

THE PIPE DREAM OF CONSTRAINING RECOGNITION THROUGH DEMOCRACY: INTERNATIONAL LAWYERS' REGULATORY PROJECT CONTINUED

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Recognition is a formal expression by its author about how she perceives the situation to which recognition is extended. Recognition simultaneously constitutes a means for its author to make known her own view of a situation, including the legal consequences, if any, that the author attributes to the situation, and on which the author intends to base her policy.¹ Albeit a political act, recognition deeply affects the international legal system and carries wide-ranging legal effects in both the international and domestic legal orders, especially when it comes to the recognition of states and governments.

It is therefore not surprising that international lawyers have long dreamt of subjecting recognition to strict legal rules. As early as 1947, Lauterpacht² claimed that states are under an obligation to recognise states that meet the traditional Montevideo test. Interestingly, in the context of recognition of governments, such legalist appetites proved lesser. At best, international lawyers envisaged certain legal constraints on the recognition of governments derived from the principle of non-intervention in internal affairs. As is well known, all of these legalistic constructions proved barely influential and had hardly any impact on the practice of states. Interestingly, however, the rise of the idea of a hierarchy of norms and the limits to the freedom of contract that were included in the 1969 Vienna Convention on the Law of Treaties ignited a new attempt to regulate recognition through law. Indeed, the notion of peremptory norms eventually coalesced, outside the law of treaties, into an obligation not to recognise as lawful situations created by a serious breach of a peremptory norm. Such a construction, allegedly drawing on the early twentieth century Stimson doctrine and the Namibia Advisory Opinion of the International Court of Justice, came to be enshrined in Article 41 of the International Law Commission's 2001 Articles on State Responsibility³ and Article 42 of the ILC's 2011 Articles on the Responsibility of International Organizations⁴ for serious violations of peremptory norms. It is noteworthy that this legalistic restraint has enjoyed some support among experts of international law despite resting on a rather loose causal link between the recognition of a government or state and the recognition as lawful of a situation created by a serious breach of a peremptory norm. All those constructions, as was explained elsewhere,⁵ have helped to perpetuate a feeling that changes of governments, like the births and deaths of states, could be subjected to rules of international law and, hence, to the scrutiny of international lawyers.

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¹ Jean d'Aspremont, *Recognition*, OXFORD BIBLIOGRAPHIES (Nov. 21, 2012).

² HERSCH LAUTERPACHT, *RECOGNITION IN INTERNATIONAL LAW* (1947).

³ *Responsibility of States for Internationally Wrongful Acts*, Int'l Law Comm'n, UN Doc. A/56/10 (Dec. 12, 2001).

⁴ *Draft articles on the responsibility of international organizations*, Int'l Law Comm'n, UN Doc. A/66/10 (2011).

⁵ Jean d'Aspremont, *The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society*, 29 CONN. J. INT'L L. 201 (2014).

This appetite of international lawyers for regulating recognition is not entirely unwarranted. The case study of Crimea with which Professor Erika de Wet⁶ introduces her observations is a good reminder that the recognition of governments can have wide-ranging legal consequences, for instance with respect to the possibility that one government can use force upon the invitation of another. In the particular case of intervention by invitation, as long as no definite pronouncement can be imposed by an authoritative international actor (for an illustration, see here (<http://www.ejiltalk.org/duality-of-government-in-cote-divoire/>) [9]), the indeterminacy of the legal standards regarding consent to intervention are inevitably exacerbated by the indeterminacy inherent in the varying perceptions and political views—expressed through recognition—regarding the legitimacy of the government entitled to express consent. In that sense, international lawyers cannot be blamed for feeling uneasy about the great instability spawned by questions of recognition. As is illustrated by the contribution discussed here, international lawyers' discomfort is, however, too often translated into ingenuousness.

It is against this backdrop that Professor de Wet's subtle, well-informed, and well-documented contribution at the heart of this symposium ought to be evaluated. Professor de Wet reminds us of the care with which international lawyers should approach questions of recognition. Drawing on the recent African practice, in which she has unparalleled expertise, she insightfully calls for a minimalistic approach to recognition and expresses justified reservations as to any hasty generalizations. She argues particularly that, despite all the enthusiasm generated by the idea of democratic governance, the idea of new legal constraints on recognition—and especially the idea of an obligation not to recognize undemocratic governments—remains a chimera. Professor de Wet is also right to highlight that despite the claims of many states that they no longer engage in the recognition of governments, states have continued to evaluate the ability of governments to act and speak on behalf of the state in case of controversial or blatantly unconstitutional transitions, and thus to subject governments to recognition. As is illustrated by the practice she examines, states do still recognise governments, the changes professed by certain states having only been a matter of solemnity. It seems difficult to expect that it will ever be otherwise.

In this context, I can only share Professor de Wet's careful and cold-eyed approach with respect to both recognition and democratic governance. I myself initially concluded that the traditional requirements of the legitimacy of the exercise of power (mostly in the form of political and civil human rights) had, in the wake of the Cold War, been supplemented by a new requirement about the legitimacy of origin of power (in the form of an obligation to abide by electoral democracy).⁷ However, I later came to the conclusion that requirements of electoral democracy had been debilitated in recent practice, including in the practice of recognition of governments.⁸ Irrespective of the veiled outrage that such skepticism has caused in the literature,⁹ Professor de Wet and I certainly found ourselves in agreement here.

Whilst concurring with the care and scepticism expressed by Professor de Wet, I feel the need to formulate one observation in the form of a clarification. Professor de Wet writes that “the ouster of the Yanukovich government was not, as such, a violation of international law,” seemingly implying that this could potentially have been the case. Although I can only agree that change of government in Ukraine in February 2014 was not an infringement of international law, I would argue that it is of little avail to try to think of changes of

⁶ Erika de Wet, *From Free Town to Cairo via Kiev: The Unpredictable Road of Democratic Legitimacy in Governmental Recognition*, 108 AJIL UNBOUND 201 (2015).

⁷ See Jean d'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U.J. INT'L L. & POL. 877 (2006).

⁸ Jean d'Aspremont, *1989-2010: The Rise and Fall of Democratic Governance in International Law*, in 3 SELECT PROCEEDINGS OF THE EUROPEAN SOCIETY OF INTERNATIONAL LAW (James Crawford ed., 2010).

⁹ Jean d'Aspremont, *Democracy and International Law According to Russell Buchan: Prescribing Under the Guise of Explaining?*, EJIL:TALK! (Nov. 17, 2014).

governments in terms of violations of international law. However the change of government in Ukraine is ultimately characterized, I would like to zero in here on the example of coups and unconstitutional overthrows of governments. Even if it were demonstrated that international law requires changes of government to be democratic, undemocratic *coups d'état* can never constitute an internationally wrongful act within the meaning of the international law of state responsibility. Indeed, as I have argued elsewhere,¹⁰ it is impossible to establish the subjective element of the internationally wrongful act on which the regime of state responsibility rests, as it is doubtful that a *coup d'état* constitutes an act of the state. Some will be tempted to highlight, to the contrary, that *coups d'état* are generally committed by armed forces or by a group of individuals already exercising certain official functions. This can sometimes be the case. However, in order to attribute the *coup d'état* to the state, the authors of the coup must have acted in the capacity of organs of the state. In overthrowing the power in place and in repudiating the existing order, the authors of the coup are never acting in this capacity. Thus, unless the ousting can directly be attributed to a foreign state, it is indeed difficult to see how a *coup d'état* could ever, in itself, constitute an internationally wrongful act. Coups can “at best” be preparatory acts for another internationally wrongful act. It must be acknowledged that Professor de Wet does not frame her claims in terms of responsibility. Yet, by evoking the lawfulness of the “ouster” itself, she raises the question of the consequences thereof.

Seeing coups through the lens of state responsibility is another manifestation of international lawyers' grand regulatory project, just like seeking to subject recognition to legal constraints. Whilst we ought to admire the generous perseverance of international lawyers in that project in spite of the abovementioned empirical and conceptual setbacks, Professor de Wet's careful and thorough examination of recent practice rightly reminds us of the fragility of their enterprise.

¹⁰ Jean d'Aspremont, *Responsibility for Coups d'Etat in International Law*, 18 TUL. J. INT'L & COMP. L. 451 (2010).