SUMMARY

The consequences of the lack of recognition of a state from the point of view of international law

The main argument of the book is that the legal effects of recognition of a certain entity as a state vary depending on the degree of acceptance of its statehood by the international community, particularly by other states. If its status is contested, the entity in question remains just a regime with a limited international personality – as opposed to a state, which enjoys full international personality.

The first two chapters explore the role of recognition and non-recognition in the process of creation of states in international law. The analysis demonstrates that the international community usually expects an entity aspiring to statehood to meet certain criteria: to have a permanent population, a defined territory and an effective and sovereign government, and to be established in a manner consistent with the norms of *jus cogens*. The process of emergence of a state is also influenced by a number of legal principles which are sometimes difficult to reconcile, such as those of non-interference in internal affairs, self-determination, territorial integrity and *uti possidetis*. Still, international practice clearly indicates that in the end it is the already existing states who assess whether the above criteria have been fulfilled, and whether the above principles have been observed in a given case. They express their opinion through granting or refusing recognition to a given entity. This makes the whole process to a large extent discretionary and, because of that, also highly politicised. As a consequence, some entities have been universally recognised as states despite manifest deficiencies as regards their fulfilment of the criteria of statehood, at least temporary (e.g. Guinea-Bissau, Bosnia and Herzegovina). On the other hand, a number of entities aspiring to statehood which seemed or seem to fulfil these criteria have been virtually or totally unrecognised (e.g. Chechnya, Somaliland) and have not been considered states by the international community as a whole.

For these reasons, the book argues that statehood and full objective international legal personality depend on recognition of the claim to statehood of a given entity by the international community. It provides the reader with general guidelines as to who needs to recognise such an entity as a state in order to produce this effect, including, *inter alia*, recognition or non-recognition by the parent state, neighbouring states, major superpowers and other states, the United Nations and relevant regional international organisations. Moreover, it

maintains that if the number and type of states or international organisations recognising an entity is insufficient to confer full international personality on it, the entity in question becomes a regime. In such cases, only those states who recognise it consider it a state. The non-recognising states, as well as international organisations and courts, treat it as a non-state entity with subjective and limited international personality. This personality may appear similar to that of a state in certain aspects, but in general is much narrower (e.g. for the purposes of application of international customary law or enforcement of international responsibility).

The approach presented in the study differs from the classical constitutive theory of recognition of states, in that it is based on hermeneutical methodology. Because of that, it puts stress on interpretation of the legal meaning of a specific act of recognition of an entity aspiring to statehood – not only in the context of bilateral relations between the recognising and the recognised, but also taking into account whether, and to what extent that entity is also recognised by other states or not. Furthermore, it maintains that states who do not recognise the entity aspiring to statehood may still enjoy some rights and have certain obligations towards it, whether it is a state (when the scope of these rights or obligations is larger) or a regime (when this scope is much narrower). This means that states cannot evade their obligations under international law towards entities aspiring to statehood simply by refusing to recognise them.

The two following chapters of the book analyse the legal effects of non-recognition of both states and regimes in various spheres to establish the differences between their status in international law. The analysis focuses on those elements of activity of states and regimes at the international level which are related to the traditionally understood international legal personality, i.e. the ability to have rights and duties derived directly from international law, to participate in the creation of new norms of such law, to raise claims based on this law and bear international responsibility for their own actions and omissions under this law, as well as the passive and active right of legation. As it turns out, the differences between states and regimes are not only quantitative, but also qualitative, and the legal status of regimes in international law remains much more precarious than partly recognised states, i.e. those which are not recognised by the entire international community (e.g. Israel, North Korea).

The analysis shows that unlike states, regimes do not benefit from many of the rights under customary international law, such as the prohibition of the use of force or interference in internal affairs, or the obligation to respect territorial integrity. Some very rare exceptions to this rule result from the unique circumstances of non-recognition of a given regime, combined with the emergence of

the conviction in the international community that it should have been nevertheless subject to such norms, as in the case of Macedonia at the beginning of the 1990s. On the other hand, regimes benefit from certain rights enjoyed by other non-state actors, such as limited protection under customary international humanitarian law. At the same time, international practice strongly suggests that states regard regimes as obliged to respect most of the basic norms of customary international law, including the previously mentioned obligations and prohibitions. Thus the status of regimes is much different compared to that of states, whose scope of rights seems to correspond to the scope of their duties. The reason for this is that states, unlike regimes, enjoy full international legal personality and because of their status as sovereigns, benefit from the principle of equality.

One can also observe interesting differences between the status of states and regimes with respect to international responsibility. As is clear from the practice and jurisprudence of international courts, nowadays regimes are increasingly treated as non-state actors controlled by third states that support them. They are regarded as responsible on their own only in exceptional cases. In contrast, the responsibility for unlawful acts committed by partly unrecognised states against states that do not recognise them is directly attributed to the former. In the area of enforcing claims, the differences in treatment of states and regimes are somewhat blurred, but the greater number of forums in which states are active significantly facilitates pursuing international law claims against them despite the lack of recognition. At the same time, both states and regimes have serious difficulties in enforcing responsibility for unlawful acts committed by states that refuse to recognise them. This problem is once again more acute in case of regimes.

The rules with regard to communication by non-recognising states with states or regimes they do not recognise are quite similar. The limits of freedom of action in this area are determined by the concerns of entities which refuse to recognise that they could be accused of implicit recognition. As regards postal, telephone and electronic communication, the opportunities of contact are clearly limited, while international practice is relatively liberal with respect to the bilateral meetings and visits. In case of the latter, however, there is a tendency to frame possible visits to various regimes, or visits from representatives of such entities, as private and unofficial. When it comes to multilateral meetings and conferences, there is a trend among states which refuse recognition to avoid contact with regimes they do not recognise, but it would be difficult to speak of a uniform norm developed in this regard. Certainly, the approach of states to such cases is strongly influenced by protests made by parent states regarding the

participation of specific entities in various types of multilateral negotiations, as well as by the claims that these entities raise in connection with their own participation in meetings in multilateral formats.

As regards other forms of contact, it is inadmissible for a non-recognising state to establish diplomatic relations with either a state or a regime it does not recognise, as the establishment of such relations implies recognition. As for consular relations, they are acceptable between states despite non-recognition, but they are not maintained between states and regimes they do not recognise – some occasional exceptions have been situations where regimes were believed to be able to quickly acquire statehood (e.g. Macedonia). After World War II, one can also observe a large variety of solutions aimed at maintaining quasi-diplomatic and quasi-consular contacts despite the lack of recognition, both in relations with states and regimes.

There are also clear differences in the treatment of states and regimes as regards treaty relations. The analysis of international practice shows that states may conclude various bilateral treaties and political agreements with states that they do not recognise. The few exceptions include treaties that comprehensively regulate mutual relations and alliances – however, the cases under analysis suggest that it is still possible to address these issues in informal agreements. As regards regimes, states that refuse to recognise them may not conclude bilateral treaties but only political agreements, albeit these may be very diverse in terms of content and differ from treaties in fact mainly in their form, sometimes a unique one. When it comes to multilateral treaties, the situation is somewhat different. It is clear from international practice that concluding such treaties and agreements involving regimes not recognised by some parties is almost unheard of, and is almost exclusively limited to instruments that regulate situations arising from armed conflicts. The exceptions are very sporadic cases when a regime participates in the conclusion of a multilateral agreement by acting in a specific capacity, e.g. as a fishing entity. Cases of conclusion of multilateral treaties with a state that is not recognised by some parties are somewhat more frequent, and relevant treaties may cover a slightly broader scope of issues. In addition to various types of treaties ending armed conflicts, treaties of a technical nature are also sometimes concluded, as well as treaties covering issues considered crucial for the international community, such as limiting nuclear tests. Finally, as regards the accession to existing multilateral treaties, it would be difficult to point out any clear differences between states and regimes not recognised by some parties. However, there is a growing tendency to create various types of solutions in treaties enabling accession by non-state entities, used mainly by Taiwan. Another problem is the application of multilateral agreements between

the non-recognising and non-recognised parties – states often try to exclude such a possibility through reservations or declarations, but such attempts are often considered to be without legal effect. It is also incorrect to argue that the lack of recognition is a definitive barrier to establishing a relationship on the basis of a given multilateral treaty between parties who do not recognise each other.

A completely different problem is that of the status of states or regimes in the domestic law of states that do not recognise them. One should note a lack of clear differences in the legal situation of these two groups. This is due to the fact that issues related to the status of a state or regime in the domestic legal order of a non-recognising state largely escape international regulation and are left to the discretion of individual states. This relates to issues such as legal capacity, capacity to perform acts in law, passive and active capacity to be party to legal proceedings. For example, both states and regimes are rarely given the opportunity to lodge complaints or actions. Usually, they are not even treated as legal persons within the meaning of the legal order of the non-recognising state. On the other hand, there have been cases where national courts accepted actions brought against them, denying them state immunity, and also cases where national courts concluded that entities aspiring to statehood enjoyed immunity despite the lack of recognition by the authorities in a given state. What matters greatly in such cases is whether the adjudicating court is seated in a state of common law or continental jurisdiction. In the former, the issues of immunities are generally resolved in accordance with the wish expressed by the executive, in the latter, the decisions are very diverse. Finally, as regards the diplomatic and consular immunities of officials of a state or regime not recognised by the host state, in practice they largely depend on the goodwill of the host state. Judicial practice generally covers cases in which there have been disputes as to the immunities or privileges of persons representing regimes and not states, which may suggest that the immunities of persons representing the latter are respected to a greater extent and do not cause controversy. This would be consistent with existing rules of international law regarding the immunities of persons holding important state functions.

One can also note a diminishing role of international recognition in cases of the acceptance of internal acts (legal acts, court judgments, administrative decisions and documents) issued by states and regimes that are not recognised by the state whose authorities examine a given case. The jurisprudence shows that in virtually all states there is a tendency to take into account these acts for the purposes of court proceedings. Again, quite significant differences exist in this respect between the states of the common law system, where the courts largely follow the approach of the executive power (although this has begun to

change, even in the UK), and the states of the continental system, where judges are allowed more freedom to adjudicate. In the latter situation, courts relatively often completely ignore the issue of recognition, focusing rather on the effectiveness of the legal order of a given entity, or the compliance of recognition of acts of such an entity with the public order.

Finally, as the research has shown, the impact of international jurisprudence on the acceptance of internal acts by national authorities should be considered moderate. In fact, the humanitarian exception proposed by the International Court of Justice in the Namibia case has never been unequivocally accepted in national legal orders. Some courts have referred to it, but it seems unjustified to argue that states have a customary obligation to accept acts which affect the rights of private persons despite non-recognition of the entities which have issued them. Still, states party to the European Convention on Human Rights may feel compelled to respect such acts. The case law of the European Court of Human Rights allows, or even requires, that the parties to the Convention take into account quite a wide range of acts of unrecognised regimes, even including certain acts of a public-law nature. This may raise justified doubts from the point of view of the compliance of such an approach with, for example, United Nations resolutions.