oppenheim's International Law*. Vol.1, 9 ed, London: Longman, 1992, p. 146.

⁵ Ibid. See, however, the Restatement of the Law (Third) of the Foreign Relations Law of the United States, which regards recognition of governments as a “formal acknowledgment that a particular regime is the effective government of a state and implies a commitment to treat that regime as the government of that state.”

⁶ GALLOWAY, L. Thomas. *Recognizing foreign governments: the practice of the United States*. Washington: American Enterprise Institute, 1978, foreword.

⁷ According to Jiménez de Aréchaga, “[c]abe definir la efectividad como el control de hecho de la maquinaria administrativa de Estado, y la aquiescencia de la población del Estado al nuevo gobierno, la cual se manifiesta por la falta de resistencia armada a las nuevas autoridades. La efectividad se expresa por la continuada obediencia a ese nuevo centro de poder. Esta continuada obediencia se puede manifestar en forma expresa, mediante actos plebiscitarios, en los cuales el pueblo de un Estado adhiere al nuevo gobierno; o en forma tácita,

some lawyers consider it to be the only criterion of recognition.”⁸ Many authors also include *stability* as a criterion for recognition.⁹

Lauterpacht pointed out that effectiveness, “either in its literal sense or as evidenced by an adequate expression of popular consent-within the territory of the State is an essential and the principal condition of recognition both of States and of governments”.¹⁰ Moreover, “reasonable prospect of permanency and stability [...] or the final and apparently irrevocable defeat of the pretensions of the parent State [...] are generally admitted”.¹¹ According to Lauterpacht, the “free acceptance of the new regime by the majority of the population”, and the “ability or willingness to

mediante la falta de resistencia armada, la continuada obediencia de la población a las órdenes o mandatos del nuevo centro de poder.” (“[e]ffectiveness can be defined as the *de facto* control of the administrative structure of the State, and the acquiescence of the State’s population to the new government, expressed through the absence of armed resistance to the new authorities. Effectiveness expresses itself by the continuous obedience to the new center of power. This continuous obedience can manifest itself expressly, through plebiscites, in which the people adhere to the new government; or tacitly, through the lack of armed resistance or the population’s continuous obedience to the orders and mandates of the new center of power.”) ARÉCHAGA, Eduardo Jiménez de. *Derecho Internacional Público*, vol.II, Montevideo: Fundación de Cultura Universitaria, 1995, p.57. For Feldemann, “If an old government is overthrown or the result of the struggle against it is predetermined, the question of effectivity of the new government arises, that is whether the latter is effective in realizing its power over the State territory, whether the great majority of the population of the country obeys it and if it really represents this State in international relations. That is, it must be evident that the new government is capable of living, that it can and really does accomplish the State power.” In FELDEMANN, David. *International Personality*, 1985, p.400 (Collected Courses of the Hague Academy of International Law, vol. 191). See also Scipione: “On peut dire, en thèse générale, avec M. P. Costal qu’il existe une autorité effective là ou une personne, un comité ou une assemblée est obéi par la population d’un territoire déterminé et dans une forme telle que ses ordres sont respectés et observés, tout au moins en ce qui concerne l’impôt du sang et les autres contributions. Il n’est cependant pas toujours facile de juger de la généralité et de la continuité de cette obéissance. Quant à la généralité, on ne pourra prétendre que toute résistance cesse dans tout le territoire de l’État. Chaque gouvernement nouveau peut avoir sa Vendée. Quant à la continuité, on ne peut pas non plus se formaliser de quelques efforts pour la briser, pourvu que ces efforts n’arrivent pas jusqu’à la compromettre. (...) C’est donc la stabilité dans l’exercice du pouvoir, c’est la réalité de son action qui démontre le caractère effectif du gouvernement de facto.” SCIPIONE, Gemma. *Les gouvernements de fait*. 1924, p.337 (Collected Courses of the Hague Academy of International Law, vol. 004)

⁸ FELDEMANN, *op.cit.*, p.400. See, also, Pellet (et al.), “[l]a reconnaissance de gouvernement est une compétence de chaque État, compétence qu’il exerce de façon discrétionnaire, mais en se fondant, en principe, sur l’effectivité du gouvernement nouveau.” DAILLER, Patrick; FORTEAU, Mathias; PELLET. *Droit International Public*. 8 ed. Paris: L.G.D.J., 2009. For Dupuy, “[L]a conduite la plus conforme au respect de la règle de non-ingérence dans les affaires intérieures d’un État consiste pour un État tiers à ne subordonner sa reconnaissance qu’à la seule exigence de l’effectivité des pouvoirs du gouvernement considéré, ce qui constitue d’ailleurs la position classique défendue en principe par la France.” In DUPUY, Pierre-Marie. *Droit International Public*. Paris: Dalloz, 2002, p. 100.

⁹ See, for instance, Scipione: “Mais, puisque liberté n’est pas caprice, les États ne se décident à donner ou à refuser leur reconnaissance à un nouveau gouvernement qu’à la suite de considérations très complexes. Une première appréciation est toujours une appréciation de fait. Elle précède toute décision. On ne trouvera point d’État disposé à reconnaître un changement qui ne présente pas des caractères d’effectivité et de stabilité.” In SCIPIONE, Gemma. *Les gouvernements de fait*. 1924, p.337 (Collected Courses of the Hague Academy of International Law, vol. 004). In the same line of thought, Benadava wrote: “Un Estado no está obligado a reconocer a un nuevo gobierno, pero está facultado para reconocerlo si dicho gobierno es estable y efectivo” (A State is not under an obligation to recognize a new government, but is allowed to recognize it if such government is *stable and effective*). In BENADAVA, Santiago. *Derecho Internacional Público*. Santiago (Chile): LexisNexis, 2001, p. 113. See also BARBOZA, Julio. *Derecho Internacional Público*. Buenos Aires: Zavalia, 2004, p. 185; DIEZ DE VELASCO, Manuel. *Instituciones de Derecho Internacional Público*. 15 ed. Madrid: Tecnos, 2005, p. 272.

¹⁰ LAUTERPACHT, H. De Facto Recognition, Withdrawal of Recognition, and Conditional Recognition. *British Yearbook of International Law*, vol. 22, pp.164-190, 1945, p. 172.

¹¹ Ibid.

fulfill international obligations” are also found in State practice, though less commonly than the other criteria.¹²

Schwarzenberger, however, presented a rather critical view of the role of acceptance by the majority of population: “In view of the means of control and repression at the disposal of any present-day government, it is hardly convincing any longer to imagine that, ultimately, any government depends on the consent of those governed.”¹³

For Hans Blix, “the criteria of effective control, independence and stability is all that need be fulfilled by an authority legally to constitute a government.”¹⁴ Nevertheless, States may withhold recognition of a government until the regime fulfills certain conditions, which are “extraneous to its quality as a government in the international law sense.”¹⁵ According to Blix:

Such extraneous conditions may be of great diversity. Demands for democratic legitimacy as well as monarchic or any other “legitimacy” would be among them. Others could be more closely linked to the national interests of the foreign State, such as willingness of the new régime to respect obligations under treaties or general international law, to protect foreigners or foreign property, etc.¹⁶

With the perspectives of these jurists as context, we will turn to observations of State practice drawn from the reports submitted by Committee members. We stress that the descriptions and preliminary conclusions in this report are based on a small subset of States. They point to possible interesting trends and areas for further investigation.

II. The current practice of recognition of governments

A. Do States actually recognize governments?

The national reports found that, in general, the States studied did not formally recognize governments as part of their standard practice. One older example of a State *not* making *formal* declarations of governmental recognition is Mexico’s Estrada Doctrine. In 1930, Genaro Estrada, the Secretary of Foreign Relations of Mexico announced that:

[...] the Mexican Government is issuing no declarations in the sense of grants of recognition, since [this] nation considers that such course is an insulting practice

¹² Ibid.

¹³ SCHWARZENBERGER, Georg. *The fundamental principles of international law*. 1955, p.241 (Collected Courses of the Hague Academy of International Law, vol. 087)

¹⁴ BLIX, Hans Martin. *Contemporary aspects of recognition*, 1970, p.643 (Collected Courses of the Hague Academy of International Law, vol. 130)

¹⁵ “The criteria of effective control, independence and stability is all that need be fulfilled by an authority legally to constitute a government. When they are satisfied the authority can claim of other States conduct based on cognizance of its legal status: to be accepted in those functions in the international sphere which as of right may vest in it, e.g., representing the State in an international organization of which it is a member. This is not to say that it can claim close, friendly or even normal relations with other governments. It is open to a foreign State to reject any “optional co-operation”. This latitude may evidently be used until the régime becomes more attractive to the State in question by fulfilling other conditions which may be raised, and which are extraneous to its quality as a government in the international law sense.” Ibid, p.643-644.

¹⁶ Ibid, p.644: “In short, in determining whether to recognize another government, States do not find the democratic quality of the government as decisive; other factors are taken into consideration as well. The stated reason for recognizing the government may be that the transition to democracy is better achieved by engaging in relations with the non-democratic government, rather than isolating it. Indeed, the willingness to recognize a non-democratic government is not necessarily detrimental to the best interests of its people; respectable arguments are made by respectable commentators that a democratic form of government is not the best form for some States depending on their stage of economic and political development.”

and one which, in addition to the fact that it offends the sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments [...].¹⁷

The set of national reports submitted by the Committee Members revealed that the reasoning of the Estrada Doctrine finds place today in the practice of most of the States studied. The Australian report explained that Australia had abandoned the practice of extending formal recognition to new governments in 1988.¹⁸ Australian authorities chose to “conduct relations with new regimes to the extent and in the manner which may be required by the circumstances of each case.”¹⁹

The reports concerning the State practice of Austria,²⁰ Canada,²¹ Cyprus,²² France,²³ the Netherlands²⁴ and the United Kingdom²⁵ made reference to express policies of recognizing States, not governments. Documents cited in the reports on Dutch²⁶ and British²⁷ practice also alluded to the practice of other States of not recognizing governments. The Cypriot report also stated that “in the view of Cyprus, separate recognition of governments is an outdated practice (...)”.²⁸

¹⁷ AMERICAN JOURNAL OF INTERNATIONAL LAW. Estrada doctrine of recognition. Vol. 25, n.4, Official documents, 1931, p. 203.

¹⁸ PERT and TULLY, Australian Report.

¹⁹ Quoted in PERT and TULLY, Australian Report.

²⁰ HAFNER, Austrian Report.

²¹ WATERS, Canadian Report.

²² CONSTANTINIDES, Cypriot Report.

²³ “La pratique de la France est, en effet, d’entretenir des relations diplomatiques non pas avec des gouvernements mais avec des États. C’est ainsi qu’elle n’a accompli pas d’acte formel de reconnaissance lorsqu’un nouveau gouvernement est instauré à la suite d’un changement de régime. Il s’agit d’une position constante.” (Quoted from a response provided by the French Minister of Foreign Affairs on March 16, 1979). “Dans nos relations avec le Tchad, nous suivons les règles du droit international (...) nous reconnaissons les États et non les gouvernements” (Quoted from a response provided by the French Minister of Cooperation on November 25th, 1982). Both quotes appear in SALMON, Jean. *Dictionnaire de Droit International Public*. Brussels: Bruylant, 2001.

²⁴ RIBBELINK, Dutch Report.

²⁵ HAPPOLD, British Report.

²⁶ “The Netherlands Minister of Foreign Affairs sent a letter to Parliament on 4 July 1990 in which he informed Parliament “(...) of the practice that will be followed in future by the Dutch Government with regard to the recognition of governments.” And he continued: “The Dutch view is that there is no duty to recognize a new government and no right to recognition of a new government. Factors which the Netherlands believes to be important in relation to the recognition of a new government are not only the effectiveness of its rule but also its willingness and ability to maintain relations on a footing of equality with other governments and to observe international obligations entered into by the previous government. Finally, in certain circumstances attention is paid to whether a new government has the support of a large part of the population.” The Minister of Foreign Affairs then refers to the practice of the other states partners in the European Political Cooperation (EPC) which has become that “in the last few years in particular almost all of them have to some extent applied the doctrine ‘we recognize states, not governments’ (...) and since it is desirable to follow the policy of all the other EPC partners, the Dutch Government has come to the conclusion that it will no longer recognize governments.” The letter concludes: “The answer to questions whether the Dutch Government regards an entity as a foreign government will have to be inferred from the nature of the relations which it has with that entity. Discussion of such issues will not disappear as a result of a change of this kind in Dutch policy, but will instead concentrate on the nature of the relations.” RIBBELINK, Dutch Report.

²⁷ From 1981 onwards, the British government decided it would no longer formally recognize governments, as stated in a written answer in the House of Commons by the Lord Privy Seal: “We have conducted a re-examination of British policy and practice concerning the recognition of Governments. This has included a comparison with the practice of our partners and allies. On the basis of this review we have decided *we shall no longer accord recognitions to Governments*. The British Government recognizes States in accordance with common international doctrine.” UNITED KINGDOM. House of Commons. Parliamentary debates, Written Answers, vol. 983, 25 April 1980, c.278. Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law*, vol.51, 1980, p.367 (italics in original). Quoted in HAPPOLD, British Report.

²⁸ Quoted in CONSTANTINIDES, Cypriot Report.

Additionally, the Kosovar²⁹, Palestinian³⁰, Taiwanese³¹ and Tanzanian³² reports also mentioned a policy of according formal recognition to States, not governments. Also Polish³³ and Israeli³⁴ practice is limited to recognition of States, and no case of recognition of a government was reported.

The Italian report denoted a less explicit policy. Italy has never expressly stated its position of not recognizing governments, but it normally abstains from doing so. Recognition of governments is “implied from diplomatic relations and accreditation of diplomatic personnel”.³⁵

The U.S. report explained that, in the past forty years, as a means of exercising political approval or disapproval of foreign regimes, United States practice has shifted from the use of formal recognition of governments to deciding whether or not to have diplomatic relations with the regime in question. In most cases, the U.S. does not emphasize whether that government was “recognized.”³⁶ As noted in the Restatement of the Law (Third) of the Foreign Relations Law of the United States, “[r]epeatedly, the State Department has responded to inquiries [about the recognition of governments] with the statement: ‘The question of recognition does not arise: we are *conducting relations* with the new government’”³⁷.

Moreover, the *Restatement (Third)* notes that, while one State may recognize the government of another State, it may choose not to establish or to break off diplomatic relations with that government. The act of “breaking off [diplomatic] relations does not constitute de-recognition of the government.”³⁸

Within the sample of researched countries, only two clearly express a policy of recognizing governments: Japan and Brazil. Based on an official statement of the Government of Japan, the Japanese report explained that Japan may recognize a government even if it came to power by means that did not conform with that country’s constitutional framework.³⁹ It should be noted, however, that Japan has not granted any express recognition of government since 1976.⁴⁰

²⁹ “The Republic of Kosovo is independent since 2008, and without international supervision since 2012. Within this relatively short period of time as an independent state, Kosovo has focused on recognition of states and not on recognition of governments.” In MUHARREMI, Kosovar Report.

³⁰ “Palestine abstains from formally recognizing foreign governments, nor maintains any formal policy position on the bright-line criteria for which governments it would be unable to recognise. It simply engages in relations that imply such recognition.” AZAROVA, Palestinian Report.

³¹ HSIEH and CHEN, Taiwanese Report.

³² KAMANGA, Tanzanian Report.

³³ CZAPLINSKI, Personal communication with the co-rapporteurs via e-mail, 31 July 2016.

³⁴ RONEN, Personal communication with the co-rapporteurs via e-mail, August 1st, 2016.

³⁵ Quoted in MILANO, Italian Report.

³⁶ “In the past forty years, United States practice has moved away from focusing on the recognition of governments as a means of exercising political approval or disapproval of foreign regimes to one where diplomatic relations serve this function. While the U.S. may extend, withhold, or even “downgrade” diplomatic relations with various governments, in most cases (with the exception of certain instances, such as those discussed in Part II) the U.S. has not emphasized whether that government was “recognized.”

³⁷ Reporters’ Note 1 of Section 203 of the Restatement of the Law (Third) of the Foreign Relations Law of the United States. Quoted in Borgen, McGuinness and Roth, U.S. Report.

³⁸ *Restatement (Third)* § 203, *comm. d*, quoted in Borgen, McGuinness and Roth, U.S. Report; see also, *Oppenheim*, op. cit., Withdrawal of recognition, p. 177, § 52 (explaining that the U.S. has stated that severing diplomatic relations is not a withdrawal of recognition).

³⁹ “Japan in principle grants both recognition of States and recognition of governments. [...] Recognition of governments [...] is granted when a new government is established in a State in a way not in conformity with the constitution of that State, for example by revolution.” Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 8 [quoted and translated by Hamamoto]. HAMAMOTO, Japanese Report.

⁴⁰ HAMAMOTO, Japanese Report.

B. Criteria for the recognition of governments: evidence from State practice

According to the Japanese report, Japan sets two conditions for recognition of governments: territorial effective control and willingness and capability of observing international law. However, even when both conditions are present, there is no obligation to grant recognition.⁴¹

Brazil has listed four criteria to recognize a government: “(i) effective control over the territory and population; (ii) commitment to follow international obligations; (iii) the consent of the government to be recognized; and (iv) the democratic and constitutional character of the government transition in question.”⁴²

Even States that do not engage into the practice of recognizing governments may, occasionally, have to deal with competing claims of representation of a government. Most reports indicate that, in such situations, a position is developed on a case-by-case basis. Different criteria were mentioned, including legitimacy, effectiveness, effective control, national interest, position taken by regional⁴³ and international organizations and observance of democratic and constitutional procedures.

The United Kingdom seems to have a defined set of conditions concerning recognition during a contested transition. In the case *Republic of Somalia v Woodhouse Drake & Carey*⁴⁴, Justice Hobhouse enumerated the following criteria for acceptance of a government as the government of the State *in casu*:

(a) whether it was the constitutional government of the State;

(b) the degree, nature, and stability of administrative control - if any - that it

⁴¹ “I think that there are two conditions for such recognition: first, the newly-formed government has established its effective control in the State; and second, the newly-formed government is willing to and capable of observing international law. Be it recognition of a State or of a government, recognition is a unilateral act of the recognizing State. There is no obligation to grant recognition where the above conditions are met and it depends on the will of the recognizing State.” Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 8 [Translated by Hamamoto]. Quoted in HAMAMOTO, Japanese Report. Mr. Hayashi further explains: “When deciding whether to recognize a government, we consider whether such conditions are met. This is a decision to be made from a purely legal point of view. It goes without saying that, looking at the situation from another perspective, we consider it important that democratic regimes and respect of human rights spread all over the world. However, I trust that you understand that we will not necessarily withhold recognition of a government or of a State simply because [...] there is no democratic election or no such political regime as the one we consider desirable in that State. When an entity is newly created as a State or a new government exercising effective control is objectively formed, it will be necessary to maintain relations with it concerning various questions [...]” Statement by Mr. Akira Hayashi (Director-General, Treaties Bureau, Ministry of Foreign Affairs), Committee on Foreign Relations, House of Representatives, 16 April 1997, p. 9 [Translated by Hamamoto]. Quoted in HAMAMOTO, Japanese Report.

⁴² Telegram sent by the Ministry of Foreign Relations of Brazil to the Brazilian Embassy in Washington, about the Brazilian Position in Matters of Recognition of Government. 14 October 1975. In BRAZIL, Brazilian Foreign Policy Handbook: 1961-1981, 2nd ed., Brasília: FUNAG, 2012, pp.180-181.

⁴³ Kosovo Report: “In conformity with its general foreign policy, Kosovo would follow the line taken by the European Union.” In MUHARREMI, Kosovar Report. The Tanzanian report also made reference to the role played by the African Union in the recognition of the “NTC-led Government in Libya”. KAMANGA, Tanzanian Report. See also MURPHY, Sean D. Democratic Legitimacy and the Recognition of States and Governments. *International and Comparative Law Quarterly*, vol. 48, pp. 545-581, 1999.

⁴⁴ UNITED KINGDOM. High Court. Queen’s Bench Division. *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*, 1993, p.54 (‘Woodhouse’). Available at <<http://www.uniset.ca/other/cs3/1993QB54.html>> .

exercised over the territory of the State;

(c) whether the United Kingdom government had any dealings with it and if so, the nature of those dealings; and

(d) in marginal cases, the extent of international recognition that it had as the government of the State.

As it will be later discussed, these criteria were applied in the case *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc*.

C. Cases in which governments or other entities were (or were not) recognized

Members of the Committee were asked to provide relevant examples in which the State they were reporting on recognized (or did not recognize) governments or other entities. An example common to many reports is the recognition of “the Government of the People’s Republic of China as the only legal Government of China”.⁴⁵ National reports cited bilateral communiqués between the People’s Republic of China and Austria (1971)⁴⁶, Brazil (1974)⁴⁷, Italy (1970)⁴⁸, Japan (1972)⁴⁹ and the United States (1978)⁵⁰, in which recognition of government was addressed, among other issues.

More recent examples have focused on the legal significance of new terminology coming into practice.

The Austrian, Canadian, Palestine and Slovenian reports mentioned, as an example of not recognizing a government, the case of the National Transitional Council (NTC), in Libya. In the midst of the struggle for power between the Qaddafi regime and NTC, these States reconciled their respective positions of not recognizing governments and their will to politically support the NTC by recognizing the NTC as the “legitimate representative of the Libyan people” and not as the “government of Libya”.⁵¹ Similar statements concerning the status of the NTC were made by France, Qatar, the Maldives, Gambia, Senegal, Turkey, Jordan, Spain, and Germany.⁵²

⁴⁵ HAFNER, Austrian Report; BIAZATTI, Brazilian Report; MILANO, Italian Report; HAMAMOTO, Japanese Report; BORGES, MCGUINNESS and ROTH, U.S. Report.

⁴⁶ See HAFNER, Austrian Report.

⁴⁷ See BIAZATTI, Brazilian Report.

⁴⁸ See MILANO, Italian Report.

⁴⁹ Joint Communiqué of the Government of Japan and the Government of the People’s Republic of China, adopted on 29 September 1972. Available at <<http://www.mofa.go.jp/region/asia-paci/china/joint72.html>>. Quoted in HAMAMOTO, Japanese Report.

⁵⁰ The complete text of the joint communiqué between the United States of America and the People’s Republic of China is available at <<http://www.taiwandocuments.org/communique02.htm>>.

⁵¹ HAFNER, Austrian Report; WATERS, Canadian Report, AZAROVA, Palestinian Report and ŠKRK, Slovenian Report. According to Azarova, “Palestine recognized the NTC as *legitimate representative of Libyan people* on 22 August 2011 through a declaration by President Mahmoud Abbas [no written record]. [...] the President’s authority is art. 40 of the 2003 amended Basic Law: ‘The President shall accept the credentials of foreign delegates to the Palestinian National Authority.’ [...] the 2003 draft Permanent Constitution makes similar provision at art. 125: ‘The president of the state [...] shall accept the credentials of representatives of foreign states and international and regional organizations.’” See <<http://www.naharnet.com/stories/en/13431>>.

⁵² TALMON, Stefan. Recognition of the Libyan National Transitional Council. *ASIL Insights*, vol. 15, issue 16, June 2011. Available at <<https://www.asil.org/insights/volume/15/issue/16/recognition-libyan-national-transitional-council>>. According to Talmon, France was the first country to recognize the NTC as “the legitimate representative of the Libyan people”.

Analogous expressions were used to refer to the NTC by other States. Italy described the NTC as “the only legitimate interlocutor for bilateral relations”.⁵³ The United States used the terminology “legitimate governing authority,” and also stated that it no longer recognized the government of Muammar Qaddafi.⁵⁴ In considering this, the authors of the U.S. report wrote:

We note that the U.S. government did not state that it was recognizing a “government” but a “legitimate governing authority.” Whether there is a legal significance to the difference terms remains to be borne out in further practice. However, please note the similar practice concerning the Syrian Opposition Coalition, [...] which explicitly stated that in that case, recognizing a legitimate representative of the people was not tantamount to recognizing a government.⁵⁵

Taiwan, for its part, explicitly stated that it regarded the NTC as the new government of Libya:

The government of the Republic of China (Taiwan) respects the people of Libya’s pursuit of democracy and recognizes the National Transitional Council (NTC) as the sole legitimate *governing authority* for Libya. Taiwan is willing to work with the *new Libyan government* to promote various cooperative projects, so as to enhance substantive bilateral relations. It is hoped that the welfare of the Libyan people will be enhanced under the leadership of the *new government*.

In the case of Syria, some States demonstrated support to the National Coalition by acknowledging its position as the legitimate representative of the Syrian people, but not using the term “government”. See, for examples, the reports concerning Australia⁵⁶, Japan⁵⁷, Slovenia⁵⁸, Netherlands⁵⁹, the United Kingdom⁶⁰ and the United States⁶¹.

The Libyan and Syrian cases point to the emerging practice of declaring or even “recognizing” an entity as a “legitimate representative” or a “legitimate governing authority” or some other new term. Do such declarations depart from the preceding practice of some States of not formally recognizing governments? Are such statements tantamount to recognizing a government? In the Syrian case, the United States clarified its view of the legal significance of the “legitimate representative” terminology it was using:

The U.S. Department of State announced at the Friends of the Syrian People meeting in December 2012 that the United States was recognizing the Syrian Opposition Coalition

⁵³ MILANO, Italian Report.

⁵⁴ BORGES, MCGUINNESS and ROTH, U.S. Report.

⁵⁵ Ibid.

⁵⁶ Australian Minister for Foreign Affairs, “Syrian Opposition Council”, media release 13 December 2012. < http://foreignminister.gov.au/releases/2012/bc_mr_121213.html >. Quoted in PERT and TULLY, Australian Report.

⁵⁷ The Fourth Ministerial Meeting of The Group of Friends of the Syrian People, Marrakech, Chairman’s conclusions, 12 December 2012. Quoted in HAMAMOTO, Japanese Report.

⁵⁸ ŠKRK, Slovenian Report.

⁵⁹ RIBBELINK, Dutch Report.

⁶⁰ UNITED KINGDOM. House of Commons. Parliamentary debates, vol. 553, 20 November 2012, cs. 445-450. Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law*, vol.83, 2012, p.358; UNITED KINGDOM. House of Commons. Parliamentary debates, vol. 541, 28 February 2012, c. 266W Reprinted in: United Kingdom Materials on International Law, *British Yearbook of International Law* reprinted in , vol.83, 2012, p. 356.

⁶¹ UNITED STATES OF AMERICA. Office of the Legal Adviser United States Department of State. *Digest of United States Practice in International Law*. 2012, CarrieLyn D. Guymon (ed.), p. 281. <<http://www.state.gov/s/l/2012/index.htm>>.

(“SOC”) as the legitimate representative of the Syrian people. The United States does not recognize the SOC as the government of Syria.⁶²

The U.S. made this announcement over a year after its recognition of the TNC in Libya as a “legitimate governing authority.” While in the Libyan case there was certain ambiguity concerning whether that recognition was tantamount to the recognition of a government, in the Syrian case the U.S. government clearly stated in its practice, a “legitimate representative of the Syrian people” is not co-extensive with being the government of Syria.

Other reports, in addition to the American, assert that these declarations of support do not constitute formal recognition of government.⁶³ However, the real meaning of the expression “the legitimate representative of the people” remains unclear.⁶⁴ The Australian report affirms that “[...] it is merely a political expression of support for a particular group”.⁶⁵ On the other hand, the Slovenian report states that these declarations “[...] concern the recognition of the legitimacy of relevant political movements or coalitions in the chaotic circumstances due to the dissolution of the previous regime or, in case of an internal armed conflict (civil war).”⁶⁶ The Dutch report mentions that recognizing a regime as the legitimate representative of the people “[...] is a political matter without international law implications.”⁶⁷ From the practice of the States studied, is not possible to extract a definitive conclusion. We can only say that the evolving use of such “legitimate representative” terminology is one area of evolving State practice in relation to the law of recognition.

In contrast to the use of these new terms, once can in fact see recent clear statements of recognition. Consider the recognition of the government of Somalia, discussed in the Japanese and U.S. reports. As quoted in the Japanese Report, the State Minister for Foreign Affairs had previously declared:

Since 1991, armed conflicts continue. Although a Transitional Federal Government was established in 2005, it still does not exercise effective control over the whole territory of Somalia. For these reasons, Japan has not recognized it. [...] We are certainly aware that the TFG is now considered to represent Somalia in the United Nations or the African Union and there is an increasing necessity to cooperate with the TFG on the international plane. We will therefore carefully examine the matter, considering various circumstances surrounding Somalia.⁶⁸

⁶² *Ibid.* As quoted in BORGES, MCGUINNESS and ROTH, U.S. Report, the U.S. Department of State spokesperson said: “As the President said last night, this reflects our positive view of the progress that the Syrian Opposition Council has made in establishing organizational structures, in making connections with the political opposition on the ground. And it also will give us the opportunity to better direct the nonlethal assistance that we are providing so that it can get directly to political leaders on the ground in the local coordinating councils, particularly in those areas of Syria that have now been liberated from regime control, and where these local coordinating councils are taking on functions of having to provide basic services, et cetera. So we want to strengthen a political opposition that’s committed to a democratic transition.” See, UNITED STATES OF AMERICA. Department of State Daily Press Briefing. Victoria Nuland Spokesperson Washington, DC, (December 12, 2012). Available at <http://www.state.gov/r/pa/prs/dpb/2012/12/201930.htm#SYRIA>.

⁶³ HAMAMOTO, Japanese Report; ŠKRK, Slovenian Report; PERT and TULLY, Australian Report; BORGES, MCGUINNESS and ROTH, U.S. Report.

⁶⁴ The Japanese report says that the meaning of the expression “the legitimate representative of the people” “[...] remains ambiguous”. See HAMAMOTO, Japanese Report.

⁶⁵ PERT and TULLY, Australian Report.

⁶⁶ ŠKRK, Slovenian Report.

⁶⁷ RIBBELINK, Dutch Report.

⁶⁸ JAPAN. House of Councilors. Committee on Official Development Aid. Mr. Yamane Ryuji (State Minister for Foreign Affairs), 27 March 2012, p. 3. Quoted in HAMAMOTO, Japanese Report.

Japan only recognized the government of Somalia in November, 2012, after the adoption of the Somali provisional constitution.⁶⁹ Assistant Vice-Minister for Foreign Affairs Kazuyuki Yamazaki said: “The Japanese Government recognized the new government of Somalia, which was established for the first time [...] 21 years ago”.⁷⁰

Similarly, the United States explicitly recognized the government of Somalia on January 17, 2013. The Note from the Spokesperson of the U.S. Department of State explained:

In 2012, after more than a decade of transitional governments, Somalia completed its political transition process. This culminated in a new provisional constitution, a new parliament, and the election by that parliament of Mr. Hassan Sheikh as Somalia's president. In recognizing President Hassan Sheikh's government as the Government of Somalia, the United States is committing to sustained diplomatic engagement with the Somali authorities.⁷¹

Two straightforward statements of recognition of a government, without any new terminology.

III. The domestic legal consequences due to the recognition or non-recognition of the government of another state

Recognition of a regime may have a variety of legal consequences such as access to the domestic courts of the recognizing State, control of State property located abroad (such as bank accounts), possibility to claim certain privileges and immunities and the attribution of legal value to foreign official acts and documents.⁷²

The case *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc* (QBD 25 Feb. 1998) provides an example of a domestic consequence due to the recognition of another State entity.⁷³ Sierra Leone Telecommunications Co Ltd (Sierratel), a company incorporated in Sierra Leone, was wholly owned and controlled by the Sierra Leone government. It held an account with Barclays Bank in London. Under its mandate, Barclays Bank was required to act on the authority of the directors of Sierratel.

When a military coup took place in Sierra Leone in 1997, the democratically elected government of President Kabbah was forced into exile in Guinea, where it claimed to continue to act

⁶⁹ “The Japanese Government recognized the new government of Somalia, which was established for the first time since 21 years ago.” JAPAN. House of Representatives. Committee on Land and Transportation. Mr. Kazuyuki Yamazaki (Assistant Vice-Minister for Foreign Affairs), 29 May 2013, p. 7 [translated by Hamamoto]. No reason for the recognition was indicated by the Assistant Vice-Minister. Quoted in HAMAMOTO, Japanese Report.

⁷⁰ Ibid.

⁷¹ UNITED STATES OF AMERICA. Office of the Spokesperson. Somalia President Hassan Sheikh Mohamud's Visit to Washington, DC. Media Note, Washington, DC. January 17, 2013. Available at <<http://www.state.gov/r/pa/prs/ps/2013/01/202997.htm>>. See also UNITED STATES OF AMERICA. Office of the Legal Adviser United States Department of State *Digest of United States Practice in International Law*. 2013, CarrieLyn D. Guymon (ed.), p.251-52. Available at <<http://www.state.gov/s/l/2013/index.htm>>. Quoted in BORDEN, MCGUINNESS and ROTH, U.S. Report.

⁷² BORDEN, MCGUINNESS and ROTH, U.S. Report and KAMANGA, Tanzanian Report. See, in this regard, Peterson, who states that “Differences of treatment persist in three fields: a new government's ability to sue in foreign courts, suits involving governmental acts having extraterritorial effect, and possession of state property located abroad.” (PETERSON, M.J. Recognition of Governments Should Not Be Abolished, *American Journal of International Law*, vol.77, pp. 31-50, 1983, p.36.)

⁷³ UNITED KINGDOM. High Court. Queen's Bench Division. *Sierra Leone Telecommunications Co Ltd v Barclays Bank Plc*, 1998.

as the government of Sierra Leone. Barclays Bank was then notified by the alleged new controllers of Sierratel that the old board of the company had been dissolved and that, with immediate effect, the previous signatories were suspended. Following the notification, Barclays Bank refused to meet payments. Sierratel applied to the court for a declaration of right, contending that the previous mandate remained valid and that the authority of the signatories had not been validly revoked.

The court applied the criteria set in the case *Republic of Somalia v Woodhouse Drake & Carey (Suisse) SA*.⁷⁴ It concluded that the military junta was not the constitutional government of the State and had no control over more than two-thirds of the country. Additionally, the government of the United Kingdom had consistently censured the military coup and continued to deal with the Kabbah government; finally, the coup had been condemned by the United Nations Security Council, the Commonwealth, the Organization of African Unity and the European Community.

The *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* case⁷⁵, a decision rendered by the Queen's Bench Division in 2011, provides another illustration of disputed transition of government. It addressed the status of the National Transitional Council of the State of Libya (NTC) and the prerogative of its representatives to control funds held by the Libyan embassy in the United Kingdom.

The Libyan embassy had funds in the British Arab Commercial Bank. A significant portion of those funds was intended to finance student grants for Libyan students in the United Kingdom.

In 2011, after the adoption by the United Nations Security Council of economic sanctions against Libya, the United Kingdom's relation with the Gaddafi government deteriorated and, in July, the NTC was recognized as the sole government of Libya. Subsequently, diplomats from the previous regime were asked to leave the country and new representatives were indicated by the NTC⁷⁶.

Following these events, the British Arab Commercial Bank received a series of contradicting instructions regarding the management of the student grant funds. The Bank was instructed by both contending sides, diplomats of the Gaddafi government and the Libyan Foreign Bank, its major shareholder, to prevent further withdrawals from the accounts. Despite these orders the Libyan embassy requested the payment of certain student grants⁷⁷.

The Bank started proceedings before the Queen's Bench Division asking for a declaratory judgment as to who could operate the mandate over the funds. The Court decided that the accounts belonged to the Libyan embassy and, as the NTC diplomats were the only accredited representatives of Libya in the UK, the funds owned by the Libyan government were under their control⁷⁸.

The Japanese report also discussed a case adjudicated by the Japanese Supreme Court in 2007 (*Kokaryo* case). In 1952, a dormitory in Kyoto (named "Kokaryo") was purchased by the Republic of China, to be used by Chinese students.

Some residents, as an act of political support of the government of the People's Republic of China, refused to observe residential regulations. The consulate of the Republic of China, unable to have the students comply with the regulations or to leave, brought a claim to the Kyoto District Court

⁷⁴ Woodhouse, op. cit.

⁷⁵ UNITED KINGDOM. High Court. Queens Bench Division. Commercial Court. *British Arab Commercial Bank plc v National Transitional Council of the State of Libya, ex parte Foreign and Commonwealth Office*, Case No 2011 FOLIO 944, 2011.

⁷⁶ Ibid, paras.2-6.

⁷⁷ Ibid, paras.7-9.

⁷⁸ Ibid, paras.25-28.

in 1967.⁷⁹ Meanwhile, in 1972, with the suit still pending, Japan recognized the Government of the People's Republic of China as "the only legal Government of China".

Two legal issues relating to the shift in the recognition of the Chinese government were brought before the lower courts (i.e., the Kyoto District Court and the High Court of Osaka): (1) whether or not the Republic of China (Taiwan) had lost all *locus standi* before Japanese courts and (2) whether or not the ownership of *Kokaryo* had been transferred to the People's Republic of China.⁸⁰

The lower courts recognized the *locus standi* of the Republic of China (Taiwan) and rejected the transfer of *Kokaryo's* ownership to the People's Republic of China. The decision, however, was reversed by the Japanese Supreme Court. The relevant parts of the decision, quoted in the Japanese report, are the following:

[T]he party to be identified as the plaintiff in this case is the State of China whose name was the "Republic of China" at the time of the filing of this lawsuit, but then changed to the "People's Republic of China" on 29 September 1972, when this case was first pending before the first instance court. [...]

Nevertheless, on the premise that the party identified as the plaintiff was the party existing as a de facto State with control over Taiwan, the court of the first instance carried out the proceedings and gave judgment [...].

Accordingly, the Court cannot but conclude that on and after 29 September 1972, while this case was first pending before the first instance court, the court proceedings were carried out without delegation of powers necessary to perform procedural acts on behalf of the person identified as the plaintiff, i.e., the State of China, and therefore the original judgment shall inevitably be quashed without passing judgment on the parties' arguments [...].⁸¹

Therefore, the Japanese Supreme Court considered that the Republic of China (Taiwan) had lost the right to represent China in Japan, left the issue of ownership open and sent the case back to the court of first instance (Kyoto District Court). The case is still pending at the present time.⁸²

In regards to U.S. law, the recognition of a regime as the government of a State can lead to that government being able to: (a) maintain a suit before a U.S. court, (b) claim sovereign immunity if sued in U.S. court, (c) access property of the State, such as bank accounts, within the jurisdiction of the U.S., and (d) have its lawful acts recognized by the U.S.⁸³

In *Banco Nacional de Cuba v. Sabbatino*, the U.S. Supreme Court stated that foreign States are allowed to access U.S. courts based on the principle of comity.⁸⁴ It also decided that the U.S.

⁷⁹ ANDO, Nisuke. *Khoka-Ryo Case and International Law: A Critique of the Japanese Supreme Court Decision. Japanese Yearbook of International Law*, vol.53, 2010, pp.1-18.

⁸⁰ Ibid.

⁸¹ Judicial Decisions in Japan. *Japanese Yearbook of International Law*, vol. 51, pp.512-569,2008. Judgment, Supreme Court, 27 March 2007 p. 512. Quoted in HAMAMOTO, Japanese Report.

⁸² It is further explained in the Japanese Report that the "2007 Judgment of the Supreme Court has been severely criticized by a number of Japanese international lawyers. Nisuke Ando argues that the *Kokaryo* case, being a civil one, has nothing to do with the right to represent the State of China and that the 1972 Joint Communiqué (...) does not prevent Japan from allowing its nationals to engage in various transactions of private character with the people of Taiwan or with the government of the Republic of China." In HAMAMOTO, Japanese Report.

⁸³ BORGES, MCGUINNESS and ROTH, U.S. Report., referring to discussions in MURPHY, Sean. *Principles of International Law*. 2nd ed., West Academic Publishing, 2012, p. 41; BEDERMAN, David. *International Law Frameworks*. Foundation Press, 2001, p.56-57); *Oppenheim's*, op. cit., p.158-160, § 47 and accompanying notes concerning U.S. practice; see, also, *Restatement (Third)* § 205 concerning the effects of non-recognition.

⁸⁴ The U.S. Supreme Court wrote: "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'

courts may accept suits brought by governments with which the U.S. does not maintain diplomatic relations, such as the Castro regime in Cuba.⁸⁵ It is further explained that

This followed earlier jurisprudence that suits by corporations owned or controlled by unrecognized regimes may be permitted. In cases where the Executive has explicitly stated that a particular government is barred from accessing U.S. courts, courts will defer to that decision. In cases where the Executive is silent, a U.S. court may then determine whether to treat an entity as the government of a state.⁸⁶

While U.S. courts have not held recognition of a government by the Executive to be a necessary condition for sovereign immunity,⁸⁷ they have held it to be a sufficient basis for immunity.⁸⁸ Moreover, where the Executive has recognized a competitor government or has made a definitive determination that a *de facto* government is not to be recognized, the courts would be unlikely to confer sovereign immunity on the *de facto* government and its agencies.⁸⁹

A U.S. federal court surveyed practice across jurisdictions in the United States and discerned at least four “divergent approaches” to issues related to unrecognized entities, which may include issues of aspirant States or governments:

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 the purpose of engaging in commercial transactions, conveying private rights and giving effect to judicial and ministerial acts within the recognized entities’ territory;
3. Courts defer to the Executive policy and statements when determining the scope of sovereign immunity of unrecognized entities;
4. In the absence of an Executive policy or Statement, courts permit jurisdiction over unrecognized entities if such jurisdiction does not violate public policy or the interests of justice.⁹⁰

in the legal sense ‘neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other.’” UNITED STATES OF AMERICA. Supreme Court. *Banco Nacional de Cuba v. Sabbatino*, 1964 (“*Sabbatino*”). In: United States Reports vol. 376 , 1964, p.408-409; Supreme Court Reporter, vol. 84, p.930. Quoted in BORGEN, MCGUINNESS and ROTH, U.S. Report.

⁸⁵*Sabbatino*, 930-32. See also, *Restatement (Third)* § 205, Reporter’s Note 1. Cited in BORGEN, MCGUINNESS and ROTH, U.S. Report.

⁸⁶ BORGEN, MCGUINNESS and ROTH, U.S. Report. Citations omitted.

⁸⁷ BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to UNITED STATES OF AMERICA. Court of Appeals of New York. *Wulfsohn v. Russian Socialist Federated Soviet Republic*, 1923. In: New York Reports, vol. 234, p. 372; North Eastern Reporter, vol. 138, p. 24.

⁸⁸ BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to UNITED STATES OF AMERICA. Supreme Court. *National City Bank of New York v. Republic of China*, 1955. In: United States Reports vol. 348, p. 358 (continuing U.S. recognition of the Taiwan-based government compelled immunity, since “[t]he status of the Republic of China in our courts is a matter for determination by the Executive and is outside the competence of the Court”).

⁸⁹ BORGEN, MCGUINNESS and ROTH, U.S. Report., citing to Note, HINES, Julius H. Why do Unrecognized Governments Enjoy Sovereign Immunity--A Reassessment of the Wulfsohn Case. *Virginia Journal of International Law*, vol. 31, issue 4, pp. 717-760, 1991, p.759 (1991).

⁹⁰ BORGEN, MCGUINNESS and ROTH, U.S. Report, the list is adapted from UNITED STATES OF AMERICA. District Court for the Southern District of New York. *Knox v. PLO*, 2004. Federal Supplement 2nd series, vol.306, p. 441-43. 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

In addition, courts in the United States have given effect to acts “dealing solely with private, local and domestic matters,” within the territory of the entity, as opposed to “with respect to matters extending beyond the borders [...]”⁹¹

There is a difference between an entity being regarded as simply “unrecognized” and a situation in which there is a U.S. policy of non-recognition. The key factual distinction between the two is whether the Executive has stated an affirmative policy of non-recognition, or has remained silent; in the latter case, the courts may treat the entity as simply unrecognized.

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) 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. »

⁹¹ UNITED STATES OF AMERICA. District Court for the Southern District of New York. *Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 1968. Federal Supplement, vol. 293, p.900 modified U.S. Court of Appeals for the Second Circuit. Federal Supplement 2nd series, 1970, vol. 433, p. 686 , cert. denied United States Reports vol. 403, p. 905; Supreme Court Reporter, vol. 91, p. 2205, 1971 (refusing to give effect to German Democratic Republic’s legislation concerning the Zeiss Foundation) as quoted by BORGES, MCGUINNESS and ROTH, U.S. Report. See also *Restatement (Third)* § 205, Reporter’s Note 3.

IV. The Vienna Convention on Diplomatic Relations and Recognition of Governments

Despite the relevance of the issue, little has been written on the potential link between diplomatic relations and recognition of governments. When addressing the matter in 1924, Scipione asserted that the admission of a right of diplomatic representation culminated in the admission of the legal existence of the government.⁹² Hans Blix, in a later work (1970), affirmed that there had been no examples of the establishment of diplomatic relations without recognition:

A government can recognize another State or government without establishing diplomatic relations with it. If official contacts will be numerous, voluminous or important, it may, however, prove practical or even indispensable to establish a channel for official contacts by means of diplomatic missions. The practice of States evidences no cases, on the other hand, in which such diplomatic relations have been established without recognition. Such relations are universally comprehended as implying recognition.⁹³

In the same line of thought, Warbrick argued that “the opening of diplomatic relations is one of the few objective acts from which recognition may be implied”.⁹⁴

When asked about obligations which may flow from the acceptance of credentials under Vienna Convention on Diplomatic Relations, most reports made reference to the terms of convention itself, such as the diplomatic privileges and immunities. Others, which dealt specifically with the possible relation between diplomatic relations and recognition had distinct responses and also addressed recognition of States.

The Australian⁹⁵ and the Palestinian⁹⁶ reports stated that acceptance of credentials under the Convention necessarily meant that the sending State had been recognized by their respective States (i.e., Australia and Palestine). On the other hand, the Slovenian report pointed out that Slovenia had accepted the credentials of the Ambassador of Palestine, although it had not yet recognized it at the time.

As for the United Kingdom, as mentioned in one of the British reports, “the existence of diplomatic relations does not necessarily constitute dealings on a ‘normal Government to Government basis’, as diplomatic relations are said to be maintained with States rather than Governments.” The

⁹² “Nous savons que, sauf engagements particuliers, un État n'a le devoir ni de reconnaître, ni de ne pas reconnaître un gouvernement de fait; mais ce qui est bien démontré par ces anciens débats et ce qui reste toujours incontestable est qu'admettre un droit de représentation diplomatique, c'est admettre aussi l'existence légale du gouvernement dont on accepte officiellement les envoyés". In: SCIPIONE, Gemma. *Les gouvernements de fait*. 1924, p.372 (Collected Courses of the Hague Academy of International Law, vol. 004).

⁹³ BLIX, op. cit., p.600.

⁹⁴ WARBRICK, Colin. The New British Policy on Recognition of Governments. *International and Comparative Law Quarterly*, vol. 30, issue 3, pp. 568-592, July 1981, p. 569. See, also, Rosenne: “(...) acceptance by the competent authorities of a State of the accreditation of an individual such as an ambassador, means recognition of the accrediting authority” ROSENNE, Shabtai. *The perplexities of modern international law: general course on public international law*. 2001, p. 269 (Collected Courses of the Hague Academy of International Law, vol 291).

⁹⁵ “In the case of Australia, yes, but only because acceptance of credentials under the Convention necessarily means that the sending state has been recognised by Australia. The consequences are that the Convention's provisions on diplomatic privileges and immunities will apply.” PERT and TULLY, Australian Report.

⁹⁶ “If Palestine as receiving state accepts the credentials of a diplomat from a sending state, the acceptance implies that Palestine recognizes the sending state as a state and the government of the sending state as the government of the sending state.” AZAROVA, Palestinian Report.

Taiwanese report cautioned it was unclear whether acceptance of credentials led to “legal obligations in addition to those in the said Convention.”⁹⁷

Closing Observations

The practice of the States studied in this report reveals that formal recognition of governments seems to no longer be a widespread international practice. Accordingly, when faced with two or more competing regimes claiming to be the government, States frequently offer political support to one of them by treating it as the legitimate representative of the local people or the rightful authority. The word "government" is deliberately not used in order to avoid any contraction in the position of not recognizing governments.

The criteria to determine which competing claim shall prevail vary in the State practice. Most reports indicated that a decision choosing a regime to be supported is taken on a case-by-case basis, considering, *inter alia*, effectiveness, national interest, the position adopted by regional and international organizations and respect for democratic and constitutional procedures.

Moreover, recognition of a regime may have legal and political implications in the domestic sphere of the recognizing State. For instance, recognition can affect the control of State property as well as privileges and immunities and the *locus standi in judicio in the courts of the recognizing country*.

A very uncertain aspect relating to the formal recognition of governments is its impacts on the diplomatic relations. The reports submitted by the members of the Committee indicates that the State practice is far from uniform on this issue. Thus, the maintenance (or severance) of diplomatic relations and the acceptance (or rejection) of credentials under the Vienna Convention on Diplomatic Relations do not necessarily mean that a new regime in the sending State had been or had not been recognized by the receiving States.

⁹⁷ HSIEH and CHEN, Taiwanese Report.