The Legal Consequences of the de facto Existence in the International Community

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Abstract: The relationship between recognition and international legal personality has been debated by constitutive and declaratory theory. This article argues that opportunities to participating in international relations ought not to be denied due to the lack of formal recognition, and demonstrates how different international for a make accommodations to ensure that unrecognized states can participate. It aims to understand 'the de facto states' that do not exist in international relations, how they survive, and what sort of entities evolve in the context of non-recognition.

Key Words: Unrecognized state, recognition, legitimacy to participate in international relations, unrecognized states wanting to participate in international relations faces numerous obstacles.

1. Introduction:

The concept of Unrecognized states (Their statutes in international relations)

Unrecognized states are territories that have achieved de facto independence but failed to gain international recognition as independent states.[1] The states themselves have little in common beyond often sharing a common reason for being unrecognized: they have come into being after succeeding from another state.[2] Their statuses are conditioned by conflict and an unwelcomed effect of the dominant norms of international law, and thus find it difficult to gain recognition.[3] The international community may react to unrecognized states by imposing embargoes or sanctions, by shunning them, or extending only limited acceptance and acknowledgment.[4] Unrecognized states are consistently denied opportunities to participate in international fora, and thus do not enjoy the benefits of international cooperation.

The legal statuses of unrecognized states have been discussed in 'the great debate' between constitutive and declaratory theory. Constitutive theory holds that an international personality cannot be created automatically. Based on the observation that, in every legal system, some organ must be competent to determine, with certainty, the subjects of system, the school of constitutive theory concludes that such an act can only be accomplished by the states through recognition.[5] According to the survey of William Thomas Worster, the school of constitutive theory regards recognition as an act intended to vest rights and obligations in an entity. As such, statehood is merely a bundle of rights and duties on the international plane.[6] Hans Kelsen holds that the without recognition, the unrecognized state does not exist *vis-à-vis* the other states. Thus, recognition is a precondition for an entity to be brought into legal existence in relations with recognizing states.[7] The conclusion would be drawn that the unrecognized state is not, in this sense, a state under international law.

Declaratory theory takes a contrary position, and holds that recognition is a political act independent of the existence of the new state.[8] James Crawford indicates that subjects other than the state may also possess a bundle of rights and duties at international level; thus, he considers the meaning of statehood to derive from standing on

[1] Nina Caspersen and Gareth Stansfield, 'Introduction' in N Caspersen and G Stansfield (eds) Unrecognized states in the international system (Routledge 2011) 2.
[2] N Caspersen, *Unrecognized States: the Struggle for Sovereignty in the Modern International System* (Polity 2012) 32.
[3] K Mulaj, 'International actions and the making of unrecognized states' in N Caspersen and G Stansfield, *Unrecognized States in the International System* (Routledge 2011) 42.
[4] S Pegg, 'De Facto States in the International System', Institute of International Relations The University of British Columbia Working (1998) 4, <http://www.isn.ethz.ch/Digital- Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c 7060233&lng=en&id=46433> accessed 2016/7/22.
[5] J Crawford, *The creation of states in international law* (Clarendon Press; Oxford University Press 2006) 20.
[6] W T Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory', Boston University International Law Journal, 27, 2009, 115- 139.

[7] H Kelsen, 'Recognition in International Law: Theoretical Observations', The American Journal of International Law 35, 1941, 605- 609.
[8] Crawford, *The Creation of states in International Law* (n5) 22.

the international level – that is to say, to possess a range of powers and responsibilities at the international level.[9] The school of declaratory theory insists that recognition is merely a political act without legal effect. The personality of an existing state is conferred by the operation of international law, rather than other existing states.[10] Furthermore, James Crawford holds that "the question is whether the denial of recognition of an entity otherwise qualifying as a State entitles the non-recognizing State to act as if it was not a State – to ignore its nationality, to intervene in its affairs, generally to deny the exercise of State rights under international law."[11] Therefore, declaratory theory correctly concludes that recognition is no longer a condition for an entity to be a state. However, recognition could be a requirement of accessing international fora.[12] That is to say, being a state is not the same as being accepted by the international community, as public international law does not impose a recognition obligation on the international community or other states.[13] The act of recognition is a political concern, which may cause the international community to refuse admission, or participation, to unrecognized states in international fora, but this is a diplomatic constraint.[14]

Accordingly, it is argued that unrecognized states must overcome higher political thresholds, and that the difficulties associated with exclusion from international fora are not resolved by declaratory theory. Thus, we can be fairly certain that even though declaratory theory successfully argues for the independent status of unrecognized states, winning a place on various international stages is something else, and a matter of diplomatic constraints.

2. The Legal Consequences of the de facto existence in the international community:

Francis Owtram observes that at the core, the foreign policies of unrecognized states, including Taiwan, Palestine, Turkish Cyprus, South Ossetia, and Somaliland, aim at recognition, including de facto recognition.[15] By skilfully conducting their foreign policies, unrecognized states could demonstrate their capacity to engage in foreign relations, especially through economic engagement to consolidate itself as a state, and acquire de facto status existence in the international community. Since the division of the world in today's 'nation state', to quote from Fred Halliday, is the power politics rather than the result of natural justice,[16] de facto existence under international relations proves useful for unrecognized states seeking to overcome their isolation by pursuing a foreign policy.[17] Francis Owtram therefore argues that, from the perspective of international law, the longer the facto sovereignty is maintained, the better.[18]

Francis Owtram does not provide a firm legal basis for his argument, but his opinion is indeed supported by the principle of effectiveness under international law, which stipulates that any claim under international law would only be valid while the situation it argued is solidly implanted in the real life.[19] That is to say, an entity claiming statehood must show that it effectively exists on the international plane as a state. Thus, the longer de facto existence is maintained by unrecognized states by its foreign policy, the more consolidated the basis for them to participate in international relations is. Cassese further provides examples that even though an effective unrecognized state could not enter into an active relation with other states, the navigation of its flagship on the high sea and the political independence shall be protected by international law.[20] James Crawford's opinion corresponds with this idea. On the legality of the use of force against Taiwan: even though, in his opinion, Taiwan is not a state, he still opines that "the suppression by force of 23 million people cannot be consistent with the UN

[9] Ibid.
[10] I Brownlie, Principles of Public International Law, 7th ed. (Oxford University, Press 2008) 87.
[11] Crawford, *The creation of states in international law* (n5) 27.
[12] Worster, 'Law, Politics, and the Conception of the State in State Recognition Theory' (n 6) 137.
[13] Brownlie, *Principles of Public International Law* (n10) 90.
[14] A Cassese, *International Law* (2edn, Oxford University Press 2005) 76.

[15] F Owtram, 'The Foreign Policies of Unrecognized States' in N Caspersen and G Stansfield (eds), *Unrecognized States in the International System* (Routledge 2011) 136.
[16] Ibid.
[17] Ibid.
[18] Ibid, 141.
[19] Cassese, *International Law* (n14) 12.
[20] Ibid, 76.

Charter", and therefore, to that extent, there must be a cross-Strait boundary for the purpose of limiting the use of force.[21] That is to say, international law, especially the prohibition on the use of force, must be applied to cross-strait relations. In 2005, the implementation of US-Japan security arrangements to "[e]ncourage the peaceful resolution of issues concerning the Taiwan Strait through dialogue" became a common strategic objective of Japan and the US.[22] Japan's current Prime Minister Shinzo Abe, before his first term as prime minister, commented, "It would be wrong for us to send a signal to China that the United States and Japan will watch and tolerate China's military invasion of Taiwan."[23] The intention to include cross-strait relations among the considerations of US-Japan security arrangements greatly angered the PRC.[24]

On the other hand, even though the US affirmed that it would continue to adhere to the 'One-China policy', it nonetheless continues to sell arms to Taiwan.[25] Even though the PRC considers both acts to constitute intervening in China's domestic affairs, the international community does not support the PRC's position.[26] With a view to supporting our argument, let us take a look at the consequence of stripping an unrecognized state of the benefits of the protection offered by international law. In a case relating to North Cyprus, the Court of Justice of the European Union (then: the European Court of Justice, ECJ) has shown that it is impracticable to exclude a de facto unrecognized state from the protection of international law.

In The *Queen v Minister of Agriculture*, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others[27], the ECJ was requested to answer whether the provisions of Agreement of 19 December 1972, establishing an Association between the European Economic Community and the Republic of Cyprus [hereinafter Association Agreement][28] "customs authorities of the exporting states" in the Origin Protocol to the Association Agreement and 'authorities empowered for this purpose... of the exporting countries', could be applied to North Cyprus.[29] Based on the Association Agreement, the products exported from "Cyprus" would enjoy preferential treatment. The practice of UK authorities and several EU members was to apply the Association Agreement to citrus fruits originated from North Cyprus. The producer and exporters from South Cyprus were dissatisfied with the practice and raised the suit against the UK Ministry of Agriculture, Fisheries and Food in UK's court. The Queen's Bench Divisional Court referred to the ECJ for the preliminary ruling. The Cyprus Problem was thus brought before ECJ in the first time. The plaintiffs claimed that the preferential treatment shall only be granted to the products from southern parts of the island.[30] Contrary to this argument, the UK and the European Commission argued that Article 5 of the Association Agreement requires non-discrimination, and that issuing certification for the products from North Cyprus is the only way to prevent discrimination against people in North Cyprus.[31] However, the ECJ rejected the UK and the Commission's argument. Consequently, citrus fruits from North Cyprus were to be assessed import duty and this sector of its economy was impacted seriously by the decision. As a consequence of the judgment, North Cyprus exporters turned to Turkey. Three days after the Anastasio-I, several exporters from North Cyprus entered into an agreement with a Turkish company. Their exports could be shipped to Turkey without unloading the cargo for phytosanitary certification in Turkey. The certification issued by the Turkey

[21] Crawford, *The Creation of States in International Law* (n 5) 221.
[22] 'JOINT STATEMENT: U.S.-JAPAN SECURITY CONSULTATIVE COMMITTEE' (Ministry of foreign Affairs of Japan, 2013) at para. 9 and 10 <http://www.mofa.go.jp/region/n-america/us/security/scc/joint0502.html> accessed 27 July 2016.
[23] C Cheong, 'US, Japan united on Taiwan; No surprise in China, but ties with US and Japan will sour' The *Straits Times* (Singapore, 19 Feb 2005).
[24] JIM YARDLEY and KEITH BRADSHER, 'China Accuses U.S. and Japan of Interfering on Taiwan' *The New York Times* (21 Feb. 2005).
[25] S Wu and E Hou Tony Liao, 'U.S. promises to continue arms sales to Taiwan: foreign ministry' *Central News Agency* (22 Aug 2013).
[26] B R Roth, 'The Entity That Dare Not Speak Its Name: Unrecognized Taiwan as a Right-Bearer in the International Legal Order', East Asia Law Review, 4, 2009, 91-113.
[27] The *Queen v Minister of Agriculture*, Fisheries and Food, ex parte S. P. Anastasiou (Pissouri) Ltd and others, [1994] Case C-432/92, 1994 E.C.R. I-03087 [hereinafter "Anastasiou-I"].
[28] Annexed to Council Regulation (EEC) No 1246/73 of 14 May 1973.
[29] T Stefan, 'The Cyprus Question before the European Court of Justice', European Journal of International Law, 12, 2001, 727- 734.
[30] The *Queen v Minister of Agriculture* (n27) para 17-18.
[31] Ibid, para 19-20, para 34.

states the goods originated from "Cyprus." The UK government accepted this loophole.[32] The plaintiffs in Anastasio-I raised a suit once again, the Anastasio-II[33], in a UK court, requesting an order that would bring an end to the use of this loophole. In 1998, the House of Lords referred to the ECJ for a preliminary ruling to interpret the Plant Health Directive. The judgment of Anastasio-II does not explicitly answer whether the origin mark could be affixed at a place other than the place of origin. In 2003, the ECJ decided in Anastasiou-III that:

"It would be contrary to the objective thereby pursued of strengthening phytosanitary safeguards to construe the official statements required by items 16.2 to 16.3a as amended as capable of being made in a non-member country other than the products' country of origin…"[34]

Its final decision was that "The phytosanitary certificate required in order to bring those plants into the Community must, therefore, be issued in their country of origin by, or under the supervision of, the competent authorities of that country."

The ECJ's opinion in Anastasio-I has been widely criticized by scholars. Christopher Greenwood contends that the ECJ omitted to note that the trend in recent years has been away from treating unrecognized states as though they did not exist.[35] The UK and the Commission's argument revealed that states are incline to admit the existence of a de facto unrecognized state. The principles established by the US domestic court also support this argument.[36] An investigation conducted by Stefan reveals that, in the instances of Manchukuo and German Democratic Republic, the fact that both states were unrecognized did not prevent acceptance of import certifications issued by their authorities.[37]

Most of all, neither Taiwan nor R.O.C. are recognized by the EU and its Member States, but certifications issued by Taiwan are not challenged when goods are imported into the EU nowadays.[38] Furthermore, Tani argues that Anastasio-II shows that the economic sanction forces North Cyprus to rely on the aid provided by Turkey, and deepens the gap between north and south. Tani thus concludes that the Cyprus problem could become much more difficult to solve, and suggests that treat the de facto existence of North Cyprus as the international community treats Taiwan would be a more effective means of solving the Cyprus problem.[39] The ECJ decisions on North Cyprus demonstrate that it is not feasible to exclude unrecognized states from the protection of international law. It also provides an illustrative example of the argument that "the longer de facto sovereignty is maintained the better", given that such de facto existence creates interest for the UK and the EU to establish relations with it, and strengthens the (*de facto*) sovereignty of North Cyprus.

3. De facto existence as a basis for participation in international relations:

ICJ, in the Advisory Opinion on Namibia,[40] touched upon the issue of the rights of people of unrecognized states. As South Africa was reluctant to relinquish its mandate over the territory of Namibia, the Security Council expressly called upon states not to recognize South Africa's unlawful administration in Namibia, and referred the matter to the ICJ. The ICJ opined that South Africa's continuing authority was illegal as it violated the right of the Namibian people to self-determination. Although the ICJ affirmed the UN members' obligation not to recognize South Africa's presence and administration in Namibia under Security Council resolution, it also opined that: "the non-recognition of South Africa's administration of the Territory should not result in depriving the people of

[32] Stefan, 'The Cyprus Question before the European Court of Justice' (n 29) 737. See also Tani Patrick, 'The Turkish Republic of North Cyprus and International Trade Law', Asper Review of International Business and Trade Law, 12, 2012, 115-128.

[33] *Regina v Minister of Agriculture*, Fisheries and Food, ex parte S.P. Anastasiou (Pissouri) Ltd and Others, [2000] C-219/98, 2000 E.C.R. I-05241. [hereinafter "Anastasiou-II"].

[34] *Regina on the application of S.P. Anastasiou (Pissouri) Ltd and Others v Minister of Agriculture, Fisheries and Food*, [2003] C-140/02, 2003 E.C.R. I-10635, at para. 69. [hereinafter "Anastasiou-III"].

[35] Christopher J. Lowe Vaughan Greenwood, 'Unrecognised States and the European Court', Cambridge Law Journal, 54, 1995, 4-5.

[36] Ibid.

[37] Stefan, 'The Cyprus Question before the European Court of Justice' (n32) 744-747.

[38] Patrick, 'The Turkish Republic of North Cyprus and International Trade Law' (n32) 134. See also, Ibid, 747.

[39] Ibid. See also Patrick, 134.

[40] Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), *Advisory Opinion*, [1971] I.C.J. Reports 16.

Namibia of any advantages derived from international cooperation."[41] The court's opinion clearly reveals that recognition is mere a political act and the question of the protection of people of unrecognized states should be considered separately from the question of recognition.

Accordingly, we also note that the ICJ was asked to determine answer whether UN members are entitled to decide which states may be admitted to the UN based on other factors not envisaged in Article 4 paragraph 1 of the UN Charter in 1948. The court opined that as UN Charter Article 4 paragraph 1 explicitly provides that all peace-loving states are entitled to become members of the UN, the criteria for the admission to the UN must be exhaustive so as to prevent the discretionary imposition of extraneous obligations unidentified in the Charter; to do otherwise would be counter to the 'universal principle' and the intention of the drafters of the Charter that political considerations be precluded.[42] The dissenting opinion holds that while political considerations are allowed, the discretion is to be bound by the principle of good faith, and ought to give effect to the purposes and principles of the UN.[43] Even though this advisory opinion does not provide an opinion on the participation of an unrecognized state, we may infer that it is inappropriate for an international organization to exclude an unrecognized state merely based on the 'political consideration' as recognition is merely a political issue without legal consequence and irrelevant to any of the conditions of membership. As such, exclusion is also not conducive to the purposes and principles of an international organization, which follow the 'universal principle'.

In light of both ICJ's advisory opinions, we may fairly say that if an unrecognized state proves that it has the capability to enter into international relations, and the ability to fulfil international responsibilities by virtue of its de facto existence, the legitimacy of its claim to participate in international relations should be upheld. The legitimacy of that claim should be protected for the benefit of its people, and the international community should develop precise norms in international law for regulating legal relations with unrecognized states. Moreover, if bringing an international norm – such as the 'universal principle' – into effect requires efforts on the part of every member of the international community, the boycott of de facto existing unrecognized states would cease to be legitimate.

Recall our earlier example of North Cyprus: mutual reliance and cooperation conducted by the UK and other EU Members States before the Anastasio-I have shown that it is possible for states to engage with an unrecognized state that enjoys only *de facto* existence. Moreover, the consequence of Anastasio series cases shows that to ignore the existence of a de facto unrecognized state could not prevent the importation from North Cyprus but problematically creates costs for UK and EU to deal with the phytosanitary issue. It is thus clear that non-recognition should not prevent the all kinds of intergovernmental cooperation and engagements in which both non-recognizing and non-recognized states have a stake and can benefit.[44] Therefore, the way for an unrecognized state to display its capability to enter into international relations, and its ability to fulfil its international responsibilities, is to seize any opportunity to connect with the international community. It is clear that a pragmatic foreign policy would assist unrecognized states in overcoming diplomatic constraints by establishing its *de facto* existence in the international community.

4. Conclusion:

The article has scrutinized the impact of *de facto* states on both international law and international society. It has shown that, the de facto states are consequently not simply 'states in waiting', identical to recognized states aside from their lack of recognition. International society has traditionally chosen to deal with them in one of three main ways-actively trying to undermine them; more or less ignoring them; and reaching some sort of limited working accommodation with them. Each of these various methods has a different set of costs and benefits both for the de facto state and for the society of states as a whole.[45] Thus, no matter where they fall on the spectrum between 'failed' and 'strong' a *de facto* state, they are subject to specific tensions that lend them an almost transient quality. They represents a partial disconnect between external an internal sovereignty while ate the same time demonstrating the continued power of the paradigm.

[41] Ibid, 56.
[42] Admission of a State to the United Nations (Charter, Art. 4), (*Advisory Opinion*, [1948] I.C.J. Reports 57) 62.
[43] Admission of a State to the United Nations (Charter, Art. 4), *Advisory Opinion*, Dissenting Opinion of Judges Basdevant, Winiarski, Sir Arnold McNair and Read, [1948] I.C.J. (Reports 82) 92.
[44] Stefan, 'The Cyprus Question before the European Court of Justice' (n32) 748.
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