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CHAPTER

6 Recognition of states and governments

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Abstract

This chapter begins with a discussion of the ‘declaratory’ and ‘constitutive’ views of recognition. According to the declaratory view, the legal effects of recognition are limited: recognition is a declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law. The declaratory theory of recognition is opposed to the constitutive view, according to which the political act of recognition is a precondition of the existence of legal rights: in its extreme form this implies that the very personality of a state depends on the political decision of other states. Discussion then turns to the distinction between recognition of states and recognition of governments, collective non-recognition and sanctions, and issues of recognition before national courts.

Keywords: [states](#), [governments](#), [non-recognition](#), [national courts](#), [declaratory theory](#), [constitutive theory](#)

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1. Recognition as a General Category

Whenever a state acts in a way which may affect the rights or interests of other states, the question arises of the significance of their reaction to the event.¹ In *Legal Status of Eastern Greenland*, it was held that Norway had, through a declaration by its Foreign Minister, Nils Ihlen, accepted Danish title to the disputed territory.² There the acceptance by Norway of Denmark's claim was by informal agreement: in other instances, formal treaty provisions will involve recognition of rights. However, apart from agreement, legally significant reactions may occur in the form of unilateral acts or conduct involving recognition or acquiescence. Unlawful acts of states may meet with protest from other states. Such acts are not in principle opposable to other states in any case, and protest is not a condition of their illegality. Conversely, the validity of a claim to territory is not conditioned on its acceptance by other states.

But acts of protest or recognition play a significant role. Furthermore, there is a spectrum of issues involving areas of uncertainty, novel, and potentially law-changing claims (cf the development of claims to continental shelf resources: chapter 11), or which arise in a context where issues are best settled on an ad hoc and bilateral basis. ↪ Disputes are often decided on the basis of facts, including elements of acquiescence, establishing a special content of legal relations between the parties, and this quite apart from treaty. Finally, protest and recognition may involve pure acts of policy not purporting to involve legal characterizations of other states' conduct.

More specifically, however, the term 'recognition' (if not exactly a term of art)³ is commonly used to refer to two related categories of state acts: first, the recognition of another entity as a state; and, secondly, the recognition of that entity's government as established, lawful, or 'legitimate', that is as entitled to represent the state for all international purposes.⁴ It further implies an undertaking by the recognizing state that it will treat the entity in question as a state (or as the government of an already recognized state).⁵

2. Recognition of States

(A) Theoretical overlay

In this context, legal writing has adopted the emphasis and terminology of political relations, notably in relation to the fundamental issue of recognition of states. Indeed, 'there is probably no other subject in the field of international relations in which law and politics appear to be more closely interwoven'.⁶

The dominance of the category 'recognition' has led to some perverse doctrine. When two states are in dispute over title to territory, a court or tribunal will examine all the available and legally significant conduct of either party. A declaration by one party that it does not 'recognize' the title of the other will not determine the issue, and will usually be worth very little. A statement registering the fact that at a certain date the opponent was in actual occupation may be evidence, but only within the context of the particular case will the statement have significance. When the existence of states and governments is in issue, by contrast, a sense of perspective seems to be elusive.

Indeed, the complexity one may expect of legal issues in interstate relations has been compacted into a doctrinal dispute between the 'declaratory' and 'constitutive' views of recognition.⁷ According to the declaratory view,⁸ the legal effects of recognition are limited: recognition is a declaration or acknowledgement of an existing state of law and fact, legal personality having been conferred previously by operation of law. In a relatively ↪ objective forum such as an international tribunal, it would be entirely proper to accept the existence of a state although it is not recognized by the other party to the dispute or by third states.⁹ This perspective appears to have been accepted (at least tacitly) by the International Court.¹⁰ In *Bosnian Genocide*,¹¹ it

was argued by the Socialist Federal Republic of Yugoslavia (SFRY) that the allegations of the breach of the Genocide Convention¹² made by Bosnia-Herzegovina were not admissible as the parties to the dispute had not recognized each other at the time of the events in question. The Court dismissed this argument on the basis that, as recognition had been given subsequently in the Dayton Accord,¹³ any defect was merely procedural and could be remedied by re-filing the claim to relate to events of genocide occurring prior to 1995.

Substantial state practice supports the declaratory view.¹⁴ Unrecognized states are quite commonly the object of international claims by the very states refusing recognition. An example is Israel, long held accountable under international humanitarian and human rights law by certain Arab states that still deny it recognition.¹⁵

The declaratory theory of recognition is opposed to the constitutive view, according to which the political act of recognition is a precondition of the existence of legal rights: in its extreme form this implies that the very personality of a state depends on the political decision of other states.¹⁶ The most nuanced defence of this perspective is that of Lauterpacht, who conceives of states as the gatekeepers of the international realm:

[T]he full international legal personality of rising communities ... cannot be automatic ... [A]s its ascertainment requires the prior determination of difficult circumstances of fact and law, there must be *someone* to perform the task. In the absence of a preferable solution, such as the setting up of an impartial international organ to perform that function, the latter must be fulfilled by States already existing. The valid objection is not against the fact of their discharging it, but against their carrying it out as a matter of arbitrary policy distinguished from legal duty.¹⁷

p. 137 Taken to its logical conclusion, however, the constitutive view is as a matter of principle impossible to accept: it is clearly established that states cannot by their independent judgement remove or abrogate any competence of other states established by international law (as distinct from agreement or concession). Moreover, the constitutive theory of recognition leads to substantial difficulties in terms of practical application. How many states must recognize? Can existence be relative only to those states which recognize?¹⁸ Is existence dependent on recognition only when this rests on an adequate knowledge of the facts? More vitally, does non-recognition by a state entitle it to treat an entity as a non-state for the purposes of international law, for example by intervening in its internal affairs or annexing its territory?

One solution put forward is that of the 'collectivization' of recognition, under which statehood matures through UN membership, or at least a call by the UN that the new state be recognized.¹⁹ Whilst this would circumvent what Lauterpacht called the 'grotesque spectacle'²⁰ of relative statehood, it has its own problems:²¹ notably, it cannot account for the legal position of a state in the period between its declaration of independence and its admission to the UN, which in the case of the two Koreas lasted some 43 years.²² Moreover, under Article 4 of the UN Charter statehood is a criterion for membership, not a consequence.

(B) The varied legal consequences of recognition and non-recognition

There is no such thing as a uniform type of recognition or non-recognition.²³ The terminology of official communications and declarations is not very consistent: there may be ‘de jure recognition’, ‘de facto recognition’, ‘full diplomatic recognition’, ‘formal recognition’, and so forth. The term ‘recognition’ may be absent, taking the form instead of agreement to establish diplomatic relations or a congratulatory message on independence day. The typical act of recognition has two legal functions. First, the determination of statehood, a question of law: such individual determination may have evidential value.²⁴ Secondly, a condition of the establishment of formal relations, including diplomatic relations and the conclusion of bilateral treaties: it is this second function which has been described by some as ‘constitutive’, but it is not a condition of statehood. Since states are not legally required to make a public declaration of recognition nor to undertake optional relations such as the exchange of ambassadors, the expression of state intent involved is political in the sense of being voluntary. But it may also be political in a more obvious sense. An absence of recognition may not rest on any legal basis at all, there being no attempt to pass on the question of statehood as such. Non-recognition may simply be part of a general policy of disapproval and boycott. Recognition may be part of a policy of aggression involving the creation of a puppet state: the legal consequences here stem from the breaches of international law involved.²⁵

Above all, recognition is a political act and is to be treated as such. Correspondingly, the term ‘recognition’ does not absolve the lawyer from inquiring into the intent of the recognizing government, placing this in the context of the relevant facts and law. Indeed, non-recognition (in the sense of a refusal to have formal relations) may carry with it the implicit *assumption* of recognition (in the sense of an acknowledgement of existence). Warbrick notes that a bare statement of non-recognition carries five possible meanings, only one of which is a definitive declaration that the entity in question is not regarded as a state. Under his taxonomy, non-recognition is: (1) a statement of neutrality, under which no view is taken deliberately as to the entity’s statehood; (2) driven purely by political calculations (thereby implying recognition of statehood in law); (3) driven by the understanding that recognition would be unlawful or premature (genuine non-recognition); (4) issued on the basis that supervening obligations in custom or treaty prevent recognition; and (5) issued on the basis of a supervening obligation imposed by the Security Council.²⁶

This leads to a consideration of the *practicalities* of recognition: the existence of a state is of little worth unless it is accepted as such into the community of nations. It is of little value to assert that Taiwan or Somaliland is a state if no one will engage with it on such a basis.²⁷

(C) The ‘duty to recognize’

Lauterpacht²⁸ and Guggenheim²⁹ adopt the view that recognition is constitutive but that there is a legal duty to recognize. This standpoint has been vigorously criticized as bearing no relation to state practice and for its inconsistency, providing as it does that state consent is determinative of statehood whilst in the same breath narrowing its scope until only one option remains.³⁰ A constitutive argument dependent on a duty to recognize in order to reconcile theoretical inconsistency becomes the declaratory theory viewed from a different perspective.

In principle, the legal duty implies that the entity in question already bears the marks of statehood and (although Lauterpacht does not express it thus) the duty would seem to be owed to the entity concerned. The argument postulates personality on an objective basis. Discussion of Lauterpacht’s views often reveals a certain confusion among the critics. Recognition, *as a public act of state*, is an optional and political act and there is no legal duty in this regard. However, in a deeper sense, if any entity bears the marks of statehood, other states put themselves at risk legally if they ignore the basic obligations of state relations. Few, for example, took the view that its Arab neighbours could treat Israel as a non-entity. In this context of state *conduct* there is a duty to

accept and apply certain fundamental rules of international law, a legal duty to ‘recognize’ for certain purposes at least.³¹ But there is no duty to make an express, public determination or to declare readiness to enter into diplomatic relations by means of recognition: this remains political and discretionary. Non-recognition (in this sense) is not a determinant of diplomatic relations, and the absence of diplomatic relations is not in itself non-recognition of the state.³²

(D) Implied recognition

Recognition is a matter of intention and may be express or implied.³³ The implication of intention is a process aided by certain presumptions.³⁴ According to Lauterpacht, in the case of recognition of states, only the conclusion of a bilateral treaty, the formal initiation of diplomatic relations, and, probably, the issue of consular exequaturs, justify the implication.³⁵ No recognition is implied from negotiations, unofficial representation, the conclusion of a multilateral treaty to which the unrecognized entity is also a party, admission to an international organization (at least in respect to those not supporting admission),³⁶ or participation with the entity concerned at an international conference. Confusion arises from two sources. First, the terminology of governmental statements may lead tribunals to give legal status to acts intended only to give a low level of recognition:³⁷ for example, an authority with which only informal and limited contacts have been undertaken may be accorded sovereign immunity by national courts.³⁸ Secondly, different considerations ought to apply to different aspects of recognition, yet doctrine tends to generalize about the subject. Thus, in terms of evidence in an international tribunal, informal relations, especially if these persist, may have probative value on the issue of statehood. However, as a matter of optional bilateral relations, recognition depends on intention.³⁹

(E) Retroactivity of recognition

British and US courts have applied the principle of retroactivity in following or interpreting the views of the executive in matters of recognition,⁴⁰ but Oppenheim describes the rule as ‘one of convenience rather than of principle’.⁴¹ Once again, one ought not to generalize except to say that on the international plane there is no rule of retroactivity. As to the basic rights and duties entailed by statehood, delayed recognition cannot be ‘retroactive’ because in a special sense it is superfluous. Optional and consensual relations it may or may not be, since the area is one of discretion.⁴²

(F) Recognition and membership of international organizations

Collective recognition may take the form of a joint declaration, for example that of the Allied Supreme Council after the First World War, or an invitation to a new state to become a party to a multilateral treaty of a political character such as a peace treaty.⁴³ The functioning of international organizations of the type of the League of Nations and UN provides a variety of occasions for recognition, of one sort or another, of states. Recognition of other members, or of non-members, may occur in the course of voting on admission to membership⁴⁴ and consideration of complaints involving threats to or breaches of the peace. Indeed, it has been argued that admission to the League and the UN entails recognition by operation of law by all other Members, whether or not they voted for admission.

The position, supported by principle and practice, would seem to be as follows. Admission to membership is evidence of statehood,⁴⁵ and non-recognizing Members are at risk if they ignore the basic rights of existence of an entity the object of their non-recognition.⁴⁶ However, there is nothing in the Charter, or customary law, which requires a non-recognizing state to enter into optional bilateral relations with other Members.⁴⁷ In any event, the test of statehood in general international law is not necessarily applicable to the issue of membership in the specialized agencies of the UN,⁴⁸ as demonstrated by the admission of Palestine to the United National Educational, Scientific and Cultural Organization (UNESCO) in 2011.⁴⁹

There are other elements in the case of organizations. Can the UN and its organs (including the Secretariat), as such, accord recognition? For the purposes of the Charter, numerous determinations of statehood are called for: for example, the UN Secretary-General acts as depositary of important treaties. Whether such determinations provide evidence of statehood for general purposes must depend on the relevance to general international law of the criteria employed in a given case.⁵⁰ Attitudes of non-recognition may depend on the political positions of individual Members and the view that in any case the special qualifications for membership contained in Article 4 of the Charter are not fulfilled: statehood may be necessary but it is not sufficient.

3. Recognition of Governments

The status of an entity as the government of a state raises somewhat different issues to those raised by recognition of statehood, although the differences were historically obscured by the practice of diplomatic recognition being applied to both states and governments.⁵¹ The legal entity in international law is the state; the government is in normal circumstances the representative of the state, entitled to act on its behalf. The consequences of an entity not being considered a state are potentially greater. The absence of a (recognized) state with respect to some area of the world raises the possibility of a legal vacuum, although in practice this may be mitigated in various ways.⁵² By contrast, the absence of a (recognized) government does not lead to a loss of title, and may instead require some form of curatorship.⁵³

p. 142 In short, although recognition of government and state may be closely related, they are not identical. Non-recognition of a particular regime is not necessarily a determination that the community represented by that regime does not qualify for statehood. Non-recognition of a government may mean that it is not regarded as a government in terms of independence and effectiveness, or that the non-recognizing state is unwilling to have normal intergovernmental relations with it. Recognition in the context of voluntary relations may be made conditional on the democratic character of the regime, the acceptance of particular claims, or the giving of undertakings, for example on treatment of minorities.⁵⁴ Here, the European Community's Guidelines on the Recognition of New States, adopted in response to the breakup of the USSR and Yugoslavia, are instructive.⁵⁵ The sphere of optional relations and voluntary obligations is one of discretion and bargain. In terms of bilateral voluntary relations, an unrecognized government is little better off than an unrecognized state.

In *Tinoco Concessions*, Great Britain claimed on the basis of concessions granted by a former revolutionary government of Costa Rica which had not been recognized by some other states, including Great Britain itself. The arbitrator, Taft CJ, observed:

The non-recognition by other nations of a government claiming to be a national personality, is usually appropriate evidence that it has not attained the independence and control entitling it by international law to be classed as such. But when recognition *vel non* of a government is by such nations determined by inquiry, not into its *de facto* sovereignty and complete governmental control, but into its illegitimacy or irregularity of origin, their non-recognition loses something of evidential weight on the issue with which those applying the rules of international law are alone concerned. What is true of the non-recognition of the United States in its bearing upon the existence of a *de facto* government under Tinoco for thirty months is probably in a measure true of the non-recognition by her Allies in the European War. Such non-recognition for any reason, however, cannot outweigh the evidence disclosed by this record before me as to the *de facto* character of Tinoco's government, according to the standard set by international law.⁵⁶

In the case of governments, 'the standard set by international law' is so far the standard of secure *de facto* control of all or most of the state territory. The Tinoco regime had that, and was thus the government for the time being of Costa Rica, irrespective of non-recognition.

p. 143 **(A) De jure and de facto recognition**

The distinction between de jure and de facto recognition occurs exclusively in the context of recognition of governments: there is no such thing as a de facto state.⁵⁷ General propositions about the distinction are to be distrusted; everything depends on the intention of the government concerned and the general context of fact and law.⁵⁸ On the international plane, a statement that a government is recognized as the ‘de facto government’ of a state may involve a purely political judgement, involving a reluctant or cautious acceptance of an effective government, lawfully established in terms of international law and not imposed from without, or an unwarranted acceptance of an unqualified agency. On the other hand, the statement may be intended as a determination of the existence of an effective government, but with reservations as to its permanence and viability. No doubt the legal and political reasons for caution may coincide, but they rarely affect courts, which, with or without the epithet de facto, accord recognition the same effect. It is sometimes said that de jure recognition is irrevocable while *de facto recognition* can be withdrawn. In the political sense, recognition of either kind can always be withdrawn: legally it cannot be unless a change of circumstances warrants it.

Situations do occur where there is a serious legal distinction between de jure and de facto recognition. Thus, some governments accepted certain legal consequences of German control of Austria, 1938–45, and Czechoslovakia, 1939–45, for example in the fields of nationality law and consular relations. Yet these same governments did not accept the lawfulness of German control.⁵⁹ In documents relating to these matters, ‘de facto recognition’ may be used to describe acceptance of facts with a dubious legal origin: de jure recognition would be inappropriate and unjustifiable.⁶⁰ In this context, it is hazardous to accept the full legal competence of an administration accorded only ‘de facto recognition’. Thus, in *Bank of Ethiopia v National Bank of Egypt and Liguori*,⁶¹ the Court gave effect to an Italian decree in Ethiopia on the basis that the UK had recognized Italy as the de facto government. In truth, Italy was no more than a belligerent occupant. Furthermore, in situations where rival governments were accorded de jure and de facto recognition in respect of the same territory, problems arise if the same legal consequences are given to both forms of recognition.⁶²

p. 144 **(B) Recognition of governments in abeyance**

There is a school of thought supporting the automatic recognition of de facto governments, exemplified by the ‘Estrada doctrine’ enunciated by the Mexican Secretary of Foreign Relations in 1930.⁶³ As a means of reducing non-recognition as a source of interference in internal affairs this is laudable, but difficulties remain.

In 1980, the British government adopted the practice of no longer according recognition to governments. The statement read as follows:

Where an unconstitutional change of regime takes place in a recognised State, Governments of other States must necessarily consider what dealings, if any, they should have with the new regime, and whether and to what extent it qualifies to be treated as the Government of the State concerned. Many of our partners and allies take the position that they do not recognise Governments and that therefore no question of recognition arises in such cases. By contrast, the policy of successive British Governments has been that we should make and announce a decision formally ‘recognising’ the new Government.

This practice has sometimes been misunderstood, and, despite explanations to the contrary, our ‘recognition’ interpreted as implying approval ...

We have therefore concluded that there are practical advantages in following the policy of many other countries in not according recognition to Governments. Like them, we shall continue to decide the nature of our dealings with regimes which come to power unconstitutionally in the light of our

assessment of whether they are able of themselves to exercise effective control of the territory of the State concerned, and seem likely to continue to do so.⁶⁴

The practical result of this change has been unfortunate. Executive certificates, like the one supplied in *Gur Corp*,⁶⁵ may be indecisive and reflect the premise that the issues are unrelated to questions of general international law. Such a premise is especially inappropriate in cases where the legitimacy of the regime raises issues of validity, for example in the case of foreign intervention. No doubt the facts are paramount in each case but the facts can only be assessed within the appropriate legal framework.⁶⁶

When issues of international legality have been in question, however, the UK government has provided the necessary guidance, for example in relation to the status of Kuwait under Iraqi occupation in 1990,⁶⁷ and the status of the 'Turkish Republic of Northern Cyprus' (TRNC).⁶⁸ Clarification as to the legitimate government of Libya was provided in the form of a certificate (apparently contrary to the announced policy) explicitly stating that the government considered the National Transitional Council (NTC) to be the legitimate government of Libya and did not recognize any other government in Libya, notably the former Qaddafi regime. This certificate permitted the NTC to obtain access to English bank accounts in Libya's name formerly under the control of Qaddafi and his supporters.⁶⁹

(C) Credentials and representation in international organizations

The approval of the credentials of state representatives by organs of the UN raises problems similar, but not identical, to those concerning admission, since in practice the formal requirements for approving credentials have been linked with a challenge to the representation of a state by a particular government.⁷⁰

4. Collective Non-Recognition and Sanctions

One form of collective non-recognition seen in practice is the resolution or decision of an organ of the UN, based on a determination that an illegal act has occurred.⁷¹ Support for the concept was provided by the International Court in the *Kosovo* advisory opinion.⁷² Article 41(2) of the International Law Commission (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts takes this further, providing that 'no State shall recognize as lawful a situation created by a serious breach' of an obligation arising under a peremptory norm of international law.⁷³ In the present context, this obligation entails two central duties of abstention: (1) not to recognize as lawful situations created by a serious breach of international law; and (2) not to render aid or assistance in maintaining the situation. Thus, there is a duty not to recognize the illegal acquisition of territory, an obligation confirmed as customary international law in the *Wall* opinion.⁷⁴

It is possible, though by no means necessary, to refer to such practice as collective non-recognition. There is no doubt a duty of states parties to a system of collective security or other multilateral conventions not to support or condone acts or situations contrary to the treaty concerned.⁷⁵ The duty of non-recognition is not, however, absolute. As the International Court stated in *Namibia*:

In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts, such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.⁷⁶

This formulation is very similar to the historical position adopted by the US and later by the UK, whereby the national courts of a non-recognizing state may continue to give effect to rights and liabilities of non-recognized regimes which are of an essentially internal and private law character.

In some contexts, the duty of non-recognition will be carefully spelled out and may be associated with measures recommended or required as a form of sanction or enforcement. The Security Council resolutions of 1965 and 1966 characterized the Smith regime in Rhodesia as unlawful in terms of the UN Charter and called upon all states not to recognize it.⁷⁷ Similar issues arose in relation to the situation in Namibia (formerly South West Africa) following the termination of the Mandate,⁷⁸ the South African 'Bantustans',⁷⁹ the status of the TRNC after the Turkish invasion of 1974,⁸⁰ and in relation to the annexation of East Timor by Indonesia.⁸¹ More recently, the obligation to not recognize has arisen in relation to Israeli activities in the Occupied Territories as a consequence of the *Wall* advisory opinion, where the Court said:

Given the character and the importance of the rights and obligations involved, the Court is of the view that all states are under an obligation not to recognize the illegal situation resulting from the construction of the wall in the Occupied Palestinian Territory, including in and around East Jerusalem. They are also under an obligation not to render aid or assistance in maintaining the situation created by such construction.⁸²

The General Assembly subsequently called on all Members 'to comply with their legal obligations as mentioned in the Advisory Opinion',⁸³ but the Security Council took no action with respect to the matter, and no state undertook to alter its behaviour towards Israel, even with respect to the provision of aid.⁸⁴

The General Assembly has called for the non-recognition of the Russian annexation of Crimea and Sevastopol, alongside the European Union, with the latter also imposing sanctions.⁸⁵ The underlying situation is unresolved.

5. Issues of Recognition Before National Courts

(A) Overview

Individual recognition may have important practical consequences on a domestic level.⁸⁶ Where the local courts are willing or obliged to follow the advice of the executive, the unrecognized state or government cannot claim immunity from the jurisdiction, obtain recognition for purposes of conflict of laws of its legislative and judicial acts, or sue in the local courts. The attitude to questions of recognition adopted by municipal courts will thus reflect the policies of the forum state, and great caution is needed in using municipal cases to establish propositions about recognition in general international law. In particular, because of the constitutional position of many courts in matters concerning foreign relations, it is unjustifiable to treat the cases as evidence supporting the constitutive position.

p. 148 **(B) The position of the UK courts**

In matters of recognition, the UK judiciary has historically adhered to two closely related principles. The first, expressed in *The Arantzazu Mendi*, is that '[o]ur State cannot speak with two voices on such a matter, the judiciary saying one thing, the executive another.'⁸⁷ The second is that although both the executive and the judiciary are considered to be manifestations of the state, only the former is competent to determine foreign policy. It is accordingly not within the purview of the courts, *sua sponte*, to 'recognize' a state or government;⁸⁸ rather, they must follow the lead of the executive. Thus, in the early case of *The Annette*,⁸⁹ the courts refused to extend state immunity to ships of the unrecognized 'Provisional Government of Northern Russia'. More recently, in *Bouhadi v Breish*, the court was required to identify the Libyan Investment Authority's chairperson, which the Libyan government was entitled to appoint. This was contested as two appointments were made by competing authorities. Following the UK executive's statement that it had not recognized either authority and that its priority was 'to establish a Government of National Accord' which would 'clarify the leadership of the Libyan Investment Authority', the court adjourned the case.⁹⁰ Although the UK government has professedly ceased issuing formal statements of recognition of governments, it still does so on occasion, in which case its certificate will be taken by the courts as conclusive.⁹¹

In the absence of a certificate, the court may examine executive action to infer that recognition has taken place.⁹² But the court is not required to guess at an unexpressed intent, and can look at the matter at large. In *Republic of Somalia v Woodhouse Drake and Carey (Suisse) SA*, Hobhouse J saw the following factors as determinative in the absence of a certificate: (1) whether the government in question is the constitutional government of the state; (2) the degree, nature, and stability of its administrative control; (3) whether the executive has had any dealings with the purported government and the nature of those dealings; and (4) in marginal cases only, the attitude of other states towards the purported government.⁹³ He added that mere statements by the Foreign and Commonwealth Office falling short of outright recognition, though highly persuasive as evidence, were not determinative.⁹⁴

The question may be complicated where the executive chooses to qualify its recognition as *de facto* rather than *de jure*. In *AM Luther v James Sagor & Co*, the Court of Appeal held that the fact that recognition was extended on a *de facto* basis alone did not diminish the legal rights available to the state.⁹⁵ This position was refined in the *Haile Selassie* case.⁹⁶ This was a claim by the Emperor of Ethiopia to assets located in England at a time when the UK recognized Italy as the *de facto* government, whilst Selassie remained *de jure* sovereign. At first instance, it was held that the Italian *de facto* authority did not impair the emperor's capacity to recover the assets in question, but before the defendant appealed, the UK government extended *de jure* recognition to the Italian authorities in Ethiopia. The Court of Appeal held this to operate retroactively⁹⁷ from the date at which *de facto* authority was first extended. Thus, the emperor's claim was displaced and any rights to property held vested in the King of Italy.

The *Haile Selassie* case gives texture to an obvious problem; that is, when there is both a *de jure* and *de facto* government with respect to the same territory.⁹⁸ Historically, the practice of the British courts was 'uniform to the point of rigidity':⁹⁹ the acts of unrecognized states and governments were given no weight.¹⁰⁰ But the courts have adopted a number of devices by way of mitigation. The first, which is virtually a legal fiction, operates on the basis of an imputed agency: the acts of the unrecognized entity are considered to be performed under powers delegated to it by the legitimate sovereign. In the *Carl Zeiss* case,¹⁰¹ the House of Lords interpreted the acts of the unrecognized government of the German Democratic Republic (GDR) as those of a subordinate organ of the Soviet Union, the *de jure* government of the relevant territory; the practical effect was that the acts of the GDR government could give rise to rights and liabilities ordinarily seen to emanate from a *de jure* government without offending the executive's policy of non-recognition. A similar situation emerged in *Gur Corp*, where the Court of Appeal found the unrecognized 'Bantustan' of Ciskei to be a subordinate body of South Africa.¹⁰²

p. 150 A second device permits the recognition of private acts internal to the unrecognized states. Put simply, the English courts have sought to recognize rights and obligations which are of a wholly private law character, unconnected to the grounds for non-recognition.¹⁰³ In *Hesperides Hotels*, Lord Denning MR expressed the view that the laws of a non-recognized entity could give rise to rights and obligations opposable in English courts insofar as they related to ‘the day-to-day affairs of the people, such as their marriages, their divorces, their leases, their occupations and so forth.’¹⁰⁴ Lord Donaldson MR in *Gur Corp* agreed, noting that:

I see great force in this [private law] reservation, since it is one thing to treat a state or government as being ‘without the law’, but quite another to treat the inhabitants of its territory as ‘outlaws’ who cannot effectively marry, beget legitimate children, purchase goods on credit or undertake countless day-to-day activities having legal consequences.¹⁰⁵

The ‘private acts’ exception was applied by Sumner J in *Emin v Yeldag*,¹⁰⁶ who expanded Lord Denning’s position to include all private acts done within a non-recognized state, provided that (1) there was no statutory prohibition on the recognition of the act, and (2) the act of recognition did not undermine the political or diplomatic goals of the executive.¹⁰⁷

The limits of the exception were demonstrated in *Kibris Türk*, where the court reviewed a decision by the Secretary of State for Transport refusing to permit a Turkish airline to operate flights between the UK and the TRNC. Wyn Williams J upheld the decision for two reasons. In the first place, though it controlled only the south of the island, the government of Cyprus was the recognized government for the territory in question within the meaning of the Chicago Convention¹⁰⁸ and therefore had the capacity to regulate air traffic within the territory.¹⁰⁹ In the second, for the court to allow the granting of a permit would be to contradict the government’s long-standing non-recognition of the TRNC; in this respect, the private acts exception could not be invoked:

[M]any of the acts of the Government of the TRNC as they relate to aviation are public and international in character. They are not properly described as laws which regulate the day to day affairs of the people who reside in the TRNC either as described by Lord Denning MR, or Sumner J ... This court is obliged to refuse to give effect to the validity of acts carried out in a territory which is unrecognized unless the acts in question can properly be regarded as regulating the day to day affairs of the people within the territory in question and can properly be regarded as essentially private in character.¹¹⁰

p. 151

(C) The position of the US courts

Much of the jurisprudence concerning non-recognition arose from the US refusal to recognize the Soviet Union from the latter’s emergence in 1922¹¹¹ to the Roosevelt–Litvinov Agreements of 1933.¹¹² The US position on the recognition of governments generally is as set out in the *Restatement Third*:¹¹³

- (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 a government of a state, if those acts apply to territory under the control of that regime and relate to domestic matters only.

In respect of principles (1) and (2) above, the situation in the US is similar to that of the UK: a non-recognized state¹¹⁴ or government can neither appear before the forum courts, nor assert a right to property held in the US.¹¹⁵ Although the courts have indicated that a mere *absence* of recognition is not determinative,¹¹⁶ where the executive has indicated clearly that the courts are closed to an unrecognized state, the judiciary will normally comply.

p. 152 The prohibition on access, however, may be relaxed depending on the facts of the case, the practical consequences of granting or not granting access, and the extent to which access is germane to the foreign policy goals of the US.¹¹⁷ Thus, in *Upright v Mercury Business Machines Co*,¹¹⁸ non-recognition of the GDR did not prevent the assignee of a trade acceptance issued by a GDR instrumentality from bringing suit. By contrast, in *Kunstsammlungen zu Weimar* a GDR government agency was converted into a purportedly separate legal person in an attempt to intervene in a case concerning the recovery of two valuable paintings. The court determined that the formal change had no effect on the GDR's control of the erstwhile agency, and denied it standing, noting that to do otherwise would be to 'render our government's non-recognition of the German Democratic Republic a meaningless gesture'.¹¹⁹

US courts since the Civil War¹²⁰ have acknowledged the acts of non-recognized states, provided that such acts '[deal] solely with private, local and domestic matters' and not 'matters extending beyond the borders' of the unrecognized entity.¹²¹ This in effect presaged the private acts exception: Lauterpacht called it the doctrine of 'justice and public policy'.¹²² The rationale was expressed in *Salimoff v Standard Oil Co of New York*: 'to refuse to recognize Soviet Russia as a government regulating the internal affairs of the country, is to give to fictions an air of reality which they do not deserve'.¹²³ The limits of the doctrine, however, may be seen in *The Maret*,¹²⁴ where the court refused to recognize the nationalization of a ship by the unrecognized Soviet Republic of Estonia.¹²⁵

(D) The position in Europe

(i) A 'pan-European' approach

p. 153 The legal consequences of non-recognition in Europe vary from state to state, but some overarching framework is provided by pan-European institutions, especially the Court of Justice. As a general rule (to which Switzerland and the Netherlands are notable exceptions),¹²⁶ non-recognized states have no right of appearance, and their acts will not be given effect by European courts.¹²⁷ This was seen in the early *Soviet Marriages* case, where the Royal Hungarian Court of Appeal refused to acknowledge a marriage concluded under the laws of the unrecognized Russian Soviet Federative Socialist Republic.¹²⁸ The position softened somewhat by the later twentieth century, as suggested in the attitude of the Italian Court of Cassation towards the GDR:

In conformity with long-standing doctrine in Italy and throughout the European continent ... where the question arises of establishing the effects in Italy of an act of private law executed abroad, it is irrelevant whether or not a State maintains diplomatic relations with another State whose rule of private international law is to be enforced, or whether or not the latter State is recognized by the former. The only prerequisite for the enforcement of a foreign legal rule is its effectiveness, provided that the particular legal provision does not also require reciprocity of treatment and so long as the principles of the foreign law to be enforced do not appear incompatible with the fundamental rules of the *lex fori*, in which case the foreign law is unenforceable for reasons of public policy.¹²⁹

Differences in approach may depend on the readiness of national courts to apply international law. In some states, the judiciary treats the political question of recognition as distinct from statehood and assesses the capacity of an entity *proprio motu* rather than deferring to executive acts. This may be seen in *Fretilin v Netherlands*, in which an East Timorese resistance group attempted to halt the sale of three Dutch corvettes to

the Indonesian government. The District Court of Amsterdam held the claim inadmissible on grounds that East Timor was not a state and the Fretilin Liberation Front therefore had no legal personality. It said, however, that 'this question must be decided independently by a court of law, irrespective of the question of recognition' and, further, 'on the basis of the factual criteria for statehood laid down by international law'.¹³⁰ A more recent example is the Italian Court of Cassation in *Djukanovic*, deciding that Montenegro was not then a state.¹³¹

p. 154 In *Anastasiou I*,¹³² the European Court of Justice heard questions referred to it by the English High Court regarding the importation of agricultural products from the TRNC. Under the terms of an Association Agreement between the European Communities and the Republic of Cyprus in 1972 and a protocol concluded in 1977, in order to obtain preferential tariff treatment each consignment of goods for export was to be accompanied by a certificate issued by the customs authorities of the exporting state as proof of origin. Northern Cypriot goods were exported into the UK and elsewhere¹³³ with certificates produced by TRNC authorities, prompting the question ↪ whether these were valid for the purposes of the agreement and protocol. Although the question turned mainly on the interpretation of the relevant texts, the UK and the European Commission argued that to deny the validity of the certificates would be to deny the inhabitants of the TRNC the advantages granted by the agreement and protocol, and thus the *Namibia* exception applied.¹³⁴ The Court, adopting the position of Advocate-General Gulmann,¹³⁵ disagreed:

While the *de facto* partition of the territory of Cyprus, as a result of the intervention of the Turkish armed forces in 1974, into a zone where the authorities of the Republic of Cyprus continue fully to exercise their powers and a zone where they cannot in fact do so raises problems that are difficult to resolve in connection with the application of the Association Agreement to the whole of Cyprus, that does not warrant a departure from the clear, precise and unconditional provisions of the 1977 Protocol on the origin of products and administrative cooperation.¹³⁶

(ii) Expanding the *Namibia* exception

Notwithstanding the judgment of the European Court of Justice in *Anastasiou I*, the *Namibia* exception arguably has been expanded before the European Court of Human Rights.¹³⁷

In *Loizidou v Turkey*, Turkey argued that in order to provide housing for displaced Turkish Cypriots fleeing from the south, the TRNC was justified in expropriating the houses of displaced Greek Cypriots. The majority did not reject this argument outright, but said that in the circumstances the expropriation was disproportionate.¹³⁸ The Court went further in *Cyprus v Turkey (Fourth Interstate Case)*, where it accepted that the remedies available in the TRNC were 'domestic' remedies provided by Turkey.¹³⁹

It is to be noted that the International Court's Advisory Opinion ... shows clearly that, in situations similar to those arising in the present case, the obligation to disregard acts of *de facto* entities is far from absolute. Life goes on in the territory concerned for its inhabitants. That life must be made tolerable and be protected by the *de facto* authorities, including their courts; and, in the very interest of the inhabitants, the acts of these authorities related thereto cannot be simply ignored by third States or by international institutions, especially courts, including this one. To hold otherwise would amount to stripping the inhabitants of the territory of all their rights whenever they are discussed in an international context, which would amount to depriving them even of the minimum standard of rights to which they are entitled.¹⁴⁰

p. 155 The Court built on this further in *Demopoulos v Turkey*, where access to the Court was barred under Article 35(1) of the European Convention on the basis that domestic remedies in the TRNC had not been exhausted.¹⁴¹

6. Conclusion

Despite continuing attempts (not least in successive editions of the present work) to dethrone the constitutive theory and to treat recognition as a manifestation of ordinary interstate processes of consent and acquiescence, formal diplomatic recognition remains an option, used in relation to conflictual situations involving new states and occasionally new governments and presented as somehow definitive. The fact that recognition by a single state, or even a majority of states, cannot on ordinary principles constitute or settle the status of the recognized entity for non-recognizing states does not seem to deter. Given the decentralized system of interstate relations and the rarity of occasions for third party settlement, it is something that disputes over recognition are not more chaotic in their outcomes than they currently seem to be.

Notes

- 1 State practice and other materials: 2 Whiteman 1–746; 1 Hackworth 161–387; 1 Moore, *Digest*, 67–248. Literature: Lauterpacht, *Recognition in International Law* (1947, repr with introduction by Crawford, 2013, xxi–lix); Jessup, *A Modern Law of Nations* (1948) 43–67; Chen, *The International Law of Recognition* (1951); Fitzmaurice (1957) 92 *Hague Recueil* 1, 16–35; Kelsen, *Principles of International Law* (2nd edn, 1967) 387; Jennings (1967) 121 *Hague Recueil* 323, 349–68; Lauterpacht, 1 *International Law: Collected Papers* (1970) 308; Salmon, *La Reconnaissance d'état* (1971); Verhoeven, *La Reconnaissance internationale dans la pratique contemporaine* (1975); Brownlie (1982) 53 *BY* 197; Dugard, *Recognition and the United Nations* (1987); Talmon, *Recognition of Governments in International Law* (1998); Grant, *The Recognition of States* (1999); Talmon (2004) 75 *BY* 101; Crawford, *Creation of States* (2nd edn, 2006) 12–28; Talmon, *La non reconnaissance collective des Etats illégaux* (2007); Fabry, *Recognizing States* (2010); Vidmar (2013) 31 *Chinese (Taiwan) YBIL & Aff* 136; Dugard (2013) 357 *Hague Recueil* 9, 36–72; Craven & Parfitt in Evans (ed), *International Law* (5th edn, 2018) 177; Charlesworth (2014) 371 *Hague Recueil* 43, 74–81; Grant in Baetens & Chinkin (eds), *Sovereignty, Statehood and State Responsibility* (2015) 192.
- 2 (1933) PCIL Ser A/B No 53, 73. The better view is that the facts disclosed an agreement rather than a unilateral act, the *quid pro quo* being Danish recognition of Norwegian sovereignty over Svalbard (Spitzbergen). On unilateral acts in general: chapter 18.
- 3 Brownlie (1982) 53 *BY* 197, 197–8.
- 4 E.g. 1 *Restatement Third* §§202, 203. Recognition of a state may be independent of the recognition of its government, though the reverse is not true: *ibid*, §203, comment (a).
- 5 *Ibid*, §202, comment (c). Also: Montevideo Convention on the Rights and Duties of States, 26 December 1933, 165 LNTS 19, Art 6 ('The recognition of a State merely signifies that the State which recognizes it accepts the personality of the other with all the rights and duties determined by international law').
- 6 Lauterpacht (1947, repr 2013) v.
- 7 Talmon characterizes the declaratory position as *status-confirming* and the constitutive position as *status-creating*: Talmon (2004) 75 *BY* 101, 101–2.
- 8 Adherents include Chen (1951); Waldock (1962) 106 *Hague Recueil* 1, 147–51; Rolin (1950) 77 *Hague Recueil* 305, 326–37; Kunz (1950) 44 *AJIL* 713; Charpentier, *La Reconnaissance internationale* (1956); Talmon (2004) 75 *BY* 101; Crawford (2nd edn, 2006) 19–22.
- 9 E.g. *Tinoco Concessions* (1923) 1 RIAA 369; *Deutsch Continental Gesellschaft v Polish State* (1929) 5 ILR 11.
- 10 The issue may arise in the case brought by Palestine against the US before the International Court in relation to alleged violations of the Vienna Convention on Diplomatic Relations, as a result of the relocation of the US Embassy in Israel from Tel-Aviv to Jerusalem: *Palestine v US*, Application, 28 September 2018.
- 11 ICJ Reports 1996 p 595, 612–13.
- 12 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 UNTS 277.
- 13 General Framework Agreement for Peace in Bosnia and Herzegovina, 14 December 1995, 35 ILM 75.
- 14 Montevideo Convention, Arts 3 ('The political existence of the State is independent of recognition by the other States'), 6. Also: 1 *Restatement Third* §202(1); Badinter Commission, *Opinion No 10* (1992) 92 ILR 206, 208; *Reference re Secession of Quebec* (1998) 115 ILR 536, 589–90. Further: Talmon (2004) 75 *BY* 101, 106–7.
- 15 Craven & Parfitt in Evans (5th edn, 2018) 177, 207.
- 16 Constitutive doctrine takes many forms; many jurists allow certain rights prior to recognition. Adherents include Anzilotti,

- 1 *Cours de droit international* (1929) 160; Kelsen (1932) 42 *Hague Recueil* 117, 260–94 (earlier he was a declaratist: (1929) 4 *RDJ* 613, 617–18); Lauterpacht (1947, repr 2013). *Certain German Interests in Polish Upper Silesia* (1926) PCIJ Ser A No 7, 28 does not unequivocally support the constitutive view, since the issue was the existence of a contractual nexus between Germany and Poland: that Poland could not invoke a treaty against Germany did not connote its non-existence as a state. For the view that UN Secretariat practice supported the constitutive position: Schachter (1948) 25 *BY* 91, 109–15. For the view that Japan's Supreme Court has supported this position: Tomonori (2013) 107 *AJIL* 627.
- 17 Lauterpacht (1947, repr 2013) 55 (emphasis in original). Lauterpacht tempers the severity of this position by reference to a 'duty' of recognition. Also: Capps (2011) 82 *BY* 248, 252–64; Crawford in Lauterpacht (repr 2013) xxi.
- 18 Further: Kelsen (1941) 35 *AJIL* 605, 609; Lauterpacht (1947, repr 2013) 67, 88; Crawford (2nd edn, 2006) 21–2.
- 19 E.g. Chen (1951) 222; Dugard (1987) 125–7; Duursma (1996) 110–12; Hillgruber (1998) 9 *EJIL* 491; Grant (2009) 256; Dugard (2013) 357 *Hague Recueil* 9, 57–69. Also and earlier: Lauterpacht (1947, repr 2013) 167–9.
- 20 Lauterpacht (1947, repr 2013) 78.
- 21 Talmon (2004) 75 *BY* 101, 105.
- 22 The Republic of Korea was established on 15 August 1948 and the Democratic Republic of North Korea on 9 September 1948. Both states were admitted to the UN on 17 September 1991: SC Res 702 (1991); GA Res 46/1, 17 September 1991.
- 23 1 *Restatement Third* §202, comment (a): 'States may recognize an entity's statehood by formal declaration or by recognizing its government, but states often treat a qualified entity as a state without any formal act of recognition.' On the distinction between recognition of governments and of legitimate representatives of the people: Talmon (2013) 12 *Chin JIL* 219.
- 24 Recognition is rarely 'cognitive' in a simple sense: the issue is one of law as well as fact, and cognition, which may involve no outward sign, occurs before, often long before, public recognition. Cf 2 Whiteman 13 (Secretary of State Dulles).
- 25 E.g. the Japanese recognition of 'Manchukuo': Crawford (2nd edn, 2006) 78–9.
- 26 Warbrick in Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1997) 9, 1–11.
- 27 Generally: Brenthurst Foundation, 'The Consequences of Somaliland's International (Non) Recognition', Discussion Paper 2011/05 (2011). Further: UKMIL (2006) 77 *BY* 597, 618–19; (2007) 78 *BY* 634, 682; (2008) 79 *BY* 565, 596–7; (2009) 80 *BY* 661, 709–10, 712–13; (2010) 81 *BY* 435, 503–5; (2011) 82 *BY* 676, 736; (2012) 83 *BY* 298, 350, 359–61; (2014) 85 *BY* 301, 394–5; *Secretary of State for the Home Department v CC and CF* [2012] EWHC 2837 (Admin), [118].
- 28 Lauterpacht (1947, repr 2013) 73–5; 158–61; 1 Lauterpacht (1970) 308, 312–14.
- 29 1 Guggenheim 190–1.
- 30 Kunz (1950) 44 *AJIL* 713; Cohn (1948) 64 *LQR* 404; Briggs (1949) 43 *AJIL* 113; Jessup (1971) 65 *AJIL* 214, 217; Brownlie (1982) 53 *BY* 197, 209; Talmon (2004) 75 *BY* 101, 103; Crawford (2nd edn, 2006) 22.
- 31 E.g. 1 *Restatement Third* §202(1).
- 32 Brownlie (1982) 53 *BY* 197, 209.
- 33 In some cases, a state may base its policy of recognition with respect to both states and governments around an approach of implied recognition: Talmon (2009) 7 *NZYIL* 1.
- 34 Lauterpacht (1947, repr 2013) 369–408; Chen (1951) 201–16; Lachs (1959) 35 *BY* 252. US practice: 1 Hackworth 327–63; 2 Whiteman 48–59, 524–604; 1 *Restatement Third* §201.
- 35 Lauterpacht (1947, repr 2013) 406.
- 36 Some international organizations are open to non-states: e.g. autonomous customs territories under the WTO (Hong Kong, Macao, and Taiwan) and the World Tourism Organization. Further: chapter 7.
- 37 Cf Talmon (2009) 7 *NZYIL* 1, 17.
- 38 E.g. *Arantzazu Mendi* [1939] AC 256.
- 39 Brownlie (1982) 53 *BY* 197, 208.
- 40 E.g. *Haile Selassie v Cable and Wireless Ltd (No 2)* [1939] 1 Ch 182. Also: 2 Whiteman 728–45; 1 Hackworth 381–5; Chen (1951) 172–86; Brownlie (1982) 53 *BY* 197, 208–9.
- 41 1 Oppenheim (9th edn, 1992) 161.
- 42 Cf *Polish Upper Silesia* (1926) PCIJ Ser A No 7, 27–39, 84 (Lord Finlay).
- 43 Generally: Rosenne (1949) 26 *BY* 437; Aufricht (1949) 43 *AJIL* 679; Wright (1950) 44 *AJIL* 548; Higgins, *Development* (1963) 131–2, 140–4, 146–50; Dugard (1987); Crawford (2nd edn, 2006) ch 4; Grant, *Admission to the United Nations* (2009); Duxbury, *The Participation of States in International Organisations* (2011) 314–15.
- 44 Cf *Northern Cameroons (Cameroon v UK)*, Preliminary Objections, ICJ Reports 1963 p 15, 119–20 (Judge Fitzmaurice).
- 45 E.g. *Genocide (Bosnia and Herzegovina v Yugoslavia)*, Preliminary Objections, ICJ Reports 1996 p 595, 611. Also: Rosenne, *Developments in the Law of Treaties 1945–1986* (1989) 215; Grant (2009) 254. For UK practice: UKMIL (2009) 80 *BY* 661, 706 (UK written intervention in the *Kosovo* advisory opinion).
- 46 Grant (2009) 255 ('UN admission, entailing the participation of all members in a multilateral treaty, may be described as putting a formal frame around the opposability of statehood toward all other UN members'). E.g. the UN admission of

- Montenegro: SC Res 1691 (2006), GA Res 60/264, 12 July 2006.
- 47 S/1466, 9 March 1950; Kelsen, *Law of the United Nations* (1951) 946.
- 48 Morgenstern, *Legal Problems of International Organizations* (1986) 46–68.
- 49 UNESCO Doc DG/2011/147, 31 October 2011; Cerone (2012) 51 ILM 606.
- 50 UN organs have been involved in varying degrees in the process of political creation of some states, e.g. Indonesia, Israel, Libya, Republic of Korea, Somalia, Namibia, Kosovo, and South Sudan. On the UN role: Crawford (2nd edn, 2006) ch 12. See also chapter 8.
- 51 Generally: Galloway, *Recognizing Foreign Governments* (1978); Ando [1985] *JAIL* 28, 29–46; Talmon (1992) 63 *BY* 231; Talmon (1998). Also: 1 *Restatement Third* §203; Pavot (2006) 14 *Rev Aff Eur* 297; Talmon (2009) 8 *Chin JIL* 135; Schuit (2012) 14 *Int Comm LR* 381, 382–95; Vidmar (2013) 31 *Chinese (Taiwan) YBIL & Aff* 136, 150–8; Gathii, ‘Introduction to the AJIL Unbound Symposium on Recognition of Governments and Customary International Law’ (2014) 108 *AJIL Unbound* 199–200; de Wet (2015) 26 *EJIL* 979, 983–92.
- 52 Thus de facto control may continue while issues of succession are resolved: e.g. the continued involvement in Kosovo of UNMIK: S/2011/675, 31 October 2011, para 2; S/2012/818, 8 November 2012, para 2; S/2013/631, 28 October 2013, para 2; S/2014/773, 31 October 2014, para 2; S/2015/303, 27 April 2015, para 2; S/2016/407, 29 April 2016, para 2; S/2016/901, 26 October 2016, para 2; S/2017/95/Rev.1, 6 February 2017, para 2; S/2017/640, 24 July 2017, para 2; S/2017/911, 31 October 2017, para 2; S/2018/76, 31 January 2018, para 2; S/2018/407, 1 May 2018, para 2.
- 53 E.g. *Republic of Somalia v Woodhouse, Drake & Carey (Suisse) SA* [1993] QB 54.
- 54 Kelsen (2nd edn, 1967) 403–4; cf Murphy (1999) 48 *ICLQ* 545. E.g. the Roosevelt–Litvinov Agreement, 16 November 1933, 11 TIAS 1248 (recognition of the USSR by the US dependent on the resolution of certain financial claims and an undertaking by the USSR not to take acts prejudicial to the internal security of the US). Also: Duxbury (2011) 101–3 on EU recognition of former Soviet states.
- 55 16 December 1991, 31 ILM 1485. Further: Hillgruber (1998) 9 *EJIL* 491.
- 56 (1923) 1 RIAA 369, 381. Also: *Wulfsohn v RSFSR*, 234 NY 372 (1923); *Sokoloff v National City Bank*, 239 NY 158 (1924); *Salimoff v Standard Oil Co*, 262 NY 220 (1933); *Deutsche Continental Gas-Gesellschaft v Polish State* (1929) 5 ILR 11; *Socony Vacuum Oil Co* (1954) 21 ILR 55; *Standard Vacuum Oil Co* (1959) 30 ILR 168; *Clerget v Représentation Commerciale de la République démocratique du Viet-Nam* (1967) 48 ILR 145; Badinter Commission, *Opinion No 1* (1991) 92 ILR 162; *Opinion No 8* (1992) 92 ILR 199; *Opinion No 10* (1992) 92 ILR 206.
- 57 Frowein, *Das de facto-Regime im Völkerrecht* (1968) proposed the idea of a ‘de facto regime’ to describe political entities that exercise control over territories, but are not recognized as states. The concept is not reflected in state practice and appears chiefly in the German literature, but see Mansour (2014) 3 *CJICL* 1182. Further: Talmon (2004) 75 *BY* 101, 103–5; Frowein, ‘De Facto Regime’ (2013) *MPEPIL*.
- 58 Briggs (1939) 33 *AJIL* 689; Brownlie (1982) 53 *BY* 197, 207–8; Talmon (1998) 59–111; Craven in Evans (4th edn, 2014) 201, 240–1.
- 59 On UK and US policies: Brownlie, *Use of Force* (1963) 414–16.
- 60 British de jure recognition in 1938 of the Italian conquest of Ethiopia in 1936 was avoided in 1941: Wright (1937) 31 *AJIL* 683; Talmon (1998) 102–3, 290; Crawford (2nd edn, 2006) 519–20.
- 61 [1937] Ch 513.
- 62 Further: *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] 1 AC 853, 898–904 (Lord Reid), 950–78 (Lord Wilberforce). Also: *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd* [1978] QB 205, 218 (Lord Denning MR).
- 63 Estrada (1931) 25 *AJIL Supp* 203; Jessup (1931) 25 *AJIL* 719.
- 64 UKMIL (1980) 51 *BY* 355, 367–8. Also: Warbrick (1981) 30 *ICLQ* 568. Further: 1 *Restatement Third* §203, reporter note (1).
- 65 *Gur Corp v Trust Bank of Africa Ltd* [1987] 1 QB 599.
- 66 For criticism: Brownlie (1982) 53 *BY* 197, 209–11; Crawford (1986) 57 *BY* 408; Talmon (1998) 3–14. Also: *Republic of Somalia v Woodhouse Drake and Carey (Suisse) SA* [1993] QB 54, noted Kingsbury (1993) 109 *LQR* 377; Crawford (1993) 52 *CLJ* 4.
- 67 *Kuwait Airways Corp v Iraqi Airways Co and the Republic of Iraq* (1999) 116 ILR 534, 580–1.
- 68 *Caglar v Billingham* (1996) 108 ILR 510, 519; *Veysi Dag v Secretary of State* (2001) 122 ILR 529, 536.
- 69 *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* (2011) 147 ILR 667, 675–7 (Blair J). Further: Warbrick (2012) 61 *ICLQ* 247; Schuit (2012) 14 *Int Comm LR* 381. For recent controversy over Venezuela: OAS Permanent Council, CP.RES.1117 (2200/19), 10 January 2019.
- 70 Higgins (1963) 131–2, 140–4, 146–50; Kelsen (2nd edn, 1967) 406.
- 71 1 *Lauterpacht* (1970) 308, 321; Kelsen (2nd edn, 1967) 415–16; Dugard (1987) 81–111; Crawford (2nd edn, 2006) 157–73; Talmon in Talmon et al (eds), *Fundamental Rules of the International Legal Order* (2006) 99; Talmon (2007); Ronen, *Transition from Illegal Regimes under International Law* (2011) chs 2, 3; Vidmar (2013) 31 *Chinese (Taiwan) YBIL & Aff* 136, 144–9; ILA Committee on Recognition/Non-Recognition in International Law, Second (Interim) Report (2014), 76 ILA Rep Conf 424, 426–32, 449–57.

- 72 *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, ICJ Reports 2010 p 403, 437–8.
- 73 On the aetiology of Art 41: Talmon in Talmon et al (2006) 99, 102–3; Dawidowicz in Crawford, Pellet, & Olleson (eds), *The Law of International Responsibility* (2010) 677; Pert (2012) 30 *Chinese (Taiwan) YBIL & Aff* 48, 49–59. See also chapter 27.
- 74 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports 2004 p 136, 171; cf *ibid*, 232 (Judge Kooijmans).
- 75 Cf the Stimson Doctrine: LNOJ, Sp Supp 101 (1932) 87–8 ('it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or the Pact of Paris'). Further: 1 Lauterpacht (1970) 308, 337–48; Turns (2003) 2 *Chin JIL* 105; Fabry (2010) 135–7; Grant, 'Doctrines (Monroe, Hallstein, Brezhnev, Stimson)' (2014) *MPEPIL*, §C. See further chapter 27.
- 76 *Namibia*, ICJ Reports 1971 p 16, 56. Also: *Loizidou v Turkey*, Merits (1996) 108 ILR 443, 462. Generally: Ronen (2011) 80–100.
- 77 SC Res 216 (1965); SC Res 217 (1965); SC Res 232 (1966); SC Res 253 (1968); SC Res 277 (1970). Later: SC Res 318 (1972); SC Res 320 (1972); SC Res 388 (1976); SC Res 409 (1977); SC Res 423 (1978). On the UN resolutions concerning Rhodesia: Fawcett (1965–6) 41 *BY* 103; McDougal & Reisman (1968) 62 *AJIL* 1; Dugard (1987) 90–8; Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law* (1990); Ronen (2011) 27–37.
- 78 Generally: *Namibia*, ICJ Reports 1971 p 16.
- 79 SC Res 385 (1976); SC Res 402 (1976); SC Res 407 (1977); SC Res 417 (1977).
- 80 SC Res 541 (1983); SC Res 550 (1984). Further: Case C-432/92 *R v Minister of Agriculture, Fisheries and Food, ex p SP Anastasiou (Pissouri) Ltd* (1994) 100 ILR 257; *Loizidou v Turkey, Preliminary Objections* (1995) 103 ILR 622; *Loizidou v Turkey, Merits* (1996) 108 ILR 443; *Demopoulos v Turkey* (2010) 158 ILR 88. Generally: Ronen (2011) 38–54.
- 81 GA Res 3485(XXX), 12 December 1975; GA Res 31/53, 1 December 1976; GA Res 32/34, 28 November 1977; GA Res 33/39, 13 December 1978; GA Res 34/40, 21 November 1979; GA Res 35/27, 11 November 1980; GA Res 36/50, 24 November 1981; GA Res 37/30, 22 November 1982; SC Res 384 (1975); SC Res 389 (1976). Further: Ronen (2011) 54–61; Vidmar (2012) 61 *ICLQ* 361, 367–8; Qerimi (2013) 36 *T Jeff LR* 181, 201–3. Also: *East Timor (Portugal v Australia)*, ICJ Reports 1995 p 90.
- 82 *Wall*, ICJ Reports 2004 p 136, 200.
- 83 GA Res ES-10/15, 20 July 2004, para 3.
- 84 Ronen (2011) 312 attributes the ineffectiveness of collective non-recognition to (1) non-uniform application of the duty (Soviet annexation of the Baltic states, Indonesian annexation of East Timor), (2) the internal strength of certain illegal regimes (the case of Rhodesia), or (3) the political consequences inherent in implementing non-recognition (the case of Israel and Palestine). Talmon in Talmon et al (2006) 99, 125, is more sanguine, but believes the scope of the duty to be limited.
- 85 GA Res 68/262, 27 March 2014, op para 6. On sanctions: e.g. Council Regulation (EU) 692/2014, OJ L183/9; Council Regulation (EU) 1351/2014, OJ L365/46. For individual non-recognition and sanctions: Daugirdas & Mortensons (2014) 108 *AJIL* 783, 800, 803–4.
- 86 Generally: Mann (1943) 29 *GST* 143; Merrills (1971) 20 *ICLQ* 476; Nedjati (1981) 30 *ICLQ* 388; Verhoeven (1985) 192 *Hague Recueil* 13; Talmon (1998) Appendix I; Fatima, *Using International Law in Domestic Courts* (2005) 388; McLachlan, *Foreign Relations Law* (2014) ch 10; ILA Committee on Recognition/Non-Recognition in International Law, Second (Interim) Report (2014), 76 *ILA Rep Conf* 424, 433–45.
- 87 [1939] AC 256, 264 (Lord Atkin). This principle still exists: *Adams v Adams* [1971] P 188, 198 (Simon P); *Re Westinghouse Electric Corp Uranium Contract Litigation (Nos 1 and 2)* [1978] AC 547, 617; *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599, 604 (Steyn J), on appeal, *ibid*, 625 (Nourse LJ); *Lonrho Exports Ltd v Export Credits Guarantee Department* [1999] Ch 158, 179 (Lightman J); *R (Sultan of Pahang) v Secretary of State* (2011) 152 ILR 543, 548 (Maurice Kay LJ), 554 (Moore-Bick LJ); *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* (2011) 147 ILR 667, 676–7 (Blair J); *Al Attiya v Al Thani* (2016) 174 ILR 519, 544 (Blake J).
- 88 As noted by Mann (1943) 29 *GST* 143, 145: '[t]he Courts cannot make foreign policy' (emphasis in original).
- 89 [1919] P 105. Also: *Luther v Sagor* [1921] 1 KB 456, on appeal: [1921] 3 KB 532.
- 90 [2016] EWHC 602 (Comm).
- 91 E.g. *Mighell v Sultan of Johore* [1894] 1 QB 149, 158 ('When once there is the authoritative certificate of the Queen through her minister of state as to the status of another sovereign, that in the courts of this country is decisive'); *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] AC 853, 43 ILR 25; *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599; *Veysi Dag v Secretary of State* (2001) 122 ILR 529, 535–6; *British Arab Commercial Bank plc v National Transitional Council of the State of Libya* (2011) 147 ILR 667, 676–7 (Blair J); *Bouhadi v Breish* [2016] EWHC 602 (Comm), [33] (Blair J).
- 92 *Gur Corp v Trust Bank of Africa Ltd* [1987] QB 599, 625. Cf Mann (1987) 36 *ICLQ* 348, 349–50; Beck (1987) 36 *ICLQ* 350.
- 93 [1993] QB 54, 68.
- 94 *Ibid*, 65. Further: *Sierra Leone Telecommunications Co Ltd v Barclays Bank* [1998] 2 All ER 821.
- 95 [1921] 1 KB 456.

- 96 *Haile Selassie v Cable & Wireless Ltd (No 2)* [1939] 1 Ch 182.
- 97 But cf *Gdynia Ameryka Linie Zeglugowe AS v Boguslawski* [1953] AC 11 (recognition of the new de jure government's acts only retrospective 'in so far as those acts related to matters under its control at the time when the acts were done'); *Civil Air Transport Inc v Civil Air Transport Corp* [1953] AC 70 ('retroactivity of recognition operates to validate acts of a de facto Government which has subsequently become the new de iure government, and not to invalidate acts of a previous de iure Government').
- 98 Generally: Mann (1987) 36 *JCLQ* 348.
- 99 Lauterpacht (1947, repr 2013) 145.
- 100 E.g. *City of Berne v Bank of England* (1804) 9 Ves Jun 346; *AM Luther v James Sagor & Co* [1921] 1 KB 456. Much later: *Adams v Adams* [1971] P 188.
- 101 *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] AC 853. Also: Greig (1987) 83 *LQR* 96.
- 102 *Gur Corp v Trust Bank of Africa Ltd* [1987] 1 QB 599.
- 103 Further: *Caglar v Billingham* (1996) 108 ILR 510, 534.
- 104 *Hesperides Hotels Ltd v Aegean Turkish Holidays* [1978] QB 205, 218. Also: *Carl Zeiss Stiftung v Rayner and Keeler Ltd (No 2)* [1967] AC 853, 954 (Lord Wilberforce).
- 105 *Gur Corp v Trust Bank of Africa Ltd* [1987] 1 QB 599, 622.
- 106 [2002] 1 FLR 956; cf *B v B* [2000] FLR 707. Also: *Parent v Singapore Airlines & Civil Aeronautics Administration* (2003) 133 ILR 264. Further: Ronen (2004) 63 *CLJ* 268.
- 107 The Foreign Corporations Act 1991 (UK), s1, provides that where a question arises as to the corporate status of a body under the laws of a non-recognized country, and those laws are applied by a settled court system, the question shall be determined as if the territory were a recognized state. Also: UKMIL (1991) 62 *BY* 535, 565–8.
- 108 Convention on International Civil Aviation, 7 December 1944, 15 UNTS 295 (as amended).
- 109 *R (Kibris Türk Hava Yollari & CTA Holidays) v Secretary of State for Transport* (2009) 148 ILR 683, 701–7. The decision was affirmed on appeal: (2010) 148 ILR 715. Further: Talmon (2005) 43 *AdV* 1; Talmon (2009) 8 *Chin JIL* 135.
- 110 *R (Kibris Türk Hava Yollari and CTA Holidays) v Secretary of State for Transport* (2009) 148 ILR 683, 714.
- 111 E.g. *Wulfsohn v RSFSR*, 234 NY 372 (1923). On the early US cases: Dickinson (1931) 25 *AJIL* 214; Borchart (1932) 36 *AJIL* 261; Lauterpacht (1947, repr 2013) 145–50 (comparing early UK and US practice).
- 112 Further: Kallis (1933) 20 *Va JIL* 1; Talmon (1998) 34–7; Grant (1999) 49–51.
- 113 Generally: Fountain (1988–89) 29 *Va JIL* 473. For a reaffirmation of the executive's exclusive power of recognition: *Zivotofsky v Kerry, Secretary of State*, 576 US (2015); McLachlan, 'Speaking with One Voice on the Recognition of States' (2015) 109 *AJIL Unbound* 61.
- 114 But cf the special provisions under the Taiwan Relations Act, 22 USC §3301 and further *Mingtai Fire and Marine Insurance Co Ltd v United Parcel Service*, 177 F3d 1142 (9th Cir, 1999). Further: Lee, *The Making of the Taiwan Relations Act* (2010); Ahl, 'Taiwan' (2008) *MPEPIL*. More generally, non-recognized governments are still offered certain protections under the US Criminal Code in relation to, e.g., counterfeiting of currency or killing of officials and representatives: 18 USC §§11, 1116. Non-recognized states are also entitled to sovereign immunity: *Wulfsohn v RSFSR*, 234 NY 372 (1923); cf *Klinghoffer v SNC Achille Lauro*, 937 F2d 44 (2d Cir, 1991).
- 115 E.g. *The Penza*, 277 F 91 (EDNY, 1931); *The Rogdai*, 276 F 294 (ND Cal, 1920); *RSFSR v Cibrario*, 235 NY 255 (1923); *Republic of Vietnam v Pfizer Inc*, 556 F2d 892 (8th Cir, 1977). However, the courts remain open to recognized governments with which the US does not have diplomatic relations: *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 408–12 (1964).
- 116 E.g. *Ministry of Defence of the Islamic Republic of Iran v Gould Inc* (1988) 82 *AJIL* 591; *Petrochemical v The M/T Stolt Sheaf*, 860 F2d 551 (2d Cir, 1988).
- 117 E.g. *The Maret*, 145 F2d 431, 439 (3d Cir, 1944); *Transportes Aereos de Angola v Ronair*, 544 F Supp 856, 863–4 (D Del, 1982) (corporations owned by non-recognized governments permitted to appear); *Russian Volunteer Fleet v US*, 282 US 481, 492 (1931) (alien investor from non-recognized country entitled to compensation for expropriation). Further: 1 *Restatement Third* §205, comment (a).
- 118 213 NYS (2d) 417 (1961).
- 119 *Kunstsammlungen zu Weimar v Elicofon*, 358 F Supp 747, 757 (EDNY, 1972), affirmed on appeal: 478 F2d 231 (2d Cir, 1973). The US later recognized the government of East Germany, after which it was permitted to intervene: *Federal Republic of Germany v Elicofon*, 358 F Supp 747 (EDNY, 1972).
- 120 E.g. *Texas v White*, 74 US 700 (1868).
- 121 *Carl Zeiss Stiftung v VEB Carl Zeiss*, 293 F Supp 892, 900 (SDNY, 1968). Also: *Sokoloff v National City Bank of New York*, 239 NY 158 (1924). Further: Lauterpacht (1947, repr 2013) 147; 1 *Restatement Third* §202, reporter note 6; *ibid*, §205, reporter note 3.
- 122 Lauterpacht (1947, repr 2013) 147.
- 123 186 NE 679, 882 (1933). Further: Dickinson (1933) 27 *AJIL* 743.

- 124 *Maret*, 145 F2d 431 (3d Cir, 1944).
- 125 Further: *Autocephalous Church of Cyprus v Goldberg and Feldman Fine Arts Inc*, 917 F2d 278 (2d Cir, 1990).
- 126 E.g. *Schinz v High Court of Zurich* (1926) 3 ILR 32; *Exportchleb Ltd v Goudekert* (1935) 8 ILR 117; *X v Y* (1946) 13 ILR 19; *South Moluccas v Netherlands New Guinea* (1954) 21 ILR 48; *VEB Carl Zeiss Jena v Carl Zeiss Heidenheim* (1965) 72 ILR 550; *Billerbeck and Cie v Bergbau-Handel GmbH* (1967) 72 ILR 59; *Wang v Switzerland*, ILDC 90 (CH 2004).
- 127 On the early European cases: *Lauterpacht* (1947, repr 2013) 151–3.
- 128 (1925) 3 ILR 31.
- 129 *Warenzeichenverband Regekungstechnik EV v Ministry of Trade and Industry* (1975) 77 ILR 571, 571.
- 130 *Democratic Republic of East Timor & Fretilin v State of the Netherlands* (1980) 87 ILR 73, 74. Also: *FRG-GDR Relations Case* (1973) 78 ILR 149, 165–6.
- 131 *Italy v Djukanovic*, ILDC 74 (IT 2004).
- 132 *Case C-432/92 R v Minister of Agriculture, Fisheries and Food, ex p SP Anastasiou (Pissouri) Ltd* (1994) 100 ILR 257.
- 133 Belgium, France, Germany, Ireland, Italy, Netherlands: *ibid*, 270.
- 134 (1994) 100 ILR 257, 276. Further: *Namibia*, ICJ Reports 1971 p 16, 56.
- 135 (1994) 100 ILR 257, 281.
- 136 *Ibid*, 297. But cf *Case C-219/98 R v Minister of Agriculture, Fisheries and Food, ex p SP Anastasiou (Pissouri) Ltd* [2000] ECR I-5241.
- 137 Ronen (2011) 88–98; Orakhelashvili in Baetens & Chinkin (2015) 172, 177–9.
- 138 *Loizidou v Turkey*, Merits (1996) 108 ILR 443, 468; 474 (Judge Baka, diss), 481 (Judge Pettiti, diss). Further: *Foka v Turkey* (2008) 158 ILR 88; *Protopapa v Turkey* [2009] ECtHR 16084/90.
- 139 (2001) 120 ILR 10, 42–6.
- 140 *Ibid*, 44–5.
- 141 (2010) 158 ILR 88, 116–38. Further: Ronen (2011) 95; Loucaides (2011) 24 *LJIL* 435, and see chapter 27.