

## **The Crimean crisis and the Polish practice on non-recognition**

*Władysław Czapliński\**

1. For the purpose of the present paper, recognition is a unilateral act of a State confirming the legality of a certain, specific situation and accepting the consequences thereof. As recognition may concern different situations in international relations, the present text concentrates upon recognition of States and governments. Effects of recognition can be defined as: the express or presumed acceptance of the ability of a State or a government to fulfil international legal obligations and of its readiness to accede to international organizations, its capability to maintain diplomatic relations, and the acceptance of a law-making power in domestic relations, including constitution-making, criminal law and private law-making. There is no obligation to recognize under general international law. Each State decides by itself whether the criteria of statehood have been met.

2. An obligation not to recognize unlawful situations is the opposite of recognition. As the recognition of States and governments remains a discretionary power of the State, the obligation of non-recognition can be imposed upon States by the international community, in particular by way of a decision taken by a competent international organization. The ILC, in its commentary to Article 41(1) of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (RSIWA), emphasized that the international community as a whole is under an ob-

\* Professor of international law, Polish Academy of Sciences. The research was supported by the National Science Center in the framework of the research project 2014/13/B/HS5/01490.

ligation of collective non-recognition of the legality of situations resulting from serious breaches of peremptory norms of international law; this collective obligation covers both formal and informal activities (*de facto* recognition).<sup>1</sup> There is, however, no convincing reason why this kind of sanction<sup>2</sup> should be limited to the breaches of *jus cogens* obligations; rather it should be widely interpreted.

The nature of the obligation of non-recognition is unclear. It could be qualified as a countermeasure, however it is not covered by the respective provisions of ARSIWA, including in particular, procedural rules; we could also consider it as a general principle of law, reflecting a principle *ex iniuria ius non oritur*.

3. The origin of non-recognition was associated with the so-called Stimson doctrine, formulated in connection with the establishment of the State of Manchukuo following the aggression of Japan against China. The application of non-recognition was far from universal, in particular if we consider the cases of the Italian aggression against Abyssinia and of the incorporation of Austria by the German Reich. In the former case, sanctions were adopted by the League of Nations but not implemented; in the latter, numerous members of the League recognized the annexation *de facto*.

The principle of non-recognition was expressed in numerous international legal instruments in the framework of the UN system. Two important declarations of the UN General Assembly, resolutions 2625(XXV) and 3314(XXIX),<sup>3</sup> confirm the non-recognition as an important element and a consequence of the principle of non-use of force in international relations ('no territorial acquisition resulting from the threat or use of force shall be recognized as legal'). Non-recognition was

<sup>1</sup> J Crawford, *The International Law Commission's Articles on State Responsibility. Introduction, Text and Commentaries* (CUP, 2002) 249-251.

<sup>2</sup> Gattini refers to it as a form of international isolation towards the perpetrator of an internationally wrongful act: A Gattini, 'Les obligations des Etats en droit d'invoquer la responsabilité d'un autre Etat' in P-M Dupuy (ed), *Obligations multilatérales, droit impératif et responsabilité international des Etats* (Pédone, 2002) 154-157.

<sup>3</sup> Containing respectively the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations, and the Definition of Aggression.

embodied as a typical element of resolutions adopted by the UN Security Council in connection with armed conflicts – reference can be made to resolution 242 (1967) concerning the Israeli-Arab conflict, resolutions 541 (1983) and 550 (1984) concerning the Turkish Republic of Northern Cyprus, resolution 662 (1990) concerning the occupation of Kuwait by Iraq, etc.

We could also refer to the Namibia advisory opinion of the International Court of Justice<sup>4</sup> or – to a lesser extent due to the unclear character of the decision – to the judgment of the same Court in the East Timor case.<sup>5</sup> In the former case the Court affirmed that the illegality of the presence of South Africa in Namibia did not result from the apartheid policy, but was connected with the expiration of the mandate system of the League of Nations. The ICJ emphasized that States should avoid any relations with South Africa, including any act of presumed recognition of the effectiveness of activities carried out by South Africa towards Namibia, such as the conclusion of international agreements, the accreditation of diplomatic and consular missions, or the maintenance of diplomatic relations leading towards a strengthening of the presence of South Africa in the territory of Namibia. In the latter case the majority of the Hague judges stressed that Australia could not violate the principle of non-recognition, as no resolution of the UN Security Council imposed an obligation of non-recognition on the Indonesian annexation of East Timor. Two judges (Weeramantry and Skubiszewski) stated however that the obligation of non-recognition was independent of the decisions of the political organs of the UN.

The non-recognition of unlawful territorial situations has also found expression in the practice of other international courts, including the European Union Court of Justice and European Court of Human Rights. The Luxembourg Court's case-law concerns mostly the Turkish Republic of Northern Cyprus: *S.P.Anastasiou (Pissouri) Ltd*<sup>6</sup> refusing the recognition of certificates of origin of goods issued by the authori-

<sup>4</sup> *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South-West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16.

<sup>5</sup> *Case concerning East Timor (Portugal v Australia)* (Merits) [1995] ICJ Rep 90.

<sup>6</sup> Case C-432/92 *The Queen and Minister of Agriculture, Fisheries and Food, ex parte SP Anastasiou (Pissouri) Ltd and Others* [1994] ECR I-3087.

ties of the area, *Apostolides*<sup>7</sup> confirming the jurisdiction of Cypriot courts with respect to real estate situated in Northern Cyprus, even if their judgments cannot be executed. Also the West Bank/Israel situation has been addressed: in *Brita*,<sup>8</sup> the EU CJ decided that goods manufactured in the Jewish settlements in Palestine were not covered by the regime of the association agreement in force between the EU and Israel. The Strasbourg Court's decisions concerned the attribution of human rights violations under the 1950 European Convention on Human Rights to the State supporting secessionist entities: *Loizidou*<sup>9</sup> dealt with Northern Cyprus, and *Ilasçu*<sup>10</sup> with Transnistria. The Court stressed that the attribution did not amount to recognition of unlawful territorial changes, but that it was aimed exclusively at guaranteeing the fundamental rights of the local population.

4. It seems that the unanimous practice of international organizations and international judicial bodies on non-recognition of unlawful situations fully confirms the rule. Its nature remains unclear – it seems that it constitutes an aspect of the general principle of law *ex iniuria ius non oritur*. We could possibly argue that the non-recognition is a customary norm – however, a detailed analysis of State practice and opinio iuris requires appropriate evidence that cannot be explored within the framework of the present study. Non-recognition can be interpreted in several ways: as a political decision of condemnation of certain acts, as a political demonstration, but also as an expression of silence.<sup>11</sup>

The problem of recognition/non-recognition is usually connected with the creation of States or governments. With respect to the former case the problem occurs in two situations: when an entity to be recognized does not meet the criteria for statehood, and when it is created in

<sup>7</sup> Case C-420/07 *Meletis Apostolides v David Charles Orams, Linda Elizabeth Orams* [2009] ECR I-03571.

<sup>8</sup> Case C-386/08 *Brita GmbH v Hauptzollamt Hamburg Hafen* [2010] ECR I-01289.

<sup>9</sup> *Loizidou v Turkey*, App no 40/1993/435/514 (ECtHR, 23 February 1995).

<sup>10</sup> *Ilascu and Others v Moldova and Russian Federation*, App no 48787/99 (ECtHR, 8 July 2004).

<sup>11</sup> C Warbrick, 'Recognition of States: Recent European Practice' in M Evans (ed), *Aspects of Statehood and Institutionalism in Contemporary Europe* (Dartmouth, 1997) 10.

violation of international law. As to the latter case, problems of recognition deal with an unconstitutional change of government.

According to traditional international law, the establishing of a State was a matter of fact, not being subjected to control from the point of view of legality. The unlawful origin of the State never constituted an obstacle for recognition if the State had an effective government.<sup>12</sup> This rule was confirmed also in controversial cases of secession, although the international recognition might be dependent upon the recognition by the predecessor State. The position towards an unconstitutional government was different, as an assessment of conformity of the governmental change with the constitution was relatively easy. The situation changed in 1960-70s, with the proclamation of the independence of Southern Rhodesia and Bantustans (by South Africa). The political organs of the UN adopted a number of resolutions declaring the illegality of the entities established in violation of the right to self-determination of peoples. Both conventions on succession of States with respect to treaties (1978) and with respect to State property, archives and debts (1983) confirm a requirement of conformity of the succession with international law. This presupposes that no State can be created in violation of the right to self-determination, nor by the use or threat of force, in particular by the third States that are supporting the possible territorial changes. The practice connected with the dismemberment of Yugoslavia, including the refusal to grant self-determination to Republika Srbska in Croatia and Bosnia/Herzegovina, as well as the similar denial of recognition of the Turkish Republic of Northern Cyprus, Abkhazia and Southern Ossetia, show that secession is prohibited under general international law. The conflict between territorial integrity of States and self-determination is usually decided in favour of the former. The case of Kosovo brings into question the coherence of the policy maintained by the international community towards the former Yugoslavia (and secession in general). In fact, most States recognizing Kosovo stated that the situation of that State was exceptional and could not be automatically treated as a precedent for possible future cases.

<sup>12</sup> J Crawford, *Creation of States in International Law* (OUP, 2007) 21; WT Worcester, 'Law, Politics, and the Conception of the State in State Recognition Theory' (2009) 27 Boston University Intl L J 155: 'Unjust entities have been regarded as States, and since the Peace of Westphalia, that they have been so regarded has been a cornerstone of the international system'.

5. Recognition is political in the sense that every State evaluates the circumstances of the case independently and takes a stand concerning the decision to recognize. Criteria for recognition should correspond with the ones of statehood. There is no supranational agency deciding in a binding way whether the criteria of statehood are met (although in exceptional cases such a binding decision can be passed, eg, by an international organization). We could say that the theoretical components of statehood are well known, but their application in the future is disputable and can lead to illegality of recognition. It means either a violation of a principle of non-intervention in the domestic affairs of the State or a premature recognition. However, we reject the latter proposal, as individual States can always claim that from their perspective the criteria of statehood in a given case are met.

6. The nature and practice of international courts on recognition is coherent and well-established. The practice of domestic courts and other State agencies meanwhile remains relatively unclear. Except for an interesting project by the Council of Europe on recognition of States and governments, linked with the State practice in cases of dissolution of the USSR and Yugoslavia,<sup>13</sup> the practice relates mostly to judicial decisions of American and British courts<sup>14</sup> dealing with the origin of the USSR, and with the establishment of the German Democratic Republic. The practice is not coherent and does not cover all related issues.

7. The annexation of Crimea by the Russian Federation brought into question the non-recognition of the effects of an unlawful act in international law. Poland, like all the EU Member States, declined to recognize the incorporation. The effects of non-recognition are not precisely in a detailed manner.

<sup>13</sup> J Klabbers et al (eds) *State Practice Regarding State Succession and Issues of Recognition* (Brill/Nijhoff 1999).

<sup>14</sup> Other judicial decisions are limited to a group of European States, and they are relatively limited.

The advisory board<sup>15</sup> set up by the Ministry of Foreign Affairs of the Republic<sup>16</sup> of Poland was given the task of codifying the effects of non-recognition of unlawful territorial acquisitions. The opinion was rendered for the use by the Legal Department of the Ministry, so we are not authorized to publish it *in extenso*. On the other hand, the analysis of the Polish practice relating to non-recognition deserves attention.

From the point of view of international law, the territory of Crimea is under military occupation. Consequently, no acts of the Russian Federation aimed at the modification of economic and social structure of Crimea should be recognized by other States. This means that no acts of Russia with respect to individuals in the domain of private law should be accepted, and the requirements of Ukrainian law as to the form and merits should be respected. There are three groups of arguments in favour of such an approach: legal, based on strict juridical legalism; political, depriving the aggressor of the gains deriving from the act of aggression; and psychological, emphasizing solidarity with a victim of aggression. On the other hand, there are important limitations upon the non-recognition. Firstly, the effects of non-recognition can possibly be a burden for ordinary people. Secondly, in the long term the measures can damage the interests of the State imposing sanctions. Thirdly, a decision on sanctions depends more upon politics than upon international law and in fact it is rarely mandatory. Fourthly, the effects of sanctions depend on domestic law, and often require amendments into existing legislation. If sanctions are imposed by an international organization, the nature of the measures depends upon the statute of that organization. Most measures taken under EU law can be self-executing, while the sanctions adopted by the UNSC require implementation.

8. There is no doubt that there is a ban on the formal recognition of the annexation of Crimea by Russia. All officials and in particular diplomatic representatives should abstain from making any (even unofficial) statements accepting the annexation. It is also important to ex-

<sup>15</sup> The Board is composed of 15 leading international law professors of Polish universities. The paper referred to in the current presentation was produced largely by Professors Paweł Czubik (Cracow) and Przemysław Saganek (Warsaw).

<sup>16</sup> In fact the historical Polish name of the State: *Rzeczpospolita Polska*, should be translated as: the Commonwealth of Poland.

clude all acts that could be considered as *de facto* recognition. Eg Polish diplomats accredited in Russia should not visit Crimea, Polish consular officers in Russia should not perform their functions with respect to Crimea, nor should Polish-Russian agreements be implemented in a way suggesting that the Peninsula is part of the Russian Federation. All treaties between Poland and Russia should be reviewed from the point of view of their possible application in Crimea.

9. The problem of non-recognition of civil status acts and other acts important for the position of individuals, issued or registered by the *de facto* regime (unrecognized government) was considered by the ICJ in the *Namibia* advisory opinion. The Court suggested that the acts relating to the registration of certain facts (birth, death) of individuals should be recognized. As to other activities (including marriages or acts concerning social or economic activities, like the creation of corporations) the practice varies. These activities can be performed either in Ukraine, or in Russia outside Crimea, and because of that reason, acts of this kind exercised by the Russian occupation authorities in Crimea should not be recognized. According to Polish civil procedure (Article 1138 of the procedural code), a foreign act on civil status can be used in an unrestricted way as evidence before Polish state agencies. However, the acts passed by the agencies of unrecognized entities or in the occupied territories cannot be considered as 'foreign documents'. Russian agencies in Crimea cannot be recognized as competent organs to act, but exclusively as private instruments, unsuitable for transcription (and deprived of any formal official power). On the other hand, the documents edited in the territories of unrecognized entities can be registered as a notification of certain facts.

The same is correct also with respect to other official documents edited by the Russian authorities in Crimea. As from the perspective of international law Crimea constitutes a part of Ukraine, acts by Russian agencies exercised there cannot be treated as official and binding.

Moreover, Polish State agencies should not recognize the official character of documents edited or legalized by consular officers of generally recognized third States in the unrecognized territory. One should also reject the effects of possible recognition of unlawful territorial situations by third States. Acts of the consular officers of third States can



only be accepted as official ones if the officers in question perform their functions without the exequatur of the Russian Federation (which is not very probable in practice, as according to our knowledge there are no consular representations of third States in Crimea).

In practice, the rules on non-recognition of official documents stated above exclude the possibility of giving effect to plenipotentiaries, accepting commercial documents issued by Russian customs officers, or restricting the exchange of judicial documents (legal aid).

10. Polish civil procedure is based upon the principle of automatic recognition of foreign judgments in civil matters. However, there exists the possibility to avoid this effect and to support the protection of Ukraine's interests. According to Article 1146 section 1(1) of the civil procedural code the judgment cannot be recognized nor executed if it is not final according to the law of the State of the forum. On the basis of this provision, Polish courts can refuse to recognize every judicial decision issued on behalf of the Russian Federation in Crimea. All judgments have to be evaluated from the perspective of Ukrainian law. Judicial decision passed not in the name of Ukraine would not become final under the law of Ukraine.

11. The non-recognition of Russian passports issued in the territory of Crimea deserves special attention. According to Article 4 of the Polish Aliens Act of 13 June 2003, the crossing of the border by a foreigner is possible solely on the basis that they possess a travel document recognized by the Polish authorities. Article 14 of the Schengen Convention of 1990 reserves to every State party a right to decide on the recognition of foreign travel documents. From a practical point of view, a determination as to whether a given passport has been issued by the Russian authorities in the area of Crimea can raise difficulties (eg the residence is not mentioned in the travel document).

On the other hand, it would be desirable to make Ukrainian passports more attractive for the local population. The abolishing of the visa regime by the European Union for Ukrainian nationals is decisively the most important political aim; a diversification of visa fees, including free visas for Ukrainians, might be a first step.



12. A suspension of certain international agreements concluded between Poland and Ukraine is another possible consequence of non-recognition of the incorporation of Crimea by Russia. The starting point should be a review of the treaties applicable to Crimea. It should be followed by a declaration (unilateral or passed jointly with the Ministry of Foreign Affairs of Ukraine) that Polish-Ukrainian treaties do not apply in the territory of Crimea; however, the advantages for Ukrainian citizens resulting from those agreements should remain in force. The suspension could refer to the *rebus sic stantibus* principle.

Newly concluded agreements between Poland and Ukraine, and between Poland and the Russian Federation, should contain a special 'Crimea clause' excluding their application with respect to the Peninsula. The Polish-Ukrainian treaties could refer to a renewed application with respect of Crimea after its reunification with Ukraine. As Russia would probably reject any proposal to introduce a common clause, a unilateral (interpretative) declaration is a possible alternative option.

We must remember that the non-application of treaties with respect of Crimea can create problems for the EU, as Russia on her side might refuse to apply international agreements with respect to Crimea, rejecting *inter alia* legal aid, extradition, or international arrest warrants. Their execution will depend on the interests of the Russian Federation. The example of the Turkish Republic of Northern Cyprus is very instructive, as it essentially became an asylum for criminals from different countries. Finally, Polish State agencies should not apply for legal aid in the territory of Crimea. In fact, the cases in question are very rare and do not create serious problems in practice.

13. Polish tourist activities in Crimea should be restricted. Tourism constitutes an important source of income for private individuals in the area. An important practical reason for this policy is the lack of Polish consular service in Crimea. Polish nationals cannot be protected by Polish consular officers accredited in Russia and Ukraine, or by consuls representing any other member State of the EU. Crimea should not be a destination for Polish tourists. It is interesting, however, that the Ministry of Foreign Affairs issued a statement concerning Northern Cyprus in 2011. It referred in a very unfortunate way to the lack of diplomatic relations between Poland and TRNC, instead of invoking the non-

recognition of the TRNC. The Ministry referred also to the non-participation of Northern Cyprus in the 1963 Vienna Convention on Consular Relations, which is not relevant to the issue in question. It seems that a similar declaration should be issued also with respect to other non-recognized entities, including Abkhazia – still a destination for Polish tourist groups.

14. Air connections between Poland and airports in the territory of Crimea should be suspended. A method of isolation should be based upon the practice observed in relation to Ercan airport in the TRNC. Flights connecting to Ercan operate via Turkey, where authorization for further operation is given. However, the case of Crimean airports is different, as one has to deal with the Russian Federation, a universally recognized subject of international law. In fact flights to Simferopol airport in Crimea, controlled by Russia, are operated exclusively by Russian carriers on the route Moscow-Simferopol. Interestingly, no corresponding problem arises with reference to Polish vessels operating on the high sea – since most of them fly low cost flags and are not controlled by the Polish State.

15. Delivery of international mail should not be blocked. Letters should be addressed to Russia and not to Ukraine, in order to guarantee an efficient distribution of mail in Crimea, also in the interest of individuals.

16. The Ministry of Foreign Affairs of Poland decided to close down Polish consulates in Sevastopol (and so it did in Donetsk). Presumably the decision was taken because of security reasons, but its effects were irreversible. In our opinion, the decision was premature, as the performing of consular functions generally did not amount to recognition (apart from a disputable issue of *exequatur*). There are several options to reinstall the Polish consular office in Crimea, and a decision on the matter is highly political. Special consular representation could be established as a branch office of the Polish consulate in Odessa in order to deal with Crimean matters. This solution makes sense in



the event that a special visa policy is introduced for the inhabitants of Crimea. Another option would be the reopening of the consulate in Sevastopol. An Ukrainian *exequatur* is still valid. Such a proposal however requires negotiations with the Russian Federation as to the Russian *exequatur*. The application with the Russian authorities should be accompanied by a declaration stating that the reestablishment of the consular post in Crimea does not amount to recognition of the annexation of the Peninsula by the Russian Federation. The declaration would hardly be accepted by Russia and we doubt that the *exequatur* would be granted. Finally, the Ministry of Foreign Affairs could possibly extend the competence of any Polish consulate in Russia to Crimea. Such a decision might be interpreted as *de facto* recognition. It seems that any steps in the domain should be done in consultation with the High Representative of the European Union for Foreign Affairs and Security Policy. The practice of other States (including the EU Member States and Canada, the latter because of a numerous and influential population of Ukrainian origin) should also be observed.

17. The present paper is certainly not exhaustive, but it can constitute a reference for international practice in the field of non-recognition of unlawful situations in international law. It aims at opening a discussion about possible further steps and sanctions imposed upon perpetrators of internationally wrongful acts.

