Law of Treaties Regime and the Relocation the US Embassy Case: Old Challenges, New Dimensions

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Abstract

The Relocation of the United States Embassy to Jerusalem case (Palestine v. United States of America) at the International Court of Justice (ICJ) provides an opportunity to reassess how the existing Law of Treaties regime deals with the impact of statements of non-recognition on multilateral treaties, an unresolved issue as old as the Vienna regime itself. The Vienna Convention on the Law of Treaties 1969 (VCLT) is silent on this particular issue, where the Law of Treaties interact with the legal consequences of non-recognition. The International Law Commission (ILC) cited, as late as 2011, at least four reasons why it does not recognize statements of unilateral non-recognition as reservations. The Relocation Case puts all four reasons to test. This paper, by examining these reasons, argues that statements of non-recognition are not independent from the international legal order as popularly imagined, and that there are possibilities for ICJ hearing the case even if it is to concur with the position of ILC, later while deciding the case. The Case reminds us about the arguments of Alain Pellet, the Special Rapporteur, in his third report on Reservations to Treaties which sought to establish a separate category of "reservations related to non-recognition" within the VCLT regime.

1. Introduction

Treaties are very important sources of international law. They are also important instruments for developing peaceful relations among nations irrespective of their social, political, and constitutional status. Even when diplomatic ties between two or more nations are severed, international agreements will usually operate to ameliorate their relationships.[1] This means that treaties and legal relations come before the inter-state political and diplomatic relationships. However, there are situations in global politics where statements of non-recognition and de-recognition are issued to render all treaty relationships with non-recognized state or entity legally unenforceable.[2] These statements –

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1 See Claude Blumann, 'Etablissement et Rupture Des Relations Diplomatiques' (1989) Aspects récents du droit des relations diplomatiques 3, 49–50; See also J Rosetto, 'La Rupture Des Relations Diplomatiques' (1989) Aspects récents du droit des relations diplomatiques 111.

2 See R Wilde, A. Cannon & E. Wilmshurst, *Recognition of States: the Consequences of Recognition or Non Recognition in UK and International Law*, *in* Summary of the

political in nature than legal – are used to deny juridical existence to states or to entities claiming statehood. The Relocation Case is the latest unfolding of this scenario. This paper believes that this is a seminal case involving the borderline issue between legal order and political order in international relations.

The instruments of non-recognition do not operate independent of the international legal order as popularly imagined.[3] Every time a declaration of non-recognition is made, there arise an obstruction to the applicability of international agreements between the states involved.[4] Nevertheless, the VCLT maintains a pretentious silence regarding the interface between the law of treaties and the legal consequences of non-recognition.[5] The ILC also colludes with this silence as late as 2011.[6] This paper examines the VCLT's and the ILC's position on the issue, using the Relocation Case and the unilateral statement of non-recognition made by the U.S. in response to Palestine's accession to the Vienna Convention of Diplomatic Relations (VCDR) and its Optional Protocol. The ILC has made

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International Law Discussion Group meeting held at Chatham House on 4 February 2010, 12 (2010). An active non-recognition and de-recognition statement denies juridical existence to international actors and hence no legal consequences of factual existence of the international actor would be cognizable by the respective state.

3 R Wilde and others (n 2); See also H. Lauterpatcht, 'Recognition of States in International Law' (1944) 53 The Yale Law Journal 385. A popular view is that a non-recognized entity, denied of jurdicial existence, cannot make any acts having any legal consequences. It can neither enter into an agreement with the non-recognizing state nor can it make any claim against the non-recognizing state in its courts of law. Therefore, while it is arguable that all possible treaty relationships between the two actors must be rendered inoperable, it doesn't necessarily follow that the ICJ, or any other international organisation for that matter, cannot recognize the juridical existence of the non-recognized state or entity. It also does not logically follow that obligations beyond treaty relations must be rendered non-cognizable. This would amount to formal adoption of the rule of constitutive theory of recognition, i.e. "no recognition, no existence" as an international legal position, while this is not simply the real case.

4 There are evidences to the contrary, but these refer to selective state practice without necessarily creating legal implications. Scholars like Brownlie even contests the idea that a State concluding a treaty with a non-recognized entity. See generally Ian Brownlie, *Principles of International Law* (7th edn, Oxford University Press 2008) 90; B. R. Bot, *Non-Recognition and Treaty Relations* (Sijthoff Publishers 1968) 60 ff; Joe Verhoeven, *La Reconnaissance Internationale Dans La Pratique Contemporaine: Les Relations Publiques Internationales* (A-Pedone 1975) 392–93; R Jennings and A Watts (eds), *Oppenheim's International Law* (9th edn, 1996) 158, 170–71.

5 Article 74 of VCLT speaks about absence of diplomatic relations, which should not be taken for granted as absence of recognition. See Angelet and Clavé, '1969 Vienna Convention Article 74' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (Oxford University Press, New York 2011) 1679–80. For the text of Article 74 VCLT, see infra note. 48.

6 Guideline 1.5.1, *Guide to Practice on Reservations to Treaties 2011*; See also 'Guide to Practice on Reservations to Treaties: Report of the International Law Commission on the Work of Its Sixty-Third Session' (2011) II Yearbook of International Law Commission, 27 The ILC while adopting its 2011 Guide to Practice on Reservations to treaties denied itself having scope for governing the unilateral statements of non-recognition made in connection with conventional relationships.