

Report on SLS/ British Institute of International and Comparative Law 21st Conference on 'Contemporary Issues in Statehood and Recognition'

The 21st Annual Conference, which took place on 30 April 2012, was convened by The Society of Legal Scholars (SLS), represented by Professor Matthew Happold from the University of Luxembourg and Paul Eden from the University of Sussex, and The British Institute of International and Comparative Law (BIICL). Thirteen distinguished speakers met to present papers on contemporary issues in statehood and recognition to an audience of legal professional, academics and students. The conference was held the British Institute of International and Comparative Law, in London.

Session One: General Issues in Statehood and Recognition

Session one was chaired by Professor Colin Warbrick from the University of Birmingham and included Eileen Denza CMG, Dr Thomas Grant from the Lauterpacht Centre for International Law at the University of Cambridge and Dr Jure Vidmar from the Institute of European and Comparative Law at the University of Oxford.

Dr Jure Vidmar – Statehood and the Legal Effects of Recognition

Dr Vidmar opened the panel presentations with a brief but comprehensive and insightful analysis of the constitutive and declaratory theories of state recognition, a dichotomy which has always received considerable attention in the relevant academic literature.

In the beginning of his presentation Dr Vidmar recalled that on the last occasion he spoke at BIICL Kosovo has just been recognised as a state by 20 nations and that now it had been recognised by 90. He then posed the question as to whether this increase had made any difference in altering of the legal status of Kosovo. He explained that if one adopts the declaratory approach then this additional number of recognitions would make no difference at all, as recognition only has the effect of recognising the existence of a new state, it does not affect state creation.

Dr Vidmar supported this assertion by referring to various examples of this practice. He explained that when breakaway regions attempt to become new states in their own right, meeting the traditional statehood is not enough, something else is required. This can be in the form of agreement from the parent state waiving its right to territorial integrity, as was the case with the creation of South Sudan. Similarly Montenegro became a new state through a constitutional process. However in both of these cases the international community's role was merely to confirm the existence of the newly formed states – it was still declaratory.

However, Dr Vidmar then went on to question the current validity of this approach and did so by pointing toward the Quebec Case in the Supreme Court of Canada. This judgment affirmed the proposition that the success of unilateral succession was dependent on the recognition by other states. As Dr Vidmar explained, on this reasoning recognition was playing a constitutive role which could not be squared with the traditional declaratory approach. In addressing this consideration Dr Vidmar expressed the opinion that international law has an underlying view that recognition can create a state, that is, that recognition has a constitutive effect.

In concluding Dr Vidmar referred back to the question which he posed earlier in his presentation – if recognition has constitutive effects then how many recognitions are required before a state can exist? He explained that the lack of an objective standard creates ambiguity which makes determining if a state has been created very difficult and something which can only be clarified over time.

Dr Tom Grant – Collective (Non-) Recognition in Light of Recent Practice

Dr Grant's segment of the discussion focussed on the relatively undeveloped concept of collective recognition and non recognition of states. He explained that the concept of collective recognition was first put forward by Lauterpacht in 1947 and he suggested that recognition was constitutive and could take place collectively within a defined framework. This idea was challenged at the time but as Dr Grant suggested may be becoming accepted.

In arguing this Dr Grant first pointed toward the ILC Articles on State Responsibility which obligate states not to recognise an entity if it has come about from a breach of a peremptory norm of international law. This is binding on all states. From this obligation a collective responsibility not to recognise derives, which is therefore an obligation of non recognition.

In the opposite direction Grant referred to the United Nations as an example of collective recognition through an international organisation. He explained that as statehood is requirement for admission to the UN, as provided in Article 4 (1) UN Charter and affirmed in ICJ Legality of Use of Force case, the UN can be seen as a central body that recognises states. However, the difficulty with this conclusion lies in the fact that when the Charter was being drafted a proposal that the UN should be granted the power of collective recognition was rejected.

Another problem with this conclusion is the fact that the decision whether or not to recognise a new state is a matter of discretion which is eradicated when collective recognition is applied. However as Dr Grant explained this is arguably becoming the case in modern times. Things that were once considered to be purely discretionary have given way to rules of international law but as yet there are no such rules in relation to recognition. As he explained recognition remains a highly discretionary area of state activity. However he suggested that this position is becoming less certain. If a state is admitted to the UN, then the member states are no longer free to deny recognition of that state and therefore discretion in recognition is limited.

Dr Grant also explored the way in which collective recognition could develop, not through a central organisation but through the practice of states. In doing so he referred to the EC guidelines on state recognition. However interestingly he focussed on how these rules not only bound those member states but also influenced the practice of wider states and from this a much wider collective position was developed. He explained that it was significant that states not in the EC (now the EU) still followed the practice of EC states as they did not wish to be isolated.

He further explained that in late 1990s states were not trying to align their recognition policy to a universal standard, or even some widespread consensus, but would act in accordance with some small group of states of which they felt an allegiance. He referred to the discussions among the Commonwealth countries and NATO in relation to the recognition of Kosovo.

Dr Grant concluded his presentation by re-emphasising Vidmar's point that recognition claims greater significance where the status of the entity is uncertain. Where the situation is clear there is little reason for states or international organisations not to recognise. It is the difficult, complex and uncertain situations that provide are problematic. He suggested that collective recognition is slowly developing but that we still have a long way to go.

Eileen Denza – European Practice on Recognition

Denza's presentation focused on the practice of the European Community (now the European Union) in relation to collective recognition of states. Reiterating various issues raised by previous speakers, Denza emphasised the fact that the practice of recognition and non recognition was far from consistent. She further explained that this lack of consistency stemmed from a lack of consensus as to how statehood arose as well as a lack of clear, identifiable and coherent guidelines on the recognition of states.

After setting the more general context Denza went on to discuss the practice of the EU. She explained that the EU formed a common policy on the recognition of states but that this did not derive from any desire to align itself with international legal practice or theory but was rather derived from an ambition to avoid conflicts which would arise out of self-interest based approach and to assert a European identity.

The result of this approach meant that the guidelines for recognition which were developed were politically motivated. Eileen Denza explained that the traditional statehood criteria were hardly acknowledged and were supplanted by various other requirements such as protecting minority rights or signing the nuclear non proliferation treaty. To include such undertakings was a major development in the practice of recognition and one which was not necessarily negative, as the requirement of signing the non proliferation treaty was very successful in practice.

Denza went on to explain that the EC/EU's success in forming a common position on recognition has been rather patchy. There have been some notable successes such as the recognition of the Baltic States but also some failures. Despite maintaining a collective European support when the community recognised Croatia and Bosnia both states were only in control of a fraction of their territory and in addition Bosnia did not have a coherent ethnic identity or the ability to maintain peace and stability within its territory. The most notable failure was in relation to Kosovo where there were no recognition guidelines and no community consensus (five states refused to fall in line with the majority). As Denza pointed out the saddest part of this failure was the fact that varying positions of states were based on self-interest not on varying interpretations of legal positions, something which the common European position had attempted to eradicate. She however noted that the European Union should not give up. The community has shown that it is capable of forming a common position on state recognition and can continue to do so in the future.

Session 2: Recognition and Non-recognition of States

The second session was chaired by Dame Rosalyn Higgins DBE QC, President of the British Institute of International and Comparative Law and included Dr Martin Dawidowicz from Lalive, Paul Eden from the University of Sussex and Dr James Summers from Lancaster University.

Dr Martin Dawidowicz - Western Sahara: Recent UN and EU Practice

Dr Dawidowicz addressed recent UN and EU practice in relation to Western Sahara highlighting the tension between effectiveness and legality. He proposed that it was through the obligation of non-recognition that the legal character of international law is vindicated against the law creating effect of fact.

The main focus of the discussion was the international legal community's involvement in Western Sahara's self-determination. Dr Dawidowicz recalled the separate opinion of Judge Dillard who stated that it was 'for the people to determine the destiny of the territory and not the territory the destiny of the people'. Recent practice in relation to Western Sahara has seen this being applied in reverse. Whilst the modes of implementation of self-determination are unclear, the ICJ in cases of decolonisation view 'free choice' as an essential aspect contained within the option of independence.

Morocco has rejected the application of 'free choice' to Western Sahara since 1958, arguing that the territorial integrity of Morocco should be respected. Whilst the ICJ has been clear that Morocco did not have sufficient ties to Western Sahara capable of triggering paragraph 6 of GA Resolution 1514, Morocco has proceeded to annex Western Sahara to its territory. Focus from the UN has been on the plan devised by James Baker in 2003, which incorporated a proposal for a referendum entailing an option for independence for Western Sahara. The Security Council expressed support for this stating that it was "an optimal political solution" but was rejected by Morocco. Dr Dawidowicz went on to discuss that in 2006 Kofi Anan had accepted the political reality that Morocco was not going to change its position, and that any new plan regarding Western Sahara's right to self-determination was doomed unless it excluded an

option of independence, but that any such plan could not be endorsed by the UN. As a result of this impasse, the UN would step back and hand the process over to Morocco and the aim should be to accomplish what no UN plan could, a compromise between international legality and political reality that would produce a just and mutually acceptable solution. Morocco introduced a new autonomy proposal in 2007 containing only one option. Whilst the Security Council welcomed the efforts it called upon the parties to negotiate in the spirit of realism and compromise. The options available to Western Sahara have reduced and the UN is treating Western Sahara as a minority within Morocco which could be viewed as creeping recognition of Morocco's claim.

EU practice was recently brought to the forefront with the renewal of the EU-Moroccan Fisheries Agreement (FPA) in February 2011 under which Moroccan waters are defined. The issue with the FPA is the lack of guidance in relation to Moroccan waters and their geographical scope especially as there is no explicit exclusion of Western Saharan waters. In December 2011 the European Parliament called upon the Commission to negotiate a new agreement. Whether this recent EU practice can be viewed as contrary to that of the UN has yet to be determined. Dr Dawidowicz concluded that in relation to Western Sahara it appeared that it was the territory determining the destiny of the people.

Paul Eden – Palestinian Statehood: Trapped between Rhetoric and Realpolitik

Paul Eden discussed the more recent issue of Palestinian Statehood and whether this issue was trapped between rhetoric and realpolitik. In September 2011, Mahmoud Abbas as Chairman of the Executive Committee of Palestine Liberation Organisation (PLO) made an application for Palestinian membership of the UN. The application was tightly worded and was an attempt to comply with the legal formalities under Article 4 of the UN Charter. As acknowledged by the ICJ in its Advisory Opinion there are five conditions contained within Article 4(1) of the UN Charter which are exhaustive. Whilst there are no political implications that should or could be imposed, there is a political element associated with whether a State is able to carry out its obligations.

It is Article 4(2) which stipulates the procedure of admission and both the Security Council and General Assembly have to participate, deadlock in one could not be made up in another. There are fifteen members of the Security Council and nine votes are required in order for Palestine to be admitted including all the permanent members. The difficulties Palestine faced were that there had been increasing domestic pressure on President Obama not to support such an application and – following Canada's lobbying in the Security Council – a negative Bosnian vote. This worked against membership of Palestine which meant that the required nine votes were not reached. In parallel to this process there was consideration of Palestine's membership of UNESCO. France has voted for Palestine to become a member of UNESCO but not the UN, instead suggesting Palestine have observer status. Paul Eden highlighted that comparatively the situation faced by Palestine was similar to that of Israel whose membership application also failed on the first attempt.

To what extent does Palestine have a right to become a member of the UN and how does this link with the four requirements under the Montevideo Convention in relation to Statehood? There is dispute over the Palestinian boundary and in the application made to the UN use was made of the boundaries drawn in 1967. This may not be problematic for Palestine as a consequence of the ICJ decision in the Continental Shelf in 1969. Concerning the requirement of effective Government, although it may now be more appropriate to talk of a requirement for a stable and effective government, Palestine has focused on developing institutions for political governance to fulfil these criteria. The World Bank and IMF have stated that government functions are now sufficient and Palestine had demonstrated the competence of a governmental organisation. However Gaza is not under control of the PLO and the boundaries in 1967 do not reflect current reality. Statehood carries the risk of fragmentation and disenfranchisement.

The key difference between Palestine and Israel is the limited nature of Palestinian sovereignty and the 1993 Declaration of Principles on Interim Self-Government Arrangements and the 1995

Israeli-Palestine Interim Agreement are clear that Palestine lacks the capacity to conduct foreign relations. This has been a stumbling block to the granting of sovereign immunity before foreign courts which has been apparent in disputes occurring within the US.

Palestine has been successful in its application for membership to UNESCO but this success has not been achieved without consequences. The US withdrew funding and Israel withheld VAT payment from the Palestinian Authority. When considering the consequences applied by the US and Israel, the PLO may sign agreements in relation to scientific, cultural and educational matters under Article 9 of the Interim Agreement, consequently Israel's retaliatory acts could be viewed as unjustified.

Most recently Palestine has sought to become a signatory to the Rome Statute, but Palestine was denied such status by the Office of the Prosecutor of the ICC under Article 12(3) of the Rome Statute. Interestingly if Palestine were to be upgraded to observer status at the UN such an application would be reconsidered.

Over two thirds of UN members recognise Palestine as a state and whether this is recognition as understood in its traditional capacity or whether this is merely recognition of the Palestinian peoples' right to self-determination is unclear.

Dr James Summers – Legality and Legitimacy in the Recognition of Kosovo, Abkhazia and South Ossetia

Dr Summers discussed legality and legitimacy in relation to recognition of Kosovo, Abkhazia and South Ossetia and how these concepts inform each other, whether they overlap and whether they have merged. All three examples show secessionist entities and all claims for independence are disputed by the States from which they are trying to break away from.

Kosovo's unilateral statement of independence has been recognised by approximately ninety States despite not fulfilling all elements required for Statehood. Whilst there has been political pressure on states to recognise Kosovo, lots of countries still have not done so, including Spain and Greece. Despite this, recognition has been geographically widespread, perhaps indicating that Kosovo has fared relatively well despite slow progress.

In comparison, Bangladesh had been far more successful with over eighty recognitions within the first year and eventually Pakistan recognising it which resulted in Bangladesh's admission to the UN.

Recognition of Abkhazia and South Ossetia since 1992 has been limited. Perhaps most important has been Russia's support of their search for independence. Kosovo has been viewed as a precedent. The difficulty has been that the State from which they are trying to break is disputing their independence. A factor that may have impacted upon their success has been the reluctance from western states to recognise them.

Recognition has in some instances become a lucrative business for some states, for instance Nauru particularly in relation to China and Taiwan.

Whilst the ICJ in its Advisory Opinion on Kosovo's unilateral declaration declared that this was not a violation of international law, such clarification did not result in a dramatic increase in recognition of Kosovo. Kosovo has benefited from the idea that it is unique and the perception that it has a future within Europe. South Ossetia and Abkhazia have suffered from the belief that Russia is trying to control states around it.

Session 3: Governments and Other Entities

The third session was chaired by Professor Matthew Happold and included Dr Jean d'Aspremont from the University of Amsterdam and Nina Patel from Blackstone Chambers.

Dr Jean d'Aspremont - Latest Developments Pertaining to the Recognition of Governments (with an Emphasis on Côte d'Ivoire)

Dr d'Aspremont first addressed the issue of denial of governmental recognition where there has been a coup. Ignoring judgements of whether coups d'état's are good or bad, they are interesting from an empirical perspective because the elicited reactions from states are excellent indicators for the present status of state recognition and recognition of government.

Where a coup has been condemned for violating constitutionality or democratic principles, uncontested international practice often brings about non-recognition of a government and sanctions which prohibit participation in international organisations. These are usually scaled down if that government commits to holding democratic elections; all the governments which have been established by recent coups have followed this course of action. This consolidates state practice which has been followed since the conclusion of the Cold War.

Dr d'Aspremont went on to discuss the mechanism of rejection of credentials by international organisations, particularly the United Nations General Assembly. In theory, the approval of credentials to international organisations serves only to check the authenticity of delegates. In practice, confining recognition of credentials to technical examination has not been possible. Recent practice demonstrates a tendency to adopt human rights and democracy as parameters for legitimacy. The following examples illustrate that not only is the accreditation process politicised, but that politicisation is inevitable.

Syria: There have been open pleas for rejection of credentials of Syria at the United Nations General Assembly. Though this has not led to a barring of delegates, the openness of the pleas reflects that it is no longer taboo to use the Credentials Committee to make political judgements.

Libya: At the 66th Session of the General Assembly, the Credentials Committee recommended that the Libyan National Transitional Council be represented at the UN and their credentials approved. It is clear in this instance that the Committee adopted legitimacy based parameters for the decision.

The Ivory Coast: The UN Credentials Committee suggested that the representatives of Watara at the expense of the representatives of Bagbo should be recognised. This was clearly based upon principles of democratic legitimacy and is remarkable by its divergence from the more traditional approach of acting as part of the narrative of state recognition to active participation in the practice.

Finally, Dr d'Aspremont addressed the issue of expression of the capacity of a government to act on behalf of a state at the international level. After the controversial elections of the Ivory Coast, international actors have ignored or released statements to the effect of non-recognition of Bagbo authority. Earlier this year, when a plane landed in French territories, France responded to a request by Watara and ignored a request by Bagbo making a statement that they were doing so in light of the legitimate authority's request therefore expressing a state will that only the Watara government was legitimate.

The practice of withdrawing recognition from governments was believed to have died out in the 1980s. However recent developments demonstrate that although formal withdrawal rarely occurs, in practical terms statements can have equivalent effect.

Naina Patel - Recognition of the Libyan National Transitional Council

Ms Patel first presented events leading up to the Libyan National Transitional Government (NTC) taking the seat as Libya's representative at the 66th UN Convention. The NTC was formed on 27th Feb 2011 to act as the 'political face of the Libyan revolution'. On March 5th they declared themselves to be the only political body representing Libya and the Libyan state. On 10th March, France officially recognised this statement.

The US position by contrast was more nuanced. On the 27th April, a US ambassador stated that despite the aid which the US was providing to the Libyan situation, the US position concerning recognition remained an undecided international relations and legal issue. Similarly the initial UK position on 13 May exhibited a more cautious approach. UK Foreign Minister William Hague described the NTC as the 'legitimate interlocutor' representing the aspirations of the Libyan people, using carefully worded language which aimed to strike a balance between full state recognition and approval of the NTC. He also stated that this had no impact upon the UK's stance on recognition and that the UK would continue to recognise states and not governments, however the UK would continue to provide support for the development of a legal infrastructure in Libya. In July 2011, the Libyan contact group – consisting of over 30 countries (including the UK and US) and international organisations such as NATO, the EU and the Arab League – announced its members' intention to deal with the NTC as the legitimate governing authority in Libya. On the 16th September the UNGA voted to allow the NTC to take Libya's seat.

The UK and US stances in the Libyan context are interesting because they reiterated the principle of recognition of states, which does not, however, automatically lead the recognition of a new government. Nevertheless, their provision of practical support for the organisation made it difficult to remain neutral. It is therefore unsurprising that by July 2011 both countries were seen to endorse the NTC in strong terms.

Ms Patel then went on to consider the issue of legality of support provided to a group. UN resolution 1973 authorised use of force and provision of some support to the rebels in Libya, however the wording of the resolution limited this provision to the aims of protecting civilians and civilian populated areas. Whilst communications equipment and protective clothing might fall under this category, the UK's delivery of a multinational team of experts to address long term needs appeared to be support for the new government. It does appear that the support in question does go beyond the limitations of Resolution 1973 and the only way it might be legally justifiable is if the UK did in fact recognise the NTC as the legitimate government of that regime.

In the end, Ms Patel analyzed access to the state's financial assets. UN resolution 1970 froze all assets belonging to the Gaddafi regime and expressed the intention that those assets would at a later date be made available to and for the benefit of the people of Libya. The NTCs access to those funds consequently became critical to maintain its position. In the case of *British Arab Commercial Bank plc v National Transitional Council of the State of Libya*, the Bank claimed the right to access funds on the authority of a representative of the NTC. To this the UK Foreign Office responded by issuing a certificate recognising the NTC as the legitimate government of Libya which was relied on by the court to affirm this right. A real problem has emerged where an entity may have sufficient control to start assuming financial responsibilities but may not have effective control over its territories.

It may be that the termed responses to the NTC represent the emergence of a new legal status, an entity between an insurgent group and a government.

The issues discussed by the distinguished speakers at the conference were wide ranging, covering the following topics: the legal effect of recognition; the relatively undeveloped concept of collective recognition and non-recognition; recent UN and EU practice in relation to Western Sahara; and the more recent issues of Palestinian Statehood and legitimacy of the Libyan National Council. Panel discussions were informative and dynamic, encouraging lively debate and collaborative contributions to theoretical and practical issues as well as providing insights into recent state practice.

Report prepared by Daniel Wand, Willa Huang and Rebecca Francis