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Research Brief

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THE LEGAL FICTION OF RECOGNITION THE CASE OF PALESTINE

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Executive Summary

This briefing provides a legal overview of the existing doctrine regarding recognition of states in international law.

Using historical examples, it shows that statehood is based on factors on the ground (the declaratory theory) and not simply on recognition by other states (the constituent theory).

For a state to be recognised, it must be consistent with the Estrada Doctrine (later codified in the Montevideo Convention). This holds that there must be a defined population, a defined territory and a functioning state that performs the functions of a public sector, and that the country is not wholly dependent on a third party.

Whatever one thinks of Palestine, the entity does not meet the criteria for statehood and recognition, and hence cannot be regarded as a state. For this reason, the 'recognition' of Palestine is legally void and of no consequence in law.

About the Author

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Established following the fallout from the Arab Spring, the Centre is dedicated to monitoring political, ideological, and military and security developments across the Middle East and providing informed assessments of their wide-ranging implications to key decision makers.



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Introduction

“You have got to get out” – this was the short and swift message from the Embassy. There was no way of guaranteeing the safety of foreigners in Nigeria. Five months earlier, a conflict had started between Nigeria and the secessionist Republic of Biafra, and members of my family had to move. The situation had gotten worse. A number of countries had recognised the breakaway republic, including Gabon, Côte d’Ivoire, Tanzania, Zambia and Haiti. And now, France, the Netherlands, Portugal, Israel and South Africa were moving in that direction.

The decision to recognise was emotionally understandable. The war had led to a devastating humanitarian crisis, with millions of civilian deaths, most of them from starvation. Television images of malnourished children were beamed into living rooms across the world. The term ‘Biafra Child’ stems from that time. In the end, after 30 months of war, Nigeria prevailed and the ‘republic’ was no more. The Igbo people (who formed the majority of the population in the would-be state) slowly integrated into the land of their erstwhile enemy. International lawyers writing about the case all unanimously agreed that Biafra had never been a state or “a subject of public international law” as the jargon is.¹

Now, 58 years later, many in the international community seem to be making the same mistake with Palestine. And maybe with similar negative consequences. When the 80th session of the UN General Assembly took place in September 2025, France, Luxembourg, Malta, Monaco, Andorra, and Belgium recognised a Palestinian State. Canada, Australia, Portugal, and the UK had done so before the UN General Assembly. This brings the number of countries recognising the entity to 157 of the 193 member states of the United Nations. That is, over 80% of all UN members. Maybe this will work as optics for the populations at home – an attempt to placate ever-more hostile domestic audiences? What the motives are is a matter for future historians. This short briefing is not a treatise in historiography, but a primer in the international law of state recognition. It outlines when a state can be recognised as legal in international law.

It’s the Law...

When dealing with international law, some basic distinctions are in order. A country is the geographical area with a particular ethnic group or *ethnos*. A state is – legally speaking an organisation governing this area and the people – or *demos* – living there. However, from this perspective, it seems that the countries seeking to recognise a Palestinian state are not doing so from a credible legal perspective. When we are dealing with the legal side of things, we are moving on to creating a new state. The aim of this publication is to analyse the law of recognition, not to consider the sagacity or otherwise of symbolic political actions.

The countries recognising Palestine seem to think that international law is more flexible than is the case in reality. The law is inflexible. So:

1. What is the position of recognition in international law?

Creation of New States

Lawyers are in the business of applying rules. And for that, they need definitions. Before you create a new state, you need to be clear what you want. Do you want an actual state? And if so, what do you mean by that?

We are all familiar with states like Bulgaria, Brunei and Brazil. But there are other places that claim to be states, but which are less clearly defined – and others that are simply no hoppers. Let’s begin with the borderline examples.

Take the case of Transnistria (officially known by the grandiose sounding *Pridnestrovian Moldavian Republic*), which claims to be a state. The small enclave situated to the east of Moldova is only recognised by other largely unrecognised states such as South Ossetia, Abkhazia (both formally in Georgia) and Nagorno-Karabakh Republic. The enclave is entirely dependent upon monetary support from the Russian Federation and many of its inhabitants continue to seek social services from Moldova. But for support from Moscow, Transnistria would not exist.

It may seem unclear why these states have not been recognised. For starters, while small, they are larger than other microstates. For example, South Ossetia on the Russian–Georgian border has a population of 53,000 and covers 3,900 km². By contrast, Liechtenstein has a population of only 33,000 and covers an area of just 160 km². So why is the former not ‘a state’ in the sense of international law but Liechtenstein is? Because Liechtenstein has control over its territory, can run a government and is not dependent on other countries to stay afloat.

The answer is that in this, size does not matter. Politics is certainly an influential factor. But legal rules also play an important role, and not least those established under public international law.

It is not merely in the former Soviet Union that there are microstates. Another, rather exotic, example is the Principality of Seborga. Covering a total area of 14 km², this small enclave on the Italian–French border is larger than Monaco (0.8 km²) and considers itself a state. Like Monaco, roughly ten miles to its east, Seborga also has its own prince. Or, more accurately, a princess. The current ruler is the German-born Nina Daniela Döbler who was elected in 2020. Yes – the small enclave is democratic, with its own elected princess.

So by some definitions, Seborga is a state. It certainly meets the criteria set down by the international lawyer Hugo Grotius in the 17th century – namely that it is a “complete

¹ David A. Ijalaye, “Was ‘Biafra’ at Any Time a State in International Law?”, *The American Journal of International Law* 65, no. 3 (1971): 553–554.

association of free men [and women] joined together for the enjoyment of rights and their common interest.”²

While euros are accepted, it also has its own official currency, the *Luigini*. Wearing decorative uniforms, a border guard – *Corpo delle Guardie* – protects the 276 inhabitants from foreign invaders, but only during tourist season.

The small enclave was never formally part of the Kingdom of Sardinia but belonged to Savoy (a state that no longer exists). So, when the Italian state was formed by bringing together many small states, Seborga was not *technically* part of the new nation. Hence, it could not be part of Italy.

So why have you never (I assume) heard about *Il Principato di Seborga*? Probably because the Italian Government has ignored its claims to independence. And, perhaps more to the point, because the Seborgese are happy to receive their Italian pensions, attend Italian schools and pay their taxes to Rome.

Basically, the Seborgese are not behaving like a state. And, in fairness, the inhabitants probably (in their heart of hearts) admit that theirs is not a state. For, according to the classic definition, a state is, “one complete in itself, that is not part of another community, but has its own laws, its own council, and its own magistrates”.³ The Seborgese microstate does not quite fit the bill. This little enclave does not have “its own laws”. Whether that is also the case with Palestine is open to interpretation. We shall get back to this.

There are also examples of microstates closer to home. Take Major Paddy Bates who set up a microstate after a spat with the government. The former British military officer did not have a landmass to build his state upon. Rather, he set up a ‘state’ on Roughs Tower, a disused offshore platform seven miles south of Suffolk. It had been used as a defence installation during World War II but had been abandoned by the Navy. Initially, Bates ran Radio Essex from the platform, the first British pirate radio station to provide 24-hour entertainment. But his career as a broadcaster was cut short by the *Marine, &c., Broadcasting (Offences) Act 1967 (c. 41)*, which made offshore radio stations illegal; 19 days after the law was passed, on 2 September 1967, Bates declared the independence of Roughs Tower and named it the Principality of Sealand.

According to *The Guinness Book of Records*, the “smallest area in the world to lay claim to nation status” is Sealand. However, upon the death of its founder ruler in 2012, Bates’s son was instated as ‘Prince’ Michael of Sealand. Though he claims the title of ruler, he lives in Suffolk and runs a fishing business, Fruits of the Sea. According to Companies House, Michael Bates is a British citizen.

When is a state recognised?

So when is a state recognised? Legally speaking, there are a number of boxes that you need to tick – and it will soon become clear that Palestine does not meet the requirements.

For starters, to be recognised as a state, the entity’s government must be the master of its own house, have its own laws, etc. In some ways, countries like Transnistria and Abkhazia do make their own laws, have their own magistrates and so on – so why do they not get

² Hugo Grotius, *De Jure Belli ac Pacis [On the Law of War and Peace]* (Paris: Nicolas Buon, 1625), Book I, Chapter I, para xiv.

³ *Ibid.*

recognised? Much of this has to do with politics. But it also has something to do with more practical realities.

Much of the debate has been over the term ‘recognition’. Countries want to be ‘recognised’ as a state. But what do we mean by this? There has been a lot of ink spilled over the meaning of this term, so it might be useful to say a few words about two important doctrines.

Basically, there are two competing theories:

- *Constituent theory*: According to the constituent theory, a state is recognised by virtue of the will and consent of already existing states. In other words, a state becomes a subject with rights and duties only when other states have recognised it.⁴
- *Declaratory theory*: According to the declaratory theory, a country can be regarded as independent when it is in control of its territory. “A new state will acquire capacity in international law... by virtue of a particular factual situation”⁵ states the formal definition. It basically means that you are a state if you behave like one – by collecting taxes, enforcing laws and such like.

Traditionally, the United States took the former view whereas Britain took the latter. For many years, the US based its policies on moral grounds. That is, “recognition is to be used as a kind of mark of approval”.⁶ So, a purely constituent position to use the legal definitions.

The United Kingdom, by contrast, took a different view and has 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”.⁷ There are still essays on this distinction in law schools. The practice over the last century or so points to the declaratory theory as the better of the two theories and even the US has, in practice, adopted this position.

The US did not recognise Communist China until 1971 because it felt that Mao’s regime did not deserve recognition. But in the 1970s, the US Department of State noted:

In 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 judgement of each state whether an entity merits recognition as a state. In reaching this judgement 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.⁸

This was a new departure for the USA, a country that traditionally took the constituent view. Now, they had changed, as the quote shows. The American position was now similar to the one taken by the United Kingdom, which says:

The normal criteria that we 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.⁹

⁴ James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2005), pp. 19ff.

⁵ Malcolm N. Shaw, *International Law* (Cambridge: Cambridge University Press, 2008), p. 446.

⁶ *Ibid.*, p. 447.

⁷ *Ibid.*

⁸ Department of State, DUSPIL, 1976, pp. 19-20.

⁹ “State Recognition: Volume 160: debated on Thursday 16 November 1989,” Hansard, <https://hansard.parliament.uk/commons/1989-11-16/debates/1a3a131f-553a-42cb-9815-261275b39500/StateRecognition>.

This is good for actors who are in control of the territory. They have a strong claim to be entitled to recognition if they can deliver justice. So, if they are issuing fines, and if they are able to collect them, they are likely to meet the definition. The same is true if they have a legal system that enforces contracts and sends people to jail. Basically, statehood depends on being able to carry out all the mundane and menial tasks undertaken by public bureaucracies.

Admittedly, there is more to recognition than merely being in control. This is where the 'Estrada Doctrine' comes in.¹⁰ Named after Genaro Estrada (a Mexican foreign minister in the early 1930s), it states the principle that his country used as a benchmark for recognising new states. The foreign minister himself said:

The government of Mexico restricts itself to keep or retire, when considered appropriate, its diplomatic agents and to continue accepting, when considered appropriate as well, similar diplomatic agents whose respective nations have accredited in Mexico, without qualifying, neither hastily nor a *posteriori*, the right that nations have to accept, keep or replace their governments or authorities.¹¹

So new countries become recognised as states when they are in control of the territory. Let us take an example. If, for instance, Scotland votes for independence (and if the Scottish government is in control of the territory), then the international community legally ought to recognise the new state.¹²

In international law, you will likely hear the phrase *opinio juris*. Directly translated, it simply means an 'opinion of law', but in practice, it means a norm that other states are duty-bound to follow.

This includes two kinds of norms - on the one hand, those that states have agreed to international conventions (which are like statutes in national law) and the judgements by the relevant international courts (which are like legal precedents from national courts).

Of these, the conventions are the most important. As far back as 1933, the 'Montevideo Convention on the Rights and Duties of States' outlined the conditions necessary for recognition: "The state as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states."¹³ This was reinforced by the Charter of the Organization of American States, agreed in the late 1940s, which made it clear that:

The political existence of the State is independent of recognition by other States. Even before being recognized, the State has the right to defend its integrity and independence, to provide for its preservation and prosperity, and consequently to organize itself as it sees fit, to legislate concerning its interests, to administer its services, and to determine the jurisdiction and competence of its courts. The exercise of these rights is limited only by the exercise of the rights of other States in accordance with international law.¹⁴

¹⁰ Alina Kaczorowska, *Public International Law* (London: Routledge, 2008), p. 83.

¹¹ Palacios Treviño, Jorge. "La Doctrina Estrada y el Principio de la No-Intervención". <https://web.archive.org/web/20090206085102/http://diplomaticosescritores.org/obras/DOCTRINAESTRADA.pdf> Retrieved 2009-04-04. Accessed 20 September 2025.

¹² Peter Radan, "Secessionist Referenda in International and Domestic Law", *Nationalism and Ethnic Politics* 18, No. 1 (January 2012).

¹³ "Montevideo Convention on the Rights and Duties of States", 26 December 1933, <https://www.ilsa.org/Jessup/Jessup15/Montevideo%20Convention.pdf>.

¹⁴ Article 13, Charter of the Organization of American States, as amended by the Protocol of Amendment to the Charter of the Organization of American States, "Protocol of Buenos Aires", signed on 27 February 1967.

So, this is purely declaratory. If you are in control, you have a state. But this is only one side of *opinio juris* - another is how this is viewed by the courts.

The case that is always cited is *Nicaragua V. United States*. Overall, a case about America's support to rebels in the Central American States, which the International Court of Justice condemned, the judges dealt with what is practice and what are rules that must be followed in international law - in short what is *opinio juris*?

In its judgement, the court ruled:

...for a new customary rule to be formed, not only must the acts concerned "amount to a settled practice", but they must be accompanied by the *opinio juris sive necessitatis* [a rule of law or necessity]. Either the States taking such action or other States in a position to react to it, must have behaved so that their conduct is "evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief. i.e., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*."¹⁵

The takeaway from this is the line about the states' "conduct" being "evidence of a belief" that this practice is obligatory.

For what has become regarded as obligatory - yes, *opinio juris* - in the establishment of states is that recognition is simply "a method of accepting certain factual situations and endowing them with legal significance", as a popular textbook put it.¹⁶

And this is not just the conclusion of academic studies. It was also the conclusion reached by the jurists on the Badinter Arbitration Committee. This was the committee headed by the former French minister of justice, which was set up by the European States to reach a common position on the issue of newly established states in the former Yugoslavia. The committee opined that "the existence...of the state is a question of fact" and "the effects of recognition by other states are purely declaratory".¹⁷

What all this adds up to is this: if you are in control of the territory, can make laws and are not under the dominance of another state, then you have a state.

So why would a state seek recognition if this recognition is not needed?

The answer is that formal recognition reinforces the perception that you are in control. The Badinter Committee concluded that:

While recognition of a state has only declaratory 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.¹⁸

Puppet on a String

When Hugo Grotius - the 17th-century lawyer who established the definition of states in international law - stressed that this entity must "not [be part] part of another community",

¹⁵ "Nicaragua v. United States of America", ICJ Reports, 27 June 1986, <https://www.icj-cij.org/node/103143>, pp. 108-109.

¹⁶ Shaw, *International Law*, p. 207.

¹⁷ International Conference on Yugoslavia, Opinion 1, 92 ILR, pp. 162 and 165.

¹⁸ *Ibid.*, p. 199.

he alluded to what are sometimes called *puppet states*. These are entities that are dependent upon another country for their survival.

To weaken some neighbouring states, the Russian Government has clandestinely supported 'puppet states' in what Moscow calls "the near abroad" (*blizhneye zarubezhye* in the vernacular). These are only in existence because they are more or less tacitly supported by the Kremlin. Two timely (and tragic) examples, of course, are the Luhansk and Donetsk People's Republics, located in the historical Donbas region of Eastern Ukraine.

Before the unprovoked invasion of Ukraine started in 2022, Russia's parliament (*Duma*) voted to recognise these entities as 'states'. Russian-supported rebels only controlled 20% of the territory of Donbas, so presumably part of the motivation for the invasion was to establish control over more land which, legally speaking, would strengthen the case for independence. In the event, in September 2022, Russia incorporated the 'states' of Donetsk and Luhansk, along with parts of Kherson and Zaporizhzhia, into Russia itself. This followed sham referendums in these 'states' where the population voted to become part of Russia.

Nevertheless, these type of 'states' often go to great lengths to look like members of the international community. Thus, when establishing such entities, a lot of work goes into making them look like states. One commentator has even called them "phantom states".¹⁹

The Russians are not the only ones to use this ruse. That it is one of the favourite tactics of non-democratic states is evidenced by the Japanese use of a similar justification to claim that the 'State of Manchukuo' – also known as Manchuria – should be "liberated" – in other words occupied by Japan. It happened in 1932. Before that, the Japanese used the so-called Wanpaoshan Incident, an alleged attack on Korean farmers in 1931, to raise tensions. Korea was under Japanese sovereignty at the time and Tokyo duly followed up with a 'false flag' operation to justify the creation of a Japanese vassal state

Like in the cases of Russian-supported 'puppet' states, the regime in Tokyo went to great lengths to make Manchuria look like a modern state. Thus, after a Japanese invasion in 1931, Japan established what looked like a constitutional monarchy, which even had the last Chinese Emperor Puyi as its nominal head of state. There was even a Privy Council, to advise and assist the emperor in the discharge of his duties – like under the British political system.²⁰

Tellingly, the Manchurian constitution was an abbreviated translation of the Japanese constitution at the time. The Japanese did not have time to draw up a new constitution for the country and there were no native lawyers who were willing to do their bidding. The 'country' was utterly dependent on Japan.²¹

As in later cases (for example, during the Second World War and in the case of Russia's invasion and annexation of Crimea), those behind the invasion often dream up elaborate narratives to say that they are acting in the interest of an oppressed minority.

Again, the invasion of Ukraine in February 2022 is a pertinent example. Before the war – and especially during the first weeks of the conflict – Vladimir Putin alleged that a genocide had taken place in the Donbas region. He justified the "special military operation" (as he called the war) by saying that Russia would "denazify" Ukraine, a country with a president of Jewish descent.²²

¹⁹ Dahlia Scheindlin, "Phantom Referendums in Phantom States: Meaningless Farce or a Bridge to Reality?", *Nationalism and Ethnic Politics* 18, No. 1 (January 2012): 65-87.

²⁰ Peter Duus, Ramon H. Myers and Mark R. Peattie (eds), *The Japanese Informal Empire in China, 1895-1937* (Princeton NJ: Princeton University Press, 1989).

²¹ Patricia B. Ebrey, et al., *The Cambridge Illustrated History of China*, Vol. 1 (Cambridge: Cambridge University Press, 1996), p. 282.

²² Anton Troianovski, "Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine", *The New York Times*, 17 March 2022, <https://www.nytimes.com/2022/03/17/world/europe/ukraine-putin-nazis.html>.

The Ukrainians responded by asking the International Criminal Court to investigate the claims. In fact, Moscow has form on these claims. A similar – baseless – assertion was used to justify the Soviet Union's invasion of Finland in 1939.²³

Like in the case of Ukraine in 2022, the international community was dismissive of the Japanese claims that they were helping an insurrection in the 1930s. The so-called *Lytton Commission Report by the League of Nations* concluded that:

The Independence Movement, which had never been heard of in Manchuria before September 1931 [when Japan invaded], was only made possible by the presence of Japanese troops... For this reason, the present regime cannot be considered to have been called into existence by a genuine and spontaneous independence movement.²⁴

These phantom-like puppet states, then, do not exist in the strictest legal sense of the word. The reader can draw their own conclusions regarding Palestine.

If Palestine is in control of the territory, and has a legal system (that can deal with claims), it may be in a favourable position, and may be on its way to statehood.

Control Over the Territory: How?

To be an effective new state, you need investors, and they need to know that their contracts will be honoured. Honouring contracts is relatively easy in a country's own courts. After all, judges are appointed by them and will apply their own domestic law. But what about the courts in other countries?

It used to be the case that the courts in other countries would not entertain doing business with unrecognised states, and in the case of the Independent State of Croatia during World War II, no one could make a claim in her courts. But this is no longer the case.

Countries that tick the formal boxes may be legally regarded as 'states' even if they are not recognised politically. Some entities, while not recognised formally by the international community, have been granted a kind of *de facto* existence by courts. Judges in countries as different (and as powerful) as Britain and Japan have rules that even unrecognised states have a legal order, and that this can be used when individuals make claims.

The famous English judge Lord Denning made this point in a famous judgement when he found that "the courts are entitled to look at the state of affairs actually existing in a territory, to see what is the law which is in fact effective and enforced in that territory, and to give such effect to it – in its impact on individuals – as justice and common sense require".²⁵

The same argument has been used by judges in Japan:

...private international law is designed to find the most appropriate law...and it is not concerned with adjusting the mutual relationship of sovereigns. Therefore, foreign law applied under private international law principles should not be limited only to the law of a recognised State or Government; effectiveness of foreign law should not depend on recognition.²⁶

²³ Malcolm L. Spencer, *Stalinism and the Soviet-Finnish War, 1939-40* (Berlin: Springer International Publishing, 2018), p. 81.

²⁴ The Lytton Commission, quoted in Crawford, *The Creation of States in International Law*, p. 78.

²⁵ *Hesperides Hotels Ltd v Aegean Turkish Holidays Ltd [1977]*, EWCA Civ J0523-2, May 1977, per Lord Denning.

²⁶ District Court of Kyoto, Judgement of 7th July 1956, quoted in M. Peterson, *Recognition of governments: legal doctrine and state practice, 1815-1995* (Basingstoke: Macmillan, 1997), p. 149.

Hence, not all unrecognised states are phantoms of the international system. One such country at the time of writing is Bougainville. The territory is currently part of Papua New Guinea (PNG) although the population is ethnically and linguistically different from the rest of PNG. After a war in the 1990s, a peace agreement was signed and it was agreed that a referendum should be held to determine the status of the territory.²⁷

In 2019, a majority of 98% voted for independence on an 87% turnout. But this is not the end of the matter. After the vote, the PNG Government maintained that the final word rested with the parliament in its capital, Port Moresby. This was legally accurate, but should have been a formality.

According to established principles of international law, this could entitle Bougainville to be regarded as a state. But only if it is in control of its territory (the legal system and so on) and if Bougainville were to begin to act as a state, at least as far as private law is concerned. This would mean that Bougainville would begin to meet the requirements of the Montevideo Convention – and be well on the way to becoming a state. To date, it has not been able to do so. The would-be island nation is still dependent upon a block-grant from Port Moresby.

Self-Determination

Self-determination is a concept that has perplexed many. It is widely believed that there is something called ‘the right to self-determination’ and that this entitles a group to exercise a right to create its own state. It is not that simple.

On the face of it, this principle is very prominent. Article 1 of the UN Charter states that the United Nations was established to “develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples”. As if to hammer home the point, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, which both came into force in 1976, both say in the first paragraph of Article 1 that “All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”

A few years back, I was approached by the exiled government of Tamil Eelam – the northern part of what is currently Sri Lanka. The Transnational Government of Tamil Eelam (TGTE) wanted to proclaim its independence. There were credible confirmations of atrocities perpetrated by the Sri Lankan Government, and the TGTE even had the support of Ad Melkert, the United Nations former envoy in Iraq and a one-time leader of the Dutch Labour Party.

The TGTE argued that it had a right to self-determination under international law. In this particular case, the answer was straightforward and disappointing: if you are *not* in control, you *don't* have a claim in international law.

So, might you fare better if you just made a claim in domestic law? Let's consider this.

Domestic Law

The black letter law of the ‘right’ to self-determination is, in a sense, very simple. And very depressing for those who want to establish a new state. In the words of James Crawford,

²⁷ Anthony J. Regan, *The Bougainville referendum: Law, administration and politics* (Canberra: Department of Pacific Affairs, The Australian National University, 2019).

a noted authority on the matter, “there is no unilateral right to secede based merely on a majority vote of the population of a given sub-division or territory”.²⁸ Those who espouse a similar legal positivist approach will further stress that this is consistent with the jurisprudence of international courts. Thus, in an *obiter dicta* (legal speak for a throwaway remark) in the Kosovo Case, Judge Yusuf held that:

A radically or ethnically distinct group within a state, even if it qualifies as a people for the purposes of self-determination, does not have the right to unilateral self-determination simply because it wishes to create its own separate state.²⁹

Similar cases have been heard in different countries. Perhaps the most famous one was in Canada and dealt with the largely French-speaking province of Quebec. In a much-cited case (it was called *Bertrand v. Québec*), Justice Robert Lessage ruled that a referendum on a unilateral declaration would be “manifestly illegal”.³⁰ This is still the legal position notwithstanding the reasoning in the much-cited (and little often misunderstood) *Re Quebec* (which is covered in more detail later).

Thus, the general rule is that referendums have to be held in accordance with existing constitutions (such a provision exists in Art 39(3) of the Ethiopian constitution but in few other states) or following an agreement between the area that seeks secession and the larger state of which it is part. This is what happened in the very different cases of East Timor in 1999, South Sudan in 2011, Scotland in 2014 and perhaps in the future state of Bougainville.

Following this logic, it would seem that the 2017 Catalanian referendum on independence from Spain was illegal. The Spanish constitution does not allow for such arrangements. The same, it would seem, is the case with the Kurdistan referendum which, on the face of it, was also illegal and unconstitutional. Though as we shall see below, there might be extenuating circumstances in the latter case.

Kurdistan – or, more precisely, Iraqi Kurdistan – is technically part of Iraq. Covering an area of roughly 40,000 km² with a population of just over five million people, the area is roughly comparable with Denmark. The Kurds have had a violent history in the past centuries. As non-Arabs, they were discriminated against and arguably subjected to genocidal persecution under Saddam Hussein's dictatorship. After the Iraq War, the Kurds came to control the territory – though with tacit Western support. Although a referendum on independence was held in 2017, there were no constitutional provisions for this. And the Western allies ignored the vote. After all, it was outside the boundaries of the region's constitutional competence. Some in Kurdistan argued that this was immaterial as Iraq was not a democratic state.

So, what matters is whether a state has provisions in its constitution that allow sub-regions of that state to secede. In some countries, there are such provisions. But it is typically in countries where these provisions are not meant to actually be used. The Soviet Union is one such example. Article 72 of its 1977 Constitution reads that “each Union Republic shall retain the right freely to secede from the U.S.S.R.”³¹ Despite this, the constitution clarified that “a Soviet Republic may secede only if a strong majority of all the other [Soviet] republics and of the Politburo vote in favour of secession.” Which, of course, virtually ensured that

²⁸ Crawford, *The Creation of States in International Law*, p. 417.

²⁹ ICJ Advisory Opinion, 22 July 2010: 1410, per Judge Yusuf.

³⁰ Quoted in David Haljan, *Constitutionalising Secession* (Portland: Bloomsbury Publishing, 2014), p. 267.

³¹ *Constitution (Fundamental Law) of the Union of Soviet Socialist Republics* (Moscow: Novosti Press Agency Publishing House, 1977), p. 56.

no republic would be able to secede. So, in most cases, the domestic law is drafted in such a way as to “express a presumption in favour of continued union and against secession”.³²

In this sense, the Soviet leader Mikhail Gorbachev, legally speaking, was right to claim that the Latvian, Estonian and Lithuanian referendums on independence in the Spring of 1991 were illegal and that he was the guarantor of *pravovoe gosudarstvo* – the equivalent of the rule of law in Soviet jurisprudence.³³ As the Iraqi and Spanish constitutions do not allow for independence referendums, the two referendums held in these two entities were, *ipso facto*, unconstitutional.

Yet matters are not that simple. Yes, all other things being equal, a country only has a right to secede if it follows the rules. However, matters are a bit more complex when a region is part of an undemocratic constitutional order. The Italian lawyer and academic Antonio Cassese summed it up in unusually clear terms:

When the central authorities of a sovereign State persistently refuse to grant participatory rights to a religious or racial group, grossly and systematically trample upon their fundamental rights, and deny them the possibility of reaching a peaceful settlement within the framework of the State structure...a group may secede – thus exercising the most radical form of external self-determination – once it is clear that all attempts to achieve internal self-determination have failed or are destined to fail.³⁴

So, this might change the situation in Kurdistan. As alluded to before, given Iraq is not a well-functioning democratic state, it could be argued that Kurdistan meets these criteria. Again, the comparison with the Soviet Union is illustrative. Notwithstanding Gorbachev’s reforms, the USSR was not a democratic regime, which consequently provided the Baltic states with a justification for declaring independence.

But given that Spain is a democratic state, this rule hardly covers Catalonia. While the Spanish Government arguably acted in a way that appeared grossly disproportionate, the legal argument remains the same. Catalonia is not currently part of a non-democratic state. Based on the situation as it stands now, the referendum was, from a purely legal perspective, extra constitutional. In a legal system under the rule of law, the powers of state institutions have to be enumerated in law.

The basic principle of *D’état du Droit* is that citizens can do anything unless it is expressly prohibited. Public bodies or ‘emanations of the state’ can only do things that are expressly allowed. Thus, the latter cannot, *legally* speaking, take actions that are not prescribed in enabling legislation. To pass legislation outside the boundaries of the constitution or enabling legislation is the very definition of being what lawyers call *ultra vires* – in English, something that falls outside the scope of what is legal.

But does the law have to be that inflexible? Not necessarily. In Canada, the two referendums held in Quebec in 1980 and 1995 were not, strictly speaking, within the powers granted to the provinces by the Canadian constitution. Technically speaking, the referendums were *ultra vires*. Yet the Canadian judges, realising that legality ultimately rests on a modicum of legitimacy, followed a more pragmatic logic. In the celebrated case *Re Quebec*, the Court was asked the question, “Under the *Constitution* of Canada, can the National Assembly,

legislature or Government of Quebec effect the secession of Quebec from Canada unilaterally?” The Court took the view that while the “secession of Quebec from Canada cannot be accomplished... unilaterally”, a referendum itself was not unconstitutional but a mechanism of gauging the will of the francophone province. Consequently, a referendum, provided it resulted in a “clear majority”, “would confer legitimacy on the efforts of the Quebec government”.³⁵

In other words, a result in favour of secession would require the rest of Canada to negotiate with Quebec. Needless to say, this ruling does not apply in all the other cases, but the Canadian example suggests that some countries’ courts have shown a flexibility and appreciation of nuances that is conducive to compromises.

Some international organisations have adopted this principle. For example, the African Union – the organisation of African states – is reluctant to establish states that could destabilise the sometimes rather artificial boundaries most African countries inherited from their colonial-era rulers. Those who had used lofty declarations to win independence were less keen when parts of their own newly established states wanted to create new states. Hence, African leaders have followed a principle called *uti possidetis*. It basically means that the borders that you have inherited stay the same. The International Court of Justice has helpfully spelled this out:

[*Uti possidetis*] is a general principle, which is logically connected with the phenomenon of obtaining independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles provoked by the changing of frontiers following the withdrawal of the administering power.³⁶

Conclusion

One can certainly make a case for the Palestinians having a state, as was envisaged when the United Nations mandated the creation of a Jewish state and an Arab state in the territory of part of the old British Mandate of Palestine (spoiler alert: the Arab side rejected that deal, with multiple Arab nations deciding instead to try and destroy the Jewish state through war rather than helping create a Palestinian one).

There have been times when such a two-state solution was within reach. For example, in the spring of 2000, then US President Bill Clinton secured Israeli backing for this. However, the deal was rejected by Yasir Arafat, who – not content with a state on the West Bank and Gaza – also demanded the right of return of those Palestinians who fled Israel in the 1948 war. This was an overreach. Since the Palestinian leader’s rejection of this offer, the prospects for a two-state solution have not been a realistic prospect. Back then, there was the prospect of a viable state on the West Bank and Gaza. Had Arafat not rejected the very generous terms, there would have been a Palestinian state today. Why? Because such a state would have met the criteria for statehood. Such as an entity would not just be a phantom state but a practical entity.

All this is worth bearing in mind in the context of this report. What we have covered in this briefing is not the history of the Israeli–Palestinian conflict, still less the international

³² Buchanan, *Secession*, p. 132.

³³ Of course, some would say that previously, under the so-called *Stalin Constitution 1936*, individual Soviet states did indeed have the right to self-determination referendums under Article 48. But this provision had been dropped in the *Khrushchev Constitution of 1956*. Consequently, the Baltic republics were in breach.

³⁴ Antonio Cassese, *Self-determination of peoples: a legal reappraisal* (Cambridge: Cambridge University Press, 1995), pp. 119-120.

³⁵ *Re Secession of Quebec*, 1998: 385.

³⁶ *Frontier Dispute, Burkina Faso v Mali*, Merits, Judgment [1986] ICJ Rep 554, ICGJ 116 (ICJ 1987), 22nd December 1986, United Nations [UN]; International Court of Justice [ICJ].

relations theory of this. Rather, what we have analysed is the jurisprudence of establishing a state.

Fundamentally, a declaration of independence and recognition of a new state is only legal if the entity in question:

- Is in control of the territory and the population,
- Is not a puppet state, and
- Can honour the rights and duties that go with being a state.

International law is remarkably pragmatic and factual, and from this perspective “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.”³⁷

In practice, this means that a state which has a functioning legal system (with courts that can enforce contracts and other disputes between individuals) *is* a state. So, if you are able to run the show without outside interference, and if you don’t rely on a powerful backer, then welcome to the world of statehood.

Palestine does not meet these criteria, primarily because it has no defined territory, and the different parts of its territory are ruled by contradictory organisations. Firstly, in terms of control of territory and population, the Palestinian Territories are non-contiguous (West Bank and Gaza), and both parts have totally different, and frequently violently opposed, political leaders. There is no single Palestinian government controlling the territory and people. The West Bank is ruled by Fatah, while Gaza is ruled by Hamas. There is also disagreement about what exactly constitutes defined Palestinian territory; the 1948 borders? The 1967 borders? Secondly, Palestine is not a puppet state, as it has no ultimate suzerain power controlling and directing its every policy, as was the case with places such as Manchuria. Thirdly, Palestine cannot honour the rights and duties that go with being a state, such as enforcing laws. Both parts of the Palestinian territories have separate, contradictory, and rival legal systems. The Palestinian Legislative Council which could make laws, has been indefinitely suspended since 2006 – by the Palestinians themselves. As a result, both halves of the Palestinian Territories rule by decree. The legal system in Gaza is based on Hamas decrees, in contrast with Fatah decrees in the West Bank.

Palestine is therefore not a state, and recognition is legally fictitious. It might serve a political purpose. But from a legal point of view, it is of no consequence. To recognise a Palestinian state is a legal step. It is framed as an act in accordance with international law. But if the decision is framed in this language, it is reasonable that we consider what the *positive* law of recognition is.

And here, we reach an extraordinary conclusion on the part of those who have chosen to make a virtue of the recognition of a Palestinian state. For, to put it bluntly, the declarations are purely political and do not have anything to do with public international law. And as such, they will have no purchase until such time as “Palestine” demonstrates it can enter the community of nations in a normative way.

³⁷ Shaw, *International Law*, p. 444.



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