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Democracy and Statehood in International Law

1 INTRODUCTION

1.1 Background

AT THE END of the Cold War, two multiethnic socialist federations were dissolved: the Union of Soviet Socialist Republics (the Soviet Union) and the Socialist Federal Republic of Yugoslavia (SFRY).[1] This period thus marked not only the end of the communist/socialist social, political and economic order but also the emergence of a number of new states.[2] The entanglement of post-Cold War political developments and the emergence of new states led to the idea that democracy should be brought into international law as a normative framework in relation to both existing and emerging states. This was at a time when some international legal scholars argued that democracy had become a

[1] Legal analyses of the two dissolutions include the following works: C Warbrick, 'Recognition of States' (1992) 41 *ICLQ* 473; A Pellet, 'The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples' (1992) 3 *EJIL* 178; D Türk, 'Recognition of States: A Comment' (1993) 4 *EJIL* 66; R Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union' (1993) 4 *EJIL* 36; S Trifunovska, *Yugoslavia through Documents: From its Creation to its Dissolution* (Dordrecht, Martinus Nijhoff, 1994); M Craven, 'What's in a Name?: The Former Yugoslav Republic of Macedonia and Issues of Statehood' (1995) 16 *Australian Yearbook of International Law* 199; M Craven, 'The European Community Arbitration Commission on Yugoslavia' (1996) 66 *British Yearbook of International Law* 333; D Bethlehem and M Weller, *The 'Yugoslav' Crisis in International Law* (Cambridge, Cambridge University Press, 1997); T Grant, *The Recognition of States: Law and Practice in Debate and Evolution* (Westport, Praeger, 1999); S Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World* (Aldershot, Ashgate, 2000); P Radan, *The Break-up of Yugoslavia and International Law* (London, Routledge, 2002); I Ziemele, *State Continuity and Nationality: The Baltic States and Russia: Past Present and Future as Defined by International Law* (Leiden, Martinus Nijhoff, 2005); J Crawford, *The Creation of States in International Law* (Oxford, Oxford University Press, 2006).

[2] New states emerging in the territory of the SFRY were: Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (FRY), Macedonia and Slovenia. See ch 2, 3.1. The new states emerging in the territory of the Soviet Union were: Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan. Estonia, Latvia and Lithuania became independent states prior to the dissolution of the Soviet Union. See ch 2, 2.1.

normative entitlement of all individuals[3] and when the European Community (EC) Member States adopted documents which explicitly expressed the willingness to (collectively) grant recognition only to those new states which had *constituted themselves on a democratic basis*.[4]

The dissolutions of the Soviet Union and of the SFRY were followed by the dissolution of a third (then already formerly) socialist federation – Czechoslovakia.[5] Shortly afterwards, Eritrea successfully seceded from Ethiopia.[6] In due course, East Timor[7] and Montenegro also became independent states.[8] In 2008, Kosovo declared independence.[9] Kosovo has attracted a significant number of recognitions, but its legal status remains ambiguous. Most recently, South Sudan emerged as an independent state.[10]

In the language of international law, these new states emerged as a result of consensual and non-consensual dissolutions of federations; as a result of consensual secessions from their parent states, and in one case perhaps even as a result of a successful unilateral secession (Kosovo). Some of these states satisfied the statehood criteria upon their emergence and others had problems in this respect. Most new states were recognised promptly, but some were not and were nevertheless considered to be states. The new states may have emerged upon the exercise of the right of self-determination and some of them possibly even under the doctrine of remedial secession. With regard to self-determination, most states emerged with the overwhelming support of the will of the people, expressed at independence referenda. And many of the post-Cold War

[3] See especially T Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46; T Franck, 'Democracy as a Human Right' in L Henkin and J Hargrove (eds), *Human Rights: An Agenda for the Next Century* (Washington DC, ASIL, 1994); T Franck, 'Legitimacy and the Democratic Entitlement' in G Fox and B Roth (eds), *Democratic Governance and International Law* (Cambridge, Cambridge University Press, 2001); F Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53; F Teson, *A Philosophy of International Law* (Boulder, Westview, 1998); AM Slaughter, 'International Law in a World of Liberal States' (1995) 6 *EJIL* 503; AM Slaughter, 'The Real New World Order' (1997) 76 *Foreign Affairs* 183.

[4] See the *EC Guidelines on Recognition* of New *States* in Eastern Europe and in the Soviet Union (16 December 1991), para 3 (emphasis added).

[5] See E Stein, *Czechoslovakia: Ethnic Conflict, Constitutional Fissure, Negotiated Breakup* (Ann Arbor, University of Michigan Press, 1997); Crawford (n 1) 402.

[6] See M Haile, 'Legality of Secessions: The Case of Eritrea' (1994) 8 *Emory International Law Review* 479; Crawford (n 1) 402.

[7] See I Martin, *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Boulder, Lynne Rienner Publishers, 2001); Crawford (n 1) 560–62; R Wilde, *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford, Oxford University Press, 2008) 178–88. See also UN Doc S/RES/1338 (31 January 2001) and UN Doc A/RES/57/3 (27 September 2002).

[8] See UN Doc A/RES/60/264 (28 June 2006). With this resolution, Montenegro was admitted to the United Nations (UN).

[9] See the Kosovo Declaration of Independence (2008).

[10] See UN Doc GA/11114 (14 July 2011).

state creations were marked by international involvement, which included the creation of democratic institutions.[11]

The question now arises whether the language being used in the discourse of state creation is still that of international law. Concepts such as statehood criteria, recognition, secession and dissolution are traditional concepts in the law of statehood. As we move through self-determination towards democracy, it becomes unclear whether one is still on the terrain of the law of statehood or is rather dealing with issues of policy. Yet even policy, if followed universally, could be reflective of state practice and *opinio juris*.

In essence, the post-1990 developments were marked by an entanglement of the processes of democratisation and state creation; however, what is the legal significance of such an entanglement?

The place of democracy in the international law of statehood remains unclear. It is commonly argued that if democracy were accepted as a statehood criterion, 'a territorial entity which did not come about in a democratic procedure and which does not seek to establish democratic government structures would not qualify as a state'.[12] This argument carefully avoids pronouncing democracy a statehood criterion and holds that democracy in the law of statehood is concerned with two basic concepts: (i) a 'democratic procedure' required by international law in the process of state creation (altering the legal status of a territory in accordance with the will of the people); and (ii) a requirement for 'democratic government structures' in a new state (creating new states that adhere to a particular political system).

Doctrinal writings have not established a proper distinction between these two concepts subsumed under democracy in the international law of statehood. Scholarship in this area of international law has also remained too narrowly focused on the statehood criteria and has not analysed state creation as an internationalised *process*, to some extent influenced by the statehood criteria but also by other factors – democracy being a prominent example of one.

1.2 Context and Existing Literature

In 1992, Thomas Franck authored 'The Emerging Right to Democratic Governance', an article which adopts an election-centric definition of

[11] J d'Aspremont, 'The Rise and Fall of Democratic Governance in International Law' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford, Hart Publishing, 2012) 61.

[12] A Peters, 'Statehood after 1989: "Effectivités" between Legality and Virtuality' in J Crawford and S Nouwen (eds), *Select Proceedings of the European Society of International Law* (Oxford, Hart Publishing, 2012) 171.

democracy, deriving the putative new right from a selection of civil and political rights.[13] A related idea stems from the writings of Fernando Teson[14] and Anne-Marie Slaughter,[15] who suggest the reconceptualisation of international law as law among democratic states.

The ideas of both normative democratic entitlement and international law as law among democratic states have attracted strong criticism. Susan Marks argues that these endeavours are overtly ideological and points out the inadequacy of an election-centric definition of democracy.[16] José Alvarez questions the idea of legal prescriptions being based on the election-centric democratic self-image of some states and argues that the democratic enterprise in international law proposes to disrupt the United Nations (UN) Charter system.[17] Brad Roth cautions that even from the perspective of the election-centric definition of democracy, a democratic bias in reading universal human rights standards cannot be assumed.[18] Steven Wheatley notes that although there is 'a commitment of the international community to democracy as the only legitimate form of government . . . [t]here is . . . no "hard" international law norm that all governments should be democratic'.[19]

These discussions on the idea that international law supports only one particular type of government relate predominantly to the governments of *existing* states and deal with the origins of their legitimacy. In contrast, this book explores the legal significance of democratic procedures, institutions and even postulates of substantive democracy for *new* state creations.

The concept of the state and its emergence has been subject to notable controversy in international legal scholarship. In one view, states emerge as 'a matter of fact', upon meeting the Montevideo statehood criteria.[20] However, as Hersch Lauterpacht argued, in order to accept this explanation, one needs to accept the rather awkward idea that 'a State exists in international law as soon as it exists'.[21] The emergence of a new state may thus rather depend on *international acceptance* of the existence of a new state rather than on a presumption that its existence is a self-evident fact.[22] Lauterpacht explained international acceptance in the context of constitu-

[13] Franck (n 3, 1992); Franck (n 3, 1994); Franck, (n 3, 2001).
[14] Teson (n 3, 1992); Teson (n 3, 1998).
[15] Slaughter (n 3, 1995); Slaughter (n 3, 1997).
[16] S Marks, *The Riddle of All Constitutions* (Oxford, Oxford University Press, 2000).
[17] J Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 *EJIL* 183.
[18] B Roth, *Governmental Illegitimacy in International Law* (Oxford, Oxford University Press, 1999), especially 324–38.
[19] S Wheatley, *The Democratic Legitimacy of International Law* (Oxford, Hart Publishing, 2010) 228.
[20] S Talmon, *Kollektive Nichtanerkennung illegaler Staaten* (Tübingen, Mohr Siebeck, 2004) 218–24.
[21] H Lauterpacht, *Recognition of States in International Law* (Cambridge, Cambridge University Press, 1948) 66.
[22] ibid.

tive recognition,[23] but this view is problematic in light of the general perception in contemporary international law of recognition being a declaratory act. However, existing practice on new state creations in contemporary international law may well suggest that Lauterpacht was right in arguing that states do not emerge automatically upon meeting the Montevideo statehood criteria. As Marc Weller argues, the emergence of a new state may instead depend on 'a grant of legal authority'.[24]

The existing literature has not adequately explored the legal nature of international acceptance of the existence of a new state in the absence of a presumption that recognition is constitutive. If the emergence of a new state is not a matter of meeting the statehood criteria, and the practice shows that this is the case, it is questionable on which other requirements a state creation depends and how these requirements are grounded in contemporary international law.

Based on the practice of states and UN organs, James Crawford argues that the traditional statehood criteria have been supplemented by additional ones, and an entity which does not meet them is not a state.[25] John Dugard bases his arguments on the general principle of law *ex injuria jus non oritur* and in the concept of *jus cogens*, and argues that the creation of an entity in breach of *jus cogens* is illegal and cannot produce legal rights to the wrongdoer; in other words, such an entity cannot become a state.[26]

While the concept of the additional statehood criteria can explain why certain illegally created effective entities did not become states (eg, Southern Rhodesia),[27] it cannot explain why some other effective entities cannot become states even in the absence of territorial illegality (eg Somaliland).[28] Statehood criteria (traditional and additional) are not the only parameters in the equation that explains whether and why an entity is a state. This book thus considers the emergence of new states in the broader context of an internationalised process which also prescribes certain democratic procedures.

Prior to 1990, it was generally not maintained that judging the type of government based on electoral practices could be determinative of a successful state creation.[29] After the end of the Cold War, this perception changed to some degree. Part of the EC's response to the events in the territories of the SFRY and the Soviet Union was to issue a set of guidelines

[23] ibid.

[24] M Weller, 'Modesty Can Be a Virtue: Judicial Economy in the ICJ *Kosovo* Opinion' (2011) 24 *Leiden Journal of International Law* 127, 129–30.

[25] Crawford (n 1) 96–173.

[26] J Dugard, *Recognition and the United Nations* (Cambridge, Grotius Publications, 1987).

[27] See ch 1, 3.5.3.

[28] See Crawford (n 1) 404, who argues that that Somalia remains the only internationally recognised state in that territory.

[29] See JES Fawcett, 'Security Council Resolution on Rhodesia' (1965–66) 41 *British Yearbook of International Law* 104, 112; DJ Devine, 'The Requirements of Statehood Re-examined' (1971) 34 *Modern Law Review* 410, 410–17 and Fawcett's response at 417.

for recognition of new states emerging in these two territories. In the case of the SFRY, the EC also established a mechanism for recognition.[30]

The legal significance of international involvement – most notably of the EC – in the dissolution of the SFRY has been examined by writers in international law and international relations. David Raič argues that the requirement for states to constitute themselves on a democratic basis, expressed in the EC Guidelines on recognition, should, as suggested by the title of this document, be regarded as a recognition requirement and not a statehood criterion.[31] However, as Richard Caplan argues, although the EC termed its involvement as that of recognition of new states, this was rather an exercise in collective state creation.[32]

This book demonstrates that the act of recognition was not crucial for the emergence of new states in the territory of the federation. It was rather that the international involvement led to an internationalised extinguishing of the SFRY's personality, which made its claim to territorial integrity inapplicable.,.Considerations for democracy by the international community were thus not necessarily applied only in the process of granting recognition, but rather in the process of international acceptance of the dissolution of the SFRY. What implications does this practice have for the contemporary law of statehood?

Existing analyses of the dissolution of the SFRY do not thoroughly deal with the substance of the EC's requirement for new states to adhere to democratic practices. It has been insufficiently explored how these requirements were implemented and what their significance was under international law. Although it is acknowledged that international involvement in the process of dissolution of the SFRY may well have had constitutive effects, little attention has been paid to the phenomenon of international (attempts at) imposition of democratic institutions in a new state being dependent on the *mode of a certain state creation*. As Jean d'Aspremont notes, there exists significant practice of an entanglement of the processes of internationalised transitions to both statehood and democracy.[33]

To date, this entanglement has not been analysed from the perspective of international law. In other words, scholarship has not explained the legal nature of the interplay between the mode of state creation and the international imposition of democratic institutions; neither has it divorced the issue of imposition of democratic institutions in the new state from the

[30] See the EC Declaration on Yugoslavia (16 December 1991).

[31] D Raič, *Statehood and the Law of Self-Determination* (The Hague, Kluwer Law International, 2002), especially 436.

[32] R Caplan, *Europe and Recognition of New States in Yugoslavia* (Cambridge, Cambridge University Press, 2005); see also S Terrett, *The Dissolution of Yugoslavia and the Badinter Arbitration Commission: A Contextual Study of Peace-Making Efforts in the Post-Cold War World* (Aldershot, Ashgate, 2000); Grant (n 1) especially 168.

[33] D'Aspremont (n 11) 12

democratic principles operating in the law of statehood via the right of self-determination.[34]

The principle of self-determination and democratic political theory have been expressly wedded in the ideas of the American and French Revolutions and in the writings and speeches of the US President Woodrow Wilson.[35] Yet self-determination also featured prominently in Lenin's writings and thus in the socialist interpretation of law and society.[36] It is thus questionable whether self-determination can be linked exclusively to democratic political theory.

Robert McCorquodale argues that self-determination as a human right,[37] like most rights, is not an absolute entitlement but is limited by other rights.[38] The right of self-determination is also limited by and weighed against the principle of territorial integrity of states[39] and would normally be consummated in its internal mode, ie its exercise will normally not result in a new state creation.[40] However, the internal mode of self-determination gave rise to some speculation that this is, in fact, a manifestation of the 'right to democracy'.[41] The right of self-determination is also one of the cornerstones of Franck's normative democratic entitlement thesis.

The association of democracy as a political system with the right of self-determination has been criticised by some writers.[42] However, it remains unexplored how the requirement for a representative government for the purpose of the right of self-determination – as a matter of law – differs from the requirement for a representative government in democratic political

[34] See Wheatley (n 19) 217, who argues that: 'Increasingly, it is accepted that the right of peoples to self-determination should be understood in terms of democratic government in accordance with the will of the people.'

[35] See W Wilson, *President Wilson's Foreign Policy: Messages, Addresses, Papers* (collected by J Brown Scott) (New York, Oxford University Press, 1918); R Baker and W Dodd (eds), *War and Peace: Presidential Messages, Addresses, and Public Papers* (New York, Harper, 1927).

[36] See VI Lenin, *Questions of National Policy and Proletarian Internationalism* (Moscow, Foreign Languages Publishing House, year of publication unknown).

[37] The right of self-determination is codified in the common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) (1966) and International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966).

[38] R McCorquodale, 'Self-Determination: A Human Rights Approach' (1994) 43 *International & Comparative Law Quarterly* 857, 875–76.

[39] See the Declaration on Principles of International Law Concerning Cooperation and Friendly Relations among States in Accordance with the Charter of the United Nations (hereinafter the Declaration on Principles of International Law), UN Doc A/RES/2625 (24 October 1970), annex, principle 5, para 7.

[40] See *Reference re Secession of Québec* [1998] 2 SCR 217 (Supreme Court of Canada) (hereinafter the *Québec* case), para 126.

[41] P Thornberry, 'Self-Determination, Minorities, Human Rights: A Review of International Instruments' (1989) 38 *International & Comparative Law Quarterly* 341. See also Wheatley (n 19) 217.

[42] A Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (Cambridge, Cambridge University Press, 1995).

theory.[43] In other words, via the right of self-determination, international law requires a *representative* government, but representative is not necessarily a synonym for democratic. This issue not only needs to be considered in the context of the internal mode of the right of self-determination but also in the context of the so-called doctrine of remedial secession.[44]

Authors discussing the link between democracy and the right of self-determination have also insufficiently stressed the difference between democracy as a political system and the operation of democratic principles within the right of self-determination. Jean Salmon cautions that there are many governments in the world that do not adhere to democratic practices but are nevertheless representative of their peoples.[45] However, the General Assembly has clearly called for one-man-one-vote principles in the context of the exercise of the right of self-determination.[46] The International Court of Justice (ICJ) has pronounced that, in principle, a popular consultation needs to be held before a change of the legal status of a territory can occur[47] and the Badinter Commission reaffirmed this standard.[48] These can be described as calls for the adoption of (some) democratic principles in the process of collective decision-making for the purpose of the exercise of the right of self-determination. However, it remains to be clarified why such calls should not be interpreted too broadly to mean a requirement for democracy as a political system.

In this vein, Peters argues that secession is a regulated process which prescribes 'peaceful and democratic procedures'.[49] For Peters: 'Any extraordinary allowance to secede has to be realized in the appropriate procedures, notably under recourse to a free and fair referendum on independence or after democratic elections, ideally under international supervision.'[50] While this position rightly maintains that secession, and state creation in general, requires a democratic process, it blurs the differ-

[43] Malcolm Shaw notes that '[t]he traditional exposition of the [statehood] criterion of government concentrated upon stability and effectiveness needed for this factor to be satisfied, while [as a consequence of operation of the right of self-determination] the representative and democratic nature of the government has also been forward[ed] as a requirement'. M Shaw, *International Law* (Cambridge, Cambridge University Press, 2008) 205.

[44] See Wheatley (n 19) 230, who argues that 'the relationship between territorial integrity and the right of peoples to self-determination can only be understood by reference to the principle of democracy'. For an overview of remedial secession, see Crawford (n 1) 188–222; A Tancredi, 'A Normative "Due Process" in the Creation of States Through Secession' in M Kohen (ed.), *Secession: International Law Perspectives* (Cambridge, Cambridge University Press, 2006).

[45] J Salmon, 'Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?' in C Tomuschat (ed.), *Modern Law of Self-Determination* (Dordrecht, Martinus Nijhoff, 1993) 280.

[46] UN Doc A/RES/2022 (5 November 1965), para 8 (on Southern Rhodesia).

[47] *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 55.

[48] The Badinter Commission, Opinion 4 (11 January 1992), para 4.

[49] A Peters, 'Does Kosovo Lie in the Lotus-Land of Freedom?' (2011) 24 *Leiden Journal of International Law* 95, 117.

[50] ibid.

ence between independence referenda and general elections in the context of the law of statehood. This book argues against such an approach and demonstrates that these are two separate issues in the law of statehood as well as in international law in general.

This book also considers the limitations that international law imposes on the will of the people in the context of the right of self-determination. One source of such a limitation is the principle of territorial integrity of states, which prevents the popular support in favour of independence from automatically resulting in statehood. Another, arguably even more controversial, limitation on the will of the people may become evident once the claim to territorial integrity is no longer applicable, when new states are created and new international borders need to be confined. As Crawford argues, the rules of international law pertaining to the confinement of borders of new states are one of the non-democratic features of international law, but 'may well serve other values'.[51]

In the territory of the SFRY, the Badinter Commission applied the *uti possidetis* principle in order to confine the new international borders along previously existing internal boundaries.[52] This application created new minorities and numerically inferior peoples. The application of what is a colonial principle in a non-colonial situation has been criticised by several scholars, including Robert McCorquodale and Raul Pangalangan,[53] Michla Pomerance,[54] Peter Radan[55] and Steven Ratner.[56] On the other hand, Alain Pellet[57] and Malcolm Shaw[58] advocate the use of *uti possidetis* and argue that respect of the will of the people cannot result in all border arrangements being in flux when new states are created. In their view, this would be an invitation to territorial conquest.

The common patterns of determination of new international borders in the territory of the former SFRY and the determination of new international borders in subsequent state creations remain insufficiently considered in the relevant literature. This book argues that the *uti possidetis* principle is

[51] Crawford (n 1) 153.

[52] The Badinter Commission, Opinion 3 (11 January 1992), especially para 2.

[53] R McCorquodale and R Pangalangan, 'Pushing Back the Limitation of Territorial Boundaries' (2001) 12 *EJIL* 867, especially 875.

[54] M Pomerance, 'The Badinter Commission: The Use and Misuse of the International Court of Justice's Jurisprudence' (1998–99) 20 *Michigan Journal of International Law* 31.

[55] P Radan, 'Post-Secession International Borders: A Critical Analysis of the Opinions of the Badinter Arbitration Commission' (2000) 24 *Melbourne University Law Review* 50.

[56] S Ratner, 'Drawing a Better Line: *Uti Possidetis* and the Borders of New States' (1996) 90 *American Journal of International Law* 590.

[57] A Pellet, 'Avis juridique sommaire sur le projet de loi donnant effet à l'exigence de clarté formulae par la Cour suprême du Canada dans son avis sur le Renvoi sur la sécession du Québec' quoted in English translation in S Lalonde, 'Québec's Boundaries in the Event of Secession' (2003) 7 *Macquarie Law Journal* 129, 137.

[58] M Shaw, 'The Heritage of States: The Principle of *Uti Possidetis* Today' (1996) 67 *British Yearbook of International Law* 75; M Shaw, 'Peoples, Territorialism and Boundaries' (1997) 8 *EJIL* 478.

not applicable outside of the process of decolonisation; however, this does not mean that outside of colonialism all borders are in flux when new states emerge. The latest internal boundary arrangement, even if it enjoys little support among the people, will nevertheless form a strong base for new international delimitation. In this context, scholarship thus far has insufficiently considered what kind of internal boundaries are capable of becoming international borders. This book analyses the practice which reveals that these are only those boundaries which delimit historically realised self-determination units.

In sum, this book takes a different focus than the existing literature on the international law of statehood. In particular, it does not focus on the statehood criteria or consider whether democracy has become one of them. Rather, it analyses the post-Cold War practice of the emergence and delimitation of new states and develops an argument that state creation is an internationalised law-governed process of overcoming an applicable counterclaim to territorial integrity. This process is influenced by the statehood criteria, among other factors. The process prescribes certain democratic procedures and may even result in the international imposition of democratic institutions. But how has this practice shaped contemporary international law and what is the legal framework governing the creation of states that stretches beyond the statehood criteria?

1.3 The Main Objectives of this Book

There are two main reasons why the law of statehood needs to be updated with post-Cold War practice. First, new states in this period have emerged outside the colonial context and in the absence of an entitlement to independence. Therefore, new states in contemporary practice emerge in different legal circumstances than was the case in the past; independence-seeking entities are faced with the applicable claim to territorial integrity of their parent states. Second, in the new legal circumstances, the emergence of new states has become increasingly dependent on international acceptance rather than meeting the statehood criteria. In recent practice, this dependence has been used for an internationalised imposition of certain democratic standards on the newly created states.

In contemporary international law, the statehood criteria seem to be largely disregarded in practice. But how do new states come into existence if meeting the statehood criteria is neither sufficient nor necessary? This book demonstrates that the emergence of a new state is not a factual occurrence but a law-governed political process which leads to a change in the legal status of a certain territory. Under international law, this process requires some democratic procedures to be followed. However, several difficult issues arise in this context.

How does a territory become an independent state?; who decides on the change of the legal status and what is the procedure leading to this effect?; how and by whom are the boundaries of the new state confined and why is the emergence of a new state very unlikely, even where it is favoured by the democratically expressed will of the people? Which democratic principles are to be followed and what are the limits on these principles in the process of state creation? How do the will of the people and the principles of democratic decision-making interact with the principles of international law, such as the territorial integrity of states, *uti possidetis* and the free choice of the political system?[59] How does the process of acquiring statehood accommodate the practice of the international imposition of a democratic political system and what is the legal significance of this practice? And how do the legal rules governing the democratic process of state creation differ from the post-Cold War law and practice of internationalised creations of democratic states?

In answering these questions, this book: (i) comprehensively analyses the practice of the post-Cold War emergence of new states and considers the legal significance of international involvement in the process of new state creations; (ii) takes the international law of statehood further than the prevailing doctrinal debates on statehood criteria and recognition theories, and determines the legal implications of the principle of territorial integrity; (iii) considers the international legal relevance of the emerging post-Cold War practice of internationalised parallel creations of democratic political systems along with the creation of new states; (iv) thoroughly analyses the practice of democratic expression of the will of the people at independence referenda in terms of legal effects as well as procedural standards and determines the international legal limitations imposed on the democratic process; (v) explains why even in the absence of the *uti possidetis* presumption outside of the process of decolonisation, new international borders tend to be confined along the lines of the previously existing internal boundaries and argues why delimitation is not subject to popular decision-making; (vi) provides for an indepth analysis of legal sources which demonstrate how principles of general international law limit the democratic expression of the will of the people in the context of the law of statehood; and (vii) systematically demonstrates that democracy as a political system and the exercise of the right of self-determination are two separate issues in the international law of statehood.

In sum, analysing the law and practice of post-Cold War state creations, the book seeks to update the inadequate theory of statehood. In practical terms, it will provide answers to questions which the law of statehood in its present state cannot answer exhaustively. These questions include:

[59] *cf* Wheatley (n 19) 245–46, who argues that: 'Democracy does not define its own borders; the borders of democracy are defined by international law.'

why do certain entities meet the statehood criteria but are not considered states and vice versa?; what is the role of recognition in contemporary international law; does a new state need to adopt a certain institutional design or have a government of a particular type?; under what circumstances can an independence referendum actually lead to independence?; who is entitled to vote at independence referenda and what kind of majority is internationally accepted as an expression of the will of the people?; and how is the international border of the new state determined?

1.4 Structure of this Book

Chapter one locates the concepts of democracy and statehood within international legal scholarship. It initially outlines the ideas of bringing democracy into international law through the provisions of international human rights law and the ideas about reconceptualising international law as law among democratic states. Such arguments have prompted sceptical voices from both international law and political science scholarship. It is argued that when one brings democracy into international law, one also brings along the quarrels about the meaning and definition of democracy. This chapter thus deals with different understandings of democracy and cautions that the one adopted by the 'democratic endeavour' within international law attracts notable criticism in political science scholarship.

Subsequently, the chapter considers the concept of the state in international law; the statehood criteria; recognition requirements; the relationship between statehood and recognition in contemporary international law; and the legal effects of non-recognition (as well as the development of the doctrine of non-recognition in the pre-1990 practice). An argument is made that in contemporary international law, meeting the statehood criteria and the existence of an effective entity do not necessarily imply the existence of a state, not even a non-recognised one. Certain human rights may well be important for the legality of a new state creation. Yet in the pre-1990 practice, democracy as a political system did not play any role in the emergence of new states. This may be different when democratic principles operating within the right of self-determination are concerned.

However, even if an entity meets the Montevideo statehood criteria and certain legality requirements, it does not automatically and self-evidently become a state. The hurdle which the entity also needs to overcome is its parent state's counterclaim for territorial integrity. The chapter argues that this hurdle may be overcome, inter alia, through internationalised action. However, the international involvement into the process of state creation brings a possibility of internationalised interference into the choice of a political system in the new state.

Chapter two turns to the post-Cold War practice of state creations. The main concern is the role of the requirements other than those identified in chapter one for the emergence of new states. It is demonstrated that in a number of post-Cold War developments, new states were created as a result of international action and such action was coupled with international attempts to create a democratic political system along with the new state. It is, however, questionable whether considerations for democracy in this context can only be seen as a matter of recognition requirements. It may well be that international involvement can produce rather than merely acknowledge the emergence of a new state.

Presenting state creation as an internationalised process, this chapter considers case studies of all successful post-1990 state creations, including the controversial case of Kosovo and the recent emergence of South Sudan as an independent state. Drawing on the analysis in chapter one, chapter two considers the legal significance of the post-1990 attempts of the international community to contribute towards the creation of new states which are organised along democratic lines.

In *chapter three*, the discussion turns to the relationship between democracy and the right of self-determination. The chapter defines the difference between internal and external aspects of self-determination and considers the link between self-determination and democratic political theory. It argues that the right of self-determination requires a representative government, yet governmental representativeness in this context is defined differently than in the context of democratic political theory. The right of self-determination is not exclusively compatible with only one particular political system.

The chapter further identifies the democratic principles operating in the context of the external aspect of the right of self-determination and analyses the procedural standards of independence referenda. It is considered whether the practice of such referenda gives a suggestion as to the generally applicable standards of popular consultation in the framework of the right of self-determination. For this purpose, the post-1990 independence referenda practice is analysed from the perspectives of procedural referenda rules and the legal effects of the expressed will of the people on the international law of statehood.

This chapter draws on democratic political theory, initially to consider the link between democracy and the principle of self-determination and, subsequently, to analyse how the will of the people operates within the right of self-determination and how it is limited by general international law, in particular by the principle of the territorial integrity of states.

Chapter four is the final substantive chapter and is concerned with the limitations on the will of the people in the context of new state creations. Such limitations may also stem from the previous internal boundary arrangement. This chapter begins with the controversy over

the applicability of the *uti possidetis* principle outside of colonial situations and questions whether all 'upgrades' of internal boundaries to international borders may be ascribed to the operation of *uti possidetis*. It further seeks to clarify the circumstances in which the will of the people pertaining to a new international delimitation may be rightfully limited by a pre-existing internal boundary arrangement.

The main argument of this chapter is that in the post-Cold War practice, new international borders are not colonial-like arbitrarily drawn boundaries, but rather are historically realised lines delimiting self-determination units. The criticism that such borders create new minorities ignores the fact that mono-ethnic 'nation states' do not exist in reality and for this reason it cannot be expected that such a state could be newly created. The latest internal boundary arrangement thus forms a strong base for the new international delimitation; nevertheless, international law does not exclude the possibility of territorial rearrangements.

Chapter five, the final chapter, provides for conclusions and summaries on the role and legal relevance of democracy and democratic principles in successful post-1990 state creations. It brings together the analysed law and practice on the emergence and delimitation of new states in the post-Cold War period, synthesises the theory of state creation as an internationalised *process*, and presents the legal nature and significance of democracy and democratic principles in this process.

2 INTERNATIONAL LAW AND (NON-)DEMOCRATIC STATES

2.1 Democracy, Elections and Human Rights

Free and fair elections are an integral part of the right to political participation and also a concept in democratic political theory, yet the relationship between democracy, elections and human rights remains somewhat controversial. In democratic political theory, there is an ongoing dispute as to whether elections should be considered a necessary or a sufficient condition for democracy. At the same time, it is ambiguous what the international legal threshold is of free and fair elections and whether such elections necessarily need to take place in a multiparty setting. This section outlines the procedural (ie, election-centric) and substantive definitions of democracy and argues that while the procedural definition may be inadequate, it is difficult to conceive democracy as an international legal principle on the postulates of its substantive definition. The concept of democracy in international human rights law is therefore often reduced to the procedural understanding and to the question of whether human rights standards require multiparty elections. However, multiparty elections should not be seen as an equivalent to democracy.