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How to recognise a State (and not)

Some practical considerations

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The mechanisms and procedures of recognition: a practical problem

A wide variety of situations arise in international relations upon which States may judge it necessary to express a view. Claims by States to territory or maritime jurisdiction, attempts to transfer the assets of an international organisation, challenges to the status and immunities of government officers, alterations in the public law of an occupied territory and constitutional crises which cast doubt on the representative capacity of a government as agent of a State are among the recurring examples. Perhaps the most notable is that where a new State is claimed to have emerged. Where an existing State resists relinquishing responsibility over the territory of the putative new State, the situation is particularly delicate.

There were tentative suggestions at the start of the United Nations era that the international response to the putative emergence of new States should be resolved centrally – not by the individual State exercising a unilateral discretion, but by a collective organ of the international community acting in the name of all its members and, perhaps, even applying international law rules. Norway, at the Dumbarton Oaks Conference, proposed that the Member States vest in the United Nations an exclusive authority to recognise new States; the idea attracted little support.[1] Perhaps it was thought that recognition, in the relevant sense, was a decision for States alone and not one to be taken by an organisation; but, if that were the case, then certainly it would have been for States, if they chose, to confer the power over that decision to an organisation of their own making. The Secretary-General, not long after, evidently saw no obstacle in principle

[1] See United Nations Conference on International Organization, Amendments and Observations on the Dumbarton Oaks Proposals (Norway), 4 May 1945, UNCIO Doc. 2, G/7 (n 1), 2–3.

to the organisation recognising new States: he proposed that, by Charter amendment or by treaty, the Member States might assign the organisation a power in this respect – in the Secretary-General's words, '[t]o establish the rule of collective recognition'.[2] That and similar proposals such as Hersch Lauterpacht's[3] notwithstanding, the traditional position – recognition as a unilateral and discretionary act – was left undisturbed.

And so has it been largely since. Thus Serbia could reassert the unilateral and discretionary character of recognition in the advisory proceedings in respect of Kosovo;[4] and Western European States, like France and the United Kingdom, while disagreeing with Serbia as to most aspects of the situation, agreed on that threshold point.[5] The European Union (EU), in respect of Eritrea, seems to have confirmed that recognition of a new State is not an action restricted by any general rule to States – the EU established a European position on recognition of Eritrea[6] – but, in respect of Kosovo, where a consensus of all its Member States (as at 2008) did not exist, the EU refrained from asserting a position. According to the Council of the EU, 'Member States will decide, in accordance with national practice and international law, on their relations with Kosovo.'[7] The evidence is, then, that the law has changed little since the early 1990s, when the Badinter Commission had been able to reach much the same conclusion.[8] The law indeed has changed little on the point since the United States' Permanent Representative famously referred to recognition as that 'high political act' which '[n]o country on earth can question',[9] even if States and their

[2] See Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, S/1466, 9 March 1950.

[3] See Hersch Lauterpacht, *Recognition in International Law* (Cambridge University Press, 1947 [repr., with a foreword by James Crawford, 2012]), 68–73. *Cf.* Josef L. Kunz, 'Critical Remarks on Lauterpacht's "Recognition in International Law"', *American Journal of International Law*, 44 (1950), 713.

[4] Written Comments of Serbia, 15 July 2009, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, 199, para. 501 ('*Kosovo* case').

[5] Written Statement by France, 17 April 2009, *Kosovo* case, 15–16, 45, paras. 1.16, 2.70; Written Statement of the United Kingdom, 17 April 2009, *Kosovo* case, 99, para. 5.51.

[6] EC Bull. No 36, 314, 8 May 1993.

[7] Council Conclusions on Kosovo, 18 February 2008, 2851st External Relations Council Meeting.

[8] See *Opinion No 10, Commission of Arbitration of the Conference on Yugoslavia* (Badinter, Chairman; Corasaniti, Herzog, Petry and Tomas Valiente, Members), 4 July 1992, 92 International Law Reports, 206, 208, para. 4.

[9] Warren Austin, 18 May 1948 quoted P. M. Brown, 'The Recognition of Israel', *American Journal of International Law*, 42 (1948), 621.

representatives in recent times would be unlikely to express the matter as stridently as that; and even given the general rule of non-recognition in respect of situations created by a serious breach of a peremptory norm.[10]

When States deal with a question of recognition 'in accordance with national practice and international law', international law, depending on the situation, thus may entail some substantive constraints, but it is the national practice which will be of primary importance when it comes to the mechanisms and procedures of recognition. It comes as little surprise, where a matter has remained de-centralised to this extent, that little if any systematic treatment has been given to the mechanisms or procedures.

Yet the mechanisms and procedures may be important when disputes arise over statehood. Disputes over statehood arise from time to time at the international level, for example in respect of the treatment an international organisation is to accord an entity.[11] It would seem that disputes over statehood are at least as frequent, perhaps more so, at the municipal level, such as in respect of how a national court is to treat the entity,[12] its acts,[13] agents[14] or property.[15] It hardly can be expected in national systems which respect the rule of law that courts in all circumstances will automatically defer to the executive determinations of the government; but when it comes to recognition of States, executive certification is important in many jurisdictions.[16] Few courts, if any, ignore entirely

[10] International Law Commission (ILC), Draft Articles on Responsibility of States for Internationally Wrongful Acts, *ILC Yearbook*, 2(2) (2001), 29; GA Res. 56/83, 12 December 2001, annex, corrig. A/56/49 (vol. I)/Corr.4, Art. 41, para. 2.

[11] E.g. treatment of the Sahrawi Arab Democratic Republic in the OAU: Gino J. Naldi, 'The Organization of African Unity and the Saharan Arab Democratic Republic', *Journal of African Law*, 26 (1982), 152–62. See also Gino J. Naldi, 'Peace-keeping Attempts by the Organisation of African Unity', *International and Comparative Law Quarterly*, 34 (1985), 595–601.

[12] *Ungar* v. *Palestine Liberation Organization*, 402 F3d 274, 287–92 (1st Cir, Selya CJ) (31 March 2005) (sovereign immunity).

[13] Case C-432/92, *The Queen* v. *Minister of Agriculture, Fisheries and Food, ex p. S. P. Anastasiou (Pissouri) Ltd and others*, Judgment, ECJ, 5 July 1994 (*Anastasiou I*), [1994] ECR I-3116 (on reference by High Court of Justice (Queen's Bench Division)) (movement and phytosanitary certificates issued by authorities of the 'Turkish Republic of Northern Cyprus').

[14] *United States* v. *Palestine Liberation Organization*, 695 F Supp 1456, 1459 (SDNY, Palmieri DJ) (29 June 1988) (representation of 'Palestine' or the 'Palestinian people' at UN headquarters by PLO).

[15] *The Maret*, 145 F2d 431, 442 (3rd Cir, Biggs CJ) (17 October 1944) (putative title of a Soviet State agency to an Estonian ship).

[16] See e.g. the position in India, with reference to United Kingdom and United States practice, *German Democratic Republic v. Dynamic Industrial Undertaking Ltd* (High Court of

whether or not the executive offices of the State have recognised (or declined to recognise) the entity in question.[17] Only in unusual circumstances would a court be likely to adjudicate a challenge against the act of recognition itself.[18]

In any circumstance, it might be supposed that whether or not recognition has taken place is easy to determine. After all, the executive organs of the State, when called on to do so, usually have been perfectly clear whether or not the State has recognised a given situation. This is why it is possible to 'presuppose . . . that the judiciary can understand what the executive has said'.[19] In some cases, however, the executive has not been so clear. Consequently, the question may itself be one of contention between parties to a dispute. This is one way in which the mechanisms and procedures of recognition may assume a practical significance – that is to say, in the forensic process.

There is also the case where the State is obliged not to recognise a given situation but seeks to preserve some scope for normal transactions. The International Court of Justice (ICJ) addressed this as a matter of protecting the interests of the inhabitants of a territory subject to a rule of non-recognition.[20] In practice, it well may be that persons or institutions elsewhere wish to invest in the territory or to engage in commerce with its inhabitants and thus are concerned that the rule of non-recognition

Bombay, 14–16 October 1970) (Mody and Vaidya JJ), paras. 35–48, repr. 64 International Law Reports, 504, 514–19.

[17] Even where courts have been relatively liberal in how they apply executive statements in light of the circumstances of the case, the inquiry starts with the question of the certification – recall *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd and others (No. 2)* [1966] 2 All ER 536.

[18] See *Horta* v. *Commonwealth*, High Court of Australia, 14 August 1994, (1994) 123 ALR 1, 7, repr. 104 International Law Reports, 450, 456:

> nothing in this judgment should be understood as lending any support at all for the proposition that, in the absence of some real question of sham or circuitous device to attract legislative power, the propriety of the recognition by the Commonwealth Executive of the sovereignty of a foreign nation over foreign territory can be raised in the courts of this country.

Supporting the position that it requires a question of constitutional propriety to give rise to a justiciable challenge, see *Belize* case, Case No. 290 and 292/91 (Constitutional Court of Guatemala, 3 November 1992): repr. 100 International Law Reports, 304.

[19] *Gur Corporation* v. *Trust Bank of Africa Ltd*, 22 July 1986 (Nourse LJ) [1987] 1 QB 599, 626, repr. 75 International Law Reports, 675, 698.

[20] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, ICJ Reports (1971), 56, para. 125.

not get in the way of *their* interests.[21] There, too, what mechanisms and procedures are understood as conferring recognition is an important question, for it is those mechanisms and procedures from which the State must refrain if it is to remain in accord with the obligation not to recognise.

The difficulty, as suggested above, is that the mechanisms and procedures have been subject to little systematic consideration. It is well enough established that, in considering close questions of statehood, recognition is a probative factor; whether a given act is to be understood as conferring recognition is the question which now may be considered.

Recognition expressly indicated

The case where a State has adopted a clear statement that it recognises the situation in question may be dealt with briefly. For example, Japan, through a statement by its foreign minister, said as follows: 'Japan recognized the Republic of South Sudan as a new state as of today.'[22] The United States, in a statement through its president, said, 'the United States formally recognizes the Republic of South Sudan as a sovereign and independent state upon this day'.[23] India recognised South Sudan through a letter from its prime minister to the president of the new State.[24] The Member States of the European Union did so jointly through a declaration.[25] The United States recognised Bosnia and Herzegovina, Croatia and Slovenia by a presidential statement in the following terms: 'The United States recognizes Bosnia-Hercegovina, Croatia, and Slovenia as sovereign and independent states.'[26]

There are also occasions when a State has incorporated a statement recognising another in a treaty. Greece did this in the Interim Accord

[21] E.g. the building company and bank involved in the dispute arising out of a bank guarantee and contracts for the construction of schools and a hospital in Ciskei, South Africa: *Gur Corporation* v. *Trust Bank of Africa Ltd.*

[22] Statement of the Foreign Minister of Japan on the Independence of the Republic of South Sudan (provisional trans.), para. 2, 9 July 2011, available at www.mofa.go.jp/announce/announce/2011/7/0709_01.html.

[23] White House, Office of the Press Secretary, Statement of the President: Recognition of the Republic of South Sudan, 9 July 2011.

[24] Letter of 9 July 2011 from Prime Minister Manmohan Singh to President General Salva Kiir Mayardit, reported at www.thehindu.com/news/national/article2215972.ece.

[25] Declaration by the EU and its Member States on the Republic of South Sudan's Independence, 9 July 2011, 12679/11 – PRESSE 232.

[26] President George H. W. Bush, Statement of 7 April 1992, repr. 1992 (i) *Public Papers of the Presidents of the United States*, 553.

of 13 September 1995, under Article 1, paragraph 1, of which Greece recognised the Former Yugoslav Republic of Macedonia:

> Upon entry into force of this Interim Accord, the Party of the First Part recognizes the Party of the Second Part as an independent sovereign state . . .[27]

Then there are reciprocal exchanges of recognition, such as that between the Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina:

> The Federal Republic of Yugoslavia and the Republic of Bosnia and Herzegovina recognize each other as sovereign independent States within their international borders.[28]

Israel and Jordan took a similar approach:

> The Parties will apply between them the provisions of the Charter of the United Nations and the principles of international law governing relations among states in time of peace. In particular:
> 1. They recognise and will respect each other's sovereignty, territorial integrity and political independence;
> 2. They recognise and will respect each other's right to live in peace within secure and recognised boundaries . . .[29]

These are statements announcing recognition in terms; they do not leave recognition to inference.

The matter becomes more complicated, where the State has given no explicit indication that it recognises the situation but its practice, in other respects, presents the possibility that it has. There, inquiry will turn to the intention of the State to recognise (or not to recognise). This raises a question: by what evidence can the intention be established? As will be seen, there has been a tendency to answer the question categorically by reference to particular types of conduct – for example, by saying that by entering into an agreement the State necessarily evinces the intention to recognise the other party as a State. Whether the State's conduct, in

[27] Interim Accord between Greece and the Former Yugoslav Republic of Macedonia (New York, adopted 13 September 1995, entered into force 13 October 1995), 1891 UNTS 3, 5.

[28] General Framework Agreement for Peace in Bosnia and Herzegovina (Bosnia and Herzegovina–Croatia–Federal Republic of Yugoslavia), 14 December 1995, Art. X, repr. 35 *International Law Materials*, 75, 90.

[29] Art. 2, Treaty of Peace between the State of Israel and the Hashemite Kingdom of Jordan (adopted 26 October 1994, entered into force 10 November 1994), 2042 UNTS 351, 393–4.

itself, will necessarily settle the question is far from clear, however. Before turning to the question of how conduct may be identified as entailing the intention to recognise, it is worth considering how intention relates to recognition.

Recognition as an intentional act

Intention has been ascribed importance in the field of recognition for some time. The Institut de Droit International addressed the matter in 1936 as follows:

> La reconnaissance *de jure* résulte, soit d'une déclaration expresse, soit d'un fait positif, marquant clairement l'intention d'accorder cette reconnaissance, tel l'établissement de relations diplomatiques; en l'absence de déclaration ou de fait semblable, la reconnaissance ne saurait être considérée comme acquise.[30]

This made clear that the act of recognition is not necessarily an explicit statement like the examples given above. The act of recognition need not be '*une déclaration expresse*'. If the act is one '*marquant clairement l'intention d'accorder cette reconnaissance . . .* ' then the State adopting the act has recognised the situation in question.

The formula is obviously of limited utility. To determine that a given act is an act of recognition, the formula has us ask whether the act is intended to be an act of recognition. Without more, this is circular. The one multilateral instrument to address the matter around the time of the Institut's Resolution is no more helpful. According to Article 7 of the Montevideo Convention:

> [T]he recognition of a state may be express or tacit. The latter results from any act which implies the intention of recognizing the new state.[31]

So, again, the emphasis is removed from form: the act need not be express; it may be 'tacit'. This hardly narrows the category of potential acts; it widens it. Recognition may result from 'any act', so long as it 'implies the intention of recognizing'. The problem is that these statements say nothing

[30] 11th Commission, Resolution, Art. 4: (1936) 9(ii) *Annuaire de l'institut de droit international*, 300, 301. '*De jure* recognition results either from an express declaration or from a positive fact, clearly indicating the intention to grant such recognition, such as the establishment of diplomatic relations; in the absence of a similar statement or fact, recognition cannot be considered to have been granted.'

[31] Art. 7, Convention on the Rights and Duties of States adopted by the 7th International Conference of American States (Montevideo, adopted 26 December 1933, entered into force 26 December 1934), 165 LNTS 21, 25.

as to the content of the intention to which they refer. And attempts to pinpoint the intention behind recognition, in terms of legal effects, run up against the oft-noted uncertainty as to the legal character of recognition. To complete the picture, it seems there may be no better way forward than further analysis of the practice.

Courts considering recognition have done so in connection with particular disputes and so have not aimed to systematise the matter. The Singapore Court of Appeal, for example, was asked to consider the extensive relations that the Singapore government maintained with Taiwan as possible evidence of recognition. The Court of Appeal concluded that it could not infer that Singapore had recognised Taiwan as a State because '[f]or there to be implied recognition, the acts must leave no doubt as to the intention to grant it'.[32] The European Court of Human Rights also seems to have understood recognition to require intention: to acknowledge that a functioning court system exists in a territory, absent an intention to extend recognition, is not to imply recognition.[33]

In the *Kosovo* Advisory Opinion, it was not necessary for the ICJ to say what acts amount to recognition. The Court restricted its observations about recognition to saying that it had not been asked 'about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State'.[34] In other cases, the Court has referred to the intentional element in connection with unilateral declarations. In the *Nuclear Tests* cases, the Court said, 'When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking.'[35] It referred to this passage in *Burkina Faso/Mali* and added (it would seem for emphasis) that 'it all depends on the intention of the State in question'.[36] The Court was considering certain acts in these

[32] *Civil Aeronautics Administration* v. *Singapore Airlines*, 14 January 2004 [2004] SGCA 3 (Singapore Court of Appeals) (Chao Hick Tin JA), para. 36, repr. 133 International Law Reports, 371, 383–4.

[33] See *Cyprus* v. *Turkey*, Application No. 25781/94, ECtHR, 10 May 2011, para. 238, repr. 120 International Law Reports, 10, 76.

[34] *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, 22 July 2010 ('*Kosovo* Advisory Opinion'), ICJ Reports (2010), 403, 423, para. 51. *Cf. Reference Re Secession of Quebec*, Supreme Court of Canada, 29 August 1998, (1998) 161 DLR (4th) 385, 443, para. 142, repr. 115 International Law Reports, 536, 589.

[35] *Nuclear Test cases (New Zealand* v. *France; Australia* v. *France)*, Judgment, 20 December 1974, ICJ Reports (1974), 472, para. 46; ICJ Reports (1974), 267, para. 43.

[36] *Frontier Dispute (Burkina Faso/Republic of Mali)*, Judgment, 22 December 1986, ICJ Reports (1986), 573, para. 39.

cases because it was possible that they gave rise to specific legal obligations for the declarant States.[37] Because what specific legal obligations arise from an act of recognition remains a matter of uncertainty – as noted, the Court would not say what the 'legal effects of . . . recognition' might be – the Court's earlier observations about intention and obligation do not necessarily apply strictly to recognition. Yet, while recognition is not exactly the type of unilateral act which the Court was considering in *Nuclear Tests* or *Burkina Faso/Mali*, recognition in its classic sense has been a unilateral act. To identify intention as a necessary element of unilateral acts seems, at least in a general way, to say something about recognition.

The modern law codification projects, like their forebears, have identified intention as an element in recognition. In the 1965 Restatement, the American Law Institute (ALI) said, 'Implied recognition may take place in a variety of ways by which a state manifests its intention to treat an entity as a state.'[38] The 1987 Restatement described recognition as an act 'confirming that the entity is a state, and expressing the intent to treat it as a state'.[39]

The International Law Commission (ILC) Special Rapporteur for unilateral acts acknowledged that '[i]t is not easy to define the act of recognition, specifically the recognition of a State' and then rallied to the intention requirement:

> The act of recognition could . . . be defined as follows:
>
> A unilateral expression of will formulated by one or more States, individually or collectively, acknowledging the existence of a de facto or de jure situation or the legality of a legal claim, with the intention of producing specific legal effects, and in particular accepting its opposability as from that time or from the time indicated in the declaration itself.[40]

Agreement, in the end, was not reached to associate recognition with the topic. As the Special Rapporteur admitted, it had not been included with

[37] See Memorial of Burkina Faso, 3 October 1985, 117 and 119, paras. 13 and 18. The statements of the French government (to the effect that atmospheric atomic tests would cease) deprived the litigation of any further object: ICJ Reports (1974), 477–8, paras. 61–65; ICJ Reports (1974), 271–2, paras. 58–62.

[38] Restatement (Second) Foreign Relations Law (1965), § 104. Manifestation of Intention to Recognize, Comment b.

[39] Restatement (Third) Foreign Relations Law (1987), § 202. Recognition or Acceptance of States, Reporters' Note 1.

[40] Rodríguez Cedeño, 6th Report, ILC 55th Session, 30 May 2003, A/CN.4/534, 17, para. 67.

the Commission's mandate as such.[41] The *Guiding Principles* which the ILC eventually adopted in respect of unilateral acts were restricted 'to unilateral acts *stricto sensu*, i.e., those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law'.[42] So this text is relevant to the act of recognition, only when the act takes 'the form of a formal declaration', and only if the act is performed with the intent to produce obligations – which it is not always clear it is, given the uncertainties surrounding the legal effects of recognition. Nor under other topics has the ILC yet adopted a text to address recognition of States.[43] Thus the conclusions which can be drawn about recognition from the ILC's work are limited, but the possible connections to recognition were certainly being considered under the topic of unilateral acts. And there the Commission as a whole placed stress on intentionality: the concern there is with '[d]eclarations publicly made and manifesting the will to be bound'.[44]

Modern writers who address recognition in its strict sense largely agree that the element of intent is central. According to Pellet, '*l'essentiel est que la volonté de reconnaître soit établie de façon certaine . . .* '[45] Shaw, too, places the stress on intention: 'recognition is founded upon the will and intent of the state that is extending the recognition'.[46] *Brownlie's Principles of Public International Law*, though with a slightly different emphasis, draws attention to intent as well:

> Above all, recognition is a political act and is to be treated as such. Correspondingly, the term 'recognition' does not absolve the lawyer from inquiring into the intent of the recognizing government, placing this in the context of the relevant facts and law.[47]

[41] Rodríguez Cedeño (Special Rapporteur), 65th Session, 2818th Meeting, para. 41, *ILC Yearbook*, 1 (2004), 185.

[42] Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, preambular para. five: *ILC Yearbook*, 2(2) (2006), 369, para. 177.

[43] Recognition of States and governments was one of the topics originally proposed for the Commission, see *ILC Yearbook* (1949), 37–8, paras. 1–13. The topic as yet has not been taken up, about which see Outline of the Working Group on the Long-term Programme of Work, A/51/10, *ILC Yearbook*, 2(2) (1996), Annex II, repr. James Crawford, *Creation of States in International Law*, 2nd edn (Oxford University Press, 2006), 757.

[44] Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, Principle (1), 370.

[45] Patrick Daillier *et al.*, *Droit international public*, 8th edn (Paris: LGDJ, 2009), 631, §370 ('what is essential is that the will to recognise be established with certainty').

[46] Malcolm N. Shaw, *International Law*, 6th edn (Oxford University Press, 2008), 462. *Cf. ibid.*, 453.

[47] James Crawford, *Brownlie's Principles of Public International Law*, 8th edn (Oxford University Press, 2012), 147. See also *ibid.*, 149.

Verhoeven[48] and Jennings and Watts[49] also referred to intent as a requirement.

Recognition is not like strict liability; an act does not constitute recognition unless it evinces the intention to recognise. That much is clear from judicial practice, the work of codifiers and academic commentary. The question, however, remains: how is it to be determined whether a given act evinces the requisite intention?

Categories of acts and the intention to recognise

States at one time believed that a wide variety of acts were tantamount to recognition – to the extent that it may be asked whether intention was necessary to the act at all. For example, the legal advisors to the Privy Council said that private commerce by British subjects would not be consistent with non-recognition of the independence of St Domingo.[50] Sending a consul to Warsaw could 'be considered . . . as amounting in fact to a recognition of [Poland's] independence'.[51]

Sending a consular officer today would still likely suggest an intention to recognise,[52] but even extensive and continuous contacts do not in themselves necessarily amount to recognition.[53] The fact that France negotiated the Geneva Agreements of 20 July 1954 did not mean it had recognised the Democratic Republic of Viet Nam.[54] The Croat, Muslim and Serb communities in Bosnia and Herzegovina participated in negotiations but this did not deprive Bosnia and Herzegovina of its territorial integrity.[55] Certainly, negotiating with aeroplane hijackers does not

[48] Joe Verhoeven, *Droit international public* (Brussels: Larcier, 2000), 64.

[49] Robert Jennings and Arthur Watts (eds.), *Oppenheim's International Law*, 9th edn (Harlow: Longman, 1992) 169, § 50.

[50] Nicholl, Piggott and Romilly to Privy Council, 22 March 1806, repr. Arnold McNair, *International Law Opinions*, 3 vols. (Cambridge University Press, 1956), I, 132.

[51] Jenner to Palmerston, 30 June 1831, repr. McNair, *International Law Opinions*, I, 134.

[52] See 'United Kingdom Materials in International Law', *British Yearbook of International Law*, 67 (1996), 717.

[53] *Civil Aeronautics Administration* v. *Singapore Airlines*, paras. 32–6, repr. 133 International Law Reports, 371, 382–3 (commercial, trade and cultural representations); *Caglar* v. *Billingham (Inspector of Taxes)*, 7 March 1996 (England, Special Commissioners) (Oliver and Brice, Commissioners), para. 45, repr. 108 International Law Reports, 510, 519 (tax and law enforcement liaisons).

[54] *Clerget* v. *Banque Commerciale pour Europe du Nord & Banque du Commerce Extérieur du Vietnam* (Court of Appeal, Paris, 7 June 1969), repr. 52 International Law Reports, 310, 312.

[55] See Written Observations of the Federal Republic of Yugoslavia, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v.

say anything about their representative capacity or about the legal identity of the movement they purport to represent.[56] In conferences[57] and in standing organisations[58] States undertake a range of contacts without implying recognition.

The substantial flexibility evident in practice notwithstanding, this is a field where the limits are still sometimes characterised in categorical terms. The act of concluding an agreement at the international level in particular has been said necessarily to imply recognition. For example, under the heading 'Manifestation of Intention to Recognize', the American Law Institute (ALI) says as follows:

> (2) The coming into effect of a bilateral international agreement between a state and an entity implies recognition of that entity as a state and recognition, as its government, of the regime that makes the agreement for it.[59]

The ILC Special Rapporteur for unilateral acts also identified the conclusion of an agreement as an implicit act of recognition:

> When a State . . . concludes an agreement with an entity that it has not recognized as such, it will be recognizing it from that point in time onwards . . .[60]

These are categorical positions, in that they attribute the intention to a category of acts; there is no reservation here for examples of agreements which do not imply recognition.

The difficulty is that the adoption of an international agreement does not necessarily in itself imply the statehood of either party. By entering into an agreement with a multilateral organisation, a State does not intend to recognise the organisation as a State.[61] The view from the early stages of the drafting of the International Centre for Settlement of Investment Disputes (ICSID) Convention had been that an investor and a State may

Serbia and Montenegro) (*Genocide case)*, 9 August 1993, 8, para. 8; and Judgment, 11 July 1996 (Preliminary Objections), ICJ Reports (1996), 595, 611, 613, paras. 19, 26.

[56] *Pan American World Airways, Inc.* v. *Aetna Casualty & Surety Co.*, 505 F2d 989, 1012 (2nd Cir, Hays CJ) (15 October 1974).

[57] E.g. London Somalia Conference, in which participated Somaliland and Puntland: FCO Communique, Lancaster House, 23 February 2012, paras. 6 and 16, available at www.gov.uk/government/news/london-conference-on-somalia-communique--2.

[58] See 'United Kingdom Materials in International Law', *British Yearbook of International Law*, 60 (1989), 590.

[59] Restatement (Second) Foreign Relations Law, § 104.

[60] Rodríguez Cedeño, 6th Report, 8, para. 28.

[61] See *Westland Helicopters Ltd* v. *Arab Organisation for Industrialisation* [1995] 2 All ER 387.

enter into an agreement to arbitrate,[62] and this could well be an international agreement.[63] Nobody would say that the host State thinks it is the respondent in an inter-State proceeding when the investor institutes arbitration!

So it is not satisfactory to say that all such acts necessarily evince the intention to confer recognition. Other factors must be considered.

Factors identifying the act of recognition

As noted above, the factor which makes it easiest to identify an act of recognition is the content of the statement which a State adopts; express acts of recognition largely remove the doubt. Some suggestions may briefly be made as to factors which are relevant in the closer cases.

The organ or agent which acts toward the entity

Where an act does not expressly confer recognition, one factor which may be considered is the functional purpose of the organ or agent which acts toward the entity in question.

As observed already, absent a centralised mechanism, it is unsurprising that international law does not specify a particular procedure or apparatus that a State must use to confer recognition. The suggestion nevertheless once was made that allocation of this competence might be under a general international law principle. The Institut de Droit International said that recognition:

> émane de l'autorité compétente, suivant le droit public de l'État, pour le représenter dans les relations extérieures.[64]

This suggests a degree of symmetry with the international law rules concerning formation of legal obligation. Article 7, paragraph 2 of the Vienna

[62] International Bank for Reconstruction and Development, 'Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (18 March 1965)' repr. *History of the ICSID Convention: Documents Concerning the Origin and the Formulation of the Convention*, 4 vols. (ICSID, Washington 1968), II(2), 1077 [24] ('ICSID Hist.'); *ibid.*, II(1), 275 (Consultative Meeting of Legal Experts, Summary Record of Proceedings (30 April 1964) 5th Session, 18 December 1963).

[63] Memorandum of the Meeting of the Committee of the Whole, 27 December 1962, SID/62–2 (7 January 1963) ICSID Hist., vol. II(1), 68 [48]; Paper prepared by the General Counsel and transmitted to the members of the Committee of the Whole, SID/63–3 (18 February 1963) ICSID Hist. (n 115), vol. II(1), 74, 79–80 [8], [18].

[64] Institut de Droit International, 11th Commission, Resolution, Art. 2, (1936) 9(ii) *Annuaire de l'institut de droit international* 300, 301.

Convention on the Law of Treaties identifies the organs which presumptively bind the State as those which perform the general foreign policy functions.[65] Other organs might bind the State as well, but this is constrained by the particular functions they are assigned. The ICJ in *Armed Activities on the Territory of the Congo* alluded to the constraint as follows:

> with increasing frequency in modern international relations other persons representing a State in specific fields may be authorized by that State to bind it by their statements in respect of matters falling within their purview. This may be true, for example, of holders of technical ministerial portfolios exercising powers in their field of competence in the area of foreign relations, and even of certain officials.[66]

Other organs may act, but their field of action is 'in respect of matters falling within their purview'. The ILC Special Rapporteur may have gone too far when he said that '[t]here is a limitative criterion in the case of recognition of a State, which is probably different from other unilateral acts such as promise, in which case a broader criterion can be established'.[67] States remain free to organise their internal functions as they please; no international rule or principle prevents a State from giving the director of the forestry department the mandate to confer recognition. The point is nevertheless valid that such an officer's statements are not generally to be presumed to indicate the intent of the State in that branch of international relations.

Disclaimer

In an area of practice where intent is of central importance, disclaimer, where adopted, inevitably has a corresponding role. The ALI said that 'certain relations or associations between the state and the entity or regime' will imply recognition – 'unless such an implication is prevented by disclaimer of intention to recognize'.[68] This would suggest a mirror effect of express statements: an express affirmation of recognition establishes the State's position with clarity; an express statement the other way does so as well, at least where the act to which the disclaimer is attached leaves some margin of doubt as to the intention behind it.

[65] Art. 7, para. 2, Vienna Convention on the Law of Treaties (Vienna, adopted 22 May 1969, entered into force 27 January 1980), 1155 UNTS 332, 334.

[66] *Case concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda)*, Jurisdiction of the Court and Admissibility of the Application, Judgment, 3 February 2006, ICJ Reports (2006), 27, para. 47.

[67] Rodríguez Cedeño, 6th Report, 18, para. 72.

[68] Restatement (Second) Foreign Relations Law, § 104.

The European Union, in adopting an agreement with Macedonia, included a disclaimer that the fact of adoption 'cannot be interpreted as acceptance or recognition by the European Communities and their Member States in whatever form or content of a denomination other than the "former Yugoslav Republic of Macedonia"'.[69]

But disclaimers have not been adopted in all situations in which a question might arise. The EU adopted no disclaimer when it established a financial support mechanism for northern Cyprus.[70] Nor did it adopt a disclaimer in respect of Taiwan when it adopted a further procedural understanding in respect of the World Trade Organization (WTO) Dispute Settlement Understanding with Chinese Taipei (Taiwan).[71] It could be that the general policy of non-recognition spoke for itself in both situations. It also could be that the language of the respective instruments entailed an implicit disclaimer. In addressing northern Cyprus, the Council referred to the 'reunification of Cyprus' and recalled the suspension of the *acquis communautaire* pending a 'solution to the Cyprus problem'; in the agreement with Taiwan, the EU referred to that entity as the 'Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu'. Recognition tends to assume that the situation being recognised has achieved a degree of permanence; the language referring to the provisional character of arrangements in Cyprus acknowledged that the situation there is not permanent. And it would be peculiar to recognise a territory using a title which was adopted to avoid the inference of statehood; the title used in dealings with Taiwan was adopted precisely to avoid that inference.[72]

Third-party statements

Serbia, in the *Kosovo* advisory proceedings, recalled that the UN Secretary-General had indicated that the UN maintained a position of 'strict status neutrality', that is to say, the UN did not recognise Kosovo as an

[69] Letter from the European Communities and their Member States to Prime Minister of the Government of the former Yugoslav Republic of Macedonia, 9 April 2001, OJ L 084, 20/03/2004, 0003–0012.

[70] Council Regulation (EC) No. 389/2006, 27 February 2006, L 65/5, §§ (2), (3).

[71] Understanding between the European Union and Chinese Taipei Regarding Procedures under Articles 21 and 22 of the Dispute Settlement Understanding, 11 July 2011, WT/DS277/15.

[72] I.e. the accommodation by which Taiwan acceded to the WTO: Accession of the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, Decision of 11 November 2001, WT/L/433.

independent State.[73] According to Serbia, it 'would clearly run counter to this position to now interpret the behaviour of either the Secretary-General or his Special Representative as a tacit acceptance of the UDI'.[74] It certainly would not be credible for Serbia later to say that that behaviour *did* amount to tacit acceptance.

Other circumstances surrounding the conduct

Finally, before imputing (or denying) the intention to recognise, it may be necessary to consider other circumstances surrounding the statement or conduct in question. It would be strange to impute the intention to recognise where the object of putative recognition is nothing like a State, nor shows any sign of becoming one. The concern instead is with a territorial entity exercising real governmental competences and at least a degree of international capacity and, moreover, which claims to be a State. Entities like Kosovo, the 'Turkish Republic of Northern Cyprus' or the 'Republic of China' in Taiwan, when these have entered into international transactions, have presented the more serious questions.

Conclusion

The purpose here has been to consider a particular dimension of a well-known problem in international law. States, by making their positions explicit one way or the other, typically have avoided the question whether they intend to recognise a given situation. The conduct of States, however, is not always clear.

In summary, four factors may help identify whether a particular act amounts to recognition:

(i) the content of the relation or statement
(ii) the usual functions performed by the organ or agent which operationalises the relation or adopts the statement
(iii) disclaimers accompanying the establishment or adoption of the relation or statement
(iv) the positions expressed by third parties

[73] Letter dated 12 June 2008 from the Secretary-General to Boris Tadić: S/2008/354, quoted Written Comments of Serbia, 15 July 2009, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo (Request for Advisory Opinion)*, 193, para. 488.

[74] *Ibid.*

(v) any other circumstances, including especially the conduct and characteristics of the entity with which the relation is entered or toward which the statement is adopted.

In a situation where non-recognition is obligatory, States may wish to enter into relations which would imply at least certain capacities in the other party. Whether the act of entering into a given relation or adopting a particular statement would amount to recognition there will have practical significance as the State seeks to maintain accordance between its conduct and its obligations.