Introduction

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In international law there are few issues that better epitomize the combination of law, fact and power more enigmatically than the question of statehood. The state is the most fundamental unit of the international legal order, but it also sits at the apex of most of the paradoxes that distinguish, and thus frame, international law. Of course, it is not the fact of territorial statehood *per se* that ensures either its fundamental character or its complexity; rather, it is the characterization of sovereignty that flows from this territorial fact. As Judge Huber memorably recorded in his award in *Island of Palmas*, '[i]ndependence in regard to a portion of a globe is the right to exercise therein, to the exclusion of any other state, the functions of a state'.[1] Ignoring the inherent circularity of this proposition, and recognizing that sovereignty is to be understood in this context in both its functional and its elemental state, it remains the case that, above all else, it is from statehood and the characterization of its ensuing sovereignty that all else in international law has historically flowed.

Thus, it is in statehood that one seeks to find a seamless amalgam of legal doctrine and social reality. As all traditional legal analyses of the creation of states tell us, effective control of territory and people remains the hallmark of what constitutes a state.[2] Legal rules may appear to impose certain constraints upon the achievement of statehood – still not better exemplified than by article 1 of the 1933 Montevideo Convention on Rights and Duties of States[3] – but the extent to which they were ever intended to do other than merely reflect

[1] Award of 4 April 1928, 11 RIAA 831, 838.
[2] J. Crawford, *The Creation of States in International Law* (Oxford University Press, 2006, 2nd edn), p. 46: 'they [referring to the usually-employed criteria of statehood] are based on the principle of effectiveness among territorial units'. Nevertheless, see also ibid., p. 37: 'there has long been no generally accepted and *satisfactory* legal definition of statehood' (emphasis added).
[3] (1934) 165 LNTS 19.

the factual constituents of statehood rather than seek to impose a normative imprimatur upon its achievement has always been, and remains, unclear.

True, in cases of factual uncertainty, political contestation or diplomatic doubt, the law is turned to as a guide, but it often remains just that – a guide. With no central organizing agency either to prescribe the specific conditions of, or to determine the attainment or otherwise of the requirements of, statehood, international law on this issue remains notionally mandatory, apparently persuasive, but ultimately contingent upon claim and response. To highlight this point, one need only reflect that one almost never talks in terms of the legality or the illegality of statehood in normal circumstances; the law of statehood encapsulates a process not readily classified within the dichotomy of compliance and breach. Rather, statehood is the assessment of a conglomeration of facts through manifold legal prisms, which can either be focused and narrow or broad and all-encompassing, such variations dependent upon whether statehood is viewed – usually *a priori* – as acceptable or impermissible in any given situation.

Even in the most egregious examples of 'unlawful' statehood, it is the mechanism (or process) of acquisition that is viewed in illegal terms (for instance, the illegal use of force) and not the statehood, in and of itself. Such process-illegality may, of course, impact upon the legitimacy of the acquisition; one might note, for instance, the widespread acceptance of the doctrine of non-recognition of aggressively acquired territory.[4] But beyond the most blatant examples, illegality seems inapposite when coming to a judgement (invariably political) whether the various factors of statehood have been met.

Law bestows rights, privileges (as well as duties and obligations) upon states, but its role in their creation remains more subtle and nuanced. This is not to suggest international law is merely a veneer; a turn to realism in the face of the structural weakness of the international legal system. It is not to question the relevance of international law. Rather, it requires scholars to consider the extent of its part (the contribution of

[4] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Report (2004) 136, 171: 'On 24 October 1970, the General Assembly adopted resolution 2625 (XXV), entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States" . . . in which it emphasized that "No territorial acquisition resulting from the threat or use of force shall be recognized as legal." As the Court stated in its Judgment in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, the principles as to the use of force incorporated in the Charter reflect customary international law. . .the same is true of its corollary entailing the illegality of territorial acquisition resulting from the threat or use of force.'

international law). Though statehood is capable of being described by law, it is much less certain that it is *governed* by it. This is not to dismiss the customary framework around the 'Montevideo criteria' as just a postscript to political decision-making – 'political' here being an assemblage of both the internal considerations of the putative state and the diplomatic deliberations of the international community in response thereto – but to recognize the partiality that such a normative understanding brings. The international law of statehood has provided us with the fullest understanding of what entities must do to be accepted as a state, but it remains a *legal* understanding of a much more complex social and political process. To that extent, it is inchoate. But this should not lead us to become fatalistic; international law has much to offer the wider debate, as the chapters in this volume testify.

However, as the International Court of Justice (ICJ)'s 2010 Advisory Opinion on Kosovo's unilateral declaration of independence[5] has revealed, the discipline of international law suffers when the subject matter is approached not just formally, but overly and overtly formalistically. In the attempt to ensure the advisory opinion maintained a careful balance between the diverse views of states, the ICJ sought not only to legalize the situation (i.e. to impose a framework of law onto the factual state of affairs) – which, in itself, though difficult, is not contentious – but went further, and idealized the role of law in this situation. In other words, the Court seemed to read into the situation a legal understanding that had little bearing upon what role law had actually played in the process, or on the behaviour and opinions of the key protagonists. It was this *ex post facto* interpretation that would disconnect the precepts of law from fact and, for many, reduce its overall credibility.

Nevertheless, the tendency and wish to conceive of statehood in legal terms continues to reflect a more fundamental and genuine aspiration, namely, to rebalance political considerations and normative understandings. When statehood is unquestioned and unquestionable, such an aspiration would appear to be easily met; there is a natural symmetry between law (as reflected by satisfaction of the principle of effective control) and fact. Though even this, as noted below, can be a mirage caused by the dominance of the state as the principal territorial entity, which fails to reflect a wider range of imperatives and calls for

[5] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo* (Advisory Opinion of 22 July 2010).

representation, including from indigenous peoples, minorities, intra- or cross-state peoples, and sub-national territorial units.

However, when statehood is unclear, not yet achieved or disputed – as was the case with Kosovo prior to the Court's judgment and remains subsequently – the disjunct between law and fact, and law's invariably peripheral role in resolving such situations, becomes the more glaring. Though the desire for law is not misconceived, its application to any given situation will, however, usually frustrate. In particular, the continued hope of some to devise a more legal doctrine of recognition as the means of providing law and certainty when little of either is apparent is a misunderstanding of that doctrine, at least as it can currently be employed by states. 'Misuse' as a term would, however, be inappropriate here as it suggests, in the usual course of events, a wrong interpretation; but only in the most obvious of circumstances could that be said to be so.

But this perspective of 'unquestioned-versus-disputed statehood' as a binary tension is ultimately false; certainly it is now, if it has not always been so. Even if one accepts the view that states *qua* states are, in their purest form, 'the formal agent for its population internationally',[6] Knop is surely right to note that this can be constructed as many 'different shades':

> [i]n some cases, international law certifies no more than the state's effective control over its population. In other cases, the creation of the state through an exercise of self-determination makes the state an agent chosen freely by a people. In yet others, international law engineers democracy and even differentiated forms and rights of representation for certain groups within the state.[7]

Thus, statehood as a legal form cannot truly be understood today without an appreciation of the myriad of alternatives, complexities, competing demands, and just 'different shades' that would seem to challenge the supremacy of the state as the paradigm legal form in international law, even if some of these other *collectivities* (for want of a better phrase to sum up everything from minority groups to non-recognized states) continue to view statehood as an aspirational form.

To be sure, self-determination receives particular attention in this volume as a principal driver of such change, having both historically

[6] K. Knop, 'Statehood: Territory, People, Government' in J. Crawford and M. Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012), p. 107.
[7] Ibid.

reoriented (through not the rejection, but rather the amplification of) the Westphalian model, as well as presenting newer and equally complex challenges to the metropolitan territory of pre-existing states. To that extent, self-determination – now seemingly tied by some to the much more contentious notion of remedial secession in the face of persistent and substantive human rights abuses and/or fundamental denials of self-governance – lies at the heart of any modern discussion of statehood. Indeed, it has been taken up and utilized in differing contexts of indigenous peoples and minority rights, though not without some historical precedent. Thus, as statehood is both a potential outcome of self-determination, but is also concomitantly a constraint thereon, it would be artificial to separate completely the one from the other. For practical reasons, this edited collection has separate parts, with the first focusing on statehood and recognition and the second on self-determination – and each certainly has its own sphere of separate interest – but much like an ill-conceived Venn diagram, the overlap is significant and forever changing.

Thus, it should be apparent that attention to these other forms is as interesting for what they tell us about statehood as they do about themselves. Philip Allott once wrote: '[a]t the end of the pre-modern period, it could not have been predicted with any justifiable sense of certainty that one particular form of social organization would come to dominate all the others . . . It would not have been possible to foresee the overwhelming power which the concept of the state would acquire within social reality-for-itself, subjecting all other forms of subordinate society to itself'.[8]

Whether other forms of society are still subordinated in quite the same way (even in the relatively short time since those words were written), and how one conceives of bundles of rights that attach to groups *vis-à-vis* the state, are thus issues that this work explores. Moreover, though it is only right to eschew an unduly hierarchical and systematic understanding of the varying participants in the international order, the challenge to the state is not just from below – or across, if one considers recognition as a matter of diplomacy – but also from what it means for states to be members of international organizations, and how that in turn impacts upon their own sovereignty.

[8] P. Allott, *Eunomia: New Order for a New World* (Oxford University Press, 1990 (paperback edn, 2001)), paragraph 12.48.

The authors in this volume bring their own perspective to these questions, as well as raising other matters pertinent to the general theme. The remainder of this Introduction will thus seek to provide further discussion of these chapters. But an additional point may be necessary, and that is the relationship between the generality of law and the specifics of local fact. A richness in many of the chapters is the focus given to particular geographical contexts; not necessarily as template examples, or metaphors, but sometimes simply as incidences of how law and fact intervene in very specific situations. It is hoped that the depth of detail contained therein will supplement and substantiate other chapters which equally focus on the position in general international law. It is through the combination of the two that this collection of essays generates fresh insight.

The book is divided into three parts; as already noted, Part I focuses upon statehood and recognition and Part II reflects upon the increasingly diverse context presented by self-determination (and indicates that this has perhaps always been the case). Part III then highlights the continuing complexity of the state in international affairs, being both the principal means of collating, however imperfectly, a nation's longing for history, tradition and culture – ultimately its sense of corporate belonging – whilst at the same time providing the singularly paradoxical conduit through which many of the new challenges and modalities of governance and self-organization are cascaded, filtered and given effect within the international system.

Part I: Statehood and recognition

Part I begins by recognizing that while statehood is an aspirational form for many territorial entities, there may be political reasons why, in some instances, this status has not – or has not yet – been sought by an entity itself. As Ronen notes, Taiwan is the most obvious example in this category, though there are others, such as the Commonwealth of Puerto Rico and perhaps, until its 2011 submission to the United Nations (UN), the Palestinian Authority. Regardless of whether the objective grounds of statehood have been achieved – territory, people and government – there has usually been either a clear political decision not to seek independence, or ambiguity as to its present and future intentions. Certainly, in some instances, there is the genuine concern that 'a declaration of independence might trigger a chain of events which would challenge the factual premises' of the very basis of the claim to

statehood. Nevertheless, the existence of so-called quasi-states is not unproblematic both for themselves and for the international community, particularly (as the chapter reveals) as regards the rules relating to the use of force and self-defence. Ronen also considers whether an entity can be a 'state-for-a-limited-purpose' within a particular international regime, for instance, the International Criminal Court, but again such a purely functional approach is not without both practical and conceptual difficulties. The chapter concludes that in all of this debate '[t]he point of departure . . . must be that the distinction between states and other entities, including quasi-states, cannot be dispensed with offhandedly'.

Chapter 2 moves the discussion forward to focus upon one of the key aspects of the 2010 Kosovo Advisory Opinion, namely, the legality of unilateral declarations of independence. Vidmar considers which aspects of unilateral declarations make them subject to the purview of international law and thus, consequently, in what situations they might be described in dichotomous terms as being either legal or illegal. In particular, and this is worthy of quotation at length:

> unilateral declarations of independence are issued in the sphere of international legal neutrality, so long as such declarations do not attempt to consolidate an illegal territorial situation, created by a breach of certain fundamental norms of international law, in particular those of *jus cogens* character.

Vidmar notes that the *unilateral* nature of such declarations neither prohibits their issuance nor precludes their acceptance under general international law. But this is far from saying they are inconsequential; rather, the more interesting question to ask is, who has authored the text – a selection of random individuals or 'representatives of an entity which meets, or is capable of meeting, the effectiveness standards presumed under the Montevideo criteria'? In the latter case, such declarations will be much more than just 'ink on paper', and thus are capable of having international legal effects, be they lawful or unlawful.

Del Mar, in Chapter 3, analyses another feature of the Advisory Opinion, namely, remedial secession. She sees great risk in accepting remedial secession as a means of resolving human rights and humanitarian crises within states. Not only is the doctrine not recognized in the *lex lata* (and she very explicitly repudiates any argument based on the savings clause found in the provisions on self-determination in the 1970 Declaration of Friendly Relations), but equally she argues that there are

very strong reasons why the doctrine should not find a place in the international law of the future. Setting to one side the practical questions of who might be entitled to benefit from remedial secession, what level of seriousness a breach must attain and at what moment in time secession might be permitted – all questions Del Mar highlights as revealing the doctrine's inadequacy – the real difficulty is the mismatch between the undoubted moral horror of extreme human rights abuses and the solution that remedial secession provides. As she notes, 'a State is a legal entity, not a human rights solution ... remedial secession shifts the debate to a secessionist cause, and away from the real issues, namely the absence of an effective "human rights culture" in the State concerned'.

Discussion of remedial secession continues in Chapter 4, where the situation in Kosovo is set next to, and contrasted with, the situations in Abkhazia and South Ossetia both prior to and after the conflict in 2008. Bolton argues that in each case, such secession attempts went through three distinct phases – what she terms the constitutional phase, the bellicose phase and the remedial phase. During the constitutional phase, the international community sought to maintain the integrity of the pre-existing state and promote alternative, more limited, forms of autonomy and self-government as a means of reconciling the differing claims. When this failed, the bellicose phase saw the secessionist arguments convert into intra-state (and inter-state) conflict, where *de facto* separation between parent state and territorial entity occurs. Finally, Bolton suggests that during the remedial stage there are certain 'remedial conditions', which must be met if remedial secession (despite its continued contestation in international legal argument) is to be considered as a legitimate response. Indeed, recognizing the potential misuse of the doctrine, as was arguably the case with Russian intervention in, and subsequent recognition of, South Ossetia and Abkhazia, the present aim must be to discern those conditions which permit remedial secession as a remedy of last resort. While Bolton is certainly more willing to consider the final necessity of remedial secession, nevertheless there remain concerns as to its abuse, best expressed in the rhetorical question she asks in her conclusion: 'whose interests are served by remedial secession?'

Though both Chapters 3 and 4 deal with matters raised – if not necessarily responded to – by the ICJ in the 2010 Advisory Opinion, Chapter 5 considers much more specifically the reasoning of the Court in that judgment. Indeed, Ntovas very explicitly seeks to move away from the general issues raised by the Court to consider the *lex specialis* of UN

Security Resolution 1244 (1999) and the Constitutional Framework for Provisional Self-Government established thereunder. He argues that there is a fundamental paradox at the heart of the Advisory Opinion, which cannot simply be wished away. Indeed, the paradox flows from the Court's own reasoning, namely, that whilst the declaration of independence did not violate the *lex specialis*, the *lex specialis* remained in force on the day of the issuance of the declaration and indeed subsequently. As Ntovas notes,

> [t]he oxymoronic conclusion must be that since the date of the declaration . . . Kosovo has enjoyed two notionally distinct yet concurrent legal orders, and this gives rise to a specific conceptual difficulty regarding a conflict of legal orders, since both refer to precisely the same territorial entity with mutual exclusivity.

Contrary to the views expressed by certain judges in their own opinions, the Court invariably sought to avoid what the legal effects of its own judgment were; he quotes Judge Bennouna, who very succinctly asks: '[b]ut then what legal order governed the authors and the declaration itself?' Ntovas concludes by wondering whether the 'strained reasoning' of the Court – so as to avoid being ensnared by certain legal difficulties in the question presented to it – has actually harmed its own judicial character. Ultimately, acceptance of the Court's opinion is not premised on the authority of the Court, however pre-eminent, but on the intrinsic merit of its reasoning; and on this matter and as regards this Advisory Opinion, many remain unconvinced.

This view as to the limited contribution the Court's judgment made to the international community's response to the situation of Kosovo is noted in Chapter 6, where Almqvist considers the role of recognition in determining a final status for Kosovo. She argues that the ICJ along with the other 'UN-based multilateral mechanisms' – in which she also includes the General Assembly and the Security Council – have not been able to constrain what she terms the 'politics of recognition'. Rather, the international community's very mixed and divided response to Kosovo's unilateral declaration of independence indicates once again that states retain a high degree of national discretion on the question of whether to recognize putative states, thus highlighting the little that international institutions can do to 'foster[. . .] common ground'. For Almqvist, this is confirmation of the long history of political and diplomatic division on such matters, and the unevenness that this inevitably creates:

> [i]n stark contrast with the idea of a standard procedure, the corroboration of these politics implies the absence of guarantees of foreseeability or certainty about the prospects of actually gaining the status of statehood. Neither does it offer any guarantees of equal treatment and fairness across different cases and communities with similar aspirations.

Almqvist raises the prospect – though no more than that – of fresh insights into how the UN can play a role in recognition if, and when, a vote is moved on the submission of Palestine for UN membership. As Chapter 7 notes, an increasing number of states have already recognized it in anticipation of the membership application. Others, that have not gone so far, have nevertheless upgraded their missions and/or strengthened their links with the Palestinian Authority. Nevertheless, at the same time, the United States is opposed to a unilateral application to the UN and would instead prefer a return to the negotiation table with Israel. In light of this, in their chapter, Megiddo and Nevo seek to provide a balanced assessment of whether the conditions for statehood – be that the Montevideo criteria, the principle of self-determination, as well as other considerations – can yet be said to have been met. Building on a previous assessment undertaken a few years previously, the authors now see a Palestinian case for statehood as having a much stronger basis. Economic development and institutional state building continues, and though the question whether negotiations have truly reached a stalemate is strongly debated (and even the glimmer of still further negotiations is likely to delay many of the key players from currently recognizing a Palestinian state), many that have recently recognized Palestine have either expressly or implicitly done so precisely because they no longer feel that successful completion of negotiations with Israel is a compulsory precursor to statehood. Thus, Megiddo and Nevo feel confident enough to say that 'an independent State of Palestine may very well be recognised ... in the near future'. There certainly does now seem a groundswell of inevitability about Palestinian statehood; whether Kosovo is an antecedent as to what political will can accomplish is perhaps a more controversial issue.

A territorial entity which remains as hopeful for a similar assessment, but politically is much less likely to secure it, is Somaliland. Chapter 8 provides a historical overview of how Somaliland has found itself in this rather curious legal no-man's land; of possessing the stability Somalia does not, but not its formal status. As Maogoto notes, 'Somaliland offers a tricky legal problem but also an opportunity. States should exercise their voice by recognising Somaliland.' This is not just a political call, but