In so far as the material elements of the crime are concerned, killing is clearly the key conduct involved and it has been held that the act in question must be intentional if not necessarily premeditated.[198] Forced migration (or 'ethnic cleansing') as such does not constitute genocide,[199] but may amount to a pattern of conduct demonstrating genocidal intent.[200] The *Akayesu* case has also been important in emphasising that rape and sexual violence may amount to genocide when committed with the necessary specific intent to commit genocide. The Trial Chamber concluded that 'Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.'[201] Further, where it is intended to prevent births within the group whether by impelling the child born of rape to be part of another group or where the woman raped refuses subsequently to procreate, this may amount to genocide.[202] The Rwanda Tribunal has also held that genocide may be committed by omission as well as by acts.[203]

War Crimes[204]

War crimes are essentially serious violations of the rules of customary and treaty law concerning international humanitarian law, otherwise known as the law governing armed conflicts.[205] Article 2 of the Statute of the ICTY, by way of example, provides for jurisdiction with regard to:

[198] See e.g. *Stakić*, IT-97-24-T, 2003, para. 515.

[199] See e.g. the *Eichmann* case, 36 ILR, p. 5 and the *Brdjanin* case, IT-99-36-T, 2004, para. 118. See also the *Blagojević* case, where, in addition, the Appeals Chamber of the ICTY held that awareness of facts related to the forcible transfer operation was insufficient to prove complicity in genocide in the absence of knowledge of mass killings at Srebrenica, IT-02-60-A, 2007, paras. 119 ff.

[200] See e.g. the *Review of the Indictments Concerning Karadžić and Mladić Pursuant to Rule 61 of the Rules of Procedure and Evidence*, ICTY, IT-95-5-R61 and IT-95-18-R61, 11 July 1996, para. 94, 108 ILR, pp. 134–5. See also ad hoc Judge Lauterpacht's Separate Opinion in the *Genocide Convention (Bosnia and Herzegovina* v. *Yugoslavia)* case, ICJ Reports, 1993, pp. 325, 431–2, and the ICC Elements of Crimes, article 6(c), footnote 4, UN Doc. PCNICC/2000/1/Add.2 (2000).

[201] ICTR-96-4-T, para. 731. [202] *Ibid.*, paras. 507–8.

[203] *Kambanda*, ICTR-97-23-S, 1998, paras. 39–40.

[204] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, chapter 12; Werle, *Principles of International Criminal Law*, part 5; and Cassese, *International Criminal Law*, chapter 4.

[205] See further as to international humanitarian law, below, chapter 21.

> grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: (a) wilful killing; (b) torture or inhuman treatment, including biological experiments; (c) wilfully causing great suffering or serious injury to body or health; (d) extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; (e) compelling a prisoner of war or a civilian to serve in the forces of a hostile power; (f) wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial; (g) unlawful deportation or transfer or unlawful confinement of a civilian; (h) taking civilians as hostages.

Article 3 provides for jurisdiction for violation of the laws or customs of war. Such violations include, but are not be limited to:

> (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; (b) wanton destruction of cities, towns or villages, or devastation not justified by military necessity; (c) attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings; (d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; (e) plunder of public or private property.[206]

Accordingly, war crimes are a discrete part of the principles of international humanitarian law, being those which have become accepted as criminal offences for which there is individual responsibility (in addition to state responsibility). Essentially, war crimes law applies to individuals and international humanitarian law to states. There is a long history of provision for individual responsibility for war crimes,[207] and article 6(b) of the Nuremberg Charter included war crimes within the jurisdiction of the Tribunal, while the concept of grave breaches of the Geneva Conventions

[206] See article 8 of the Statute of the ICC, which is exhaustive rather than illustrative in its exposition of fifty offences and is divided into sections dealing with: grave breaches of the Geneva Conventions of 12 August 1949; other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law; in the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949 and other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law. See also article 4 of the Statute of the ICTR concerning violations of article 3 common to the Geneva Conventions and of Additional Protocol II of 1977; article 3 of the Statute of the Special Court for Sierra Leone and article 14 of the Statute of the Iraqi High Tribunal.

[207] See e.g. the US Army Lieber Code, April 1864.

of 1949 recognised certain violations as crimes subject to universal jurisdiction. Traditionally, international humanitarian law has distinguished between international and non-international armed conflicts, with legal provision being relatively modest with regard to the latter. However, common article 3 to the Geneva Conventions laid down certain minimum standards which were elaborated in Additional Protocol II of 1977.[208] In addition, since the conflict in Rwanda was clearly an internal one, the ICTR Statute necessarily provided for individual responsibility for violations of the principles concerning non-international armed conflicts, in effect recognising that common article 3 and Additional Protocol II formed the basis of criminal liability.

The key modern decision has been the *Tadić* case before the ICTY. The Appeals Chamber in the jurisdictional phase of the case noted that an armed conflict existed whenever there was a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state. International humanitarian law applied from the initiation of such armed conflicts and extended beyond the cessation of hostilities until a general conclusion of peace was reached; or, in the case of internal conflicts, a peaceful settlement achieved. Until that moment, international humanitarian law continued to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[209] The distinction between international and non-international armed conflicts was thus minimised. Although it was noted that international law did not regulate internal conflict in all aspects, it was held to 'cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities'.[210] Further, it was held that individual criminal responsibility existed with regard to violations laid down in customary and treaty law, irrespective of whether the conflict was an international or an internal one.[211] It was concluded that in order for article 3 of the ICTY Statute to be applicable, the violation had to be 'serious', which meant that it had to constitute a

[208] See below, chapter 21, p. 1194.
[209] IT-94-1-T, Decision of 2 October 1995, para. 70, 105 ILR, pp. 453, 486.
[210] *Ibid.*, para. 127. [211] *Ibid.*, para. 129.

breach of a rule protecting important values, and the breach must involve grave consequences for the victim. In addition, the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.[212]

This *Tadić* judgment can now be taken as reflecting international law and it is to be noted that a significant number of provisions dealing with international conflicts now apply to internal conflicts as laid down in the Statute of the International Criminal Court.[213]

Crimes against humanity[214]

Article 6(c) of the Nuremberg Charter included 'crimes against humanity' within the jurisdiction of the Tribunal and these were defined as 'murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the law of the country where perpetrated'.[215]

Article 5 of the Statute of the ICTY provided for jurisdiction with regard to the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: '(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) rape; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts'. Article 3 of the Statute of the ICTR is in similar form, other than that it is specified that the crimes in question (which are the same as those specified in the ICTY Statute) must have been committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds. Article 7 of the Statute of the ICC notes that the crimes in question (enforced disappearance and apartheid are added to the list appearing in

[212] *Ibid.*, para. 94. See also e.g. the *Galić* case, IT-98-29-T, 2003, para. 11 and the *Kanyabashi* decision on jurisdiction, ICTR-96-15-T, 1997, para. 8.

[213] See article 8(2)(c) and (e) of the Statute.

[214] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, chapter 11; Werle, *Principles of International Criminal Law*, part 4; and Cassese, *International Criminal Law*, chapter 5. See also Bassiouni, *Crimes Against Humanity in International Criminal Law*.

[215] The Tokyo Charter was in similar terms, as was Allied Control Council Law No. 10 save that it added rape, imprisonment and torture to the list of inhumane acts and did not require a connection to war crimes or aggression: see Cryer *et al.*, *Introduction to International Criminal Law*, pp. 188 ff.

the Statutes of the two international criminal tribunals) have to be committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.

Although article 5 of the ICTY Statute did not specifically refer, unlike the other instruments, to the necessity of a widespread or systematic attack as the required framework for the commission of acts amounting to crimes against humanity, this was incorporated into the jurisprudence through the *Tadić* trial decision of 7 May 1997. This interpreted the phrase 'directed against any civilian population' as meaning 'that the acts must occur on a widespread or systematic basis, that there must be some form of a governmental, organizational or group policy to commit these acts and that the perpetrator must know of the context within which his actions are taken'.[216]

The requirement of 'widespread or systematic' was examined in *Akayesu*, where the Trial Chamber declared that the concept of widespread could be defined as 'massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims', while 'systematic' could be defined as 'thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources'. It was noted that there was no requirement that this policy must be adopted formally as the policy of a state, although there had to be some kind of preconceived plan or policy.[217] In *Blaškić*, the ICTY Trial Chamber defined 'systematic' in terms of

> the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community; the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another; the preparation and use of significant public or private resources, whether military or other, and the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan. The plan, however, need not necessarily be declared expressly or even stated clearly and precisely. It may be surmised from the occurrence of a series of events.[218]

In *Kunarac*, the ICTY Appeals Chamber held that while proof that the attack was directed against a civilian population and proof that it was

[216] IT-94-1-T, para. 644, 112 ILR, pp. 1, 214. See also paras. 645 ff. This was reaffirmed in the decision of the Appeals Chamber of 15 July 1999, para. 248, 124 ILR, pp. 61, 164.
[217] ICTR-96-4-T, 1998, para. 580. [218] IT-95-14-T, 2000, paras. 203–4, 122 ILR, pp. 1, 78

widespread or systematic were legal elements of the crime, it was not necessary to show that they were the result of the existence of a policy or plan. The existence of a policy or plan could be evidentially relevant, but it was not a legal element of the crime.[219]

Many of the same acts may constitute both war crimes and crimes against humanity, but what is distinctive about the latter is that they do not need to take place during an armed conflict. However, to constitute crimes against humanity the acts in question have to be committed as part of a widespread or systematic activity, and to be committed against any civilian population, thus any reference to nationality is irrelevant. However, it is important to maintain a clear distinction between civilian and non-civilian in this context. The Trial Chamber in the *Martić* case noted that one could not allow the term 'civilian' for the purposes of a crime against humanity to include all persons who were not actively participating in combat, including those who were *hors de combat*, at the time of the crimes, as this would blur the necessary distinction between combatants and non-combatants.[220]

Of course, any act of genocide by definition will constitute also a crime against humanity, although the reverse is clearly not the case. What is required for crimes against humanity is an 'attack' and this has been broadly defined. In the *Akayesu* case, for example, this term was defined as an

> unlawful act of the kind enumerated in Article 3(a) to (i) of the Statute, like murder, extermination, enslavement etc. An attack may also be non-violent in nature, like imposing a system of apartheid, which is declared a crime against humanity in Article 1 of the Apartheid Convention of 1973, or exerting pressure on the population to act in a particular manner, may come under the purview of an attack, if orchestrated on a massive scale or in a systematic manner.[221]

It is also necessary for the alleged perpetrator to be aware that his act was part of a broader attack. The Appeals Chamber in its jurisdiction decision in *Tadić* concluded that to convict an accused of crimes against humanity, it had to be proved that the crimes were related to the attack on a civilian population and that the accused knew that his crimes were so related.[222] This is so even if he does not identify with the aims of the attack and his act was committed for personal reasons.[223]

[219] IT-96-23&23/1, 2002, para. 98.
[220] IT-95-11-T, 2007, paras. 55–6. [221] ICTR-96-4-T, 1998, para. 581.
[222] IT-94-1-A, 1999, para. 271, 124 ILR, pp. 61, 173. [223] *Ibid.*, paras. 255 ff.

Aggression[224]

Aggression is recognised as a crime in customary international law. Article 6 of the Nuremberg Charter defined its jurisdiction as including '(a) Crimes against peace. Namely, planning, preparation, initiation, or waging of a war of aggression or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing' and a number of defendants were convicted of offences under this head. General Assembly resolution 95(1) affirmed the principles recognised by the Nuremberg Charter and its judgment. Aggression was termed the 'supreme international crime' in one of the judgments.[225] The Tokyo Charter included the same principle as did Allied Control Council Law No. 10. General Assembly resolution 3314 (XXIX) of 14 December 1974 contained a definition of aggression in contravention of the Charter.[226] The crime of aggression is referred to in article 5 of the Statute of the ICC, but in no other such instrument. Indeed, article 5(2) provides that the Court cannot exercise jurisdiction over the crime of aggression until a provision is adopted defining the crime and setting out the conditions under which the Court may exercise jurisdiction with respect to it. The delay in achieving this has been caused by several problems. The first is that, unlike the other substantive international crimes, aggression is a crime of 'leadership' and necessarily requires that it be determined as an initial point that the state, of whom the accused is a 'leader' in some capacity, has committed aggression. This is a wholly different proposition from asserting the responsibility of individuals for genocide, war crimes or crimes against humanity. It is also unclear what differences may exist between the state's act of aggression and the individual's crime of aggression. Secondly, article 5(2) of the ICC Statute provides that the conditions for the exercise of the Court's jurisdiction must be consistent with the relevant provisions of the UN Charter. The Security Council has the competence under Chapter VII of the Charter

[224] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, chapter 13; and Werle, *Principles of International Criminal Law*, part 6. See also Y. Dinstein, *War, Aggression and Self-Defence*, 4th edn, Cambridge, 2005, and see further below, chapter 22, p. 1240.

[225] See Judgment 186, 41 AJIL, 1947, p. 172.

[226] See also the General Treaty for the Renunciation of War (the 'Kellogg–Briand Pact'), 1928, which condemned recourse to war as an instrument of international policy; article 1 of the International Law Commission's Draft Code of Offences against Peace and Security, 1954, and article 1(2) of the revised Draft Code adopted in 1996. Article 16 of the latter instrument provides that a leader who as leader or organiser actively participates in or orders the planning, preparation, initiation or waging of aggression committed by a state shall be responsible for a crime of aggression.

to determine whether an act of aggression has taken place and it has been argued that a prior determination by the Council is necessary before the Court may exercise jurisdiction with regard to individual responsibility for aggression. This has been contested.[227] However, the question of the relationship between the competences of the Council and Court respectively is unsettled. These matters are currently being negotiated by the Assembly of States Parties to the Rome Statute.[228]

Conclusion – fair trial provisions

Part of the rapidly developing international law concerning individual responsibility for international crimes relates to the protection of the human rights of the accused. The following provisions constitute the essence of the requirements of fair trial. Article 21 of the ICTY Statute, for example, provides that:

> 1. All persons shall be equal before the International Tribunal.
>
> 2. In the determination of charges against him, the accused shall be entitled to a fair and public hearing, subject to article 22 of the Statute [which concerns the protection of victims and witnesses].
>
> 3. The accused shall be presumed innocent until proved guilty according to the provisions of the present Statute.
>
> 4. In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:
>
> (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) to be tried without undue delay;
> (d) to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to

[227] See e.g. Cryer *et al.*, *Introduction to International Criminal Law*, pp. 276 ff. See also A. Carpenter, 'The International Criminal Court and the Crime of Aggression', 64 *Nordic Journal of International Law*, 1995, p. 223; A. Zimmermann, 'The Creation of a Permanent International Criminal Court', 25 *Suffolk Transnational Law Review*, 2005, p. 1, and C. Kress, 'Versailles–Nuremberg–The Hague: Germany and the International Criminal Law', 40 *International Lawyer*, 2006, p. 15.

[228] See e.g. the Fifth Session of the Assembly of States Parties, February 2007, ICC-ASP/5/35, Annex II and the Report of the Special Working Group on the Crime of Aggression, 13 December 2007, www.icc-cpi.int/library/asp/ICC-ASP-6-SWGCA-1_English.pdf.

him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
(e) to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
(f) to have the free assistance of an interpreter if he cannot understand or speak the language used in the International Tribunal;
(g) not to be compelled to testify against himself or to confess guilt.

This formulation is essentially repeated in article 20 of the ICTR Statute. Article 55 of the ICC Statute provides that:

1. In respect of an investigation under this Statute, a person:

(a) Shall not be compelled to incriminate himself or herself or to confess guilt;
(b) Shall not be subjected to any form of coercion, duress or threat, to torture or to any other form of cruel, inhuman or degrading treatment or punishment;
(c) Shall, if questioned in a language other than a language the person fully understands and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness; and
(d) Shall not be subjected to arbitrary arrest or detention, and shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute.

2. Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court and that person is about to be questioned either by the Prosecutor, or by national authorities pursuant to a request made under Part 9, that person shall also have the following rights of which he or she shall be informed prior to being questioned:

(a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court;
(b) To remain silent, without such silence being a consideration in the determination of guilt or innocence;
(c) To have legal assistance of the person's choosing, or, if the person does not have legal assistance, to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by the person in any such case if the person does not have sufficient means to pay for it; and

(d) To be questioned in the presence of counsel unless the person has voluntarily waived his or her right to counsel.

In addition, article 66 provides for the presumption of innocence and for the fact that it is for the Prosecutor to prove the guilt of the accused beyond reasonable doubt. Article 67 lays down that:

1. In the determination of any charge, the accused shall be entitled to a public hearing, having regard to the provisions of this Statute, to a fair hearing conducted impartially, and to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks;
(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;
(c) To be tried without undue delay;
(d) Subject to article 63, paragraph 2, to be present at the trial, to conduct the defence in person or through legal assistance of the accused's choosing, to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it;
(e) To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute;
(f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings of or documents presented to the Court are not in a language which the accused fully understands and speaks;
(g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence;
(h) To make an unsworn oral or written statement in his or her defence; and
(i) Not to have imposed on him or her any reversal of the burden of proof or any onus of rebuttal.

2. In addition to any other disclosure provided for in this Statute, the Prosecutor shall, as soon as practicable, disclose to the defence evidence in

the Prosecutor's possession or control which he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence. In case of doubt as to the application of this paragraph, the Court shall decide.[229]

Suggestions for further reading

A. Cassese, *International Criminal Law*, 2nd edn, Oxford, 2008

R. Cryer, H. Friman, D. Robinson and E. Wilmshurst, *An Introduction to International Criminal Law and Procedure*, Cambridge, 2007

W. Schabas, *An Introduction to the International Criminal Court*, 3rd edn, Cambridge, 2007

The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone, Cambridge 2006

[229] Note among other relevant issues, the principle of command responsibility, whereby a superior is criminally responsible for acts committed by subordinates that he knew or had reason to know had been or were about to be committed and no action was taken: see e.g. Green, *Armed Conflict*, pp. 303–4; I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 AJIL, 1999, p. 573, and Kittichaisaree, *International Criminal Law*, p. 251. See also article 87 of Additional Protocol I, 1977; article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; article 6(3) of the Statute of the International Criminal Tribunal for Rwanda, 1994 and article 28 of the Statute of the International Criminal Court, 1998. Note the *Čelebići* case, IT-96-21, 16 November 1998, paras. 370 ff.; the *Krnojela* case, IT-97-25-A, 17 September 2003 and the *Blagojević* case, IT-02-60-A, 2007. Further, military necessity may not be pleaded as a defence, see e.g. *In re Lewinski (called von Manstein)*, 16 AD, p. 509, and the claim of superior orders will not provide a defence, although it may be taken in mitigation depending upon the circumstances: see e.g. Green, *Armed Conflict*, pp. 305–7; Green, *Superior Orders in National and International Law*, Leiden, 1976; Kittichaisaree, *International Criminal Law*, p. 266, and Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law*, Leiden, 1965. See also article 8 of the Nuremberg Charter, 39 AJIL, 1945, Supp., p. 259; Principle IV of the International Law Commission's Report on the Principles of the Nuremberg Tribunal 1950, *Yearbook of the ILC*, 1950, vol. II, p. 195; article 7(4) of the Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993; article 6(4) of the Statute of the International Criminal Tribunal for Rwanda, 1994 and article 33 of the Statute of the International Criminal Court, 1998.

9

Recognition

International society is not an unchanging entity, but is subject to the ebb and flow of political life.[1] New states are created and old units fall away. New governments come into being within states in a manner contrary to declared constitutions whether or not accompanied by force. Insurgencies occur and belligerent administrations are established in areas of territory hitherto controlled by the legitimate government. Each of these events creates new facts and the question that recognition is concerned with revolves around the extent to which legal effects should flow from such occurrences. Each state will have to decide whether or not to recognise the particular eventuality and the kind of legal entity it should be accepted as.

Recognition involves consequences both on the international plane and within municipal law. If an entity is recognised as a state in, for example, the United Kingdom, it will entail the consideration of rights and duties that would not otherwise be relevant. There are privileges permitted to

[1] See generally e.g. J. Crawford, *The Creation of States in International Law*, 2nd edn, Oxford, 2006; *Oppenheim's International Law* (eds. R. Y. Jennings and A. D. Watts), 9th edn, London, 1992; H. Lauterpacht, *Recognition in International Law*, Cambridge, 1947; T. C. Chen, *The International Law of Recognition*, London, 1951; J. Charpentier, *La Reconnaissance Internationale et l'Évolution du Droit des Gens*, Paris, 1956; T. L. Galloway, *Recognising Foreign Governments*, Washington, 1978; J. Verhoeven, *La Reconnaissance Internationale dans la Pratique Contemporaine*, Paris, 1975 and Verhoeven, 'La Reconnaissance Internationale, Déclin ou Renouveau?', AFDI, 1993, p. 7; J. Dugard, *Recognition and the United Nations*, Cambridge, 1987; H. Blix, 'Contemporary Aspects of Recognition', 130 HR, 1970-II, p. 587; J. Salmon, 'Reconnaissance d'État', 25 *Revue Belge de Droit International*, 1992, p. 226; S. Talmon, *Recognition in International Law: A Bibliography*, The Hague, 2000; T. D. Grant, *The Recognition of States: Law and Practice in Debate and Evolution*, London, 1999, and *Third US Restatement on Foreign Relations Law*, Washington, 1987, vol. I, pp. 77 ff. See also Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, pp. 556 ff.; P. M. Dupuy, *Droit International Public*, 8th edn, Paris, 2006, p. 95, and L. Henkin, R. C. Pugh, O. Schachter and H. Smit, *International Law: Cases and Materials*, 3rd edn, St Paul, 1993, pp. 244 ff.

a foreign state before the municipal courts that would not be allowed to other institutions or persons.

It is stating the obvious to point to the very strong political influences that bear upon this topic.[2] In more cases than not the decision whether or not to recognise will depend more upon political considerations than exclusively legal factors. Recognition is not merely applying the relevant legal consequences to a factual situation, for sometimes a state will not want such consequences to follow, either internationally or domestically.

To give one example, the United States refused for many years to recognise either the People's Republic of China or North Korea, not because it did not accept the obvious fact that these authorities exercised effective control over their respective territories, but rather because it did not wish the legal effects of recognition to come into operation.[3] It is purely a political judgment, although it has been clothed in legal terminology. In addition, there are a variety of options open as to what an entity may be recognised as. Such an entity may, for example, be recognised as a full sovereign state, or as the effective authority within a specific area or as a subordinate authority to another state.[4] Recognition is a statement by an international legal person as to the status in international law of another real or alleged international legal person or of the validity of a particular factual situation. Once recognition has occurred, the new situation is deemed opposable to the recognising state, that is the pertinent legal consequences will flow. As such, recognition constitutes participation in the international legal process generally while also being important within the context of bilateral relations and, of course, domestically.

Recognition of states

There are basically two theories as to the nature of recognition. The constitutive theory maintains that it is the act of recognition by other states that creates a new state and endows it with legal personality and not the process by which it actually obtained independence. Thus, new states are

[2] See e.g. H. A. Smith, *Great Britain and the Law of Nations*, London, 1932, vol. I, pp. 77–80.

[3] See e.g. M. Kaplan and N. Katzenbach, *The Political Foundations of International Law*, New York, 1961, p. 109.

[4] See e.g. *Carl Zeiss Stiftung* v. *Rayner and Keeler* [1967] AC 853; 43 ILR, p. 23, where the Court took the view that the German Democratic Republic was a subordinate agency of the USSR, and the recognition of the Ciskei as a subordinate body of South Africa, *Gur Corporation* v. *Trust Bank of Africa Ltd* [1986] 3 All ER 449; 75 ILR, p. 675.

established in the international community as fully fledged subjects of international law by virtue of the will and consent of already existing states.[5] The disadvantage of this approach is that an unrecognised 'state' may not be subject to the obligations imposed by international law and may accordingly be free from such restraints as, for instance, the prohibition on aggression. A further complication would arise if a 'state' were recognised by some but not other states. Could one talk then of, for example, partial personality?

The second theory, the declaratory theory, adopts the opposite approach and is a little more in accord with practical realities.[6] It maintains that recognition is merely an acceptance by states of an already existing situation. A new state will acquire capacity in international law not by virtue of the consent of others but by virtue of a particular factual situation. It will be legally constituted by its own efforts and circumstances and will not have to await the procedure of recognition by other states. This doctrine owes a lot to traditional positivist thought on the supremacy of the state and the concomitant weakness or non-existence of any central guidance in the international community.

For the constitutive theorist, the heart of the matter is that fundamentally an unrecognised 'state' can have no rights or obligations in international law. The opposite stance is adopted by the declaratory approach that emphasises the factual situation and minimises the power of states to confer legal personality.

Actual practice leads to a middle position between these two perceptions. The act of recognition by one state of another indicates that the former regards the latter as having conformed with the basic requirements of international law as to the creation of a state. Of course, recognition is highly political and is given in a number of cases for purely political reasons. This point of view was emphasised by the American representative on the Security Council during discussions on the Middle East in May 1948. He said that it would be:

[5] See e.g. Crawford, *Creation of States*, pp. 19 ff. and J. Salmon, *La Reconnaissance d'État*, Paris, 1971. See also R. Rich and D. Turk, 'Symposium: Recent Developments in the Practice of State Recognition', 4 EJIL, 1993, p. 36.

[6] See e.g. J. L. Brierly, *The Law of Nations*, 6th edn, Oxford, 1963, p. 138; I. Brownlie, *Principles of Public International Law*, 6th edn, Oxford, 2003, p. 87; D. P. O'Connell, *International Law*, 2nd edn, London, 1970, vol. I, pp. 128 ff.; S. Talmon, 'The Constitutive Versus the Declaratory Theory of Recognition: Tertium Non Datur?', 75 BYIL, 2004, p. 101, and Crawford, *Creation of States*, pp. 22 ff. See also the *Tinoco* arbitration, 1 RIAA, p. 369; 2 AD, p. 34 and *Wulfsohn* v. *Russian Republic* 138 NE 24; 2 AD, p. 39.

> highly improper for one to admit that any country on earth can question the sovereignty of the United States of America in the exercise of the high political act of recognition of the *de facto* status of a state.

Indeed, he added that there was no authority that could determine the legality or validity of that act of the United States.[7] This American view that recognition is to be used as a kind of mark of approval was in evidence with regard to the attitude adopted towards Communist China for a generation.[8]

The United Kingdom, on the other hand, has often tended to extend recognition once it is satisfied that the authorities of the state in question have complied with the minimum requirements of international law, and have effective control which seems likely to continue over the country.[9] Recognition is constitutive in a political sense, for it marks the new entity out as a state within the international community and is evidence of acceptance of its new political status by the society of nations. This does not imply that the act of recognition is legally constitutive, because rights and duties do not arise as a result of the recognition.

Practice over the last century or so is not unambiguous but does point to the declaratory approach as the better of the two theories. States which for particular reasons have refused to recognise other states, such as in the Arab world and Israel and the USA and certain communist nations,[10] rarely contend that the other party is devoid of powers and obligations before international law and exists in a legal vacuum. The stance is rather that rights and duties are binding upon them, and that recognition has not been accorded for primarily political reasons. If the constitutive theory were accepted it would mean, for example, in the context of the former Arab non-recognition of Israel, that the latter was not bound by international law rules of non-aggression and non-intervention. This has not been adopted in any of the stances of non-recognition of 'states'.[11]

[7] See M. Whiteman, *Digest of International Law*, Washington, 1968, vol. II, p. 10.

[8] See generally D. Young, 'American Dealings with Peking', 45 *Foreign Affairs*, 1966, p. 77, and Whiteman, *Digest*, vol. II, pp. 551 ff. See also A/CN.4/2, p. 53.

[9] See Lauterpacht, *Recognition*, p. 6.

[10] See 39 *Bulletin of the US Department of State*, 1958, p. 385.

[11] See e.g. the *Pueblo* incident, 62 AJIL, 1968, p. 756 and *Keesing's Contemporary Archives*, p. 23129; Whiteman, *Digest*, vol. II, pp. 604 ff. and 651; 'Contemporary Practice of the UK in International Law', 6 ICLQ, 1957, p. 507, and *British Practice in International Law* (ed. E. Lauterpacht), London, 1963, vol. II, p. 90. See also N. Mugerwa, 'Subjects of International Law' in *Manual of International Law* (ed. M. Sørensen), London, 1968, pp. 247, 269.

Of course, if an entity, while meeting the conditions of international law as to statehood, went totally unrecognised, this would undoubtedly hamper the exercise of its rights and duties, especially in view of the absence of diplomatic relations, but it would not seem in law to amount to a decisive argument against statehood itself.[12] For example, the Charter of the Organisation of American States adopted at Bogotá in 1948 notes in its survey of the fundamental rights and duties of states that:

> the political existence of the state is independent of recognition by other states. Even before being recognised the state has the right to defend its integrity and independence.[13]

And the Institut de Droit International emphasised in its resolution on recognition of new states and governments in 1936 that the

> existence of the new state with all the legal effects connected with that existence is not affected by the refusal of one or more states to recognise.[14]

In the period following the end of the First World War, the courts of the new states of Eastern and Central Europe regarded their states as coming into being upon the actual declaration of independence and not simply as a result of the Peace Treaties. The tribunal in one case pointed out that the recognition of Poland in the Treaty of Versailles was only declaratory of the state which existed 'par lui-même'.[15] In addition, the Arbitration Commission established by the International Conference on Yugoslavia in 1991 stated in its Opinion No. 1 that 'the existence or disappearance of the state is a question of fact' and that 'the effects of recognition by other states are purely declaratory'.[16]

On the other hand, the constitutive theory is not totally devoid of all support in state practice. In some cases, the creation of a new state, or the establishment of a new government by unconstitutional means, or the occupation of a territory that is legally claimed will proceed uneventfully and be clearly accomplished for all to see and with little significant opposition.

[12] See above, chapter 5.

[13] Article 9. This became article 12 of the Charter as amended in 1967. See also the Montevideo Convention on Rights and Duties of States, 1933, article 3.

[14] 39 *Annuaire de L'Institut de Droit International*, 1936, p. 300. See also *Third US Restatement*, pp. 77–8.

[15] *Deutsche Continental Gas-Gesellschaft* v. *Polish State* 5 AD, p. 11.

[16] 92 ILR, pp. 162, 165. See also the decision of the European Court of Human Rights in *Loizidou* v. *Turkey (Preliminary Objections)*, Series A, No. 310, 1995, at p. 14; 103 ILR, p. 621, and *Chuan Pu Andrew Wang and Others* v. *Office of the Federal Prosecutor*, Swiss Supreme Court, First Public Law Chamber, decision of 3 May 2004, No. 1A.3/2004; partly published as BGE 130 II 217, para. 5.3.

However, in many instances, the new entity or government will be insecure and it is in this context that recognition plays a vital role. In any event, and particularly where the facts are unclear and open to different interpretations, recognition by a state will amount to a declaration by that state of how it understands the situation, and such an evaluation will be binding upon it. It will not be able to deny later the factual position it has recognised, unless, of course, circumstances radically alter in the meantime. In this sense, recognition can be constitutive. Indeed, the Yugoslav Arbitration Commission noted in Opinion No. 8 that 'while recognition of a state by other states has only declarative value, such recognition, along with membership of international organisations, bears witness to these states' conviction that the political entity so recognised is a reality and confers on it certain rights and obligations under international law'.[17] By way of contrast, the fact of non-recognition of a 'new state' by a vast majority of existing states will constitute tangible evidence for the view that such an entity has not established its conformity with the required criteria of statehood.[18]

Another factor which leans towards the constitutive interpretation of recognition is the practice in many states whereby an unrecognised state or government cannot claim the rights available to a recognised state or government before the municipal courts. This means that the act of recognition itself entails a distinct legal effect and that after recognition a state or government would have enforceable rights within the domestic jurisdiction that it would not have had prior to the recognition.[19]

This theoretical controversy is of value in that it reveals the functions of recognition and emphasises the impact of states upon the development of international law. It points to the essential character of international law, poised as it is between the state and the international community. The declaratory theory veers towards the former and the constitutive doctrine towards the latter.

There have been a number of attempts to adapt the constitutive theory.[20] Lauterpacht maintained, for example, that once the conditions prescribed by international law for statehood have been complied with, there is a duty

[17] 92 ILR, pp. 199, 201.

[18] See *Democratic Republic of East Timor* v. *State of the Netherlands* 87 ILR, pp. 73, 74.

[19] See below, p. 471.

[20] Note the reference to the 'relativism inherent in the constitutive theory of recognition' with regard to the situation where some states recognised the Federal Republic of Yugoslavia as the continuator of the Federal Republic of Yugoslavia and others did not: see the *Genocide Convention (Bosnia* v. *Serbia)* case, ICJ Reports, 2007, Dissenting Opinion of Judge Al-Khasawneh, para. 8.

on the part of existing states to grant recognition. This is because, in the absence of a central authority in international law to assess and accord legal personality, it is the states that have to perform this function on behalf, as it were, of the international community and international law.[21]

This operation is both declaratory, in that it is based upon certain definite facts (i.e. the entity fulfils the requirements of statehood) and constitutive in that it is the acceptance by the recognising state of the particular community as an entity possessing all the rights and obligations that are inherent in statehood. Before the act of recognition, the community that is hoping to be admitted as a state will only have such rights and duties as have been expressly permitted to it, if any.

The Lauterpacht doctrine is an ingenious bid to reconcile the legal elements in a coherent theory. It accepts the realities of new creations of states and governments by practical (and occasionally illegal) means, and attempts to assimilate this to the supremacy of international law as Lauterpacht saw it. However, in so doing it ignores the political aspects and functions of recognition, that is, its use as a method of demonstrating or withholding support from a particular government or new community. The reality is that in many cases recognition is applied to demonstrate political approval or disapproval. Indeed, if there is a duty to grant recognition, would the entity involved have a right to demand this where a particular state (or states) is proving recalcitrant? If this were so, one would appear to be faced with the possibility of a non-state with as yet no rights or duties enforcing rights against non-recognising states.

Nevertheless, state practice reveals that Lauterpacht's theory has not been adopted.[22] The fact is that few states accept that they are obliged in every instance to accord recognition. In most cases they will grant recognition, but that does not mean that they have to, as history with regard to some Communist nations and with respect to Israel illustrates. This position was supported in Opinion No. 10 of the Yugoslav Arbitration Commission in July 1992, which emphasised that recognition was 'a discretionary act that other states may perform when they choose and in a manner of their own choosing, subject only to compliance with the imperatives of general international law'.[23]

The approach of the United States was emphasised in 1976. The Department of State noted that:

[21] *Recognition*, pp. 24, 55, 76–7.

[22] See e.g. H. Waldock, 'General Course on Public International Law', 106 HR, 1962, p. 154. See also Mugerwa, 'Subjects', pp. 266–90.

[23] 92 ILR, pp. 206, 208.

> [i]n the view of the United States, international law does not require a state to recognise another entity as a state; it is a matter for the judgment of each state whether an entity merits recognition as a state. In reaching this judgment, the United States has traditionally looked to the establishment of certain facts. These facts include effective control over a clearly defined territory and population; an organised governmental administration of that territory and a capacity to act effectively to conduct foreign relations and to fulfil international obligations. The United States has also taken into account whether the entity in question has attracted the recognition of the international community of states.[24]

The view of the UK government was expressed as follows:

> The normal criteria which the government apply for recognition as a state are that it should have, and seem likely to continue to have, a clearly defined territory with a population, a government who are able of themselves to exercise effective control of that territory, and independence in their external relations. Other factors, including some United Nations resolutions, may also be relevant.[25]

Recent practice suggests that 'other factors' may, in the light of the particular circumstances, include human rights and other matters. The European Community adopted a Declaration on 16 December 1991 entitled 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' in which a common position on the process of recognition of the new states was adopted. It was noted in particular that recognition required:

- respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris,[26] especially with regard to the rule of law, democracy and human rights;
- guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;[27]
- respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement;

[24] DUSPIL, 1976, pp. 19–20.

[25] 102 HC Deb., col. 977, Written Answer, 23 October 1986. See also 169 HC Deb., cols. 449–50, Written Answer, 19 March 1990. As to French practice, see e.g. Journal Officiel, Débats Parl., AN, 1988, p. 2324.

[26] See above, chapter 7, p. 372. [27] See above, chapter 7, p. 376.

- acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability;
- commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning state succession and regional disputes.[28]

On the same day that the Guidelines were adopted, the European Community also adopted a Declaration on Yugoslavia,[29] in which the Community and its member states agreed to recognise the Yugoslav republics fulfilling certain conditions. These were that such republics wished to be recognised as independent; that the commitments in the Guidelines were accepted; that provisions laid down in a draft convention under consideration by the Conference on Yugoslavia were accepted, particularly those dealing with human rights and the rights of national or ethnic groups; and that support would be given to the efforts of the Secretary-General of the UN and the Security Council and the Conference on Yugoslavia. The Community and its member states also required that the particular Yugoslav republic seeking recognition would commit itself prior to recognition to adopting constitutional and political guarantees ensuring that it had no territorial claims towards a neighbouring Community state. The United States took a rather less robust position, but still noted the relevance of commitments and assurances given by the new states of Eastern Europe and the former USSR with regard to nuclear safety, democracy and free markets within the process of both recognition and the establishment of diplomatic relations.[30]

Following a period of UN administration authorised by Security Council resolution 1244 (1999),[31] the Yugoslav (later Serbian) province of Kosovo declared independence on 17 February 2008. This was preceded by

[28] UKMIL, 62 BYIL, 1991, pp. 559–60. On 31 December 1991, the European Community issued a statement noting that Armenia, Azerbaijan, Belarus, Kazakhstan, Moldova, Turkmenistan, Ukraine and Uzbekistan had given assurances that the requirements in the Guidelines would be fulfilled. Accordingly, the member states of the Community declared that they were willing to proceed with the recognition of these states, *ibid*., p. 561. On 15 January 1992, a statement was issued noting that Kyrghyzstan and Tadzhikistan had accepted the requirements in the Guidelines and that they too would be recognised, UKMIL, 63 BYIL, 1992, p. 637.

[29] UKMIL, 62 BYIL, 1991, pp. 560–1.

[30] See the announcement by President Bush on 25 December 1991, 2(4 & 5) *Foreign Policy Bulletin*, 1992, p. 12, as cited in Henkin *et al.*, *International Law*, pp. 252–3. See also, as to the importance of democratic considerations, S. D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments', 48 ICLQ, 1999, p. 545.

[31] See above, chapter 5, p. 204.

the Comprehensive Proposal for the Kosovo Status Settlement formulated by Martti Ahtisaari which had in March 2007 called for independence for Kosovo with international supervision.[32] This was rejected by Serbia. The international community was divided as to the question of recognition of Kosovo's independence. It was recognised swiftly by the US, the UK, Germany and the majority of EU states, Japan and others. Russia and Serbia, on the other hand, made it clear that they opposed recognition, as did Spain and Greece. Accordingly, in the current circumstances, while many countries recognise Kosovo, many do not and entry into the UN is not possible until, for example, Russia is prepared to lift its opposition in view of its veto power.[33] For those states that have recognised Kosovo, the latter will be entitled to all the privileges and responsibilities of statehood in the international community and within the legal systems of the recognising states. However, for those that have not, the state and diplomatic agents of Kosovo will not be entitled to, for example, diplomatic and state immunities, while the international status of Kosovo will be controversial and disputed. While recognition may cure difficulties in complying with the criteria of statehood, a situation where the international community is divided upon recognition will, especially in the absence of UN membership, ensure the continuation of uncertainty.

There are many different ways in which recognition can occur and it may apply in more than one kind of situation. It is not a single, constant idea but a category comprising a number of factors. There are indeed different entities which may be recognised, ranging from new states, to new governments, belligerent rights possessed by a particular group and territorial changes. Not only are there various objects of the process of recognition, but recognition may itself be *de facto* or *de jure* and it may arise in a variety of manners.

Recognition is an active process and should be distinguished from cognition, or the mere possession of knowledge, for example, that the entity involved complies with the basic international legal stipulations as to statehood. Recognition implies both cognition of the necessary facts and an intention that, so far as the acting state is concerned, it is willing that the legal consequences attendant upon recognition should operate.

[32] See S/2007/168 and S/2007/168/Add.1.

[33] One month after the declaration of independence, twenty-eight states had recognised the independence of Kosovo, including sixteen of the twenty-seven EU member states and six of the UN Security Council's fifteen members: see 'Kosovo's First Month', International Crisis Group Europe Briefing No. 47, 18 March 2008, p. 3.

For example, the rules as to diplomatic and sovereign immunities should apply as far as the envoys of the entity to be recognised are concerned. It is not enough for the recognising state simply to be aware of the facts, it must desire the coming into effect of the legal and political results of recognition. This is inevitable by virtue of the discretionary nature of the act of recognition, and is illustrated in practice by the lapse in time that often takes place between the events establishing a new state or government and the actual recognition by other states. Once given, courts have generally regarded recognition as retroactive so that the statehood of the entity recognised is accepted as of the date of statehood (which is a question of fact), not from the date of recognition.[34]

Recognition of governments[35]

The recognition of a new government is quite different from the recognition of a new state. As far as statehood is concerned, the factual situation will be examined in terms of the accepted criteria.[36] Different considerations apply where it is the government which changes. Recognition will only really be relevant where the change in government is unconstitutional. In addition, recognition of governments as a category tends to minimise the fact that the precise capacity or status of the entity so recognised may be characterised in different ways. Recognition may be of a *de facto*[37] government or administration or of a government or administration in effective control of only part of the territory of the state in question. Recognition constitutes acceptance of a particular situation

[34] See e.g. Chen, *Recognition*, pp. 172 ff. See also the views of the Yugoslav Arbitration Commission as to the date of succession of the former Yugoslav republics, Opinion No. 11, 96 ILR, p. 719. Note that retroactivity of recognition is regarded by Oppenheim as a rule of convenience rather than of principle: see *Oppenheim's International Law*, p. 161.

[35] See e.g. I. Brownlie, 'Recognition in Theory and Practice', 53 BYIL, 1982, p. 197; C. Warbrick, 'The New British Policy on Recognition of Governments', 30 ICLQ, 1981, p. 568; M. J. Peterson, 'Recognition of Governments Should Not Be Abolished', 77 AJIL, 1983, p. 31, and Peterson, *Recognition of Governments: Legal Doctrine and State Practice*, London, 1997; N. Ando, 'The Recognition of Governments Reconsidered', 28 *Japanese Annual of International Law*, 1985, p. 29; C. Symmons, 'United Kingdom Abolition of the Doctrine of Recognition: A Rose by Another Name', *Public Law*, 1981, p. 248; S. Talmon, 'Recognition of Governments: An Analysis of the New British Policy and Practice', 63 BYIL, 1992, p. 231, and Talmon, *Recognition of Governments in International Law*, Oxford, 1998; B. R. Roth, *Governmental Illegitimacy in International Law*, Oxford, 1999; *Oppenheim's International Law*, p. 150; Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 415, and Galloway, *Recognising Foreign Governments*.

[36] See above, chapter 5, p. 197. [37] See further below, p. 459.

by the recognising state both in terms of the relevant factual criteria and in terms of the consequential legal repercussions, so that, for example, recognition of an entity as the government of a state implies not only that this government is deemed to have satisfied the required conditions, but also that the recognising state will deal with the government as the governing authority of the state and accept the usual legal consequences of such status in terms of privileges and immunities within the domestic legal order.

Political considerations have usually played a large role in the decision whether or not to grant recognition. However, certain criteria have emerged to cover recognition of illegal changes in government. Such criteria amounted to an acceptance of the realities of the transfer of power and suggested that once a new government effectively controlled the country and that this seemed likely to continue, recognition should not be withheld. The United Kingdom on a number of occasions adopted this approach.[38] It was declared by the Under-Secretary of State for Foreign Affairs in 1970 that the test employed was whether or not the new government enjoyed, 'with a reasonable prospect of permanence, the obedience of the mass of the population . . . effective control of much of the greater part of the territory of the state concerned'.[39]

It is this attitude which prompted such policies as the recognition of the communist government of China and the Russian-installed government of Hungary in 1956 after the failure of the uprising. However, this general approach cannot be regarded as an absolute principle in view of the British refusal over many years to recognise as states North Vietnam, North Korea and the German Democratic Republic.[40] The effective control of a new government over the territory of the state is thus an important guideline to the problem of whether to extend recognition or not, providing such control appears well established and likely to continue. But it was no more than that and in many cases appeared to yield to political considerations.

The *Tinoco* arbitration[41] constitutes an interesting example of the 'effective control' concept. In 1919, the government of Tinoco in Costa Rica was overthrown and the new authorities repudiated certain

[38] See the Morrison statement, 485 HC Deb., cols. 2410–11, 21 March 1951.

[39] 799 HC Deb., col. 23, 6 April 1970. See also Foreign Office statements, 204 HL Deb., col. 755, 4 July 1957 and 742 HC Deb., cols. 6–7, Written Answer, 27 February 1967.

[40] See e.g. D. Greig, 'The Carl-Zeiss Case and the Position of an Unrecognised Government in English Law', 83 LQR, 1967, pp. 96, 128–30 and *Re Al-Fin Corporation's Patent* [1970] Ch. 160; 52 ILR, p. 68.

[41] 1 RIAA, p. 369 (1923); 2 AD, p. 34.

obligations entered into by Tinoco with regard to British nationals. Chief Justice Taft, the sole arbitrator, referred to the problems of recognition or non-recognition as relating to the Tinoco administration. He decided that since the administration was in effective control of the country, it was the valid government irrespective of the fact that a number of states, including the United Kingdom, had not recognised it. This was so despite his opinion that:

> 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.[42]

Where recognition has been refused because of the illegitimacy or irregularity of origin of the government in question, rather than because of the lack of effectiveness of its control in the country, such non-recognition loses some of its evidential weight. In other words, where the degree of authority asserted by the new administration is uncertain, recognition by other states will be a vital factor. But where the new government is firmly established, non-recognition will not affect the legal character of the new government. The doctrine of effective control is an indication of the importance of the factual nature of any situation. But in those cases where recognition is refused upon the basis of the improper origins of the new government, it will have less of an impact than if recognition is refused because of the absence of effective control. Taft's view of the nature of recognition is an interesting amalgam of the declaratory and constitutive theories, in that recognition can become constitutive where the factual conditions (i.e. the presence or absence of effective control) are in dispute, but otherwise is purely declaratory or evidential.

A change in government, however accomplished, does not affect the identity of the state itself. The state does not cease to be an international legal person because its government is overthrown. That is not at issue. The recognition or non-recognition of a new administration is irrelevant to the legal character of the country. Accordingly one can see that two separate recognitions are involved and they must not be confused. Recognition of a state will affect its legal personality, whether by creating or acknowledging it, while recognition of a government affects the status of the administrative authority, not the state.

It is possible, however, for recognition of state and government to occur together in certain circumstances. This can take place upon the creation

[42] 1 RIAA, p. 380; 2 AD, p. 37.

of a new state. Israel, to take one example, was recognised by the United States and the United Kingdom by the expedient of having its government recognised *de facto*.[43] Recognition of the government implies recognition of the state, but it does not work the other way.

It should be noted that recognition of a government has no relevance to the establishment of new persons in international law. Where it is significant is in the realm of diplomatic relations. If a government is unrecognised, there is no exchange of diplomatic envoys and thus problems can arise as to the enforcement of international rights and obligations.

Although the effective control doctrine is probably accepted as the most reliable guide to recognition of governments, there have been other theories put forward, the most prominent amongst them being the Tobar doctrine or the so-called doctrine of legitimacy. This suggested that governments which came into power by extra-constitutional means should not be recognised, at least until the change had been accepted by the people.[44] This policy was applied particularly by the United States in relation to Central America and was designed to protect stability in that delicate area adjacent to the Panama Canal. Logically, of course, the concept amounts to the promotion of non-recognition in all revolutionary situations and it is, and was, difficult to reconcile with reality and political consideration. In American eyes it became transmuted into the Wilson policy of democratic legitimacy. Where the revolution was supported by the people, it would be recognised. Where it was not, there would be no grant of recognition. It was elaborated with respect to the Soviet Union until 1933, but gradually declined until it can now be properly accepted merely as a political qualification for recognition to be considered by the recognising state.[45]

A doctrine advocating the exact opposite, the automatic recognition of governments in all circumstances, was put forward by Estrada, the Mexican Secretary of Foreign Relations.[46] But this suffers from the same disadvantage as the legitimacy doctrine. It attempts to lay down a clear test for recognition in all instances excluding political considerations and

[43] See e.g. Whiteman, *Digest*, vol. II, p. 168.

[44] See e.g. Mugerwa, 'Subjects', p. 271, and 2 AJIL, 1908, Supp., p. 229.

[45] See e.g. G. H. Hackworth, *Digest of International Law*, Washington, DC, 1940, vol. I, pp. 181 ff. See also 17 AJIL, 1923, Supp., p. 118; O'Connell, *International Law*, pp. 137–9, and Whiteman, *Digest*, vol. II, p. 69.

[46] See e.g. 25 AJIL, 1931, Supp., p. 203; P. Jessup, 'The Estrada Doctrine', 25 AJIL, 1931, p. 719, and Whiteman, *Digest*, vol. II, p. 85. See also Talmon, 'Recognition of Governments', p. 263; Chen, *Recognition*, p. 116; O'Connell, *International Law*, pp. 134–5, and C. Rousseau, *Droit International Public*, Paris, 1977, vol. III, p. 555.

exigencies of state and is thus unrealistic, particularly where there are competing governments.[47] It has also been criticised as minimising the distinction between recognition and maintenance of diplomatic relations.[48]

The problem, of course, was that recognition of a new government that has come to power in a non-constitutional fashion was taken to imply approval. Allied with the other factors sometimes taken into account in such recognition situations,[49] an unnecessarily complicated process had resulted. Accordingly, in 1977 the United States declared that:

> US practice has been to de-emphasise and avoid the use of recognition in cases of changes of governments and to concern ourselves with the question of whether we wish to have diplomatic relations with the new governments . . . The Administration's policy is that establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct our affairs with other governments directly.[50]

In 1980, the UK government announced that it would no longer accord recognition to governments as distinct from states.[51] This was stated to be primarily due to the perception that recognition meant approval, a perception that was often embarrassing, for example, in the case of regimes violating human rights. There were, therefore, practical advantages in not according recognition as such to governments. This change to a policy of not formally recognising governments had in fact taken place in certain

[47] See e.g. Peterson, 'Recognition', p. 42, and C. Rousseau, 'Chroniques des Faits Internationaux', 93 RGDIP, 1989, p. 923.

[48] Warbrick, 'New British Policy', p. 584.

[49] For example, the democratic requirement noted by President Wilson, President Rutherford Hayes' popular support condition and Secretary of State Seward's criterion of ability to honour international obligations: see statement by US Department of State, DUSPIL, 1977, pp. 19, 20. See also *Third US Restatement*, para. 203, note 1. The Organisation of American States adopted a resolution in 1965 recommending that states contemplating recognition of a new government should take into account whether that government proposes to hold elections within a reasonable time, 5 ILM, 1966, p. 155.

[50] DUSPIL, 1977, p. 20. See also DUSPIL, 1981–8, vol. I, 1993, p. 295. Note that Deputy Secretary of State Christopher stated in 1977 that unscheduled changes of government were not uncommon in this day and age and that 'withholding diplomatic relations from these regimes after they have obtained effective control penalises us', *ibid.*, p. 18. See also, as regards Afghanistan and the continuation of diplomatic relations, 72 AJIL, 1978, p. 879. Cf. the special circumstances of the recognition of the government of China, DUSPIL, 1978, pp. 71–3 and *ibid.*, 1979, pp. 142 ff. But cf. Petersen, 'Recognition'.

[51] See 408 HL Deb., cols. 1121–2, 28 April 1980. See also Symmons, 'United Kingdom Abolition', p. 249.

civil law countries rather earlier. Belgium[52] and France[53] appear, for example, to have adopted this approach in 1965. By the late 1980s, this approach was also adopted by both Australia[54] and Canada,[55] and indeed by other countries.[56]

The change, however, did not remove all problems, but rather shifted the focus from formal recognition to informal 'dealings'. The UK announced that it would continue to decide the nature of dealings with unconstitutional regimes:

> in the light of [an] 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.[57]

The change, therefore, is that recognition of governments is abolished but that the criterion for dealing with such regimes is essentially the same as the former test for the recognition of governments.[58] In that context, regard should also be had to the phrase 'of themselves'.[59]

De facto and *de jure* recognition[60]

In addition to the fact that there are different entities to be recognised, recognition itself may take different forms. It may be either *de facto* or *de*

[52] See 11 *Revue Belge de Droit International*, 1973, p. 351.

[53] See 69 RGDIP, 1965, p. 1089. See also 83 RGDIP, 1979, p. 808; G. Charpentier, 'Pratique Française du Droit International', AFDI, 1981, p. 911, and Rousseau, *Droit International Public*, p. 555.

[54] See J. G. Starke, 'The New Australian Policy of Recognition of Foreign Governments', 62 *Australian Law Journal*, 1988, p. 390.

[55] See 27 Canadian YIL, 1989, p. 387. See also *Re Chateau-Gai Wines Ltd and Attorney-General for Canada* [1970] Ex CR 366; 55 ILR, p. 38.

[56] See e.g. the Netherlands, 22 Netherlands YIL, 1991, p. 237, and New Zealand, *Attorney-General for Fiji* v. *Robt Jones House Ltd* [1989] 2 NZLR 69 at 70–1; 80 ILR, p. 1. The European Union has stated that 'it does not recognise governments, and even less political personalities, but states, according to the most common international practice', *Bulletin of the European Union*, 1999–7/8, p. 60 and UKMIL, 70 BYIL, 1999, p. 424.

[57] 408 HL Deb., cols. 1121–2, 28 April 1980. This has been reaffirmed on a number of occasions: see e.g. UKMIL, 69 BYIL, 1998, p. 477 and UKMIL, 72 BYIL, 2001, p. 577.

[58] See *Gur Corporation* v. *Trust Bank of Africa* [1987] 1 QB 599; 75 ILR, p. 675.

[59] See, as regards the different approaches adopted to the Cambodian and Ugandan experiences, Symmons, 'United Kingdom Abolition', p. 250, and UKMIL, 50 BYIL, 1979, p. 296. See also above, chapter 4, p. 192. See, as to recognition of belligerency and insurgency, e.g. O'Connell, *International Law*, pp. 148–53; Lauterpacht, *Recognition*, p. 270, and *Oppenheim's International Law*, pp. 161 ff.

[60] See e.g. *Oppenheim's International Law*, p. 154.

jure. A more correct way of putting this might be to say that a government (or other entity or situation) may be recognised *de facto* or *de jure*.

Recognition *de facto* implies that there is some doubt as to the long-term viability of the government in question. Recognition *de jure* usually follows where the recognising state accepts that the effective control displayed by the government is permanent and firmly rooted and that there are no legal reasons detracting from this, such as constitutional subservience to a foreign power. *De facto* recognition involves a hesitant assessment of the situation, an attitude of wait and see, to be succeeded by *de jure* recognition when the doubts are sufficiently overcome to extend formal acceptance. To take one instance, the United Kingdom recognised the Soviet government *de facto* in 1921 and *de jure* in 1924.[61] A slightly different approach is adopted in cases of civil war where the distinction between *de jure* and *de facto* recognition is sometimes used to illustrate the variance between legal and factual sovereignty. For example, during the 1936–9 Spanish Civil War, the United Kingdom, while recognising the Republican government as the *de jure* government, extended *de facto* recognition to the forces under General Franco as they gradually took over the country. Similarly, the government of the Italian conquering forces in Ethiopia was recognised *de facto* by the UK in 1936, and *de jure* two years later.[62]

By this method a recognising state could act in accordance with political reality and its own interests while reserving judgment on the permanence of the change in government or its desirability or legality. It is able to safeguard the affairs of its citizens and institutions by this, because certain legal consequences will flow in municipal law from the recognition.[63]

There are in reality few meaningful distinctions between a *de facto* and a *de jure* recognition, although only a government recognised *de jure* may enter a claim to property located in the recognising state.[64] Additionally, it is generally accepted that *de facto* recognition does not of itself include the exchange of diplomatic relations.

Premature recognition[65]

There is often a difficult and unclear dividing line between the acceptable recognition of a new state, particularly one that has emerged or is emerging

[61] See e.g. O'Connell, *International Law*, p. 161. See also the Morrison statement, above, note 38.

[62] See below, pp. 473 and 474. [63] See below, p. 471.

[64] See e.g. *Haile Selassie* v. *Cable and Wireless Ltd (No. 2)* [1939] 1 Ch. 182; 9 AD, p. 94.

[65] See e.g. *Oppenheim's International Law*, pp. 143 ff. and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 558.

as a result of secession, and intervention in the domestic affairs of another state by way of premature or precipitate recognition, such as, for example, the view taken by the Nigerian federal government with respect to the recognition of 'Biafra' by five states.[66] In each case, the state seeking to recognise will need to consider carefully the factual situation and the degree to which the criteria of statehood (or other relevant criteria with regard to other types of entity with regard to which recognition is sought) have been fulfilled. It is therefore a process founded upon a perception of fact. In the case of Croatia, it could be argued that the recognition of that state by the European Community and its member states (together with Austria and Switzerland) on 15 January 1992 was premature.[67] Croatia at that time, and for several years thereafter, did not effectively control some one-third of its territory. In addition, the Yugoslav Arbitration Commission had taken the view in Opinion No. 5 on 11 January 1992 that Croatia did not meet fully the conditions for recognition laid down in the European Community Guidelines of 16 December 1991,[68] since the Constitutional Act adopted by Croatia did not fully incorporate the required guarantees relating to human rights and minority rights.[69] It could also be argued that the recognition of Bosnia-Herzegovina on 6 April 1992 by the European Community and member states and on 7 April 1992 by the USA was premature, particularly since the government of that state effectively controlled less than one-half of its territory, a situation that continued until the Dayton Peace Agreement of November 1995.[70] On the other hand, it could be argued that in the special

[66] See e.g. J. Stremlau, *The International Politics of the Nigerian Civil War, 1967–70*, Princeton, 1977, pp. 127–9, and D. Ijalaye, 'Was "Biafra" at Any Time a State in International Law?', 65 AJIL, 1971, p. 51. See also Lauterpacht, *Recognition*, pp. 7–8.

[67] See e.g. R. Müllerson, *International Law, Rights and Politics*, London, 1994, p. 130, and R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 EJIL, 1993, p. 36.

[68] See above, p. 451.

[69] 92 ILR, pp. 179, 181. Note that the President of Croatia on 15 January 1992 announced that Croatia would abide by the necessary conditions and on 8 May 1992 its Constitution was amended. The amended Constitution was considered by the Arbitration Commission on 4 July 1992, which concluded that the requirements of general international law with regard to the protection of minorities had been satisfied, *ibid.*, p. 209. Note, however, the critical views of the UN Human Rights Committee with regard to the distinctions made in the Croatian Constitution between ethnic Croats and other citizens: see CCPR/C/79/Add.15, p. 3. Croatia became a member of the UN on 22 May 1992. See also M. Weller, 'The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia', 86 AJIL, 1992, p. 569.

[70] See e.g. Weller, 'International Response'. Cf. the views of the UK Minister of State at the Foreign Office, UKMIL, 63 BYIL, 1992, p. 645. Note that Bosnia became a member of the UN on 22 May 1992.

circumstances of Former Yugoslavia, the international community (particularly by means of membership of the UN which is restricted to states) was prepared to accept a loosening of the traditional criteria of statehood, so that essentially international recognition compensated for lack of effectivity.

Recognition may also be overdue, in the sense that it occurs long after it is clear as a matter of fact that the criteria of statehood have been satisfied, but in such cases, different considerations apply since recognition is not compulsory and remains a political decision by states.[71]

Implied recognition[72]

Recognition itself need not be express, that is in the form of an open, unambiguous and formal communication, but may be implied in certain circumstances.[73] This is due to the fact that recognition is founded upon the will and intent of the state that is extending the recognition. Accordingly, there are conditions in which it might be possible to declare that in acting in a certain manner, one state has by implication recognised another state or government. Because this facility of indirect or implied recognition is available, states may make an express declaration to the effect that a particular action involving another party is by no means to be interpreted as comprehending any recognition. This attitude was maintained by Arab countries with regard to Israel, and in certain other cases.[74] It automatically excludes any possibility of implied recognition but

[71] See e.g. with regard to the delays in recognising Macedonia, Henkin *et al.*, *International Law*, p. 253, and Nguyen Quoc Dinh *et al.*, *Droit International Public*, p. 565. Israel, of course, remained unrecognised by its Arab neighbours until long after its establishment in 1948. It was recognised in 1979 by Egypt and in 1995 by Jordan.

[72] See e.g. *Oppenheim's International Law*, p. 169; Lauterpacht, *Recognition*, pp. 369–408, and Chen, *Recognition*, pp. 201–16. See also Talmon, 'Recognition of Governments', pp. 255 ff., and M. Lachs, 'Recognition and Modern Methods of International Co-operation', 35 BYIL, 1959, p. 252.

[73] Note that article 7 of the Montevideo Convention on Rights and Duties of States, 1933 provides that 'the recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognising the new state.' See also R. Higgins, *The Development of International Law by the Political Organs of the United Nations*, Oxford, 1963, pp. 140 ff.

[74] See e.g. UK and North Vietnam, Cmd 9763, p. 3, note 1, and Israel and Arab countries, International Convention on the Elimination of all Forms of Racial Discrimination, 1965: see *Human Rights International Instruments*, UN, ST/HR/4/rev.4, 1982. Note that Egypt withdrew its declarations regarding non-recognition of Israel with regard to this Convention on 18 January 1980, *ibid.*, p. 86.

does suggest that without a definite and clear waiver, the result of some international actions may be recognition of a hitherto unrecognised entity in certain circumstances.

The point can best be explained by mentioning the kind of conditions which may give rise to the possibility of a recognition where no express or formal statement has been made. A message of congratulations to a new state upon attaining sovereignty will imply recognition of that state, as will the formal establishment of diplomatic relations,[75] but the maintenance of informal and unofficial contacts (such as those between the United States and Communist China during the 1960s and early 1970s in Warsaw) will not.[76] The issuing of a consular *exequatur*, the accepted authorisation permitting the performance of consular functions, to a representative of an unrecognised state will usually amount to a recognition of that state, though not in all cases.[77] A British Consul has operated in Taiwan, but the UK does not recognise the Taiwan government.[78] It is possible that the conclusion of a bilateral treaty between the recognising and unrecognised state, as distinct from a temporary agreement, might imply recognition, but the matter is open to doubt since there are a number of such agreements between parties not recognising each other. One would have to study the circumstances of the particular case to clarify the issue.[79]

[75] See O'Connell, *International Law*, pp. 154–5. Note that the UK stated that in the case of Namibia 'there was no formal recognition of statehood, but it was implicit in the establishment of diplomatic relations in March 1990', UKMIL, 63 BYIL, 1992, p. 642. Instructing an ambassador to make suitable, friendly contact with the new administration in question might also suffice: see UKMIL, 50 BYIL, 1979, p. 294.

[76] See e.g. *Pan American World Airways Inc.* v. *Aetna Casualty and Surety Co.* 13 ILM, 1974, pp. 1376, 1397.

[77] See *Oppenheim's International Law*, p. 171, note 9.

[78] Discussions with an unrecognised entity conducted by consular officers will not of itself imply recognition: see e.g. H. de Smith, *Great Britain and the Law of Nations*, London, 1932, vol. I, p. 79, and *Civil Air Transport Inc.* v. *Central Air Transport Corporation* [1953] AC 70, 88–9. The establishment of an office in the UK, for example, of an unrecognised entity is not as such prohibited nor does it constitute recognition: see e.g. with regard to the PLO, 483 HL Deb., cols. 1248–52, 27 January 1987 and UKMIL, 58 BYIL, 1987, p. 531. Note that under section 1 of the Diplomatic and Consular Premises Act 1987, the permission of the Foreign Secretary is required if the premises in question are to be regarded as diplomatic or consular.

[79] See e.g. *Republic of China* v. *Merchants' Fire Assurance Corporation of New York* 30 F.2d 278 (1929); 5 AD, p. 42 and *Clerget* v. *Banque Commerciale pour l'Europe du Nord* 52 ILR, p. 310. See, with regard to the special position as between the German Federal Republic and the German Democratic Republic, *Re Treaty on the Basis of Relations Between the Federal Republic of Germany and the German Democratic Republic* 78 ILR, p. 150. See also Whiteman, *Digest*, vol. II, pp. 567 ff.

The making of claims by a state against an entity will not necessarily imply recognition.[80]

Recognition is not normally to be inferred from the fact that both states have taken part in negotiations and signed a multilateral treaty,[81] for example the United Nations Charter. Practice shows that many of the member states or their governments are not recognised by other member states.[82] Although Israel and many Arab countries are UN members, this did not affect Arab non-recognition of the Israeli state.[83] However, where the state concerned has voted in favour of membership in the UN of the entity in question, it is a natural inference that recognition has occurred. The UK, for example, regarded its vote in favour of UN membership for the former Yugoslav republic of Macedonia as amounting to recognition of that entity as a state.[84] Indeed, irrespective of recognition by individual states, there is no doubt that membership of the UN is powerful evidence of statehood since being a state is a necessary precondition to UN membership by virtue of article 4 of the UN Charter.[85]

In the case of common participation in an international conference, similar considerations apply, although the element of doubt has often stimulated non-recognising states to declare expressly that their presence and joint signature on any agreement issuing forth from the meeting is in no way to be understood as implying recognition. Such has been the case particularly with the Arab states over the years with regard to Israel.

State practice has restricted the possible scope of operation of this concept of implied recognition to a few instances only and all the relevant surrounding circumstances will have to be carefully evaluated before one can deduce from conduct the intention to extend recognition. States like to retain their control of such an important political instrument as recognition and are usually not keen to allow this to be inferred from the

[80] See e.g. with regard to Formosa/Taiwan, 6 ICLQ, 1957, p. 507 and with regard to Turkish-occupied northern Cyprus, 957 HC Deb., col. 247, Written Answer, 8 November 1978.

[81] See e.g. UKMIL, 49 BYIL, 1978, p. 339 and Whiteman, *Digest*, vol. II, pp. 563 ff. See also *Civil Aeronautics Administration* v. *Singapore Airlines Ltd* [2004] 1 SLR 570; [2004] SGCA 3, para. 35; 133 ILR, pp. 371, 383.

[82] See the Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, S/1466, 1950 and 4 *International Organisation*, 1950, pp. 356, 359.

[83] See e.g. Q. Wright, 'Some Thoughts about Recognition', 44 AJIL, 1950, p. 548. See also, with regard to the Ukraine and Byelorussia, members of the UN prior to the demise of the USSR of which they were constituent republics, UKMIL, 55 BYIL, 1978, p. 339.

[84] See 223 HC Deb., col. 241, Written Answer, 22 April 1993 and UKMIL, 64 BYIL, 1993, p. 601. Note that a similar view was taken with regard to the Democratic People's Republic of Korea, 62 BYIL, 1991, p. 559.

[85] See the *Conditions of Membership of the United Nations* case, ICJ Reports, 1948, pp. 57 ff.; 15 AD, p. 333.

way they behave. They prefer recognition to be, in general, a formal act accorded after due thought.

Conditional recognition

The political nature of recognition has been especially marked with reference to what has been termed conditional recognition. This refers to the practice of making the recognition subject to fulfilment of certain conditions, for example, the good treatment of religious minorities as occurred with regard to the independence of some Balkan countries in the late nineteenth century, or the granting of most-favoured-nation status to the recognised state. One well-known instance of this approach was the Litvinov Agreement of 1933 whereby the United States recognised the Soviet government upon the latter undertaking to avoid acts prejudicial to the internal security of the USA, and to come to a settlement of various financial claims.[86]

However, breach of the particular condition does not invalidate the recognition. It may give rise to a breach of international law and political repercussions but the law appears not to accept the notion of a conditional recognition as such. The status of any conditions will depend upon agreements specifically made by the particular parties.[87] It is, however, important to distinguish conditional recognition in this sense from the evolution of criteria for recognition generally, although the two categories may in practice overlap.[88]

Collective recognition[89]

The expediency of collective recognition has often been noted. This would amount to recognition by means of an international decision, whether

[86] See e.g. *United States* v. *Pink* 315 US 203, 229 (1942), Whiteman, *Digest*, vol. II, pp. 120 ff.; 10 AD, p. 48, and A. Kiss, *Répertoire de la Pratique Française en Matière de Droit International Public*, Paris, 1962–72, vol. III, pp. 40 ff.

[87] See e.g. Lauterpacht, *Recognition*, chapter 19. See also the Treaty of Berlin, 1878 concerning Bulgaria, Montenegro, Serbia and Romania and the provisions dealing with freedom of religion, articles V, XXVII, XXXV and XLIII.

[88] See further above, p. 451, with regard to the approach of the European Community to the emergence of new states in Eastern Europe and out of the former USSR and Yugoslavia. This constituted a co-ordinated stand with regard to criteria for recognition by the Community and its member states rather than collective recognition as such.

[89] See e.g. Higgins, *Development of International Law*; Dugard, *Recognition*; Lauterpacht, *Recognition*, p. 400; Chen, *Recognition*, p. 211, and *Oppenheim's International Law*, pp. 177 ff.

by an international organisation or not. It would, of course, signify the importance of the international community in its collective assertion of control over membership and because of this it has not been warmly welcomed, nor can one foresee its general application for some time to come. The idea has been discussed particularly since the foundation of the League of Nations and was re-emphasised with the establishment of the United Nations. However, it rapidly became clear that member states reserved the right to extend recognition to their own executive authorities and did not wish to delegate it to any international institution. The most that could be said is that membership of the United Nations constitutes powerful evidence of statehood. But that, of course, is not binding upon other member states who are free to refuse to recognise any other member state or government of the UN.[90]

Withdrawal of recognition[91]

Recognition once given may in certain circumstances be withdrawn. This is more easily achieved with respect to *de facto* recognition, as that is by its nature a cautious and temporary assessment of a particular situation. Where a *de facto* government loses the effective control it once exercised, the reason for recognition disappears and it may be revoked. It is in general a preliminary acceptance of political realities and may be withdrawn in accordance with a change in political factors.[92] *De jure* recognition, on the other hand, is intended to be more of a definitive step and is more difficult to withdraw.

Of course, where a government recognised *de jure* has been overthrown a new situation arises and the question of a new government will have to be faced, but in such instances withdrawal of recognition of the previous administration is assumed and does not have to be expressly stated, providing always that the former government is not still in existence and carrying on the fight in some way. Withdrawal of recognition of one government without recognising a successor is a possibility and indeed was the approach adopted by the UK and France, for example, with regard to Cambodia in 1979.[93] However, with the adoption of the new British

[90] See further above, p. 445. [91] See Lauterpacht, *Recognition*, p. 349.

[92] Withdrawal of *de facto* recognition does not always entail withdrawal of *de jure* recognition: see, with regard to Latvia, *Re Feivel Pikelny's Estate*, 32 BYIL, 1955–6, p. 288.

[93] See 975 HC Deb., col. 723, 6 December 1979, and C. Warbrick, 'Kampuchea: Representation and Recognition', 30 ICLQ, 1981, p. 234. See also AFDI, 1980, p. 888.

policy on recognition with regard to governments,[94] the position is now that the UK government will neither recognise nor withdraw recognition of regimes.[95]

Withdrawal of recognition in other circumstances is not a very general occurrence but in exceptional conditions it remains a possibility. The United Kingdom recognised the Italian conquest of Ethiopia *de facto* in 1936 and *de jure* two years later. However, it withdrew recognition in 1940, with the intensification of fighting and the dispatch of military aid.[96] Recognition of belligerency will naturally terminate with the defeat of either party, while the loss of one of the required criteria of statehood would affect recognition. It is to be noted that the 1979 recognition of the People's Republic of China as the sole legal government of China entailed the withdrawal of recognition or 'derecognition' of the Republic of China (Taiwan). This was explained to mean that, 'so far as the formal foreign relations of the United States are concerned, a government does *not* exist in Taiwan any longer'.[97]

Nevertheless, this was not to affect the application of the laws of the United States with respect to Taiwan in the context of US domestic law.[98] To some extent in this instance the usual consequences of non-recognition have not flowed, but this has taken place upon the background of a formal and deliberate act of policy.[99] It does show how complex the topic of recognition has become.

The usual method of expressing disapproval with the actions of a particular government is to break diplomatic relations. This will adequately demonstrate aversion as did, for example, the rupture in diplomatic relations between the UK and the USSR in 1927, and between some Arab countries and the United States in 1967, without entailing the legal consequences and problems that a withdrawal of recognition would initiate. But one must not confuse the ending of diplomatic relations with a withdrawal of recognition.

[94] See above, p. 458. [95] 424 HL Deb., col. 551, 15 October 1981.

[96] See *Azazh Kebbeda* v. *Italian Government* 9 AD, p. 93.

[97] US reply brief in the Court of Appeals in *Goldwater* v. *Carter* 444 US 996 (1979), quoted in DUSPIL, 1979, pp. 143–4.

[98] Taiwan Relations Act, Pub. L. 96–8 Stat. 22 USC 3301–3316, s. 4.

[99] Also of interest is the UK attitude to the 'republic of Somaliland'. This territory is part of Somalia but proclaimed independence in 1991. It is totally unrecognised by any state, but the UK maintains 'continuing contacts' with it and works 'very closely' with it: see HL Deb., vol. 677, col. 418, 16 January 2006 and HL Deb., vol. 683, col. 212, 14 June 2006. See also M. Schoiswohl, *Status and (Human Rights) Obligations of Non-Recognized De Facto Regimes in International Law: The Case of 'Somaliland'*, Leiden, 2004.

Since recognition is ultimately a political issue, no matter how circumscribed or conditioned by the law, it logically follows that, should a state perceive any particular situation as justifying a withdrawal of recognition, it will take such action as it regards as according with its political interests.

Non-recognition[100]

There has been developing since the 1930s a doctrine of non-recognition where, under certain conditions, a factual situation will not be recognised because of strong reservations as to the morality or legality of the actions that have been adopted in order to bring about the factual situation. It is a doctrine that has also been reinforced by the principle that legal rights cannot derive from an illegal situation (*ex injuria jus non oritur*).[101]

This approach was particularly stimulated by the Japanese invasion of Manchuria in 1931. The US Secretary of State declared in 1932 that the illegal invasion would not be recognised as it was contrary to the 1928 Pact of Paris (the Kellogg–Briand Pact) which had outlawed war as an instrument of national policy. The doctrine of not recognising any situation, treaty or agreement brought about by non-legal means was named the Stimson doctrine after the American Secretary of State who put it forward. It was reinforced not long afterwards by a resolution of the Assembly of the League of Nations stressing that League members should not recognise any situation, treaty or agreement brought about by means contrary to the League's Covenant or the Pact of Paris.[102]

However, state practice until the Second World War was not encouraging. The Italian conquest of the Empire of Ethiopia was recognised and the German takeover of Czechoslovakia accepted. The Soviet Union made a series of territorial acquisitions in 1940, ranging from areas of Finland to the Baltic States (of Lithuania, Estonia and Latvia) and Bessarabia. These

[100] See e.g. Lauterpacht, *Recognition*, pp. 416–20, and *Oppenheim's International Law*, pp. 183 ff. See also R. Langer, *Seizure of Territory*, Princeton, 1947; Hackworth, *Digest*, vol. I, p. 334; I. Brownlie, *International Law and the Use of Force by States*, Oxford, 1963, chapter 25; Dugard, *Recognition*, pp. 24 ff. and 81 ff., and Crawford, *Creation of States*, pp. 120 ff. See also S. Talmon *La Non Reconnaissance Collective des États Illégaux*, Paris, 2007.

[101] See e.g. *Oppenheim's International Law*, pp. 183–4, and the *Namibia* case, ICJ Reports, 1971, pp. 16, 46–7; 49 ILR, pp. 2, 36–7.

[102] LNOJ, Sp. Supp. no. 101, p. 8. This principle was reiterated in a number of declarations subsequently: see e.g. 34 AJIL, 1940, Supp., p. 197. See also O'Connell, *International Law*, pp. 143–6.

were recognised *de facto* over the years by Western powers (though not by the United States).[103]

The doctrine was examined anew after 1945. Article 2(4) of the UN Charter prohibits the threat or use of force *inter alia* against the territorial integrity of states, while the draft Declaration on the Rights and Duties of States, 1949, emphasised that territorial acquisitions by states were not to be recognised by other states where achieved by means of the threat or use of force or in any other manner inconsistent with international law and order. The Declaration on Principles of International Law, 1970, also included a provision to the effect that no territorial acquisition resulting from the threat or use of force shall be recognised as legal,[104] and Security Council resolution 242 (1967) on the solution to the Middle East conflict emphasised 'the inadmissibility of the acquisition of territory by war'.[105]

Rhodesia unilaterally proclaimed its independence in November 1965 and in the years of its existence did not receive official recognition from any state at all, although it did maintain diplomatic relations with South Africa and Portugal prior to the revolution of 1974. The day following the Rhodesian declaration of independence, the Security Council passed a resolution calling upon all states not to accord it recognition and to refrain from assisting it.[106] The Council imposed selective mandatory economic sanctions on Rhodesia and these were later made comprehensive.[107] Similar action was also taken with regard to the Bantustans, territories of South Africa declared by that state to be independent.[108] The Security Council also adopted resolution 541 in 1983, which deplored the purported

[103] O'Connell, *International Law*, pp. 143–6.

[104] See also article 11 of the Montevideo Convention on the Rights and Duties of States, 1933; article 17 of the Bogotá Charter of the OAS, 1948, and article 52 of the Vienna Convention on the Law of Treaties, 1969. Note also article 5(3) of the Consensus Definition of Aggression, 1974, adopted by the General Assembly in resolution 3314 (XXIX).

[105] See also Security Council resolutions 476 (1980) and 478 (1980) declaring purported changes in the status of Jerusalem by Israel to be null and void, and resolution 491 (1981) stating that Israel's extension of its laws, jurisdiction and administration to the Golan Heights was without international legal effect.

[106] Security Council resolution 216 (1965). See also Security Council resolutions 217 (1965), 277 (1970) and 288 (1970).

[107] See e.g. Security Council resolutions 221 (1961), 232 (1966) and 253 (1968). See also M. N. Shaw, *Title to Territory in Africa*, Oxford, 1986, p. 160; R. Zacklin, *The United Nations and Rhodesia*, Oxford, 1974, and J. Nkala, *The United Nations, International Law and the Rhodesian Crisis*, Oxford, 1985.

[108] See e.g. General Assembly resolution 31/6A and the Security Council statements of 21 September 1979 and 15 December 1981, Shaw, *Title to Territory*, p. 149. See also J. Dugard, *International Law, A South African Perspective*, Kenwyn, 1994, chapter 5.

secession of part of Cyprus occupied by Turkey in 1974 and termed the proposed Turkish Cypriot state 'legally invalid'.[109] In 1990, the Security Council adopted resolution 662, which declared the Iraqi annexation of Kuwait 'null and void' and called on all states and institutions not to recognise the annexation.[110] The principle of non-recognition of title to territory acquired through aggression in violation of international law was also reaffirmed in the *Brcko Inter-Entity Boundary* award with regard to aggression in Bosnia.[111]

The role of non-recognition as an instrument of sanction as well as a means of pressure and a method of protecting the wronged inhabitants of a territory was discussed more fully in the Advisory Opinion of the International Court of Justice in the *Namibia* case, 1971, dealing with South Africa's presence in that territory. The Court held that since the continued South African occupancy was illegal, member states of the United Nations were obliged to recognise that illegality and the invalidity of South Africa's acts concerning Namibia and were under a duty to refrain from any actions implying recognition of the legality of, or lending support or assistance to, the South African presence and administration.[112]

The legal effects of recognition

In this section some of the legal results that flow from the recognition or non-recognition of an entity, both in the international sphere and within the municipal law of particular states, will be noted. Although recognition may legitimately be regarded as a political tool, it is one that nevertheless entails important consequences in the legal field.

Internationally

In the majority of cases, it can be accepted that recognition of a state or government is a legal acknowledgement of a factual state of affairs. Nevertheless, it should not be assumed that non-recognition of, for example,

[109] See above, chapter 5, p. 235. See also *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 60–1; 120 ILR, p. 10.

[110] See below, chapter 22, p. 1253.

[111] 36 ILM, 1997, pp. 396, 422.

[112] ICJ Reports, 1971, pp. 16, 54, 56; 49 ILR, pp. 2, 44, 46. Non-member states of the UN were similarly obliged, *ibid.* The non-recognition obligation did not extend, however, to certain acts of a humanitarian nature the effect of which could only be ignored to the detriment of the inhabitants of the territory, *ibid.*, p. 56 and *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 90–8; 120 ILR, p. 10. See also above, chapter 5, p. 225.

a state will deprive that entity of rights and duties before international law, excepting, of course, those situations where it may be possible to say that recognition is constitutive of the legal entity.

In general, the political existence of a state is independent of recognition by other states, and thus an unrecognised state must be deemed subject to the rules of international law. It cannot consider itself free from restraints as to aggressive behaviour, nor can its territory be regarded as *terra nullius*. States which have signed international agreements are entitled to assume that states which they have not recognised but which have similarly signed the agreement are bound by that agreement. For example, the United Kingdom treated the German Democratic Republic as bound by its signature of the 1963 Nuclear Test Ban Treaty even when the state was not recognised by the UK.

Non-recognition, with its consequent absence of diplomatic relations, may affect the unrecognised state in asserting its rights or other states in asserting its duties under international law, but will not affect the existence of such rights and duties. The position is, however, different under municipal law.

Internally

Because recognition is fundamentally a political act, it is reserved to the executive branch of government. This means that the judiciary must as a general principle accept the discretion of the executive and give effect to its decisions. The courts cannot recognise a state or government. They can only accept and enforce the legal consequences which flow from the executive's political decision, although this situation has become more complex with the change in policy from express recognition of governments to acceptance of dealings with such entities.

To this extent, recognition is constitutive, because the act of recognition itself creates legal results within the domestic jurisdiction. In the United Kingdom and the United States particularly, the courts feel themselves obliged to accept the verdict of the executive branch of government as to whether a particular entity should be regarded as recognised or not. If the administration has recognised a state or government and so informs the judiciary by means of a certificate, the position of that state or government within the municipal structure is totally transformed.

It may sue in the domestic courts and be granted immunity from suit in certain instances. Its own legislative and executive acts will be given effect to in the courts of the recognising state and its own diplomatic

representatives will be able to claim the various immunities accorded to the official envoys of a recognised state. In addition, it will be entitled to possession in the recognising state of property belonging to its predecessor.

The UK[113]

The English courts have adopted the attitude over many years that an entity unrecognised by the Foreign Office would be treated before the courts as if it did not exist and accordingly it would not be able to claim immunity before the courts.[114] This meant in one case that ships of the unrecognised 'Provisional Government of Northern Russia' would not be protected by the courts from claims affecting them.[115] Similarly an unrecognised state or government is unable to appear before the courts as a plaintiff in an action. This particular principle prevented the revolutionary government of Berne in 1804 from taking action to restrain the Bank of England from dealing with funds belonging to the previous administration of the city.[116]

The leading case in English law on the issue of effects of recognition of an entity within the domestic sphere is *Luther* v. *Sagor*.[117] This concerned the operations and produce of a timber factory in Russia owned by the plaintiffs, which had been nationalised in 1919 by the Soviet government. In 1920 the defendant company purchased a quantity of wood from the USSR and this was claimed in England by the plaintiffs as their property since it had come from what had been their factory. It was argued by them that the 1919 Soviet decree should be ignored before the English courts since the United Kingdom had not recognised the Soviet government. The lower court agreed with this contention and the matter then came to the Court of Appeal.[118]

In the meantime the UK recognised the Soviet government *de facto* and the Foreign Office informed the Court of Appeal of this in writing. The result was that the higher court was bound to take note of the Soviet decree and accordingly the plaintiffs lost their case, since a court must give effect to the legislation of a recognised state or government. The Court also held that the fact that the Soviet government was recognised

[113] See e.g. Talmon, 'Recognition of Governments', pp. 275 ff.; Greig, 'Carl-Zeiss Case', and J. G. Merrills, 'Recognition and Construction', 20 ICLQ, 1971, p. 476.
[114] See e.g. *Halsbury's Laws of England*, 4th edn, London, 1977, vol. XVIII, p. 735.
[115] *The Annette* [1919] P. 105; 1 AD, p. 43.
[116] *The City of Berne* v. *The Bank of England* (1804) 9 Ves. Jun. 347.
[117] [1921] 1 KB 456; 1 AD, p. 47. [118] [1921] 3 KB 532; 1 AD, p. 49.

de facto and not *de jure* did not affect the issue. Another interesting point is that since the Foreign Office certificate included a statement that the former Provisional Government of Russia recognised by the UK had been dispersed during December 1917, the Court inferred the commencement of the Soviet government from that date.

The essence of the matter was that the Soviet government was now accepted as the sovereign government of the USSR as from December 1917. And since recognition once given is retroactive and relates back to the date that the authority of the government was accepted as being established, and not the date on which recognition is granted, the Soviet decree of 1919 was deemed to be a legitimate act of a recognised government. This was so even though at that date the Soviet government was not recognised by the United Kingdom.

The purpose of the retroactivity provision[119] is to avoid possible influence in the internal affairs of the entity recognised, since otherwise legislation made prior to recognition might be rejected. However, this will depend always upon the terms of the executive certificate by which the state informs its courts of the recognition. Should the Foreign Office insist that the state or government in question is to be recognised as a sovereign state or government as of the date of the action, the courts would be bound by this.

As is the case with legislation, contracts made by an unrecognised government will not be enforced in English courts. Without the required action by the political authorities, an unrecognised entity does not exist as a legal person before the municipal courts. The case of *Luther* v. *Sagor* suggested that in general the legal consequences of a *de facto* recognition would be the same as a *de jure* one. This was emphasised in *Haile Selassie* v. *Cable and Wireless Ltd (No. 2)*,[120] but regarded as restricted to acts in relation to persons or property in the territory which the *de facto* government has been recognised as effectively controlling.

In other words, a different situation would ensue with regard to persons or property situated outside the territory of the state or government. In the *Haile Selassie* case, the Emperor of Ethiopia was suing a British company for money owing to him under an agreement. The problem was that when the action was brought, the UK had recognised the Italian forces as the *de facto* authority in Ethiopia while Haile Selassie was still recognised as the *de jure* sovereign. The Court held that since the case concerned a debt

[119] See e.g. *Oppenheim's International Law*, p. 161, and Whiteman, *Digest*, vol. II, pp. 728–45.
[120] [1939] 1 Ch. 182; 9 AD, p. 94.

recoverable in England and not the validity of acts with regard to persons or property in Ethiopia, the *de jure* authority, Emperor Haile Selassie, was entitled to the sum due from the company, and the *de facto* control of the Italians did not affect this.

However, before the defendant's appeal was heard, the United Kingdom extended *de jure* recognition to the Italian authorities in Ethiopia. The Court of Appeal accepted that this related back to, and was deemed to operate as from the date of, the *de facto* recognition. Since this had occurred prior to the case starting, it meant that the Italian government was now to be recognised as the *de jure* government of Ethiopia, before and during the time of the hearing of the action. Accordingly, Haile Selassie was divested of any right whatsoever to sue for the recovery of the money owing.

This problem of the relationship between a *de facto* government and a *de jure* government as far as English courts were concerned, manifested itself again during the Spanish Civil War. The case of the *Arantzazu Mendi*[121] concerned a private steamship registered in Bilbao in the Basque province of Spain. In June 1937, following the capture of that region by the forces of General Franco, the opposing Republican government issued a decree requisitioning all ships registered in Bilbao. Nine months later the Nationalist government of Franco also passed a decree taking control over all Bilbao vessels. In the meantime, the *Arantzazu Mendi* itself was in London when the Republican government issued a writ to obtain possession of the ship. The owners opposed this while accepting the Nationalists' requisition order.

It was accepted rule of international law that a recognised state cannot be sued or otherwise brought before the courts of another state. Accordingly, the Nationalists argued that since their authority had been recognised *de facto* by the UK government over the areas they actually controlled, their decree was valid and could not be challenged in the English courts. Therefore, the action by the Republican government must be dismissed.

The case came before the House of Lords, where it was decided that the Nationalist government, as the *de facto* authority of much of Spain including the region of Bilbao, was entitled to be regarded as a sovereign state and was able to benefit from the normal immunities which follow therefrom. Thus, the action by the Republican government failed.

[121] [1939] AC 256; 9 AD, p. 60.

The House of Lords pointed out that it did not matter that the territory over which the *de facto* authority was exercising sovereign powers was from time to time increased or diminished.[122] This case marks the high-point in the attribution of characteristics to a *de facto* authority and can be criticised for its over-generous assessment of the status of such an entity.[123]

The problems faced by the English court when the rights and obligations of a *de jure* government and a *de facto* government, claiming the same territory, appear to be in conflict have been briefly noted. Basically, the actions of a *de facto* authority with regard to people and property within this sphere of control will be recognised in an English court, but where property is situated and recoverable in England, the *de jure* sovereign will have precedence. A similarly complicated situation arises where the interests of two recognised *de jure* governments of the same state are involved, as one supersedes the other. Problems can arise concerning the issue of retroactivity, that is, how far the court will relate back actions of a *de jure* government, since recognition is normally retroactive to the moment of inception of the particular state or government.

The matter was discussed in the *Gdynia Ameryka Linie* v. *Boguslawski* case.[124] During the Second World War the Polish government-in-exile stationed in London was recognised by the UK as the *de jure* government of Poland. However, on 28 June 1945 the communist provisional government was established with effective control of the country and at midnight on 5 July the UK recognised that government as the *de jure* government of Poland. A couple of days prior to this recognition, the Polish government-in-exile made an offer to Polish seamen of compensation in the event of leaving the merchant navy service. The money was to be paid by the particular employers to seamen not wanting to work for the communist provisional government. In the *Boguslawski* case the employers refused to pay the compensation to seamen requesting it, and argued that the UK recognition *de jure* of the provisional government was retroactive to 28 June, this being the date that the government effectively took control of the country. If this was the case, then acts of the government-in-exile after 28 June ceased to be of effect and thus the offers of compensation could not be enforced in the English courts.

The House of Lords emphasised the general proposition that recognition operates retroactively. However, they modified the statement by

[122] See e.g. Lord Atkin, [1939] AC 256, 264–5.
[123] See e.g. Lauterpacht, *Recognition*, pp. 288–94.
[124] [1953] AC 11; 19 ILR, p. 72.

declaring that the courts had to give effect not only to acts done by the new government after recognition, but also to acts done before the recognition 'in so far as those acts related to matters under its control at the time when the acts were done'.[125] It was stated that while the recognition of the new government had certain retroactive effects, the recognition of the old government remained effective down to the date when it was in fact withdrawn. Problems might have arisen had the old government, before withdrawal of recognition, attempted to take action with respect to issues under the control of the new government. However, that was not involved in this case.

In other words, and in the circumstances of the case, the principle of retroactivity of recognition was regarded as restricted to matters within the effective control of the new government. Where something outside the effective control of the new government is involved, it would appear that the recognition does not operate retroactively and that prior to the actual date of recognition one would have to accept and put into effect the acts of the previous *de jure* government.

This could lead to many complicated situations, especially where a court is faced with conflicting courses of action, something which is not hard to envisage when one *de jure* government has been superseded by another. It could permit abuses of government such as where a government, knowing itself to be about to lose recognition, awards its supporters financial or other awards in decrees that may be enforced in English courts. What would happen if the new government issued contrary orders in an attempt to nullify the effect of the old government's decrees is something that was not examined in the *Boguslawski* case.

Another case which came before the courts in the same year was *Civil Air Transport Inc.* v. *Central Air Transport Corporation*,[126] and it similarly failed to answer the question mentioned above. It involved the sale of aircraft belonging to the nationalist government of China, which had been flown to the British Crown Colony of Hong Kong. Such aircraft were sold to an American company after the communist government established effective control over the country but before it had been recognised by the UK. The Court accepted that the nationalist government had been entitled to the aircraft and pointed out that:

[125] Lord Reid, [1953] AC 11, 44–5; 19 ILR, pp. 81, 83.

[126] [1953] AC 70; 19 ILR, pp. 85, 93, 110. See also F. A. Mann, 'Recognition of Sovereignty', 16 MLR, 1953, p. 226.

> retroactivity of recognition operates to validate acts of a *de facto* Government which has subsequently become the new *de jure* Government, and not to invalidate acts of the previous *de jure* Government.[127]

It is to be noted that the communist government did not attempt to nullify the sale to the American company. Had it done so, a new situation would have been created, but it is as yet uncertain whether that would have materially altered the legal result.

The general doctrine adhered to by the UK with regard to recognition (and now diplomatic dealings) is that it will be accorded upon the evidence of effective control. It is used to acknowledge factual situations and not as a method of exhibiting approval or otherwise. However, this is not so in all cases and there are a number of governments in effective control of their countries and unrecognised by the UK. One major example was the former German Democratic Republic. Since the prime consequence of non-recognition is that the English courts will not give effect to any laws of an unrecognised entity, problems are thus likely to arise in ordinary international political and commercial life.

The issue came before the courts in the *Carl Zeiss Stiftung* v. *Rayner and Keeler Ltd (No. 2)* case.[128] It concerned the Carl Zeiss foundation which was run by a special board, reconstituted in 1952 as the Council of Gera. The problem was that it was situated in the German Democratic Republic (GDR) and the establishment of the Council of Gera as the governing body of the Carl Zeiss foundation was effected by a reorganisation of local government in the GDR. When Carl Zeiss brought a claim before the English courts, the issue was at once raised as to whether, in view of the UK non-recognition of the GDR, the governing body of the foundation could be accepted by the courts. The Court of Appeal decided that since the Foreign Office certified that the UK recognised 'the State and Government of the Union of Soviet Socialist Republics as *de jure* entitled to exercise governing authority in respect of that zone'[129] (i.e. the GDR, being the former Soviet zone of occupation), it was not possible to give effect to any rules or regulations laid down by the GDR. The House of Lords, however, extricated the English courts system from a rather difficult position by means of an elaborate fiction.

It stated that as a Foreign Office certificate is binding on the courts as to the facts it contains, it logically followed that the courts must recognise

[127] [1953] AC 70, 90; 19 ILR, pp. 110, 113.
[128] [1967] AC 853; 43 ILR, p. 42. See also Greig, 'Carl-Zeiss Case'.
[129] [1966] 1 Ch. 596; 43 ILR, p. 25.

the USSR as the *de jure* governing authority of East Germany, irrespective of the creation of the GDR. The courts were not entitled to enter into a political examination of the actual situation but were obliged to accept and give effect to the facts set out in the Foreign Office certificate. Thus, the Soviet Union was the *de jure* sovereign and the GDR government must be accepted as a subordinate and dependent body.

Accordingly, the Court could recognise the existence of the Carl Zeiss Stiftung by virtue of the UK recognition of the *de jure* status of the Soviet Union, the GDR as an administrative body being relevant only as a legal creature of the USSR.

The problem brought out in the *Carl Zeiss* case and sidestepped there was raised again in a series of cases concerning Rhodesia, following the unilateral declaration of independence by the Smith regime in 1965. Basically, if a government or state which exercises effective control over its own territory is unrecognised by the UK a strict enforcement of the 'no recognition, no existence' rule could lead to much hardship and inconvenience. Accordingly, in *Adams* v. *Adams*[130] a Rhodesian divorce decree was not recognised in an English court. However, in *Hesperides Hotels Ltd* v. *Aegean Turkish Holidays*,[131] concerning an action in trespass with respect to hotels owned by Greek Cypriots but run by Turkish Cypriots following the Turkish invasion of 1974, Lord Denning stated *obiter* that he believed that the courts could recognise the laws and acts of an unrecognised body in effective control of territory, at least with regard to laws regulating the day-to-day affairs of the people.[132] It is certainly an attractive approach, provided it is carefully handled and strictly limited to determinations of a humanitarian and non-sovereign nature.[133] In *Caglar* v. *Bellingham*, it was noted that while the existence of a foreign unrecognised government could be acknowledged in matters relating to commercial obligations or matters of private law between individuals or matters of routine administration such as registration of births, marriages and deaths, the courts would not acknowledge the existence of an unrecognised state if to do so would involve them in acting inconsistently with the foreign

[130] [1971] P. 188; 52 ILR, p. 15.

[131] [1978] QB 205; 73 ILR, p. 9. See also M. N. Shaw, 'Legal Acts of an Unrecognised Entity', 94 LQR, 1978, p. 500.

[132] [1978] QB 205, 218; 73 ILR, pp. 9, 15. See also Steyn J, *Gur Corporation* v. *Trust Bank of Africa Ltd* [1986] 3 WLR 583, 589, 592; 75 ILR, p. 675.

[133] See further the *Namibia* case, ICJ Reports, 1971, pp. 16, 56; 49 ILR, pp. 2, 46, and *Cyprus* v. *Turkey*, European Court of Human Rights, Judgment of 10 May 2001, paras. 90–8; 120 ILR, p. 10.

policy or diplomatic stance of the UK.[134] In *Emin* v. *Yeldag*, the Court held that private acts taking place within an unrecognised state could be regarded as valid within the English legal system provided that there was no statutory prohibition[135] and that such acceptance did not compromise the UK government in the conduct of foreign relations.[136] Indeed, where the issue concerns the lawful acts of a person recognised as existing in English law, they will be justiciable before the English courts and will not be tainted by illegality because the unrecognised state can be associated with the actions.[137]

In many cases, however, the problems with regard to whether an entity is or is not a 'state' arise in connection with the interpretation of a particular statutory provision. The approach of the courts has been to focus upon the construction of the relevant instrument rather than upon the Foreign Office certificate or upon any definition in international law of statehood.[138]

Some of the consequential problems of non-recognition were addressed in the Foreign Corporations Act 1991. This provides that a corporation incorporated in a territory not recognised by the UK government as a state would be regarded as having legal personality within the UK where the laws of that territory were applied by a settled court system. In other words, the territory would be treated for this purpose as if it were a recognised state, thereby enabling its legislation to be applied in this circumstance on the normal conflict of rules basis. The point should, however, be stressed that the legislation was not intended at all to impact upon recognition issues as such.[139]

[134] 108 ILR, p. 510, at 534.

[135] Such as in *Adams* v. *Adams* [1970] 3 All ER 572 in view of the relationship between the UK and Southern Rhodesia.

[136] [2002] 1 FLR 956. This contradicted the earlier case of *B* v. *B* [2000] FLR 707, where a divorce obtained in the unrecognised 'Turkish Republic of Northern Cyprus' was not recognised. See also *Parent and Others* v. *Singapore Airlines Ltd and Civil Aeronautics Administration* 133 ILR, p. 264.

[137] See *North Cyprus Tourism Centre Ltd* v. *Transport for London* [2005] EWHC 1698 (Admin), para. 50.

[138] See e.g. *Re Al-Fin Corporation's Patent* [1970] Ch. 160; 52 ILR, p. 68; *Reel* v. *Holder* [1981] 1 WLR 1226; 74 ILR, p. 105 and *Caglar* v. *Bellingham* 108 ILR, p. 510 at 528, 530 and 539, where the statutory term 'foreign state' was held to mean a state recognised by the UK.

[139] This legislation was adopted essentially to deal with the situation following *Arab Monetary Fund* v. *Hashim (No. 3)* [1991] 2 WLR, whereby the legal personality of a company not incorporated in a territory recognised as a state would not be recognised in English law. See UKMIL, 62 BYIL, 1991, pp. 565–8. See also the decision of the Special Commissioners in *Caglar* v. *Bellingham*, 108 ILR, p. 510 at 530, where it was emphasised that the intention of

Since the UK decision to abandon recognition of governments in 1980, the question arises as to the attitude of the courts on this matter. In particular, it appears that they may be called upon to examine the nature of the UK government's dealings with a new regime in order to determine its status for municipal law purposes.[140]

In *Gur Corporation* v. *Trust Bank of Africa*[141] the Court was in fact called upon to decide the status of Ciskei. This territory, part of South Africa, was one of the Bantustans granted 'independence' by South Africa. This was accomplished by virtue of the Status of Ciskei Act 1981. The preliminary issue that came before the Court in a commercial dispute was whether Ciskei had *locus standi* to sue or be sued in England. The Foreign and Commonwealth Office certified that Ciskei was not recognised as an independent sovereign state either *de facto* or *de jure* and that representations were made to South Africa in relation to matters occurring in Ciskei. The Court of Appeal held that it was able to take account of such declarations and legislation as were not in conflict with the certificates.

The effect of that, noted Lord Donaldson, was that the Status of Ciskei Act 1981 could be taken into account, except for those provisions declaring the territory independent and relinquishing South African sovereignty. This led to the conclusion that the Ciskei legislature was in fact exercising power by virtue of delegation from the South African authorities.[142] Accordingly, the government of Ciskei could sue or be sued in the English courts 'as being a subordinate body set up by the Republic of South Africa to act on its behalf'.[143] Clearly the Court felt that the situation was analogous to the *Carl Zeiss* case. Whether this was in fact so is an open question. It is certainly open to doubt whether the terms of the certificates in the cases were on all fours. In the *Gur* case, the executive was far more cautious and non-committal. Indeed, one of the certificates actually stated that the UK government did not have a formal position regarding the exercise of governing authority over the territory of Ciskei,[144] whereas in *Carl Zeiss* the certificate noted expressly that the USSR was recognised as *de jure* entitled to exercise governing authority in respect

the legislation was not to affect at all the government's policy on recognition, but to sever the connection with public international law and deal with issues of private international law.

[140] See 409 HL Deb., cols. 1097–8 and Symmons, 'United Kingdom Abolition', pp. 254–60.

[141] [1987] 1 QB 599; 75 ILR, p. 675.

[142] [1987] 1 QB 599, 623; 75 ILR, p. 696.

[143] [1987] 1 QB 599, 624. See also Nourse LJ, *ibid.*, pp. 624–66; 75 ILR, pp. 696–9.

[144] [1987] 1 QB 599, 618–19; 75 ILR, p. 690.

of the territory (the GDR).[145] The gap was bridged by construction and inference.

More widely, it is unclear to what extent the change in policy on recognition of governments has actually led to a change in attitude by the courts. There is no doubt that the attitude adopted by the government in certifying whether or not diplomatic dealings were in existence with regard to the entity in question is crucial. An assertion of such dealing would, it appears, be determinative.[146] The problem arises where the Foreign Office statement is more ambiguous than the mere assertion of dealings with the entity. The consequence is that a greater burden is imposed on the courts as an answer as to status is sought. On the one hand, the *Gur* case suggests that the courts are not willing to examine for themselves the realities of any given situation, but would seek to infer from the terms of any certificate what the answer ought to be.[147] On the other hand, Hobhouse J in the High Court in *Republic of Somalia* v. *Woodhouse Drake and Carey (Suisse) SA*[148] took the wider view that in deciding whether a regime was the government of a state, the court would have to take into account the following factors: (a) whether it is the constitutional government of the state; (b) the degree, nature and stability of administrative control, if any, that it of itself exercises over the territory of the state; (c) whether the UK government has any dealings with it, and if so the nature of those dealings; and (d) in marginal cases, the extent of international recognition that it has as the government of the state.[149] Part of the answer as to why a different emphasis is evident is no doubt due to the fact that in the latter case, there were competing bodies claiming to be the government of Somalia and the situation on the ground as a matter of fact was deeply confused. It should also be noted that in the *Republic of Somalia* case, the court took the view that Foreign Office statements were no more than part of the evidence in the case, although likely to be the best evidence as to whether the government had dealings with the entity in question.[150]

[145] [1966] 1 Ch. 596; 43 ILR, p. 25.

[146] See e.g. the *Arantzazu Mendi* [1939] AC 256, 264; 9 AD, p. 60, and *Gur Corporation* v. *Trust Bank of Africa* [1987] 1 QB 599, 625; 75 ILR, p. 675. See also *Republic of Somalia* v. *Woodhouse Drake and Carey (Suisse) SA* [1993] QB 54, 65–6; 94 ILR, p. 620.

[147] See e.g. F. A. Mann, 'The Judicial Recognition of an Unrecognised State', 36 ICLQ, 1987, p. 349, and Beck, 'A South African Homeland Appears in the English Court: Legitimation of the Illegitimate?', 36 ICLQ, 1987, p. 350.

[148] [1993] QB 54; 94 ILR, p. 608.

[149] [1993] QB 54, 68; 94 ILR, p. 622.

[150] [1993] QB 54, 65; 94 ILR, p. 619. This was reaffirmed in *Sierra Leone Telecommunications Co. Ltd* v. *Barclays Bank* [1998] 2 All ER 821; 114 ILR, p. 466. See also K. Reece Thomas,

The USA

The situation in the United States with regard to the recognition or non-recognition of foreign entities is similar to that pertaining in the UK, with some important differences. Only a recognised state or government can in principle sue in the US courts.[151] This applies irrespective of the state of diplomatic relations, providing there is no war between the two.[152] However, an unrecognised state or government may in certain circumstances be permitted access before the American courts. This would appear to depend on the facts of each case and a practical appreciation of the entity in question.[153] For example, in *Transportes Aeros de Angola* v. *Ronair*,[154] it was held that in the particular circumstances where the US State Department had clearly stated that allowing the plaintiff (a corporation owned by the unrecognised government of Angola) access to the Court would be consistent with the foreign policy interests of the United States, the jurisdictional bar placed upon the Court would be deemed to have been lifted.

As in the UK, a declaration by the executive will be treated as binding the courts, but in the USA the courts appear to have a greater latitude. In the absence of the 'suggestion' clarifying how far the process of non-recognition is to be applied, the courts are more willing than their UK counterparts to give effect to particular acts of an unrecognised body. Indeed, in the *Carl Zeiss* case Lords Reid and Wilberforce referred in approving terms to the trend evident in decisions of US courts to give recognition to the 'actual facts or realities found to exist in the territory in question', in the interests of justice and common sense. Such recognition did not apply to every act, but in Lord Wilberforce's words, it did apply to 'private rights, or acts of everyday occurrence, or perfunctory acts of administration'.[155] How far this extends, however, has never been precisely defined.

It was the difficulties engendered by the American Civil War that first stimulated a reappraisal of the 'no recognition, no existence' doctrine. It

'Non-recognition, Personality and Capacity: The Palestine Liberation Organisation and the Palestine Authority in English Law', 29 *Anglo-American Law Review*, 2000, p. 228.

151 See e.g. *Republic of Vietnam* v. *Pfizer* 556 F.2d 892 (1977); 94 ILR, p. 199.

152 See *Banco Nacional de Cuba* v. *Sabbatino* 376 US 398, 412; 35 ILR, p. 2 and *National Oil Corporation* v. *Libyan Sun Oil Co.* 733 F.Supp. 800 (1990); 94 ILR, p. 209.

153 See above, p. 234, regarding Taiwan after 1 January 1979. See also *Wulfsohn* v. *Russian Republic* 234 NY 372 (1924); 2 AD, p. 39.

154 544 F.Supp. 858, 863–4 (1982); 94 ILR, pp. 202, 208–9.

155 [1967] AC 853, 954; 43 ILR, pp. 23, 66.