



Meeting Summary

Recognition of States: the Consequences of Recognition or Non- Recognition in UK and International Law

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RALPH WILDE: RECOGNITION IN INTERNATIONAL LAW

The Basic Framework and Process of International Recognition

Each state conducts its relations with other states on the basis of particular understandings of the legal status of those other states. In many instances, such understandings are uncontroversial and amount to a recognition of the *status quo*: the UK and its dealings with France, for example. Sometimes, however, a state can take a position which challenges the existing order, such as recognizing a new state—for example the claim of Kosovo in 2008 to constitute a state comprising territory formerly part of Serbia—or take a position which rejects a claim itself challenging the *status quo*—for example that of the Turkish Republic of Northern Cyprus to constitute a state comprising territory formerly part of Cyprus. Recognition, then, can be an attempt to alter or reaffirm the existing order.

There are two main international law aspects to the recognition process.

1. Recognition can play a role in the international legality of the object of recognition: sometimes, a state is or is not a state legally because, amongst other things, other states have decided to treat it as such.
2. The recognition itself is regulated by international law, in that states are sometimes constrained in their choices when comes to recognition.

These two aspects are related, and can come into tension insofar as states seek through recognition to create a new sovereignty arrangement which challenges the legal *status quo* and thereby is potentially at odds with their obligations to another state or group of states whose entitlements are being altered by this change.

The international law framework is bound up in the rules that define what is and is not a state. In understanding the international law concerning statehood, and their significance for recognition, a distinction between two particular usages of the term 'sovereignty' is instructive. As Eli Lauterpacht remarked:

. . . it is necessary to distinguish between the two principal meanings attributed to the word 'sovereignty'. It is used, in one sense, to describe the right of ownership which a State may have in any particular portion of territory. This may be called 'the legal sovereignty' . . . [t]his kind of sovereignty may be likened to the residual title of the owner of freehold land which is let out on a long lease. The word 'sovereignty' is, however, more commonly used, in its second meaning, to

describe the jurisdiction and control which a State may exercise over territory, regardless of the question of where ultimate title to the territory may lie.¹

These two ideas of 'sovereignty' reflect two potential connections between the juridical person of the state and a territorial unit: administration (what Lauterpacht terms 'jurisdiction and control') on the one hand, and ownership on the other.

It is sometimes assumed that control is exercised over territory on the basis that the territory in question is, or forms part of, the state exercising this control. In order to draw such a conclusion, however, one needs to assume that the actor asserting the right to administer territory does so in a particular capacity: as the holder of title with respect to the territory. But such an assumption cannot be made. As Lauterpacht states in relation to his two models of 'sovereignty':

[u]sually sovereignty in this latter sense [mere jurisdiction and control] is to be found in the same hands as the legal sovereignty [i.e., ownership] but there is no reason in law why it should be and often it is not.²

The starting point for understanding the legalities of any regime of recognition or non-recognition, then, is to consider what the object of that recognition or non-recognition itself claims to be. In the words of D.P. O'Connell, 'a government is only recognized for what it claims to be'.³ One cannot determine fully what the legal significance of recognition is to that being recognized, and whether this recognition is itself lawful, without first focusing more closely on the legalities surrounding the claim itself.

In understanding the different capacities in which entities may administer territory insofar as issues of territorial status are concerned, the distinction between a 'state' and a 'government' is instructive. In international law, the connection between the two is understood in terms of agency: the government is not itself a legal person, but, rather, the agent that acts on behalf of the legal person—the state—concerned. Its acts are the acts of the state. It follows, then, that simply looking at who is control on the ground is insufficient by itself for resolving the status of the territory and the legality of any recognition or non-recognition of this arrangement. One needs to enquire into the basis on which this control is exercised as far as the status of the territory is concerned.

¹ E Lauterpacht, 'The Contemporary Practice of the United Kingdom in the Field of International Law—Survey and Comment', 5 (1956) *ICLQ* 405, at 410.

² *Id.*

When states administer territory, they often do so on the basis that the area in question is their own sovereign territory, whether this arrangement is long-standing, for example the UK in UK territory, or amounts to a change in the *status quo*, for example Iraq's claim to title over Kuwait following its invasion in 1990, and Kosovo's claim to statehood in territory forming part of Serbia on declaring independence in 2008.

Sometimes, states administer territory on the basis that sovereignty resides somewhere other than in themselves. So, for example, the Allies in Germany and Austria and the US in Japan after the Second World War, and the US-UK Coalition Provisional Authority in Iraq in 2003-4, operated on the basis that they were not claiming title over the territories involved and that, indeed, this title resided in the existing sovereign states – Germany, Austria Japan and Iraq.

Declaratory Role of Recognition in the Law of Statehood

What, then, is the legal significance of recognition or non-recognition? To appreciate this it is necessary to clarify the broader legal framework on the law of statehood within which recognition can play a part.

Presumption in favour of the status quo

The starting point for understanding this framework is, as James Crawford, observes, that:

. . . there is a distinction between the creation of a new State on the one hand and the subsistence or extinction of an established State on the other.⁴

As far as the latter is concerned:

. . . generally, the presumption—in practice a strong presumption—favours the continuity and disfavors the extinction of an established State.⁵

In the question-and-answer session following the speakers' addresses, a number of questions were asked about specific disputed territories, and the panellists politely declined to answer where they did not feel sufficiently knowledgeable about the specified situation. However, in response to a

³ DP O'Connell, 'The Status of Formosa and the Chinese Recognition Problem', 50 (1956) *AJIL* 405, 415.

⁴ J Crawford, *The Creation of States in International Law* (2nd edn, OUP, 2006), 51.

⁵ *Id.*, 701.

question regarding the legal status of Somaliland, Dr. Wilde noted that the continued general international recognition of Somaliland as part of Somalia was based on the presumption of continuity.

One might say that this reflects a broader presumption in favour of the *status quo* in relation to statehood generally and territorial title in particular: that, in general terms, the continuance of statehood and a state's title over its territory is presumed, whereas the creation of a new state and the loss of title over territory are to be proved. In any given situation, both considerations are potentially applicable in a mutually-reinforcing manner, in that one may be seeking to resolve whether or not a particular territorial unit continues to form part of the territory of one state, or has instead become part of another state or been constituted as a new state. In such a scenario, two interlinked questions are being determined simultaneously: that of the continued title enjoyed by the original state, and that of the creation of a new state or the acquisition of a territorial unit by another state. Depending on which issue is being focused on, one approaches the status issue either in terms of a presumption in favour of the *status quo* (continued title by the original state) or a lack of presumption in favour of an alteration in the *status quo* (new statehood or alteration in title in favour of another state). The presumption and the lack of presumption are thus two sides of the same coin: each is reinforced by the other.

The criteria other than recognition

The international law framework determining whether or not a new entity does or does not constitute a state, and whether an existing state no longer exists, can be understood to comprise:

- Criteria concerned with the practical viability of the state or claimant state, such as a permanent population, existing in a defined territory, over which there is an effective government operating independently from external control, in the sense that it purports to govern the people and the territory on the basis that it, and they, constitute an independent state.

Thus, with respect to the example of Kosovo's declaration of independence in 2008, one of the problems is conformity to the independence criterion, bearing in mind the continued international involvement in its governance, operating on the basis of Security Council Resolution 1244 (1999) passed under Chapter VII of the UN Charter which affirms the status of Kosovo as part of Serbia.

- Criteria concerned with certain policy objectives, such as self-determination and the use of military force, and/or operating on the basis of UN Security Council determinations. The effect of these criteria potentially to alter an outcome that would otherwise be the case were issues of practical viability the sole consideration.

As for self-determination, if the claimant state constitutes a self-determination unit (SDU)—an entity that has a lawful right to external self-determination—then it may be regarded to lawfully constitute a state even if in some respects its conformity to the viability criteria is somewhat deficient. This would be the case, for example, with certain newly independent former colonial states in the post-Second World War era of decolonization, for example, The Congo. By contrast, if the existence of the new state would involve a violation of self-determination, whether internal or external, then this may operate as a bar to statehood that would otherwise be valid on the basis of conformity to the viability criteria. So, for example, the claim of Rhodesia to independent statehood was invalid because, amongst other things, being constituted on the basis of an *apartheid* system of white minority rule, it violated internal self-determination.

Moreover, the existence of the international law rules restricting the use of military force have led to a position suggesting that the creation of a new state, or the extinction of an existing state or the loss of its territory, will be invalid if brought about through the use of force and/or the conduct of military occupation. There are important difficulties and uncertainties, however, in distinguishing between lawful and unlawful uses of force, and considering circumstances where force is used to support the exercise of a claim to external self-determination, for example India in relation to Bangladesh. The UN Security Council also sometimes takes positions on these issues, although usually it is questionable whether this amounts merely to a reinforcement rather than an alteration of the position that would exist anyway as a matter of general international law.

The Relevance of Recognition in the Law of Statehood

Recognition as potentially constitutive

The view of most international lawyers is that the position taken by other states—whether recognition or non-recognition—as to the creation of a new state or the continuance of an existing state is merely declaratory, not also constitutive of, the legal position in this regard. In other words, the usual

position is to apply the criteria reviewed above, irrespective of the view taken on this matter by other states. However, most of those who adopt this 'declaratory' theory of recognition accept that recognition can have a constitutive role in certain marginal cases: it is capable of pushing things further in favour of a particular outcome towards which the existing criteria are pointing but which itself is not reached by considering them alone. Thus, if an entity claims to be a new state, but is somewhat deficient in conformity to the viability criteria, recognition by other states in favour of its claim to statehood may tip the balance. This is especially significant given the presumption mentioned earlier against the creation of new states.

In order for recognition to have this constitutive effect, however, it needs to be of a certain quantum, since this effect is based on the general notion that international law is made, and altered, only if one can identify a general trend across most, if not all, states. One would have to see, therefore, considerable recognition by states generally, ideally, although not necessarily, manifest through a decision by the United Nations to admit the claimant entity as a new member, something which presupposes statehood. The recognition of Bosnia and Herzegovina as an independent state and its admission as a member of the United Nations in the first half of the 1990s would appear to illustrate this role for recognition. With respect to Kosovo, on the other hand, on this issue is whether the current number of states that have recognized it – 65⁶, – is enough to make a difference, given that there are 192 member states of the United Nations.

There was some discussion about whether recognition by the European Union would constitute recognition by all of its member states. Ultimately, there was considerable doubt cast on whether EU recognition would actually have any legal effect, notwithstanding the provisions of the Lisbon Treaty. As for international organizations more generally, Dr. Wilde noted that UN admission is premised on an application of the international law of statehood. However, it is an open question as to whether international organizations are governed by international law, which, by its nature, is intended to govern states. In the human rights field, there have been some efforts to bind international organizations to human rights obligations, such as seeking the EU's accession to the European Convention on Human Rights (ECHR). More generally, the International Law Commission have been working on Draft Articles on the Responsibility of International Organizations.

⁶ According to www.kosovothanksyou.com.

The juridical significance of this recognition is relatively straightforward when focusing only the viability criteria. Things are more difficult, however, when considering the policy-based criteria, since there is a potential for the two—the outcome suggested by these criteria, on the one hand, and that suggested by recognition, on the other—to be at odds with each other; for example, if recognition was at odds with the law of self-determination. On the one hand, entities can attain what amounts to external self-determination even if they don't have a right to this, and such an outcome, and its recognition, would be lawful provided other areas of international law are complied with. However, if an outcome involves a violation of self-determination, it is at least arguable that recognition cannot have a constitutive effect. This is because self-determination is regarded as one of those special areas of international law that have *jus cogens* status, i.e. it is non-derogable, incapable of being limited by other rules of international law other than rules which have the same status. As a result, even if, then, a significant number of states recognize such an arrangement, this will not have the legal role that, all things being equal, it would have in circumstances where there would be no clash with the law of self-determination.

In many cases of violations of self-determination, the violation itself leads to non-recognition (e.g., as previously mentioned, Rhodesia), and so a contradiction does not present itself. But, looking forward, this may be an issue, one hopes not, in the case of future arrangements with respect to the Palestinians and the people of the Western Sahara. One interesting and uncertain issue here is whether all aspects of the law of self-determination are relevant in the same respect.

Recognition mediates the question of the continued existence of a state

What paved the way for the statehood of Bosnia and Herzegovina illustrates another constitutive role for recognition: the potential to determine, legally, that an existing state has ceased to exist. In the first half of the 1990s, four of the six constituent Republics of the Socialist Federal Republic of Yugoslavia (SFRY)—Croatia, Bosnia and Herzegovina, Macedonia, Slovenia—declared independence (Macedonia as the 'Former Yugoslav Republic of Macedonia'). The remaining two republics, Serbia and Montenegro, claimed to be the existing state, albeit with less territory and with a smaller population, and, reflecting the changed times, with an altered name, the Federal Republic of Yugoslavia (FRY). As a matter of international law, this could have been regarded, on the one hand, as a series of secessions from an existing state. This was the FRY view. On the other hand, such a loss of territory and

population could have meant that conformity to the viability criteria was fatally compromised, rendering the extinction of the existing state. This view ended up being adopted by many of the world's states, and was to a certain extent endorsed at the United Nations. Arguably, the legal effect of this general view being adopted was to render as a matter of law a situation which was on the facts capable of two mutually contradictory explanations to be one of the two scenarios: the extinction of an existing state. If this is correct, then recognition had the effect of constituting the legal extinction of a state.

In a not unrelated legal matter, this prior determination on the extinction of the SFRY was then significant in terms of the legal position of the four former Republics claiming statehood. If the SFRY did not exist, then the presumption in favour of the *status quo* mentioned earlier did not tilt things against the creation of new states, since this would not be on the basis of an existing state losing its territory. In, arguably, determining the non-existence of the SFRY, then, states altered the legal position as far as the claimant entities were concerned.

Recognition can de-legitimize existing claims

More generally, active non-recognition—i.e. not just failing to recognize, but actively rejecting the validity of that which is being claimed—can have a constitutive effect in de-legitimizing claims to statehood or alterations in the territorial entitlements of existing states. Just as states will often refrain from recognizing situations that are illegal, so the active rejection of such claims may not make much difference, if at all, to the legality of that being claimed—it is already illegal—even if it may have significance in other respects. So the widespread international rejection of Iraq's claim to title over Kuwait in 1990, for example, amounted to the reinforcement of the existing position as a matter of international law. In circumstances where the law is less clear, however, recognition may perhaps bring clarity to the situation.

Legal Consequences of Recognition

Distinction between discretionary and obligatory matters

When states are recognizing a situation, e.g. a claim to statehood, which directly implicates issues of sovereignty-as-title, the legal position depends in part on a distinction between matters which are mandatory in international law, and those which are left to the state's discretion.

States are bound to respect the sovereignty of other states, which includes their territorial integrity and political independence. If, then, an entity is a state as a matter of international law, all other states are bound to 'recognize' this, even if they object in some way to that state's legitimacy or some aspects of its policy. Equally, if an entity claims to be a state, but is not, and is formed of the territory that forms part of an existing state, then other states are bound not to recognize this because of their obligations owed to the existing state.

Certain other core obligations also operate on this basis, including, most obviously, the international law relating to the use of force. But in many areas of international relations, states remain free to limit their mutual relations. In these areas, then, states can, in effect, choose not to 'recognize' another entity as a state, even if, as a matter of the basic contours of their relationship, they are actually bound to do so. Sometimes such a policy is concerned with a political objection to what may ultimately be a lawful arrangement. In other cases, such as the situation with respect of some states and Kosovo, for example, states may wish to stay outside the political process surrounding Kosovo's independence, their position amounting to one of remaining on the fence, or failing to give clear support, rather than a clear repudiation of Kosovo's status as a state, something which would be unlawful if indeed Kosovo is a state.

Link with constitutive role

When, however, states in their recognition or non-recognition practice are taking a clear stand on the question of status itself, this has to be in conformity to the legal position of the entity in question in order to be lawful. Given the constitutive role that recognition can play, the possibility arises whereby, in effect, states are seeking through recognition to render lawful something that would otherwise be unlawful. It is doubtful that states can through recognition alone render lawful something that would be unlawful as a matter of the law of self-determination, because of the *jus cogens* nature of that law. Just as, and indeed because, the recognition would not itself alter the illegality of the situation, so the recognition would itself be unlawful. So, for example, those states who recognized Indonesia's occupation of East Timor between 1975 and 1999 not only failed to alter the illegality of Indonesia's claim to title over East Timor, they also themselves violated their obligations to the people of East Timor through this process of recognition.

Less clear, however, is a situation that would be unlawful only as a matter of the right of an existing state to respect for its territorial integrity, and not also because of the related matter of self-determination. Even if one could somehow conclude that this right is not itself of the same fundamental importance (i.e. not *jus cogens*) — quite a conclusion to draw — one would need to see a substantial quantum of recognition in order for a position that would otherwise be at odds with that right to be lawful. If recognition was not of this nature, then the pre-existing right would remain intact, and those states recognizing the new situation would be violating it.

In response to a question regarding the validity of agreements concluded with respect to the natural resources of disputed territories, such as the Palestinian Territories and the Western Sahara, it was noted that to some extent, validity depends on what is expressly or impliedly being agreed. Agreements will, by necessity, make certain assumptions about sovereignty. For example, the Dayton Accords were concluded with Serb President Milosevic despite many of the witnesses not recognizing the legitimacy of the Federal Republic of Yugoslavia (FRY). Similarly, a number of agreements have been reached regarding economic relations with Taiwan, but such agreements are not government-to-government. However, where such assumptions are unlawful, the making of such agreements may be tantamount to complicity. For example, the resource agreement concluded between Australia and Indonesia about oil on East Timorese territory constituted a violation by Australia of East Timorese sovereignty.

ANDREW CANNON: CONSEQUENCES OF NON-RECOGNITION IN UK LAW

Mr. Cannon introduced his comments by noting that he was speaking on his own behalf and not on behalf of Her Majesty's Government and thus his comments should not be construed as representing any view or position of the UK Government.

While the grant of recognition is an act on the international plane affecting the mutual rights and obligations of states and their status or legal capacity in general, it also has very significant consequences at the national level. Whether or not a state is recognized in the UK is a matter for the government, which has applied a policy of expressly recognizing states – most recently Kosovo in February 2008. If the executive recognizes a state, that recognized state has full legal personality before the domestic courts. It can act as any other actor, sue and be sued, subject of course to the rules of state immunity. Its legislative and executive acts will be given effect in the courts of the recognizing state, and its diplomatic personnel will be able to claim the appropriate immunities.

More complicated, and perhaps more interesting, is the question of the consequences in UK law of non-recognition. It is suggested that this is a difficult area of law, and largely still undeveloped. In very few of the cases where the issue has been discussed has the judicial comment been the *ratio* of the case. Given that the law of recognition falls squarely within the realm of politics and international relations, so the task of the UK courts in trying to extract clear domestic legal principles is by no means straightforward.

Starting Principles

The traditional approach adopted by the UK courts was for a long time that an entity unrecognized by the UK government would be treated by the courts simply as if it did not exist. To quote Sir Hersch Lauterpacht's seminal 1947 text, 'Recognition in International Law':

... no juridical existence can be attributed to an unrecognized government and ... no legal consequences of its purported factual existence can be admitted. ... The correct, and reasonable, rule is that both the unrecognized government and its acts are a nullity.'

The text refers to governments, but the principle is the same for states. Thus under this classic view an unrecognized state would be unable to appear before the courts as a claimant, and its acts would not be cognizable in the courts. It was often expressed as the principle that the Executive and the

Courts must act with 'one voice'; as Lord Atkin said in the case of the *Arantzazu Mendi*: 'Our State cannot speak with two voices ... the judiciary saying one thing, the executive another'. So the principle holds that the Courts may not grant more recognition to an entity than the executive itself, and the early cases, such as the 1804 decision in *City of Berne v The Bank of England* and the 1921 case of *Luther v Sagor* confirmed that the acts of an unrecognized government cannot be recognized by an English court.

Developments in Modern Case Law

The modern caselaw has indicated a shift from the principle that the UK courts may not take cognizance of acts of an unrecognized state/entity, inasmuch as a strict enforcement of the 'no recognition, no existence' rule could lead to much hardship and inconvenience at a private law level. The first hint of judicial awareness of this came in the 1966 case of *Carl Zeiss Stiftung v Rayner & Keeler (No.2)*. The defendants alleged that Carl Zeiss had no standing to sue, since the administrative act under which Carl Zeiss had been constituted was an act of East Germany (the German Democratic Republic, GDR) and the GDR was not recognized by the UK: the Foreign Office had certified that the USSR was recognized as sovereign over the GDR. While the Court of Appeal saw this as determinative, the House of Lords, in what has been described as an 'elaborate fiction', decided that it could give effect to the acts of the GDR on the basis that they had been lawfully delegated to the GDR by the recognized sovereign, the USSR. This neatly allowed the courts to circumvent the traditional doctrine of non-recognition to avoid an injustice. The fiction was that of course the USSR itself recognized the GDR as an independent state.

In a passage of Lord Wilberforce's judgment in this case, the beginnings of the private acts exception can be seen:

My Lords, if the consequences of non-recognition of the East German "government" were to bring in question the validity of its legislative acts, I should wish seriously to consider whether the invalidity so brought about is total, or whether some mitigation of the severity of this result can be found. ... In the United States some glimmerings can be found of the idea that non-recognition cannot be pressed to its ultimate logical limit and that where private rights, or acts of everyday occurrence, or perfunctory acts of administration are concerned (the scope of these exceptions has never been precisely defined), the courts may, in the interests of justice and common sense, where no consideration of public policy to the contrary has to prevail, give recognition to the actual facts or realities found to exist in the territory in question.... No trace of any such doctrine is yet to be found in English

law, but equally, in my opinion, there is nothing in those English decisions ... which would prevent its acceptance... I should wish to regard it as an open question, in English law, in any future case whether and to what extent it can be invoked.

This *dictum* has been repeated in a number of subsequent cases, and can now reasonably be said to represent English law.

The first case to take this up was *Hesperides Hotels v Aegean Turkish Holidays Ltd*, in 1977. Again, the case did not turn on the recognition point. It concerned an action brought for conspiracy to trespass by the original Greek Cypriot owners of two hotels in northern Cyprus, which since the 1974 conflict had been occupied by Turkish Cypriots. The Court of Appeal dismissed the claim on the basis that the English courts had no jurisdiction to consider an action for trespass to immovables situated outside England. But, in *obiter*, Lord Denning MR looked at some length at the question of recognition in his judgment, supporting the earlier comments of Lord Wilberforce and challenging the non-recognition doctrine in order to mitigate, for the individual, the otherwise harsh consequences of non-recognition:

I would unhesitatingly hold that the courts of this country can recognise the laws or acts of a body which is in effective control of a territory even though it has not been recognized by Her Majesty's Government...: at any rate, in regard to the laws which regulate the day to day affairs of the people, such as their marriages, their divorces, their leases, their occupations, and so forth...

Sir John Donaldson MR also registered his approval of Lord Wilberforce's comments in his 1986 judgment in *Gur Corporation v Trust Bank of Africa* (again in *obiter*):

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

The next development came from the legislature. Since Lord Wilberforce's comments had still not been approved in the *ratio* of a case, the traditional doctrine remained that none of the legislative, executive, judicial or administrative acts of an unrecognized state would be accepted as valid by a UK court. Thus, a company incorporated in an unrecognized state would have no legal personality as far as the UK was concerned and could not sue or be sued in the UK courts. But there was concern that such a position would cause unwarranted hardship to individuals and damage commercial confidence, so the legislature passed the Foreign Corporations Act 1991 (FCA), which gave companies incorporated under the laws of unrecognized

territories legal personality within the UK legal system. It provided that the consequences of UK non-recognition of the company's territory of incorporation would not apply to the corporation in question provided that the territory concerned had a 'settled legal system'. It is clear from the parliamentary reports that this bill was passed in direct response to the position taken by the courts following Lord Wilberforce.

Emin v Yeldag appears to be the only case (not governed by the FCA) where this doctrine is upheld as the *ratio* of the case, and Lord Wilberforce's 'open question' is finally answered, in which Sumner J. reviewed all of the authorities above and overturned two previous authorities in deciding to recognize a divorce granted in northern Cyprus.

Recent Developments

The latest case on this issue is the judgment of Mr Justice Wyn Williams issued in July 2009 in *Kibris Turk Hava Yollari and CTA Holidays v Secretary of State for Transport*.⁷ The case was a judicial review, brought by an airline incorporated in Turkey (and a travel company) that wished to operate direct flights between the UK and northern Cyprus. The Secretary of State had refused the grant of an operating permit for such flights on the basis that to do so would be unlawful, and the applicants sought review of this decision, which was upheld, the judge agreeing that the authorization of direct flights would have been unlawful. The judgment contains a fairly detailed consideration of the private acts exception, including the comments of Lord Denning in *Hesperides Hotels*, and the judgment in *Emin v Yeldag*. However, Wyn Williams J states:

I cannot accept that I am entitled to give validity to the acts of the TRNC (as they relate to international aviation) by virtue of the principles set out in the preceding paragraphs. I accept without hesitation that many of the acts of the Government of the TRNC as they relate to aviation are public and international in character. They are not properly described as laws which regulate the day to day affairs of the people who reside in the TRNC either as described by Lord Denning MR, or Sumner J.... This court is obliged to refuse to give effect to the validity of acts carried out in a territory which is unrecognized unless the acts in question can properly be regarded as regulating the day to day affairs of the people within the territory in question and can properly be regarded as essentially private in character.

⁷ This decision is under appeal, which appeal is expected to be heard in the next few months.

Summary and Conclusion

Modern UK caselaw has thus created two exceptions to the traditional doctrine of ‘no recognition, no existence’:

- The first is the ‘delegated authority exception’, as decided in *Carl Zeiss and Gur*, in which the acts of an unrecognized state can be considered where such acts can be said have been done pursuant to powers delegated by the recognized sovereign authority.
- The second, the ‘private acts exception’, is as proposed by Lord Wilberforce in *Carl Zeiss*, endorsed by Lord Denning and Lord Donaldson in *Hesperides Hotels* and *Gur* respectively, and finally accepted as *ratio* by Mr Justice Sumner in *Emin v Yeldag*: an exception for ‘private rights, or acts of everyday occurrence, or perfunctory acts of administration’, or ‘acts which can properly be regarded as regulating the day to day affairs of the people within the territory in question and can properly be regarded as essentially private in character.’

There has been some question as to whether the private acts exception to the ‘no recognition, no existence’ doctrine violates the need for the executive and the judiciary to speak with ‘one voice’. It is suggested that there is no conflict between the two principles.

The recognition of states is a blunt instrument: it is ‘yes’, or ‘no’, but reality is more complicated than that. The international political situation is different for every unrecognized entity, and thus so is the UK’s position towards each entity. There are invariably complex international relations concerns involved, for example where another state is hostile to the unrecognized entity, and/or claims sovereignty over the territory claimed by the unrecognized entity. But in our globalized world, people travel, work, live and study increasingly freely across borders. They need security in their private and commercial transactions. They need governments, and courts, to set clear boundaries, but also to acknowledge, and to help them deal with, practical realities. It is natural that individuals, in making decisions, will be guided by the international politics, and the government’s level of engagement short of recognition, and will expect the courts to do the same.

The FCA is one example of the government taking a lead. It’s clear that Parliament was keen to ensure the *dicta* of Lord Wilberforce would be upheld by the courts at least with respect to commercial activity. But in other situations, the Courts can, and do, seek information from the government as to this level of engagement.

It is the job of the courts to translate the politics of engagement into legal principle, and the language that the courts have used on this topic seems to suggest that such engagement is relevant to the courts' own consideration. Lord Donaldson's comment, cited with approval in *Emin* and *Kibris Turk* that '[t]he basic public policy constraint is that the courts cannot take cognisance of a foreign juridical person, if to do so would involve them in acting inconsistently with the foreign policy or diplomatic stance of this country', seems to presuppose a careful look by the courts at the broad 'foreign policy or diplomatic stance of this country' – not just the absolute, yes/no question of recognition or non-recognition.

However, the new approach is limited to 'private acts'. The Courts to date have not been prepared to acknowledge acts of an unrecognized state/entity that can be characterized as public and international in character, i.e. the acts of states, on the basis that this would seem to cross the line of formal recognition.

In response to a question, Mr. Cannon noted that the American legal position has been more 'evolutionary', which is to say that American caselaw seems to have recognized the private acts exception earlier and more often, although this may have been primarily by virtue of relevant cases coming before the courts sooner.