

**DEMOCRACY AND STATE CREATION  
IN INTERNATIONAL LAW**

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## ABSTRACT

At the end of the Cold War some scholars argued that democracy is the only legitimate political system and that this needs to be acknowledged even by international law. This thesis rejects such arguments and takes the position that attributes of statehood are not dependent on type of government. As far as existing states are concerned, democracy is not an ongoing requirement for statehood.

The end of the Cold War also coincided with the dissolutions of two multiethnic federations, the Soviet Union and Yugoslavia. The dissolution of Czechoslovakia followed shortly afterwards and subsequently Eritrea, East Timor and Montenegro also became independent states. Most recently, independence was declared by Kosovo. Some of these post-Cold War state creations were subject to significant international involvement, which might have had effects of (informal) collective state creations. This thesis argues that in such circumstances international efforts to create a new state were associated with attempts to implement a democratic political system. On the other hand, where the emergence of a new state was merely a fact (and the international community was not involved in producing this fact), recognition was normally universally granted without an enquiry into the (non-) democratic methods of governments of the newly-emerged states.

Apart from democracy as a political system, this thesis is also concerned with the operation of democratic principles in the process of state creation, most notably through the exercise of the right of self-determination. An argument is made that the will of the people within the right of self-determination has a narrower scope than is the case within democratic political theory. Further, while the operation of the right of self-determination requires consent of the people before the legal status of a territory may be altered, a democratic expression of the will of a people will not necessarily create a state.

Limits on the will of the people in the context of the right of self-determination stem from the principle of territorial integrity of states, protection of rights of other peoples and minorities, and even from the previously existing internal boundary arrangement. In the context of the latter it is concluded that the *uti possidetis* principle probably does not apply outside of the process of decolonisation. However, this does not mean that existing internal boundaries are not capable of limiting the democratically-expressed will of the people, especially where boundaries of strong historical pedigree are in question.

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I am grateful to my parents, who inspired my curiosity in developments around the world, enabled me to travel, supported my educational and personal goals (often at considerable expense) and understood that I had to move abroad to fulfil these goals.

This is to declare that the following is the result of the author's own work. This thesis conforms to the specifications of the University of Nottingham for submissions for the degree of Doctor of Philosophy.

This thesis is 108,916 words in length. It is over the regular word limit due to the addition of a chapter covering recent developments in Kosovo. In consultation with my supervisor, I decided that it was essential for the context of the thesis to include these developments.

It is my intention that the research is current as of 20 March 2009.

Jure Vidmar

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## I. INTRODUCTION

### 1.1. Scope of the thesis

At the end of the Cold War two multiethnic socialist federations were dissolved: the Union of Soviet Socialist Republics<sup>1</sup> and the Socialist Federative Republic of Yugoslavia (SFRY).<sup>2</sup> 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.<sup>3</sup> The entanglement of post-Cold War political developments and the emergence of new states led to ideas that democracy should be brought into international law in relation to both existing and emerging states. This was a time when it was discussed whether democracy would become a normative entitlement of all individuals<sup>4</sup> and when some states explicitly expressed that they would (collectively) grant recognition only to those new states which had constituted themselves on a democratic basis.<sup>5</sup>

The dissolutions of the Soviet Union and of the SFRY were followed by the dissolution of a third (then already formerly) socialist federation – Czechoslovakia.<sup>6</sup> Shortly afterwards, Eritrea successfully seceded from Ethiopia.<sup>7</sup> Later East Timor<sup>8</sup>

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<sup>1</sup> Hereinafter: the Soviet Union.

<sup>2</sup> Legal analyses of the two dissolutions include the following works: Warbrick (1992), Pellet (1992), Türk (1992), Rich (1993), Trifunovska (1994), Craven (1995), Craven (1996), Bethlehem and Weller (1997), Grant (1999), Terrett (2000), Radan (2002), Ziemele (2005), Crawford (2006).

<sup>3</sup> New states emerging in the territory of the SFRY were: Bosnia-Herzegovina, Croatia, the Federal Republic of Yugoslavia (FRY), Macedonia and Slovenia. See *infra* ch. 4.3. 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 *infra* ch. 4.4.1.

<sup>4</sup> See especially Franck (1992), Franck (1994), Franck (2001), Teson (1992), Teson (1998), Slaughter (1995), Slaughter (1997).

<sup>5</sup> See the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991), para 3.

<sup>6</sup> See Stein (1997); Crawford (2006), p. 402.

<sup>7</sup> See Haile (1994); Crawford (2006), p. 402.

<sup>8</sup> See Martin (2001); Crawford (2006), p. 560–62; Wilde (2008), pp. 178–188. See also SC Res 1338 (31 January 2001) & GA Res 57/3 (27 September 2002).

and, only months before the research for this thesis began, Montenegro<sup>9</sup> also became independent states. When this thesis was underway Kosovo declared independence.<sup>10</sup> Kosovo has not been universally recognised but recognition was not collectively withheld.<sup>11</sup>

These developments point out that the study of creation and recognition of states and the exercise of the right of self-determination remain relevant and important even in the post-decolonisation period and after the dissolutions of the multiethnic socialist federations. Further, although it first seemed that democracy did not play an important role in the creation and recognition of states emerging in the territories of the former Soviet Union and of the SFRY,<sup>12</sup> it may well be that democratic-considerations were the driving force behind international involvement in some subsequent state creations.

This thesis is generally concerned with the role of democracy in the creation of states and in the exercise of the right of self-determination. Its central aim is not to examine whether international law allows for the creation of a non-democratic state. Rather, it considers whether some situations of post-1991 state creations reflected attempts to create democratic states and examines how such attempts were influenced by mode of state creation.

The term ‘democracy’ not only refers to democracy as a political system but also to the principles of democratic decision-making.<sup>13</sup> The thesis thus also seeks to

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<sup>9</sup> See GA Res 60/264 (28 June 2006). With this resolution Montenegro was admitted to the United Nations (UN).

<sup>10</sup> See Kosovo Declaration of Independence (2008).

<sup>11</sup> See Who Recognized Kosovo as an Independent State <<http://www.kosovothanksyou.com>>.

<sup>12</sup> See Grant (1999), p. 96, arguing that recognition was extended in due course, although democracy was not taking root in many of the newly-created states. Grant concludes that the EC Guidelines were a tool of geographical strategy rather than an instrument of international law.

<sup>13</sup> See *infra* ch. 2.2.

identify and analyse the operation of democratic principles in international law governing the creation of states and the exercise of the right of self-determination.<sup>14</sup>

The main focus is the post-1991 practice of state creations. However, for a thorough understanding of the relevance of type of government and domestic institutions for the law of statehood and the right of self-determination, pre-1991 situations are outlined. The thesis generally focuses on situations which eventually led to new state creations, while unsuccessful secessionist attempts fall beyond its scope. A notable exception to this rule is the situation of Québec. Although it did not lead to a new state creation, the reasoning of the Supreme Court of Canada in the *Québec case*<sup>15</sup> and the writings of prominent scholars<sup>16</sup> on the matter clarify the position of international law in regard to new state creations and, more generally, in regard to the exercise of the right of self-determination.

## 1.2. Context

After the demise of the Soviet Union and the social, political and economic system it sponsored, Francis Fukuyama developed the thesis of the end of history, which proclaims liberal-democracy the only legitimate socio-political system.<sup>17</sup> While non-liberal-democratic societies still exist, they are, in Fukuyama's view, "historical" and they would eventually need to adopt liberal-democratic practices and thus become "post-historical".<sup>18</sup> Fukuyama's understanding of liberal-democracy is based on a selection of civil and political rights – mostly those relevant for the conducting of free and fair elections<sup>19</sup> – and on a rejection of economic, social and cultural rights.

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<sup>14</sup> See especially infra ch. 5.4. and 6.

<sup>15</sup> *Reference re Secession of Quebec* [1998] 2 SCR 217 (The Supreme Court of Canada) [hereinafter: the *Québec case*].

<sup>16</sup> See *The Territorial Integrity of Quebec in the Event of the Attainment of Sovereignty* (Franck, Higgins, Pellet, Shaw, Tomuschat) (1992) [hereinafter: *The Québec Report*].

<sup>17</sup> Fukuyama (1992), especially pp. 276–77.

<sup>18</sup> *Ibid.*, p. 277.

<sup>19</sup> *Ibid.*, pp. 42–43.

Indeed, he proclaims the latter set of rights to be incompatible with the postulates of a free market economy.<sup>20</sup> Fukuyama's understanding of liberal-democracy is election-centric and closely associated with the existence of a capitalist economic system.

The post-Cold War absence of the Leninist concept of people's democracy<sup>21</sup> and the proclamation of the victory of liberal-democracy as the only legitimate political system led some international legal scholars to make an argument in favour of a normative entitlement to democracy. In 1992, Thomas Franck authored "The Emerging Right to Democratic Governance", an article which adopts the election-centric definition of democracy and derives the new right from a selection of civil and political rights.<sup>22</sup> A related idea stems from writings of Fernando Teson<sup>23</sup> and Anne-Marie Slaughter,<sup>24</sup> who suggest the re-conceptualisation of international law as law among liberal-democratic states.

The ideas of both normative democratic entitlement and international law as law among liberal-democratic states have attracted determined critique. Susan Marks argues that these endeavours are overtly ideological and points out the inadequacy of an election-centric definition of democracy.<sup>25</sup> José Alvarez questions the idea of legal prescriptions being based on the election-centric liberal-democratic self-image of some states and argues that the liberal-democratic enterprise in international law

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<sup>20</sup> Ibid.

<sup>21</sup> In the view of the Leninist concept of democracy, "[e]lections were not an occasion to call into question the hard-earned gains of popular struggle or to allow the enemies of popular power the opportunity to sow seeds of internal division. Rather, elections allowed the populace to appoint from within its midst the most dedicated and capable to carry forward the revolutionary project." Roth (1999), pp. 327–28. In other words, the Leninist concept of people's democracy did not exclude elections as such; it excluded elections in a multiparty setting.

<sup>22</sup> Franck (1992). See also Franck (1994), Franck (2001).

<sup>23</sup> Teson (1992), Teson (1998)

<sup>24</sup> Slaughter (1995), Slaughter (1997).

<sup>25</sup> Marks (2000).

proposes to disrupt the United Nations (UN) Charter system.<sup>26</sup> Brad Roth points out that even from the perspective of the election-centric definition of democracy, a liberal-democratic bias in reading universal human rights standards cannot be assumed.<sup>27</sup>

However, these discussions on the idea that type of government would more prominently become a factor relevant for international law relate predominantly, if not exclusively, to the governments of existing states and deal with the origins of their legitimacy. In contrast, this thesis tries to explore how liberal-democratic procedures, institutions and even postulates of substantial democracy<sup>28</sup> relate to new state creations.

Based on the practice of states and UN organs, arguments have been made that fulfilling statehood criteria will not necessarily be enough for a state creation. 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.<sup>29</sup> John Dugard bases his arguments in the general principle of law *ex injuria jus non oritur* and in the concept of *jus cogens* and argues that creation of an entity in breach of *jus cogens* is illegal and cannot produce legal rights to the wrongdoer, i.e. such an entity cannot become a state.<sup>30</sup> However, at least prior to 1991, it was generally not maintained that judging type of government based on electoral practices could be determinative of a successful state creation.<sup>31</sup>

After the end of the Cold War, this perception changed to some degree. Part of the European Community's (EC) response to the events in the territories of the

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<sup>26</sup> Alvarez (2001).

<sup>27</sup> Roth (1999), especially pp. 324–38.

<sup>28</sup> See infra ch. 2.2.2.

<sup>29</sup> Crawford (2006), pp. 96–173.

<sup>30</sup> Dugard (1987).

<sup>31</sup> See Fawcett (1965–1966), p. 112; Devine (1971), pp. 410–17 and Fawcett's response, *ibid.*, p. 417.

SFRY and the Soviet Union was to issue a set of guidelines for recognition of new states emerging in these two territories.<sup>32</sup> In the example of the SFRY, the EC also established a mechanism for recognition.<sup>33</sup>

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. Richard Caplan argues that although the EC termed its involvement as that of recognition of new states, it was rather collective state creations.<sup>34</sup> The analyses of the dissolution of the SFRY, however, do not thoroughly deal with the substance of the EC's requirement for new states to adhere to liberal-democratic practices. Further, it has been insufficiently explored to what degree these requirements were implemented. Although it is acknowledged that international involvement was much more significant, i.e. had constitutive effects, for new state creations in the territory of the former SFRY than in the former Soviet Union,<sup>35</sup> it remains insufficiently explored how the difference between consensual (Soviet Union) and non-consensual (SFRY) dissolution led to different degrees of international involvement and to attempts on different scales to impose certain democratic standards prior to recognition or, perhaps, in the process of state creation.

David Raič argues that the requirement for states to constitute themselves on a democratic basis, expressed in the EC Guidelines, should, as suggested by the title of this document, be regarded a recognition requirement and not a statehood criterion.<sup>36</sup> Yet it remains somewhat unexplained to what degree some of the requirements expressed in the EC Guidelines were applied to subsequent state creations. This is especially relevant in situations where international involvement

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<sup>32</sup> See supra n. 5.

<sup>33</sup> See EC Declaration on Yugoslavia (16 December 1991).

<sup>34</sup> Caplan (2005). See also Terrett (2000), Grant (1999), especially p. 168.

<sup>35</sup> See infra ch. 4.3.7.

<sup>36</sup> Raič (2002), especially p. 436.

determined a new state creation, i.e. when international involvement was not limited to acknowledgement of the fact that a new state was in existence but rather produced such a fact.

Democracy and democratic principles also enter the theory and practice of state creations through the right of self-determination. The principle of self-determination and the democratic political theory have been expressly wedded in the ideas of the American and French revolutions and in writings and speeches of the United States (US) President Wilson.<sup>37</sup> Yet self-determination also featured prominently in Lenin's writings and thus in the socialist interpretation of law and society.<sup>38</sup> 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,<sup>39</sup> like most rights, is not an absolute entitlement but is limited by other rights.<sup>40</sup> The right of self-determination is also limited by and weighed against the principle of territorial integrity of states<sup>41</sup> and would normally be consummated in its internal mode, i.e. its exercise will normally not result in a new state creation.<sup>42</sup> However, the internal mode of self-determination gave rise to some speculation that this right has implications for democracy.<sup>43</sup> Significantly, the right of self-determination is one of the cornerstones of Franck's normative democratic entitlement thesis.<sup>44</sup>

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<sup>37</sup> See Wilson (1918); Baker and Dodd (1926).

<sup>38</sup> See Lenin (year of publication unknown).

<sup>39</sup> 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).

<sup>40</sup> McCorquodale (1994), pp. 875–76.

<sup>41</sup> 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], GA Res 2625 (24 October 1970), annex, principle 5, para 7.

<sup>42</sup> See the *Québec case* (1998), para 126.

<sup>43</sup> Thornberry (1993).

<sup>44</sup> See supra n. 22.

The association of democracy as a political system with the right of self-determination has been criticised by Antonio Cassese.<sup>45</sup> However, what remains unexplored is how the requirement for a representative government for the purpose of the right of self-determination differs from the requirement for a representative government in democratic political theory. 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.<sup>46</sup>

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 points out that there are many governments in the world that do not adhere to liberal-democratic practices but are nevertheless representative of their peoples.<sup>47</sup> Yet the General Assembly has clearly called for one-man-one-vote principles in the context of the exercise of the right of self-determination.<sup>48</sup> The International Court of Justice (ICJ) held that, in principle, a popular consultation needs to be held before a change of the legal status of a territory can occur<sup>49</sup> and the Badinter Commission reaffirmed this standard.<sup>50</sup> 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.

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<sup>45</sup> See generally Cassese (1995).

<sup>46</sup> See Crawford (2006), pp. 188–122; Tancredi (2006).

<sup>47</sup> Salmon (1993), p. 280.

<sup>48</sup> GA Res 2022 (5 November 1965), para 8 (on Southern Rhodesia).

<sup>49</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 55.

<sup>50</sup> The Badinter Commission, Opinion 4 (11 January 1992), para 4.

This thesis also explores how the will of the people in the context of the right of self-determination may be limited by the rules of international law. One source of such limitation is the principle of territorial integrity of states.<sup>51</sup> Another, and arguably even more disputable, limitation on the will of the people may become evident once the claim to territorial integrity is removed, when new states are created and new international borders need to be confined.

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.<sup>52</sup> New minorities and numerically inferior peoples were thus created. This application of a colonial principle in a non-colonial situation remains criticised by several scholars, including Robert McCorquodale and Raul Pangalangan,<sup>53</sup> Michla Pomerance,<sup>54</sup> Peter Radan<sup>55</sup> and Steven Ratner.<sup>56</sup> On the other hand, Alain Pellet<sup>57</sup> and Malcolm Shaw<sup>58</sup> advocate the use of *uti possidetis* and argue that respect of the will of the people cannot justify a situation in which all border arrangements are in flux when new states are created. In their view this would be an invitation to territorial conquest.

What remains insufficiently considered in the relevant literature are 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. This thesis suggests that the historical origin of a border needs to be taken into account, although this does not necessarily mean that the *uti possidetis* principle is applicable outside of the process of decolonisation.

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<sup>51</sup> See supra n. 41.

<sup>52</sup> The Badinter Commission, Opinion 3 (11 January 1992), especially para 2.

<sup>53</sup> McCorquodale and Pangalangan (2001), especially p. 875.

<sup>54</sup> Pomerance (1998–1999).

<sup>55</sup> Radan (2000).

<sup>56</sup> Ratner (1996).

<sup>57</sup> Pellet (1999).

<sup>58</sup> Shaw (1996), Shaw (1997).

### **1.3. Structure and methodology**

The scope and context of this thesis require an interdisciplinary methodology, combining international law and democratic political theory. However, in some chapters methods will more closely fall within that of doctrinal law.

Interdisciplinarity is most prominent in **Chapter Two**, where the ideas of bringing democracy into international law through provisions of international human rights law and of re-conceptualising international law as law among liberal-democratic states are discussed. There are sceptical voices from both international law and political science scholarship.

It will be argued that when one brings democracy into international law, one also brings along the quarrels about the meaning and definition of democracy in political science scholarship. This chapter will thus deal with different understandings of democracy and point out that the one adopted by the pro-democratic endeavour within international law attracts significant criticism in political science scholarship. A similar approach will be taken when addressing the idea of the re-conceptualisation of international law as law among liberal-democratic states. It will be argued that the underlying theory of this idea is the democratic peace theory, which might not be built on sound foundations.

**Chapter Three** deals with the pre-1991 practice of state creations. Initially the statehood criteria and recognition theories will be outlined. An argument will be made that in contemporary international law, the existence of an effective entity does not necessarily imply the existence of a state, not even a non-recognised one. It will be considered which non-effectiveness-based criteria have effects on the law of statehood, what the role of human rights standards is in this context and whether political system played any role in the creation of new states in the pre-1991 practice.

This chapter will also try to establish the relationship between the statehood criteria and recognition requirements, between recognition and non-recognition and make an argument in favour of the concept of the additional statehood criteria. The method in this chapter is that of doctrinal law, as it tries not only to examine the pre-1991 practice of state creations but also to clarify some basic concepts in the law of statehood which are relevant for subsequent chapters.

**Chapter Four** examines the post-1991 practice of state creations. The main question is whether in the post-1991 period requirements other than those identified in Chapter Three as statehood criteria became relevant in the situations of new state creations. In particular, it will be considered whether the imposition of human rights standards and of a democratic political system have become a more prominent concern to the international community when new states are created. This chapter further examines how international involvement may determine the mode of state creation and open a possibility for the imposition of certain political requirements. Yet it is questionable whether such political requirements can be described merely as requirements originating in the recognition policy of some states or if they actually influence the emergence of an entity as a state.

This chapter comprehends non-empirical case studies of the dissolution of the Soviet Union, the SFRY and subsequent state creations. Drawing on the interdisciplinary analysis in Chapter Two and on the doctrinal analysis in Chapter Three, Chapter Four examines the legal significance of the post-1991 attempts of the international community to contribute toward the creation of new states which are organised along liberal-democratic lines.

**Chapter Five** addresses the relationship between democracy and the right of self-determination and examines the link between self-determination and democratic

political theory. It not only looks at the relationship between the right of self-determination and democracy as a political system but also tries to identify the democratic principles operating within the right of self-determination. In this context standards of independence referenda are considered. It is examined whether the practice of such referenda gives a suggestion as to standards of popular consultation in the framework of the right of self-determination. For this purpose post-1991 referenda are analysed from the perspectives of referenda rules and the impact of the expressed will of the people.

This chapter draws on democratic political theory; initially to examine the link between democratic political theory and the principle of self-determination and, subsequently, to show how the will of the people operates within the right of self-determination and how it is limited by general international law.

**Chapter Six** considers the will of the people in regard to the creation of new international borders. It examines whether and to what degree internal boundaries potentially limit the will of the people when new states are created outside of the process of decolonisation. This chapter begins with the question of 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 the *uti possidetis* principle. It further attempts to clarify circumstances in which the will of the people in regard to the question of a new international delimitation may be rightfully limited by a pre-existing internal boundary arrangement.

**Chapter Seven** addresses the specific situation of Kosovo’s declaration of independence. It is not intended that Kosovo would be the central case study of the thesis. However, as the most recent, and a very disputable, state creation it deserves

thorough attention, which could not be given it in previous chapters. Further, the analysis of Kosovo draws on a variety of issues discussed in earlier chapters. These include: statehood criteria, recognition theories, applicability of the duty of non-recognition, exercise of the right of self-determination, the 'remedial secession doctrine' and an attempt by the international community to create a new democratic state. The chapter on Kosovo may thus serve as an example to show how some concepts relevant for the law of statehood operate and what shortcomings they face in difficult situations.

## II. INTERNATIONAL LAW AND DEMOCRACY

### 2.1. Introduction

Overlapping elements and an interdependence between democracy and human rights make international human rights law the most suitable framework for invoking democracy as a principle of international law.<sup>59</sup> Yet the word ‘democracy’ does not appear in the universal human rights treaties, nor has the International Court of Justice (ICJ) “based any of its decisions on the legal application of democratic principles.”<sup>60</sup> The only universal human rights instrument that makes reference to democracy is the Universal Declaration of Human Rights (UDHR):

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.<sup>61</sup>

Thus, even the UDHR does not use the noun ‘democracy’ but refers to it with an adjective in the notion of ‘democratic society’. Further, Article 29 of the UDHR mentions ‘general welfare in a democratic society’ as one of the considerations for whose purpose human rights may be subject to limitation, which implies that democracy and human rights are two distinct concepts which might not always work in the same direction and may pose limitations on each other.

This chapter initially outlines the relationship between the concepts of democracy and human rights. Subsequently it examines the claim that universal human rights elaborations stipulate for rights and freedoms commonly associated with the concept of democracy<sup>62</sup> and argues where the boundaries are of the so-called democratic rights. In this context it will be considered whether interpretation of the

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<sup>59</sup> Rich (2001), p. 23.

<sup>60</sup> Ibid., p. 20.

<sup>61</sup> UDHR, Article 29(2).

<sup>62</sup> Donnelly (2003), p. 609.

so-called democratic rights has taken a liberal-democratic bias in the post-Cold War period. Further, the proposed impacts of a liberal-democratic reading of international human rights law on general international law will be critically evaluated by analysing two somewhat distinct, though inter-related, theories: the normative democratic entitlement and democratic peace.

## **2.2. The relationship between human rights and democracy**

It often appears to be generally accepted that “human rights and democracy belong together.”<sup>63</sup> The two concepts are thus often used interchangeably.<sup>64</sup> Yet the question of the relationship between democracy – otherwise a concept within political theory – and the framework of human rights law is complex.<sup>65</sup> It is argued that “[d]emocracy aims to empower people in order to ensure that they, rather than some other group in society, rule [while] [h]uman rights, by contrast, aim to empower individuals, thus limiting rather than empowering the people and their government.”<sup>66</sup> Furthermore, despite the close-knit relationship between democracy and human rights, the two concepts should not be perceived as complementary but as an “organic unity.”<sup>67</sup> Therefore, democracy and human rights should not be referred to as synonyms or even as concepts necessarily pursuing the same goal, but rather as two concepts mutually dependent and supportive of one another.

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<sup>63</sup> Marks and Clapham (2005), p. 61.

<sup>64</sup> Donnelly (2003), p. 631: “If we are really interested in regimes that protect the full range of internationally recognized human rights – which is what most well-meaning Western advocates of ‘democracy’ seem to have in mind – why not just say that? Why take the risk of being misread, or glossing over the crucial qualifying adjectives, by talking about democracy.”

<sup>65</sup> Beetham (1999), pp. 89–90: “Democracy and human rights have historically been regarded as distinct phenomena, occupying different areas of the political sphere: the one a matter of the organization of government, the other a question of individual rights and their defence. [The distinctions between democracy and human rights] have been further reinforced by an academic division of labour which has assigned the study of democracy to political science, and of human rights to law and jurisprudence.”

<sup>66</sup> Donnelly (2003), p. 619. To this one should add that human rights do not always empower only individuals but also groups such as peoples and minorities. For more see *infra* ch. 5.

<sup>67</sup> Beetham (1999), p. 90.

The definition of the relationship between human rights and democracy depends on the definition of democracy one adopts. Thus its different definitions need to be considered.

### **2.2.1. The procedural definition of democracy and its shortcomings**

The term ‘democracy’ is a synthesis of the Greek words *demos*, meaning ‘people’, and *kratos*, meaning ‘rule’.<sup>68</sup> Semantically, the term democracy stands for ‘rule by the people’; however, in political science discourse there has been much ambiguity surrounding both components of the word ‘democracy’. A consensus has been achieved that the term ‘people’ means all adult men and women.<sup>69</sup> However, a consensus over the meaning of the term ‘rule’ is more elusive. Thus, the disputable question now is no longer who rules, but rather how people exercise their rule.

The classical modern theory of democracy, adopted at the end of the eighteenth century, was government-centric and defined democracy “in terms of sources of authority for government, purposes served by government, and procedures for constituting government.”<sup>70</sup> In the early years of modern democracy, when the category of ‘people’ was severely restricted, predominantly to wealthy men of a specific societal status determined by birth and education, the democratic method was confined to a small elite, which exercised rule on behalf of the majority, itself excluded from the power to rule.<sup>71</sup> The democratic method of this kind still significantly resembled non-democratic ones.<sup>72</sup> This was rather a situation of “[a]

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<sup>68</sup> See Sorensen (1993), p. 3.

<sup>69</sup> Relatively recently women in many states deemed democratic did not constitute the category of ‘people who rule’. Many male citizens had long been excluded from this category based on reasons such as ethnic and racial background, class background, level of education, and wealth. See Sorensen (1993), pp. 9–16.

<sup>70</sup> Huntington (1990), p. 6.

<sup>71</sup> See Held (1995), pp. 9–12.

<sup>72</sup> In some sense such rule was similar to that later established in apartheid South Africa, where democratic rule was in the hands of a minority determined by race, while the majority could not participate in the exercise of rule. See Sorensen (1993), pp. 14–17.

society divided between a large impoverished mass and a small favoured elite [which] would result either in oligarchy (dictatorial rule of the small upper stratum) or in tyranny (popularly-based dictatorship).”<sup>73</sup>

With extension of the category ‘people’, the inadequacy of the government-centric definition of the rule became evident. The most tangible and quantitatively provable switch to the real rule of people happened by adoption of electoral laws that enacted universal suffrage.<sup>74</sup> This enabled everyone to participate in the democratic process. Thus, the classical, i.e. government-centric, understanding of democracy was challenged in the electoral process. Consequently, a new understanding of democracy was developed, which is well-captured in the writings of Joseph Schumpeter: “[T]he democratic method is that of institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote.”<sup>75</sup> His ideas have remained both influential and criticised up to present.<sup>76</sup>

If one literally follows Schumpeter’s definition, democracy would only be a matter of electoral process. In such an understanding people periodically have a chance to elect their political leaders, while in the time between the elections, their participation within society is limited to the status of observers who assess the actions of their leaders in order to decide whether to re-elect or to replace them at the next elections.<sup>77</sup> In this understanding one could argue that the only action that political leaders are precluded from is suspension of the following elections.

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<sup>73</sup> Lipset (1994), p. 75.

<sup>74</sup> It is argued that elections are the most tangible part of the democratic process and therefore are often considered a synonym for democracy. Carothers (1992), p. 264. Compare *infra* n. 180.

<sup>75</sup> Schumpeter (1942), p. 269.

<sup>76</sup> See *infra* ch. 2.4.

<sup>77</sup> Such an understanding of democracy may be challenged by the question of whether a democratic political system would not be “more democratic if ordinary citizens (as they typically do) lobbied their representatives between elections, organized campaigning groups, engaged in consultative processes, took part in demonstrations ... if they actively regarded public matters as their affair, and if

The ‘institutional arrangement’<sup>78</sup> necessary for election of leaders may, however, point out an arrangement wider than merely that of electoral law which is not to be suspended. Indeed, the Schumpeterian definition of democracy already looks beyond the electoral process as the sole criterion of democracy and “elucidates the link between democracy, rights and the rule of law.”<sup>79</sup> Namely, if everyone is allowed to compete for political leadership, “this will in most cases though not in all mean a considerable amount of freedom of discussion for all. In particular it will normally mean a considerable amount of freedom of the press,”<sup>80</sup> which enables an individual to obtain more information on the candidates and their programmes and thus optimise the electoral choice. In essence, even the Schumpeterian understanding of the electoral process is not only about standing for an election and casting a vote, but it rather means that “the institution of periodic elections must go hand in hand with the necessary institutions for securing respect for the rule of law and constitutional guarantees of civil and political rights.”<sup>81</sup>

The Schumpeterian understanding of democracy does not literally refuse to look beyond elections but rather puts elections at the centre of the democratic method.<sup>82</sup> In this perception, free and fair elections are seen not as a necessary condition of democracy, but as a sufficient one.

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representatives were systematically required to listen to them.” Beetham (1999), p. 3. In other words, the democratic process operates even between elections and not only at elections.

<sup>78</sup> Schumpeter (1942), p. 269.

<sup>79</sup> Marks (2000), p. 51.

<sup>80</sup> Schumpeter (1942), pp. 271–72.

<sup>81</sup> Marks (2000), p. 51.

<sup>82</sup> The Schumpeterian definition of democracy expressly echoes within the normative democratic entitlement theory: “The existence of a democratic form of government – evidenced by fair and free periodic elections, three branches of government, an independent judiciary, freedom of political expression, equality before the law, and due process – is *sine qua non* to the enjoyment of human rights.” Cerna (1995), p. 295. Above it was established that these institutions are indeed the *sine qua non* of the enjoyment of human rights as well as democracy. However, to take these institutions as evidence of a democratic form of government is to ignore that the relationship between human rights and democracy is much more complex and not confined to a selection of civil and political rights.

While such a narrow (i.e. procedural) understanding of democracy acknowledges the necessity for other rights to be respected – expressly the freedoms of speech and assembly – it defines these rights vis-à-vis the right to political participation rather than vis-à-vis the entire human rights framework. In other words, the freedoms of speech and assembly in this model are the *sine qua non* of democracy because they are the *sine qua non* of the right to political participation.<sup>83</sup> Such a definition of democracy is thus based on a hierarchical order of a selection of civil and political rights.

### **2.2.2. The substantive definition of democracy in relation to human rights**

In contrast to the procedural definition, the substantive definition of democracy is based on democracy's underlying principles rather than merely elections. It is argued that:

The core idea of democracy is that of popular vote or popular control over collective decision-making. Its starting point is with the citizen rather than with the institutions of government. Its defining principles are that all citizens are entitled to a say in public affairs, both through participation in government, and that this entitlement should be available on terms of equality to all. Control *by* citizens over their collective affairs and equality *between* citizens in the exercise of that control are the basic democratic principles.<sup>84</sup>

Democracy is defined in a much broader sense of popular control and equality for all. Such a definition enables answering of the question of “why particular institutions or procedures have a claim to be democratic, and what needs to be changed to be more so.”<sup>85</sup> Democracy is thus not defined as something absolute or as a promised destination, but rather as a continuous journey.<sup>86</sup>

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<sup>83</sup> Compare the UN Human Rights Committee (HRC), General Comment 25 (1996), para 12.

<sup>84</sup> Beetham (1999), p. 90–91 (italics in original).

<sup>85</sup> Marks and Clapham (2005), p. 63.

<sup>86</sup> Marks (2000), p. 73.

In the substantive definition of democracy, civil and political, as well as social, economic and cultural rights are made an integral part of democracy.<sup>87</sup> Indeed, “[i]f public decision-making is the business of all citizens equally, then all must be not just entitled, but also enabled, to undertake it, and that calls for access to the requisite social, economic and cultural resources. Political equality depends on overcoming material deprivation.”<sup>88</sup> This relationship is one of mutual dependency between economic, social and cultural rights on one side and democracy on the other,<sup>89</sup> as the absence of social, economic and cultural rights “compromises civil and political equality, the quality of public life and the long-term viability of democratic institutions themselves; democracy, on the other hand, constitutes a necessary if not sufficient condition for the protection of economic and social rights.”<sup>90</sup>

Two main challenges to the argument of mutual dependency between social, economic and cultural rights and democracy have been invoked. First, proponents of the procedural understanding of democracy argue that social, economic and cultural rights lack normative precision and, consequently, democracy cannot be normatively defined. Such a view is well-captured in the following observation:

To some people democracy has or should have much more sweeping and idealistic connotations. To them, “true democracy” means *liberté, égalité, fraternité*, effective citizen control over policy, responsible government, honesty and openness in politics, informed and rational deliberation, equal participation and power, and various other civic virtues. These are, for the most part, good things and people can, if they wish, define democracy in these terms. Doing so, however, raises the problems that

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<sup>87</sup> Beetham (1999), p. 114.

<sup>88</sup> Marks and Clapham (2005), pp. 64–65.

<sup>89</sup> Beetham (1999), p. 114.

<sup>90</sup> *Ibid.*

come up with the definitions of democracy by source or by purpose. Fuzzy norms do not yield useful analysis.<sup>91</sup>

Second, the mutual dependence between social, economic and cultural rights on the one hand and democracy on the other has been challenged by the neo-liberal<sup>92</sup> view that social, economic and cultural rights contradict some of the rights from the civil and political cluster. Fukuyama defines ‘fundamental rights’ as civil and political rights and rejects social, economic and cultural rights arguing that “the achievement of these rights is not clearly compatible with other rights like those of property or free economic exchange.”<sup>93</sup> Such an argument has been described as “the extreme neo-liberal view that private property and the freedom of exchange constitute absolute and untouchable ‘natural rights’”.<sup>94</sup> This is, however, to overlook that both private property and freedom of exchange are “socially constructed and validated institutions, whose primary justification lies in their effectiveness in securing people’s means of livelihood.”<sup>95</sup> Ultimately, “[a] democratic society ... requires both the institutions of private property and free exchange and the guarantee of basic economic rights, if it is to be founded upon a general consent.”<sup>96</sup>

Although human rights and democracy ‘belong together’, they should not be understood as synonyms, nor are they merely a corrective of each other. While

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<sup>91</sup> Huntington (1990), p. 9.

<sup>92</sup> Consider the following definition of neo-liberalism: “Neoliberalism is in the first instance a theory of political economic practices that proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets, and free trade. The role of the state is to create and preserve an institutional framework appropriate to such practices ... [I]f markets do not exist ... then they must be created, by state action if necessary. State interventions in markets (once created) must be kept to a bare minimum because, according to the theory, the state cannot possibly possess enough information to second-guess market signals (process) and because powerful interest groups will inevitably distort and bias state interventions (particularly in democracies) for their own benefit.” Harvey (2005), p. 2.

<sup>93</sup> Fukuyama (1992), pp. 42–43.

<sup>94</sup> Beetham (1999), p. 101.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid., pp. 100–01.

democracy and human rights depend on each other, realisation of one does not bring automatic realisation of the other.<sup>97</sup>

### **2.2.3 Democratic transition and democratic consolidation**

When new democratisations are in question, the implementation of democratic institutions and procedures is a task of democratic transition. In one oft-quoted definition, in the process of democratic transition a state adopts the legal order, the institutions and procedures which guarantee and allow for:

(i) the right to vote, (ii) the right to be elected, (iii) the right of political leaders to compete for support and votes, (iv) elections that are free and fair, (v) freedom of association, (vi) freedom of expression, (vii) alternative sources of information and (viii) institutions for making public policies depend on votes and other expressions of preference.<sup>98</sup>

However, “[w]hile the transition process is critical, experience has shown that the more difficult battle is that for democratic consolidation; simply put, one successful election does not create democracy.”<sup>99</sup>

Diamond defines democratic consolidation as a process “in which the norms, procedures, and expectations of democracy become so internalized that actors routinely, instinctively conform to the written (and unwritten) rules of the game, even when they conflict and compete intensely.”<sup>100</sup> Democratic consolidation thus depends on the behaviour of political actors and not merely on the existence of democratic procedures.<sup>101</sup> Democratic consolidation is therefore an ongoing process, a continuous journey,<sup>102</sup> during which steps forward or backwards are always possible. Responsibility for democratic consolidation does not lie only with

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<sup>97</sup> Marks and Clapham (2005), p. 64.

<sup>98</sup> Dahl (1971), p. 3,

<sup>99</sup> Rich (2001), p. 26.

<sup>100</sup> Diamond (1999), p. 65.

<sup>101</sup> Ibid.

<sup>102</sup> Compare supra n. 86.

governments but also with other actors, such as the political opposition, civil society, media and even individuals and international factors.<sup>103</sup>

One could say that in the view of the procedural definition of democracy, democratic transition is enough to proclaim a certain state to be a democracy. On the other hand, the substantive understanding of democracy, arguably, takes a consolidated democracy as its ideal. However, as democratic consolidation depends on multiple actors (i.e. it is not a sole responsibility of governments) and is virtually impossible to define normatively, it would be difficult to draw international legal prescriptions and consequences with a consolidated democracy in mind.

### **2.3. Democracy within the normative framework of human rights law**

Although international human rights instruments make no reference to democracy itself being a human right, arguments have been made that democratic principles operate within certain human rights elaborations and thus “by becoming a party to an international human rights instrument, a state agrees to organize itself along democratic lines by establishing independent tribunals, allowing freedom of expression, and conducting free elections.”<sup>104</sup>

This understanding is a reflection of the procedural understanding of democracy, which places free and fair elections in the middle of the democratic process, while it acknowledges that some other criteria of human rights protection also need to be met for the conducting of such elections.<sup>105</sup> Yet, even if one accepts the electoral-centric (procedural) definition of democracy, it is questionable whether the universal understanding of the right to political participation really requires the political system of liberal-democracy.

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<sup>103</sup> For more see Berglund (2001), pp. 13–14. See also Diamond (1999), p. 66.

<sup>104</sup> Cerna (1995), p. 295.

<sup>105</sup> See supra ch. 2.2.1.

### 2.3.1. Right to political participation and democracy

The right to political participation is elaborated in Article 21 of the UDHR and in Article 25 of the International Covenant on Civil and Political Rights (ICCPR). In the Cold War environment, the meanings of the “will of the people”<sup>106</sup> and of the “will of the electors”<sup>107</sup> were controversial.<sup>108</sup> This was a consequence of two competing interpretations of democracy and democratic principles at that time. The interpretation of the Western<sup>109</sup> world referred to the model of ‘liberal-democracy’,<sup>110</sup> while the interpretation of the Soviet bloc referred to the model of ‘people’s democracy’.<sup>111</sup>

Article 25 of the ICCPR provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.<sup>112</sup>

Similar to Article 21 of the UDHR, Article 25 of the ICCPR does not specifically require multiparty elections. Further, it does not establish a specific link between elections and government-formation. In other words, nothing in this provision

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<sup>106</sup> UDHR, Article 21(3)

<sup>107</sup> ICCPR, Article 25(b).

<sup>108</sup> A possible interpretation could also be that, for example, multiparty elections are not required if the will of the people is against them. See Rich (2001), p. 23.

<sup>109</sup> The term ‘Western states’ at that time implied states belonging to the regional group ‘Western European and Others’, unofficially used within the UN system. Yet after the end of the Cold War such a definition of ‘Western states’ is no longer adequate. References to ‘Western states’ in the post-Cold War era should then be understood as states of Europe broadly understood and non-European states in which societies are of European historic, cultural, religious and linguistic origin. In this context Carothers (1992), p. 263 argues: “Latin America and Eastern Europe are essentially parts of the Western world.”

<sup>110</sup> See *infra* ch. 2.3.3. for understanding of democracy in the framework of the ECHR.

<sup>111</sup> See Roth (1999), p. 331, consider especially the following argument: “In the Marxist-Leninist view, multi-party competition [otherwise a crucial postulate of the Western concept of liberal-democracy] masks the inalterable structure of power rooted in the concentrated ownership and control of the major means of production, distribution and exchange.”

<sup>112</sup> ICCPR, Article 25.

defines the extent to which a government needs to reflect the electorate's will.<sup>113</sup> If in a liberal-democratic understanding the composition of government needs to reflect electoral results,<sup>114</sup> and elections need to take place in a true multiparty setting,<sup>115</sup> such an interpretation is not acceptable for the Leninist concept of democracy.<sup>116</sup> Indeed, the drafting history shows that many, if actually not most, signatory states would have refused to ratify the ICCPR were it to bind them to liberal-democratic institutions.<sup>117</sup> Thus, the language of the UDHR and the ICCPR is to be understood as an attempt "to avoid controversy over institutional requisites, while still asserting a universal human interest in political participation that states are bound to satisfy in some manner,"<sup>118</sup> while one cannot proclaim the liberal-democratic interpretation of democracy as the authoritative one.

The position that human rights treaty provisions and customary international law do not require a state to adopt any particular electoral method or, in general, any political, social, economic and cultural system, was confirmed by the ICJ in the *Nicaragua case*.<sup>119</sup> However, if such an interpretation of the ICCPR and of customary

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<sup>113</sup> Roth (1999), p. 330.

<sup>114</sup> This postulate of liberal-democracies is subject to caution. Since the liberal-democratic model does not prescribe a single model of government-formation or a single constitutional system (presidential, semi-presidential, or parliamentary), the 'representative government' may significantly differ from electoral results. What is more, the question of what is a 'representative government' to a great degree becomes subject to subjective analyses. For more see infra ch. 2.3.3.

<sup>115</sup> Even this postulate is subject to caution as the liberal-democratic model does not prescribe a single model of party system, which is also a consequence of different electoral systems. The model of two-party democracy may lead to significant considerations regarding its democratic quality and so can a fragmented, so-called hundred-party system. A detailed analysis of these deficiencies would, however, reach beyond the scope of this thesis. For more see von Beyme (2001), pp. 3–24, Elgie and Zielonka (2001), pp. 25–47.

<sup>116</sup> See supra n. 111.

<sup>117</sup> Roth (1999), p. 332.

<sup>118</sup> Ibid.

<sup>119</sup> In the *Nicaragua case*, ICJ Rep 1986, the ICJ, *inter alia*, held: "[T]he Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections." (para 261). The Court took this position although Nicaragua was a party to the ICCPR and further argued: "[A]dherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State ... The Court cannot contemplate the creation of a new rule opening up a

international law was accurate in 1986, there is a question of whether this has changed after the end of the Cold War.

### **2.3.2. A liberal-democratic bias in post-Cold War international law?**

After the end of the Cold War, an argument in favour of a global trend shifting toward democracy was made within international law scholarship. Writing in 1992, Franck argued:

For nations surfacing from long, tragic submergence beneath bogus ‘people’s democracy’ or outright dictatorship, the legitimization of power is a basic, but elusive, move in the direction of reform. As of late 1991, there are more than 110 governments, almost all represented in the United Nations, that are legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise. Most joined the trend in the past five years.<sup>120</sup>

While Franck acknowledges that there are still a few out of 110 democracies that are democratic “more in form than in substance,”<sup>121</sup> there is much critique against such a generalisation. Indeed, the number of democracies only formally following electoral procedures while not being substantial democracies is too great to be put into the category of ‘merely a few’.<sup>122</sup> It is therefore questionable whether the end of the Cold War has provided us with practice in support of the claim that the right to political participation is to be understood in the interpretation of the Western model of liberal-democracy.

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right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.” (para 263).

<sup>120</sup> Franck (1992), p. 47.

<sup>121</sup> Ibid.

<sup>122</sup> In response to Franck’s argument it was held that “this observation greatly overstates the prevalence of electoral structures that can usefully be characterized as liberal-democratic. Electoral processes in many countries coexist with *de jure* or *de facto* repression, exclusion of candidates regarded as unacceptable, and reserves of power (especially military) elites, not to mention mechanisms for the perpetration and fraud.” Roth (1999), p. 337.

In 1990, the General Assembly adopted Resolution 45/150, entitled ‘Enhancing the effectiveness of the principle of periodic and genuine elections’. The Resolution, *inter alia*, provides:

[T]he efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other States.<sup>123</sup>

This Resolution was followed by Resolution 45/151, entitled ‘Respect for the principles of national sovereignty and non-interference in the internal affairs of States and their electoral processes’. The Resolution, *inter alia*, provides:

Recognizing that the principles of national sovereignty and non-interference in the internal affairs of any State should be respected in the holding of elections;

Also recognizing that there is no single political system or single model for electoral process equally suited to all nations and their peoples, and that political systems and electoral processes are subject to historical, political, cultural and religious factors;

4. Urges all states to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system.<sup>124</sup>

Arguably, this is the first post-Cold War expression of *opinio juris*<sup>125</sup> on the relationship between obligations imposed by the right to political participation and the principle of non-interference into matters essentially in domestic jurisdiction, such as adoption of a particular political system and/or electoral method. These General Assembly Resolutions confirm the *Nicaragua case* standard. Namely,

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<sup>123</sup> GA Res 45/150 (18 December 1990). The Resolution was adopted with a vote of 129 in favour and eight against, with nine abstentions.

<sup>124</sup> GA Res 45/151 (18 December 1990). The Resolution was adopted with a vote of 111 in favour, and twenty-nine against, with eleven abstentions.

<sup>125</sup> General Assembly resolutions are not *per se* a source of international law, but may serve as expression of *opinio juris* and state practice. Indeed, “[t]he process by which they [General Assembly Resolutions] are adopted (adopted unanimously, or nearly unanimously, or by consensus or otherwise) establishes whether the practice is a ‘general’ one.” Harris (2004), p. 58. See also *infra* n. 424.

obligations imposed on states by the right to political participation and other human rights standards do not demand a specific political system.

In 1996, the Human Rights Committee (HRC) adopted General Comment 25, in which it held that the right to political participation “lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”<sup>126</sup> Further, it established that the right to political participation depends on some other rights: “Freedom of expression, assembly and association are essential conditions for the right to vote and must be fully protected.”<sup>127</sup>

The HRC further argued that “[p]ositive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively.”<sup>128</sup> Notably, the HRC invoked a number of requisites necessary for the right to political participation to be exercised effectively that are comprehended in a cluster of social, economic and cultural rights, but failed to invoke those rights specifically (very notably the right to health and the right to education). The HRC, however, also specifically stated that no particular electoral system is prescribed by the right to political participation.<sup>129</sup>

It has been observed that General Comment 25 “gives teeth to the Covenant’s obligation to hold ‘genuine periodic elections’.”<sup>130</sup> However, what is evidently absent in General Comment 25 is a specific reference to elections in a multiparty setting.

Consequently, not even General Comment 25 allows us to adopt a liberal-democratic bias when reading the elaboration of the right to political participation in

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<sup>126</sup> HRC, General Comment 25 (1996), para 1.

<sup>127</sup> *Ibid.*, para 12.

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*, para 21.

<sup>130</sup> Rich (2001), p. 23.

the ICCPR, as “[t]here is a great difference ... between obliging States to address seriously their citizens’ interest in participation in governance and imposing on a state a specific political solution in a given circumstance.”<sup>131</sup>

### **2.3.3. Democracy in regional human rights treaties**

There is no reference to democracy in the African Charter on Human and Peoples’ Rights.<sup>132</sup> On the other hand, the American Convention on Human Rights (ACHR)<sup>133</sup> makes a reference to ‘democratic institutions’ in the preamble,<sup>134</sup> while elaborations of the right to assembly,<sup>135</sup> freedom of association<sup>136</sup> and freedom of movement and residence<sup>137</sup> invoke the interest of ‘democratic society’, for the purpose of which these rights may be limited. Further, Article 32 provides: “The rights of each person are limited by the rights of others, by the security of all, and by the just demands of the general welfare, in a democratic society.”<sup>138</sup> The strongest reference to democracy as a political system is, however, made in Article 28 which, *inter alia*, provides that “[n]o provision of [the ACHR] shall be interpreted as ... precluding other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government.”<sup>139</sup>

‘Representative democracy’ has also been invoked in reports of the Inter-American Commission on Human Rights, where the Commission “underlined the direct relationship between representative democracy and the guarantee of the

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<sup>131</sup> Roth (1999), p. 343.

<sup>132</sup> The African Charter on Human and Peoples’ Rights (1982).

<sup>133</sup> The American Convention on Human Rights (ACHR) (1969).

<sup>134</sup> *Ibid.*, Preamble, para 1.

<sup>135</sup> *Ibid.*, Article 15

<sup>136</sup> *Ibid.*, Article 16

<sup>137</sup> *Ibid.*, Article 22.

<sup>138</sup> *Ibid.*, Article 32(2).

<sup>139</sup> *Ibid.*, para 28(c).

observance of human rights.”<sup>140</sup> Yet nothing in the ACHR implies that elections need to be in a multiparty setting.

The phrase ‘representative democracy’ within the ACHR has also been dealt with in the jurisprudence of the Inter-American Court of Human Rights. In this regard the Court argued:

States may establish minimum standards to regulate political participation, provided they are reasonable and in keeping with the principles of representative democracy. These standards should guarantee, among other matters, the holding of periodic free and fair elections based on universal, equal and secret suffrage, as an expression of the will of the voters, reflecting the sovereignty of the people, and bearing in mind, as established in Article 6 of the Inter-American Democratic Charter, that “[p]romoting and fostering diverse forms of participation strengthens democracy”.<sup>141</sup>

The right and opportunity to vote and to be elected embodied in Article 23(1)(b) of the American Convention is exercised regularly in genuine periodic elections by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.<sup>142</sup>

In *Castañeda Gutman v Mexico*, the Court also held that “the American Convention, like other international human rights treaties, does not establish the obligation to implement a specific electoral system. Nor does it establish a specific mandate on the mechanism that the States must establish to regulate the exercise of the right to be elected in general elections.”<sup>143</sup> The Court therefore did not specifically establish that elections need to take place in a multiparty setting. However, the Court further held:

[I]n comparative electoral law, the regulation of the right to be elected, as regards the registration of the candidacies, may be executed in two ways: by the system of registration of candidates exclusively

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<sup>140</sup> Trinidad (1998), p. 410.

<sup>141</sup> *Yatama v Nicaragua* (2005), para 207.

<sup>142</sup> *Castañeda Gutman v Mexico* (2008), para 149.

<sup>143</sup> *Ibid.*

by the political parties, or by the system of registration of candidacies by the political parties, together with the possibility of registering independent candidacies.<sup>144</sup>

Although this observation was made in the context of registration of candidates, it is significant that the Court made a reference to political parties in plural. Thus, it might be possible to argue that while there exists no generally prescribed electoral system, the Court has at least implied, although not unequivocally stated, that elections need to be in a multiparty setting.

The subsequent chapters of this thesis deal with situations of new state creations in which international involvement expressed some democratic considerations.<sup>145</sup> In the majority of situations of this kind, international involvement was evidently channelled through European states. Therefore the image of democracy applied was, arguably, also European. The European image of democracy is, however, reflected in the framework of the European Convention of Human Rights (ECHR), which therefore needs to be more thoroughly considered.

The European Convention of Human Rights (ECHR) stipulates for limitation of certain rights if ‘necessary in democratic society’. This limitation clause is not invoked generally but is attached to specific human rights provisions: the right to a fair trial,<sup>146</sup> the right to respect for private life and family,<sup>147</sup> freedom of thought, conscience and religion,<sup>148</sup> freedom of expression,<sup>149</sup> and freedom of assembly and association.<sup>150</sup> However, at the time of its drafting, democracy within the ECHR framework was not understood too broadly. Indeed, the initial draft elaboration of the right to political participation, which stipulated for elections in a multiparty setting,

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<sup>144</sup> Ibid., para 198.

<sup>145</sup> See *infra* ch. 4.

<sup>146</sup> European Convention on Human Rights (ECHR) (1950), Article 6.

<sup>147</sup> Ibid., Article 8.

<sup>148</sup> Ibid., Article 9.

<sup>149</sup> Ibid., Article 10.

<sup>150</sup> Ibid., Article 11.

was rejected.<sup>151</sup> The interpretation of the so-called democratic rights was thus not unitary and could accommodate different concepts of democracy and electoral process.

The subsequent jurisprudence of the European Court of Human Rights (ECtHR), however, ascribed the elaborations of the so-called democratic rights within the ECHR a liberal-democratic meaning. The link between democracy and freedom of expression was established in the *Handyside case*<sup>152</sup> and was later affirmed in a number of subsequent cases.<sup>153</sup>

The standard that elections need to take place in a multiparty setting was firmly established in the *United Communist Party of Turkey case*, dealing with the freedom of assembly and association:

[P]olitical parties are a form of association essential to the proper functioning of democracy. In view of the importance of democracy in the Convention ... there can be no doubt that political parties come within the scope of Article 11 ...<sup>154</sup>

[T]he State is under the obligation, among others, to hold, in accordance with Article 3 of Protocol No. 1, free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Such choice is inconceivable without the participation of a plurality of political parties representing the different shades of opinion to be found within countries' population. By relaying this range of opinion – with the help of the media – at all levels of social life, political parties make an irreplaceable contribution to political debate, which is at the very core of the concept of a democratic society.<sup>155</sup>

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<sup>151</sup> Collected Edition of the "Travaux Préparatoires" of the European Convention on Human Rights (1975) [hereinafter *Travaux*, vol. 1], p. 296 (attached to Teitgen report). This right was later added in Article 3 of Protocol 1 to the ECHR. Its elaboration is less comprehensive, i.e. it does not invoke multiparty elections and can thus be compared to the elaborations of this right in the UDHR and ICCPR. See ECHR, Protocol 1 (1952), Article 3.

<sup>152</sup> *Handyside v United Kingdom* (1976), para 49.

<sup>153</sup> See the following cases: *Lingens v Austria* (1986), para 41; *Oberschlick v Austria* (1991), para 57; *Castells v Spain* (1992), para 42; *Jersild v Denmark* (1995), para 31; *Goodwin v United Kingdom* (1996), para 39; *Karhuvaara and Italehti v Finland* (2005), para 37; *Busuioc v Moldova* (2005), para 58; and *Steel and Morris v United Kingdom* (2005), para 87.

<sup>154</sup> The *United Communist Party of Turkey case* (1998), para 24.

<sup>155</sup> *Ibid.*, para 44.

The framework of the ECHR thus became much more specific in terms of the definition of a particular political system than it was at the time of its drafting. Indeed, in the Court's view: "Democracy is without doubt a fundamental feature of the European public order. Democracy ... appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it."<sup>156</sup> Importantly, the Court unequivocally linked democracy with multiparty elections.

The Court's most recent jurisprudence also shows that democracy in the framework of the ECHR is to be understood comprehensively and not merely in terms of electoral procedures. In the *Rekvenyi case*, the Court dealt with the question of whether the prohibition of members of the police, military, and security forces to join political parties was a violation of Article 11 of the ECHR. The Court based its reasoning on the relatively recent Hungarian experience with a non-democratic regime, in which the police, military, and security forces were heavily politicised and in the service of the regime.<sup>157</sup> The Court did not find the prohibition to be a violation of Article 11 and stated that such a limitation could be beneficial for the "consolidation and maintenance of democracy".<sup>158</sup>

Also interesting from this perspective is the *Ždanoka case*, where the Court held that the limitation of the right to stand for an election to a person who was actively involved in the activities of the Communist Party of Latvia (CPL) was disproportionate and not necessary in a democratic society.<sup>159</sup> The Court clearly separated the question of de-politicisation of the police, military, and security forces,

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<sup>156</sup> Ibid., para 45.

<sup>157</sup> *Rekvenyi v Hungary* (2000), para. 47.

<sup>158</sup> Ibid., para. 42.

<sup>159</sup> *Ždanoka v Latvia* (2006), para. 110.

upheld in the *Rekvenyi case*, from the question of restriction of the right to political participation.<sup>160</sup>

The *Ždanoka case* is also instructive because of the Court’s reasoning on the question of the imminence of a threat to ‘democratic society’. The Government of Latvia argued that former members of the CPL were a threat to Latvian democracy. According to the submission of the Government of Latvia, the CPL had sponsored subversive actions against the newly-elected Latvian government, following the first democratic elections in March 1990.<sup>161</sup> The Court, however, rejected this view: “[T]he applicant’s disqualification from standing for election to Parliament and local councils on account of her active participation in the CPL, maintained more than a decade after the events held against that party, is disproportionate to the aim pursued and, consequently, not necessary in a democratic society.”<sup>162</sup>

The Court gave express support to the view of the dissenting opinion of three (out of seven) judges of the Constitutional Court of Latvia, where it was held that “the Latvian democratic system had become sufficiently strong for it no longer to fear the presence within its legislative body of persons who had campaigned against the system ten years previously.”<sup>163</sup> The Court thus partly based its decision on the view that the state of Latvian democracy ten years after the subversive events was at a level where such restrictions were no longer necessary. Although the Court did not use the specific term ‘democratic consolidation’, it obviously took the latter into account when deciding that a threat to ‘democratic society’ was not imminent. Arguably, the Court thus also implied that its decision might have been different if it had considered Latvian democracy not consolidated enough to reject the existence of

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<sup>160</sup> Ibid.

<sup>161</sup> Ibid., para 66.

<sup>162</sup> Ibid., para. 110.

<sup>163</sup> The Constitutional Court of Latvia, Judgment of 30 August 2000, cited in the *Ždanoka case* (2006), para 49.

an imminent threat to ‘democratic society’. This allows us to assume that in a possible similar case in the future, the Court’s decision might be different and imminence could be established based on a democracy more vulnerable than Latvia’s was at the time when the decision in the *Ždanoka case* was taken. Arguably, the Court adopted an approach to contribute to substantive democracy within state parties and contribute toward democratic consolidation.

This section has shown that in the time of drafting of the ECHR, references to democratic society did not reach beyond the meaning of such reference in the UDHR and elaborations of the so-called democratic rights were not read with a liberal-democratic bias. However, jurisprudence of the ECtHR has changed this understanding and now there exists no doubt that state parties to the ECHR need to organise their electoral method and political system along liberal-democratic lines. The Inter-American Court of Human Rights has moved in the same direction, though not as unequivocally as the ECtHR.

## **2.4. The normative democratic entitlement**

### **2.4.1. Explaining the concept and its criticism**

At the end of the Cold War and in the triumphal age of liberal-democracy and ideological proclamation of the “end of history”,<sup>164</sup> an attempt was made to proclaim democracy itself a human right. In his groundbreaking article entitled ‘The Emerging Right to Democratic Governance’,<sup>165</sup> Franck derives the right to democratic governance from the right of self-determination, freedom of expression and the right to political participation.<sup>166</sup> Franck remains aware that this is a rather narrow concept of democracy; however, he is prepared to accept it in order to find the lowest

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<sup>164</sup> See for more on the critique of ‘democratic ideology’, see Marks (2000), 8–49.

<sup>165</sup> Franck (1992).

<sup>166</sup> See Franck (1992), p. 52

common denominator in the politically and culturally diverse world.<sup>167</sup> Further, Franck sees that a right to democratic governance, so underpinned, benefits from a relatively clear normative framework and thus appears to be much more persuasive as a legal right.<sup>168</sup>

Franck argues that people's consent – meaning democratic choice – validates governance.<sup>169</sup> Consequently the legitimacy of non-democratic governments is disputed. At the same time the democratic legitimacy of a government is not merely an internal, but also an international category.<sup>170</sup> An international component in this understanding also means that the right to democratic governance is guaranteed on the international plane and that there should exist international mechanisms for its protection.

Although the three cornerstones of the right to democratic governance (the right of self-determination, freedom of expression and the right to political participation) have been acknowledged as international human rights, initially invoked by the UDHR and later specified by the ICCPR, it is argued that it was the international circumstances at the end of the Cold War that enabled the emergence of the customary rule of the global entitlement to democratic governance.<sup>171</sup> Franck argues that after the response to the coups in the Soviet Union and Haiti in 1991, “the leaders of states constituting the international community vigorously asserted that

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<sup>167</sup> Franck (1992), p. 90.

<sup>168</sup> Ibid. Compare Huntington (1990), pp. 9–10. Compare also supra ch. 2.2.1. For a critique of an attempt to fit democracy into the legal prescription see also Carothers (1992), p. 265, arguing: “International law, like most law, tends to look for bright lines, but it is very hard to find one when dealing with democracy.”

<sup>169</sup> Franck (1992), p. 47. Thus, Franck and other proponents of this theory assume that popular consent would always favour democracy, which is a rather utopian claim. Consider the following argument: “There is an assumption by pro-democracy advocates that government by consent means democracy.” Carothers (1992), p. 265.

<sup>170</sup> Franck (1992), p. 46.

<sup>171</sup> On the other hand, it was argued that “[d]emocracy, or the right to live under a democratic form of government, became an international legal right in 1948 [by the UDHR], although for decades it was honored more in breach than in observance.” Cerna (1995), p. 290.

only democracy validates governance.”<sup>172</sup> In this perception, a global switch to democracy after the Cold War has occurred and (liberal) democracy has become the only form of government deemed legitimate by the world’s population: “People almost everywhere now demand that government be validated by Western style multiparty democratic elections. The [democratic] entitlement now aborning is widely enough understood to be almost universally celebrated.”<sup>173</sup>

When pronouncing Western style democracy as the universally-accepted, sole legitimate system of government, Franck provides little evidence for such a claim. Relevant evidence may exist within newly democratised Western societies.<sup>174</sup> Yet it would be virtually impossible to extend Western-style democracy to be the preference of all of humanity.<sup>175</sup>

The right to democratic governance also provokes a question associated with the definition of democracy, i.e. to what one is entitled by the proposed normative entitlement to democracy. The decisive criterion for the exercise of the right to democratic governance appears to be formation of a government based on free and fair elections:

The right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made.<sup>176</sup> ... The term ‘democracy’, as used in international rights parlance, is intended to connote the kind of governance that is legitimated by the consent of the governed. Essential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its government.<sup>177</sup>

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<sup>172</sup> Franck (1992), p. 47.

<sup>173</sup> *Ibid.*, p. 90.

<sup>174</sup> See Carothers (1992), pp. 262–63. See also *supra* n. 109.

<sup>175</sup> *Ibid.*, p. 263.

<sup>176</sup> Franck (2001), p. 25.

<sup>177</sup> Franck (1994), p. 75.

In this understanding, elections are perceived as a sufficient rather than necessary criterion for democracy.<sup>178</sup> The right is therefore premised on the procedural understanding of democracy, the shortcomings of which have been discussed above.<sup>179</sup> However, since elections are the most tangible part of the democratic process,<sup>180</sup> it is relatively easy to monitor them and determine whether they were free. According to Franck, the legitimacy of government would ultimately depend on this determination.<sup>181</sup>

#### **2.4.2. The substance of entitlement and normative determinacy through electoral monitoring**

The idea of the right to democratic governance proposes that electoral monitoring become an institutionalised instrument.<sup>182</sup> Merely refusing electoral monitoring – not the failure to have free and fair elections let alone democracy broadly understood – might then constitute a breach of international law.<sup>183</sup> This shifts the focus of the right to democratic governance from the electoral process to electoral monitoring.

Nevertheless, electoral monitoring features a quality of normative determinacy, which is otherwise significantly absent in value judgements on whether a certain state is a democracy.<sup>184</sup> Political scientists have developed methods to measure democracy, all of which, however, suffer from arbitrariness in the choice of parameters as well as in the creation of certain values in order to categorise states into groups ‘democratic’, ‘non-democratic’, and, possibly, ‘semi-democratic’.<sup>185</sup> Even if one adopted the definition of a democratic state proposed by the normative

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<sup>178</sup> Compare supra ch. 2.2.1.

<sup>179</sup> See supra ch. 2.2.1.

<sup>180</sup> Carothers (1992), p. 264.

<sup>181</sup> See Franck (1992), p. 90–91.

<sup>182</sup> Franck (2001), pp. 41–47.

<sup>183</sup> Ibid., p. 47, arguing: “If monitoring evolves into a universal obligation, perhaps consequences will attach even to a refusal to be monitored.”

<sup>184</sup> Compare supra ch. 2.2.2. and 2.2.3.

<sup>185</sup> For more on the attempts and problems of measuring democracy see Sorensen (1993), pp. 16–19.

democratic entitlement endeavour within international law scholarship,<sup>186</sup> there is still no central authority to make a judgement on whether a state is democratic. The threshold of democracy is thus reminiscent of a well-known definition of obscenity, made by the US Supreme Court Justice Stewart in *Jacobellis v Ohio* (1964), who held that he could not define which materials were obscene, but nonetheless famously concluded “I know it when I see it.”<sup>187</sup> With value judgements on whether a certain state is democratic, one could paraphrase this statement and establish the pattern in the following words: name a state and I will tell you whether it is a democracy.<sup>188</sup> Such value judgements are greatly influenced by a liberal-democratic self-image of states.<sup>189</sup> However, when consequences are to be drawn based on the determination of whether a state is a democracy, such subjective value judgements do not appear to be an appropriate underpinning.

The institutionalised international electoral-monitoring arrangement seemingly overcomes this deficiency. The democratic nature of a state is no longer defined in terms of ‘I know it when I see it’ but is rather backed by the authority of international electoral monitoring. In other words, through an international standard of electoral monitoring a threshold for democracy would be established which would work in two steps. In the first step states would need to agree to electoral monitoring. A rejection of monitoring would mean “a signal that the country concerned is not prepared to open itself to international scrutiny and is not interested in the international legitimacy that a positive report would bestow.”<sup>190</sup> In the second step, a report of international observers would need to be positive. This would seemingly

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<sup>186</sup> See supra ch. 2.4.1.

<sup>187</sup> *Jacobellis v Ohio* 378 US 184 (1964), concurring opinion of Justice Stewart.

<sup>188</sup> See Alvarez (2001), p. 194, who takes issue with an automatic presumption that the United States is an exemplary liberal-democracy.

<sup>189</sup> See Alvarez (2001), pp. 236–38.

<sup>190</sup> Rich (2001), p. 26.

provide the normative quality of the judgement on whether a state is democracy. However, the problem is that the decision of the electoral monitors can be objective only in relation to electoral procedure, i.e. if they did not discover any significant electoral fraud (e.g. fake ballots). The assessment of other demands of free elections, acknowledged even by the procedural understanding of democracy (i.e. freedom of expression, freedom of assembly, freedom of religion and conscience),<sup>191</sup> would, however, still remain in the subjective sphere of ‘I know it when I see it’. Indeed, in a short period spent in an observed state, observers cannot realistically assess the requisites of democracy in that state.<sup>192</sup>

Further, any assessment of this kind is inherently subjective because of the lack of normative criteria to be used when such assessments are made. Indeed, “electoral monitoring has not been the democratic panacea,”<sup>193</sup> as it is much easier to implement democratic institutions (the task of democratic transition) and observe this part of the democratisation process than to consolidate democracy and assess progress in this phase.<sup>194</sup>

The normative democratic entitlement idea pronounces democratic transition for democracy while democratisation theory sees this institutional part as only one phase of the democratisation process which needs to be followed by the consolidation phase.<sup>195</sup> However, it would be rather difficult to define the right to democratic governance as a ‘right to consolidated democracy’ for two major reasons. First, such a comprehensive definition of democracy does not provide us with a precise normative framework which would enable us to make a distinction between

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<sup>191</sup> See supra ch. 2.2.1.

<sup>192</sup> See Carothers (1992), p. 264.

<sup>193</sup> Rich (2001), p. 26.

<sup>194</sup> Ibid. Compare also supra ch. 2.2.3.

<sup>195</sup> See supra ch. 2.2.3.

‘democratic’ and ‘not democratic’.<sup>196</sup> Consequently, one could say that a comprehensive definition of democracy does not allow us to express in normative and non-descriptive terms what is a democracy. On the other hand, if normative democratic entitlement to democracy is *de facto* defined in terms of free and fair elections, the entitlement is much more precise and quantitatively definable.<sup>197</sup> Second, while governments can be held responsible for implementation of democratic institutions in respective states, the postulates of democratic consolidation reach beyond the responsibility of governments and define a variety of duty-bearers in the process of democratic consolidation.<sup>198</sup> In human rights language, it would be impossible to define upon whom the obligations stemming from the right to democratic governance, so conceived, would fall, and the obligations would go beyond those of governments.<sup>199</sup>

This section has shown that the idea of the right to democratic governance essentially adopts the procedural definition of democracy. As its normative determinacy is based on electoral monitoring, the right to democratic governance effectively becomes a right to monitored elections.

## **2.5. International law as law among liberal-democratic states**

### **2.5.1. Bringing the democratic peace theory into international law**

In 1795, Immanuel Kant wrote a work entitled “To Perpetual Peace: A Philosophical Sketch”<sup>200</sup> in which he laid out an idea of perpetual peace among states with a republican form of government which form a federation of free states. Kant saw

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<sup>196</sup> Compare supra ch. 2.2.2.

<sup>197</sup> Compare supra ch. 2.4.1.

<sup>198</sup> See Linz and Stepan (1996), p. 7. Compare supra ch. 2.2.3.

<sup>199</sup> Compare supra ch. 2.2.3.

<sup>200</sup> Kant (1795).

democracy on the domestic plane to be the decisive factor for peaceful behaviour on the international plane.<sup>201</sup>

The neo-Kantian understanding of international law rejects the Kelsenian concept of a presupposed validity of the *Grundnorm*,<sup>202</sup> and rather anchors the validity of the legal norm in the people's consent, which is presumed to be a consequence of rational choice.<sup>203</sup> The first premise is that people are rational and peace-loving and therefore their democratic choice is peace rather than war. If the second premise is that people exercise final control over decision-making, then the conclusion should follow that democracies pursue peaceful behaviour in international affairs.

In part of the post-Cold War international law scholarship, an attempt was made to accommodate neo-Kantian ideas of democratic peace within contemporary international law. In this theory, the consent of people on the domestic plane has direct implications for the law of statehood, as “[i]ndividuals must give consent to governments in order that they can possess the formal credentials of statehood.”<sup>204</sup> Consent of people is premised on the existence of a liberal-democratic political system, which is typically deemed to require the following qualities:

[1] formal legal equality for all citizens and constitutional guarantees of civil and political rights such as freedom of religion and the press; [2] broadly representative legislatures exercising supreme sovereign authority based on the consent of the electorate and constrained only by a guarantee of basic civil rights; [3] legal protection of private property rights justified either by individual acquisition,

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<sup>201</sup> Kant held: (1) “The civil constitution of every country shall be republican.” (2) [International law] shall be based on a federation of free states. In the neo-Kantian scholarship, the notion republican constitution is understood as constitution of a democratic state. Teson (1992), p. 61, for example, argues: “By ‘republican,’ Kant means what we would call today a liberal democracy, a form of political organization that provides full respect for human rights.”

<sup>202</sup> For Kelsen, “the affirmation of the foundational norm is ‘presupposed’ by any express or implied affirmation of individual legal rules. This affirmation of the foundational norm of a legal system (‘one ought to do whatever is authorized by the historically first constitution’), is what Kelsen calls the ‘*Grundnorm*’ or ‘Basic Norm’.” Bix (2006), p. 59.

<sup>203</sup> Teson (1998), p. 5.

<sup>204</sup> Simpson (1994), p. 115.

common agreement or social utility; [4] market economies controlled primarily by the forces of supply and demand.<sup>205</sup>

The proponents of the democratic peace theory in international law argue that international law should be conceived as law among liberal-democratic states, while states with a different form of government would not be part of this legal system.<sup>206</sup> The relationship between liberal-democratic states vis-à-vis states with other forms of government would be governed by different legal rules and liberal-democracies would have a duty to take action for the implementation of the will of the people (i.e. liberal-democratic institutions) in states where the will of people is disregarded (i.e. liberal-democratic institutions are absent).<sup>207</sup>

In the context of international action, Teson differentiates between illegitimate governments and illegitimate states.<sup>208</sup> Illegitimate governments are those that are not representative of their people, i.e. they do not come to power by means of liberal-democratic electoral process.<sup>209</sup> Illegitimate states, on the other hand, are those in which human rights are systematically breached and their peoples no longer consent to the existence of such a state.<sup>210</sup> In both circumstances, it is suggested, such states would no longer be deemed sovereign in their territories.<sup>211</sup> The concept of illegitimate states, to some degree, falls close to arguments in favour of the 'remedial secession doctrine' and might also underpin arguments in favour of dissolution of non-representative multiethnic states,<sup>212</sup> both of which will be thoroughly discussed below. Yet Teson at this point does not make an argument in

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<sup>205</sup> Doyle (1983), pp. 207–08.

<sup>206</sup> Slaughter (1995), pp. 528–34.

<sup>207</sup> Teson (1998), pp. 64–65.

<sup>208</sup> *Ibid.*, pp. 57–58. There is also a possibility that a government was initially legitimate, i.e. elected, but it later lost its legitimacy (e.g. by grave breaches of human rights). *Ibid.*, p. 57.

<sup>209</sup> *Ibid.*, p. 57.

<sup>210</sup> *Ibid.*, p. 58.

<sup>211</sup> *Ibid.*

<sup>212</sup> Compare *infra* ch. 5.4.

favour of ‘remedial secession’ but an argument in favour of military intervention which he terms “humanitarian”, although it rather appears to be pro-democratic.<sup>213</sup>

[F]orce will sometimes have to be used against nonliberal regimes as a last resort in self-defence or in defence of human rights. Liberal democracies must seek peace and use all possible alternatives to preserve it. In extreme circumstances, however, violence may be the only means to uphold the law and defend the liberal alliance against outlaw dictators that remain nonmembers. Such ... is the proper place of war in the Kantian theory.<sup>214</sup>

Such an argument has been described by sceptics as consistent with democratic peace but inconsistent with Article 2(4) of the UN Charter.<sup>215</sup> Significantly, the invoked right to self-defence is not disputable and applies to all states under Article 51 of the UN Charter. As such it does not need to be specifically invoked as a postulate of new international law, defined as law among liberal-democratic states. The situation, however, changes if a non-democratic government is *per se* perceived as a threat to international peace. This is what the pro-force argument within the so-called Kantian theory of international law implies: “[A] war of self-defence by a democratic government and its allies against a despotic aggressor is a just war.”<sup>216</sup> From the context of this statement it is clear that reference to self-defence against a despotic aggressor is not meant as against an aggressor from outside but against an aggressor who is deemed to lack domestic (democratic) legitimacy. In this understanding, states would enjoy attributes of statehood, including protection of Article 2(4) of the UN Charter, based on the democratic legitimacy of their governments.

Slaughter, on the other hand, concentrates on the expansion of the zone of liberal-democracy – and consequently of democratic peace – by peaceful means. Her

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<sup>213</sup> Teson (1998), pp. 59–64.

<sup>214</sup> Ibid., p. 90.

<sup>215</sup> Alvarez (2001), p. 236.

<sup>216</sup> Teson (1992), p. 91.

theory looks under the layer of state sovereignty and focuses on cooperation and networking between professionals from different states working in the same or similar branches, which impact governance both globally and within states.<sup>217</sup> The foundation for such transnational networking is a common liberal-democratic identity in which societies, arguably, pursue similar goals.<sup>218</sup> In Slaughter's view, such networking should not be an exclusive club for professionals from liberal-democratic states. Indeed, cooperation with professionals from non-liberal-democratic states is of crucial importance for Slaughter and serves as a means for non-liberal-democratic states to get accustomed to liberal-democratic practices.<sup>219</sup> Slaughter ultimately sees a possibility for an expansion of the liberal-zone in this 'tutorial approach' of professionals from liberal-democratic states towards counterparts from non-democratic states.<sup>220</sup> Such tutelage and networking between professionals from liberal-democratic and non-liberal-democratic states should lead to adoption of liberal-democratic practices in non-liberal-democratic states, which would, according to neo-Kantian postulates, lead to peaceful behaviour in international affairs.<sup>221</sup>

Such a conceptualisation, however, draws parallels with the system of international law developed in the nineteenth century, where a 'standard of

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<sup>217</sup> See generally Slaughter (2004).

<sup>218</sup> Pursuing common goals in liberal democracies is a rather risky statement. Slaughter argues that in the matter of the death penalty the Constitutional Court of South Africa resorted to the reasoning of the courts of Hungary, India, Tanzania, Germany and of the ECtHR. *Ibid.*, pp. 186–87. However, Slaughter does not mention that in the same judgement in which foreign jurisprudence was considered in order to establish that the death penalty was unconstitutional in South Africa, the Constitutional Court of South Africa also considered the jurisprudence of the Supreme Court of the United States on this matter. The South African Constitutional Court identified several breaches of human rights standards stemming from the death penalty and decided not to follow the United States' example. See the *Makwanyane case* (1995), paras 40–62. Notably, had the South African Constitutional Court followed the United States' doctrine, it could have reached a diametrically opposite conclusion than it did. Yet such a conclusion would still be underpinned by a cross-jurisdictional citing from a fellow liberal-democracy.

<sup>219</sup> Slaughter (1997), p. 194.

<sup>220</sup> *Ibid.*, pp. 185–86.

<sup>221</sup> See *supra* n. 201.

civilisation' was applied in order to decide on whether a state was to be admitted into the system of international law.<sup>222</sup> The idea thus gets a neo-colonial spin, where the old colonial 'civilising missions' would be renamed 'democratisation and pacification missions'.

Slaughter further proposes development of an adequate normative framework which would allow us to distinguish between liberal and non-liberal states as well as provide us with a set of rules which would govern relations between them.<sup>223</sup> Such a normative framework is, however, conceived on the platform of the procedural understanding of democracy, the association of democracy with certain liberal-democratic institutions and postulates of the free market economy, and with the established hierarchy of civil and political rights.<sup>224</sup> In short, the normative system to distinguish between liberal and non-liberal states adopts Fukuyama's pattern, which pronounces a liberal-democracy wherever a capitalist economy is in existence.<sup>225</sup> Furthermore, while Slaughter does establish the category of illiberal states, which operate outside of the 'zone of law',<sup>226</sup> her theory remains somewhat unclear as to what the consequences are of this status.

Conceptualising international law as law among liberal-democratic states rejects the principle of sovereign equality of states and replaces the concept of state sovereignty with the concept of popular sovereignty, which originates in democratic political theory.<sup>227</sup> It attempts to create a system of international law based on the exclusive-club-approach and an expansion of this club would be sought. The

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<sup>222</sup> Simpson (2001), p. 546, consider especially the following argument: "Civilisation was a usefully illusive term", however, even at that time it was perceived that "a civilised state was one that accorded basic rights to its citizens."

<sup>223</sup> Slaughter (1995), p. 506.

<sup>224</sup> Slaughter adopts the definition of a liberal state developed by Doyle (compare supra n. 205). See Burley (1992), p. 1915. At a later point Slaughter (1997, p. 196) defines a non-liberal State as one that "has neither a representative government nor a market economy."

<sup>225</sup> See Fukuyama (1992), p. 42.

<sup>226</sup> See supra notes 217–220.

<sup>227</sup> Compare infra ch. 5.2.

proposed means for the expansion of this club differentiate and range from informal networking among professionals from different states to pro-democratic interventions. Such views are, however, difficult to reconcile with the UN Charter system, which is based on the sovereign equality of states. Yet proponents of such a new international law do not seem to seek reconciliation with the UN Charter. Indeed, they seem to seek invention of a new international legal system<sup>228</sup> which would take different types of governments into account. Liberal-democratic governments would be at least strongly favoured by the new international system, if not actually pronounced the only legitimate ones. However, as Koskenniemi argues, international law has been there before – when ‘civilisation’ was applied as a qualifying criterion.<sup>229</sup>

### **2.5.2. The democratic peace theory scrutinised**

The democratic peace theory has both philosophical and empirical foundations. Philosophically, it is founded on the Kantian assumption that people are rational and prefer peace to war.<sup>230</sup> Consequently, if the people have control over decision making and access to information, which are qualities of democratic states, their governments will conduct peaceful policies.<sup>231</sup> The empirical foundation of the theory is based on the studies proving the absence of war between any two democracies. Perhaps the most influential study of this kind is that of Michael Doyle, who traces peace between democracies from 1817.<sup>232</sup>

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<sup>228</sup> Slaughter (1997), p. 183.

<sup>229</sup> See Koskenniemi (2000), p. 17.

<sup>230</sup> Kant (1795), Section II, First Definitive Article for Perpetual Peace.

<sup>231</sup> Ibid.

<sup>232</sup> Doyle (1983).

Both foundations of the theory have been subject to criticism. In regard to citizens' control over war-making, it is argued that in modern constitutions, these decisions are "often not encumbered by reference to public opinion."<sup>233</sup> Indeed: In relatively few of the major constitutional democracies does the legislature have a substantial role in making war. The executive has accrued more and more power through the years by recourse to national security arguments. Even in cases where elected representatives are given a role in the Constitution, methods are found to circumvent these checks and balances.<sup>234</sup> Further, it cannot be assumed that people in democratic states will always disapprove of their governments getting involved in armed conflicts.<sup>235</sup> Both problems have been affirmed in 2003, prior to the invasion of Iraq. The United Kingdom went to war with Iraq despite the disapproval of an overwhelming majority of the United Kingdom's population, who had no mechanism to prevent the war.<sup>236</sup> In the United States, on the other hand, the government had the overwhelming approval of its citizenry to go to war with Iraq,<sup>237</sup> which proves that it cannot be presumed that the populations of modern democracies would necessarily disapprove of war-making.

The reliability of the empirical underpinnings of the democratic peace theory also remains questionable. The definition of war adopted for this empirical study excludes civil wars and covert operations of one democratic state against another one,<sup>238</sup> and it sets the bar for a conflict to be defined as a war at a thousand fatalities.<sup>239</sup> Despite these disputable methodological manoeuvres, there exist exceptions to the above-quoted rule that liberal states do not fight wars *inter se*. For

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<sup>233</sup> Simpson (1994), p. 122.

<sup>234</sup> Ibid.

<sup>235</sup> Ibid., p. 123.

<sup>236</sup> See Polls Find Europeans Oppose Iraq War, BBC, 11 February 2003 <<http://news.bbc.co.uk/2/hi/europe/2747175.stm>>.

<sup>237</sup> Poll: Most Back War, But Want U.N. Support, USA Today (16 March 2003) <[http://www.usatoday.com/news/world/iraq/2003-03-16-poll-iraq\\_x.htm](http://www.usatoday.com/news/world/iraq/2003-03-16-poll-iraq_x.htm)>.

<sup>238</sup> Doyle (1983), pp. 215–16.

<sup>239</sup> See Alvarez (2001), p. 234, n. 240 for a critical evaluation of such a statistical manoeuvre. The terminological distinction between war and conflict is problematic from the perspective of international humanitarian law, as such a distinction does not exist in its framework. For clarity of argument in this section the terminology adopted by democratic peace proponents will be used.

example Peru and Ecuador fought a war in 1941, although they were both classified as democratic states according to the underlying criteria of the democratic peace theory.<sup>240</sup>

Further, the democratic peace theory is built on a procedural understanding of democracy<sup>241</sup> and on a democratic self-image of some states,<sup>242</sup> it ascribes the responsibility for conflicts to states deemed non-democratic and does not address the problem of an overtly aggressive behaviour of states deemed democratic vis-à-vis those deemed non-democratic.<sup>243</sup>

Given the non-disputed inclination of democracies toward waging wars on states deemed non-democratic,<sup>244</sup> the theory of the consent of an inherently rational and peaceful citizenry, significant for liberal-democracies, appears to be rather vague. To put it differently, this theory would only allow us to conclude that the population in a democracy behaves rationally and peacefully toward its ‘co-democracies’, while it loses its peace-proneness and rationality when non-democratic states (and their respective populations) are in question.

It is not possible to deny that democratic peace does exist in some form, but there is a question in which form it exists and whether it can really have any influence on international law. As one sceptical scholar has argued, “we are given no

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<sup>240</sup> See Doyle (1983), p. 213. Doyle (1983), p. 216–17 also invokes wars between England and the United States as well as the First World War. He concludes that these wars do not spoil the causality of democratic peace. According to Doyle, the United States became a liberal republic after 1865 (thus assuming that England in colonial times was a liberal state) and in reference to the First World War, Doyle (ibid.) argues that Imperial Germany may have been liberal on the domestic plane, while its citizenry did not have access to decision-making in foreign affairs. Especially the latter explanation is rather odd in light of the argument of the democratic peace theory that democratic government on the domestic plane *per se* fosters peaceful behaviour in international affairs. (Compare supra n. 201). Lastly, participation of the citizenry in decision-making in foreign affairs has always been restricted and remains restricted even now. It was not significant only for Imperial Germany (see supra n. 233.).

<sup>241</sup> See Doyle (1983), pp. 206–07.

<sup>242</sup> See Alvarez (2001), pp. 236–37.

<sup>243</sup> Ibid., p. 238, especially the following argument: “Liberal prescriptions for ‘perpetual peace’ say little about the possibility ... that liberal states may have a tendency, perhaps a greater tendency than non-liberal states, to wage war on those that they perceive to be non-liberal.”

<sup>244</sup> Ibid.

reason ... to believe that the liberal peace, if it exists and truly reflects something more than the transitory experience of a number of post-1945 democracies, matters to the legal developments at issue.”<sup>245</sup> Democratic peace proponents generalise the absence of wars among democratic states as proof of the peaceful behaviour of democratic states in international affairs. In other words, they use the conclusion in order to interpret the premises. The overtly aggressive behaviour of liberal-democratic states against those deemed non-liberal-democratic, however, disproves the validity of such an interpretation.

In what form democratic peace does exist is a comprehensive question and a detailed analysis would fall beyond the scope of this thesis. It is indeed difficult to find a convincing rationale for democratic peace and therefore “it is difficult to make it relevant to specific legal prescriptions.”<sup>246</sup> Democratic peace might exist between mostly Western states, a fact which does not imply the peace-proneness of these states, but, perhaps, that “[d]emocracies seem able ... to resolve ... clashes by means other than war.”<sup>247</sup> No other causality should be implied based on this conclusion. Further, taking into account the undisputed aggressiveness of democracies in relation to states deemed non-democratic,<sup>248</sup> as well as claims that such a use of force should be legal, one could make a cynical conclusion that democracy gives one state the assurance that it would not be invaded by another democracy or a coalition of states led by a state with a democratic form of government which rhetorically invokes democratic ideals as a justification for a military intervention.

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<sup>245</sup> Ibid., p. 235.

<sup>246</sup> Ibid., especially the following argument: “As those international lawyers who have tried to examine the legal implications of the liberal peace have noted, finding out whether, for example, democracies do not make war on one another because of normative-cultural explanations, due to structural/institutional factors, or because of complex interactions between the two, would appear to have radically different implications as well as pose very distinct research methodologies.”

<sup>247</sup> Crawford (2001), p. 91.

<sup>248</sup> See supra n. 243.

## **2.6. Conclusion**

Democracy has come into international legal parlance through human rights law. In the building period of the UN system, the noun ‘democracy’ was omitted from the relevant documents, while the provisions of human rights law arguably required some legal consequences, usually associated with the concept of democracy. In the Cold War period a liberal-democratic interpretation of these provisions was not the single authoritative one and general international law perceived political system to be a matter in the essential domestic jurisdiction of states.

At the end of the Cold War, when Fukuyama proclaimed the end of history and the ultimate victory of liberal-democracy, these ideas had an echo even in international law. The absence of the competing concept of people’s democracy inspired a liberal-democratic reading of human rights provisions, as well as interpretations of general international law with a pro-democratic bias. Thus, on the one hand liberal-democracy was associated with certain human rights and on the other democracy was itself proclaimed a human right.

In regard to the claim that human rights provisions stipulate for a political system organised along liberal-democratic lines, this chapter has established that this was not a generally accepted position at the time of drafting of these provisions, and not even the end of the Cold War changed this perception. Yet such a universal pattern is not applicable to the framework of the ECHR, which at the time of its drafting did not imply a liberal-democratic interpretation of its references to democracy. Such an interpretation has, however, developed through the jurisprudence of the organs of the Convention. To some degree similar, though perhaps not so unequivocal, development has also been witnessed in the framework of the ACHR.

According to neo-liberal ideology, the end of the Cold War also meant a defeat of social, economic and cultural rights. Fukuyama expressly proclaimed the supremacy of the civil and political cluster and declared the social, economic and cultural cluster incompatible with both civil and political rights as well as with liberal-democracy itself.<sup>249</sup> Liberal-democracy was defined in terms of electoral procedures and a free market economy. The definition adhered to the Schumpeterian procedural understanding of democracy, which perceives democracy as a method of choosing a government. The quality distinguishing it from a non-democratic method is that this method requires the consent of the governed, expressed at free and fair elections. The expression ‘free and fair elections’, however, requires fulfilment of some prerequisites that can be expressed in human rights language. The right to political participation thus comes at the centre of the procedural understanding of democracy, which is underpinned with a selection of other civil and political rights. This selection may vary from author to author but would commonly include freedom of speech, freedom of assembly, freedom of religion and the right to a fair trial.<sup>250</sup>

From the political theory side it has been argued that the election-centric definition of democracy is inadequate. A more comprehensive definition is one in terms of the underlying principles of democracy,<sup>251</sup> which are popular control over collective decision-making and the equality of all. However, these principles cannot be satisfied merely by a formally-guaranteed right to political participation. The equality of all and the control over collective decision-making also depend on social and economic requirements. Thus, social, economic and cultural rights are equally important as are civil and political rights. Further, human rights are not a synonym

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<sup>249</sup> Fukuyama (1992), pp. 42–43.

<sup>250</sup> See supra ch. 2.2.1., 2.3.1. and 2.4.1.

<sup>251</sup> See supra ch. 2.2.2.

for democracy. The two concepts are interdependent but can work in opposite directions.<sup>252</sup>

The definition of democracy in terms of the right to political participation as a superior right and of a set of other civil and political rights establishes a hierarchy of human rights and arbitrarily limits the interdependence of human rights to a selection of civil and political rights. This is contrary to essential conceptual bases of human rights.

It was on the basis of the procedural, electoral-centric, definition of democracy that the right to democratic governance was conceived. At the end of the Cold War it was argued that virtually all of humanity was embracing liberal-democracy as the only legitimate political system.<sup>253</sup> It was, furthermore, argued that the people's consent validates governance while, without persuasive evidence, it was presumed that the people's consent would also be in favour of a Western-style democracy.<sup>254</sup> Thus a global normative entitlement to democracy was proclaimed where democracy is no longer treated as merely a political system, but as a human right. Based on the notion of popular sovereignty, it was argued that political system is no longer in the essential domestic jurisdiction of states. Consequently, a non-democratic government would no longer be considered legitimate.

There are many problematic aspects associated with this theory. Initially it assumes that the people's legitimate choice would always be a "Western" style liberal-democracy. However, a global shift to democracy cannot be universalised. The theory of the right to democratic governance also stipulates for international legitimisation of governance.<sup>255</sup> This legitimisation is electoral-centric, adopting the

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<sup>252</sup> See supra ch. 2.2.2.

<sup>253</sup> See supra ch. 2.4.1.

<sup>254</sup> See supra ch. 2.4.1.

<sup>255</sup> See supra ch. 2.4.1.

procedural definition of democracy, and draws its determinacy in election-monitoring.<sup>256</sup> The right to democratic governance thus effectively becomes a right to monitored elections.

The idea related to the normative democratic entitlement is that of bringing the democratic peace theory into international law. It builds on postulates similar to those of the normative democratic entitlement school, stresses the importance of a non-state-centric analysis of the international society and implies that the internal organisation of a state is reflected in its behaviour in international affairs. It is argued by its supporters that international law should accommodate the differences between states organised along liberal-democratic lines and those adhering to a different political organisation. Consequently, international law would become law among liberal-democratic states.

Despite some statistical manoeuvres and caveats used for validation of the peace-proneness of democratic states vis-à-vis other democracies, democratic peace, arguably, only exists in some form among Western states.<sup>257</sup> From this conclusion no other correlations should be implied. The major deficiency of the theory is that it tells nothing about the behaviour of democratic states vis-à-vis those deemed non-democratic.<sup>258</sup> The aggressiveness toward non-democratic states also disproves the Kantian rationale behind it, namely that people with a republican education understand that war is evil and would not support waging a war.<sup>259</sup> Since people in democracies have the final say over the decision-making, it is maintained that war in the last instance would not be waged.<sup>260</sup> Yet this chapter has shown that people in

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<sup>256</sup> See supra ch. 2.4.1. and 2.4.2.

<sup>257</sup> See supra ch. 2.5.2.

<sup>258</sup> See supra ch. 2.5.2.

<sup>259</sup> See supra ch. 2.5.2.

<sup>260</sup> See supra ch. 2.5.2.

contemporary democracies do not have the final control over war-making.<sup>261</sup> Further, the support for, say, the Iraq invasion in the United States in 2003 shows that the people's understanding of wars as something inherently evil is not something which could be automatically presupposed in democratic states.<sup>262</sup>

The means of expansion of democratic peace and of the international guarantee of a normative democratic entitlement also became an important question. While more modest proponents of the theory call for a slow and patient expansion through international cooperation and professional networks of multiple disaggregated states,<sup>263</sup> more radical proponents propose a right to war of democratic states vis-à-vis those not deemed democratic.<sup>264</sup> Thus, non-democratic states could ultimately lose some attributes of statehood.

This chapter showed that democracy cannot be regarded as a continuous requirement for states in order to possess the attributes of statehood. It may well be that type of government and some democratic standards have played some role in situations of new state creations, but it remains questionable whether democratic standards operate within the concept of statehood criteria, recognition requirements, or have impacted the practice of new state creations in some other way. The forthcoming chapters therefore deal with international law governing the creation and recognition of states and the exercise of the right of self-determination. Although the European image of democracy cannot be universalised,<sup>265</sup> it might have been envisaged by some documents regarding the creation and recognition of states in the post-Cold War period.

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<sup>261</sup> See supra ch. 2.5.2.

<sup>262</sup> See supra ch. 2.5.2.

<sup>263</sup> See supra ch. 2.5.1.

<sup>264</sup> See supra ch. 2.5.1.

<sup>265</sup> See supra ch. 2.3.3.

### **III. THE STATEHOOD CRITERIA AND THE ACT OF RECOGNITION IN THE PRE-1991 PRACTICE**

#### **3.1. Introduction**

This chapter deals with the law of statehood and the act of recognition. It considers the norms constituting the statehood criteria and their relationship with the act of recognition. It is further examined to what degree recognition is a political and to what degree a law-governed act. The main focus of this chapter is the developments in the UN Charter era in the pre-1991 period. It outlines the traditional statehood criteria and the development of the additional statehood criteria and analyses the legal significance of non-recognition. The obligation to withhold recognition and the concept of the additional statehood criteria are examined to see if they may be problematic in light of the generally perceived role of recognition in contemporary international law.

#### **3.2. Statehood**

##### **3.2.1. The traditional statehood criteria**

The Montevideo Convention on Rights and Duties of States, in its Article 1, provides: “The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory, (c) government; and (d) capacity to enter into relations with other states.”<sup>266</sup> These provisions have acquired the status of customary international law.<sup>267</sup> However, “the question remains whether these criteria are sufficient for Statehood, as well as being necessary.”<sup>268</sup>

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<sup>266</sup> The Montevideo Convention on Rights and Duties of States 165 LNTS 19 (1933), Article 1.

<sup>267</sup> See Harris (2004), p. 99.

<sup>268</sup> Dixon and McCorquodale (2003), p. 137.

The criteria of a permanent population and defined territory do not prescribe any minimum requirement of surface area or a minimum population-figure.<sup>269</sup> As to the criterion of defined territory, international law does not require that all borders of a state need to be undisputed but rather demands “sufficient consistency” of the territory.<sup>270</sup> Further, “a group of people without a territory cannot establish a State”<sup>271</sup> and a territory alone cannot be considered a state without a group of people intending to inhabit it permanently. A qualifying group of people may, however, consist of different peoples,<sup>272</sup> and of people of different nationalities,<sup>273</sup> hence a permanent population has been defined as “[a]n aggregate of individuals of both sexes who live together as a community in spite of the fact that they may belong to different races or creeds, or be different in colour.”<sup>274</sup>

The criterion of government has been described as “the most important single criterion of statehood, since all the others depend upon it.”<sup>275</sup> This is so because “governmental authority is the basis for normal inter-State relations; what is an act of a State is defined primarily by reference to its organs of government, legislative, executive or judicial.”<sup>276</sup> A government of a state needs not only to exist as an authority but also to exercise effective control in the territory of a state, as well as to operate independently from the authority of governments of other states.<sup>277</sup> In this

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<sup>269</sup> See Crawford (2006), pp. 46–47 and pp. 52–53.

<sup>270</sup> See the German-Polish Mixed Arbitral Tribunal: “[I]t is enough that this territory [of a state] has sufficient consistency, even though its boundaries have not yet been accurately delimited, and that the State actually exercises independent public authority over that territory.” *Deutsche Continental Gas-Gesellschaft v Polish State* (1929), pp. 11–15. This position was later confirmed by the ICJ: “There is ... no rule that the land frontiers of a State must be fully delimited and defined, and often in various places and for long periods they are not.” *North Sea Continental Shelf cases*, ICJ Rep 1969, para 46.

<sup>271</sup> Raič (2002), p. 60.

<sup>272</sup> *Ibid.*, p. 58.

<sup>273</sup> See Crawford (2006), pp. 52–53.

<sup>274</sup> Oppenheim, *International Law* (Lauterpacht, ed.) (1955), p. 118.

<sup>275</sup> Crawford (2006), p. 56.

<sup>276</sup> *Ibid.*

<sup>277</sup> See Aust (2005), pp. 136–37, arguing: “There must be a central government operation as a political body within the law of the land and in effective control over the territory ... The government must be sovereign and independent, so that within its territory it is not subject to authority of another state.”

regard, the International Commission of Jurists held that the Finnish Republic in the period of 1917 to 1918 did not become a sovereign state “until the public authorities had become strong enough to assert themselves throughout the territories of that State without the assistance of foreign troops.”<sup>278</sup> It is important to note that type of government was traditionally not important.<sup>279</sup> It will be examined at a later point how and to what degree this has changed.

The capacity to enter into relations with other states is said to be a corollary of a sovereign and independent government, which exercises jurisdiction on the territory of the state.<sup>280</sup> As such, it is “a consequence of statehood, not a criterion for it.”<sup>281</sup> Indeed, the criterion is self-fulfilling as non-state entities cannot enter into relations with foreign states on the same level as do states. They have this capacity once they become states. Nevertheless, non-state actors have some limited capacity to enter into relations with states, as the “[c]apacity to enter into relations with States at the international level is no longer, if it ever was, an exclusive State prerogative.”<sup>282</sup> This capacity is also significant for international organisations and even for subunits of states.<sup>283</sup> However, such a limited capacity cannot imply statehood of the subunit in question. Further, the capacity to enter into relations with other states needs to be distinguished from the actual existence of relations, which is

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See also Raič (2002), p. 75, defining independence of a state as possessing “the *legal capacity* to act as it wishes, within the limits given by international law.” (italics in original).

<sup>278</sup> Report of the International Committee of Jurists Entrusted by the Council of the League of Nations with the Task of Giving an Advisory Opinion upon the Legal Aspects of the Aaland Islands Question. LNOJ Spec. Supp. 3 (1920) [hereinafter: *The Aaland Islands case* (1920)], pp. 8–9.

<sup>279</sup> See Charlesworth and Chinkin (2000), p. 132.

<sup>280</sup> *Ibid.*, p. 132, arguing: “Sovereignty means both full competence to act in the external arena, for example by entering into treaties or by acting to preserve state security, and exclusive jurisdiction over internal matters.”

<sup>281</sup> Crawford (2006), p. 61.

<sup>282</sup> *Ibid.*

<sup>283</sup> See Raič (2002), p. 73. See also Harris (2004), p. 106, arguing: “Units within a *federal state* may or may not be allowed by the federal constitution some freedom to conduct their own foreign affairs. If, and to the extent that, they are allowed to do so, such units are regarded by international law as having international personality ... Such units are not thereby states but international persons *sui generis*.” (italics in original).

a matter of policy of states.<sup>284</sup> In other words, the law of statehood does not impose an obligation upon states to enter into relations with other states if they do not wish to do so.

Once states have acquired statehood, the latter is difficult to lose, even when the traditional criteria are no longer met. Indeed, statehood criteria only apply to newly-created states and not to existing ones.<sup>285</sup> A clear example of this doctrine is Somalia, which continues to be a state although its government does not exercise effective control over its territory.<sup>286</sup>

The traditional statehood criteria are criticised for being “essentially based on the principle of effectiveness,”<sup>287</sup> as nineteenth century international law was ready to acknowledge statehood to any entity fulfilling the traditional statehood criteria and showing sufficient durability of its existence.<sup>288</sup> The traditional criteria are therefore often considered to be effectiveness-based. Yet in contemporary international law there exists important evidence that effectiveness is no longer the only principle governing the law of statehood, as some additional criteria are also considered.

### **3.2.2. The additional statehood criteria**

The criteria described as ‘additional’ do not originate specifically in the law of statehood but are rather concepts developed in other fields of international law which impact the law of statehood. The prohibition of the illegal use of force, respect of the right of self-determination and respect for human rights in general (not only of the right of self-determination) have most commonly been identified as such criteria.<sup>289</sup>

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<sup>284</sup> See Raič (2002), p. 73.

<sup>285</sup> McCorquodale (2005), p. 192.

<sup>286</sup> See generally Lyons and Samatar (1995).

<sup>287</sup> Crawford (2006), p. 97.

<sup>288</sup> Raič (2002), p. 57.

<sup>289</sup> See McCorquodale (2005), p. 191.

The prohibition of the use of force is expressed in Article 2(4) of the UN Charter.<sup>290</sup> It is argued that the protection of states accorded in this Article:

[E]xtends to continuity of legal personality in the face of illegal invasion and annexation: there is a substantial body of practice protecting the legal personality of the State against extinction, despite prolonged lack of effectiveness. [However] [t]he question is whether modern law regulates the creation of states to any greater degree than this, in a situation involving illegal use of force.<sup>291</sup>

International law thus protects existing states from having their international personality extinguished, even when the effective situation suggests that a state no longer exists.<sup>292</sup> At the same time, some evidence suggests that when a new effective entity emerges as a result of an illegal use of force, such an entity will not acquire statehood. These issues will be further discussed below.

The right of self-determination is expressed in the common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). Further, this right “has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.”<sup>293</sup> The exercise of this right will be more thoroughly discussed at a later point in this thesis. In regard to the question of statehood, the right of self-determination has “softened” the traditional criterion of effective government: “The evolution of self-determination has affected the standard necessary as far as the actual exercise of authority is concerned, so that it appears a lower level of effectiveness, at least in decolonisation situations, has been accepted.”<sup>294</sup> While the right of self-

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<sup>290</sup> UN Charter, Article 2(4).

<sup>291</sup> Crawford (2006), p. 132.

<sup>292</sup> The Iraqi annexation of Kuwait which was proclaimed null and void by the Security Council Resolution 662 may serve as an example of such. See SC Res 662 (9 August 1990).

<sup>293</sup> McCorquodale (1994), p. 858.

<sup>294</sup> Shaw (2003), p. 183. Shaw (ibid, pp. 182–83) gives examples of the Congo and Guinea-Bissau. The Congo became an independent state on 30 June 1960. Although the province of Katanga declared its secession, the central government did not exercise effective control and there even existed two

determination may – at least this was the case in colonial situations – justify the creation of a new state even when effectiveness-based criteria are not met, there is a question as to whether self-determination may override effectiveness also in the other direction, i.e. if statehood can be denied to an effective entity created in violation of the right of self-determination. These issues will be further discussed below.

The question remains of whether human rights in general play any role in the creation of states. Crawford argues:

[T]here is so far in modern practice no suggestion that as regards statehood itself, there exists any criterion requiring regard for fundamental human rights. The cases are numerous of governments violating fundamental norms of human rights; there is no case where such violations have called in question statehood itself.<sup>295</sup>

There have been references to certain human rights made in relation to the creation of states in the era of decolonisation but it has been established that human rights standards invoked in this context aimed to foster the exercise of the right of self-determination and were not expressed as conditions for statehood.<sup>296</sup> Further, the statehood criteria are only relevant in relation to the creation of new states and not in relation to existing ones, in a sense that a state no longer fulfilling them would no longer be a state.<sup>297</sup> Thus, the statehood of existing states could not be disputed on the basis of human rights violations, even if respect for human rights were accepted as a statehood criterion. Significantly, an entity wishing to become a state can only adopt institutional provisions for the protection of human rights but there can be no guarantee that it would not violate them in practice. At the same time international law does not foresee a loss of statehood if an existing state no longer meets all of the

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competing factions claiming to be the government of the Congo. Guinea-Bissau declared independence on 24 September 1973, which was accepted by majority of states in the General Assembly, although the rebel forces controlled between two-thirds and three-quarters of the territory.

<sup>295</sup> Crawford (2006), p. 148.

<sup>296</sup> See *infra* ch. 3.3.3.

<sup>297</sup> See *supra* n. 285.

statehood criteria,<sup>298</sup> which would consequently also apply for the respect of human rights if this were a statehood criterion. In the pre-1991 era, human rights in general were therefore not a statehood criterion; however, it might be possible to argue that this is not the case when human rights of a *jus cogens* character are in question.<sup>299</sup>

The additional criteria of statehood set legality-based standards for entities wishing to become states and thus look beyond mere effectiveness as adhered to by the traditional criteria. This does not mean that traditional criteria are no longer important but rather that the additional set of criteria may prevent effective entities from acquiring statehood. It also should be noted that the concept of the additional statehood criteria remains somewhat controversial and has not been acknowledged by all scholars.<sup>300</sup> This issue will be further discussed below.

### **3.3. The recognition of states**

#### **3.3.1. Recognition theories**

Recognition is argued to be “a method of accepting factual situations and endowing them with legal significance, but this relationship is a complicated one.”<sup>301</sup> Indeed, the relationship between factual situations and the creation of legal rights by the act of recognition remains a controversial issue in international law, since the act has legal consequences while it is “primarily based on political or other non-legal considerations.”<sup>302</sup> Yet, there exist strong suggestions that this act is no longer merely political but has become, at least to some degree, a law-governed process.

Traditionally two theories of recognition were developed: constitutive and declaratory. The constitutive theory perceives recognition as “a necessary act before

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<sup>298</sup> See supra n. 286.

<sup>299</sup> For more see infra ch. 3.3.3.4.

<sup>300</sup> See infra ch. 3.3.2. for Talmon's argument against the additional statehood criteria.

<sup>301</sup> Shaw (2003), p. 185.

<sup>302</sup> McCorquodale (2005), p. 193.

the recognized entity can enjoy an international personality”,<sup>303</sup> while the declaratory theory perceives it as “merely a political act recognizing a pre-existing state of affairs.”<sup>304</sup>

In regard to the constitutive theory of recognition, the question of “whether or not an entity has become a state depends on the actions [i.e. recognitions] of existing states.”<sup>305</sup> However, the situation in which one state may be recognised by some states but not by others is an evident problem and thus a great deficiency of the constitutive theory.<sup>306</sup> In the absence of a central international authority for granting of recognition, this would mean that such an entity at the same time has and does not have an international personality.<sup>307</sup>

Therefore, most writers have adopted a view that recognition is declaratory.<sup>308</sup> This means that a “state may exist without being recognized, and if it does exist, in fact, then whether or not it has been formally recognized by other states, it has a right to be treated by them as a state.”<sup>309</sup> According to this view, when recognition actually follows, other states merely recognise a pre-existing situation. However, this answer does not seem to be entirely satisfactory, as it is not evident why the act of recognition is still important. Indeed:

It is only by recognition that the new state acquires the status of a sovereign state under international law in its relations with the third states recognizing it as such. If it were to acquire this legal status before and independently of recognition by the existing states ... this legal consequence under international law would occur automatically and could no longer be prevented by withholding recognition of the entity as a state.<sup>310</sup>

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<sup>303</sup> Dixon and McCorquodale (2003), p. 154.

<sup>304</sup> Ibid.

<sup>305</sup> Grant (1999), p. 2.

<sup>306</sup> Brierly (1963), p. 138.

<sup>307</sup> Ibid.

<sup>308</sup> See Harris (2004), p. 145.

<sup>309</sup> Brierly (1963), p. 138.

<sup>310</sup> Hillgruber (1998), p. 494.

As a result there would be virtually no consequences of non-recognition. As Hillgruber further argues: “Legal personality under international law, which non-recognition was intended to prevent, would already have been acquired, and non-recognition would then in a sense be futile ... without this flaw [of non-recognition] having any significant legal consequences under international law.”<sup>311</sup> Thus, despite the general perception of recognition as being declaratory, it is not possible to deny that it does have constitutive elements, since international personality may depend on recognition.<sup>312</sup>

Hersch Lauterpacht proposed that in the absence of a central international authority for granting of recognition, states need to perform this duty.<sup>313</sup> Lauterpacht’s view was that once an entity has met the criteria of statehood, existing states have a duty to recognise such an entity as a state and thus award it the rights and duties of a state.<sup>314</sup> Such a solution would be both declaratory and constitutive, since it acknowledges a factual situation, i.e. meeting of the statehood criteria, and creates a new legal situation, i.e. awards statehood to the entity in question. This proposal has been challenged for its contradictory nature,<sup>315</sup> as well as for insufficient state practice proving that states accept such a duty to recognise entities fulfilling the statehood criteria.<sup>316</sup>

### **3.3.2. Recognition, non-recognition and statehood criteria**

In relation to the debate on the concept of the additional criteria and recognition theories, the scope and legal effects of collective recognition and non-recognition

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<sup>311</sup> Ibid.

<sup>312</sup> Ibid.

<sup>313</sup> Lauterpacht (1948), pp. 12–24

<sup>314</sup> Ibid.

<sup>315</sup> It has been argued that Lauterpacht’s theory “which makes recognition obligatory in conformity with the objective facts of a State’s existence defeats its own premise, since it ceases to be constitutive and in fact becomes declaratory however it may be described.” Marek (1968), p. 137.

<sup>316</sup> Ibid.

have also become controversial topics. This section considers the legal significance of collective non-recognition and the relationship between non-recognition and the statehood criteria. Two main concepts in the theory of collective non-recognition will be distinguished: the prohibition of premature recognition and the doctrine of obligatory non-recognition. The former predominantly refers to prohibition of recognition before an entity has satisfied the traditional, effectiveness-based, statehood criteria. The latter predominantly refers to non-recognition of an effective entity which, having satisfied the traditional criteria, is not recognised as a state due to its illegal creation, i.e. does not satisfy the additional statehood criteria.

An argument in favour of divorcing the additional statehood criteria from the prohibition of premature recognition is that it is inherent for the traditional, effectiveness-based, criteria that they might not be met at a certain point in time, but this does not mean that they could not be met in the future. Recognition can thus be premature. On the other hand, the additional criteria are legality-based. Consequently, if an entity is established illegally, time would normally not annul this illegality.<sup>317</sup> Recognition of an illegally created entity therefore cannot be premature, only illegal.

Premature recognition comes into question in the case of a secessionist entity trying to break off from its parent state. In such a case “[f]oreign states must then decide whether the new state has really already safely and permanently established itself, or only makes efforts to this end without having already succeeded.”<sup>318</sup> If an entity has not satisfied the statehood criteria, recognition is considered “an unlawful act, and it is frequently maintained that such untimely recognition amounts to

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<sup>317</sup> It should be added that it is possible that an illegally-created entity “recreates” itself in accordance with the additional statehood criteria but then this is no longer the same entity, although the same territory may be in question.

<sup>318</sup> Oppenheim’s International Law (Jennings and Watts, eds.) (1992), p. 143.

[unlawful] intervention.”<sup>319</sup> In the case of recognition when an entity fails to meet statehood criteria, “nullity of certain acts of recognition has been accepted in practice.”<sup>320</sup> However, this has not always been the case.

Examples of premature recognition include the United States’ recognition of Israel (1948)<sup>321</sup> and India’s recognition of Bangladesh (1971).<sup>322</sup> Despite this premature recognition, Bangladesh subsequently received general recognition.<sup>323</sup> Israel remains unrecognised by a number of Arab states; however, their non-recognition is “premised primarily on a determination to deny political *legitimacy* and not statehood to Israel.”<sup>324</sup> Israel is a member of the UN and it is generally not disputed that it is a state.<sup>325</sup> In the context of decolonisation there have been examples of recognition granted to former colonies which did not fulfil the statehood criteria.<sup>326</sup> However, as argued above, one can ascribe this anomaly to the fact that the right of self-determination at that time somewhat “softened” the traditional statehood criteria, and decolonisation, via the exercise of the right of self-determination, prevailed over effectiveness.<sup>327</sup>

In the case of an illegally created entity, the doctrine of obligatory non-recognition applies, which means that recognition of such an effective entity is collectively withheld. Arguably, non-recognition of an illegally created entity is an obligation owed *erga omnes*.<sup>328</sup> Advocates of the declaratory theory who adopt the concept of the additional set of legality-based statehood criteria argue that the

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<sup>319</sup> Ibid.

<sup>320</sup> Crawford (2006), p. 21. Crawford further invokes the accepted possibility of a nullity of recognition as an argument against the constitutive theory of recognition.

<sup>321</sup> Oppenheim’s International Law (Jenning and Watts, eds.) (1992), p. 144.

<sup>322</sup> Ibid.

<sup>323</sup> Ibid.

<sup>324</sup> Dugard (1987), p. 61 (*italics in original*).

<sup>325</sup> Ibid., pp. 60–63.

<sup>326</sup> See *supra* n. 294.

<sup>327</sup> See *supra* n. 294.

<sup>328</sup> Raič (2002), p. 107.

purpose of collectively withholding recognition to illegally created entities is not that recognition could constitute statehood of such an entity but is merely an affirmation of a legally non-existent situation. One such argument is well-captured in the following paragraph:

[T]he obligation of non-recognition has a declaratory character in the sense that States are considered to be under a legal obligation not to recognize a specific situation which is *already* legally non-existent. Thus, the obligation of withholding recognition is not the cause of the fact that an illegal act does not produce the intended results, that is, legal rights for the wrongdoer. Non-recognition merely declares or confirms that fact and the obligation not to grant recognition prevents the validation or ‘curing’ of the illegal act or the situation resulting from that act.<sup>329</sup>

Such an argument is not entirely persuasive. Talmon argues that the call for collective non-recognition of an illegally created effective entity indeed implies that such an entity could become a state through recognition and that proponents of the declaratory theory do not adequately prove that this is not so.<sup>330</sup> Talmon, however, does not make an argument in favour of the constitutive theory but rather questions the concept of the additional statehood criteria, arguing that “adherents of the declaratory theory were forced to develop additional criteria for statehood, which in the case of the collectively non-recognized States were obviously not met, in order to explain non-recognition as confirming the objective legal situation [that an illegally created effective entity is not a state].”<sup>331</sup> In this view, not acknowledging that illegally created effective entities are states is the ‘original sin’ which leads to two problems: (i) implying constitutive effects to the act of recognition and (ii) treatment of some recognition requirements as statehood criteria. Talmon consequently argues that “[t]he collectively non-recognized States may be ‘illegal States’ [but] they are

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<sup>329</sup> Ibid., p. 105 (italics in original).

<sup>330</sup> Talmon (2004), p. 138.

<sup>331</sup> Ibid., pp. 120–21.

nevertheless still ‘States’<sup>332</sup> and that “the additional criteria of legality proposed are not criteria for statehood but merely conditions for recognition, *viz* reasons for not recognizing *existing* States.”<sup>333</sup>

In this perception, only the rights stemming from statehood are withheld by collective non-recognition, not the status of a state itself.<sup>334</sup> “The creation of a State cannot be undone by non-recognition alone, and so non-recognition cannot have *status-destroying* effect either. What can be done, however, is to withhold the rights inherent in statehood from a new State. To that extent, non-recognition has a negatory, i.e. a *status-denying*, effect.”<sup>335</sup>

Although the critique of the constitutive nature of recognition, which stems from the concept of the additional statehood criteria and the doctrine of collective non-recognition, is well-made, Talmon’s arguments are not unproblematic. The argument, that the additional statehood criteria are merely an attempt to explain why the doctrine of collective non-recognition does not imply that recognition can have constitutive effects, ignores the fact that a similar relationship exists between the traditional statehood criteria and the prohibition of premature recognition.<sup>336</sup> In some circumstances where recognition was granted before the traditional statehood criteria were met,<sup>337</sup> it would be possible to argue that statehood was constituted.

Talmon’s arguments also suggest that a non-recognised state does not have all the rights stemming from statehood, i.e. it does not have all the attributes of statehood. It is, however, rather difficult to accept that there exist two types of states,

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<sup>332</sup> Ibid., p. 125.

<sup>333</sup> Ibid., p. 126 (*italics in original*).

<sup>334</sup> Ibid., p. 180.

<sup>335</sup> Ibid. (*italics in original*).

<sup>336</sup> See *supra* notes 318–320.

<sup>337</sup> See *supra* n. 294.

those with all and those with only some attributes of statehood.<sup>338</sup> This seems to be unacceptable from the perspective of sovereign equality of states.<sup>339</sup> On the other hand, denying statehood to illegally created effective entities does not lead to the problem of having states with differing attributes of statehood under international law. It is undisputed that effective entities have some but not all rights and duties under international law<sup>340</sup> and thus some attributes of statehood. However, by being non-states, their unequal status vis-à-vis states does not disturb the principle of sovereign equality.

What I propose here is that the concept of the additional statehood criteria should not be dismissed on grounds of the argument that the doctrine of collective non-recognition, triggered by non-fulfilment of these criteria, suggests that recognition may sometimes have constitutive effects. I rather propose that it might be worthwhile to acknowledge that in some circumstances recognition will have constitutive effects. This is not to say that the declaratory view needs to be rejected. Indeed, it does not need to be disputed that the emergence of new states is merely a matter of fact.<sup>341</sup> However, what should be acknowledged is that such facts are sometimes produced by considerable international involvement, in which the act of recognition and the doctrine of collective non-recognition play significant roles.

Crawford argues that:

[I]n many cases, and this is true of the nineteenth century as of the twentieth, international action has been determinative [for new state creations]: international organizations or groups of States—especially the so-called ‘Great Powers’—have exercised a collective authority to supervise, regulate and condition ... new state creations. In some cases the action takes the form of the direct

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<sup>338</sup> This does not mean that non-recognised states cannot exist. Below an argument will be made that states not recognised on political (not legal) grounds have indeed been treated as states.

<sup>339</sup> UN Charter, Article 2(1).

<sup>340</sup> See *infra* notes 349 and 350.

<sup>341</sup> See the examples of Macedonia and the Federal Republic of Yugoslavia (FRY), *infra* ch. 4.3.5. and 4.3.6.

establishment of the new State: a constitution is provided, the State territory is delimited, a head of State is nominated. In others it is rather a form of collective recognition—although the distinction is not a rigid one. Alternatively, various international regimes have been established for particular territories or groups of territories, with eventual independence in view—in particular, the Mandate and Trusteeship systems, and the procedures established under Chapter XI of the [UN] Charter.<sup>342</sup>

Crawford rejects the constitutive theory;<sup>343</sup> however, this observation implies that collective state creations are not only a matter of direct multilateral state-making such as, for example, at the Congress of Berlin<sup>344</sup> or settlements after both world wars.<sup>345</sup> Collective recognition can also have constitutive effects and is sometimes difficult to distinguish from collective state creations. This is especially the case when the territorial status of an entity is unclear and/or there exists a competing claim to territorial integrity by a parent state.<sup>346</sup> These issues will be further explored at a later point in this thesis, where post-1991 state creations will be examined. Arguments will be made that collective state creation and/or collective recognition does not need to be a matter of institutionalised international action but can be also be a consequence of informal agreement and/or ‘concerted practice’ among certain states.

When acknowledging some constitutive effects in the act of recognition, caveats accompanying the constitutive theory need to be considered.<sup>347</sup> Indeed, if collective recognition by certain states is considered equivalent to state creation, the inevitable question that follows is how many and whose recognitions are necessary for collective recognition to be seen as state creation. However, this question could also be asked from the other direction: in absence of a Security Council Chapter VII

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<sup>342</sup> Crawford (2006), p. 501.

<sup>343</sup> *Ibid.*, especially pp. 27–28.

<sup>344</sup> *Ibid.*, p. 508.

<sup>345</sup> *Ibid.*, pp. 516–522.

<sup>346</sup> Compare *infra* ch. 4.2., 4.3. and 7.

<sup>347</sup> See *supra* ch. 3.3.1.

Resolution explicitly calling for non-recognition, how many and whose withholdings of recognition are required that an entity is not considered a state? As the recent example of Kosovo shows, this question is not easy to answer and will be dealt with at a later point.

As to the effects of non-recognition, the situation is relatively clear when the Resolution is in question as “the incidents of non-recognition will normally be spelled out in the instruments.”<sup>348</sup> The question remains of what the effects of collective non-recognition are when it is practiced without a specific resolution. Even if an entity is not recognised, this does not mean that it does not have rights and obligations under international law. Indeed:

[T]he governments of both Israel and Palestine are expected to comply with customary international law, no matter what their international status. Similarly, the international recognition in 1999 of both Kosovo and East Timor as having some form of international personality was a necessary consequence of international actions on those territories.<sup>349</sup>

Further, judicial decisions – those of the ICJ as well as some significant decisions of domestic courts – show that even non-recognised entities and illegally annexed territories have some sovereign powers in the disputable territory when people’s interest or “private rights” are in question. As the ICJ held in the *Namibia Advisory Opinion*:

[T]he non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation. In particular, while official acts performed by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid, this invalidity cannot be extended to those acts,

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<sup>348</sup> Crawford (2006), p. 162.

<sup>349</sup> McCorquodale (2005), p. 196.

such as, for instance, the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory.<sup>350</sup>

This section shows that the prohibition of premature recognition and the doctrine of obligatory non-recognition bring legal considerations into the otherwise political act of recognition. Non-recognition on legal grounds stems from non-fulfilment of statehood criteria, traditional and/or additional. The problematic aspect of collective non-recognition is, however, that it implies that recognition may in some circumstances create a state. An argument was made that the most convenient response to this problem might be to simply acknowledge that (collective) recognition can sometimes have constitutive effects and that it is sometimes difficult to separate it from collective state creation.

### **3.3.3. Collective non-recognition in the pre-1991 practice**

#### **3.3.3.1. Manchukuo and European annexations**

Development of the doctrine of collective non-recognition of illegally created effective entities arguably began in the era of the League of Nations and collective response to the creation of Manchukuo and of European annexations and puppet states.

After Japan's occupation of Manchuria in 1931 and establishment of the State of Manchukuo,<sup>351</sup> the latter was not universally recognised as a state. On 11 March 1932, the Assembly of the League of Nations adopted a resolution in relation to Manchukuo in which it held that “[i]t is incumbent upon the Members of the League of Nations not to recognize any situation, treaty or agreement which may be brought

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<sup>350</sup> The *Namibia Advisory Opinion*, ICJ Rep 1971, para 125. In the practice of the United Kingdom's courts, Lord Wilberforce in *Carl Zeiss Stiftung v Rayner and Keeler* (1967) argued that when private rights are in question, “non-recognition cannot be pressed to its ultimate logical limit.” See *Carl Zeiss Stiftung v Rayner and Keeler Ltd*, Lord Wilberforce, reprinted in Harris (2004), p. 177. See also *Emin v Yeldag* (2002), reprinted in Harris (2004), p. 179.

<sup>351</sup> See Raič (2002), p. 116.

about by means contrary to the Covenant of the League of Nations or to the Pact of Paris.”<sup>352</sup> Despite this proclamation, it remains questionable whether Manchukuo may really serve as an early example of the doctrine of obligatory non-recognition. Indeed, the Lytton Commission, established by the League to enquire on the case of Manchukuo, found that the entity lacked independence and was a puppet state of Japan.<sup>353</sup> Consequently, statehood could be denied based on traditional criteria and not due to its illegal creation.<sup>354</sup>

International responses to the annexations and establishing of puppet-states in Europe and in Africa by Fascist Italy and Nazi Germany<sup>355</sup> as well as by the Soviet Union<sup>356</sup> do not give a unitary answer to whether the new effective situations were recognised. Indeed, “[t]he extinction of Austria, Albania and Czechoslovakia was recognized by most European Powers”<sup>357</sup> and submergence of the Baltic States “widely if tacitly accepted”,<sup>358</sup> while the Independent State of Croatia was recognised only by Germany, Italy, Slovakia, Bulgaria, Romania and Japan.<sup>359</sup>

Like Manchukuo, the situation in Europe also invoked questions of independence of the newly-created states. Albania, Slovakia and Croatia, though each in a constitutionally different position, can be merely described as puppet states

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<sup>352</sup> LNOJ (March 1932), p. 384. Notably, the Covenant of the League of Nations dealt with the prohibition of the use of force in Article 10. The resolution thus adopted the doctrine previously expressed by the United States (also known as the Stimson Doctrine), according to which the United States did not “admit the legality of any situation de facto ... and [did] not ... recognize any situation, treaty or agreement ... brought about by means contrary to the covenants and obligations of the Treaty of Paris of August 27, 1928.” Statement of Foreign Secretary of the United States Henry Stimson, reprinted in 26 AJIL 1932, p. 342. In the Treaty of Paris the contracting states condemned the recourse to war and subscribed themselves to peaceful settlement of disputes. See *The Treaty of Paris (1928)* <<http://www.yale.edu/lawweb/avalon/imt/kbpact.htm>>.

<sup>353</sup> Report of the Commission of Enquiry, League of Nations Publications, Vol 7, No 12 (1932) p. 97 [hereinafter *The Lytton Commission*].

<sup>354</sup> Crawford (2006) p. 133. It should be noted that Manchukuo was still recognised by a number of states, besides Japan also by El Salvador, Italy, Spain, Germany, Poland, Hungary, Romania, and Finland. Dugard (1987), p. 34.

<sup>355</sup> Ethiopia (1935), Austria (1938), Slovakia (1939), Albania (1939), Croatia (1941).

<sup>356</sup> For more on the Baltic States see *infra* ch. 4.4.1.

<sup>357</sup> Dugard (1987), pp. 37–38. Significantly, only the United States strictly adhered to the Stimson Doctrine, which was also adopted by the League in the question of Manchukuo. (*Ibid.*)

<sup>358</sup> Crawford (2006), p. 690.

<sup>359</sup> Sereni (1941), p. 1144.

of Italy and Germany, respectively.<sup>360</sup> Thus, similarly to Manchukuo, their statehood can be disputed under the traditional statehood criteria. It therefore remains somewhat unclear whether unlawful use of force in the interwar period was considered a barrier which prevented Manchukuo and some European entities from becoming states. One can say that there existed insufficient state practice, as well as insufficient *opinio juris*, to support such a claim.<sup>361</sup> Nevertheless, “State and League practice, albeit inconsistent, demonstrated a clear trend in favour of the non-recognition of territorial conquests, if necessary, of the non-recognition of an aspirant State produced by conquest.”<sup>362</sup>

### 3.3.3.2. The Turkish Republic of Northern Cyprus

In 1974, the officers of the Greek Cypriot National Guard, which was backed by Greece, overthrew the central government of Cyprus.<sup>363</sup> In response, Turkey militarily intervened and established an effective Turkish entity in Northern Cyprus.<sup>364</sup>

Turkey maintained that the intervention aimed to protect Turkish Cypriots;<sup>365</sup> however, the Security Council adopted Resolution 353 in which the intervention was condemned.<sup>366</sup> The Turkish Republic of Northern Cyprus (TRNC) declared independence on 15 November 1983,<sup>367</sup> after negotiations on a possible federal arrangement between Turkish and Greek Cypriot entities failed.<sup>368</sup>

Upon proclamation of independence of the TRNC, the Security Council adopted Resolution 541 in which it, *inter alia*, called “upon all States to respect the

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<sup>360</sup> Ibid., p. 1151.

<sup>361</sup> Dugard (1987), p. 39.

<sup>362</sup> Ibid., pp. 39–40.

<sup>363</sup> See Raič (2002), p. 123.

<sup>364</sup> Ibid.

<sup>365</sup> Ibid.

<sup>366</sup> SC Res 353 (20 July 1974).

<sup>367</sup> See Raič (2002), p. 123.

<sup>368</sup> Ibid.

sovereignty, independence, territorial integrity and non-alignment of the Republic of Cyprus”,<sup>369</sup> and called “upon all States not to recognise any Cypriot state other than the Republic of Cyprus.”<sup>370</sup> While Resolution 541 was not adopted under Chapter VII of the UN Charter, the TRNC was not recognised by any state other than Turkey.<sup>371</sup>

Illegal creation is not the only issue where the statehood of the TRNC can be disputed. The continuous presence of the Turkish military and its political dependence on Turkey lead to the conclusion that the TRNC’s statehood may be disputed under the traditional statehood criteria. Namely, it is questionable whether the TRNC has government which is independent from the government of any other state. As was held by ECtHR in *Cyprus v Turkey*:

[T]he Court’s reasoning is framed in terms of a broad statement of principle as regards Turkey’s general responsibility under the Convention for the policies and actions of the “TRNC” authorities. Having effective overall control over northern Cyprus, its responsibility cannot be confined to the acts of its own soldiers or officials in northern Cyprus but must also be engaged by virtue of the acts of the local administration which survives by virtue of Turkish military and other support. It follows that, in terms of Article 1 of the Convention, Turkey’s “jurisdiction” must be considered to extend to securing the entire range of substantive rights set out in the Convention and those additional Protocols which she has ratified, and that violations of those rights are imputable to Turkey.<sup>372</sup>

One possible argument is therefore that Turkey is in effective control of the TRNC, which is a puppet-state of Turkey. Nevertheless, if the TRNC attracted a significant number of recognitions, it would be difficult to argue that it is not a state.

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<sup>369</sup> SC Res 541 (18 November 1983), para 6.

<sup>370</sup> *Ibid.*, para 7.

<sup>371</sup> See Crawford (2006), p. 144.

<sup>372</sup> *Cyprus v Turkey* (2002), para 77.

### 3.3.3.3. Southern Rhodesia

On 11 November 1965, the government of Southern Rhodesia issued the Unilateral Declaration of Independence (UDI).<sup>373</sup> This was done despite the fact that both the General Assembly and the Security Council adopted a set of resolutions in which the white-minority government, due to the exclusion of the black population from political participation, was proclaimed as non-representative of the entire population of Southern Rhodesia and thus held not to be the right authority to declare independence.<sup>374</sup> The Security Council called on the United Kingdom not to decolonise Southern Rhodesia and on other states to withhold recognition.<sup>375</sup>

Upon the issuing of the UDI, UN organs continued the initiative for collective non-recognition. The General Assembly Resolution 2024 condemned “the unilateral declaration of independence made by the racist minority in Southern Rhodesia”<sup>376</sup> and recommended the matter to the Security Council.<sup>377</sup> The Security Council adopted Resolution 216, in which it condemned “the unilateral declaration of independence made by a racist minority in Southern Rhodesia.”<sup>378</sup> It further decided “to call upon all States not to recognize this illegal racist minority regime in Southern Rhodesia and to refrain from rendering any assistance to this illegal regime.”<sup>379</sup> This Resolution was followed by Resolution 217, in which the Security Council condemned “the usurpation of power by a racist settler minority in Southern Rhodesia and [regarded] the declaration of independence by it as having no legal

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<sup>373</sup> Dugard (1987), p. 90. The UDI included a provision that the Government of Southern Rhodesia would act as the representative of the Queen. UDI, Section 2 (1) (b). However, in 1970 Southern Rhodesia proclaimed itself a republic. *Ibid.*, pp. 90–91.

<sup>374</sup> See GA Res 1747 (XVI) (27 June 1962), SC Res 202 (6 May 1965), GA Res 2022 (XX) (5 November 1965).

<sup>375</sup> See SC Res 202, para 3, 4, 5.

<sup>376</sup> GA Res 2024 (XX) (11 November 1965), para 1.

<sup>377</sup> *Ibid.*, para 3.

<sup>378</sup> SC Res 216 (12 November 1965), para 1.

<sup>379</sup> *Ibid.*

validity;”<sup>380</sup> and called “upon all States not to recognize this illegal authority and not to entertain any diplomatic or other relations with it.”<sup>381</sup>

All states, including apartheid South Africa,<sup>382</sup> complied with the resolutions and “Rhodesia was at no stage recognized by any State.”<sup>383</sup> Such a situation occurred despite the fact that there was no doubt that Southern Rhodesia met the traditional criteria for statehood.<sup>384</sup> None of the relevant resolutions directly invoked Chapter VII of the UN Charter, though references to international peace and security were made. The legal status of some of the resolutions is thus questionable;<sup>385</sup> however, in absence of a direct reference to Chapter VII they were probably not legally binding.

Upon Southern Rhodesia’s proclamation of a republic on 18 March 1970,<sup>386</sup> the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 277, in which it decided “that Member States shall refrain from recognizing this illegal regime or from rendering assistance to it.”<sup>387</sup> Call for non-recognition of Southern Rhodesia thus doubtlessly became legally binding, although full compliance was achieved already after previous resolutions, even though they had probably not been legally binding.<sup>388</sup>

The Security Council and General Assembly Resolutions on Southern Rhodesia notably avoided the use of the term ‘state’. The reason for this stems from the purpose of these Resolutions, namely preventing Southern Rhodesia from acquiring statehood. The Security Council and the General Assembly did not want to cause any ambiguity, which could have resulted if the term ‘state’ were used.

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<sup>380</sup> SC Res 217 (20 November 1965) para 3.

<sup>381</sup> *Ibid.*, para 6.

<sup>382</sup> Dugard (1987), p. 91: “South Africa, with which Rhodesia maintained diplomatic relations and close economic and political ties, refrained from according express recognition to Rhodesia.”

<sup>383</sup> *Ibid.*, p. 91.

<sup>384</sup> *Ibid.*, p. 91.

<sup>385</sup> *Ibid.*, p. 95.

<sup>386</sup> *Ibid.*, pp. 92–93.

<sup>387</sup> SC Res 277 (18 March 1970), para 2.

<sup>388</sup> Compare *supra* n. 385.

Consequently, the language used in the Resolutions may lead us to the conclusion that the matter in question is actually non-recognition of the government.<sup>389</sup> However, “the real issue was the statehood of Rhodesia, as the purpose of the Unilateral Declaration of Independence was to establish Rhodesia as an independent State.”<sup>390</sup> In other words, although legitimacy of the white minority government was denied, this was done in the context of the UDI, i.e. that the white minority government was not a legitimate authority to proclaim independence.<sup>391</sup>

Notable from resolutions of the UN organs in reference to Southern Rhodesia are the references to democracy and democratic principles, even to political parties.<sup>392</sup> However, references to democracy and democratic principles in the relevant resolutions were limited to the framework of the right of self-determination and to the question of how this right is to be exercised.<sup>393</sup> Indeed, democratic principles in the Resolutions on Southern Rhodesia were invoked because the government, which declared the UDI, was not representative of the people of the entity and as such did not have the competence to make such a proclamation.<sup>394</sup> In other words, the change of legal status of the territory would not occur “in accordance with ... freely expressed will and desire”<sup>395</sup> of all of the people of Southern Rhodesia, as demanded by the General Assembly Resolution 1514. In order for the “freely expressed will and desire” to be ascertained, some democratic principles obviously need to be followed but it is too ambitious to conclude that

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<sup>389</sup> Dugard (1987), p. 93–94. Evident are references to the “illegal regime” and to “authority”.

<sup>390</sup> *Ibid.*, p. 94.

<sup>391</sup> See Raič (2002), p. 134.

<sup>392</sup> See GA Res 2022 (XX) (5 November 1965), para 8.

<sup>393</sup> See Nkala (1985), p. 57. See also Fawcett (1965–1966), p. 112; Devine (1971), pp. 410–17 and Fawcett’s response to Devine’s article. *Ibid.*, p. 417.

<sup>394</sup> Compare *supra* n. 374.

<sup>395</sup> GA Res 1514 (XV) (14 December 1960), para 5.

operation of the right of self-determination necessarily requires democracy as a political system.<sup>396</sup>

#### **3.3.3.4. The South African “Homelands”**

The development of the “homeland-policies” in South Africa began in the 1950s as a response to international pressure on the apartheid-regime.<sup>397</sup> These policies attempted to attach indigenous Africans to separate territorial entities, based on their respective tribal origins.<sup>398</sup> With the “independence” of the “homelands”, these people would lose South African citizenship.<sup>399</sup> Further, there was an extensive indigenous African population living outside of “their homelands”, who would also become “homeland citizens” and thus likewise denationalised as citizens of South Africa.<sup>400</sup> Consequently, it was observed that:

Should all the *Bantustans* become independent, then theoretically there would no longer be any black citizen of South Africa; instead, the urban blacks would all be tied by citizenship clauses ... to one of the various homelands. The material wealth of the country would remain in the hands of the white minority.<sup>401</sup>

The creation of the “Homelands” as quasi-independent states was in obvious pursuance of racist policies of their parent-state, South Africa.

In regard to the right of self-determination it can be argued that the right was not applied to the entire peoples who would qualify for it and that the “initial organization of the black population of South Africa into *bantustans* was imposed

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<sup>396</sup> See *infra* ch. 5.

<sup>397</sup> See Raič (2002), p. 135.

<sup>398</sup> See Crawford (2006), p. 339.

<sup>399</sup> *Ibid.*, p. 340–41.

<sup>400</sup> Transkei, for example, which was a “homeland” of Xhosa-speaking peoples, had resident population of 1.7 million. In addition, there were another 1.3 million people classified as citizens of Transkei who had no real linkage to its territory. See Faye Witkin (1977), p. 610.

<sup>401</sup> *Ibid.*, p. 622.

without their participation.”<sup>402</sup> Thus, the creation of the “homelands” as quasi-independent states was not an expression of the right of self-determination, as maintained by South Africa,<sup>403</sup> but its violation which attempted to prevent self-determination of a larger unit.<sup>404</sup>

Between 1976 and 1981, Transkei,<sup>405</sup> Bophuthatswana,<sup>406</sup> Venda,<sup>407</sup> and Ciskei<sup>408</sup> were granted quasi-independence by South Africa as a parent-state. Even before the declaration of independence of the four “homelands”, the General Assembly Resolutions 2671F<sup>409</sup> and 2775E<sup>410</sup> held that the “homeland” policies were expressions of apartheid and against the right of self-determination.

After the declaration of independence of Transkei, the General Assembly adopted Resolution 31/6A in which it called upon “all Governments to deny any form of recognition to the so-called independent Transkei and to refrain from having any dealings with the so-called independent Transkei or other Bantustans.”<sup>411</sup> The General Assembly thus held that the creation of “Homelands” was not a real expression of the right of self-determination but rather meant a pursuance of racist policies and called for non-recognition. This view was subsequently confirmed by Security Council Resolutions 402<sup>412</sup> and 407<sup>413</sup> and after the admission to

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<sup>402</sup> Ibid., p. 621. Notably, the “homelands” were not entirely forced into “independence”. Indeed, “[i]t seems more likely that the homeland leaders chose the course of separation as the only means open to them to further the interest of their tribes [in the absence of a popular consultation] [i]t is ... unclear whether the goal of independence was shared equally by the populace of the *bantustan*.” Ibid., p. 614.

<sup>403</sup> See Raič (2002), p. 135.

<sup>404</sup> Crawford (2006), p. 128.

<sup>405</sup> Status of Transkei Act 100 (26 October 1976).

<sup>406</sup> Status of Bophuthatswana Act 89 (6 December 1977).

<sup>407</sup> Status of Venda Act 107 (13 September 1979).

<sup>408</sup> Status of Ciskei Act 110 (4 December 1981).

<sup>409</sup> GA Res 2671 F (8 December 1970), see especially para 3.

<sup>410</sup> GA Res 2775 (29 November 1971).

<sup>411</sup> GA Res 31/6 A (26 October 1976), para 3.

<sup>412</sup> SC Res 402 (22 December 1976).

<sup>413</sup> SC Res 407 (25 May 1977).

“independence” of the three other “Homelands” also by General Assembly Resolutions 37/43<sup>414</sup> and 37/69A.<sup>415</sup>

None of these Security Council resolutions was adopted under Chapter VII of the UN Charter. Nonetheless, full compliance of third states was achieved. Further, the fact that the Security Council did not act under Chapter VII of the UN Charter “does not necessarily mean that States [were] not under any legal obligation to withhold recognition of the homeland-States.”<sup>416</sup> The character of norms violated in the case of the South African “homelands” may be argued to be that of *jus cogens* and, consequently, states may have been “under a general legal obligation to withhold recognition of such an illegality.”<sup>417</sup>

While it can be generally concluded that the violation of the right of self-determination and the pursuance of racist policies were the source of the illegality of the state-creations in the case of the South African “Homelands”, it also needs to be noted that these cases may serve as examples of limits to external self-determination exercised with the consent of a parent state.<sup>418</sup>

### **3.3.3.5. Collective non-recognition and the concept of the additional statehood criteria**

As shown above, the doctrine of obligatory non-recognition of illegally created effective entities has been developed in the practice of the UN organs and possibly even originates in the practice of the League of Nations. Yet it remains unclear whether “a binding resolution or decision of a UN body is necessary” for an obligation of non-recognition to be triggered<sup>419</sup> but, nevertheless, “such a resolution

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<sup>414</sup> GA Res 37/43 (3 December 1982).

<sup>415</sup> GA Res 37/69A (9 December 1982).

<sup>416</sup> Dugard (1987), p. 102.

<sup>417</sup> Ibid.

<sup>418</sup> Compare *infra* ch. 5.4.

<sup>419</sup> McCorquodale (2005), p. 197

or decision makes the obligation definitive.”<sup>420</sup> While there exists extensive practice of both the General Assembly and the Security Council calling for collective non-recognition (the latter organ at one occasion even invoking Chapter VII),<sup>421</sup> it shall be noted that collective non-recognition has been also practiced “in a number of other situations without a formal United Nations resolution to that effect (e.g. East Timor).”<sup>422</sup>

It is questionable whether the requirements that an entity must not be established as a result of an illegal use of force, in breach or the right of self-determination or in pursuance of racist policies reflect the additional statehood criteria or, perhaps, recognition requirements. However, there is significant evidence that these requirements (or criteria) have been universally adopted by states and that an entity created in violation of them will not be able to enjoy all attributes of statehood. This should imply that such an entity is not a state.<sup>423</sup>

In the discussed situations, states withheld recognition to effective entities even in the absence of a Chapter VII resolution. Together with voting for resolutions of the UN organs which proclaimed the emergence of effective entities to be illegal in situations of illegal use of force, breach of the right of self-determination and pursuance of racist policies, this may imply the existence of state practice and *opinio juris*, proving the existence of rules of customary international law that any state creation in violation of the rules in question is illegal.<sup>424</sup> If there exists a rule of customary international law, such a rule can only reflect statehood criteria, which have a status of legal prescription, and not recognition requirements, which are a

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<sup>420</sup> Ibid.

<sup>421</sup> See *infra* n. 387.

<sup>422</sup> Crawford (2006), p. 159

<sup>423</sup> See *supra* ch. 3.2.2.

<sup>424</sup> In the *Nicaragua case* ICJ Rep 1986, para 188, the ICJ held that *opinio juris* may be, *inter alia*, deduced from the attitude of states toward relevant General Assembly Resolutions and concluded that consent to the text of a resolution “may be understood as an acceptance of the rule or set of rules declared by the resolution.” Compare also *supra* n. 125.

matter of policy. In other words, law-governed obligations to withhold recognition can only be regarded as statehood criteria. Such is the relationship between the traditional statehood criteria and the prohibition of premature recognition as well as the relationship between the additional statehood criteria and the duty of non-recognition of illegally created effective entities.

When states withhold recognition this is not always done because either traditional or additional statehood criteria are not met. It will be argued in the forthcoming chapters that recognition can also be withheld on political considerations; however, in such circumstances a non-recognised entity may still be considered a state.<sup>425</sup>

#### **3.3.4. Recognition of governments and sources of governmental legitimacy**

The act of recognition of governments is, like the act of the recognition of states, “a political act that has legal consequences.”<sup>426</sup> It is even more controversial than the act of recognition of states, as, unlike the recognition of states, the recognition of governments is not a one-time act.<sup>427</sup> This opens the possibility of much more frequent politicisation of this type of recognition than of recognition of states. Recognition of governments can thus become “a political tool for reaching foreign policy goals.”<sup>428</sup> Recognition of governments does not apply in situations when the change of government occurs in accordance with constitutional provisions of the state in question but only when a new government usurps power against such provisions.<sup>429</sup> An implication of this limitation of the scope of the act of the recognition of governments is that after elections in a democratic state the new

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<sup>425</sup> See *infra* ch. 4.3.5. and 4.3.6.

<sup>426</sup> McCorquodale (2005), p. 197.

<sup>427</sup> *Ibid.*, p. 198.

<sup>428</sup> Peterson (1997), p. 3.

<sup>429</sup> See Harris (2004), p. 156.

government will not be subject to recognition or non-recognition.<sup>430</sup> However, if an elected government is overthrown, the coup government will not necessarily be considered the legitimate government of the state in question.

As is clear from the traditional statehood criteria, government is a *sine qua non* of a state.<sup>431</sup> On the other hand, not even a government can exist without a state.<sup>432</sup> On both the domestic and international plane the government acts on behalf of a state and consequently the state's policies are perceived through the actions of its government. It is therefore important that there exists no doubt as to who is the government which is entitled to speak on behalf of a certain state. The criteria relevant for the determination of who constitutes the actual government are associated with the questions of effective control and legitimacy.<sup>433</sup>

The effectiveness consideration does not deal with the question of how the new government has come to power but merely acknowledges the situation of an effective government being in power. This understanding is expressed in the following statement: "The government brought into permanent power by a revolution or a *coup d'état* is, according to international law, the legitimate government of a State, whose identity is not affected by these events."<sup>434</sup> In this regard two legal rules apply. First, recognition of a new government should not be granted before effective control over the territory of a state in question is achieved; second, after an old government loses its effective control, it should be no longer treated as the government of the state in question.<sup>435</sup> The regime is thus granted recognition if it

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<sup>430</sup> Ibid.

<sup>431</sup> See supra ch. 3.2.1.

<sup>432</sup> Roth (1999), p. 130, argues: "just as there is no government without a state, there is no state without a government."

<sup>433</sup> Ibid., pp. 136–37.

<sup>434</sup> Kelsen (1966), p. 220.

<sup>435</sup> Peterson (1997), p. 35.

meets the statehood criterion of government.<sup>436</sup> This was also the practice adopted by most states in the twentieth century.<sup>437</sup> There were, however, some important exceptions to this general rule, such as the United States, which required some democratic legitimacy before granting recognition.<sup>438</sup>

The practice of explicit recognition of governments has declined and most governments now resort to the “Estrada Doctrine”, which perceives an explicit declaration of recognition of governments as an insulting practice that interferes with the internal affairs of other states.<sup>439</sup> Instead of an explicit proclamation of recognition the approach of the “Estrada Doctrine” is less formal and “confines itself to the maintenance or withdrawal ... of ... diplomatic agents, and to the continued acceptance ... of ... accredited diplomatic agents.”<sup>440</sup> This doctrine was quietly accepted by the United States with the Department of State statement in 1977.<sup>441</sup>

Although the practice of explicit recognitions of governments has declined, there is significant practice of factual non-recognition of governments. Such practice has been identified in regard to three types of situations:

[1] [There exist] [t]wo or more local *de facto* authorities each claiming to be the only legitimate government of a (recognized) State ... [2] the government of a State claims to continue to be the government of a part of the State’s territory that has *de facto* seceded ... [3] an authority in exile claims to be the government of a State which is under the effective control of a colonial power, a

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<sup>436</sup> McCoquodale (2005), p. 198.

<sup>437</sup> Ibid.

<sup>438</sup> Ibid., though even practice of the United States was inconsistent. See Peterson (1997), p. 53.

<sup>439</sup> This doctrine is named after the Mexican minister of foreign affairs Genaro Estrada who, in 1930, made a proclamation on behalf of Mexico that its government in the future shall issue “no declaration in the sense of grants of recognition, since [Mexico] considers that such a course is an insulting practice and one which, in addition to the facts that it offends sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes.” Estrada Doctrine (1930), reprinted in Roth (1999), pp. 137–38.

<sup>440</sup> Ibid.

<sup>441</sup> See Harris (1999), p. 159. The United States Department of State argued that “establishment of relations does not involve approval or disapproval but merely demonstrates a willingness on our part to conduct affairs with other governments directly.” US Department of State statement (1977), reprinted in Harris (2004), p. 159.

belligerent occupant or its local puppet, or an authority which came to power by *coup d'état* or revolution.<sup>442</sup>

In the absence of explicit recognitions in such situations, actions of states imply their views in regard to the problem of which government is considered the legitimate representative of the state in question.<sup>443</sup>

Important clarification of the doctrine of recognition and non-recognition of governments also stems from the practice of UN organs. From 1949, governments of the People's Republic of China and of the Republic of China have both claimed to be the legitimate government of China.<sup>444</sup> The Government of the Republic of China initially represented China in the UN.<sup>445</sup> In 1971, however, the General Assembly adopted Resolution 2758<sup>446</sup> which recognised:

[T]he representatives of [the Government of the People's Republic of China] as the only legitimate representatives of China [and expelled] the representatives of [the Government of the Republic of China (Taiwan)] from the place which they unlawfully [occupied] at the United Nations and in all the organizations related to it.<sup>447</sup>

Two observations can be made in this context. First, the General Assembly acknowledged that the Government of the Republic of China was not the legitimate government of China as it was in effective control of only a fraction of the Chinese territory, i.e. of Taiwan. Second, the General Assembly confirmed that the Government of the People's Republic of China is the legitimate government of the entire Chinese territory, including Taiwan, although it obviously did not exercise effective control over Taiwan.

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<sup>442</sup> Talmon (1997), pp. 7–8.

<sup>443</sup> Ibid.

<sup>444</sup> Crawford (2006), p. 200.

<sup>445</sup> Ibid.

<sup>446</sup> GA Res 2758 (25 October 1971).

<sup>447</sup> Ibid., para 4.

Subsequent practice of UN organs also shows that the question of effectiveness will not always be the only criterion when deciding whether a certain government is the legitimate representative of the state which it claims to represent. Indeed, to deny the status of legitimate government to the respective governments of the People's Republic of China and Cyprus in the territories of Taiwan and the TRNC, respectively, could imply recognition of the two entities as states.<sup>448</sup> Recognition of the Smith government in Southern Rhodesia might have implied acceptance of the UDI.<sup>449</sup> Non-recognition of the Kuwaiti government as the only legitimate government of Kuwait after the Iraqi occupation could have implied acceptance of the Iraqi annexation.<sup>450</sup> However, in all of these circumstances, norms of general international law were involved while the regime type as such played no role.<sup>451</sup>

### **3.4. Conclusion**

The traditional statehood criteria, originating in the Montevideo Convention, are essentially based on effectiveness. With further developments in other fields of international law, it is questionable whether the traditional criteria are the only relevant criteria for statehood. The concept of the additional statehood criteria has emerged in this context. However, the additional criteria remain disputed by some scholars and their scope is sometimes not entirely clear.

The disputability of the additional statehood criteria stems from the view that they blur statehood criteria with recognition requirements and in certain circumstances imply that recognition may have constitutive effects. However, it was argued in this chapter that the statehood criteria may be perceived as a concept which

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<sup>448</sup> Compare supra ch. 3.3.3.2. for the TRNC.

<sup>449</sup> Compare supra ch. 3.3.3.3.

<sup>450</sup> See SC Res 661 (6 August 1990). For more see also infra ch. 5.3.4.1.

<sup>451</sup> Compare supra ch. 3.2.2

brings legal reasoning into an otherwise political act of recognition. While no legal obligation to grant recognition exists, it can be argued that in certain circumstances there is a legal obligation to withhold recognition. Non-fulfilment of either set of statehood criteria, traditional or additional, may lead to such an obligation. If an entity does not meet the traditional statehood criteria, a premature recognition offends the territorial integrity of a parent state in the territory of which such an entity attempts to constitute itself. If an effective entity is otherwise established but in breach of some of the fundamental principles of international law, there is some evidence that such an entity will not be considered a state.

In the UN Charter era, the development of international law on the use of force, the right of self-determination and some other international human rights norms have had a notable impact on the law of statehood. Significant practice exists of UN organs in support of the conclusion that states are protected from having their international personality extinguished if force is illegally used against them.<sup>452</sup> Further, practice of the UN organs also shows that entities established as a result of an unlawful external use of force will not be recognised as independent states. Yet in such circumstances statehood may often also be disputed under the traditional statehood criteria as doubts exist whether such an entity really has a government independent from any other government. Practice of the UN organs also supports the conclusion that an effective entity will be denied statehood if it is created in breach of the right of self-determination or in pursuance of racist policies.

If the additional statehood criteria are not met, states are under obligation not to grant recognition. Such an obligation has been universally accepted when non-recognition is called for by the General Assembly or by the Security Council, even if

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<sup>452</sup> See the response to the Iraqi occupation of Kuwait. SC Res 662 (9 August 1990) and *supra* ch. 3.2.2.

the latter organ does not act under Chapter VII of the UN Charter. Yet the applicability of the obligation of non-recognition without a specific resolution of a UN organ remains much more uncertain as a possible violation of relevant legal norms needs to be determined by states.

In regard to criticism that the additional statehood criteria imply that recognition may be constitutive, this chapter has made an argument that constitutive effects in some circumstances should be acknowledged. Indeed, although it is generally perceived in contemporary international law that recognition is declaratory, there exist situations in which international involvement, *inter alia*, through collective recognition and collective non-recognition, has constitutive effects. This is especially relevant in a case of unilateral secession, i.e. in a situation in which a competing claim to territorial integrity exists. An argument was made in this chapter that the principle of sovereign equality does not allow us to conclude that there exist two types of states: those with full rights and duties stemming from statehood and those with only some rights and duties stemming from statehood. Therefore, entities, albeit effective, which do not have full rights and duties inherent in statehood should not be considered states.

Further, in examples of illegally created (effective) entities, there exists significant state practice where states withheld recognition not due to their political considerations but because they believed international law – even in the absence of a Chapter VII resolution – bound them to do so. This may supplement state practice with *opinio juris* and prove the existence of some additional (i.e. legality-based) statehood criteria.

The influence of the right of self-determination and human rights in general on the law of statehood has led to some controversy in interpreting the scope of the

requirements that these criteria set for a lawful state creation. It should be recalled that statehood criteria are only applied when states are created and are, generally, not continuous requirements. This is, however, not to say that self-determination and human rights standards have no relevance for territorial integrity claims of the existing states. It may well be that gross human rights violations weaken the violating state's claim to territorial integrity, when limiting the exercise of the right of self-determination to the internal mode of this right. This issue will be further addressed below, when discussing the 'remedial secession doctrine'.

After the end of the Cold War and the creation of several new states, especially in the territories of the former SFRY and of the former Soviet Union, there is some evidence that recognition requirements – and possibly even statehood criteria – were expanded by some further requirements, such as: democracy rather than some democratic principles operating within the right of self-determination; human rights other than those of *jus cogens* character; and commitment to peace apart from the prohibition of creation of a state as a result of an unlawful use of force. These issues will be considered in the next chapter.

The practice of express recognition of governments has declined, yet there exists significant practice of factual recognition and non-recognition when states and/or UN organs have to decide which of the competing authorities is the legitimate representative of the state they all claim to represent. In pre-1991 practice, norms of general international law prevailed over effectiveness, while, in order to determine which government was legitimate, the type of government was not considered. In the forthcoming chapters it will be argued whether and to what degree this has changed.

## IV. DEMOCRACY AND HUMAN RIGHTS IN THE PRACTICE OF POST-1991 STATE CREATIONS

### 4.1. Introduction

This chapter deals with the question of whether the pre-1991 standard – that the nature of an entity’s political system does not *per se* impact the law of statehood – has changed in the practice of post-1991 state creations. The starting point will be the European Community (EC) Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union<sup>453</sup> and the EC Declaration on Yugoslavia.<sup>454</sup> It will be considered which requirements expressed in these documents stretch beyond the statehood criteria and what image of democracy they adopt when they spell out the latter as a recognition criterion. Subsequently, it will be examined how the EC Guidelines were applied in the territories of the former SFRY and of the former Soviet Union and how they interfere with the law of statehood. Further, it will be considered whether the requirements expressed in the EC Guidelines were applied in subsequent state creations. In this context an argument will be made that the practice of international imposition of certain democratic standards in situations of new state creations depends on the mode of a state creation.

This chapter deals with successful post-1991 state creations. Secessionist attempts which did not lead to new state creations are generally not considered, while the Kosovo situation is dealt with in Chapter 7.

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<sup>453</sup> EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union (16 December 1991), reprinted in Trifunovska (1994), p. 472 [hereinafter EC Guidelines].

<sup>454</sup> EC Declaration on Yugoslavia (16 December 1991), reprinted in Trifunovska (1994), p. 474 [hereinafter EC Declaration].

## **4.2. EC Guidelines and EC Declaration: beyond the statehood criteria**

### **4.2.1. Background to the Yugoslavia crisis and the European Community's involvement**

After Slovenia and Croatia both declared independence on 25 June 1991,<sup>455</sup> an armed conflict between Slovenia and the Yugoslav National Army (YNA) broke out.<sup>456</sup>

While there was no major outbreak of hostilities between Croatia and the YNA immediately after Croatia's proclamation of independence, there had been conflicts between Serb paramilitaries and Croatian police since early 1991.<sup>457</sup>

Upon the outbreak of hostilities, foreign ministers of the Netherlands, Luxembourg and Italy – the “EC Troika” – were sent to Slovenia “in order to negotiate the withdrawal of Slovenia's declaration of independence [and] a cease-fire between the warring factions”<sup>458</sup> along with reestablishment of normal functioning of federal organs.<sup>459</sup> The efforts resulted in an agreement signed on 7 July 1991, at Brioni Islands, Croatia.<sup>460</sup> The Brioni Agreement was concluded by the EC, represented by the EC Troika,<sup>461</sup> representatives of the Yugoslav federal organs,<sup>462</sup> and representatives of Slovenia<sup>463</sup> and Croatia.<sup>464</sup>

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<sup>455</sup> Declaration of Independence of the Republic of Slovenia (1991) and Declaration of Independence of the Republic of Croatia (1991).

<sup>456</sup> See Crawford (2006), p. 396.

<sup>457</sup> Terrett (2000), p. 31.

<sup>458</sup> *Ibid.*, p. 72.

<sup>459</sup> The Yugoslav political crisis culminated in Serbia's usurpation of federal organs such as the collective presidency in which it controlled three out of eight seats and the non-appointment of the Croatian member of the presidency to its constitutionally-established rotating chairmanship. See *ibid.*, p. 32.

<sup>460</sup> See The Brioni Agreement <<http://www.ukom.gov.si/10let/pot/osamosvojitvenidokumenti/brionska-deklaracija>>.

<sup>461</sup> *Ibid.* The composition of the Troika of foreign ministers was changed due to the EC's policy of rotating the presidency. The foreign minister of Italy was followed by the foreign minister of Portugal.

<sup>462</sup> The federal organs were represented by the premier, the minister of internal affairs, the deputy minister of defence, and members of the federal presidency. *Ibid.*

<sup>463</sup> The Slovenian representatives included the chairman of the Slovene presidency, the Slovene premier, the Slovene foreign minister, the speaker of the Slovene Assembly and the Slovene representative in the federal presidency. *Ibid.*

<sup>464</sup> Croatia was represented by its president. (*Ibid.*) The few-in-number Croatian representation can be understood in the context of the Agreement which predominantly dealt with Slovenia. See *infra* n. 470.

The Brioni Agreement stipulated for a three-month suspension period in which the situation of 25 June 1991 (prior to Slovenia's and Croatia's declarations of independence) was to be re-established.<sup>465</sup> In this period further negotiations on the future of Yugoslavia were to take place.<sup>466</sup> The Brioni Agreement also stipulated for the withdrawal of YNA units to their barracks as well as the demobilisation of the Slovene military units.<sup>467</sup> It further established a monitoring mission under the auspices of the Conference for Security and Co-operation in Europe (CSCE), for which it was specifically stated that it was not a peace-keeping mission and that the observers were unarmed.<sup>468</sup> In the latter context Croatia was also mentioned, although the entire text predominantly referred to the situation in Slovenia and aimed at ending hostilities between Slovenia and the YNA.<sup>469</sup> Nevertheless, although the provisions of the Agreement effectively regulated the cease-fire in Slovenia, in general terms they also applied to Croatia and thus the three-month suspension of Croatia's declaration of independence was also enforced.<sup>470</sup>

On 27 August 1991, the EC and its member-states founded the Conference on Yugoslavia, under whose auspices the Arbitration Commission was established.<sup>471</sup> The Arbitration Commission was chaired by the President of the French Constitutional Court, Robert Badinter.<sup>472</sup> As has been observed, "the authority of the

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<sup>465</sup> The Brioni Agreement, Annex 1, para 4.

<sup>466</sup> Ibid.

<sup>467</sup> Ibid., Annex 1, para 5.

<sup>468</sup> Ibid., Annex 2.

<sup>469</sup> It needs to be noted that the YNA was, at least formally, a military force of the federation. Although hostilities between Croatian police forces and Serb paramilitary units began already in early 1991, the latter, unlike the YNA, could not be perceived as agents of the federation. In Slovenia, however, police and military units were involved in an armed conflict with a federal agent. This situation would soon develop in Croatia but had not openly occurred at the time when the Brioni Agreement was reached. See supra n. 460.

<sup>470</sup> See supra n. 465.

<sup>471</sup> See Crawford (2006), p. 396.

<sup>472</sup> Hereinafter: The Badinter Commission. The other four members of the Commission were the Presidents of the Constitutional Courts of Germany and Italy, the President of the Court of Arbitration of Belgium and the President of the Constitutional Tribunal of Spain. See Pellet (1992), p. 178. Terms the 'Badinter Commission' and 'Badinter Committee' are used interchangeably. References to the

Commission ... derived from two related but distinct sources: from the European Community as a legal entity unto itself and from the constituents of the Community.”<sup>473</sup> The mandate of the Commission and the scope of its decisions were, however, not entirely defined:

The mandate given to the Committee was somewhat vague. At the outset it was envisaged that the Committee would rule by means of binding decisions upon request from ‘valid Yugoslavian authorities’. Although no consultative procedure was formally established, the Committee was in fact called upon to give one opinion at the request of Lord Carrington, President of the Peace Conference (Opinion No. 1); similar requests were subsequently made by the Serbian Republic, using the Conference as intermediary (Opinions Nos. 2 and 3) and the Council of Ministers of the EEC (Opinions Nos. 4 to 7).<sup>474</sup>

The scope of legal issues with which the Badinter Commission dealt was relatively broad. Indeed, “[m]inority rights, use of force, border changes, the rule of law, state succession, and recognition all eventually fell within the Commission’s brief.”<sup>475</sup> The opinions of the Badinter Commission were formally not legally binding.<sup>476</sup>

At the Council of Ministers meeting on 16 December 1991, the EC adopted two documents in which it expressed its recognition policy in regard to the new states emerging in the territories of the SFRY and of the Soviet Union, respectively:<sup>477</sup> the EC Guidelines<sup>478</sup> and the EC Declaration.<sup>479</sup> These documents were part of broader EC involvement in the processes of dealing with disintegration

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‘Badinter Committee’ in secondary sources should therefore be understood as synonyms for the ‘Badinter Commission’.

<sup>473</sup> Grant (1999), p. 154.

<sup>474</sup> Pellet (1992), p. 178.

<sup>475</sup> Grant (1999), p. 156.

<sup>476</sup> See Türk (1999), p. 70.

<sup>477</sup> See Harris (2004), pp. 147–52.

<sup>478</sup> See supra n. 453. As the dissolution of the SFRY coincided with the dissolution of the Soviet Union, “many of the same issues were raised in relation to both cases.” Terret (2000) p. 80. Notably, the EC became much more involved in the dissolution of the SFRY which was a source of instability in the geographical proximity of a number of the EC member-states. Hence the EC Declaration only dealt with the SFRY.

<sup>479</sup> See supra n. 454.

of the two federations, which were for a great part motivated by stopping ongoing and preventing future armed conflicts in their respective territories.<sup>480</sup>

## **4.2.2. Substance of the EC Guidelines and EC Declaration**

### **4.2.2.1. The EC Guidelines**

The EC Guidelines invoked “the normal standards of international practice and the political realities in each case”<sup>481</sup> when recognition was to be granted. This may be understood as a reference to the traditional statehood criteria.<sup>482</sup> Further, the EC Guidelines, *inter alia*, invoke “the principle of self-determination,”<sup>483</sup> “rights of ethnic and national groups and minorities”,<sup>484</sup> “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement”<sup>485</sup> and spell out: “The Community and its Member States will not recognize entities which are the result of aggression.”<sup>486</sup> The standards invoked in this context, which deal with the prohibition of unlawful use of force, respect for the right of self-determination and even a limited reference to human rights, could arguably still fall within the additional statehood criteria, developed in the era of the UN Charter.<sup>487</sup>

The document, however, also spells out that new states must “have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful

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<sup>480</sup> See Caplan (2005), pp. 15–16. It should be noted that 1991 was the year of final negotiations on the Treaty on European Union (TEU) which also foresaw the creation of the “second pillar”, i.e. Common Foreign and Security Policy (CFSP). In the time when the EC became involved in the Yugoslav crisis, the TEU had not been ratified by all EC member-states, while “Yugoslavia became an experimental test-case” for the EC member-states and their commitment to the CFSP. Terrett (2000), p. 72.

<sup>481</sup> EC Guidelines (1991), para 2.

<sup>482</sup> See Harris (2004), p. 148.

<sup>483</sup> EC Guidelines (1991), para 2.

<sup>484</sup> *Ibid.*, para 3.

<sup>485</sup> *Ibid.*

<sup>486</sup> *Ibid.*, para 4.

<sup>487</sup> See *supra* ch. 3.2.2. and 3.3.3.5.

process and to negotiations.”<sup>488</sup> To these general requirements, stretching beyond the statehood criteria, a much more specific meaning is attached by the demand that new states need to have “respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights.”<sup>489</sup> As already discussed, the provisions of the UN Charter cannot be interpreted as favouring a particular type of political system, i.e. they do not require the Western style of (liberal) democracy.<sup>490</sup> However, this might not be true in regard to the Charter of Paris and the Final Act of Helsinki. The image of democracy in these two documents determines the image of democracy in the EC Guidelines. This issue will be dealt with below.

#### **4.2.2.2. The EC Declaration**

The EC Declaration, *inter alia*, provides:

The Community and its Member States agree to recognize the independence of all the Yugoslav Republics fulfilling all the conditions set out below. The implementation of this decision will take place on 15 January 1992.

They are therefore inviting all Yugoslav Republics to state by 23 December [1991] whether:

- they wish to be recognized as independent States
- they accept the commitments contained in the above-mentioned Guidelines
- they accept the provisions laid down in the draft Convention - especially those in Chapter II on human rights and rights of national or ethnic groups - under consideration by the Conference on Yugoslavia
- they continue to support the efforts of the Secretary General and the Security Council of the United Nations, and the continuation of the Conference on Yugoslavia.

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<sup>488</sup> EC Guidelines (1991), para 2.

<sup>489</sup> *Ibid.*, para 3.

<sup>490</sup> See *supra* ch. 2.

The applications of those Republics which reply positively will be submitted through the Chair of the Conference to the Arbitration Commission for advice before the implementation date.<sup>491</sup>

The EC Declaration thus established the procedure for collective recognition and set out the conditions for recognition.

Caplan argues that:

In a manner strikingly similar to the present case [EC's recognition of the states emerging in the territory of the SFRY], the contracting parties to the 1878 Treaty of Berlin (Austria, France, Germany, Great Britain, Italy, Russia and Turkey) linked their recognition of Bulgaria, Montenegro, Serbia and Romania to respect for minority rights, then narrowly defined in religious terms, on the part of newly established states ... Even more extensive were the minority rights provisions that the Entente Powers established as a condition for their recognition of the new states created after First World War—Poland; Czechoslovakia; and the Kingdom of Serbs, Croats and Slovenes ...—and included in their treaties with many of the defeated and enlarged states.<sup>492</sup>

The conditional collective recognition, based on some human rights standards, was thus not a new occurrence when the EC Declaration was adopted and new states recognised. However, the procedure foreseeing application of entities that “wish to become states,”<sup>493</sup> which was then referred for consideration to the Badinter Commission,<sup>494</sup> and the date that was set to determine when the decision would be implemented,<sup>495</sup> lead to the question of whether the EC Declaration established a mechanism to create new states.

In the absence of a universal body for granting of recognition,<sup>496</sup> it can be argued that the Badinter Commission to a certain degree played this role. This view is, however severely limited by the fact that its decisions were not legally binding –

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<sup>491</sup> EC Declaration (1991), para 3. For explanation on “the provisions laid down in the draft Convention” see *infra* ch. 4.3.3.

<sup>492</sup> Caplan (2005), pp. 61–62.

<sup>493</sup> EC Declaration (1991), para 3.

<sup>494</sup> *Ibid.*, para 4.

<sup>495</sup> *Ibid.*, para 2.

<sup>496</sup> See *supra* n. 313.

not even for EC member-states.<sup>497</sup> Indeed, “[v]esting an arbitration panel with authority to study and advise on recognition is not the same as vesting such an organ with authority to recognize.”<sup>498</sup> The Badinter Commission was thus not a body that granted recognition but rather a body that “to some extent ... influenced state practice.”<sup>499</sup> Yet it was also a body composed of eminent legal experts with a sense of strong legal persuasiveness in its opinions.<sup>500</sup> The legal significance of its opinions will be further discussed below.

Conditions set for recognition make a general reference to the EC Guidelines<sup>501</sup> and more specifically define a required commitment to human rights protection (especially rights of minorities),<sup>502</sup> a commitment to peaceful resolution of the conflict in the territory of the SFRY,<sup>503</sup> and an assurance that the new state would have no territorial claims toward neighbouring states.<sup>504</sup> From the point of view of the conditions set for recognition, the EC Declaration followed the EC Guidelines and partially supplemented them with requirements which specifically addressed the situation in the territory of the SFRY in December 1991. The EC Declaration is therefore a technical and SFRY-specific document and its main relevance is that it established a mechanism for recognition in this particular situation. In order to determine the image of democracy in the EC’s involvement in the new state creations

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<sup>497</sup> See supra n. 476.

<sup>498</sup> Grant (1999), p. 168. The creation of such a body to deal with recognition, among other questions, was not unprecedented. Above were mentioned the Commission of Jurists, established under the auspices of the League of Nations, which dealt with the territorial status of the Åland Islands (see supra n. 278 and infra n. 940) and the Lytton Commission, also established by the League of Nations, that dealt with the status of Manchukuo (see supra ch. 3.3.3.1.).

<sup>499</sup> Ibid.

<sup>500</sup> Compare infra ch. 4.3.

<sup>501</sup> The EC Guidelines (1991), para 3.

<sup>502</sup> Ibid.

<sup>503</sup> Ibid.

<sup>504</sup> Ibid., para 5. This requirement specifically had in mind the dispute between Greece and Macedonia over the latter’s name. See Grant (1999), p. 158. Compare infra ch. 4.3.5.

in the territories of the SFRY and the Soviet Union, the relevant document to be analysed is the EC Guidelines.

#### **4.2.3. The image of democracy, human rights and a commitment to peace in the EC Guidelines**

It has been established that the EC Guidelines spelt out some requirements that arguably fall within either the traditional or additional statehood criteria.<sup>505</sup> These will not be discussed at this point. The focus will be on two kinds of recognition requirements: first, requirements that do not constitute the statehood criteria; second, requirements that stem from the statehood criteria but extend the scope of their operation. The requirement for new states “to have constituted themselves on a democratic basis”<sup>506</sup> falls within the first group. The image of democracy within this requirement will be examined in this context. In the second group fall: (i) the requirement for respect of human rights and (ii) the requirement that states must refrain from illegal use of force. As has been argued, respect for human rights to a certain degree is relevant as a statehood criterion.<sup>507</sup> However, this section examines whether this requirement is extended in the EC Guidelines beyond the human rights of *jus cogens* character, whether the commitment to peace required by the EC Guidelines reaches beyond the requirement that a state may not be created as a result of an illegal use of force and whether the EC Guidelines thus, possibly, adopt the idea of democratic peace.<sup>508</sup>

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<sup>505</sup> See supra ch. 4.2.2.1.

<sup>506</sup> EC Guidelines (1991), para 3.

<sup>507</sup> See supra n. 299.

<sup>508</sup> Compare supra ch. 2.5. and 3.2.2.

#### 4.2.3.1. Democracy in the EC Guidelines

The EC Guidelines, *inter alia*, provide:

[The EC and its member-states] affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.<sup>509</sup>

Reference to ‘constituted on a democratic basis’ could generally be interpreted as confined to ‘democratic principles’ operating within the right of self-determination.<sup>510</sup> In practice this would mean that this specific requirement would demand for independence to be declared upon a popular consultation at which a free and fair expression of the will of the people would be guaranteed.<sup>511</sup> The requirement of ‘constituted on a democratic basis’ would thus, arguably, not reach beyond the scope of (additional) statehood criteria.<sup>512</sup> However, there is a question of whether the EC Guidelines really attempted to confine references to democracy to ‘democratic principles’ operating within the right of self-determination. While the EC Guidelines do not directly attempt to define the understanding of democracy, this understanding is expressed in the Charter of Paris, to which the EC Guidelines expressly refer.<sup>513</sup> Consequently, the understanding of democracy within the EC Guidelines seems to be determined by its reference to the Charter of Paris.

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<sup>509</sup> EC Guidelines (1991), para 3.

<sup>510</sup> Compare supra ch. 3.3.3.3.

<sup>511</sup> Compare infra ch. 5.4.

<sup>512</sup> Compare supra ch. 3.2.2.

<sup>513</sup> There are also references made to the Final Act of Helsinki, with which the Conference on Security and Co-operation in Europe (CSCE) was established. However, dating to 1975, this is a document drafted in the Cold War era. It does not invoke democracy or ‘democratic principles’ and deals with human rights within the boundaries of the UDHR and the two universal covenants. (See The Final Act of Helsinki 14 ILM 1292 (1975)). The Charter of Paris, dating to 1990, will thus be the most relevant document to determine the image of democracy as well as human rights standards in the EC Guidelines. An analysis of the Final Act of Helsinki will follow from the point of view of the commitment to peace expressed in this document. See infra ch. 4.2.3.3.

The Charter of Paris for a New Europe was adopted on 21 November 1990 in the framework of the Conference on Security and Co-operation in Europe (CSCE).<sup>514</sup> Notably, the document was adopted at the end of the Cold War and was signed by virtually all democratising (former) communist states in Europe, including the Soviet Union and the SFRY.<sup>515</sup>

The Charter's chapter entitled Human Rights, Democracy and Rule of Law, to which the EC Guidelines refer,<sup>516</sup> *inter alia*, provides:

Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression of all groups of society, and equality of opportunity for each person.<sup>517</sup>

Apart from using the terms 'democratic government' and 'democracy', this definition falls close to the definition of the right to political participation expressed in Article 21 of the UDHR<sup>518</sup> and Article 25 of the ICCPR.<sup>519</sup> Notably, as in these two elaborations, reference to elections in a multiparty setting is omitted. However, the possibility of various interpretations of the democratic model required by the Charter of Paris is severely limited in light of Annex 1 to this document. Article 7 of Annex 1 provides:

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<sup>514</sup> The Charter of Paris for New Europe, with which the CSCE was transformed into the Organisation for Security and Cooperation in Europe (OSCE), was signed by the following states: France, Germany, Italy, the Soviet Union, the United Kingdom, the United States, Canada, Belgium, the Netherlands, Poland, Spain, Sweden, Austria, Czechoslovakia, Denmark, Finland, Hungary, Norway, Switzerland, Greece, Romania, Turkey, Yugoslavia, Bulgaria, Ireland, Luxembourg, Portugal, Cyprus, the Holy See, Iceland, Liechtenstein, Malta, Monaco, and San Marino. (See The Charter of Paris <[http://www.osce.org/documents/mcs/1990/11/4045\\_en.pdf](http://www.osce.org/documents/mcs/1990/11/4045_en.pdf)>). Later the following states also joined: Albania, Andorra, Armenia, Azerbaijan, Bosnia-Herzegovina, Estonia, Georgia, Kazakhstan, Kyrgyzstan, Latvia, FRY, Macedonia, Moldova, Slovenia, Tajikistan, Turkmenistan, Ukraine, and Uzbekistan. (Ibid.). Apart from Albania and Andorra, all of the states that have signed the Charter of Paris after 1990 are former republics of either the SFRY or of the Soviet Union.

<sup>515</sup> Ibid.

<sup>516</sup> See supra n. 513.

<sup>517</sup> The Charter of Paris (1990), p. 3.

<sup>518</sup> See supra n. 106.

<sup>519</sup> See supra n. 112.

To ensure that the will of the people serves as the basis of the authority of government, the participating States will

- hold free elections at reasonable intervals, as established by law;
- permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote;
- guarantee universal and equal suffrage to adult citizens;
- ensure that votes are cast by secret ballot or by equivalent free voting procedure, and that they are counted and reported honestly with the official results made public;
- respect the right of citizens to seek political or public office, individually or as representatives of political parties or organizations, without discrimination;
- respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities;
- ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution;
- provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a nondiscriminatory basis for all political groupings and individuals wishing to participate in the electoral process;
- ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures.<sup>520</sup>

The references to a multiparty system, limited office-term and specific provisions for, rather than general reference to, free and fair elections go beyond the reach of ‘democratic rights’, which require a very restricted interpretation within the

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<sup>520</sup> Charter of Paris (1990), Annex 1, Article 7.

universal human rights instruments.<sup>521</sup> Indeed, with these provisions the Charter of Paris goes beyond the universal standard of non-interference into the choice of a particular political system within a state<sup>522</sup> and requires implementation of liberal-democratic institutions.<sup>523</sup> This image of democracy is thus close to the understanding within the ECHR and not within the universal framework.<sup>524</sup>

Notably, the Charter of Paris predominantly deals with democratic institutions rather than substance. In Article 7 of Appendix 1, democracy is inherently associated with free and fair elections which depend on fulfilment of some other human rights, most notably freedom of association and freedom of expression. This rather narrow expression of democracy<sup>525</sup> is, however, supplemented by a formulation in the Charter's chapter on Human Rights, Democracy and Rule of Law, which attempts to define democracy more in terms of its underlying principles, beyond the electoral process and association with a selection of human rights:<sup>526</sup> "Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law."<sup>527</sup>

The image of democracy in the Charter of Paris does not entirely adopt the procedural understanding of democracy. However, it stipulates for a number of institutional requirements significant for the interpretation of liberal-democracy in

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<sup>521</sup> Compare supra ch. 2.3.

<sup>522</sup> See supra ch. 2.3.

<sup>523</sup> Compare supra ch. 4.2.2.1.

It needs to be added that such a requirement contravenes the Cold War standard expressed in the Final Act of Helsinki: "[The participating states] will also respect each other's right freely to choose and develop its political, social, economic and cultural systems as well as its right to determine its laws and regulations." The Final Acts of Helsinki (1975), Chapter I, para 1. It can be thus argued that the end of the Cold War within the framework of the OSCE brought a significant change to the liberal-democratic understanding of democracy and human rights. It was argued at an earlier point that this change cannot be extended to the UN level. See supra ch. 2.3.

<sup>524</sup> See supra ch. 2.3.3.

<sup>525</sup> Compare supra ch. 2.2.1.

<sup>526</sup> Compare supra ch. 2.2.2.

<sup>527</sup> Charter of Paris (1990), p. 3.

the ECHR framework, which stretch beyond the scope of ‘democratic rights’ in the universal human rights elaborations.<sup>528</sup> Further, the requirement for democracy goes beyond the operation of ‘democratic principles’ within the right of self-determination and thus exceeds the (additional) statehood criteria.

#### **4.2.3.2. Human Rights in the EC Guidelines**

Apart from references to some human rights within the definition of democratic standards, the Charter of Paris makes the respect of human rights a separate requirement and a number of civil and political rights are specifically invoked, while reference to economic, social and cultural rights is only general.<sup>529</sup> Notably, the Charter of Paris does not specifically invoke the right of self-determination, which is otherwise referred to in the Final Act of Helsinki. This reference essentially repeats the universal elaboration of the common Article 1 of the ICCPR and the ICESCR,<sup>530</sup> while it also adds an important limitation to the right of self-determination, which is to be exercised “in conformity with the purposes and principles of the Charter of the United Nations and with the relevant norms of international law, including those relating to territorial integrity of states.”<sup>531</sup> In other words, the Final Act of Helsinki affirms that the right of self-determination is not an entitlement to secession.<sup>532</sup>

It has been argued above that human rights other than those of *jus cogens* character have not been regarded as statehood criteria and that democracy as a

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<sup>528</sup> Compare supra ch. 2.3.3.

<sup>529</sup> Charter of Paris (1990), p. 3. The Charter thus invokes a number of civil and political rights and only makes a brief mention of the entire economic, social and cultural cluster, without naming those rights individually. On the other hand the Final Act of Helsinki specifically invokes the freedom of thought, conscience, religion or belief, and rights of minorities, without further elaborations on the scope of these rights. Further, there is a general reference to civil, political, economic, social, cultural and other rights and freedoms. The Final Act of Helsinki (1975), Chapter VII, para 1, para 2 and para 4.

<sup>530</sup> The Final Act of Helsinki (1975), Chapter VII. For more on the right of self-determination and on the distinction between internal and external self-determination. See infra ch. 5.3.

<sup>531</sup> Ibid., para 1.

<sup>532</sup> Compare infra ch.. 5.3. and 5.4.

political system (or type of government in general) has not had any role in the creation of states.<sup>533</sup> Yet the EC Guidelines, adopting the Charter of Paris, have notably set a much higher bar and proclaimed general respect for human rights a recognition requirement.<sup>534</sup>

#### **4.2.3.3. The EC Guidelines and a commitment to peace**

A commitment to peace is expressed in the EC Guidelines and in the EC Declaration indirectly by a reference to the Final Act of Helsinki<sup>535</sup> and by specific references in the two documents in regard to the situation in the disintegrating SFRY in 1991.<sup>536</sup> The scope of the requirement for new states to be committed to peace will be initially analysed through the understanding expressed in the Final Act of Helsinki. Subsequently, the scope of “peace-activism” expressed in the specific references in the EC Guidelines and in the EC Declaration will also be considered. The major question will be whether the commitment to peace as expressed in the two documents reaches beyond the requirement that a state cannot be established as a result of an unlawful use of force.<sup>537</sup>

With a view to reduce the Cold War tensions,<sup>538</sup> the Final Act of Helsinki was signed in 1975 by both Western and socialist states.<sup>539</sup> As already established its references to human rights do not reach beyond the universal interpretation and

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<sup>533</sup> See supra ch. 3. and 3.4.

<sup>534</sup> Compare supra ch. 4.2.2.1.

<sup>535</sup> See supra n. 489.

<sup>536</sup> See supra notes 485 and 491.

<sup>537</sup> Compare supra ch. 3.2.2.

<sup>538</sup> See <<http://www.osce.org/about/13131.html>>.

<sup>539</sup> The document was signed by the following states: Austria, Belgium, Bulgaria, Canada, Cyprus, Czechoslovakia, Denmark, Finland, France, the German Democratic Republic, the Federal Republic of Germany, Greece, the Holy See, Hungary, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Portugal, Romania, San Marino, Spain, Sweden, Switzerland, Turkey, the Soviet Union, the United Kingdom, the United States and Yugoslavia. The following states subsequently also signed the document: Albania, Andorra, Armenia, Azerbaijan, Belarus, Bosnia-Herzegovina, Croatia, Czech Republic, Estonia, Georgia, Kazakhstan, Latvia, Lithuania, FYR Macedonia, Montenegro, Slovenia, Tajikistan, Ukraine, and Uzbekistan. With exceptions of Albania, Andorra and Czech Republic, all of these states emerged in the territories of the former SFRY and of the former Soviet Union. See <<http://www.osce.org/about/13131.html>>.

reflect the Cold War compromise to accommodate competing interpretations of democracy and human rights standards.<sup>540</sup>

The first chapter of the Final Act of Helsinki deals with sovereign equality and respect for the rights inherent in sovereignty,<sup>541</sup> where it essentially subscribes itself to the provisions of Article 2 of the UN Charter.<sup>542</sup> In the chapter on refraining from the threat or use of force, the Final Act of Helsinki *mutatis mutandis* repeats Article 2(4) of the UN Charter:

The participating States will refrain in their mutual relations, as well as in their international relations in general, from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations and with the present Declaration. No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle.<sup>543</sup>

In regard to inviolability of the territory the Final Act of Helsinki provides:

The participating States regard as inviolable all one another's frontiers as well as the frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly, they will also refrain from any demand for, or act of, seizure and usurpation of part or all of the territory of any participating State.<sup>544</sup>

The participating States will likewise refrain from making each other's territory the object of military occupation or other direct or indirect measures of force in contravention of international law, or the object of acquisition by means of such measures or the threat of them. No such occupation or acquisition will be recognized as legal.<sup>545</sup>

It has been argued that in the case of unlawful use of force, existing states are protected from having their international personality extinguished.<sup>546</sup> The same protection applies when partial occupation of the territory of a state resulting from an

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<sup>540</sup> Compare supra n. 118.

<sup>541</sup> The Final Act of Helsinki (1975), chapter 1.a.I.

<sup>542</sup> See UN Charter, Article 2.

<sup>543</sup> The Final Act of Helsinki, Chapter (1975) II, para 1. Compare UN Charter, Article 2(4).

<sup>544</sup> The Final Act of Helsinki (1975), Chapter III.

<sup>545</sup> Ibid., Chapter IV, para 3.

<sup>546</sup> See supra ch. 3.2.2.

unlawful use of force is in question – in such a situation international law would not recognise a shift of sovereignty.<sup>547</sup> Consequently, in regard to existing states the Final Act of Helsinki does not extend the scope of the prohibition of the use of force and its consequences on the law of statehood any further than does the UN Charter. In other words, from the point of view of the prohibition of the use of force and non-recognition of factual situations resulting from the illegal use of force, the Final Act of Helsinki did not bind the participating states to any higher standards than generally applicable international law does. The Final Act of Helsinki, however, dealt with existing states and generally did not refer to the creation of new states.<sup>548</sup> On the other hand, the EC Guidelines and the EC Declaration were documents referring to situations of new state creations. There is therefore a question of how the provisions of the Final Act of Helsinki, in conjunction with specific provisions of the EC Guidelines work as recognition requirements.

The EC Guidelines provide: “The Community and its Member States will not recognize entities which are the result of aggression.”<sup>549</sup> It can be argued that in this requirement the EC Guidelines follow the obligation to withhold recognition when an entity is created illegally.<sup>550</sup> Yet the EC Guidelines set further requirements in regard to the prohibition of the use of force. The requirement of “respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement,”<sup>551</sup> resembles the provisions of the Final Act of Helsinki on

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<sup>547</sup> See supra ch. 3.3.

<sup>548</sup> It can be argued that it touches upon the question of new state creations indirectly in the chapter on self-determination by affirming that the right of self-determination is limited by the principle of territorial integrity of states (see supra n. 539). Unlike the universal elaboration of the right of self-determination in the common Article 1 of the Covenants, the Final Act of Helsinki thus unequivocally adopts the distinction between internal and external modes of the exercise of the right of self-determination.

<sup>549</sup> EC Guidelines (1991), para 5.

<sup>550</sup> Compare supra ch. 3.2.2. and 3.3.

<sup>551</sup> The EC Guidelines (1991), para 3.

inviolability of frontiers and territorial integrity of states.<sup>552</sup> Such a requirement applied to entities which are not (yet) states presupposes confinement of new international borders along the lines of internal boundaries in the case of dissolution of a parent state.<sup>553</sup> Further, this requirement does not relate to the use of force within the entity itself in an attempt to create a new state<sup>554</sup> but to the use of force beyond the newly confined international borders. Indeed, the EC Guidelines do not only refer to entities which could become effective as a result of an illegal use of force but also to potential new states which could be involved in armed conflict in other newly created states. In such a situation the question is not whether the entity itself is the result of an unlawful use of force<sup>555</sup> but rather whether an entity resorts to an unlawful use of force outside of its territory. Such a requirement extends the scope of the additional statehood criterion that a state may not be created as the result of an unlawful use of force.<sup>556</sup> Consequently, non-recognition following from failure to meet this requirement falls outside of the scope of the obligation to withhold recognition.<sup>557</sup>

The EC Guidelines further set requirements which are either broadly related to the commitment to peace, such as “acceptance of all relevant commitments with regard to disarmament and nuclear non-proliferation as well as to security and regional stability”<sup>558</sup> and “commitment to settle by agreement, including where appropriate by recourse to arbitration, all questions concerning State succession and

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<sup>552</sup> See supra n. 544.

<sup>553</sup> For more on the *uti possidetis* principle applied in the territory of the SFRY compare infra ch. 6.

<sup>554</sup> Crawford (2006), pp. 135–35, argues that “[i]t is probably the case that the use of force by a non-State entity in exercise of a right of self-determination is legally neutral, that is, not regulated by international law at all (though the rules of international humanitarian law may well apply).”

<sup>555</sup> Later Republika Srpska and Republika Srpska Krajina became such entities but they initially did not exist in the framework of the SFRY. See infra ch. 4.3.3. and 4.3.4.

<sup>556</sup> See supra ch. 3.2.2.

<sup>557</sup> See supra ch. 3.3.2.

<sup>558</sup> EC Guidelines (1991), para 4.

regional disputes.”<sup>559</sup> The EC Declaration also demanded support of “the efforts of the Secretary General and the Security Council of the United Nations, and the continuation of the Conference on Yugoslavia.”<sup>560</sup> These requirements evidently fall beyond the statehood criteria and express some recognition requirements which are specifically associated with the situation in the SFRY at the end of 1991.

### **4.3. The EC Guidelines and the EC Declaration in action**

#### **4.3.1. Background: The Socialist Federative Republic of Yugoslavia**

The SFRY was a federation of six republics<sup>561</sup> and two autonomous provinces.<sup>562</sup> It was established during the Second World War, on 29 November 1943, under the name Federal People’s Republic of Yugoslavia,<sup>563</sup> following the Kingdom of Yugoslavia, initially named the Kingdom of Serbs, Croats and Slovenes, which was established in 1918.<sup>564</sup>

At the time of the dissolution, the 1974 SFRY Constitution was in force, which defined republics as states<sup>565</sup> and delimited internal boundaries.<sup>566</sup> Importantly, the “federal organization relied heavily on the ethnic component.”<sup>567</sup> The 1974 Constitution adopted a distinction between ‘nations’ and ‘nationalities’. The term ‘nation’ applied to the people attached to a certain republic and ‘nationality’ to the people attached to one of the two respective autonomous provinces.<sup>568</sup> It can be said that the Constitution was an expression of (internal) self-

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<sup>559</sup> Ibid.

<sup>560</sup> EC Declaration (1991), para 3.

<sup>561</sup> The six republics were: Slovenia, Croatia, Bosnia-Herzegovina, Serbia, Montenegro, and Macedonia. See Constitution of the SFRY (1974), Article 2.

<sup>562</sup> The two autonomous regions, Kosovo and Vojvodina, were otherwise part of broader Serbia but had their autonomous status established within the federal (not Serb) constitutional order. See *ibid.*

<sup>563</sup> Renamed to the SFRY by the Constitution of 1963.

<sup>564</sup> For more see *infra* ch. 6.4.8.

<sup>565</sup> Constitution of the SFRY (1974), Article 3.

<sup>566</sup> *Ibid.*, Article 5(1).

<sup>567</sup> Türk (1992), p. 66.

<sup>568</sup> See Constitution of the SFRY (1974), Article 1.

determination.<sup>569</sup> federal units were given wide powers for the exercise of effective control over their respective territories<sup>570</sup> and even had some limited competencies in the conducting of foreign policy.<sup>571</sup> Such competencies were not confined to republics but were extended even to the two autonomous provinces.<sup>572</sup> These units also had representatives in the federal organs.<sup>573</sup> Such widely-conceived autonomy within the federal constitution in many respects elevated the powers of the autonomous provinces to the level of powers vested in republics.

According to the preamble to the Constitution of the SFRY, only ‘nations’, i.e. peoples attached to one of the republics, were entitled to the right of self-determination, and this right extended to cover even secession.<sup>574</sup> Yet a specific constitutional provision enabling the exercise of the right to secession inherent to ‘nations’ was missing. It therefore remains disputable whether nations (i.e. peoples attached to certain republics) really had a right to secession under the federal constitution.

When the Badinter Commission dealt with the situation in the SFRY, the entitlement to secession, possibly stemming from the preamble to the 1974 Constitution, was not invoked. In its Opinion 1, the Commission expressed the opinion “that the Socialist Federal Republic of Yugoslavia is in the process of dissolution.”<sup>575</sup> Such an opinion denied the position taken by Serbia, arguing that “those Republics which have declared or would declare themselves independent or sovereign have seceded or would secede from the SFRY which would otherwise

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<sup>569</sup> Compare *infra* ch. 5.3.

<sup>570</sup> See Constitution of the SFRY (1974), Articles 268 & 273.

<sup>571</sup> *Ibid.*, Article 271.

<sup>572</sup> *Ibid.*

<sup>573</sup> *Ibid.*, Article 291 (regulating the assembly), Article 348 (regulating the federal government), Article 381 (regulating the constitutional court).

<sup>574</sup> *Ibid.*, preamble, General Principle I.

<sup>575</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 3.

continue to exist.”<sup>576</sup> The Badinter Commission based its reasoning on the following arguments: four out of six republics of the SFRY (Slovenia, Croatia, Bosnia-Herzegovina and Macedonia) had declared independence;<sup>577</sup> the “composition and workings of the essential organs of the Federation ... no longer meet the criteria of participation and representatives inherent in a federal state;”<sup>578</sup> “an armed conflict between different elements of the federation had erupted [while the] authorities of the Federation and the Republics have shown themselves to be powerless to enforce respect for the succeeding ceasefire agreements concluded under the auspices of the European Communities or the United Nations Organization.”<sup>579</sup>

In its subsequent opinions, the Badinter Commission applied the *uti possidetis* principle in order to “upgrade” the former internal boundaries to international borders.<sup>580</sup> As follows from the EC Declaration, only republics were considered to be eligible for independence.<sup>581</sup> Accordingly, autonomous provinces (Kosovo and Vojvodina) and subsequently-created entities in the territory of the disintegrating SFRY, such as Republika Srpska in Bosnia-Herzegovina and Republika Srpska Krajina in Croatia, could not become states.<sup>582</sup> The application of *uti possidetis* in this non-colonial situation was very controversial and remains criticised.<sup>583</sup> This issue will be revisited at a later point.

#### **4.3.2. Slovenia**

On 25 June 1991, the Assembly of the Republic of Slovenia adopted the Foundational Constitutional Instrument on Sovereignty and Independence of the

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<sup>576</sup> Ibid., Introduction.

<sup>577</sup> Ibid., para 3(a).

<sup>578</sup> Ibid., para 3(b).

<sup>579</sup> Ibid., para 3(c).

<sup>580</sup> The Badinter Commission, Opinion 2 (11 January 1992).

<sup>581</sup> See supra n. 491.

<sup>582</sup> The Badinter Commission, Opinion 3 (11 January 1992).

<sup>583</sup> See infra ch. 6.3. and 6.4.8.

Republic of Slovenia and a separate Declaration on Independence. The preamble to the first instrument spelled out that “the SFRY does not function as a state governed by the rule of law and allows grave violations of human rights, rights of peoples, as well as rights of republics and autonomous provinces.”<sup>584</sup>

The decision that the Republic of Slovenia shall become an independent and sovereign state was adopted at a referendum, held on 23 December 1990, by a majority of 88.5 percent of all eligible people to vote (ninety-two percent of those who voted) and with four percent in absolute figures expressly voting against it.<sup>585</sup>

After the adoption of the Brioni Agreement, Slovenia’s declaration of independence was suspended for three months.<sup>586</sup> In the period of suspension no compromise was found and no alternative arrangement within the framework of Yugoslavia developed. On 23 December 1991, the Assembly of the Republic of Slovenia adopted a new constitution which adopted liberal-democratic institutions<sup>587</sup> and a chapter on human rights and fundamental freedoms.<sup>588</sup>

The Badinter Commission specifically dealt with recognition of Slovenia in its Opinion 7. Applying the requirements from the EC Guidelines and the EC Declaration, the Badinter Commission made the following references in regard to democratic standards implemented in Slovenia:

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<sup>584</sup> The Foundational Constitutional Instrument on Sovereignty and Independence of the Republic of Slovenia (1991), preamble, para 3, my own translation. The Official Gazette of the Republic of Slovenia No 1/91-I (25 June 1991).

<sup>585</sup> See the Government of the Republic of Slovenia, Office of Information <<http://www.ukom.gov.si/10let/pot/kronologija>>.

<sup>586</sup> See *supra* ch. 4.2.1.

<sup>587</sup> The Constitution of the Republic of Slovenia (1991); Chapter 4, Articles 80–137. Chapter 4 of the 1991 Constitution introduced the model of parliamentary democracy with a merely ceremonial role of the president of the republic. This system replaced the previous “Assembly model”, significant for socialist states, which, *inter alia*, foresees fusion of the legislative and executive branches. Consequently, in the previous constitutional order the government acted as the Executive Council of the Assembly. The democratic elections in April 1990 were held to the socialist institutional design upon constitutional amendments which enabled a multiparty setting. See Vidmar (2008), pp. 146–150.

<sup>588</sup> The Constitution of the Republic of Slovenia (1991), Chapter 2, Articles 14–65.

[T]he present Assembly was the outcome of elections held in April 1990, after which an Executive Council supported by six parties controlling a majority of the Assembly was formed.

It should be noted that Article 81 of the new Constitution of 23 December 1991 provides for universal, equal and direct suffrage and the secret ballot. The Constitutional Act to give effect to the Constitution provides that the present Assembly will remain in place until the election of the new Parliament.<sup>589</sup>

The Badinter Commission further observed that Slovenia's "Respect for the provisions of the United Nations Charter, the Helsinki Final Act and the Charter of Paris is stated in the Declaration of Independence" and that in regard to:

[T]he requirement that Slovenia's legal system should respect human rights, observe the rule of law and guarantee a democratic regime, the Republic's answers to the Commission's questionnaire cite a number of constitutional provisions which establish to the Commission's satisfaction that these principles will be acted upon.... The Republic of Slovenia undertakes to accept international machinery for monitoring respect for human rights, including individual petitions to the European Commission of Human Rights.<sup>590</sup>

In regard to the requirement for the protection of ethnic groups and minorities, the Badinter Commission held that Slovenia's constitutional order guarantees "a number of specific rights to the Italian and Hungarian minorities."<sup>591</sup>

The Opinion further analysed the provisions on human rights standards in Slovenia's Constitution and concluded:

[W]hile the Republic of Slovenia ... accepts the international machinery that has been set up to protect and monitor respect for human rights, the Constitution of 23 December also institutes a Constitutional Court with jurisdiction to enforce respect for human rights and fundamental freedoms both in the law and in individual actions.<sup>592</sup>

In regard to Slovenia's commitment to peace and resolving of the conflict in the territory of the SFRY, the Badinter Commission stated:

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<sup>589</sup> The Badinter Commission, Opinion 7 (11 January 1992), para 1.

<sup>590</sup> *Ibid.*, para 2(a).

<sup>591</sup> *Ibid.*, para 2(b).

<sup>592</sup> *Ibid.*, para 3(a).

The commitment of the Republic of Slovenia to respect the inviolability of territorial boundaries made in the Declaration of Independence is repeated in the application for recognition. The Republic's frontiers are delimited in Article 2 of the Basic Constitutional Charter of 25 June 1991 unchanged by reference to the existing frontiers.

The Republic of Slovenia also stresses that it has no territorial disputes with neighbouring states or the neighbouring Republic of Croatia.<sup>593</sup>

The Badinter Commission ultimately held that “the Republic of Slovenia satisfies the tests in the [EC] Guidelines and the [EC] Declaration.”<sup>594</sup>

From the reasoning of the Badinter Commission in Opinion 7, the following observation can be derived: First, the Badinter Commission did not find any difficulties with Slovenia's meeting of traditional or additional statehood criteria. Indeed, its reasoning was mainly based on the political criteria expressed in the EC Guidelines. Second, when assessing Slovenia's meeting of recognition requirements associated with democracy, protection of human rights and commitment to peace, the Badinter Commission based its reasoning on the institutional implementation of these requirements. Third, when the Badinter Commission examined actual developments in regard to the political system of liberal-democracy, its approach was electoral-centric and did not go beyond the observation that democratic elections had been held and the next democratic elections were scheduled.

Slovenia was recognised by the EC member states on 15 January 1992 and admitted to the UN on 22 May 1992.<sup>595</sup> The Badinter Commission, however, subsequently held that Slovenia became a state on 8 October 1991, when the Brioni Agreement was terminated.<sup>596</sup>

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<sup>593</sup> Ibid., para 2(c).

<sup>594</sup> Ibid., para 4.

<sup>595</sup> GA Res 46/236 (22 May 1992).

<sup>596</sup> The Badinter Commission, Opinion 11, para 4 (16 July 1993).

### 4.3.3. Croatia

On 25 June 1991, the Croatian parliament adopted the Declaration on Promulgation of a Sovereign and Independent Republic of Croatia.<sup>597</sup> The Declaration, *inter alia*, draws legitimacy on the expressed will of the people at referendum, held on 19 May 1991.<sup>598</sup> At the referendum ninety-three percent of those who voted cast their votes in favour of independence.<sup>599</sup> Adoption of the Brioni Agreement suspended Croatia's declaration of independence for a period of three months.<sup>600</sup>

Because of the ethnic structure of its population, the case of Croatia was not as clear as that of Slovenia. Twelve percent of the population of Croatia was of Serb ethnic origin<sup>601</sup> and opposed the declaration of independence.<sup>602</sup> Already prior to the referendum on the declaration of independence, Serbs in Croatia proclaimed that they no longer accepted Croatia's authority.<sup>603</sup> As a result Kninska Krajina, an entity which sought union with Serbia, was established; however, the parliament of Serbia rejected such an option.<sup>604</sup> With YNA support, Kninska Krajina became an entity in whose territory Croatia did not exercise effective control.<sup>605</sup> On 19 December 1991, the self-proclaimed parliament of Kninska Krajina declared independence and, in

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<sup>597</sup> The Declaration on Promulgation of a Sovereign and Independent Republic of Croatia (1991). The Official Gazette of the Republic of Croatia No 31/1991 (25 June 1991).

<sup>598</sup> *Ibid.*, Article 2.

<sup>599</sup> See Trifunovska (1994), p. 299.

<sup>600</sup> See *supra* ch. 4.2.1.

<sup>601</sup> See Raič (2002), p. 349.

<sup>602</sup> *Ibid.* For more on the historical background of Serbian minority within Croatia see *infra* ch. 6.4.8.

<sup>603</sup> *Ibid.*

<sup>604</sup> *Ibid.*, p. 388. The exact reason why the Milošević-controlled Serbian parliament rejected a union with Krajina is unknown. The answer should probably be sought in the context of international pressure to stop the conflicts in both Croatia and Bosnia-Herzegovina and secret agreements between the presidents of Croatia and Serbia. In 1993, the New York Times made the following observation: "In Zagreb, Croatia's capital, Western diplomats say they suspect President Milosevic reached a secret understanding with President Franjo Tudjman of Croatia over territory [of Krajina] ... No one seems sure of the substance of this agreement, but there is a suspicion in the Zagreb diplomatic corps that President Milosevic at least offered to force the Serbs in northern, western and southern Krajina to surrender in return for Croatia's giving him the separate eastern Krajina region, which directly abuts his territory. See Croatia's Serb Enclave Feels Betrayed, NY Times (9 May 1993) <<http://query.nytimes.com/gst/fullpage.html?res=9F0CE7DA1E3EF93AA35756C0A965958260&scp=1&sq=a%20plan%20for%20peace%20may%201993&st=cse>>.

<sup>605</sup> Raič (2002), p. 338.

accordance with the EC Declaration, addressed a request for recognition as an independent state.<sup>606</sup> The Badinter Commission ignored the application and recognition was not granted by any state, not even by the Federal Republic of Yugoslavia (FRY). It was not until 1995 that Croatia established effective control over Kninska Krajina.<sup>607</sup>

The Badinter Commission dealt with the recognition of Croatia in its Opinion 5, delivered on 11 January 1992. Applying the EC Guidelines, the Badinter Commission found deficiencies in Croatia's meeting of minority protection standards:

[T]he Constitutional Act of 4 December 1991 does not fully incorporate all the provisions of the draft Convention of 4 November 1991, notably those contained in Chapter II, Article 2(c), under the heading 'Special status' [and] the authorities of the Republic of Croatia should therefore supplement the Constitutional Act in such a way as to satisfy those provisions.<sup>608</sup>

The Badinter Commission thus referred to the Draft Convention of the Conference on Yugoslavia (the so-called Carrington draft Convention) from 4 November 1991, which, *inter alia*, adopts minority protection standards agreed upon in the agreement between presidents Franjo Tuđman (Croatia), Slobodan Milošević (Serbia) and the Yugoslav defence minister Veljko Kadijević, brokered by the Netherlands' foreign minister Hans van den Broek, at The Hague on 4 October 1991.<sup>609</sup> The relevant chapter provides:

[A]reas in which persons belonging to a national or ethnic group form a majority, shall enjoy a special status of autonomy.

Such a status will provide for:

(a) The right to have and show national emblems of that group;

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<sup>606</sup> Ibid., p. 389.

<sup>607</sup> Ibid., p. 390.

<sup>608</sup> The Badinter Commission, Opinion 5 (11 January 1992), para 3.

<sup>609</sup> UN Doc S/23169 (4 October 1991).

- (b) The right to a second nationality for members of that group in addition to the nationality of the republic
- (c) An educational system which respects the values and needs of that group;
- (d) (i) A legislative body,
  - (ii) An administrative structure, including regional police force,
  - (iii) And a judiciary responsible for matters concerning the area, which reflects the composition of the population of the area;
- (e) Provisions for appropriate international monitoring...

Such areas, unless they are defined in part by an international frontier with a State not party to This Convention, shall be permanently demilitarized and no military forces, exercises or activities on land or in the air shall be permitted in those areas...<sup>610</sup>

The Badinter Commission ultimately held:

[S]ubject to this reservation [minority protection standards], the Republic of Croatia meets the necessary conditions for its recognition by the Member States of the European Community in accordance with the Declaration on Yugoslavia and the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, adopted by the Council of the European Communities on 16 December 1991.<sup>611</sup>

The Badinter Commission did not invoke the problem that Croatia did not exercise effective control over part of its territory (i.e. in the territory of Kninska Krajina), although the EC Guidelines provide that “the normal standards of international practice”,<sup>612</sup> i.e. statehood criteria, would be applied when recognition was to be considered. Nevertheless, despite this deficiency and despite the Badinter Commission’s finding that Croatia did not sufficiently fulfil the required minority protection standards, the EC member states granted recognition to Croatia on 15 January 1991.<sup>613</sup> Admission to the UN followed on 22 May 1992.<sup>614</sup> The Badinter

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<sup>610</sup> Ibid., pp. 39–40. Compare also Caplan (2005), p. 22, at n. 30.

<sup>611</sup> The Badinter Commission, Opinion 5 (11 January 1992), para 3.

<sup>612</sup> See supra n. 481.

<sup>613</sup> Crawford (2006), p. 397.

<sup>614</sup> GA Res 46/238 (22 May 1992).

Commission subsequently held that Croatia, like Slovenia, became a state on 8 October 1991, which is the day on which the Brioni Agreement terminated.<sup>615</sup> Unlike in its reasoning in the case of Slovenia,<sup>616</sup> the Badinter Commission did not invoke Croatian democratic elections or make any other direct observations in regard to democracy in Croatia. Indeed, “[r]ecognition proceeded apace for Croatia despite some unanswered questions over General Franjo Tudjman’s methods of governance.”<sup>617</sup>

#### 4.3.4. Bosnia-Herzegovina

Within the SFRY, Bosnia-Herzegovina was defined as a republic of three constitutive ‘nations’: Muslims, Serbs and Croats.<sup>618</sup> Most numerous were Muslims (43.7 percent in 1991), followed by Serbs (31.3 percent in 1991) and Croats (17.3 percent in 1991).<sup>619</sup> Its diverse ethnic composition and the armed conflict that broke out made recognition of Bosnia-Herzegovina an especially difficult issue.

On 15 October 1991, the Assembly of Bosnia-Herzegovina, in the absence of the representatives of Serbian nationality, adopted the Memorandum on Sovereignty of Bosnia-Herzegovina.<sup>620</sup> On 20 December 1991, Bosnia-Herzegovina addressed the application for recognition in accordance with the EC Declaration.<sup>621</sup>

The Badinter Commission, *inter alia*, held that:

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<sup>615</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 4.

<sup>616</sup> See supra ch. 4.3.2.

<sup>617</sup> Grant (1999), p. 95.

<sup>618</sup> Constitution of the Socialist Republic Bosnia and Herzegovina (1969), Article 1.

The term ‘Muslim’ had an ethnic and not religious connotation. In the times of the SFRY, the term ‘Bosniak’ was not in use, while the term ‘Bosnian’ was in politically-correct language only used as an adjective, while it had a pejorative meaning if used as a noun to refer to the people of Bosnia.

<sup>619</sup> In addition to that, 5.5 percent of inhabitants of Bosnia-Herzegovina declared themselves ‘Yugoslavs’ and 2.2 percent invoked some other ethnic background. The 1991 Census, The Socialist Republic of Bosnia and Herzegovina <<http://josip.purger.com/other/bih/index.htm>>.

<sup>620</sup> The Memorandum on Sovereignty of Bosnia-Herzegovina, The Official Gazette of the Socialist Republic of Bosnia-Herzegovina No 32 (15 October 1991). The Memorandum was adopted at a night-meeting of the Assembly, which began on the previous day; therefore, it is sometimes dated to 14 October 1991.

<sup>621</sup> The Badinter Commission, Opinion 4 (11 January 1992).

[T]he current Constitution of the SRBH [Socialist Republic of Bosnia and Herzegovina] guarantees equal rights for 'the nations of Bosnia-Herzegovina - Muslims, Serbs and Croats - and the members of the other nations and ethnic groups living on its territory'.

The current Constitution of the SRBH guarantees respect for human rights, and the authorities of Bosnia-Herzegovina have sent the Commission a list of the laws in force giving effect to those principles; they also gave the Commission assurances that the new Constitution now being framed would provide full guarantees for individual human rights and freedoms.

The authorities gave the Commission an assurance that the Republic of Bosnia-Herzegovina had no territorial claims on neighbouring countries and was willing to guarantee their territorial integrity.<sup>622</sup>

The Badinter Commission thus saw no institutional deficiencies for the implementation of human rights standards. Direct references to democracy were not made "and Bosnia received recognition ... with doubts lingering over whether ... [its] nascent institutions would function democratically."<sup>623</sup> Democratic principles were nevertheless invoked in the context of the right of self-determination. This will be further discussed below.<sup>624</sup>

A referendum on independence, upon a specific request by the Badinter Commission,<sup>625</sup> was subsequently held between 29 February and 1 March 1992.<sup>626</sup> The referendum was boycotted by Bosnian Serbs,<sup>627</sup> while independence was supported by sixty-three percent of all eligible to vote (to which the boycotting Serbs also counted).<sup>628</sup> Bosnia-Herzegovina was recognised as a state by the EC member states on 6 April 1992<sup>629</sup> and admitted to the UN on 22 May 1992.<sup>630</sup>

The Badinter Commission subsequently held that Bosnia-Herzegovina became an independent state on 6 March 1992, the day when results of the

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<sup>622</sup> Ibid., para 1.

<sup>623</sup> Grant (1999), p. 195.

<sup>624</sup> See infra ch. 5.3.

<sup>625</sup> See infra n. 1153.

<sup>626</sup> See Crawford (2006), p. 398.

<sup>627</sup> Ibid.

<sup>628</sup> Ibid.

<sup>629</sup> Ibid.

<sup>630</sup> GA Res 46/237 (22 May 1992).

referendum on independence were proclaimed.<sup>631</sup> This critical date for Bosnia-Herzegovina's becoming a state was also affirmed by the ICJ in the *Bosnia Genocide case*, in the context of the question of when Bosnia-Herzegovina became party to the Genocide Convention.<sup>632</sup>

The Badinter Commission and recognising states did not invoke that large parts of Bosnia-Herzegovina were not under effective control of the central government.<sup>633</sup> Further, although popular consent for the creation of the state of Bosnia-Herzegovina was given prior to recognition, in light of the boycott of one of its constitutive peoples, the quality of this consent remains questionable. Two interpretations are possible regarding the question of why the boycott of the Serbian population was irrelevant. First, the majoritarian concept of democratic decision-making at the referendum prevailed. Second, the exercise of the right of self-determination was limited by the previous internal boundary arrangement which prevented Bosnian Serbs from seeking the arrangement they preferred.<sup>634</sup> These two questions will be addressed at a later point.

#### **4.3.5. Macedonia**

Macedonia held its referendum on independence on 8 September 1991. The decision for independence was upheld by 72.16 percent of eligible to vote or ninety-five percent of those who voted.<sup>635</sup> On 17 September 1991, the Declaration of

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<sup>631</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 6.

<sup>632</sup> The relevant reasoning of the ICJ reads: "Whether Bosnia and Herzegovina automatically became party to the Genocide Convention on the date of its accession to independence on 6 March 1992, or whether it became a party as a result - retroactive or not - of its Notice of Succession of 29 December 1992, at all events it was a party to it on the date of the filing of its Application on 20 March 1993." The *Bosnia Genocide case*, ICJ Rep 1996, para 23.

<sup>633</sup> See Crawford (2006), p. 398.

<sup>634</sup> Compare *infra* ch. 6.4.8.

<sup>635</sup> Trifunovska (1994), p. 345. A share of 3.5 percent of those who voted was expressly against the independence. According to the 1991 census, major ethnicities populating Macedonia were the following: Macedonians (65.3 %), Albanians (27.73 %), Turks (3.79 %) and Serbs (2.09 %). Macedonian Census (1991) <<http://www.makedonija.info/republic.html>>.

Independence was proclaimed by Macedonia's Assembly.<sup>636</sup> On 20 December 1991, Macedonia sent a request for recognition in accordance with the EC Declaration.<sup>637</sup>

The Badinter Commission, *inter alia*, held that "the Arbitration Commission also notes that on 17 November 1991, the Assembly of the Republic of Macedonia adopted a Constitution embodying the democratic structures and the guarantees for human rights which are in operation in Europe."<sup>638</sup> The Badinter Commission further found that Macedonia had implemented an adequate institutional framework for minority rights protection<sup>639</sup> and showed adequate commitment to international peace<sup>640</sup> and inviolability of borders.<sup>641</sup>

Much of the Badinter Commission's reasoning on Macedonia was dedicated to the latter's dispute with Greece over the name 'Macedonia'. Greece maintained (and still maintains) that use of the name 'Macedonia' implies territorial claims against Greece.<sup>642</sup> The Badinter Commission noted that Macedonia amended its constitution on 6 January 1992 and unequivocally renounced any territorial claims and interference into affairs of other states. It ultimately took the view:

[T]hat the Republic of Macedonia satisfies the tests in the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and the Declaration on Yugoslavia adopted by the Council of the European Communities on 16 December 1991 [and] that the Republic of Macedonia has, moreover, renounced all territorial claims of any kind in unambiguous statements binding in international law; that the use of the name 'Macedonia' cannot therefore imply any territorial claim against another State.<sup>643</sup>

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<sup>636</sup> The Declaration on the Sovereignty and Independence of the Republic of Macedonia, 17 September 1991, reprinted in Trifunovska (1994), pp. 345–47.

<sup>637</sup> The Badinter Commission, Opinion 6 (11 January 1992).

<sup>638</sup> *Ibid.*, para 3.

<sup>639</sup> *Ibid.*

<sup>640</sup> *Ibid.*, para 1.

<sup>641</sup> *Ibid.*, para 4.

<sup>642</sup> See Greece Rejects Macedonia Nato Bid, BBC (6 March 2008) <<http://news.bbc.co.uk/2/hi/europe/7280723.stm>>.

<sup>643</sup> The Badinter Commission, Opinion 6 (11 January 1992), para 4.

However, Greece was not willing to grant recognition to Macedonia under this name.<sup>644</sup> Consequently, despite an explicit recommendation by the Badinter Commission, Macedonia remained unrecognised by the EC member states until 16 December 1993, and even then it was recognised under the compromise name ‘The Former Yugoslav Republic of Macedonia’ (FYR Macedonia).<sup>645</sup> Prior to recognition by the EC, on 8 April 1993, the FYR Macedonia had already become member of the UN.<sup>646</sup>

For more than a year, non-recognition of Macedonia, which had origins in the EC’s internal policy, had been virtually universalised as only Bulgaria, Turkey and Lithuania granted recognition, under its original name, before admission of the FYR Macedonia to the UN.<sup>647</sup> This situation had an evidently political character because Macedonia otherwise clearly met both the statehood criteria as well as other recognition requirements expressed in the EC Guidelines and the duty to withhold recognition did not apply.<sup>648</sup> Indeed, Macedonia was not established in violation of the right of self-determination or as a result of an unlawful use of force. Further, since Macedonia’s former parent state no longer existed,<sup>649</sup> this was not a case of unilateral secession and there was no applicable claim to territorial integrity which could prevent the creation of a new state.

Nevertheless, this absence of recognition does not imply that Macedonia at that time was not a state but rather that it was an example of political non-recognition.<sup>650</sup> It also needs to be noted that in its Opinion 11, the Badinter

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<sup>644</sup> See Craven (1995), pp. 199–200.

<sup>645</sup> See Crawford (2006), p. 398.

<sup>646</sup> GA Res 47/225 (8 April 1993).

<sup>647</sup> See Rich (1993), p. 52.

<sup>648</sup> Compare *supra* ch. 3.2. and 4.2.

<sup>649</sup> See the Badinter Commission, Opinion 9 (4 July 1992).

<sup>650</sup> On 1 and 2 May 1992, the EC and its member states adopted the Declaration on the Former Yugoslav Republic of Macedonia, in which it was held that they were “willing to recognise that State as a sovereign and independent State, within its existing borders, and under a name that can be

Commission held that Macedonia became a state on 17 November 1991, the day when it adopted a new constitution which proclaimed Macedonia a sovereign state.<sup>651</sup>

#### **4.3.6. The Federal Republic of Yugoslavia**

The two remaining former republics of the SFRY, Serbia and Montenegro, unified in the FRY and claimed continuity of SFRY's international personality. This was expressed in the Constitution of the FRY, which was promulgated on 27 April 1992. Article 2 defined the FRY as a state of Serbia and Montenegro,<sup>652</sup> while the preamble invoked their unification on the grounds of "uninterrupted international personality of Yugoslavia."<sup>653</sup>

The FRY's claim to the SFRY's international personality is evident from submissions of both Serbia and Montenegro to the EC in response to the invitation to apply for recognition, as expressed by the EC Declaration. In his reply on 23 December 1991, Serbia's Foreign Minister recalled that Serbia acquired "internationally recognized statehood at the Berlin Congress of 1878 and on that basis had participated in the establishment in 1918 of the Kingdom of Serbs, Croats and Slovenes which became Yugoslavia [and concluded that Serbia] is not interested in secession."<sup>654</sup> Montenegro's Foreign Minister, in his response on 24 December 1991, also declined the EC's invitation to apply for recognition and invoked the

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accepted by all parties concerned." Declaration on the Former Yugoslav Republic of Macedonia, Informal Meeting of Ministers of Foreign Affairs, Guimaracs, 1 and 2 May 1992, reprinted in Hill and Smith (2000), p. 376. The use of the term 'state' rather than, for example, 'entity' clearly implies that Macedonia's attributes of statehood were not a subject of dispute, it was rather that the EC did not want to enter into relations with Macedonia under its constitutional name. In this context see also Craven (1995), pp. 207–218.

<sup>651</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 5.

<sup>652</sup> Constitution of the FRY (1992), Article 2.

<sup>653</sup> Constitution of the FRY (1992), preamble, my own translation.

<sup>654</sup> Rich (1993), p. 47.

international personality that Montenegro had prior to joining the Yugoslav state formations.<sup>655</sup>

The Badinter Commission, however, noted already in its Opinion 1 “that the Socialist Federal Republic of Yugoslavia is in the process of dissolution.”<sup>656</sup> Subsequently, the UN Security Council in its Resolution 757 held that “the claim by the Federal Republic of Yugoslavia (Serbia and Montenegro) to continue automatically the membership of the former Socialist Federal Republic of Yugoslavia (in the United Nations) has not been generally accepted.”<sup>657</sup> The Security Council further held in Resolution 777:

[T]he Federal Republic of Yugoslavia (Serbia and Montenegro) cannot continue automatically the membership of the former Socialist Federal Republic of Yugoslavia in the United Nations; and therefore recommends to the General Assembly that it decide that the Federal Republic of Yugoslavia (Serbia and Montenegro) should apply for membership in the United Nations and that it shall not participate in the work of the General Assembly.<sup>658</sup>

This recommendation was accepted by the General Assembly in its Resolution 47/1.<sup>659</sup>

The Badinter Commission referred to Resolution 757 when it found that “the process of dissolution of the SFRY referred to in Opinion 1, from 29 November 1991, is now complete and that the SFRY no longer exists.”<sup>660</sup> In this context the Badinter Commission concluded in Opinion 9 that “[n]ew states have been created on the territory of the former SFRY and replaced it. All are successor states to the former SFRY”<sup>661</sup> and that it follows from the Security Council resolutions that the “Federal Republic of Yugoslavia (Serbia and Montenegro) has no right to consider

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<sup>655</sup> Ibid.

<sup>656</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 3.

<sup>657</sup> SC Res 757, preamble (30 May 1992).

<sup>658</sup> SC Res 777, para 1 (19 September 1992).

<sup>659</sup> GA Res 47/1 (19 September 1992).

<sup>660</sup> The Badinter Commission, Opinion 8 (4 July 1992), para 4.

<sup>661</sup> The Badinter Commission, Opinion 9 (4 July 1992), para 1.

itself the SFRY's sole successor.”<sup>662</sup> Consequently, “the SFRY's membership of international organizations must be terminated according to their statutes and ... none of the successor states may thereupon claim for itself alone the membership rights previously enjoyed by the former SFRY.”<sup>663</sup> The Badinter Commission ultimately held in Opinion 10:

[T]he FRY (Serbia and Montenegro) is a new state which cannot be considered the sole successor to the SFRY ... its recognition by the Member States of the European Community would be subject to its compliance with the conditions laid down by general international law for such an act and the joint statement and [EC] Guidelines<sup>664</sup>

Nevertheless, the FRY continued to claim continuity with the international personality of the FRY and, therefore, did not apply for membership in the UN before the end of the Milošević regime and was admitted to the UN on 1 November 2000.<sup>665</sup> While non-admission to the UN can be simply ascribed to the absence of an application for membership, the FRY's non-recognition remains much more disputable. Since the FRY refused to seek recognition in accordance with the EC Declaration, it remained universally unrecognised. The EC recognition policy was thus universalised, just as in the case of Macedonia, although the circumstances were different.

Yet, non-recognition does not imply that the FRY was not a state. Indeed, “the FRY, despite not having received, or indeed requested, recognition, was clearly considered to have fulfilled the factual requirements of Statehood, as is confirmed by

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<sup>662</sup> Ibid., para 3.

<sup>663</sup> Ibid., para 4.

<sup>664</sup> The Badinter Commission, Opinion 10 (4 July 1992), para 5.

<sup>665</sup> UN Doc A/Res 55/12 (1 November 2000). Some statements made by officials of the Republic of Serbia imply that Serbia still holds that it inherited the international personality of the former SFRY. When addressing the Security Council after Kosovo's declaration of independence, the President of Serbia, Boris Tadić, *inter alia*, made the following statement: “Serbia, let me recall, is a founding State Member of the United Nations.” UN Doc S/PV.5838 (18 February 2008), p. 4.

its appearance before the ICJ in the *Bosnia Genocide Case*.<sup>666</sup> There was also one circumstance which made the position of the FRY significantly different in comparison to other non-recognised states:

[T]he FRY had the advantage of possession. The SFRY's foreign service had been progressively denuded of its non-Serbian or Montenegrin representatives and accordingly, the personnel in the Yugoslav missions abroad were by and large loyal to Belgrade and most accepted the FRY as the country they now represented.<sup>667</sup>

Further, "[i]n response many countries reserved their positions and stated that continuing dealings with FRY representatives were without prejudice to any eventual decision on the FRY's claim [to continuation of international personality of the SFRY]".<sup>668</sup> However, 'the advantage of possession' gave the FRY the capacity to enter into relations with foreign states, which is otherwise a significant problem of non-recognised states.

The FRY also declared itself a successor of treaties concluded by the SFRY.<sup>669</sup> Consequently, "[o]ther states were ... faced with a dilemma: they wanted the FRY to respect the treaties, especially human rights conventions, to which the SFRY had been a party, but they could not accept the FRY as a party on the basis of continuation of statehood."<sup>670</sup> Indeed, when deciding on jurisdiction in the *Bosnia Genocide case*, the ICJ made the following observations in regard to applicability of the Genocide Convention:

[The SFRY] signed the Genocide Convention on 11 December 1948 and deposited its instrument of ratification, without reservation, on 29 August 1950. At the time of the proclamation of the Federal Republic of Yugoslavia, on 27 April 1992, a formal declaration was adopted on its behalf to the effect that: "The Federal Republic of Yugoslavia, continuing the State, international legal and political

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<sup>666</sup> Terrett (2000), p. 282.

<sup>667</sup> Rich (1993), p. 54.

<sup>668</sup> Ibid.

<sup>669</sup> Aust (2005), p. 400.

<sup>670</sup> Ibid.

personality of the Socialist Federal Republic of Yugoslavia, shall strictly abide by all the commitments that the Socialist Federal Republic of Yugoslavia assumed internationally." This intention thus expressed by Yugoslavia to remain bound by the international treaties to which the former Yugoslavia was party was confirmed in an official Note of 27 April 1992 from the Permanent Mission of Yugoslavia to the United Nations, addressed to the Secretary-General. The Court observes, furthermore, that it has not been contested that Yugoslavia was party to the Genocide Convention. Thus, Yugoslavia was bound by the provisions of the Convention on the date of the filing of the Application in the present case, namely, on 20 March 1993.<sup>671</sup>

The non-recognition of the FRY was somewhat unusual because the FRY denied that there was any new state creation in its case.<sup>672</sup> Further, other states did not deny that the FRY was a state but held that it did not continue the international personality of the SFRY. The FRY was, however, deemed to be a successor of rights and duties of the SFRY – albeit not the only one – and non-recognition did not influence this question. At the same time ‘the advantage of possession’ gave the FRY the capacity to act as a state also on the international plane.

The Badinter Commission in its Opinion 11 held that the FRY became a state on 27 April 1992, the day when it adopted its constitution.<sup>673</sup> The United Kingdom, for example, recognised the FRY in 9 April 1996.<sup>674</sup> Its denying recognition for this long has been described as “overtly political”.<sup>675</sup> It needs to be noted that recognition came after the FRY had signed the General Framework Agreement for Peace in Bosnia and Herzegovina which, *inter alia*, stipulated for mutual recognition of the

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<sup>671</sup> The *Bosnia Genocide case* (1996), para 17.

<sup>672</sup> This problem is also pointed out in Opinion 11 of the Badinter Commission: “There are particular problems in determining the date of State succession in respect of the Federal Republic of Yugoslavia because that State considers itself to be the continuation of the Socialist Federal Republic of Yugoslavia rather than a successor State.” The Badinter Commission, Opinion 11 (16 July 1993), para 7.

<sup>673</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 7.

<sup>674</sup> HC Deb (7 May 1996), col 89.

<<http://www.publications.parliament.uk/pa/cm199596/cmhansrd/vo960507/text/60507w19.htm>>.

<sup>675</sup> Dixon and McCorquodale (2003), p. 160.

FRY and Bosnia-Herzegovina<sup>676</sup> and effectively terminated the FRY's direct military involvement in the armed conflict in Bosnia-Herzegovina.<sup>677</sup>

#### **4.3.7. Comment on state creations in the territory of the SFRY**

Although the EC Guidelines invoked “the normal standards of international practice”<sup>678</sup> when recognition was to be granted, the traditional statehood criteria played virtually no role in the reasoning of the Badinter Commission. Indeed, Croatia and Bosnia-Herzegovina were recognised as independent states although their governments clearly did not exercise effective control over large parts of their respective territories.

Macedonia clearly met the traditional and additional statehood criteria as well as recognition requirements expressed in the EC Guidelines but remained unrecognised.<sup>679</sup> Fulfilment of the statehood criteria suggests that there existed no obligation to withhold recognition which would apply *erga omnes*.<sup>680</sup> Further, as Macedonia was not a case of unilateral secession, it is virtually impossible to find any law-based reason for its non-recognition.<sup>681</sup> There existed no competing claim to territorial integrity. Non-recognition was thus political. If one does not accept that

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<sup>676</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina, Article X (14 December 1995) <<http://www.oscebih.org/overview/gfap/eng>>.

<sup>677</sup> In this regard the House of Commons Select Committee on Foreign Affairs later noted (in the context of the Kosovo crisis): “The EU's 'Declaration on Yugoslavia', adopted on 16 December 1991, required that all Yugoslav republics seeking recognition agree to accept extensive provisions for safeguarding the rights of national minorities within their boundaries, including the granting of autonomy ('special status') to minorities forming a majority in the area where they lived. However, when in April 1996 the EU member states, including the United Kingdom, decided to extend recognition to Yugoslavia, they chose to ignore the requirement of autonomy for the Kosovo Albanians which earlier had been a central component of the EU's recognition policy. The EU merely noted at the time that improved relations between Yugoslavia and the international community would depend upon, *inter alia*, a 'constructive approach' by Yugoslavia to the granting of autonomy for Kosovo. Again, achieving Milosevic's cooperation on Bosnia was given priority over exercising leverage on Kosovo.” HC Select Committee on Foreign Affairs, Fourth Report (23 May 2000), para 32 <<http://www.publications.parliament.uk/pa/cm199900/cmselect/cmfaaff/28/2807.htm#note53>>. For more on Kosovo see *infra* ch. 7.2.

<sup>678</sup> See *supra* n. 481.

<sup>679</sup> See *supra* ch. 4.3.5. See also Rich (1993), p. 57.

<sup>680</sup> Compare *supra* ch. 3.3.2.

<sup>681</sup> Compare *supra* ch. 4.2.1. and 4.3.5.

recognition is constitutive,<sup>682</sup> Macedonia's statehood in the period of non-recognition cannot be disputed.

The FRY was a new state creation, although it denied this fact.<sup>683</sup> Based on its claim for continuity of the international personality of the SFRY, the FRY did not seek recognition as foreseen by the EC Declaration.<sup>684</sup> Consequently, the Badinter Commission did not need to apply the EC Guidelines to this situation. Given its involvement in armed conflicts in Croatia<sup>685</sup> and Bosnia-Herzegovina,<sup>686</sup> atrocities in Kosovo<sup>687</sup> and the authoritarian nature of the Milošević regime,<sup>688</sup> it is possible to speculate that the FRY would not have met the EC Guidelines standards associated with a commitment to international peace, human rights and democracy.<sup>689</sup>

However, this does not mean that the FRY did not meet the statehood criteria. Indeed, the FRY obviously met the traditional statehood criteria, including the disputable criterion of capacity to enter into relations with foreign states.<sup>690</sup> Further, although the FRY may well have been involved in an unlawful use of force outside of its territory (Bosnia-Herzegovina and Croatia) and denial of the right of self-determination in its own territory (Kosovo),<sup>691</sup> the FRY itself was not established as a result of unlawful use of force and/or in breach of the right of self-determination.

Arguably, the example of the FRY points out the difference between the scope of the additional statehood criteria and the scope of recognition requirements

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<sup>682</sup> Above an argument was made that recognition can have constitutive effects. However, this is so when it is not clear whether an entity meets the statehood criteria and/or there exists a competing claim to territorial integrity. Neither was the case in the example of Macedonia. Compare *supra* ch. 3.3.2.

<sup>683</sup> See *supra* ch. 4.2.1. and 4.3.6.

<sup>684</sup> See *supra* ch. 4.2.2.1.

<sup>685</sup> See especially SC Res 815 (30 March 1993), SC Res 820 (17 April 1993), the latter implying Serbia's involvement in both Croatia and Bosnia-Herzegovina.

<sup>686</sup> See especially SC Res 752 (15 May 1992), SC Res 757 (30 May 1992), SC Res 758 (8 June 1992), SC Res 760 (18 June 1992).

<sup>687</sup> See *infra* ch. 7.

<sup>688</sup> See N Miller (2005), pp. 552–64.

<sup>689</sup> See *supra* ch. 4.2.3.

<sup>690</sup> See *supra* ch. 4.3.6.

<sup>691</sup> See *infra* ch. 7.2.

expressed in the EC Guidelines. While the additional statehood criteria preclude a state creation where an effective entity is established as a result of an unlawful use of force or in denial of the right of self-determination,<sup>692</sup> the EC Guidelines have a broader scope. They demand peaceful behaviour in the international community in general<sup>693</sup> and adherence to a particular (liberal-democratic) political system, not merely operation of some democratic principles within the right of self-determination.<sup>694</sup> Thus, the aggressive behaviour of the FRY, human rights violations and the authoritarian nature of the Milošević regime cannot be deemed to have prevented the FRY from meeting the statehood criteria. Consequently, the duty of non-recognition did not apply *erga omnes* and non-recognition of the FRY can be seen as merely political and not as a consequence of a legal fact that the FRY was an illegally created effective entity. Indeed, it was shown that the FRY was treated as a state.<sup>695</sup>

The Badinter Commission expressly held that recognition is declaratory and that it did not perceive itself as a body which creates states. Such a perception is obvious from the reasoning in Opinion 11 in which it was, *inter alia*, held that Slovenia and Croatia became states on 8 October 1991 (the day of the expiry of the moratorium on their respective declarations on independence),<sup>696</sup> Macedonia on 17 November 1991 (the day of the adoption of a new constitution),<sup>697</sup> Bosnia-Herzegovina on 6 March 1992 (the day of the proclamation of referendum results)<sup>698</sup> and the FRY on 27 April 1992 (the day of the adoption of a new constitution).<sup>699</sup>

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<sup>692</sup> See supra ch. 3.2.2.

<sup>693</sup> See supra ch. 4.2.3.

<sup>694</sup> See supra n. 520.

<sup>695</sup> See supra ch. 4.3.6.

<sup>696</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 4.

<sup>697</sup> See supra n. 651.

<sup>698</sup> See supra n. 631.

<sup>699</sup> See supra n. 673.

These opinions imply a declaratory understanding of recognition; however, they were made subsequently, for state succession purposes, and are not unproblematic.<sup>700</sup>

When the Badinter Commission delivered its Opinion 11, on 16 July 1993, Slovenia and Croatia had already been recognised as independent states and were members of the UN.<sup>701</sup> Further, on 16 July 1993 there already existed the authority of the Badinter Commission's previous opinions holding that the SFRY was in the process of dissolution (Opinion 1)<sup>702</sup> and that this process was completed (Opinion 8).<sup>703</sup>

Yet on 8 October 1991, an authority holding that the process of dissolution was underway in the SFRY was absent. Further, such a finding was supported by the fact that four out of the SFRY's six constitutive republics had declared independence,<sup>704</sup> while on 8 October 1991, Bosnia-Herzegovina had not yet declared independence<sup>705</sup> and Macedonia's declaration was fairly recent.<sup>706</sup> The prevailing view on 8 October 1991 was that Slovenia and Croatia sought unilateral secession.<sup>707</sup> In such a circumstance the acquisition of statehood is much more questionable and, arguably, essentially depends on recognition. As was observed by the Supreme Court of Canada in the *Québec case*: "The ultimate success of ... [unilateral] secession

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<sup>700</sup> In Opinion 11 the Badinter Commission dealt with questions of succession after the dissolution of the SFRY had been completed and for this purpose it had to establish critical dates on which the SFRY's former republics became independent states. See the Badinter Commission, Opinion 11 (16 July 1993), para 2

<sup>701</sup> See supra n. 595 and n. 613 and 614.

<sup>702</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 3.

<sup>703</sup> The Badinter Commission, Opinion 8 (4 July 1992), para 4.

<sup>704</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 2.

<sup>705</sup> Bosnia-Herzegovina declared independence on 15 October 1991. See supra n. 620.

<sup>706</sup> Macedonia declared independence on 17 September 1991. See supra n. 636.

<sup>707</sup> See Grant (1999), pp. 152–53, arguing: "Though the United States, the Soviet Union, and various West European states and organizations stated their disapproval of Croat and Slovene unilateral declarations of independence, Germany quickly began to suggest that it would extend recognition to the putative states. As early as August 7, 1991, the German government expressed support for the secessionists." See also Raič (2002), p. 352, arguing that on 8 October 1991, people of Croatia possessed the right to secession based on the 'remedial secession' doctrine.

would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession....”<sup>708</sup>

Slovenia’s and Croatia’s unilateral secessions would thus ultimately depend on recognition by the international community which would take legality and legitimacy criteria into consideration.<sup>709</sup> However, recognition on 8 October 1991 was not certain. Indeed, “[a]s much as the Slovenes may have wished and hoped for EC recognition, it was really not until the EC Council of Ministers meeting of 16 December [1991] that they would be assured of it.”<sup>710</sup> In other words, it was not before the adoption of the EC Guidelines and Declaration that it became clear that Slovenia (and also Croatia) would be recognised as independent states.<sup>711</sup>

Caplan argues that “if one reads history of this period backwards from its final denouncement, the uncertainty is less apparent.”<sup>712</sup> Arguably, this is what the Badinter Commission did when it subsequently held that Slovenia and Croatia became states on 8 October 1991. It was the opinion of the Badinter Commission, delivered on 29 November 1991,<sup>713</sup> which established the universally-accepted authority stating that the SFRY was in the process of dissolution. Further, the EC Guidelines and Declaration established a mechanism to deal with this situation (i.e. to recognise new states emerging in the territory of the SFRY). Although the Badinter Commission expressly held that it did not see itself as a body which creates states,<sup>714</sup> it can be said that its observation that the SFRY was in the process of dissolution crucially changed the international perception of legal circumstances in the territory of the SFRY. Indeed, in its Opinion 11, the Badinter Commission itself

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<sup>708</sup> The *Québec case* (1998), para 155.

<sup>709</sup> A ‘remedial secession’ argument could, possibly, be advanced. Compare *infra* ch. 5.4.

<sup>710</sup> Caplan (2005), pp. 105–106.

<sup>711</sup> Compare *supra* ch. 4.2.1.

<sup>712</sup> Caplan (2005), p. 104.

<sup>713</sup> The Badinter Commission, Opinion 1 (29 November 1991).

<sup>714</sup> See *supra* notes 696–700.

ascribed great importance to the view that the SFRY was in the process of dissolution:

[T]he demise of the Socialist Federal Republic of Yugoslavia, unlike that of other recently dissolved States (USSR, Czechoslovakia), resulted not from an agreement between the parties but from a process of disintegration that lasted some time, starting, in the Commission's view, on 29 November 1991, when the Commission issued opinion No. 1, and ending on 4 July 1992, when it issued opinion No. 8.<sup>715</sup>

The role of the Badinter Commission thus had constitutive effects as it provided for a universally-adopted authority that dissolution, rather than attempts at unilateral secession, was underway in the SFRY. This removed the claim to territorial integrity of the SFRY and recognitions were ultimately declaratory.<sup>716</sup> The broader involvement of the EC, however, had significant constitutive effects. The opinions of the Badinter Commission were formally not legally binding<sup>717</sup> and were not entirely followed by EC member states.<sup>718</sup> Nevertheless, they importantly shaped state practice of the entire international community and, after such a finding of the Badinter Commission, it was not disputed that the SFRY was a case of dissolution.<sup>719</sup> Such a view was adopted even by the Security Council.<sup>720</sup>

The finding that dissolution was underway in the SFRY also importantly shaped legal circumstances for those republics which either declared independence at a later stage or attempted to continue the SFRY's international personality. It was

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<sup>715</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 2.

<sup>716</sup> The constitutive effects of the EC's involvement in the state creations are captured in the following anecdote: "At the second meeting with an EC foreign ministerial troika in Zagreb on 30 June [1991], where the EC negotiators were seeking a restoration of the status quo ante, De Michelis [foreign minister of Italy] approached Rupel [foreign minister of Slovenia] and assured him privately that Slovenia would not be forced to rejoin Yugoslavia: 'You will be an independent state. Croatia, on the other hand is a more complicated issue, since its situation is different from yours. But you'll be free in three months. You just have to stick to your agreements.'" Caplan (2005), pp. 102–103, quoting interview with Slovenian Foreign Minister Dimitrij Rupel.

<sup>717</sup> See supra n. 476.

<sup>718</sup> See the examples of Croatia (supra ch. 4.3.3.) and Macedonia (supra ch. 4.3.5.).

<sup>719</sup> See supra ch. 4.2.1. and 4.3.6.

<sup>720</sup> SC Res 757 and SC Res 777.

established above that non-recognition of Macedonia and the FRY did not preclude these two entities from being states.<sup>721</sup> However, similarly to the cases of Slovenia and Croatia, it is difficult to accept that Macedonia was a state before it became evident that the opinion of the Badinter Commission, holding that the SFRY was in a process of dissolution, had been universally accepted. However, in the later stage, after Macedonia lacked recognition because of the dispute over its name,<sup>722</sup> the situation was already determined by the dissolution of the SFRY and thus by the absence of a competing claim to territorial integrity. This was also the case with the FRY where there was no competing claim for territorial integrity. Since statehood criteria were obviously met, Macedonia and the FRY were clear situations in which the relationship between the emergence of new states and the act of recognition could be explained by the declaratory theory of recognition.

While the EC Guidelines invoke democratic standards, human rights protection and commitment to peace as recognition criteria, it is possible to conclude that the Badinter Commission applied these requirements very loosely. An exception is Slovenia, in which case the Badinter Commission discussed the implemented democratic standards at great length.<sup>723</sup> Democracy was broadly invoked in the opinion on Macedonia,<sup>724</sup> while it played virtually no role in opinions dealing with Croatia and Bosnia-Herzegovina.

The Badinter Commission found significant deficiencies in Croatia's meeting of minority rights protections standards, but the EC member states nevertheless granted recognition.<sup>725</sup> In the case of Bosnia-Herzegovina, the Badinter Commission

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<sup>721</sup> See supra ch. 4.3.5. and 4.3.6.

<sup>722</sup> See supra ch. 4.3.5.

<sup>723</sup> See supra ch. 4.3.2.

<sup>724</sup> See supra ch. 4.3.5.

<sup>725</sup> See supra ch. 4.3.3. Croatia had later improved institutional provisions for the protection of minority rights (especially in regard to the protection of the Serb minority). See The Constitutional

held that it was unclear whether the will of its peoples really favoured the creation of a separate state.<sup>726</sup> Thus, although the Badinter Commission did not deal with democratic institutions, it can be argued that democratic principles were invoked in regard to the right of self-determination. Only after the overwhelming majority of all citizens supported the creation of a separate state was recognition to Bosnia-Herzegovina granted by the EC and subsequently by the entire international community.<sup>727</sup> Yet the referendum was boycotted by Bosnian Serbs and support for independence, although widespread, ignored the wishes of one of the constitutive peoples.<sup>728</sup>

#### **4.4. Other new state creations at the end of the Cold War**

##### **4.4.1. The dissolution of the Soviet Union**

In regard to the dissolution of the Soviet Union, two separate occurrences need to be examined: first, the regaining of independence by Estonia, Latvia and Lithuania, and second, the establishment of the Commonwealth of Independent States (CIS).

In the interwar period, Estonia, Latvia and Lithuania were independent states and were members of the League of Nations.<sup>729</sup> Based on the Ribbentrop-Molotov Pact, signed in 1939, the three Baltic States were annexed by the Soviet Union in

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Act on Rights of National Minorities, The Official Gazette of the Republic of Croatia No 01-081-02-3955/2 (13 December 2002). However, it is still maintained that minority rights in general and rights of Serbs in specific remain inadequately protected in practice. In its 2008 report on Croatia, Amnesty International noted: “The 1991–95 war continued to overshadow human rights in Croatia. Despite some progress in the investigation and prosecution of war crimes, impunity remained widespread for crimes allegedly committed by members of the Croatian Army and police forces. Minorities, including Roma and Croatian Serbs, suffered discrimination, including in economic and social rights. Of at least 300,000 Croatian Serbs displaced by the conflict, approximately 130,000 were officially recorded as having returned home.” Amnesty International, Croatia, Report 2008 <<http://www.amnesty.org/en/region/croatia/report-2008>>.

<sup>726</sup> See supra ch. 4.3.4.

<sup>727</sup> See supra ch. 4.3.4.

<sup>728</sup> See supra ch. 4.3.4. See also infra ch. 5.4.3.3.

<sup>729</sup> See Crawford (2006), p. 393.

1940.<sup>730</sup> While “[t]he international community almost uniformly refused to grant *de jure* recognition to the 1940 Soviet annexation of the Baltic States,”<sup>731</sup> it was *de facto* accepted that they were constitutive republics of the Soviet Union.<sup>732</sup>

Lithuania declared independence on 11 March 1990.<sup>733</sup> At a subsequent referendum, held in February 1991, 90.47 percent of cast votes were in favour of independence.<sup>734</sup> Estonia declared independence on 20 August 1991, following a referendum, at which 77.83 percent of cast votes were in favour of independence.<sup>735</sup> Latvia declared independence on 21 August 1991, following a referendum at which 73.68 percent of cast votes were in favour of independence.<sup>736</sup> Subsequently, “[o]n 6 September 1991, the State Council of the Soviet Union voted unanimously to recognize the independence of the Baltic States.”<sup>737</sup> Thus, consent of the parent state for the creation of the three independent states was given.

Some states granted recognition to the Baltic States prior to recognition granted by the Soviet Union. Notably, the EC member states recognised the Baltic States on 27 August 1991.<sup>738</sup> However, due to different interpretations of the legal status of the Baltic States, there were also different views on the question of whether this was an act of recognition of new states or acknowledgement of a revival of states in existence prior to annexation in 1940:

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<sup>730</sup> Article 1 of the Secret Additional Protocol to the Ribbentrop-Molotov Pact reads: “In the event of a territorial and political rearrangement in the areas belonging to the Baltic States (Finland, Estonia, Latvia, Lithuania), the northern boundary of Lithuania shall represent the boundary of the spheres of influence of Germany and U.S.S.R. In this connection the interest of Lithuania in the Vilna area is recognized by each party.” The German-Soviet Non-Aggression Pact (The Ribbentrop-Molotov Pact) (23 August 1939), Secret Additional Protocol, Article 1 <[http://www.geocities.com/iturks/html/riibbentrop\\_molotov\\_pact.html](http://www.geocities.com/iturks/html/riibbentrop_molotov_pact.html)>.

<sup>731</sup> Himmer (1992), p. 323.

<sup>732</sup> *Ibid.*, p. 324.

<sup>733</sup> Crawford (2006), p. 394

<sup>734</sup> *Ibid.*

<sup>735</sup> *Ibid.*

<sup>736</sup> *Ibid.*

<sup>737</sup> *Ibid.*

<sup>738</sup> Warbrick (1992), p. 474. Recognition was thus granted before adoption of the EC Guidelines (see *supra* ch. 4.2.1.). The latter document was therefore not applicable in this situation.

A distinction was drawn in the [EC] Presidency statement between the position of the Netherlands and Spain which had recognised the annexation of the Baltic States and which, accordingly, needed to recognise their revived status, and the remainder of the Community States, for which the act of 27 August [1991] was not an act of recognition.<sup>739</sup>

The dilemma is also captured in the position of the Government of the United Kingdom, which held that the act of 27 August 1991 was an act of recognition; however, “it has yet to take a position on whether the present Baltic States are simply revivals of the ones existing before 1940.”<sup>740</sup> Warbrick concludes that “[f]rom a purely legal point of view, the outcome will depend to an extent on what view is taken of the legality of the Ribbentrop-Molotov Pact and the subsequent incorporation of the territories into the USSR.”<sup>741</sup>

Estonia, Latvia and Lithuania were admitted to the UN on 17 September 1991.<sup>742</sup> It remains significant that “[t]he Security Council did not consider the applications for recognition made by the Baltic States until 12 September 1991, six days after the Soviet Union had agreed to recognize them.”<sup>743</sup> According to Crawford, this implies that “the position of the Soviet authorities was treated as highly significant even in a case of suppressed independence.”<sup>744</sup> It also needs to be noted that Lithuania declared independence more than seventeen months before the EC extended recognition and held a referendum six months before recognition. Lithuania may be an example of a state creation where a unilateral declaration of independence was subsequently acknowledged by the parent state. On the other hand, Estonia and Latvia declared independence after a period of negotiations with

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<sup>739</sup> Ibid.

<sup>740</sup> Ibid.

<sup>741</sup> Ibid.

<sup>742</sup> GA Res 46/4 (17 September 1991) (Estonia), GA Res 46/5 (17 September 1991) (Latvia), GA Res 46/6 (17 September 1991) (Lithuania).

<sup>743</sup> Crawford (2006), p. 394.

<sup>744</sup> Ibid.

Soviet authorities and in a more favourable political situation.<sup>745</sup> Estonia and Latvia, unlike Lithuania, were recognised as states and received approval of the parent state virtually immediately after the declaration of independence.<sup>746</sup>

After the three Baltic States became independent, the Soviet Union continued in existence as a federation of twelve republics. On 8 December 1991, the presidents of Belarus, Russia and Ukraine signed the Agreement on the Establishment of the Commonwealth of Independent States<sup>747</sup> which, *inter alia*, comprehends the following formulation:

We, the Republic of Belarus, the Russian Federation ... and Ukraine, as founder states of the Union of Soviet Socialist Republics and signatories of the Union Agreement of 1922 ... hereby declare that the Union of Soviet Socialist Republics as a subject of international law and a geopolitical reality no longer exists.<sup>748</sup>

On 21 December 1991, a protocol to the Minsk Agreement was adopted by the remaining Soviet Republics, with an exception of Georgia,<sup>749</sup> by way of which the CIS was extended to these former republics from the moment of ratification of the Minsk Agreement.<sup>750</sup> On the same day, eleven Soviet Republics (in the absence of Georgia), adopted the Alma Ata Declaration which, *inter alia*, declared: “With the establishment of the Commonwealth of Independent States, the Union of Soviet Socialist Republics ceases to exist.”<sup>751</sup>

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<sup>745</sup> For more see Ziemele (2005), p. 43.

<sup>746</sup> Compare *supra* notes 737–742.

<sup>747</sup> The Agreement on the Establishment of the Commonwealth of Independent States (1991) 31 ILM 138 (1992) [hereinafter the Minsk Agreement].

<sup>748</sup> *Ibid.*, preamble, para 1.

<sup>749</sup> The Protocol to the Agreement Establishing the Commonwealth of Independent States signed at Minsk on 8 December 1991 by the Republic of Belarus, the Russian Federation (RSFSR) and Ukraine (1991) 31 ILM 147 (1992) [hereinafter the Alma Ata Protocol].

<sup>750</sup> Ratifications took place on the following dates: Belarus (10 December 1991), Ukraine (10 December 1991), Russia (10 December 1991), Kazakhstan (23 December 1991), Turkmenistan (26 December 1991), Uzbekistan (4 January 1992), Armenia (18 February 1992), Kyrgyzstan (6 March 1992), Tajikistan (26 June 1993), Azerbaijan (24 September 1993), and Moldova (8 April 1994). Eventually also Georgia ratified the Minsk Agreement on 3 December 1993. See the Minsk Agreement (1991).

<sup>751</sup> The Alma Ata Declaration (1991) 31 ILM 147 (1992).

The Minsk Agreement further expressed the intention to set up “lawfully constituted democratic States”<sup>752</sup> and:

[T]o develop ... relations on the basis of mutual recognition of and respect for State sovereignty, the inalienable right to self-determination, the principles of equality and non-intervention in internal affairs, of abstention from the use of force and from economic or other means of applying pressure and of settling of controversial issues through agreement, and other universally recognized principles and norms of international law [and confirmed] adherence to the purposes and principles of the Charter of the United Nations, the Helsinki Final Act and the other documents of the Conference on Security and Co-operation in Europe.<sup>753</sup>

Similar commitments were also expressed in the Alma Ata Protocol.<sup>754</sup>

Notably, the Agreement adopted the commitment to standards similar to those expressed in the EC Guidelines.<sup>755</sup> Yet the Minsk Agreement was concluded eight days before the EC Guidelines were adopted, so its commitments were obviously not expressed in order to comply with the EC Guidelines. Further, unlike in the example of the SFRY, where it was held that none of its former republics had an exclusive right to inherit the SFRY’s international personality,<sup>756</sup> in the case of the Soviet Union it was mutually accepted by members of the CIS that Russia continued membership of the Soviet Union in international organisations. Such a position was expressed in the Decision by the Council of Heads of State of the CIS, adopted on 21 December 1991: “The States of the Commonwealth support Russia’s continuance of

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<sup>752</sup> The Minsk Agreement (1991), para 3.

<sup>753</sup> *Ibid.*, paras 3 & 4.

<sup>754</sup> The Alma Ata Declaration, *inter alia*, invokes the following commitments: “[S]etting up lawfully constituted democratic States, the relations between which will be developed on the basis of mutual recognition and respect for State sovereignty and sovereign equality, the inalienable right to self-determination, the principles of equality and non-intervention in internal affairs, abstention from the use of force and the threat of force and from economic or any other methods of bringing pressure to bear, peaceful settlement of disputes, respect for human rights and freedoms including the rights of national minorities, conscientious discharge of obligations and the other universally acknowledged principles and norms of international law.” The Alma Ata Declaration (1991), para 2.

<sup>755</sup> Compare *supra* ch. 4.2.2.1.

<sup>756</sup> See *supra* ch. 4.2.1., 4.3.6. and 4.3.7.

the membership of the Union of Soviet Socialist Republics in the United Nations.”<sup>757</sup>

Subsequently, on 24 December 1991, the President of the Russian Federation addressed a letter to the UN Secretary-General, stating:

The membership of the Union of the Soviet Socialist Republics in the United Nations, including the Security Council and all other organs and organizations of the United Nations system, is being continued by the Russian Federation (RSFSR) with the support of the countries of the Commonwealth of Independent States.<sup>758</sup>

No resolution confirming the continuity of membership was passed but Russia took up the seat of the Soviet Union without objections.<sup>759</sup>

All newly-emerged states in the territory of the former Soviet Union were rapidly admitted to the UN and no objection was raised in regard to their statehood.<sup>760</sup> Further, although it was observed that both the Minsk Agreement and the Alma Ata Protocol invoked the commitments comparable to the requirements expressed in the EC Guidelines,<sup>761</sup> the latter document was not applied by the recognising states before recognition was granted. As has been observed:

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<sup>757</sup> The Decision by the Council of Heads of State of the Commonwealth of Independent States (1991) 31 ILM 138 (1992), para 1.

<sup>758</sup> The Letter of the President of the Russian Federation to the UN Secretary-General, 31 ILM 138 (1992).

<sup>759</sup> Crawford (2006), p. 395. Russia’s continued membership of the Soviet Union in the UN is, however, not uncontested by legal scholars. Significantly, this was not an example of state’s name change or secession of part of the Soviet Union’s territory. This was an example of dissolution and “with the demise of the Soviet Union ... its membership in the UN should have automatically lapsed and Russia should have been admitted to membership in the same way as the other newly-independent republic (except for Belarus and Ukraine).” Blum (1992), p. 359. As was already argued, the former Soviet republics agreed that Russia would continue the Soviet Union’s membership in the UN (see supra n. 758). However, “[t]he correct legal path to this end would have been for all the republics of the Soviet Union except Russia to secede from the union, thus preserving the continuity between the Soviet Union and Russia for the UN membership purposes.” Blum (1991), p. 361. Nevertheless, it is questionable whether such a path was possible in rather complicated Soviet political situation in 1991. See also infra ch. 5.4.4.1.

<sup>760</sup> Moldova, Kazakhstan, Kyrgyzstan, Uzbekistan, Armenia, Tajikistan, Turkmenistan, Azerbaijan all became members of the UN on 2 March 1992 and Georgia, who made its application belatedly, on 31 July 1992. GA Res 46/223 (Moldova), GA Res 46/224 (Kazakhstan), GA Res 46/225 (Kirgizstan), GA Res 46/226 (Uzbekistan), GA Res 46/227 (Armenia), GA Res 46/228 (Tajikistan), GA Res 46/229 (Turkmenistan), GA Res 46/230 (Azerbaijan), GA Res 46/241 (Georgia). Ukraine and Belarus were original members of the UN and continued their membership. See Aust (2005), p. 18.

<sup>761</sup> Compare supra ch. 4.2.3.

[I]n the face of evidence that democracy was still not taking root, recognition was in due course extended to [the] new states. [When drafting the EC Guidelines] [t]he West seems to have awaited stability in Moscow, rather than democracy in the republics, and this would imply that geographical strategy was more at work than international law.<sup>762</sup>

This observation is indeed correct for the example of the Soviet Union, where the dissolution was consensual and recognition of new states became merely a matter of acknowledging a fact.<sup>763</sup> Yet, as was shown above, the EC's involvement in the dissolution of the SFRY was much more complex.<sup>764</sup>

#### **4.4.2. The dissolution of Czechoslovakia**

The dissolution of Czechoslovakia was negotiated among, at that time already elected, political elites,<sup>765</sup> while it was unclear whether the people of either federal unit supported the creation of separate Czech and Slovak states:

[The dissolution] was the result of almost three years of constitutional negotiations which ended in deadlock when the Slovak side demanded a confederation or a "union" and the Czech side refused to accept anything but "a functional federation." In the face of the "no exit" situation the two sides agreed, with the blessing of the Federal Parliament, on an orderly breakup and on a dense network of international agreements between the nascent republics defining their future relations.<sup>766</sup>

The dissolution of Czechoslovakia was thus not initiated by secessionist attempts in either republic but was rather a result of different views on the internal organisation of the common state and an inability to reconcile these views. In this negotiated settlement, Czechoslovakia ceased to exist on 31 December 1992.<sup>767</sup> On 1 January 1993, the Czech Republic and Slovakia were proclaimed independent

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<sup>762</sup> Grant (1999), p. 96.

<sup>763</sup> Compare *infra* ch. 5.4.4.1.

<sup>764</sup> Compare *supra* ch. 4.2.1. and 4.3.

<sup>765</sup> The first post-Communist multiparty parliamentary elections in Czechoslovakia took place on 8 and 9 June 1990. Elections were held to both federal assembly and assembly of the constitutive republics. For more see Czechoslovakia: Parliamentary Elections <[http://www.ipu.org/parline-e/reports/arc/2084\\_90.htm](http://www.ipu.org/parline-e/reports/arc/2084_90.htm)>.

<sup>766</sup> Stein (1997), p. 45.

<sup>767</sup> See Crawford (2006), p. 402.

states.<sup>768</sup> Both were admitted to the UN on 19 January 1992.<sup>769</sup> Czechoslovakia was thus a clear example of consensual dissolution and the existence of the two new states was not disputed.

It may be argued that consent of the people for the alteration of the legal status of the territory was not unequivocally given. The fact that the political leaders who carried out the dissolution were democratically elected does not change this consideration.<sup>770</sup> The international community, however, accepted the dissolution of Czechoslovakia and, consequently, the creation of two separate states, as fact and the absence of a referendum on the future legal status of the territory was not invoked before recognitions were granted. Further, the questionable quality of democracy in Slovakia in the period of Primer Minister Vladimir Mečiar did not play any role in international recognition of Slovakia.<sup>771</sup>

#### **4.4.3. The creation of Eritrea**

Eritrea was a former Italian colony. After Italy's defeat in the Second World War, it was temporarily put under British administration.<sup>772</sup> In 1950, UN General Assembly Resolution 390 proposed a federal arrangement for Eritrea and Ethiopia, under the Ethiopian Crown.<sup>773</sup> The arrangement foresaw meaningful self-government for Eritrea.<sup>774</sup>

In 1952, a federal constitution "was adopted unanimously by the Eritrean Assembly and the Government of Eritrea and its federation with Ethiopia came into

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<sup>768</sup> Ibid.

<sup>769</sup> GA Res 47/221 (19 January 1993) (Czech Republic); GA Res 47/222 (19 January 1993) (Slovakia).

<sup>770</sup> See *infra* ch. 5.3.4.2. for discussion on the shortcomings of the electoral process when the exercise of the right of self-determination is in question.

<sup>771</sup> See Ramet (1997), pp. 85–90.

<sup>772</sup> For more see M Haile (1994), pp. 482–87.

<sup>773</sup> GA Res 390 (V) A (2 Dec. 1950).

<sup>774</sup> Resolution 390 (V), *inter alia*, provides: "Eritrea shall constitute an autonomous unit federated with Ethiopia under the sovereignty of the Ethiopian Crown." Ibid., para 1.

being.”<sup>775</sup> Faced with growing Eritrean dissatisfaction over the federation with Ethiopia and calls for independence, the federal arrangement was unilaterally terminated by Ethiopia in 1962.<sup>776</sup> Subsequently, the Eritrean Peoples Liberation Front (EPLF) emerged, which sought Eritrean independence.<sup>777</sup> This became feasible after the change of government in Ethiopia in 1991, when the Ethiopian military regime was defeated by the Ethiopian People’s Revolutionary Democratic Front, backed by the EPLF.<sup>778</sup> In Eritrea, a provisional government was established, which co-brokered the ceasefire agreement between the conflicting parties within Ethiopia<sup>779</sup> and planned a referendum on independence.<sup>780</sup>

The referendum was held in 1993, under UN auspices, at which overwhelming (99.8 percent) support was given for independence.<sup>781</sup> In this context the General Assembly adopted Resolution 47/114 on 16 December 1992, in which it observed “that the authorities directly concerned have requested the involvement of the United Nations to verify the referendum in Eritrea”<sup>782</sup> and supported “the establishment of a United Nations observer mission to verify the referendum.”<sup>783</sup> Eritrean independence was accepted by the Transitional Government of Ethiopia, which previously came to power with help of the EPLF.<sup>784</sup> Eritrea was admitted to the UN on 28 May 1993.<sup>785</sup>

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<sup>775</sup> M Haile (1994), p. 487. See also generally Schiller (1953), pp. 375–82.

<sup>776</sup> See Crawford (2006), p. 402. Ethiopia was at that time still ruled by Emperor Haile Selassie, whose government was ousted in 1974 by the military regime, which stayed in power until 1991. See M Haile (1994), p. 487 and S Haile (1987), pp. 9–17.

<sup>777</sup> See Crawford (2006), p. 402.

<sup>778</sup> Ibid.

<sup>779</sup> Keesing’s, (1992), p. 38855.

<sup>780</sup> Keesing’s (1992), p. 39085.

<sup>781</sup> Crawford (1992), p. 402.

<sup>782</sup> GA Res 47/114 (5 April 1993), preamble, para 3.

<sup>783</sup> Ibid., para 1.

<sup>784</sup> Ibid.

<sup>785</sup> GA Res 47/230 (28 May 1993).

Although one could advance an argument that Ethiopian suppression of the right of self-determination in Eritrea might have given support to ‘remedial secession’,<sup>786</sup> it is notable that Eritrea became independent once consent of its parent state was given and, consequently, there existed no competing claim to territorial integrity. International involvement into the state creation of Eritrea was limited to observation of the independence referendum and did not address governance issues.<sup>787</sup>

#### **4.4.4. Conclusions on the state creations**

In the case of the Soviet Union, the Minsk Agreement and the Alma Ata Protocol removed the claim to territorial integrity and made the dissolution consensual.<sup>788</sup> Consensual dissolution was also the case in Czechoslovakia and, consequently, there was no competing claim to territorial integrity. The example of Eritrea was different but led to a similar legal situation. Secession from Ethiopia, not dissolution, was in question. However, the approval of Ethiopia removed the claim to territorial integrity and, once it was confirmed that independence was an undisputable wish of the Eritrean people, there was no doubt that Eritrea was a state.

In these situations, the absence of a claim to territorial integrity made the emergence of new states a matter of fact which was acknowledged by the international community and, consequently, recognitions and admission to the UN promptly followed. In these situations, international involvement was not decisive for the state creations. International involvement was much more significant in

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<sup>786</sup> For more on the 'remedial secession doctrine' see *infra* ch. 5.4.

<sup>787</sup> Compare *infra* ch. 4.5.1. and 7.3. for different accounts on East Timor and Kosovo.

<sup>788</sup> It needs to be noted that the political situation in the Soviet Union in 1991 was rather complicated, the three Baltic republics had become independent states and secessionist tensions were present also in some other republics. This situation was invoked in the Declaration by the Heads of State of the Republic of Belarus, the RSFSR and Ukraine: “[T]he talks on the drafting of a new Soviet Treaty have become deadlocked and that the *de facto* process of withdrawal of republics from the Union of Soviet Socialist Republics and the formation of independent States has become reality.” Declaration by the Heads of States of the Republic of Belarus, the RSFSR and Ukraine (1991) 31 ILM 138 (1992).

situations which were at least initially attempts at unilateral secession. Such was the case of the dissolution of the SFRY, where it was argued that international involvement had constitutive effects for the creation of new states. While the declarations of independence of Slovenia and of Croatia were initially considered to be attempts at unilateral secession, it was the opinion of the Badinter Commission which provided the authority that the dissolution was underway and thus Yugoslavia's claim to territorial integrity was removed.<sup>789</sup> Although the Badinter Commission expressly held that recognition was declaratory, its opinions had notable constitutive effects.<sup>790</sup> There was no comparable international involvement in the other three situations which have been addressed so far.

In 1991, the EC's initial response to crises in the SFRY and the Soviet Union aimed to deal with the developments in both dissolving federations. This was implied by the EC Guidelines which applied broadly to Eastern Europe and the Soviet Union.<sup>791</sup> The EC Declaration, however, specifically referred to the SFRY.<sup>792</sup> Consequently, while the recognition criteria, expressed in the EC Guidelines, were meant to be extended to the new states emerging in the territory of the Soviet Union, there existed no mechanism for recognition comparable to that established by the EC Declaration. Further, there existed no body comparable to the Badinter Commission which would discuss recognition issues and thus provide reasoning behind the application of the EC Guidelines.

The standards expressed in the EC Guidelines, which reach beyond the statehood criteria,<sup>793</sup> were not applied in those post-Cold War state creations in which statehood criteria were met and there existed no claim to territorial integrity by

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<sup>789</sup> See supra ch. 4.2.1. and 4.3.

<sup>790</sup> See supra n. 716.

<sup>791</sup> See supra ch. 4.2.

<sup>792</sup> See supra ch. 4.2.2.2.

<sup>793</sup> See supra ch. 4.2.2.1.

a parent state. In these circumstances the international community accepted that such entities were states, regardless of type of government. It now needs to be examined what role democratic standards, expressed in the EC Guidelines, played in subsequent situations of new state creations.

#### **4.5. Subsequent state creations and international involvement**

##### **4.5.1. East Timor**

The division of the Timor Island dates to Portuguese and Dutch colonial conquests. The Portuguese first arrived to the island of Timor at the beginning of the sixteenth century.<sup>794</sup> In the early seventeenth century their control over the island was challenged by the Dutch.<sup>795</sup> The history of foreign rule of East Timor has been thoroughly examined elsewhere.<sup>796</sup> For the purpose of this thesis it should suffice to recall that the Portuguese managed to strengthen their power in the eastern part of the Timor Island while the Dutch controlled the western part. The division was officially confirmed in a treaty initially concluded in 1848<sup>797</sup> and unequivocally accepted by both states in 1859.<sup>798</sup> The colonial boundary between the Dutch-controlled western part and the Portuguese-controlled eastern part of the Timor Island was finally determined by the Treaty of The Hague in 1913.<sup>799</sup> This delimitation now represents the international border between the Democratic Republic of Timor-Leste and Indonesia.<sup>800</sup>

Colonial possessions of the Netherlands in the Indonesian archipelago were lost at the end of the Second World War. Indonesia declared independence in 1945,

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<sup>794</sup> See Singh (1995), p. 2.

<sup>795</sup> Ibid., p. 3.

<sup>796</sup> See generally Singh (1995), Krieger and Rauschnig (1997), Taylor (1999), Hainsworth and McCloskey (2000), Martin (2001).

<sup>797</sup> For more see Singh (1995), p. 6.

<sup>798</sup> Ibid.

<sup>799</sup> See Chronology of East Timor <<http://www.nautilus.org/~rmit/publications/timor-cronology.html>>.

<sup>800</sup> See Deeley (2001), especially pp. 25–27. See also the *East Timor case*, ICJ Rep 1995, para 10.

which was acknowledged by the Netherlands in 1949.<sup>801</sup> Portugal, on the other hand, retained its colonial possessions until the democratic change in the 1970s.<sup>802</sup> In East Timor the democratic change in Portugal led to the creation of three main political factions,<sup>803</sup> the rivalries between which led to a civil war.<sup>804</sup> After the outbreak of hostilities in 1975, the Portuguese administration left the island and, subsequently, two factions separately declared independence.<sup>805</sup> While the pro-independence faction claimed that East Timor had become an independent state, the pro-Indonesian faction maintained that East Timor had acquired independence from Portugal and entered into association with Indonesia.<sup>806</sup> On 7 December 1975, Indonesia occupied the territory, claiming “to be effecting East Timorese self-determination.”<sup>807</sup> On 17 July 1976, the President of Indonesia promulgated an act which declared East Timor an Indonesian province.<sup>808</sup> In Indonesia’s view, the people of East Timor consummated their right of self-determination “through integration with Indonesia.”<sup>809</sup>

In Portugal’s understanding, however, East Timor was not properly decolonised and, consequently, Portugal still regarded itself as an administering power.<sup>810</sup> Such views were also expressed by the UN organs. The Security Council Resolution 384 called upon:

[A]ll States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV); ... the Government of Indonesia to withdraw without delay all its forces from the Territory [of East Timor];

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<sup>801</sup> Davison (2005), p. 18

<sup>802</sup> Singh (1995), p. 7.

<sup>803</sup> Taylor (1995), pp. 23–25.

<sup>804</sup> Martin (2001), p. 16.

<sup>805</sup> Ibid.

<sup>806</sup> Ibid.

<sup>807</sup> Wilde (2008), p. 179.

<sup>808</sup> Martin (2001), p. 16.

<sup>809</sup> Ibid., pp. 16–17.

<sup>810</sup> Ibid., p. 17.

the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination; [and urged] ... all States and other parties concerned to co-operate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situations and to facilitate the decolonization of the Territory.<sup>811</sup>

These views were reaffirmed by Security Council Resolution 389<sup>812</sup> and by a set of General Assembly Resolutions.<sup>813</sup> Importantly, East Timor remained on the list of Non-Self-Governing territories.<sup>814</sup> It is argued that “Portugal continued to assert its formal ties to East Timor throughout the occupation, notably by bringing a case about East Timor against Australia to the ICJ in 1991.”<sup>815</sup>

In 1999, the new Indonesian leadership indicated that it would be willing to discuss the future legal status of East Timor.<sup>816</sup> On 30 August 1999, upon an agreement between Indonesia and Portugal,<sup>817</sup> a referendum on the future status of the territory was held. At the referendum, which was supervised by the UN mission,<sup>818</sup> the people of East Timor rejected an autonomy arrangement within Indonesia and set the course toward independence.<sup>819</sup> This decision led to an outbreak of violence, initiated by Indonesian forces.<sup>820</sup> Subsequently, the Security Council, acting under Chapter VII, on 15 September 1999, adopted Resolution 1264, which, *inter alia*, authorised:

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<sup>811</sup> SC Res 384 (22 December 1975), paras 1–4. A similar view was previously expressed by GA Res 3485 (XXX) (12 December 1975).

<sup>812</sup> SC Res 389 (22 April 1976), especially paras 1 & 2.

<sup>813</sup> GA Res 31/53 (1 December 1976); GA Res 32/34 (28 November 1977), GA Res 33/39 (13 December 1978); GA Res 34/40 (21 November 1979); GA Res 35/27 (11 November 1980), GA Res 36/50 (24 November 1981).

<sup>814</sup> See Wilde (2008), pp. 179–80.

<sup>815</sup> Wilde (2008), p. 181. For more on the *East Timor case* see Scobbie (1995), pp. 223–242; Clark (1995), pp. 243–250, Simpson (1995), pp. 251–268.

<sup>816</sup> *Ibid.*

<sup>817</sup> See *infra* ch. 5.4.3.8.

<sup>818</sup> See SC Res 1236, especially paras 4, 8, 9 (7 May 1999).

<sup>819</sup> See *infra* ch. 5.4.3.8.

<sup>820</sup> *Ibid.*

[T]he establishment of a multinational force under a unified command structure, pursuant to the request of the Government of Indonesia conveyed to the Secretary-General on 12 September 1999, with the following tasks: to restore peace and security in East Timor, to protect and support UNAMET in carrying out its tasks and, within force capabilities, to facilitate humanitarian assistance operations, and authorizes the States participating in the multinational force to take all necessary measures to fulfil this mandate.<sup>821</sup>

On 25 October 1999, the Security Council, acting under Chapter VII, adopted Resolution 1272, with which it established “a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.”<sup>822</sup> Resolution 1272 in its preamble also reaffirmed “respect for the sovereignty and territorial integrity of Indonesia.”<sup>823</sup>

Prior to the “release” of East Timor to independence and transfer of power from international territorial administration to organs of the East Timorese state, the international administrative authority supervised the creation of democratic institutions.<sup>824</sup> Under UN auspices, elections were held on 30 August 2001 and 91.3 percent of those eligible to vote cast their votes.<sup>825</sup> On 15 September 2001, the Special Representative of the United Nations Secretary General “swore in the 88 members of the Constituent Assembly.”<sup>826</sup> On 20 September 2001, the Special Representative appointed a second transitional government, the members of which were all East Timorese and the composition of the government reflected the outcome

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<sup>821</sup> SC Res 1264, para 3 (15 September 1999).

<sup>822</sup> SC Res 1272, para 1 (25 October 1999).

<sup>823</sup> *Ibid.*, para 12.

<sup>824</sup> UN Doc S/2001/436 (2 May 2001), paras 2–7; S/2001/983 (18 October 2001), paras. 4–8.

<sup>825</sup> UN Doc S/2001/983 (18 October 2001), para 5.

<sup>826</sup> *Ibid.*

of the elections to the assembly.<sup>827</sup> The UN Secretary-General noted that this was “the first time that the executive government [was] controlled by East Timorese, albeit under the overall authority of [the UN Secretary-General’s] Special Representative.”<sup>828</sup>

On 28 November 2001, the Constituent Assembly adopted a resolution in which it expressed support for direct presidential elections.<sup>829</sup> The Special Representative determined that the presidential elections would take place on 14 April 2002.<sup>830</sup> On 22 March 2002, the text of the new Constitution was signed by members of the East Timorese political elite, religious leaders and representatives of the civil society.<sup>831</sup> It was determined that the Constitution would enter into force on 20 May 2002, which was the day foreseen for the proclamation of independence.<sup>832</sup> East Timor’s course to independence was otherwise affirmed in Security Council Resolution 1338, adopted on 31 January 2001.<sup>833</sup> After the declaration of independence on 20 May 2002,<sup>834</sup> East Timor was ultimately admitted to the UN on 27 September 2002.<sup>835</sup>

The Constitution of East Timor makes a number of specific references to a democratic political order. Section 1 of the Constitution provides: “The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the

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<sup>827</sup> Ibid., para 7.

<sup>828</sup> Ibid.

<sup>829</sup> UN Doc S/2002/80 (17 January 2002), para 7.

<sup>830</sup> Ibid. See also S/2002/432 (17 April 2002), para 7.

<sup>831</sup> Ibid., para 4.

<sup>832</sup> Ibid, paras 2 & 4.

<sup>833</sup> SC Res 1338 (31 January 2001). Notably, this resolution was not adopted under Chapter VII of the UN Charter.

<sup>834</sup> See East Timor: Birth of a Nation, BBC (19 May 2002) <<http://news.bbc.co.uk/2/hi/asia-pacific/1996673.stm>>.

<sup>835</sup> GA Res 57/3 (27 September 2002).

human person.”<sup>836</sup> Section 6(c) provides that one of the fundamental objectives is “[t]o defend and guarantee political democracy and participation of the people in the resolution of national problems.”<sup>837</sup> Besides these general references to democracy, a number of other operative articles enact specific provisions which leave no doubt that the electoral process in East Timor is organised along liberal-democratic lines, in a multiparty setting. Section 7 expressly enacts universal suffrage and a multiparty political system,<sup>838</sup> Sections 46 and 47, respectively, deal with the right to political participation and with the right to vote, within the elaboration of which a multiparty political system is expressly demanded<sup>839</sup> and Section 70 deals specifically with political parties and the 'right of opposition'.<sup>840</sup>

According to the Constitution, the Constitutive Assembly was transformed into the Parliament.<sup>841</sup> The Constitution specifically regulated elections of the Parliament<sup>842</sup> and of the President.<sup>843</sup> It can be concluded that the political system, which was designed in East Timor under UN auspices, is organised along liberal-democratic (procedural) lines. The international territorial administration thus not only guided East Timor toward independence but also through the process of democratic transition and building of democratic institutions. Yet, if one does not understand democracy in its procedural understanding, defined in terms of democratic institutions,<sup>844</sup> it would be an exaggeration to say that international territorial administration led East Timor to democracy. Indeed, after the declaration of independence, the process of democratic consolidation has not been

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<sup>836</sup> Constitution of the Democratic Republic of East Timor (2002), Section 1(1).

<sup>837</sup> *Ibid.*, Section 6(c).

<sup>838</sup> *Ibid.*, Section 7.

<sup>839</sup> *Ibid.*, Section 46 & Section 47.

<sup>840</sup> *Ibid.*, Section 70.

<sup>841</sup> *Ibid.*, Sections 92–101.

<sup>842</sup> *Ibid.*, Section 93(1).

<sup>843</sup> *Ibid.*, Section 76(1).

<sup>844</sup> Compare *supra* ch. 2.2.1. and 2.2.2.

straightforward and has faced several obstacles.<sup>845</sup> Nevertheless, it remains significant that international territorial administration, the actions of which were attributed to the UN,<sup>846</sup> implemented an institutional design characteristic for a liberal-democratic political system.<sup>847</sup>

#### 4.5.2. Montenegro

As set out above, in 1992 Montenegro and Serbia founded the FRY.<sup>848</sup> The two republics of this federation enjoyed significant degree of self-government<sup>849</sup> but the FRY's constitution did not foresee a mechanism for secession. In the last period of the Milošević regime in the FRY, which came to an end in October 2000,<sup>850</sup> political forces favouring independence became more prominent in Montenegro.<sup>851</sup> Opinion polls suggested that, at the end of 2000, independence was supported by roughly fifty percent of Montenegro's population and expressly opposed by twenty-five percent.<sup>852</sup> Another twenty-five percent of Montenegro's population did not have an opinion on this question.<sup>853</sup> This was a significant difference compared to 1998, when independence was supported only by twenty-five percent, rising to thirty percent in

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<sup>845</sup> See L Horta, *East Timor: A Nation Divided*, Open Democracy (8 June 2006) <[http://www.opendemocracy.net/democracy-protest/easttimor\\_3629.jsp](http://www.opendemocracy.net/democracy-protest/easttimor_3629.jsp)>.

<sup>846</sup> See *infra* n. 1628.

<sup>847</sup> Scepticism toward such an imposition was expressed by East Timor's first president, Xanana Gusmao, in the following words: "We are witnessing ... an obsessive acculturation to standards that hundreds of international experts try to convey ... we absorb [these] standards just to pretend we look like a democratic society and please our masters of independence. What concerns me is the noncritical absorption of [such] standards given the current stage of the historic process we are building." Quoted in Foley (2008), p. 141.

<sup>848</sup> See *supra* ch. 4.3.6.

<sup>849</sup> Each of the two republics had its own constitution and significant powers in internal matters as well as some limited competencies in foreign policy. See Constitution of the FRY (1992), Articles 6 & 7.

<sup>850</sup> See *Yugoslav Opposition Supporters Enter Parliament Building*, CNN (5 October 2000) <<http://transcripts.cnn.com/TRANSCRIPTS/0010/05/bn.03.html>>.

<sup>851</sup> See *Montenegro Reviews Yugoslavia Ties*, Associated Press (18 June 1999) <<http://www.highbeam.com/doc/1P1-23210818.html>>.

<sup>852</sup> See *Crnogorsko javno mnjenje uoči referenduma* (23 December 2000) <<http://www.aimpress.ch/dyn/pubs/archive/data/200012/01223-005-pubs-pod.htm>>.

<sup>853</sup> *Ibid.*

1999.<sup>854</sup> Despite the increasing support for independence, a significant share of population and influential political parties opposed the change of Montenegro's territorial status.<sup>855</sup>

Given the armed conflict associated with the dissolution of the SFRY, the international community feared pro-independence pressures could result in Montenegro's unilateral declaration of secession and potentially lead to turmoil in Montenegro itself and broadly in the region. In response, the EU brokered a compromise between those who favoured independence and those who advocated a continued union with Serbia. It was observed that:

The EU worked very hard to counter, or at least postpone, any prospect of Montenegrin independence, which is felt would have a negative spillover effect on Kosovo ... Javier Solana, the EU's High Representative for Common Foreign and Security Policy, applied long and strong pressure on Montenegro's politicians to obtain their agreement to remain in an awkward construct with Serbia that permitted both republics de facto independence in nearly all spheres. In return they were promised they could engage in a more rapid EU accession process.<sup>856</sup>

The result of a compromise was the adoption of a new constitution in February 2003, which significantly differed from the one previously in force. The Constitution, *inter alia*, renamed the FRY as the State Union of Serbia and Montenegro (SUSM)<sup>857</sup> and referred to its constitutive parts as 'states'.<sup>858</sup>

Compared to the federal arrangement of the FRY, the SUSM was a very loose federation with only a few federal organs which had severely restricted competencies.<sup>859</sup> Unlike the Constitution of the FRY, the Constitution of the SUSM

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<sup>854</sup> Ibid.

<sup>855</sup> Ibid.

<sup>856</sup> The International Crisis Group Briefing No. 169, Montenegro's Independence Drive (7 December 2006), p. 1.

<sup>857</sup> Constitution of the SUSM (2003), Article 1.

<sup>858</sup> Ibid., Article 2.

<sup>859</sup> The state union had only five common ministries: internal affairs, defence, international economic affairs, domestic economic affairs and human and minority rights. Ibid., Articles 40–45. The Constitution further specified that only the SUSM had the international personality but at the same

provided for a clear constitutional mechanism to secede and even solved the problem of state succession in advance. Article 60 of the Constitution of the SUSM provided:

After the end of the period of three years, member-states shall have the right to begin the process of a change of the status of the state or to secede from the State Union of Serbia and Montenegro.

The decision on secession from the State Union of Serbia and Montenegro shall be taken at a referendum.

In case of secession of the state of Montenegro from the State Union of Serbia and Montenegro, international documents referring to the Federal Republic of Yugoslavia, especially the United Nations Security Council Resolution 1244, shall only apply to the state of Serbia as a successor.

The member-state which resorts to the right to secession shall not inherit the right to international personality and all disputes shall be solved between the successor-state and the seceded state.

In case that both states, based on the referendum procedure, opt for a change of the state-status or independence, the disputable questions of succession shall be regulated in a process analogical to the case of the former Socialist Federative Republic of Yugoslavia.<sup>860</sup>

This article indicates the transitional nature of the SUSM and reflects the fact that the creation of this state was a political compromise and the political reality was clearly expressed: Article 60 evidently acknowledged that Montenegro (not Serbia) was the federal unit likely to seek independence.

At the referendum held on 21 May 2006, independence was supported by 55.53 percent of those who voted at a turnout of 86.49 percent of the eligible to vote.<sup>861</sup> Based on this vote, the Montenegrin Parliament, on 3 June 2006, adopted the Declaration of Independence<sup>862</sup> and on 30 June 2006 Montenegro was admitted to

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time allowed the federal units some competencies in foreign policy, even membership in those international organisations which do not prescribe statehood as a condition for membership. Ibid., Article 14.

<sup>860</sup> Constitution of the SUSM (2003), Article 60, my own translation.

<sup>861</sup> Svet ministara državne zajednice Srbija i Crna Gora, Direkcija za informisanje (24 May 2006) <[http://www.info.gov.yu/saveznavlada/list\\_detalj.php?tid=1&idteksta=15132](http://www.info.gov.yu/saveznavlada/list_detalj.php?tid=1&idteksta=15132)>.

<sup>862</sup> Declaration of Independence of the Republic of Montenegro, The Official Gazette of the Republic of Montenegro No 36/06 (3 June 2006).

the UN.<sup>863</sup> The referendum rules were, however, subject to political involvement of the EU and will be further discussed below.<sup>864</sup>

When the dissolution of the SFRY was in question, the EC became involved after Slovenia and Croatia respectively had already declared independence.<sup>865</sup> In the framework of the EC's involvement, the Badinter Commission held that dissolution of the federation was underway in the SFRY and not attempts at unilateral secession.<sup>866</sup> This opinion became the legal authority which removed the claim to territorial integrity. In the case of Montenegro, the EU became involved in the process of the dissolution of the FRY already prior to Montenegro's declaration of independence. To prevent possible turmoil resulting from Montenegro's attempt at unilateral secession, the EU brokered a compromise which resulted in the transitional constitution of the SUSM. The constitution of this state established a clear mechanism for secession and even a formula for state succession. Although the procedure was different, the effect was similar to the case of the SFRY – the claim to territorial integrity was removed and Montenegro's secession was not unilateral. Since the Constitution of the SUSM enabled the federal units significant attributes of statehood,<sup>867</sup> there was no doubt that Montenegro was a state. Arguably, EU involvement created legal circumstances in which recognition was declaratory. However, involvement in the pre-recognition phase suggests that Montenegro could, possibly, be regarded as a collectively-created state.

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<sup>863</sup> GA Res 60/264 (28 June 2006).

<sup>864</sup> See *infra* ch. 5.4.3.6.

<sup>865</sup> See *supra* ch. 4.2.1.

<sup>866</sup> See *supra* ch. 4.3.1.

<sup>867</sup> See *supra* n. 859.

As institutions of liberal-democracy in Montenegro already existed,<sup>868</sup> international involvement in the state creation was not coupled with implementation of a democratic political system.

#### **4.6. Non-recognition of governments in the post-1991 era**

Some significant collective practice has developed which denies recognition to coup-governments overthrowing democratically-elected ones. Sierra Leone and Haiti are examples of such. In the case of Sierra Leone, the Security Council, acting under Chapter VII, demanded that “the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order.”<sup>869</sup>

The example of Haiti is even more significant as the Security Council authorised an intervention for the return of an ousted democratically-elected government. In 1994, the Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 940 on Haiti. Based on this Resolution, the United States led a multi-national effort to bring the overthrown elected President Jean-Bertrande Aristide back to power.<sup>870</sup> The Resolution, *inter alia*, spelled out:

Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrande Aristide, within the framework of the Governors Island Agreement ...

4. Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the

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<sup>868</sup> The OSCE has observed presidential and parliamentary elections in Montenegro since 1997. All of the elections observed took place in a multiparty setting and were deemed to be reasonably free and fair. For more see OSCE, Office for Democratic Institutions and Human Rights, Elections: Montenegro <<http://www.osce.org/odihr-elections/20443.html>>. For more on the procedural understanding of democracy see supra ch. 2.2.1.

<sup>869</sup> SC Res 1132 (8 October 1997), para 1

<sup>870</sup> See generally Falk (1995).

legitimate authorities of the Government of Haiti; and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States ....<sup>871</sup>

Importantly, Resolution 940 thus authorised an intervention for the purpose of restoration of an elected government and not for imposition of democracy.

The entire role of the UN in the Haiti events, which ultimately led to intervention under Chapter VII, is interesting from the point of view of pro-democratic advocacy within international law.<sup>872</sup> One can argue that the internationalisation of the internal matters of Haiti was the very instrument which opened the door to an intervention.<sup>873</sup> Namely, the UN observed the Haitian election in 1990 and, after it had verified the electoral results, it was unwilling to accept nullification of these results by a coup.<sup>874</sup> As Resolution 940 also points out, the Governors Island Agreement<sup>875</sup> further internationalised the internal conflict. In the process of the negotiation of this agreement between the *de facto* government of Haiti and the government-in-exile, the UN also became a party and thus also responsible for the implementation of solutions foreseen by the agreement.<sup>876</sup> As Resolution 940 shows, the failure of the *de facto* government of Haiti to comply with this agreement was also a reason for intervention. Thus, one could argue that the UN in the example of Haiti acted in accordance with the idea of an international guarantee of the normative entitlement to democracy which featured all phases proposed by the theory, from electoral-monitoring and verification of the electoral

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<sup>871</sup> SC Res 940 (31 July 1994).

<sup>872</sup> Compare *supra* ch. 2.3., 2.4. and 2.5.

<sup>873</sup> Roth (1999), p. 385.

<sup>874</sup> *Ibid.*

<sup>875</sup> The Governors Island Agreement, concluded on 3 July 1993, was a UN-sponsored agreement between the elected overthrown president Aristide and the *de facto* government of Haiti which foresaw a retreat of the non-elected *de facto* government from power in exchange for amnesty. For more see UN Doc S/26063 (12 July 1993).

<sup>876</sup> *Ibid.*

results to the later actions of diplomatic efforts and, ultimately, the use of force when electoral results were disregarded.<sup>877</sup>

It is noted that the Security Council acted under Chapter VII of the UN Charter, although it is generally perceived that no threat to international peace and security existed,<sup>878</sup> at least not if the ‘traditional understanding’ of this concept is applied. However, if the overthrow of the Aristide government is interpreted as an aggression against the people of Haiti, the intervention can be argued to be an exercise of an international guarantee of the normative entitlement to democracy.<sup>879</sup>

Resolution 940 should not be understood too broadly, as the previous engagement of the UN in the electoral process in Haiti makes the situation somewhat specific. Further, it is questionable to what degree other Chapter VII resolutions addressing the governance problem in a certain territory have been founded on express pro-democratic rather than general human rights arguments. There exists practice established in regard to the legitimacy of those governments which are in effective control but are “unwilling to carry out essential international law duties and obligations.”<sup>880</sup> Grave breaches of international human rights and threats to international peace fall under this category, but absence of a democratic government does not. An example may be found in the collective response to the Taliban government of Afghanistan. Acting under Chapter VII of the UN Charter, the Security Council adopted Resolution 1363, in which it insisted:

[T]hat the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective measures to ensure that the territory under its control is not used for terrorist installations and camps,

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<sup>877</sup> Compare supra ch. 2.4.2.

<sup>878</sup> See Falk (1995), p. 342.

<sup>879</sup> Compare supra ch. 2.4.2.

<sup>880</sup> Roth (1999), p. 149.

or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.<sup>881</sup>

With the formulation “the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan”,<sup>882</sup> the Security Council, arguably, expressed that it did not recognise the Taliban government as the legitimate government of Afghanistan. In regard to the situation in Afghanistan, the Security Council frequently invoked obligations of “the Taliban, as well as other Afghan factions.”<sup>883</sup> This raises doubts as to whether, in the Security Council’s perception, the Taliban government had effective control over the territory of Afghanistan. The Taliban government in Afghanistan might have also been disputed in terms of its effectiveness.

Nevertheless, it remains very significant that the Security Council in its resolutions on Afghanistan under Taliban control expressed that the Taliban were obliged to comply with duties imposed by international law – most notably threats to international peace<sup>884</sup> and human rights<sup>885</sup> were in question – while it strictly avoided using the term “the government of Afghanistan”. Instead, terms such “the Afghan faction known as the Taliban”,<sup>886</sup> “the Taliban authorities”,<sup>887</sup> “the territory of Afghanistan under Taliban control”<sup>888</sup> were used, or it was demanded that “the Taliban [and not “the government of Afghanistan”] comply”<sup>889</sup> with previous resolutions.

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<sup>881</sup> SC Res 1267 (15 October 1999), para 1.

<sup>882</sup> Ibid.

<sup>883</sup> See SC Res 1214, (8 December 1998), para 1.

<sup>884</sup> See SC Res 1267, SC Res 1333 (19 December 2000) and SC Res 1363 (30 July 2001), where the Security Council acted under Chapter VII of the UN Charter.

<sup>885</sup> See SC Res 1267 (15 October 1999), preamble: “[D]eep concern over the continuing violations of international humanitarian law and of human rights, particularly discrimination against women and girls.”

<sup>886</sup> See SC Res 1267, para 1.

<sup>887</sup> See SC Res 1333, preamble.

<sup>888</sup> See SC Res 1363, para 3(b).

<sup>889</sup> See SC Res 1333, paras 1 & 2.

Security Council Resolution 1378, *inter alia*, condemned “the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups”<sup>890</sup> and expressed deep concern about “serious violations by the Taliban of human rights and international humanitarian law”<sup>891</sup> and further expressed:

[I]ts strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which:

- should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan’s neighbours,
- should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion,
- should respect Afghanistan’s international obligations.<sup>892</sup>

The Security Council thus denied legitimacy of the Taliban government in Afghanistan based on its grave human rights violation and threats to international peace and expressed its support for a change of government. However, despite some references to democratic principles, such as “broad-based” government, which is “multi-ethnic and fully representative of all the Afghan people”,<sup>893</sup> one cannot argue that Security Council Resolution 1378 expressed support for a particular political system – that of Western style liberal-democracy. The use of the term ‘democracy’ itself was avoided. Further, it was established above that certain ‘democratic rights’ cannot be a synonym for democracy.<sup>894</sup> The Security Council’s expressed support for the change of government in Afghanistan was therefore confined to issues of international peace and human rights and cannot be regarded as pro-democratic activism.

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<sup>890</sup> SC Res 1378 (14 November 2001), preamble.

<sup>891</sup> *Ibid.*

<sup>892</sup> *Ibid.*, para 1.

<sup>893</sup> *Ibid.*

<sup>894</sup> Compare *supra* ch. 2.2.

In the post-Cold War practice, recognition of governments in its “pre-Estrada Doctrine” meaning was not re-established.<sup>895</sup> However, there is some evidence of collective non-recognition of governments. Some effective governments were denied recognition because they were deemed illegitimate due to their unconstitutional establishments by overthrowing democratically-elected governments. Such were the examples of Haiti and Sierra Leone. Yet there exists no example in collective practice that would deny legitimacy to a firmly-established non-democratic government, based solely or predominantly on its non-democratic nature. As the example of the Taliban government in Afghanistan shows, the legitimacy of a government may be questioned based on threats to international peace and grave violations of human rights, but not based on non-democratic practices.

#### **4.7. Conclusion**

In 1991, faced with the developments in the Soviet Union and the SFRY, the EC issued a set of Guidelines for recognition of new states emerging in their respective territories, which stretched beyond the statehood criteria and made recognition dependent on fulfilment of some standards associated with democratic government, commitment to peace and respect for human rights. The documents expressed a liberal-democratic understanding of democracy, with elections in a multi-party setting, demanded that new states adopt human rights protection standards and abstain from the use of force outside of their territories. In the case of the new states emerging in the territory of the SFRY, the EC’s involvement was most notable. As part of this involvement, a mechanism for recognition was established. This included the Badinter Commission which advised on matters regarding recognition. Opinions

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<sup>895</sup> Compare *supra* n. 439.

of the Badinter Commission provide a point of reference on how the EC Guidelines and statehood criteria were implemented. The Opinions were formally not legally binding; however, this was a body of strong legal persuasiveness and its opinions importantly shaped recognition policies of the EC and also some non-EC member states.

Besides democracy, human rights and a commitment to peace requirements, the EC Guidelines referred to the established statehood criteria when recognition was to be granted. Croatia and Bosnia-Herzegovina, however, did not meet the criterion of effective government. The Badinter Commission did not find this deficiency problematic and recognition was granted. At the same time, statehood criteria were clearly met in the cases of Macedonia and of the FRY, but recognitions were granted with a delay. Non-recognition, however, did not prevent the FRY and Macedonia from being considered states.

The Badinter Commission thoroughly discussed the democracy requirement expressed in the EC Guidelines only in the case of Slovenia and even in this situation, the reasoning was limited to free and fair multiparty elections and to acknowledgement that constitutional arrangements were implemented which provided for a multiparty political system and a guarantee of human rights. Democracy was also briefly invoked in the case of Macedonia but was not discussed in any other situation.

In the case of Bosnia-Herzegovina, democratic principles operating within the right of self-determination came into consideration. The Badinter Commission held that Bosnia-Herzegovina could not become an independent state before it was clear that independence was an expression of the will of the people.<sup>896</sup> Recognition

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<sup>896</sup> See also *infra* ch. 5.4.3.3.

was not extended before a referendum was held, at which the majority of the population supported independence. Yet the referendum was boycotted by the ethnic Serb population in Bosnia-Herzegovina and thus it remains questionable whether one ethnic group may be outvoted by other ethnic groups and whether the previous internal boundary arrangement limited the choice of the Serb population. These questions will be dealt with below.

The Badinter Commission further found that the minority protection standards implemented in Croatia fell short of the requirements set by the EC Guidelines. The EC member states and the international community in general nevertheless granted recognition.

In the case of the Soviet Union and subsequent state creations, no comparable mechanism for recognition existed. The dissolutions of the Soviet Union and Czechoslovakia had a consensual character. In the absence of a competing claim to territorial integrity, the emergence of new states was a fact which was promptly recognised by the international community without application of the standards expressed in the EC Guidelines. The standards invoked in the EC Guidelines were applied very loosely in the SFRY and did not play a significant role in other new state creations at the end of the Cold War. The EC Guidelines were thus a situation-specific document, resulting from EC's striving for peaceful dissolution of two socialist federations at the end of the Cold War. Although initially drafted with the Soviet Union also in mind, the EC Guidelines were in the end to some degree followed only in the territory of the former SFRY. Commitments similar to those in the EC Guidelines were expressed in the Minsk Agreement and in the Alma Ata Protocol; however, because the Minsk Agreement was concluded eight days prior to

the adoption of the EC Guidelines, such commitments were evidently not made in order to comply with the requirements expressed in the EC Guidelines.

The standards expressed in the EC Guidelines were not generally adopted as recognition requirements in subsequent state creations nor have they become additional statehood criteria. Yet there exists strong evidence that democracy, human rights standards and commitment to peace did play an important role in some subsequent post-1991 state creations. This was evident in situations with significant international involvement in the process of state creation.

Although the Badinter Commission held that recognition is declaratory and did not perceive itself as a body that creates states, some of its opinions had constitutive effects. Notably, the view that the SFRY was in a process of dissolution changed the universal perception that Slovenia and Croatia were seeking unilateral secession. It may be argued that the Badinter Commission's removal of the claim to territorial integrity had constitutive effects for the creation of new states, while recognition itself could be perceived as declaratory.

In subsequent successful state creations, international involvement began prior to the declarations of independence. In these situations international involvement sought to achieve the consent of a parent state and thus to remove the potential claim to territorial integrity. Such was the case of Montenegro, where EU involvement led to the creation of a transitional State Union of Serbia and Montenegro, the constitution of which comprehended a clear mechanism for secession. EU involvement also led to the adoption of rules for popular consultation before the legal status of Montenegro could be altered.<sup>897</sup> In East Timor (and in Kosovo),<sup>898</sup> international territorial administration was established under Chapter VII

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<sup>897</sup> See *infra* ch.5.4.3.6.

<sup>898</sup> For the discussion on Kosovo see *infra* ch. 7.3.

of the UN Charter. The reason for such an arrangement was abuse of sovereign powers by the parent state. However, the arrangement which was established to solve the problem of “bad governance” started to affect the question of sovereignty.<sup>899</sup> It must be noted that the problem of “bad governance” in this context is generally not to be understood as a synonym for the absence of democracy but as a synonym for grave breaches of human rights and denial of the right of self-determination in its internal mode. In East Timor international involvement ultimately led to Indonesia’s consent to East Timor’s independence.

This chapter has shown that where independence is a matter of fact, i.e. where statehood criteria are met and no claim to territorial integrity exists, the international community will generally recognise this fact without an enquiry into the government’s methods of governing. If recognition in such circumstances does not follow, non-recognition is merely political and such an entity is nevertheless considered a state. However, where the international community is actively involved in producing the emergence of a new state, there is a clear trend that there would be an attempt to create democratic institutions along with the creation of a new state. This has happened even when the UN guided entities toward statehood.

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<sup>899</sup> See Wilde (2001), p. 503.

## V. DEMOCRACY AND THE RIGHT OF SELF-DETERMINATION

### 5.1. Introduction

In the previous chapters it was concluded that the right of self-determination plays an important role in the creation and recognition of states and that some democratic principles operate within this right.<sup>900</sup> It remains for this chapter to clarify how democratic principles operate within the right of self-determination and how norms of general international law limit the will of the people.

Initially it will be shown how the principle of self-determination was developed and linked to democratic political theory and why this linkage is not uncontested. Subsequently the scope of applicability of self-determination as a human right will be examined. A distinction between internal and external modes of the exercise of the right of self-determination will be drawn. For the internal mode, the crucial question will be how a representative government is defined and whether the exercise of the right of self-determination in its internal mode has effects of a 'right to democracy'. For the external mode, it will be considered in what circumstances it may lead to secession. Special consideration will be given to unilateral secession, to the 'doctrine of remedial secession', to modes of state dissolutions and to the question of what role, if any, democracy plays in these processes.

To identify the democratic principles operating within the requirement for popular consultation before the legal status of a territory may be altered, case studies of post-1991 referenda in situations of new state-creations will be used. It will be examined whether common international standards exist which apply to public consultations of this kind.

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<sup>900</sup> See supra ch. 3.2. and 3.3.

## **5.2. Self-determination: a political principle and a human right**

### **5.2.1. Development of the political principle of self-determination**

The development of the principle of self-determination in its modern meaning was closely associated with the concept of a representative government.<sup>901</sup> The idea stems from Enlightenment political theory and dates to the American and French revolutions in 1776 and in 1789, respectively. Both events:

[M]arked the demise of the notion that individuals and peoples, as subjects of the King, were objects to be transferred, alienated, ceded, or protected in accordance with the interests of the monarch. The core of the principle lies in the American and French insistence that the government be responsible to the peoples.<sup>902</sup>

The principle of self-determination initially proved to be a political tool rather than an empowerment of the people. The ideals of the American Revolution served the purpose of gaining independence from Great Britain, while the idea of a representative government on the domestic level was understood as the representation of a relatively small proportion of the entire population.<sup>903</sup> The idea of popular sovereignty in post-revolutionary France was initially used as a tool for annexation of territories to France. In this context the will of the people was resorted to selectively and was implemented only if the popular vote were in favour of France.<sup>904</sup> In the French understanding the principle of self-determination did not apply to colonial peoples.<sup>905</sup>

At the beginning of the twentieth century, the principle of self-determination featured prominently in the writings of two important political and intellectual figures, Lenin and Woodrow Wilson. As the former was the leader of the Socialist

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<sup>901</sup> R Miller (2003), p. 613.

<sup>902</sup> Cassese (1995), p. 11.

<sup>903</sup> See Reid (1989), pp. 121–22.

<sup>904</sup> Cassese (1995), pp. 11–12.

<sup>905</sup> Ibid.

Revolution in Russia and the latter the US President, these two champions of self-determination had different ideological underpinnings for advancing the principle of self-determination and consequently also differing interpretations of the scope and objective of this principle.

Writing in 1916, Lenin held that:

Victorious socialism must necessarily establish a full democracy and, consequently, not only introduce full equality of nations but also realise the right of the oppressed nations to self-determination, i.e. the right to free political separation.<sup>906</sup>

The right of nations to self-determination implies exclusively the right to independence in the political sense, the right to free political separation from the oppressor nation. Specifically, this demand for political democracy implies complete freedom to agitate for secession and for the decision on secession to be made by a referendum of the seceding nation. This demand, therefore, is not the equivalent of a demand for separation, fragmentation and the formation of small states. It implies only a consistent expression of struggle against all national oppression. The closer a democratic state system is to complete freedom to secede the less frequent and less ardent the desire for separation will be.<sup>907</sup>

Lenin thus thought of self-determination in terms of secession, which he saw as a last resort to end the nationalist oppression taking place in bourgeois societies.<sup>908</sup>

The Leninist concept of self-determination needs to be looked at through the prism of Lenin's ideological background. The objective of the Leninist notion of self-determination was not protection of the collective interests of peoples but "a tool, a vehicle or a strategic concept for the realization of the integration of all nations, that is, a universal socialist society."<sup>909</sup>

The understanding that self-determination was merely in service of the socialist revolution was clearly expressed in Lenin's argument in favour of the

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<sup>906</sup> Lenin (year of publication unknown), p. 135.

<sup>907</sup> Ibid., pp. 138–39.

<sup>908</sup> Raič (2002), p. 186.

<sup>909</sup> Ibid.

Treaty of Brest-Litovsk.<sup>910</sup> This peace settlement included substantial transfers of the territories of Poland, Lithuania, Latvia, Estonia and Belarus to Germany, thus denying self-determination to the peoples of these territories.<sup>911</sup> Yet Lenin saw the Treaty of Brest-Litovsk as crucially important for advancing the socialist revolution, arguing that socialism had priority over the respect for self-determination.<sup>912</sup>

Although in Lenin's understanding self-determination was merely a tool for furthering the socialist revolution, the ideological attachment of the Soviet Union to self-determination played an important role in codifying the right of self-determination in the UN Charter era.<sup>913</sup> Further, the Constitution of the Soviet Union from 1977 provided: "Each Union Republic shall retain the right freely to secede from the USSR."<sup>914</sup>

### **5.2.2. The will of the people: Woodrow Wilson, democracy and self-determination**

While Leninist self-determination originated in socialist political theory, President Wilson built his ideas of self-determination on liberal-democratic premises. Indeed, "[f]or the US president, self-determination was the logical corollary of popular sovereignty, it was synonymous with the principle that governments must be based on 'the consent of the governed'."<sup>915</sup>

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<sup>910</sup> The Treaty of Brest-Litovsk was signed between Russia and the Central Powers on 3 March 1918 and brought a separate peace between these belligerents in the First World War. See Freund (1957), pp. 1–33

<sup>911</sup> Ibid.

<sup>912</sup> Cassese (1995), p. 18, quoting Lenin's article in *Pravda* on 21 February 1918.

<sup>913</sup> Ibid., p. 19.

<sup>914</sup> Constitution of the Soviet Union (1977), Article 72. The mechanism for secession was set out in the Soviet Secession Law (1990), which made secession virtually impossible in practice and in the end no Soviet republic followed this path to achieve independence. See The Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR, reprinted Hannum (1993), pp. 753–60.

<sup>915</sup> Cassese (1995), p. 19.

On 8 January 1918, President Wilson presented the Fourteen Points speech to the US Congress.<sup>916</sup> Notably, his ideas for a lasting peace in Europe, expressed in this speech, are closely associated with the principles of self-determination and democracy. In the preamble, Wilson, *inter alia*, stressed that “[t]he day of conquest and aggrandizement is gone by; so is also the day of secret covenants entered into in the interest of particular governments and likely at some unlooked-for moment to upset the peace of the world.”<sup>917</sup> The Fourteen Point speech specifically dealt with the situations in Russia,<sup>918</sup> Belgium,<sup>919</sup> France,<sup>920</sup> Italy,<sup>921</sup> Austria-Hungary,<sup>922</sup> Romania, Serbia, Montenegro,<sup>923</sup> Turkey<sup>924</sup> and Poland.<sup>925</sup>

President Wilson stipulated the key criteria for drawing new borders in Europe, which would follow ethnic lines, respect the will of people in regard to in which state they wanted to live and enable economic development to the peoples of Europe. A similar view was expressed in Wilson’s statement from 1917, claiming that every people “has a right to choose the sovereignty under which they shall live.”<sup>926</sup> In regard to the peoples of Austria-Hungary and Turkey, an ‘opportunity of autonomous development’ was invoked, while the term ‘self-determination’ does not appear in the Fourteen Points speech. It is argued that Wilson publicly used the term ‘self-determination’ for the first time in his public appearance on 11 February 1918,

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<sup>916</sup> President Woodrow Wilson's Fourteen Points  
<http://www.yale.edu/lawweb/avalon/wilson14.htm>.

<sup>917</sup> Ibid, preamble, para 1.

<sup>918</sup> Ibid., Point VI.

<sup>919</sup> Ibid., Point VII.

<sup>920</sup> Ibid., Point VIII.

<sup>921</sup> Point IX provides: “A readjustment of the frontiers of Italy should be effected along clearly recognizable lines of nationality.” Ibid.

<sup>922</sup> Point X provides: “The peoples of Austria-Hungary, whose place among the nations we wish to see safeguarded and assured, should be accorded the freest opportunity to autonomous development.” Ibid.

<sup>923</sup> Ibid., Point XI.

<sup>924</sup> Ibid., Point XII.

<sup>925</sup> Ibid., Point XIII.

<sup>926</sup> Baker and Dodd (1926), p. 187.

which was about a month after he delivered the Fourteen Points speech. His preferred term until then was ‘self-government.’<sup>927</sup>

The Wilsonian concept of ‘self-government’ was initially developed for internal purposes and its meaning was that “peoples of each State be granted the right freely to choose State authorities and political leaders.”<sup>928</sup> The Wilsonian understanding of self-government (i.e. self-determination) was thus not only rooted in liberal-democratic political theory but was actually a synonym for a liberal-democratic political system. It was the experience of the First World War which led Wilson to ascribe an external connotation to the concept of self-government.<sup>929</sup> Yet the original internal (i.e. democratic) meaning and external implications could not be easily reconciled. Wilsonian self-government (i.e. self-determination) thus had a dual and somewhat contradictory meaning: “On the one hand, it implied the right of a population to select its own form of government, yet, on the other hand, it also suggested that self-government must be a *continuing* process and must therefore be synonymous with the *democratic* form of government.”<sup>930</sup> In other words, when the internal (democratic) understanding of self-government was applied externally, there was a presumption that popular choice would always favour a democratic political system at the domestic level. Indeed, “the principles of self-determination put forward by President Woodrow Wilson divided and created States, but they also propose democracy.”<sup>931</sup> Yet this implies interference with the choice of the political system of other peoples and thus a violation of rather than support for self-determination.

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<sup>927</sup> See Pomerance (1976), p. 2.

<sup>928</sup> Cassese (1995), p. 19.

<sup>929</sup> Ibid.

<sup>930</sup> Pomerance (1976), p. 17 (italics in original).

<sup>931</sup> R Miller (2003), p. 619.

Wilson not only wed democracy and self-government (i.e. self-determination) but also closely associated these two concepts with peace. In his address to the US Congress on 2 April 1917, President Wilson, *inter alia*, stated that “[a] steadfast concert for peace can never be maintained except by a partnership of democratic nations ... Only free peoples can hold their purpose and their honor steady to a common end and prefer the interests of mankind to any narrow interests of their own.”<sup>932</sup> These views have also influenced the democratic peace theory.<sup>933</sup>

Wilsonian self-determination was criticised for a number of inconsistencies, as was Wilson himself for departing from this principle in the post-First World War peace settlement. Indeed, “[a]lthough Wilson had proclaimed national self-determination as though it were an absolute principle, in practice he could not prevent the inconsistent application of the principle by the Peace Conference. In other words, Wilson had promised more than he could deliver at Paris.”<sup>934</sup>

The principle of self-determination invoked several questions which have not been entirely resolved up to the present day. Initially, there is a question of to whom the principle or the right of self-determination applies. It is argued that prior to the Paris Peace Conference Wilson naively believed that beneficiaries of the right of self-determination would be “self-evident and therefore easy to ascertain.”<sup>935</sup> Hence, a well-known critique of Wilson’s concept of self-determination is captured in the following quote:

[A] Professor of Political Science who was also President of the United States, President Wilson, enunciated a doctrine which was ridiculous, but which was widely accepted as a sensible proposition,

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<sup>932</sup> Baker and Dodd (1927), p. 12.

<sup>933</sup> See supra ch. 2.5. See also Slaughter (1995), pp. 507–11. See generally also Slaughter (2009), pp. 89–117.

<sup>934</sup> Raič (2002), p. 189.

<sup>935</sup> *Ibid.*, p. 184.

the doctrine of self-determination. On the surface it seemed reasonable: let the people decide. It was in fact ridiculous because the people cannot decide until somebody decides who are the people.<sup>936</sup>

Further, as soon as the principle of self-determination was ascribed a potential of external applicability, it became obvious that the principle of self-determination would collide with the principle of territorial integrity of states.<sup>937</sup>

In the process of drafting the Covenant of the League of Nations, Wilson included a draft of Article 10, which regulated the principle of territorial integrity of states and in this context invoked the right of self-determination.<sup>938</sup> This draft was rejected and the final Article 10, which invoked territorial integrity of states, did not comprehend any reference to the right of self-determination and/or territorial readjustments.<sup>939</sup> Self-determination remained a political principle and not an international legal entitlement. This was affirmed in the *Aaland Islands case* (1920), in which the International Committee of Jurists held that the principle of self-determination was not a positive rule of international law.<sup>940</sup>

### **5.2.3. Self-determination as a human right**

The codification of self-determination as a norm of international law came in the UN Charter era. The UN Charter invokes the respect of the principle of self-determination among the purposes of the UN<sup>941</sup> and in the context of the international economic and social co-operation. The principle of self-determination is ascribed a scope of applicability which is significantly broader than the political self-

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<sup>936</sup> Jennings (1956), pp. 55–56.

<sup>937</sup> Pomerance (1976), p. 22.

<sup>938</sup> Draft Article 10 of the Covenant of the League of Nations, reprinted in Hunter Miller (1928), pp. 12–13.

<sup>939</sup> Charter of the League of Nations, Article 10.

<sup>940</sup> The *Aaland Islands case* (1920), p. 5. Some observations in the *Aaland Islands case* nevertheless remain relevant for the modern understanding of the right of self-determination and will be revisited below.

<sup>941</sup> UN Charter, Article 1(2).

government applicable to peoples.<sup>942</sup> As a human right, self-determination is elaborated in the common Article 1 of the ICCPR and ICSECR.<sup>943</sup> Further, this right “has been declared in other international treaties and instruments, is generally accepted as customary international law and could even form part of *jus cogens*.”<sup>944</sup>

In the comment on Article 1, the Human Rights Committee (HRC) held that:

In connection with article 1 of the Covenant, the Committee refers to other international instruments concerning the right of all peoples to self-determination, in particular the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, adopted by the General Assembly on 24 October 1970 (General Assembly resolution 2625 (XXV)).<sup>945</sup>

The Declaration on Principles of International Law comprehends a clause that stipulates for the territorial integrity of states:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.<sup>946</sup>

This elaboration should be looked at from two aspects. First, the provision attempts to limit the right of self-determination with the territorial integrity of states. Second, a reversed reading of this elaboration may suggest that under certain circumstances the territorial integrity limitation to the right of self-determination may not be applicable. The latter has been referred to as the ‘safeguard clause’.<sup>947</sup>

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<sup>942</sup> UN Charter, Article 55.

<sup>943</sup> ICCPR & ICESCR, Article 1.

<sup>944</sup> McCorquodale (1994), p. 858.

<sup>945</sup> The United Nations Human Rights Committee (1984), Comment 12, para 7.

<sup>946</sup> The Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625, annex, principle 5, para 7, (24 October 1970) [hereinafter the Declaration on Principles of International Law].

<sup>947</sup> See Crawford (2006), pp. 118–21.

From its early development the concept of self-determination has been criticised for its lack of precision. It is argued that it is unclear who is a people,<sup>948</sup> and even once a people is identified, it is not entirely clear what entitlement the applicability of the right of self-determination brings or how it is exercised. These questions will be dealt with in forthcoming sections. Initially, however, it needs to be recalled that self-determination in modern international law has the status of a (collective) human right and, as such, is subject to the same limitations as most human rights.<sup>949</sup> Above an argument was made that President Wilson defined self-determination as an absolute principle.<sup>950</sup> Yet the human rights approach to self-determination allows a significantly narrower scope:

[T]he right of self-determination is not an absolute right without any limitations. Its purpose is not directly to protect the personal or physical integrity of individuals or groups as is the purpose of the absolute rights and, unlike the absolute rights, the exercise of this right can involve major structural and institutional changes to a State and must affect, often significantly, most groups and individuals in that State and beyond that State. Therefore, the nature of the right does require some limitations to be implied on its exercise.<sup>951</sup>

It is further argued that limits on the right of self-determination are designed to protect the rights of everyone, “not just those seeking self-determination.”<sup>952</sup>

In regard to the presumption of a liberal-democratic nature of the right of self-determination, it is argued that “self-determination often was employed as a tool for challenging colonial oppression, but it was not necessarily linked to liberalism or democracy.”<sup>953</sup> Further, “[s]elf-determination enjoys a ‘democratic’ label in spite of the fact that it was the former Eastern Bloc nations that played the most significant

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<sup>948</sup> See *infra* ch. 5.3.3.1.1.

<sup>949</sup> See generally McCorquodale (1994).

<sup>950</sup> See *supra* n. 934.

<sup>951</sup> McCorquodale (1994), pp. 875–76.

<sup>952</sup> *Ibid.*, p. 876.

<sup>953</sup> R Miller (2003), p. 612.

role in developing and promoting self-determination following World War II, usually in the face of great reluctance from Western democracies.”<sup>954</sup>

### **5.3. The exercise of the right of self-determination and democracy**

#### **5.3.1. The territorial integrity limitation and internal self-determination**

While it can be firmly established that international law supports the view that the right of self-determination applies outside of the colonial context, its non-colonial exercise has different implications. Indeed, in colonial situations “the only territorial relationship to be altered was that with the metropolitan power. Achieving independence ... did not come at the expense of another sovereign state’s territory or that of an adjacent colony.”<sup>955</sup> However, in non-colonial situations the right of self-determination collides with territorial integrity of states. It should be recalled that the right of self-determination is not an absolute human right<sup>956</sup> and thus the principle of territorial integrity limits the exercise of this right. In this regard the Supreme Court of Canada held in the *Québec case*:

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.<sup>957</sup>

The *Québec case* affirms that outside of a colonial context the right of self-determination will normally be consummated in its internal mode. However, there is a question of how the right of self-determination is to be consummated in the internal mode. Further, it is questionable what constitutes ‘the most extreme of cases’ in

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<sup>954</sup> Ibid.

<sup>955</sup> Fox (1994–1995), p. 736.

<sup>956</sup> See supra n. 951.

<sup>957</sup> The *Québec case* (1998), para 126.

which secession may be justified. Some possible interpretations in regard to these two questions stem from the principle of territorial integrity, as elaborated in the Declaration on Principles of International Law.<sup>958</sup>

A reversed reading of this provision gives a sense of its entire scope. If so read, it can be interpreted that a state which does not have a government that represents “the whole people belonging to the territory without distinction as to race, creed or colour”<sup>959</sup> may, possibly, not have a right to avail itself on the principle of territorial integrity.<sup>960</sup> In other words, in such circumstances external self-determination may be legitimised. This issue will be further discussed below.

Apart from possible relevance of the elaboration of the principle of territorial integrity for the external mode of the right of self-determination, this elaboration gives an idea of requirements for a representative government in the context of the internal mode of the right of self-determination. Indeed, an argument has been made that the Declaration on Principles of International Law represents “a shift in the tone of self-determination, from the Soviet-sponsored emphasis on external self-determination to the Western-sponsored emphasis on internal self-determination.”<sup>961</sup>

The formulations ‘the whole people’ and ‘without distinction as to race, creed or colour’ have both been interpreted in light of democratic political theory. One writer argued: “Is it not a mockery of self-determination to say that an oppressive dictatorship ‘represents’ the whole people?”<sup>962</sup> The term ‘oppressive dictatorship’ is elusive but in the context of a democratic interpretation of the right of (internal) self-determination it should probably be understood as a government which does not come to office based on the will of the people, expressed by means of liberal-

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<sup>958</sup> See supra n. 946.

<sup>959</sup> Ibid.

<sup>960</sup> See Crawford (2006) p. 119.

<sup>961</sup> R Miller (2003), p. 623.

<sup>962</sup> Rosas (1993), p. 238.

democratic electoral procedures.<sup>963</sup> However, even if one assumes that such governments do not reflect the will of the people, it is questionable whether non-democratic governments breach the right of self-determination *prima facie*, i.e. solely by not adhering to liberal-democratic political system and its procedures.

It is argued that “[t]he ‘democratic’ aspect of self-determination is present in muted form, through the idea of representation in the Declaration on Principles [on International Law], and by an indeterminate ‘connection’ with human rights.”<sup>964</sup> In this section the interdependence of human rights will be examined in light of its effects on the right of self-determination. Initially, the question of the scope of the “democratic aspect” within the right of self-determination, stemming from the interdependence of human rights, will be discussed. Subsequently, the requirement for a representative government, originating from the Declaration on Principles of International Law, will be evaluated and the reach of democratic principles, operating within this requirement, pointed out.

### **5.3.2. Democratic principles stemming from the interdependence of human rights**

One exemplary expression of interdependence between the right of self-determination and other human rights is captured in the statement of the West German representative in the General Assembly in 1988:

The right of self-determination had far broader connotations than simply freedom from colonial rule and foreign domination. Article 1 [of the ICCPR and ICESCR] ... defined the right of self-determination as the right of all peoples freely to determine their political status and freely to pursue their economic, social and cultural development. The question as to how peoples could freely determine their status was answered in Article 25 [of the ICCPR] ... The right of self-determination was indivisible from the right of the individual to take part in the conduct of public affairs, as was

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<sup>963</sup> See Franck (1995), pp. 84–85.

<sup>964</sup> Thornberry (1993), p. 120.

very clearly stated in Article 21 of the Universal Declaration of Human Rights. The exercise of the right to self-determination required the democratic process which, in turn was inseparable from the full exercise of such human rights as the right to freedom of thought conscience and religion; the right of freedom of expression; the right of peaceful assembly and of association; the right to take part in cultural life; the right to liberty and security of person; the right to move freely in one's country and to leave any country, including one's own, as well as to return to one's country.<sup>965</sup>

This statement also implies that the exercise of the right of self-determination requires adherence to some democratic standards. Particular attention has been paid to Article 25 of the ICCPR, which elaborates the right to political participation.<sup>966</sup> The relationship between the right of self-determination and the right to political participation was addressed by the HRC in its General Comment 25:

The rights under article 25 are related to, but distinct from, the right of peoples to self-determination. By virtue of the rights covered by article 1 (1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs.<sup>967</sup>

The question at this point is whether the right to political participation and its influence on the right of self-determination ascribes the latter the effect of a 'right to democracy'.

The answer to this question needs to be sought in the context of two arguments from Chapter 2. First, the right to political participation, as elaborated in Article 25 of the ICCPR, is not a synonym for democracy, as the procedural (i.e. electoral-centric) definition of democracy is inadequate.<sup>968</sup> Second, the Western (i.e. liberal-democratic) interpretation of the right to political participation has been adopted in the context of the ECHR and to some extent also in the context of the

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<sup>965</sup> UN Doc A/C.3/43/SR.7 (13 October 1988), p. 16, para 76

<sup>966</sup> See supra n. 112.

<sup>967</sup> HRC General Comment 25 (1996), para 2.

<sup>968</sup> See supra ch. 2.2. and 2.3.1.

ACHR.<sup>969</sup> However, an argument was made in Chapter 2 that such an interpretation cannot be universalised and Article 25 of the ICCPR cannot be interpreted as a requirement for multiparty elections.<sup>970</sup> Thus, at the universal level, the consequence of the interdependence of the right of self-determination and the right to political participation does not constitute a requirement for states to enact a Western-style liberal democratic political system, a major feature of which is a multiparty electoral process.<sup>971</sup>

### **5.3.3. Democratic principles stemming from the ‘safeguard clause’**

In the context of the internal mode of the right of self-determination, the importance of the ‘safeguard clause’ is that it gives a general idea of what is a representative government. Yet a definition of a representative government is not straightforward and attempts have been made to link it to procedures of a liberal-democratic political system.<sup>972</sup>

In this section the scope of liberal-democratic practices operating in the right of self-determination will be evaluated. Initially, it will be discussed to whom the right of self-determination applies and how the ‘representativeness’ of government is to be understood for the purpose of the right of self-determination. Subsequently the ‘representativeness’ of government in the context of the right of self-determination will be discussed in light of liberal-democratic procedural practices.

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<sup>969</sup> See supra ch. 2.3.3.

<sup>970</sup> See supra ch. 2.3.1. and 2.3.2.

<sup>971</sup> Compare supra ch. 2.3.3.

<sup>972</sup> See supra ch. 5.3.3.1.2. on the Wilsonian concept of self-determination. See also ch. 2.2.1.

### **5.3.3.1. Beneficiaries of the right of self-determination and the concept of a representative government**

#### **5.3.3.1.1. Who constitutes a people?**

The right of self-determination only applies to peoples.<sup>973</sup> This leads to the problem of distinguishing between those groups who qualify as a people and those who do not. Investigating the events in East Pakistan in 1972, the International Commission of Jurists made the following remark in regard to the concept of ‘people’ and the right of self-determination:

If we look at the human communities recognized as peoples, we find that their members usually have certain characteristics in common, which act as a bond between them. The nature of the more important of these common features may be [historical, racial or ethnic, cultural or linguistic, religious or ideological, geographical or territorial, economic, quantitative]. This list ... is far from exhaustive ... [A]ll the elements combined do not necessarily constitute proof: large numbers of persons may live together within the same territory, have the same economic interests, the same language, the same religion, belong to the same ethnic group, without necessarily constituting a people. On the other hand, a more heterogeneous group of persons, having less in common, may nevertheless constitute a people.

To explain this apparent contradiction, we have to realize that our composite portrait lacks one essential and indeed indispensable characteristic - a characteristic which is not physical but rather ideological and historical: a people begin to exist only when it becomes conscious of its own identity and asserts its will to exist ... the fact of constituting a people is a political phenomenon, that the right of self-determination is founded on political considerations and that the exercise of that right is a political act.<sup>974</sup>

Although not of direct legal relevance, this definition gives some suggestion as to what criteria shall be applied when considering whether a group qualifies as a people, but these criteria are not entirely clear, non-comprehensive and subjective.<sup>975</sup>

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<sup>973</sup> See ICCPR (1966) and ICESCR (1966), Article 1.

<sup>974</sup> International Commission of Jurists, Events in East Pakistan (1972), p. 49.

<sup>975</sup> See generally Musgrave (1997) pp. 154–67.

### 5.3.3.1.2. Representative government: race, colour or creed

There is sufficient practice of UN organs in support of the claim that a government which is not representative of people of all races and colours constitutes a violation of the right of self-determination. This follows from the General Assembly and Security Council resolutions on Southern Rhodesia<sup>976</sup> and South Africa<sup>977</sup> and universal non-recognition of the Rhodesian UDI and South African “Homelands”.

The link between racial discrimination and denial of the right of self-determination was, for example, further expressed by Security Council Resolution 417 on apartheid-rule in South Africa,<sup>978</sup> in which the Security Council expressed grave concern “over reports of torture of political prisoners and the deaths of a number of detainees, as well as the mounting wave of repression against individuals, organizations and the news media,”<sup>979</sup> reaffirmed “its recognition of the legitimacy of the struggle of the South African people for the elimination of *apartheid* and racial discrimination,”<sup>980</sup> and affirmed “the right to the exercise of self-determination by all the people of South Africa as a whole, irrespective of race, colour or creed.”<sup>981</sup> The Security Council then condemned “the South African racist regime for its resort to massive violence and repression against the black people, who constitute the great majority of the country, as well as all other opponents of *apartheid*,”<sup>982</sup> and expressed “its support for, and solidarity with, all those struggling for the elimination of *apartheid* and racial discrimination and all victims of violence and repression by the South African racist regime.”<sup>983</sup>

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<sup>976</sup> See supra ch. 3.3.3.3.

<sup>977</sup> See supra ch. 3.3.3.4.

<sup>978</sup> SC Res 417 (31 October 1977).

<sup>979</sup> Ibid., preamble, para 3.

<sup>980</sup> Ibid., preamble, para 5 (italics in original).

<sup>981</sup> Ibid., preamble, para 6.

<sup>982</sup> Ibid., para 1 (italics in original).

<sup>983</sup> Ibid., para 2 (italics in original).

Although Security Council Resolution 417, *inter alia*, makes references to political violence and to all opponents of apartheid, which can also be associated with the freedom of expression of South African whites and not only with the right of self-determination and prohibition of racial discrimination of South African blacks, it is obvious that the scope of this resolution is the prohibition of racial discrimination and not a political opinion, broadly understood.

It needs to be specified how broadly prohibition of racial discrimination can be understood and whether it can cover identities other than different skin colour. A broader definition stems from Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.<sup>984</sup>

The reasoning of the Committee on the Elimination of Racial Discrimination is also in line with this broader interpretation of racial discrimination. In the opinion on Austria, the Committee addressed the problem of minority rights of Slovenes in Austria as a matter falling within the category of racial discrimination,<sup>985</sup> despite the fact that both ethnic groups, Slovene and Austrian, have the same skin colour.

It remains to be examined whether non-discrimination based on 'creed' can be interpreted to include political opinion and, if so, what the consequences are of such a requirement. Initially it should be recalled that the right of self-determination applies to peoples.<sup>986</sup> The representativeness of a government, without any

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<sup>984</sup> The International Convention on the Elimination of All Forms of Racial Discrimination (1965), Article 1.

<sup>985</sup> The Committee on the Elimination of Racial Discrimination (2008), para 14.

<sup>986</sup> Compare *supra* ch. 5.3.3.1.1.

discrimination stemming from creed, can be most closely associated with the common identity of a people stemming from ‘religion or ideology’, as identified in the Events in East Pakistan study.<sup>987</sup>

In a narrow way a people can be defined by political identities. Indeed, ethnicity-, race- and religion-based identities often transgress into the political sphere and, as a consequence, political activities based on such identities are very common, including emergence of political parties which stem from ethnic, racial or religious identities.<sup>988</sup> However, this pattern cannot be extended to cover political opinion in a broader sense of plurality of political views and identities of members and/or voters of political parties. For example, one cannot argue that members or voters of the Labour Party in the United Kingdom have the right of self-determination.

Consequently, governmental non-representation of a certain people based on their political view, construed in a sense of party-politics and political identities, which are not associated with identities constituting a people, cannot lead to a violation of the right of self-determination. This argument also works in the situation of a government not adhering to liberal-democratic practices. The government of Slobodan Milošević in the FRY and Serbia may have violated the right of self-determination of Kosovo Albanians;<sup>989</sup> however, there exists no support for a claim that it violated the right of self-determination of Serbs and/or Montenegrins. Indeed, its undemocratic character cannot be interpreted to mean a *prima facie* violation of the right of self-determination of all peoples in its territory.

In the case of Southern Rhodesia, it was argued that the General Assembly called for participation of all political parties;<sup>990</sup> however, this needs to be looked at

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<sup>987</sup> See supra n. 974.

<sup>988</sup> See generally Tepe (2005), p. 283.

<sup>989</sup> See infra ch. 7.2.

<sup>990</sup> See supra ch. 3.3.3.3.

in light of exclusion of black, i.e. colour/race-based, political parties from the process of the drafting of the constitution.<sup>991</sup> The situation is thus confined to the violation of the right of self-determination stemming from racial discrimination and not from absence of a multiparty political system.

This section shows that a requirement for a representative government needs to be limited to groups with identities that constitute a people and cannot be extended to mean a political opinion in general. This confirms the standard according to which the right of self-determination applies to peoples and as political opinion in general does not define a people, the right of self-determination of groups with different political views cannot be violated.

#### **5.3.4. The right of self-determination and a multiparty electoral democracy**

##### **5.3.4.1. The right of self-determination and free choice of political system**

It has been established above that ‘representativeness’ of a government for the purposes of the right of self-determination needs to be confined to groups to which the right of self-determination actually applies, i.e. peoples. In this section it will be examined whether the claim that a representative government needs to be an outcome of a multiparty electoral system is compatible with the elaboration of the right of self-determination as well as with state practice and practice of UN organs. Further, it will be argued that mere adherence to a multiparty electoral democracy may not necessarily result in the exercise of the right of self-determination.

The Declaration on Principles of International Law was adopted in 1970, in the time of the Cold War. Thus it can be speculated that the socialist states at that time would not have supported the Declaration if this elaboration meant to bind them to a liberal-democratic political system. Such a conclusion does not only need to be

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<sup>991</sup> See SC Res 202 (6 May 1965), preamble.

based on an ideological assumption but also stems from the drafting history of the Declaration. At the time of drafting, the United Kingdom and the United States clearly expressed that the term ‘representative government’ did not presuppose any particular political system. On behalf of the United Kingdom it was stated that “[t]he use of the word ‘representative’ ... was not intended to mean that only one system of government properly met the criterion [of representativeness].”<sup>992</sup> Similarly, in the context of the meaning of the term ‘representative government’, the representative of the United States held that his government “understood that the Charter, as originally conceived, did not impose upon Members of the United Nations the duty to adopt a certain type of government.”<sup>993</sup>

Hence, in the time of drafting of the Declaration on Principles of International Law, there was a unanimous perception that the term ‘representative government’ was not exclusively associated with the political system of liberal-democracy. Consequently, the ‘safeguard clause’ could not be interpreted to require multiparty elections. As discussed in Chapter 2, the end of the Cold War inspired the so-called liberal-democratic reading of provisions of international law. The requirement for a ‘representative government’ operating within the right of self-determination was thus read as a requirement for a government which comes to office in multiparty elections.<sup>994</sup> However, such an interpretation is problematic in light of the analysis in Chapter 2, where it is argued that the theory of normative democratic entitlement is based on a hierarchical sorting of an arbitrary selection of civil and political rights.<sup>995</sup>

At the end of the Cold War, between 1988 and 1993, a set of General Assembly Resolutions, entitled ‘Enhancing the Effectiveness of the Principle of

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<sup>992</sup> UN Doc A/AC.125/SR.69 (4 December 1967), p. 9.

<sup>993</sup> UN Doc A/AC.125/SR.92 (21 October 1968), p. 133.

<sup>994</sup> See supra ch. 2.2.1. and 2.4.

<sup>995</sup> See supra ch. 2.2.1. and 2.4.

Periodic and Genuine Elections’ was adopted.<sup>996</sup> The resolutions, *inter alia*, deal with the question of representative government and affirm that governmental authority stems from the will of the people,<sup>997</sup> which is expressed at periodic and genuine elections.<sup>998</sup> It states that the electoral process needs to accommodate “distinct alternatives”.<sup>999</sup> Significantly, a call for accommodation of ‘distinct alternatives’ in the electoral system is not the same as a call for multiparty elections. If the drafters meant elections in a multiparty setting, they could have expressed this unambiguously in order to avoid the possibility of other interpretations.

Despite some specific references to apartheid,<sup>1000</sup> it cannot be argued that the resolutions have only an anti-apartheid meaning. Their universal language implies general applicability, while the resolutions clearly express that “there is no single political system or electoral method that is equally suited to all nations and their people.”<sup>1001</sup> In this regard it is also recalled that “all States enjoy sovereign equality and that each State has the right freely to choose and develop its political, social, economic, and cultural system.”<sup>1002</sup> These expressions confirm that the right to political participation cannot be automatically associated with a liberal-democratic political system. Further, these expressions also confirm that free choice, conferred to peoples by virtue of the right of self-determination, is not limited to one particular political system – that of Western-style liberal-democracy.

The view that the legitimacy of a government and territorial integrity of a state do not depend on adherence to a liberal-democratic political system also stems

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<sup>996</sup> See GA Res 43/157 (8 December 1988); GA Res 44/146 (15 December 1989); GA Res 46/137 (17 December 1991); GA Res 47/138 (18 December 1992); GA Res 48/131 (20 December 1993). The latter two resolutions mainly deal with electoral assistance.

<sup>997</sup> GA Res 44/146, para 3; GA Res 46/137, para 4.

<sup>998</sup> GA Res 43/157, para 2; GA Res 44/146, para 2; GA Res 46/137, para 2.

<sup>999</sup> GA Res 43/157, para 3.

<sup>1000</sup> GA Res 43/157, para 4 of the preamble & para 4 of the main text; GA Res 44/146, para 4 of the preamble & para 6 of the main text; GA Res 46/137, para 5 of the preamble & para 6 of the main text.

<sup>1001</sup> GA Res 45/150 (18 December 1990).

<sup>1002</sup> GA Res 43/157 (8 December 1988).

from the reaction of the Security Council to the Iraqi occupation of Kuwait, which otherwise coincided with the end of the Cold War.

After the Iraqi occupation of Kuwait in 1990, the Security Council, acting under Chapter VII of the UN Charter, affirmed the territorial integrity of Kuwait. The Security Council expressed its determination “to bring the invasion and occupation of Kuwait by Iraq to an end and to restore the sovereignty, independence and territorial integrity of Kuwait.”<sup>1003</sup> The Security Council also proclaimed the Government of Kuwait to be the legitimate government of that state by determining that “Iraq so far has failed to comply with paragraph 2 of resolution 660 (1990) and has usurped the authority of the legitimate Government of Kuwait”<sup>1004</sup> and “as a consequence, [decided] to take ... measures ... to restore the authority of the legitimate Government of Kuwait.”<sup>1005</sup>

It needs to be noted that Kuwait was an example of violation of territorial integrity by an illegal use of force from outside. Nevertheless, it remains significant that the Security Council established that Kuwait was protected by the principle of territorial integrity and that its government was the only legitimate government of that state. This was established despite the fact that the government of Kuwait was not known for adherence to liberal-democratic practices and despite its record of human rights violations.<sup>1006</sup>

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<sup>1003</sup> SC Res 661 (6 August 1990), preamble.

<sup>1004</sup> *Ibid.*, para 1.

<sup>1005</sup> *Ibid.*, para 2.

<sup>1006</sup> Consider the following observation: “The human rights situation in Kuwait prior to the [Iraqi] invasion was not a good one. The National Assembly (dissolved by the Emir of Kuwait in 1986, during the Iran-Iraq war, citing concerns that national security was being compromised by open debate) remained dissolved in 1990, although the war ended in 1988. The ruling al-Sabah family continued in 1990 to resist calls to restore parliamentary rule and to relax the severe restrictions imposed on constitutionally guaranteed freedom of expression and assembly. It continued to rule by decree, to tolerate torture, and to permit the secret trial of security cases by special tribunals whose decisions were not subject to appeal.” Testimony of Andrew Whitley, Before the House Foreign Affairs Committee, Human Rights in Iraq and Iraqi-Occupied Kuwait Middle East Watch (8 January 1991) <<http://www.hrw.org/reports/1991/IRAQ91.htm>>. See generally also Ghabra (1994).

In one already discussed situation, the Security Council denied legitimacy to the Taliban government in representing the entire people of Afghanistan.<sup>1007</sup> It was argued that the denial of legitimacy was based both on the lack of effective control and on threats to international peace and security and gross human rights violations.<sup>1008</sup>

The relevant Security Council resolutions dealing with the Taliban regime<sup>1009</sup> in Afghanistan do not invoke free and fair elections in a multiparty setting, which implies that a representative government can also be achieved by means other than liberal-democratic electoral procedures. Resolution 1378 specifically refers to a ‘multi-ethnic’ representation, while a multiparty-setting is not mentioned.<sup>1010</sup>

The post-Cold War practice of the General Assembly and of the Security Council, dealing with the questions of territorial integrity and governmental legitimacy, thus prove that the liberal-democratic nature of a government is not a qualification for the protection of territorial integrity and for legitimacy of governments. Practice of UN organs thus acknowledges that governments can be representative of peoples even if they do not come to office upon liberal-democratic electoral procedures.

Lastly, the definition of representative government for the purpose of the right of self-determination in terms of liberal-democratic practices is problematic in light of the free choice conferred to peoples by this right. As follows from the elaboration of the right of self-determination, “[b]y virtue of that right they [peoples]

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<sup>1007</sup> See supra ch. 4.6.

<sup>1008</sup> See supra ch. 4.6.

<sup>1009</sup> See supra ch. 4.6.

<sup>1010</sup> SC Res 1378 (14 November 2001), para 1.

freely determine their political status and freely pursue their economic, social and cultural development.”<sup>1011</sup> On the other hand:

The thesis that ‘representative’ government would necessarily entail the Western conception of representative democracy could be subject to criticism, as a preordained choice, it leaves no free choice to the people concerned as to their form of government, which would in itself be contrary to political self-determination ... [B]y necessarily linking internal self-determination to a Western style of democratic government, such an interpretation leaves no room for a population’s *own* perception of the representative character of the government and for people’s own (traditional) procedures.<sup>1012</sup>

Salmon, similarly, argues that:

In the Western countries it is generally believed that the only right answer is a system of liberal regime coupled with market economy. Such reasoning is purely ideological; there are many regimes in the world which are not similar to Western parliamentarism and which may, however, be viewed as truly representative of the peoples concerned according to their own social and historic traditions.<sup>1013</sup>

Addressing this problem, Raič proposes a minimum threshold for a representative government which is not defined in terms of liberal-democratic procedures:

A minimum requirement seems to be that the claim to representativeness by a non-oppressive government is not contested or challenged by (part of) the population. Thus, the notion of ‘representativeness’ assumes that government and the system of government is not imposed on the population of a State, but that it is based on the consent or assented by the population and in that sense is representative of the will of the people regardless of the forms or methods by which the consent or assent is freely expressed.<sup>1014</sup>

The fact that even a non-democratic state is capable of having a government representative of its peoples was implied by the Badinter Commission in the case of

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<sup>1011</sup> ICCPR & ICESCR, Article 1, para 1.

<sup>1012</sup> Raič (2002), pp. 276–77 (*italics in original*). This has been pointed out also in regard to the Wilsonian concept of self-determination. See *infra* ch. 5.2.2.

<sup>1013</sup> Salmon (1993), p. 280.

<sup>1014</sup> Raič (2002), p. 279.

the SFRY. In Opinion 1, in which it ultimately established that the SFRY was in the process of dissolution,<sup>1015</sup> the Badinter Commission stated:

The composition and workings of the essential organs of the Federation, be they the Federal Presidency, the Federal Council, the Council of the Republics and the Provinces, the Federal Executive Council, the Constitutional Court or the Federal Army, no longer meet the criteria of participation and representativeness inherent in a federal state.<sup>1016</sup>

The Badinter Commission thus implied that prior to Serbia's usurpation of the federal organs,<sup>1017</sup> they were (could have been) representative of the peoples of the SFRY. This was so although the representatives in these organs were not elected according to liberal-democratic electoral practices.<sup>1018</sup>

This section shows that a representative government for the purpose of the right of self-determination cannot be argued to be only the one that comes to office as a result of liberal-democratic electoral procedures. In the age of the Cold War, such an interpretation was prevented by the competitive idea of 'people's democracy'. In the post-Cold War period, practice of UN organs shows that the Cold-War-standard, i.e. non-confinement of the concept of 'representative government' to a particular political system, has not changed. Further, imposition of a particular political system would violate the right of self-determination, as elaborated in the common Article 1 of the ICCPR and ICESCR. If the right of self-determination is to be protected, peoples need to be given an opportunity to choose a political system and choice cannot be limited solely to Western-style liberal-democracy.

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<sup>1015</sup> See supra ch. 4.2.1. and 4.3.1.

<sup>1016</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 2(c).

<sup>1017</sup> See Dugard and Raič (2006), p. 126. See also supra n. 459.

<sup>1018</sup> Elections in the SFRY were indirect and not multiparty. For details see Constitution of the SFRY (1974), Articles 282–312 (Assembly), Articles 313–332 (Presidency), Articles 346–362 (the Federal Executive Council).

Indeed, even a state that does not have a government which comes to office based on liberal-democratic electoral procedures can have a government representative of all of its people “without distinction as to race, creed or colour.”<sup>1019</sup> There is also a question of whether liberal-democratic liberal procedures necessarily lead to fulfilment of the right of self-determination.

#### **5.3.4.2. The shortcomings of electoral democracy in the exercise of the right of self-determination**

An exemplary association of the right of self-determination with postulates of Western-style liberal-democracy can be found in the statement of the Government of the United Kingdom:

[T]he right of self-determination in the United Kingdom itself is exercised primarily through the electoral system ... The British system of parliamentary government is sustained by an electorate casting its votes in free and secret ballots at periodic elections which offer a choice between rival candidates, usually representing organised political parties of different views ... All elections in Northern Ireland continue to produce an overall majority of the electorate voting for Unionist policies, i.e. continuing as part of the United Kingdom.<sup>1020</sup>

In this perception, the right of self-determination is not only associated with democracy but narrowly with the electoral process. More precisely, it is claimed that it is exercised through the electoral system. In this context the United Kingdom did not claim that liberal-democratic electoral practices are the only means for the exercise of the right of self-determination. This question has already been discussed above. At this point it will be discussed whether adherence to the postulates of the liberal-democratic political system *per se* leads to consummation of the right of self-determination.

In regard to such a claim by the United Kingdom, it has been argued:

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<sup>1019</sup> The Declaration on Principles of International Law (1970), principle 5, para 7.

<sup>1020</sup> The Third Report of the United Kingdom to the Human Rights Committee, paras 18–20, quoted in McCorquodale (1996), p. 309.

As well as the difficulty in principle of expecting elections to be able to show the wishes of the people ... the United Kingdom electoral system is particularly problematic as there is no proportional representation electoral system [apart from local and EU elections]. It has a 'first-past-the-post' electoral system, where the winner of a constituency seat is the person who polls the most votes, however few, which means that the winner of the election may very often not reflect the views of the majority of voters. There is an additional difficulty with a 'first-past-the-post' system if it is the sole means to determine the wishes of the people of Northern Ireland because of the divided nature of its society.<sup>1021</sup>

The HRC held in its General Comment 25 that the right to political participation does not impose any particular electoral system on a state; however, it stressed the need that an electoral system enables the equality of votes and does not discriminate against any group:

Although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by article 25 and must guarantee and give effect to the free expression of the will of the electors. The principle of one person, one vote, must apply, and within the framework of each State's electoral system, the vote of one elector should be equal to the vote of another. The drawing of electoral boundaries and the method of allocating votes should not distort the distribution of voters or discriminate against any group and should not exclude or restrict unreasonably the right of citizens to choose their representatives freely.<sup>1022</sup>

The particular claim of the United Kingdom, that its electoral system guarantees the exercise of the right of self-determination, can be thus disputed on grounds of the specific anomalies of the electoral system. Further, the claim that electoral democracy *per se* leads to the exercise of the right of self-determination is problematic in general, not only in connection with a particular electoral system. The electoral process can lead to 'tyranny of the majority', i.e. to dominance of the majority people over a numerically inferior people. Indeed:

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<sup>1021</sup> Ibid., p. 310.

<sup>1022</sup> The UN Human Rights Committee (1996), General Comment 25, para 21.

Although, theoretically, in a Western-style representative democracy the entire population is entitled to participate in the elections of representatives who, in their turn, participate in the political decision-making process on behalf of the population, this does by no means mean that this form of governance is automatically a sufficient *guarantee* for genuine respect for the right of internal self-determination of a people which constitutes a numerical minority within a State.<sup>1023</sup>

This is especially the case when political parties are organised along ethnic or religious lines and parties of numerically superior people have access to a much broader electoral base and wider representation. If no other mechanisms limit the power of the majority, the liberal-democratic electoral process can lead to violation, not fulfilment, of the right of self-determination.<sup>1024</sup>

Another problem of the association of the right of self-determination with the electoral process is the complexity of voters' decision-making in the voting-booth. Indeed:

[T]o rely on elections as the primary means of determining ... free and genuine wishes [of the people of a territory] is fraught with difficulty. It is impossible to prove from election results on what particular issues a voter casts her/his vote, when there will invariably be other issue or issues besides self-determination which are raised during an election campaign.<sup>1025</sup>

In other words, voting for a certain party does not imply that the voter agrees with the entire programme of the party. In this context, it cannot be presumed that a vote for a party that puts secession on its agenda implies a vote for secession.<sup>1026</sup> For example, at the 2007 Scottish elections, the Scottish National Party (SNP) became the strongest party in the Scottish Parliament by winning 47 out of 129 seats.<sup>1027</sup>

While the SNP puts independence of Scotland on its political agenda,<sup>1028</sup> it cannot be

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<sup>1023</sup> Raič (2002), p. 280 (italics in original).

<sup>1024</sup> Compare infra ch. 5.4. and 6.5.

<sup>1025</sup> McCorquodale (1996), p. 304.

<sup>1026</sup> Compare infra ch. 5.4.1.1. for the example of Parti Québécois.

<sup>1027</sup> See BBC, Election 2007 <[http://news.bbc.co.uk/2/hi/in\\_depth/uk\\_politics/2007/election\\_2007/default.stm](http://news.bbc.co.uk/2/hi/in_depth/uk_politics/2007/election_2007/default.stm)>.

<sup>1028</sup> See Scottish National Party <<http://www.snp.org/node/240>>.

assumed that all votes for the SNP are automatically votes for Scottish independence. Likewise, it cannot be assumed that all votes for parties other than the SNP are votes against Scottish independence.

#### **5.3.4.3. Arrangements for the exercise of the right of self-determination in its internal mode**

There is no single arrangement prescribed for the right of self-determination to be exercised in the internal mode. Indeed, “[t]he exercise of this right can take a variety of forms, from autonomy over most policies and laws in a region or part of a State ... to a people having exclusive control over only certain aspects of policy.”<sup>1029</sup> However, “customary and treaty law on *internal* self-determination [do not] provide guidelines on the possible distribution of power among institutionalized units or regions.”<sup>1030</sup>

Federation has been argued to be an exemplary arrangement for protection of the right of self-determination. It is argued that:

The classical case [of federalism] is that of a state composed of a number of ethnic, religious or linguistic groups, provided that these are concentrated in certain regions, so that the federal system makes it possible to confer upon them ... self-rule. It is necessary ... to ensure that the delimitation of internal boundaries between the cantons [i.e. federal units] would enable a specific group or groups—constitution a minority on a country-wide basis—to form a majority within the borders of a given canton [i.e. federal unit].<sup>1031</sup>

A federal arrangement can indeed vest significant powers in its units, even some attributes of statehood.<sup>1032</sup> However, two caveats apply. First, not all federations are arrangements for the exercise of the right of self-determination. There exist states with federal units, the populations of which do not qualify as peoples and

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<sup>1029</sup> McCorquodale (1994), p. 864.

<sup>1030</sup> Cassese (1995), p. 332 (italics in original).

<sup>1031</sup> Dinstein (1993), pp. 223–24.

<sup>1032</sup> See Harris (2004), p. 106.

the right of self-determination is thus not applicable. Austria, for example, is a federal state<sup>1033</sup> but the respective populations of its federal units clearly do not constitute separate peoples. Second, even non-federal state arrangements can adopt mechanisms for the protection of the right of self-determination and even have clearly delimited self-determination units. Such an example is the United Kingdom, which “may not be a federal system, but it is a union state built in 1707 upon the union of two established, or at least incipient, national societies.”<sup>1034</sup>

#### **5.4. Secession and the will of the people**

One can argue that “[i]t is undisputed that a people is entitled to secession if such right is provided for in the constitution of a parent state.”<sup>1035</sup> An obvious example of such a constitutional provision is Article 60 of the State Union of Serbia and Montenegro.<sup>1036</sup> In the absence of a specific constitutional mechanism allowing for secession, it is not disputed that secession may occur if there exists approval of a parent-state.<sup>1037</sup> Such approval may be given prior to the declaration of independence or subsequently, after independence has already been declared.<sup>1038</sup>

When there exists no constitutional provision allowing for secession and the latter is opposed by the parent-state, the situation can be described as an attempt at unilateral secession. While there exists no entitlement to unilateral secession in international law, such an act is not prohibited. In this regard the Supreme Court of Canada held in the *Québec case*:

International law contains neither a right of unilateral secession nor the explicit denial of such a right, although such a denial is, to some extent, implicit in the exceptional circumstances required for

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<sup>1033</sup> The Federal Constitution of Austria (1920), Article 2.

<sup>1034</sup> Tierney (2004), p. 112.

<sup>1035</sup> Raič (2002), p. 313.

<sup>1036</sup> See supra n. 860.

<sup>1037</sup> Raič (2002), p. 314–15.

<sup>1038</sup> Ibid.

secession to be permitted under the right of a people to self-determination, e.g., the right of secession that arises in the exceptional situation of an oppressed or colonial people ....<sup>1039</sup>

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within a framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises in only the most extreme of cases and, even then, under carefully defined circumstances.<sup>1040</sup>

Reference to ‘the most extreme cases’, which may justify a unilateral secession, is to be read against the background of the provision on self-determination and territorial integrity expressed in the Declaration on Principles of International Law.<sup>1041</sup> The provision allows for an interpretation that a state which does not comply with “the principle of equal rights and self-determination of peoples” and whose government does not represent “the whole people belonging to the territory without distinction as to race, creed or colour,”<sup>1042</sup> would, possibly, not be entitled to limit the right of self-determination of the oppressed people with the territorial integrity principle. In this regard the Supreme Court of Canada held: “The other clear case where a right to external self-determination accrues [apart from colonial situations] is where a people is subject to alien subjugation, domination or exploitation outside a colonial context.”<sup>1043</sup>

The Court also identified a possible link between denial of the right of self-determination in its internal mode and unilateral secession:

[T]he right to self-determination may ground a right to unilateral secession in a third circumstance. Although this third circumstance has been described in several ways, the underlying proposition is

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<sup>1039</sup> The *Québec case* (1998), para 112.

<sup>1040</sup> *Ibid.*, para 126.

<sup>1041</sup> *Ibid.*, paras 127–128.

<sup>1042</sup> The Declaration on Principles of International Law (1970), annex, principle 5, para 7.

<sup>1043</sup> The *Québec case* (1998), para 133.

that, when a people is blocked from the meaningful exercise of its right to self-determination internally, it is entitled, as a last resort, to exercise it by secession.<sup>1044</sup>

The Court observed that “it remains unclear whether this third proposition actually reflects an established international law standard,”<sup>1045</sup> and held that in the *Québec case* clarification of this issue was not important because a violation of this kind was not in question in the situation of Québec.<sup>1046</sup>

Secession of oppressed peoples, also referred to as ‘remedial secession’, generally has wide support among writers,<sup>1047</sup> but it remains somewhat unclear in what circumstances ‘remedial secession’ may, possibly, become an entitlement. In the *Aaland Islands case* it was pointed out that a shift of sovereignty as an “exceptional solution” may only be considered as a “last resort.”<sup>1048</sup> The latter condition is also adopted in modern writings and is interpreted narrowly: secession needs to be the only means for preventing systematic oppression.<sup>1049</sup>

In the ECtHR’s case of *Loizidou v Turkey*, Judges Wildhaber and Ryssdal probably had ‘remedial secession’ in mind when arguing:

In recent years a consensus has seemed to emerge that peoples may also exercise a right to self-determination if their human rights are consistently and flagrantly violated or if they are without representation at all or are massively under-represented in an undemocratic and discriminatory way. If this description is correct, then the right to self-determination is a tool which may be used to re-establish international standards of human rights and democracy.<sup>1050</sup>

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<sup>1044</sup> Ibid., para 134.

<sup>1045</sup> Ibid., para 135.

<sup>1046</sup> Ibid.

<sup>1047</sup> For a detailed account on the academic support for ‘remedial secession’, see Tancredi (2006), p. 176. But see also Shaw (1997), p. 483, who argues that “[s]uch a major change in legal principle cannot be introduced by way of an ambiguous subordinate clause, especially when the principle of territorial integrity has always been accepted and proclaimed as a core principle of international law, and is indeed placed before the qualifying clause in the provision in question.”

<sup>1048</sup> The *Aaland Islands case* (1920), p. 21.

<sup>1049</sup> See Crawford (2006), p. 120 & Tancredi (2006), p. 175. See also the *Québec case* (1998), para 134.

<sup>1050</sup> *Loizidou v Turkey* (1997), p. 535 (Judge Wildhaber concurring, joined by Judge Ryssdal).

Despite significant support for ‘remedial secession’ in academic writings, there is an acute lack of state practice in support of this doctrine. The only possible examples in its support in the UN Charter era are the secession of Bangladesh from Pakistan and, possibly, the dissolutions of the SFRY and of the Soviet Union.

In 1947, Pakistan was created “out of the provinces of the British India and the Indian states with majority Muslim population.”<sup>1051</sup> Its territory was geographically divided in two parts, which were separated by a distance of about a thousand miles across India. In East Pakistan most of the population spoke Bengali, a language not spoken in West Pakistan, while “[t]he only aspect of social life which the two populations shared was that of Islam.”<sup>1052</sup> East Pakistan “had suffered relatively severe and systematic discrimination from the central government based in Islamabad.”<sup>1053</sup>

At general Pakistani elections in December 1970, the Awami League, an autonomy-seeking East Pakistani party, won 167 out of 169 seats allocated to the eastern part of the state in the Pakistani Parliament.<sup>1054</sup> This result meant a solid majority in the 313-seat Pakistani Parliament.<sup>1055</sup> In response to the dominance of the Awami League, the central government of Pakistan suspended the Parliament and introduced a period of martial rule in East Pakistan, “which involved acts of repression and even possibly genocide and caused some ten million Bengalis to seek refuge in India.”<sup>1056</sup>

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<sup>1051</sup> Pavković and Radan (2007), p. 103.

<sup>1052</sup> *Ibid.*, p. 104.

<sup>1053</sup> Crawford (2006), p. 140.

<sup>1054</sup> *Ibid.*, pp. 140–41.

<sup>1055</sup> *Ibid.*

<sup>1056</sup> *Ibid.*, p. 141.

On 17 April 1971, the Awami League proclaimed the independence of East Pakistan.<sup>1057</sup> East Pakistani guerrilla forces were at that time already in armed conflict with Pakistani armed forces.<sup>1058</sup> On 3 December 1971, India intervened in support of East Pakistan, fighting Pakistani armed forces on both sides, eastern and western.<sup>1059</sup> On 17 December 1971, Pakistani armed forces surrendered, India declared ceasefire on the western side and, on 6 December 1971, recognised the independence of Bangladesh.<sup>1060</sup> With help of Indian forces, the Awami League exercised substantial control over the territory of Bangladesh.<sup>1061</sup> Within weeks, Bangladesh was explicitly recognised by twenty-eight states.<sup>1062</sup> Recognition by Pakistan was granted on 22 February 1974.<sup>1063</sup>

While Bangladesh may serve as an argument in support of ‘remedial secession’, this is not the only possible interpretation. Other arguments may also be plausible. Indeed:

Different views can be held as to whether in the circumstances of 1970, the people of East Bengal had a right of self-determination, whether this was a case of ‘remedial secession’ or whether the withdrawal of the Pakistan Army after the ceasefire on 16 December 1971 merely produced a *fait accompli*, which in the circumstances other States had no alternative but to accept.<sup>1064</sup>

In regard to the ‘remedial secession’ argument in the contexts of the Soviet Union and of the former SFRY, it is argued that:

After the recognition by the international community of the disintegration as unitary States of the Soviet Union and Yugoslavia, it could now be the case that any government which is oppressive to

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<sup>1057</sup> Pavković and Radan (2007), p. 102.

<sup>1058</sup> Ibid.

<sup>1059</sup> Crawford (2006), p. 141.

<sup>1060</sup> Ibid.

<sup>1061</sup> Ibid.

<sup>1062</sup> Ibid. Consider also the following argument: “The USSR, bound by a recently concluded treaty with India, and its fellow members of the Soviet-led Warsaw pact recognized Bangladesh within weeks of India’s removal of the Pakistani army from power in Bangladesh. So did the Scandinavian States, Australia and New Zealand.” Pavković and Radan (2007), p. 108.

<sup>1063</sup> Crawford (2006), p. 141.

<sup>1064</sup> Ibid., p. 393.

peoples within its territory may no longer be able to rely on the general interest of territorial integrity as a limitation on the right of self-determination.<sup>1065</sup>

However, it is questionable whether the ‘remedial secession’ argument was really acknowledged by the international community in these two situations.

Although the political situation in the Soviet Union in 1991 was rather complicated,<sup>1066</sup> from the legal point of view the dissolution of the Soviet Union was a consensual act supported by all republics, including Russia.<sup>1067</sup> The ‘remedial secession argument’ could thus only be plausible in regard to the Baltic States, which achieved independence prior to the dissolution of the Soviet Union.<sup>1068</sup> Such an argument in this context stems from suppression of their independence, which resulted from the Ribbentrop-Molotov Pact.<sup>1069</sup> When the Baltic States were accepted to UN membership, “[i]ndividual Member States [of the UN] emphasized that, since the independence of the Baltic States had been unlawfully suppressed, they had the right of self-determination.”<sup>1070</sup> Yet, as pointed out in this chapter, the right of self-determination does not mean a ‘right to unilateral secession’ and even in the example of the Baltic States, applicability of the right of self-determination did not automatically result in secession.<sup>1071</sup> In the end, the secession of the Baltic States was consensual, with the approval of the Soviet Union.<sup>1072</sup>

In the case of the SFRY, it is argued that both Slovenia and Croatia were initially examples of an attempt at unilateral secession which later resulted in dissolution of the parent-state.<sup>1073</sup> The attempts at unilateral secession played an

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<sup>1065</sup> McCorquodale (1994), p. 880.

<sup>1066</sup> For more see *infra* ch. 5.4.4.1.

<sup>1067</sup> See *supra* ch. 4.4.1.

<sup>1068</sup> See *supra* ch. 4.4.1.

<sup>1069</sup> See *supra* n. 730.

<sup>1070</sup> Crawford (2006), p. 394.

<sup>1071</sup> *Ibid.*, p. 395.

<sup>1072</sup> See *supra* ch. 4.4.1. See also *infra* ch. 5.4.4.1.

<sup>1073</sup> Dugard and Raič (2006), pp. 123–30.

important role in the process of dissolution, which proves that “secession and dissolution are not mutually exclusive.”<sup>1074</sup> The Badinter Commission indeed based its opinion in which it established that the SFRY was in the process of dissolution on the fact that three out of its six constituent republics had already declared independence and that due to Serbia’s usurpation of federal organs, the federation was no longer functioning.<sup>1075</sup> As this implies that the SFRY was no longer representative of its peoples, Opinion 1 of the Badinter Commission may suggest that the ‘remedial secession doctrine’ was acknowledged.<sup>1076</sup> Such an argument is not without difficulties as the Badinter Commission expressly held that dissolution, not unilateral secession, was at work.<sup>1077</sup> This view was subsequently affirmed by state practice and practice of UN organs.<sup>1078</sup>

It has been established that there is no right to unilateral secession under international law. On the other hand, the absence of such a right does not imply that unilateral secession as such is an illegal act: “The position is that secession is neither legal nor illegal in international law, but a legally neutral act the consequences of which are regulated internationally.”<sup>1079</sup> In regard to the position of unilateral secession in international law, the Supreme Court of Canada in the *Québec case* made the following observation:

Although there is no right, under the Constitution or at international law, to unilateral secession, that is secession without negotiation on the basis just discussed, this does not rule out the possibility of an unconstitutional declaration of secession leading to a *de facto* secession. The ultimate success of such a secession would be dependent on recognition by the international community, which is likely to consider the legality and legitimacy of secession having regard to, amongst other facts, the conduct of

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<sup>1074</sup> Ibid., p. 128.

<sup>1075</sup> See supra notes 577 and 578. See also Dugard and Raič (2006), pp. 125–26.

<sup>1076</sup> Ibid., p. 130.

<sup>1077</sup> See Badinter Commission, Opinion 1 (29 November 1991).

<sup>1078</sup> See supra ch. 4.3.

<sup>1079</sup> Crawford (2006), p. 390.

Québec and Canada, in determining whether to grant or withhold recognition. Such recognition, even if granted, would not, however, provide any retroactive justification for the act of secession, either under the Constitution of Canada or at international law.<sup>1080</sup>

This position of the Supreme Court of Canada seems to be in line with Shaw's opinion on the 'safeguard clause':

[I]t may well be the case that the attitudes adopted by third states and the international community as a whole, most likely expressed through the United Nations, in deciding whether or not to recognize the independence of a seceding entity will be affected by circumstances factually precipitating secession, so that recognition may be more forthcoming where the secession has occurred as a consequence of violations of human rights. Thus, the content of the [safeguard] clause should perhaps best be seen in this light, that is as a relevant factor in determining the views taken by the international community generally, and states particularly, as to recognition.<sup>1081</sup>

#### **5.4.1. Québec, attempts at secession and popular consultation**

##### **5.4.1.1. Background to the *Québec case***

At 1976 elections in the Province of Québec, the Parti Québécois (PQ) was elected into office.<sup>1082</sup> On the political agenda of the PQ was state sovereignty of Québec, a Canadian province in which the majority of population is French-Canadian.<sup>1083</sup> On 20 May 1980, a referendum was held on a mandate to the Government of Québec to negotiate a new agreement with the rest of Canada, which would lead to Québec's sovereignty, while economic ties with Canada would be maintained. The English version of the referendum question reads:

The Government of Québec has made public its proposal to negotiate a new agreement with the rest of Canada, based on the equality of nations; this agreement would enable Québec to acquire the exclusive power to make its laws, administer its taxes and establish relations abroad in other words sovereignty and at the same time, to maintain with Canada an economic association including a

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<sup>1080</sup> The *Québec case* (1998), para 155.

<sup>1081</sup> Shaw (1997), p. 483.

<sup>1082</sup> See Dumberry (2006), p. 418.

<sup>1083</sup> See Bayefsky (2000), p. 5.

common currency; any change in political status resulting from these negotiations will be submitted to the people through a referendum; on these terms, do you agree to give the Government of Québec the mandate to negotiate the proposed agreement between Québec and Canada?<sup>1084</sup>

At a turnout of 85.61 percent of all eligible to vote, the mandate to the Government of Québec to negotiate with the rest of Canada on sovereignty of Québec was rejected by 59.56 percent of the valid votes cast.<sup>1085</sup>

After the re-election of the PQ in 1994, the Draft Bill Respecting the Sovereignty of Québec was tabled at the Québec National Assembly.<sup>1086</sup> The Draft Bill foresaw Québec's declaration of independence and authorisation of the Government of Québec to negotiate a new economic association with Canada.<sup>1087</sup> According to the Draft Bill, sovereignty could only be proclaimed upon an approval of the population of Québec, expressed at a referendum.<sup>1088</sup>

The question at the independence referendum, held on 30 October 1995, reads: "Do you agree that Québec should become sovereign, after having made a formal offer to Canada for a new economic and political partnership, within the scope of the Bill respecting the future of Québec and of the agreement signed on 12 June 1995?"<sup>1089</sup> At a turnout of 95.52 percent of all eligible to vote, the proposal was rejected by 50.58 percent of votes cast.<sup>1090</sup>

Prior to the referendum, a Québec resident challenged the legality of the Draft Bill and legality of the referendum at the Superior Court of Québec.<sup>1091</sup> After his

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<sup>1084</sup> Reprinted in Dumberry (2006), p. 418, at n. 8.

<sup>1085</sup> See Electoral Geography: Québec Independence Referendum.

<<http://www.electoralgeography.com/new/en/countries/q/quebec/quebec-independence-referendum1980.html>>

<sup>1086</sup> See Dumberry (2006), p. 419.

<sup>1087</sup> Ibid. See also Draft Bill Respecting the Sovereignty of Québec (1995), Articles 1 & 2. <<http://www.solon.org/misc/referendum-bill.html>>.

<sup>1088</sup> Ibid., Article 16.

<sup>1089</sup> Reprinted in Dumberry (2006), p. 420, at n. 16.

<sup>1090</sup> Ibid.

<sup>1091</sup> Ibid.

motion was denied, he filed another, revised, action in 1996.<sup>1092</sup> Although the referendum results were already known, the Canadian federal government intervened and “initiated a ‘reference’ to the Supreme Court of Canada.”<sup>1093</sup>

The Supreme Court of Canada dealt with three questions:

Under the Constitution of Canada, can the National Assembly, legislature or government of Québec effect the secession of Québec from Canada unilaterally?

Does international law give the National Assembly, legislature or government of Québec the right to effect the secession of Québec from Canada unilaterally? In this regard, is there a right to self-determination under international law that would give the National Assembly, legislature or government of Québec the right to effect the secession of Québec from Canada unilaterally?

In the event of a conflict between domestic and international law on the right of the National Assembly, legislature or government of Québec to effect the secession of Québec from Canada unilaterally, which would take precedence in Canada?<sup>1094</sup>

The Court’s reasoning on these three questions provides important guidelines on the position of international law in regard to unilateral secession, limits on the right of self-determination and on democratic principles operating within this right.

#### **5.4.1.2. The *Québec case* and popular consultation**

The Supreme Court of Canada held in the *Québec case* that a democratic decision in favour of secession does not result in a ‘right to secession’, while such a will of the people cannot be ignored:

The democratic principle ... would demand that considerable weight be given to a clear expression by the people of Québec of their will to secede from Canada, even though a referendum, in itself and without more, has no direct legal effect, and could not in itself bring about unilateral secession.<sup>1095</sup>

The Court went on to argue that to accept:

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<sup>1092</sup> Details on this issue are beyond the scope of this thesis. For more see Dumberry (2006), pp. 421–22 and Bayefsky (2000), pp. 10–12.

<sup>1093</sup> Bayefsky (2000), p. 12.

<sup>1094</sup> The *Québec case* (1998), Introduction, para 2.

<sup>1095</sup> *Ibid.*, para 87.

[T]hat a clear expression of self-determination by the people of Québec would impose no obligations upon the other provinces or the federal government ... would amount to the assertion that other constitutionally recognized principles necessarily trump the clearly expressed democratic will of the people of Québec.<sup>1096</sup>

The Court held that in such a circumstance an obligation would be put on both Québec and Canada to negotiate a future constitutional arrangement for Québec. The Court, importantly, stressed:

No negotiations could be effective if their ultimate outcome, secession, is cast as an absolute legal entitlement based upon an obligation to give effect to that act of secession in the Constitution. Such a foregone conclusion would actually undermine the obligation to negotiate and render it hollow.<sup>1097</sup>

In regard to the duty to negotiate, it has been observed that “[t]he content of this constitutional duty to negotiate is loosely defined by the Court, but it is clear that it should not solely consist of the ‘logistical details of secession’.”<sup>1098</sup> However, the Court did not discuss any possible arrangements that would indicate an outcome of such negotiations nor did it address the problem of a situation in which Québec would accept nothing short of independence, while Canada would be unwilling to accept such a demand.

Nevertheless, it remains significant that the Supreme Court of Canada held that democratic principles cannot prevail over all other principles. In the context of Canadian constitutional law, the following principles were identified: federalism, democracy, constitutionalism, the rule of law and respect for minorities.<sup>1099</sup> The Court importantly noted that the principle of democracy is not an absolute principle and “cannot be invoked to trump” other constitutional principles.<sup>1100</sup>

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<sup>1096</sup> Ibid., para 91.

<sup>1097</sup> Ibid.

<sup>1098</sup> Dumberry (2006), p. 429.

<sup>1099</sup> The *Québec case* (1998), para 33.

<sup>1100</sup> Ibid., para 91.

The Court also gave special consideration to the problem of tyranny of the majority to which procedural adherence to democratic decision-making may lead:

Although democratic government is generally solicitous of [fundamental human rights and individual freedoms], there are occasions when the majority will be tempted to ignore fundamental rights in order to accomplish collective goals more easily or effectively. Constitutional entrenchment ensures that those rights will be given due regard and protection.<sup>1101</sup>

The Court continued: “Canadians have never accepted that ours is a system of simple majority rule.”<sup>1102</sup>

The majority is a well-known problem of democratic decision-making and modern definitions of democracy have adopted some mechanisms for protection of minorities.<sup>1103</sup> Indeed, “centuries of philosophical debate over, and political experimentation with, the majority principle have led to the protected status of the minority as much as to the authoritative status of the majority in Western democracies.”<sup>1104</sup> In the context of the right of self-determination, decision-making regarding a change of legal status of a territory thus cannot be merely a matter of the majority and its preference. When unilateral rather than pre-negotiated, i.e. consensual, secession is in question the *Québec case* confirms the standard that a successful referendum does not lead to a ‘right to secession’ but is one of the factors that legitimises a secessionist claim. As follows from the *Québec case*, minority protection standards would also play an important role in determining the legitimacy of a secessionist claim. It can be argued that such a standard also follows from the EC Guidelines, which, *inter alia*, identified minority protection standards as requirements for recognition of new states.<sup>1105</sup> Such standards were likewise applied

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<sup>1101</sup> *Ibid.*, para 74.

<sup>1102</sup> *Ibid.*, para 76.

<sup>1103</sup> For more on the protection of minorities within democratic constitutions and safeguards against the tyranny of the majority see Lijphart (1984), pp. 187–96.

<sup>1104</sup> R Miller (2003), p. 637.

<sup>1105</sup> EC Guidelines (1991), para 6.

by the Badinter Commission, which also stressed the importance of popular consultation.<sup>1106</sup>

It was argued above that the right of self-determination is not an absolute human right and, as such, it is limited by other human rights, which includes the right of self-determination of other peoples.<sup>1107</sup> The *Québec case* confirmed this view. Yet Bosnia-Herzegovina was recognised as an independent state, although the popular consultation was boycotted by the Serb population.<sup>1108</sup> Nevertheless, the example of Bosnia-Herzegovina is significantly different from that of Québec. When the referendum in Bosnia-Herzegovina was held, its parent state was deemed to be in the process of dissolution,<sup>1109</sup> and the *uti possidetis* principle was applied by the Badinter Commission.<sup>1110</sup> The impact of this principle on the will of the people will be examined in Chapter 6.

#### **5.4.2. The standards of popular consultation in the context of the right of self-determination**

##### **5.4.2.1. The development of popular consultation in the context of the right of self-determination**

In the *Western Sahara Advisory Opinion*, the ICJ held that “the application of the right of self-determination requires a free and genuine expression of the will of the peoples concerned.”<sup>1111</sup> Expression of the will of the people for the purpose of the right of self-determination is most commonly associated with popular consultations, usually formalised by referenda.

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<sup>1106</sup> For more see supra ch. 4.3.3. and 4.3.4.

<sup>1107</sup> See supra notes 951 and 952.

<sup>1108</sup> See supra ch. 4.3.4.

<sup>1109</sup> See supra ch. 4.3.1.

<sup>1110</sup> See supra ch. 4.3.1.

<sup>1111</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 55.

Invoking the idea of self-determination, popular consultations were held already in the age of post-revolutionary French government.<sup>1112</sup> However, self-determination was at that time used as a tool of French annexations and the will of the people was applied selectively, i.e. only if it favoured a shift of sovereignty to France.<sup>1113</sup> After the First World War, under the influence of President Wilson and his conception of self-determination, several referenda on the future legal status of European territories took place under the League of Nations' auspices.<sup>1114</sup>

In the period of decolonisation, referenda became even more closely associated with the exercise of the right of self determination and “came to be the stock-in-trade of the United Nations in situations involving accession to independence, association, or integration of colonies and non-self-governing territories.”<sup>1115</sup> Indeed:

[T]he U.N. has organized or monitored self-determination plebiscites or referendums in colonial territories, so that the populations concerned the international status of their country or territory – union with another sovereign country, or independence as a sovereign country – upon being granted independence. The U.N. has also temporarily administered a few such territories as an interim authority before a transfer of sovereignty, or a plebiscite or referendum, or elections.<sup>1116</sup>

Despite the common association of the expression of the will of the people with referenda, there can be situations in which popular consultation is not required and/or necessary. In the *Western Sahara Advisory Opinion*, the ICJ held:

The validity of the principle of self-determination, defined as the need to pay regard to the freely expressed will of peoples, is not affected by the fact that in certain cases the General Assembly has dispensed with the requirement of consulting the inhabitants of a given territory. Those instances were based either on the consideration that a certain population did not constitute a “people” entitled to self-

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<sup>1112</sup> Cassese (1995), p. 11.

<sup>1113</sup> Ibid., pp. 11–12.

<sup>1114</sup> Brady and Kaplan (1994), p. 175.

<sup>1115</sup> R Miller (2003), p. 630.

<sup>1116</sup> Beigbeder (1994), p. 91.

determination or on the conviction that a consultation was totally unnecessary, in view of special circumstances.<sup>1117</sup>

It will now be considered whether referendum is the only relevant means of expression of the will of the people, what the effects are of the independence referenda and whether certain procedural referenda standards could potentially be regarded as rules of customary international law.

#### **5.4.2.2. The Québec situation and clarification of popular consultation standards**

The Supreme Court of Canada held in the *Québec case* that “[t]he referendum result, if it is to be taken as an expression of the democratic will, must be free of ambiguity both in terms of the question asked and in terms of the support it achieves.”<sup>1118</sup> In the Canadian context, the requirement of ‘free of ambiguity’ and the issue of negotiations for the determination of future status of an independence-seeking federal unit was subsequently addressed by the Clarity Act (2000).

In regard to the referendum question, the Clarity Act provides:

[A] clear expression of the will of the population of a province that the province cease to be part of Canada could not result from

(a) a referendum question that merely focuses on a mandate to negotiate without soliciting a direct expression of the will of the population of that province on whether the province should cease to be part of Canada; or

(b) a referendum question that envisages other possibilities in addition to the secession of the province from Canada, such as economic or political arrangements with Canada, that obscure a direct expression of the will of the population of that province on whether the province should cease to be part of Canada.<sup>1119</sup>

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<sup>1117</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 59.

<sup>1118</sup> The *Québec case* (1998), para 87.

<sup>1119</sup> The Clarity Act (2000), Article 1, para 3.

The Clarity Act was evidently drafted with the 1980 and 1995 referenda questions in Québec in mind. Both referenda questions were formulated in a way that they implied a future economic association with Canada.<sup>1120</sup> Further, the 1980 referendum question did not ask voters directly on independence but on a mandate for the Government of Québec to negotiate on a new arrangement with the rest of Canada, which would lead to independence.<sup>1121</sup> Although the requirement for clear referendum questions reflects specific issues previously experienced with the referenda question in Québec, it nevertheless has some universal validity. Indeed, unclear or even misleading referenda questions cannot be a base for an expression of the will of the people. It remains to be determined below, when referenda questions in other secessionist situations will be examined, to what degree the Clarity Act standard can be universalised.

In regard to the required majority, the Clarity Act provides:

In considering whether there has been a clear expression of a will by a clear majority of the population of a province that the province cease to be part of Canada, the House of Commons shall take into account

(a) the size of the majority of valid votes cast in favour of the secessionist option;

(b) the percentage of eligible voters voting in the referendum; and

(c) any other matters or circumstances it considers to be relevant.<sup>1122</sup>

The required majority thus remains undefined and it is not clear whether a majority of all valid votes cast would be perceived as an expression of the will of the people or a more qualified majority would be required (e.g. majority of all eligible to vote). As follows from the Clarity Act, the required majority may be situation specific and no universally prescribed standard can be imposed. It needs to be recalled that the expressed will of a people does not lead to the self-executing

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<sup>1120</sup> See supra ch. 5.4.1.1.

<sup>1121</sup> Compare supra n. 1084.

<sup>1122</sup> Bill C-20 (29 June 2000) [The Clarity Act], Article 2, para 2.

secession of a province but merely gives a mandate to a provincial government to negotiate with the federal government. This is specifically reaffirmed in the Clarity Act.<sup>1123</sup>

In the Québec situation, where consultation is to be understood as part of a broader process of negotiations for a future constitutional arrangement, a firmly prescribed majority is not necessary. This is different in situations in which consultation may lead to self-executing secession with the approval of a parent-state, where clear referendum rules need to be established in order to avoid ambiguity. Montenegro is a good example of such a situation.<sup>1124</sup>

### **5.4.3. Post-1990 popular consultation standards**

#### **5.4.3.1. Slovenia**

The question at the independence referendum in Slovenia was prescribed by the Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act and reads: “Shall the Republic of Slovenia become a sovereign and independent state?”<sup>1125</sup> The Act further specified: “The decision that the Republic of Slovenia becomes an independent state shall be adopted if supported by the majority of all eligible to vote.”<sup>1126</sup>

Independence was supported by a majority of 88.5 percent of all eligible to vote (92 percent of those who voted), with four percent of all eligible to vote expressly voting against it.<sup>1127</sup> The expression of the will of people on Slovenia’s

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<sup>1123</sup> Ibid., Article 3.

<sup>1124</sup> See supra ch. 4.5.2. and infra ch. 5.4.3.6.

<sup>1125</sup> The Plebiscite on the Sovereignty and Independence of the Republic of Slovenia Act (1990), Article 2, my own translation. The Official Gazette of the Republic of Slovenia No 44-2102/1990 (2 December 1990).

<sup>1126</sup> Ibid., Article 3, my own translation.

<sup>1127</sup> See From the Plebiscite to Independence <<http://www.ukom.gov.si/10let/pot/kronologija>>.

independence was therefore clear from the points of view of both clarity of the question asked and the majority in its support.

#### **5.4.3.2. Croatia**

On 25 April 1991, the President of Croatia issued the Decree on the Call for Referendum on Independence of the Republic of Croatia.<sup>1128</sup> The Decree set the date of the referendum to be 19 May 1991.<sup>1129</sup> Two choices were offered at the referendum:

1. Do you agree that the Republic of Croatia, as a sovereign and independent state which guarantees the cultural autonomy and all civil liberties of Serbs and members of other nationalities in Croatia, shall enter into an association of sovereign states together with other republics (according to the suggestion of the Republic of Croatia and the Republic of Slovenia for solving of the state crisis in the SFRY)?
2. Do you agree that the Republic of Croatia shall remain in Yugoslavia as a unitary federal state (according to the suggestion of the Republic of Serbia and the Socialist Republic of Montenegro for solving of the state crisis in the SFRY)?<sup>1130</sup>

The Croatian referendum question was thus much more ambiguous than was the case in Slovenia.<sup>1131</sup> It is questionable whether the Croatian question would pass the standard set by the Clarity Act in Canada, which states that referendum results are relevant only if they are free of ambiguity. The Clarity Act specifies that the referendum question cannot be perceived as free of ambiguity if it: (i) merely consults on the beginning of negotiations for a future legal status of a territory rather than on secession itself, and/or (ii) envisages other possibilities of association with its

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<sup>1128</sup> The Decree on the Call for Referendum on Independence of the Republic of Croatia (25 April 1991). The Official Gazette of the Republic of Croatia No 21 (2 May 1991). The President of Croatia had the power to issue such a Decree under Article 98 of the Constitution of the Republic of Croatia (1990).

<sup>1129</sup> *Ibid.*, Article 2.

<sup>1130</sup> *Ibid.*, Article 3, my own translation.

<sup>1131</sup> The Plebiscite on the Sovereignty and Independence of the Republic of Slovenia (1990), Article 2, my own translation.

parent state and thus obscures the real question.<sup>1132</sup> Arguably, the Croatian referendum question did both. A possible loose association was a matter to be negotiated with other republics and not a pre-negotiated arrangement to be tested at a referendum. Further, the question on actual independence of Croatia was only implied in the first choice and to some degree obscured within a broader question. The wording of the referendum question actually suggests a situation in which Croatia at that time would already be a sovereign state and its population was given a choice to join a loose association of former Yugoslav states. This was, however, not the case on 19 May 1991, when the referendum was held.

Nevertheless, it is questionable whether Canadian standards can be transplanted to the situation in Croatia in 1991. The referendum question makes a reference to the Croatian and Slovenian proposal at that time that the SFRY would transform itself into a loose association of independent states.<sup>1133</sup> It is questionable whether political elites in Croatia and Slovenia really believed that such an association was feasible.<sup>1134</sup> Due to the internal political situation in the SFRY<sup>1135</sup> and reactions of the international community to the aspirations of Croatia and Slovenia to become independent states,<sup>1136</sup> the proposal aimed to express strive for independence in milder language. The ambiguous and implicit question on independence at the Croatian referendum should therefore be ascribed to political situation, while there existed no doubt among the population of Croatia that this was a referendum on independence. Such a perception was implicitly confirmed by the

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<sup>1132</sup> See supra n. 1119.

<sup>1133</sup> Pavković and Radan (2007), p. 147.

<sup>1134</sup> Ibid.

<sup>1135</sup> At that time Croatian police forces had already engaged in armed conflict with Serbian paramilitary groups. See supra n. 457.

<sup>1136</sup> The international community did not favour the independence of Croatia and Slovenia. See Cohen (1995), pp. 217–22. Compare supra notes 707 and 716.

Serb population of Croatia, who boycotted the referendum out of opposition to Croatia's path to independence.<sup>1137</sup>

To specify the majority required for ascertaining the will of the people at the referendum, the Decree on the Call for Referendum on Independence of the Republic of Croatia adopted the referenda rules spelled out in Article 87 of the Constitution of the Republic of Croatia:<sup>1138</sup> “At a referendum, a decision is taken by the majority of voters who cast votes, under the condition that majority of the eligible to vote cast their votes at the referendum.”<sup>1139</sup> The required majority was thus less demanding than was the case in Slovenia, where a majority of all eligible to vote was required.<sup>1140</sup> The majority of all eligible to vote was nevertheless achieved. At a turnout of 83.56 percent of all eligible to vote, 94.17 percent of votes cast were in favour of independence.<sup>1141</sup> In absolute shares this means that independence of Croatia was supported by 78.69 percent of all eligible to vote.

In its Opinion 5, the Badinter Commission noted that it took the referendum results from 19 May 1991 into account;<sup>1142</sup> however, the boycott of the referendum by the Serb population was not invoked. Thus, the Badinter Commission was ready to accept that Croatian Serbs were outvoted by the Croat majority. On the other hand, the Badinter Commission insisted on implementation of adequate mechanisms for protection of minority rights before Croatia could be recognised as an independent

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<sup>1137</sup> Twelve percent of the population of Croatia was of Serb ethnic origin and opposed the declaration of independence. Raič (2002), p. 349. Already prior to the referendum on the declaration of independence, Serbs in Croatia proclaimed that they no longer accepted Croatia's authority. (Ibid.). As a result, an entity called Kninska Krajina was established (Ibid., p. 388). See supra ch. 4.3.3.

<sup>1138</sup> The Decree on the Call for Referendum on Independence of the Republic of Croatia (1991), preamble.

<sup>1139</sup> Constitution of the Republic of Croatia (1990), Article 87, para 2, my own translation.

<sup>1140</sup> See supra n. 1126.

<sup>1141</sup> See A Short Summary of Croatian History <<http://www.andrija-hebrang.com/povijest.htm#nastanak>>.

<sup>1142</sup> The Badinter Commission, Opinion 5 (11 January 1992), point 4.

state.<sup>1143</sup> Such a standard is *mutatis mutandis* similar to the one later established by the Clarity Act in Canada, which provides that no secession may occur if, *inter alia*, sufficient minority rights protection standards in the secession-seeking territory are not implemented.<sup>1144</sup> This requirement may be interpreted as a safeguard against the tyranny of the majority which can follow decision-making based on majoritarian principles. Further, the Badinter Commission also applied the *uti possidetis* principle,<sup>1145</sup> which will be further discussed below.

Croatia declared independence on 25 June 1991,<sup>1146</sup> referring to Article 140 of the Constitution of Croatia:

The republic of Croatia shall remain a constitutive part of the SFRY until a new agreement of the Yugoslav republics is achieved or until the Assembly of the Republic of Croatia decides otherwise.

Shall an act or procedure of a federal body or of a body of another republic or province member of the federation constitute a violation of territorial integrity of the Republic of Croatia, or shall she be brought into an unequal position in the federation, or shall her interests be threatened, the organs of the Republic shall, stemming from the right of self-determination and the sovereignty of the Republic of Croatia, affirmed by this Constitution, deliver necessary decisions, regarding the protection of sovereignty and interests of the Republic of Croatia.<sup>1147</sup>

Importantly, Article 140 did not declare that Croatia had a ‘right to secession’ by virtue of the right of self-determination alone but obviously resorted to the ‘remedial secession’ doctrine. As has been argued above, such a claim is not unproblematic.<sup>1148</sup>

#### **5.4.3.3. Bosnia-Herzegovina**

The Badinter Commission referred to the three ethnic groups constituting Bosnia-Herzegovina as ‘peoples’ and not to a people of Bosnia-Herzegovina.<sup>1149</sup> Further, the

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<sup>1143</sup> See supra ch. 4.3.3.

<sup>1144</sup> Clarity Act (2000), Article 2.3.

<sup>1145</sup> See supra ch. 4.3.1.

<sup>1146</sup> The Constitutional Decree of the Assembly of the Republic of Croatia on Sovereignty and Independence of the Republic of Croatia (25 June 1991).

<sup>1147</sup> The Constitution of the Republic of Croatia (1990), Article 140, my own translation.

<sup>1148</sup> See supra notes 1077 and 1078.

Badinter Commission expressly held that the right of self-determination applies to the Serbian populations in Bosnia-Herzegovina and in Croatia, respectively.<sup>1150</sup> It thus follows that the right of self-determination applies to all three constitutive ethnic groups in Bosnia-Herzegovina. It needs to be recalled that the Badinter Commission held that applicability of the right of self-determination did not give the Serbian population of Bosnia-Herzegovina the right to found their own state.<sup>1151</sup> However, as follows from the Opinion on Bosnia-Herzegovina, the Badinter Commission held that the will of the people (or, perhaps, of peoples) of Bosnia-Herzegovina was unclear, i.e. had not been ascertained. The reasoning behind such a conclusion was obviously rooted (also) in the political activities of the Serbian population of Bosnia-Herzegovina (e.g. the attempt at secession of Republika Srpska).<sup>1152</sup>

In order to ascertain the will of the people in Bosnia-Herzegovina, the Badinter Commission suggested a referendum.<sup>1153</sup> A referendum was not proclaimed the only means of expression of the will of the people (or peoples), however, the Badinter Commission did not specify what other means could also be acceptable.

On 27 January 1992, the Assembly of Bosnia-Herzegovina adopted the Decree on the Call of the Republic's Referendum for Affirming of the Status of Bosnia and Herzegovina.<sup>1154</sup> The referendum question reads: "Do you support sovereign and independent Bosnia-Herzegovina, a state of equal citizens, peoples of Bosnia-Herzegovina – Muslims, Serbs, Croats and people of other nationalities who live in Bosnia-Herzegovina?"<sup>1155</sup>

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<sup>1149</sup> The Badinter Commission, Opinion 4 (11 January 1992).

<sup>1150</sup> The Badinter Commission, Opinion 2 (11 January 1992).

<sup>1151</sup> The Badinter Commission, Opinion 4 (11 January 1992).

<sup>1152</sup> *Ibid.*, especially para 3 & 4.

<sup>1153</sup> *Ibid.*, para 4.

<sup>1154</sup> The Decree on the Call of the Republic's Referendum for Affirming of the Status of Bosnia and Herzegovina, The Official Gazette of the Republic of Bosnia and Herzegovina, No. 2 (27 January 1992) (my own translation). For more on the background to the referendum see *supra* ch. 4.3.4.

<sup>1155</sup> *Ibid.*, Article 3.

The referendum question was thus clear, although it notably avoided wording such as ‘Do you agree that Bosnia-Herzegovina becomes an independent state?’ The omission of a more specific wording probably needs to be ascribed to the fact that, at the request of the Badinter Commission, the referendum was held after Bosnia-Herzegovina had already declared independence and after the Badinter Commission had already held that the SFRY was in the process of dissolution.<sup>1156</sup> In the perception of its central government, Bosnia-Herzegovina at that time already existed as an independent, though non-recognised, state.<sup>1157</sup> Such a perception also stems from the title of the Decree calling for a referendum, which expressly suggests affirming and not determining the status of Bosnia-Herzegovina. It may well be that the central government did not want the referendum question to imply that Bosnia-Herzegovina was not a state at the time of the referendum.

For the referendum rules, the Act on Referenda of the Socialist Republic of Bosnia-Herzegovina from 1977 was used.<sup>1158</sup> This act foresaw decision-making with a majority of all valid votes cast and without any special guarantees to the constitutive peoples of Bosnia-Herzegovina that they would not be outvoted by the other two constitutive peoples.<sup>1159</sup>

The referendum on independence of Bosnia-Herzegovina was boycotted by the Serb population while Bosnian Muslims and Bosnian Croats overwhelmingly supported an independent state of Bosnia-Herzegovina. The result was sixty-three percent of all eligible to vote in favour of independence.<sup>1160</sup> The boycotting Serb

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<sup>1156</sup> For details see supra ch. 4.3.1.

<sup>1157</sup> It needs to be recalled that the Badinter Commission held that Bosnia-Herzegovina became a state on the date when referendum results were declared. The same critical date for Bosnia-Herzegovina’s becoming a state was also adopted by the ICJ in the *Bosnia Genocide case*. See supra ch. 4.3.4.

<sup>1158</sup> The Act on Referenda of the Socialist Republic of Bosnia-Herzegovina, The Official Gazette of the Socialist Republic of Bosnia and Herzegovina No 29/77 (1977).

<sup>1159</sup> Ibid, Article 28.

<sup>1160</sup> For more on the declaration of independence of Bosnia-Herzegovina and its subsequent recognition as an independent state see supra ch. 4.3.4.

population (31.3 percent of the entire population of Bosnia-Herzegovina) counted in the mathematical total of one hundred percent.<sup>1161</sup> The referendum results were nevertheless deemed an expression of the will of the people in favour of independence. Bosnian Serbs were thus outvoted and, although they were bearers of the right of self-determination, not given a chance to seek an arrangement which they preferred. Indeed, the Badinter Commission held that they could only consummate the right of self-determination in its internal mode.<sup>1162</sup> One possible interpretation is that the majoritarian understanding of democracy had prevailed.

While the right of self-determination is, in general, virtually confined to consummation in its internal mode,<sup>1163</sup> it is significant that Bosnia-Herzegovina was a new state creation and one of its constitutive peoples was unified in this state arrangement against its wishes and without its consent. This problem cannot be only ascribed to the majoritarian principles of democracy, as the *uti possidetis* principle was also applied by the Badinter Commission.<sup>1164</sup> This issue will be further discussed below.

#### **5.4.3.4. Macedonia**

The Macedonian referendum question reads: “Are you in favour of an independent Macedonia with a right to enter into a future association of sovereign states of Yugoslavia?”<sup>1165</sup> Similarly to the Croatian referendum question, the Macedonian question also mentioned the possibility of loose association of sovereign states in the territory of the SFRY. The Macedonian referendum question asked voters on independence, but the question was not as straightforward as the referendum

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<sup>1161</sup> See supra ch. 4.3.4.

<sup>1162</sup> See the Badinter Commission, Opinion 2 (11 January 1992).

<sup>1163</sup> See supra ch. 5.3.

<sup>1164</sup> See supra ch. 4.3.1.

<sup>1165</sup> See Ден што веднаш стана историја (Den shto vednash stana istorija), my own translation <<http://217.16.70.236/?pBroj=1349&stID=2147477716>>.

question in Slovenia.<sup>1166</sup> An argument can be made that a possibility of a new Yugoslav association – an association of sovereign states – to some degree also obscured the real question and it is questionable whether it would pass the ‘clarity test’ set in the Canadian Clarity Act.<sup>1167</sup> A possible interpretation is that the political elite sought approval on two different issues: (i) the independence of Macedonia, and (ii) a mandate to negotiate Macedonia’s entry into a possible loose Yugoslav association, premised on sovereignty of its member states. However, if this was the purpose of the referendum question, it should have been expressed in two separate questions in order to avoid ambiguity.

A majority of 72.16 percent of all eligible to vote supported Macedonia’s independence.<sup>1168</sup> As was argued in the previous chapter, the Badinter Commission held that Macedonia had implemented relevant minority protection mechanisms and dedicated most of its reasoning to Macedonia’s misunderstanding with Greece over its name and called for Macedonia’s unequivocal renouncing of territorial claims toward Greece.<sup>1169</sup>

#### **5.4.3.5. The Federal Republic of Yugoslavia**

Although the FRY was a new state creation, it was only at the end of the Milošević regime in 2000 when the FRY itself acknowledged this fact, most notably by applying for membership of the UN.<sup>1170</sup> In these circumstances no consultation was held either in Serbia or Montenegro on the question of whether the population of these two republics approved the creation of the FRY. Instead, the view that there was no new state-creation was expressly affirmed in the preamble to the Constitution

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<sup>1166</sup> See supra n. 1126.

<sup>1167</sup> See supra ch. 5.4.2.2.

<sup>1168</sup> Trifunovska (1994), p. 345.

<sup>1169</sup> See supra ch. 4.3.5.

<sup>1170</sup> See supra n. 665.

of the FRY from 1992, which claimed the FRY's continuity with the international personality of the SFRY.<sup>1171</sup>

The example of the FRY perhaps points out some contradictions of the EC's involvement in the dissolution of the SFRY. While the Badinter Commission held that the SFRY was in the process of dissolution,<sup>1172</sup> the EC Guidelines invited its constitutive republics to opt for recognition as independent states.<sup>1173</sup> At the same time the EC Guidelines and the Badinter Commission did not address the question of republics that might not want to become independent states. The problem is that the parent state, according to the Badinter Commission, no longer existed and therefore the alternative to independence was not a continued status within the SFRY but an association in a new state-formation – the FRY. Such an association would, however, also require the approval of the peoples in question.

Nevertheless, this was a problem only in Serbia and in Montenegro, where no significant independence movements existed at that time, while the problem in Bosnia-Herzegovina was only theoretical. The referendum on independence in Bosnia-Herzegovina was held after the EC Declaration had already invited the Yugoslav republics to opt for recognition as independent states and after the Badinter Commission already held that the SFRY was in the process of dissolution.<sup>1174</sup> This was not the case in Slovenia, Croatia and Macedonia,<sup>1175</sup> where referenda were held and independence proclaimed before the adoption of the EC Guidelines and before the Badinter Commission delivered its first opinion.<sup>1176</sup> In theory, if the population of Bosnia-Herzegovina rejected the independence option at the referendum, it is not

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<sup>1171</sup> The Constitution of the FRY (1992), preamble. See also supra ch. 4.3.6.

<sup>1172</sup> The Badinter Commission, Opinion 1 (29 November 1991).

<sup>1173</sup> See supra ch. 4.2.2.1.

<sup>1174</sup> See supra ch. 4.3.1.

<sup>1175</sup> Macedonia declared independence only twelve days before the Badinter Commission issued its Opinion 1. See supra ch. 4.3.5.

<sup>1176</sup> See supra ch. 4.3.

possible to say that this would be a proper expression of the will of the people to join the newly-created FRY. However, given the fact that the SFRY no longer existed, no other choice was left.<sup>1177</sup>

The fact that there was no referendum on association held in Serbia and in Montenegro cannot be *per se* deemed a violation of the right of self-determination. The Badinter Commission's opinion on Bosnia-Herzegovina can be interpreted in a way that referendum is a means to ascertain the will of the people but not the only one.<sup>1178</sup> Further, the standard established by the ICJ in the *Western Sahara Opinion* allows for circumstances in which the will of the people is obvious and popular consultations are not necessary.<sup>1179</sup> It is probably safe to conclude that no doubt exists that a federation between Serbia and Montenegro was at that time the undisputed wish of the vast majority of Serbs and Montenegrins.<sup>1180</sup>

#### **5.4.3.6. Montenegro**

It has been argued that Montenegro's secession from the SUSM was expressly permitted under Article 60 of the Constitution of the SUSM.<sup>1181</sup> The same article also demanded a referendum for secession to take place; however, it did not specify the referendum rules.<sup>1182</sup> The latter again became subject to EU involvement. The EU imposed the Independence Referendum Act, which required that secession be confirmed by a majority of fifty-five percent of votes cast, under the condition of participation of at least fifty percent plus one vote of those eligible to vote.<sup>1183</sup> The

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<sup>1177</sup> In the example of Bosnia-Herzegovina necessary caveats apply, as one of its constitutive peoples opposed independence and demanded either independence for its own entity or continuation in association with Serbia and Montenegro. See supra ch. 4.3.4. and 5.4.3.3.

<sup>1178</sup> See supra ch. 5.4.3.3.

<sup>1179</sup> Compare supra n. 1117.

<sup>1180</sup> Compare supra n. 852.

<sup>1181</sup> For more see supra ch. 4.5.2.

<sup>1182</sup> The Constitution of SUSM (2003), Article 60.

<sup>1183</sup> The Act on Referendum on State-Legal Status of the Republic of Montenegro, The Official Gazette of the Republic of Montenegro No 12/06 (2 March 2006), Article 6.

required majority was probably based on opinion polls suggesting that approximately half of the population supported independence while a relatively large share of the population determinedly opposed it.<sup>1184</sup> The referendum question was unambiguous: “Do you agree that the Republic of Montenegro becomes an independent state with a full international legal personality?”<sup>1185</sup>

At the referendum held on 21 May 2006, independence was supported by 55.53 percent of those who voted at a turnout of 86.49 percent of all eligible to vote.<sup>1186</sup> As the referendum results show, the support for independence barely met the EU-imposed fifty-five percent requirement. The threshold was thus described as a political gamble as it would be quite possible that the result would fall in the ‘grey zone’ between fifty and fifty-five percent.<sup>1187</sup> In such a circumstance:

Montenegro’s government would have been legally unable to declare independence. At the same time it would have viewed the referendum result as a mandate to further weaken the State Union. The unionists would have viewed the result as a victory and demanded immediate parliamentary elections and closer ties with Belgrade.<sup>1188</sup>

Although politically risky, the EU-imposed majority requirement contributed toward the legitimacy of decision-making. The EU feared that the proponents of a union would boycott the referendum and thus endanger its democratic legitimacy.<sup>1189</sup> The referendum formula, however, gave union advocates reasonable hope that the referendum on secession would not be successful and thus motivated them to mobilise their supporters to take part in the vote. By avoiding either a boycott of advocates of a union with Serbia or victory of the proponents of Montenegrin

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<sup>1184</sup> See supra ch. 4.5.2.

<sup>1185</sup> The Act on Referendum on State-Legal Status of the Republic of Montenegro (2006), Article 5, my own translation.

<sup>1186</sup> Svet ministara državne zajednice Srbija i Crna Gora, Direkcija za informisanje (24 May 2006) <[http://www.info.gov.yu/saveznavlada/list\\_detalj.php?tid=1&idteksta=15132](http://www.info.gov.yu/saveznavlada/list_detalj.php?tid=1&idteksta=15132)>.

<sup>1187</sup> International Crisis Group, Briefing No. 42, Montenegro’s Referendum (30 May 2006), p. 6.

<sup>1188</sup> Ibid.

<sup>1189</sup> See International Crisis Group, Briefing No. 42 (30 May 2006), p. 2

independence with a narrow majority of, in theory, merely a vote over fifty percent, the referendum was given broader democratic legitimacy.

The example of Montenegro also proves that the question of a relevant majority for a consultation to be considered an expression of the will of the people does not need to be limited to the choice between a majority of all eligible to vote and a majority of all (valid) votes cast. Nevertheless, it needs to be pointed out that in absolute shares Montenegrin independence was supported by 48.02 percent of all eligible to vote. If, for example, the Slovenian standard of majority of all people eligible to vote were applied,<sup>1190</sup> Montenegro would have been unable to declare independence.

#### **5.4.3.7. Eritrea**

In the environment of a consensual secession, i.e. with the approval of Ethiopia,<sup>1191</sup> the UN-sponsored referendum in Eritrea<sup>1192</sup> was unambiguous from the point of view of both the question asked as well as popular support. The referendum question reads as follows: “Are you in favour of Eritrea becoming an independent, sovereign State?”<sup>1193</sup> At a participation of 93.9 percent, 99.8 percent of votes cast were in favour of independence.<sup>1194</sup> Independence was thus supported by 94.06 percent of all eligible to vote. Due to the consensual nature of the new state-creation, international recognition promptly followed.<sup>1195</sup>

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<sup>1190</sup> Compare supra n. 1126.

<sup>1191</sup> See supra ch. 4.4.3.

<sup>1192</sup> Ibid.

<sup>1193</sup> See Elections in Eritrea <<http://africanelections.tripod.com/er.html>>.

<sup>1194</sup> Ibid.

<sup>1195</sup> For details see supra ch. 4.4.3.

#### 5.4.3.8. East Timor

On 5 May 1999, the Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor was concluded.<sup>1196</sup> The Agreement comprehended a document entitled ‘A Constitutional Framework for a Special Autonomy for East Timor’, which provided for autonomy of East Timor within Indonesia.<sup>1197</sup> The Agreement, however, foresaw consultation of the people of East Timor on the autonomy arrangement. The consultation was conducted under UN auspices.<sup>1198</sup>

The popular consultation on the acceptance or rejection of the autonomy arrangement, which would lead to independence, was further affirmed by Resolution 1246 of the UN Security Council.<sup>1199</sup> Neither the Agreement nor Resolution 1246 specified the required majority or the exact referendum questions. Neither was the majority-requirement specified in the Agreement Regarding the Modalities for the Popular Consultation of the East Timorese through a Direct Ballot, which was also concluded between Indonesia and Portugal on 5 May 1999.<sup>1200</sup>

As follows from the Agreement between Indonesia and Portugal, the interpretation of the referendum results was left to the Secretary-General. Some guidelines on standards adopted by the Secretary-General in regard to the referendum rules follow from the Report of the Secretary-General on the Question of East Timor from 5 May 1999:

[S]hould the popular consultation result in a majority of the East Timorese people rejecting the proposed special autonomy, the Government of Indonesia would take the constitutional steps necessary to terminate Indonesia's links with East Timor, thus restoring under Indonesian law the

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<sup>1196</sup> UN Doc S/1999/513 (5 May 1999), Annex 1. See also Martin (2001), pp. 15–34.

<sup>1197</sup> UN Doc S/1999/513 (5 May 1999), Appendix.

<sup>1198</sup> UN Doc S/1999/513 (5 May 1999), paras 1–8.

<sup>1199</sup> *Ibid.*, para 1.

<sup>1200</sup> UN Doc S/1999/513 (5 May 1999), Annex 2.

status that East Timor held prior to 17 July 1976, and that the Governments of Indonesia and Portugal would agree with the Secretary-General on arrangements for a peaceful and orderly transfer of authority in East Timor to the United Nations, which would then initiate a process enabling East Timor to begin a transition towards independence.<sup>1201</sup>

By reference to the “majority of the East Timorese people”,<sup>1202</sup> the Secretary-General, perhaps, wanted to set a standard according to which a decision is taken by the more demanding majority of all eligible to vote and not by that of all valid votes cast. However, such a conclusion cannot be straightforward.

Two unambiguous questions were asked at the referendum:

Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?

Do you reject the proposed special autonomy for East Timor, leading to East Timor’s separation from Indonesia?<sup>1203</sup>

In light of the somewhat undefined majority that determines the will of the people, if the Secretary-General’s reference to the “majority of the East Timorese people”<sup>1204</sup> is interpreted as a requirement for the majority of all people eligible to vote, it is unclear what would have happened if neither of the two possibilities received the required support. In the absence of any other possibility, the Secretary-General would probably need to declare the winning choice to be the one which received the majority of all valid votes cast.

Nevertheless, the ambiguity associated with the required majority was not proven to be a problem in practice. The people of East Timor rejected the autonomy arrangement and supported the course to independence with 78.5 percent of votes

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<sup>1201</sup> Ibid., para 2.

<sup>1202</sup> Ibid.

<sup>1203</sup> Ibid., Annex 2, para B.

<sup>1204</sup> See supra n. 1201.

cast, at a participation of 98.6 percent.<sup>1205</sup> This means that independence was supported by 77.4 percent of all eligible to vote in East Timor.

#### **5.4.4. The dissolution of the Soviet Union and popular consultations**

##### **5.4.4.1. The circumstances of the dissolution of the Soviet Union**

The dissolution of the Soviet Union was an outcome of the rather complicated political situation in this federation. The decisive development was a power contest between the Soviet Leader Mikhail Gorbachev and the then already elected President of Russia, Boris Yeltsin.<sup>1206</sup> The failed putsch attempt of a group of Soviet officials in August 1991 further weakened Gorbachev and the federal organs and strengthened Yeltsin and his agenda to undermine the federation.<sup>1207</sup> In the post-putsch environment of a virtually non-functioning federation and with the former Baltic republics having been recognised as independent states, “independence for the republics [was] essentially a matter of declaring it.”<sup>1208</sup>

Notably, independence was initially not on the agenda of the political leadership in all of the Soviet republics. Indeed, Yeltsin’s primary goal was to undermine Gorbachev’s power and not to disrupt the Soviet Union.<sup>1209</sup> The latter may be described as a side-effect of the primary goal. Meanwhile, the Ukrainian leadership, faced with a strong pro-independence movement, only co-opted independence ideas at the end of 1990.<sup>1210</sup> In the Central Asian republics, political elites initially opposed the referendum on the future of the Soviet Union<sup>1211</sup> but “once it became clear it would occur, they sought a way to co-opt nationalist

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<sup>1205</sup> See Crawford (2006), p. 561. For more on East Timor's course to independence, see *supra* ch. 4.5.1.

<sup>1206</sup> Kotkin (2001), p. 103.

<sup>1207</sup> See *ibid.* for a detailed account on the situation.

<sup>1208</sup> Brady and Kaplan (1994), p. 192.

<sup>1209</sup> Kotkin (2001), p. 104.

<sup>1210</sup> *Ibid.*, p. 105.

<sup>1211</sup> See *infra* ch. 5.4.4.2.

sentiment.”<sup>1212</sup> Nevertheless, “up until the very last minute ... almost all of Central Asia’s leaders maintained hope that the Union could be saved.”<sup>1213</sup> In many republics independence was not a result of secessionist activities but rather an outcome of political developments in the Soviet Union. Therefore for the most part “it was not nationalism *per se*, but the structure of the Soviet state ... that proved fatal to the USSR.”<sup>1214</sup>

#### **5.4.4.2. The all-Union referendum and its variations**

Faced with opposition from anti-reform Party hardliners, demands of the groups seeking democratisation, secessionist claims by some republics and Yeltsin’s attempt to usurp the Soviet state-institutions and put them in service of Russia, Gorbachev called for an all-Union referendum on the future of the Soviet Union<sup>1215</sup> with an aim “to obtain the authority he needed to keep the Soviet Union intact.”<sup>1216</sup>

The referendum was held on 17 March 1991<sup>1217</sup> and the question read: “Do you consider necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign republics, in which the rights and freedoms of an individual of any nationality will be fully guaranteed?”<sup>1218</sup> The required majority for the preservation of the Soviet Union to be voted for was fifty percent of those who voted.<sup>1219</sup> Other referendum rules were somewhat unclear and results open to different interpretations “so that success could be claimed for a variety of different outcomes.”<sup>1220</sup> It was not specified what the consequences of a negative answer

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<sup>1212</sup> Brady and Kaplan (1994), p. 194.

<sup>1213</sup> Kotkin (2001), p. 40.

<sup>1214</sup> *Ibid.*, p. 106.

<sup>1215</sup> Brady and Kaplan (1994), p. 187.

<sup>1216</sup> *Ibid.*

<sup>1217</sup> *Ibid.*, p. 186.

<sup>1218</sup> *Ibid.*, p. 187.

<sup>1219</sup> See Taagepera (1993), p. 193.

<sup>1220</sup> Brady and Kaplan (1994), p. 188.

would be, either by the entire population of the Soviet Union or by a single republic. Further, the question did not imply how the federation would be renewed.

The referendum proposal was not unanimously accepted by the Soviet Republics and approaches toward the referendum question were not uniform. The referendum was boycotted by six out of the fifteen republics: Armenia, Estonia, Georgia, Latvia, Lithuania and Moldova.<sup>1221</sup> Estonia, Latvia and Lithuania also held referenda on independence prior to 17 March 1991, when the all-Union referendum was scheduled.<sup>1222</sup> Armenia held a separate independence referendum after this date.<sup>1223</sup> Of those Soviet republics which did not boycott the all-Union referendum, special referenda on independence prior to the dissolution of the Soviet Union on 8 December 1991 were held in Turkmenistan<sup>1224</sup> and Ukraine.<sup>1225</sup> On 29 December 1991, when the Soviet Union had already been dissolved, special referenda on independence were also held in Azerbaijan and Uzbekistan.<sup>1226</sup> In three Soviet republics: Kazakhstan, Kirghizia and Uzbekistan no specific referenda on independence were held but the question of the all-Union referendum was modified

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<sup>1221</sup> Ibid.

<sup>1222</sup> See supra ch. 4.4.1.

<sup>1223</sup> At the Armenian referendum held on 21 September 1991 (announcing it before the all-Union referendum was scheduled), independence was supported by 99.3 percent of those who voted, at a turnout of 95.1 percent. Brady and Kaplan (1994), p. 193.

<sup>1224</sup> In Turkmenistan, the independence referendum was organised on 26 October 1991. The referendum question on independence was presented along with “a vaguely worded question about support for the domestic and foreign policy of the president of the Supreme Soviet of Turkmenistan.” Brady and Kaplan (1994), p. 201. Independence, along with the question on foreign and domestic policies, was supported by 97.4 percent of those who voted at a turnout of 94.1 percent. (Ibid.).

<sup>1225</sup> The referendum on independence of Ukraine was held on 1 December 1991. The referendum question read: “Do you support the Act of the Declaration of the Independence of Ukraine?” At a participation rate of 84.18 percent, 90.32 of votes cast were in favour of independence. This means that 76.03 percent of all eligible to vote supported an independent Ukraine. See Electoral Geography: Ukraine <<http://www.electoralgeography.com/new/en/countries/u/ukraine/ukraine-independence-referendum-1991.html>>.

<sup>1226</sup> Independence referenda in Azerbaijan and Uzbekistan were held subsequently, after the Soviet Union had already been dissolved. In the absence of any other option, independence of Azerbaijan was confirmed by 99.6 percent of those who voted at a turnout of 95.3 percent of all eligible to vote. Brady and Kaplan (1994), p. 193. The independence of Uzbekistan was confirmed by 98.2 percent of those who voted at a turnout of 94 percent of all eligible to vote. (Ibid.).

to imply the possible creation of a sovereign state.<sup>1227</sup> In Russia the all-Union referendum question was also modified but it did not ask on independence.<sup>1228</sup> In Moldova, neither the all-Union referendum (in any of its variations) nor a specific independence referendum was ever held.<sup>1229</sup>

The dissolution of the Soviet Union was an outcome of internal political developments, in which independence referenda did not play the decisive role. In the absence of any other choice, they merely confirmed the emergence of new states.

#### **5.4.5. Summary of popular consultation standards**

The practice of independence referenda in situations of successful post-1991 state creations might form a base for the development of rules of customary international law regulating the legal significance of independence referenda and procedural rules to be followed at such consultations. The following rules have been identified in this section: (i) a democratically-expressed will of the people in favour of an independent state puts an obligation on both the secession-seeking entity and its parent state to negotiate the future legal status of the secession-seeking entity but there is no

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<sup>1227</sup> In Kazakhstan, Kirghizia and Uzbekistan, the all-Union referendum question was modified to imply creation of a sovereign state. The referendum questions in Kirghizia and Uzbekistan read: “Do you consider it necessary the preservation of the Union of Soviet Socialist Republics as a renewed federation of equal sovereign states, in which the rights and freedoms of an individual of any nationality will be fully guaranteed?” Brady and Kaplan (1994), p. 194. The referendum question in Kazakhstan read: “Do you consider it necessary to maintain the USSR as a union of sovereign states of equal rights?” (Ibid.). Although these questions did not directly ask on independence, the shift from ‘republics’ to ‘states’ is notable. In Kazakhstan, the turnout of the registered voters was 88.2 percent, while 94.1 of valid votes were affirmative to the question asked (and implying independence). (Ibid., pp. 190–91). In Kirghizia, the turnout of the registered voters was 92.9 and the answer was affirmative by 94.6 of those who cast their votes. (Ibid.). In Uzbekistan, the turnout of the registered voters was 95.4 percent and the answer was affirmative by 93.7 percent of those who cast their votes. (Ibid., p. 193). Unlike Kazakhstan and Kirghizia, Uzbekistan also had a special referendum on independence, which eventually took place after the Soviet Union had already been transformed to the CIS.

<sup>1228</sup> In Russia, the original question of the all-Union referendum was not modified but supplemented with a question on the popular election of the president of Russia. At the referendum, the answer to the original question of the all-Union referendum was affirmative by 71.3 percent of those who cast their votes, at a turnout of 75.4 percent of the registered voters. (Ibid.). The question on the popular election of the Russian president was supported by 69.9 percent of those who cast their votes. (Ibid., p. 194).

<sup>1229</sup> Brady and Kaplan (1994), p. 193.

presumption that such an entity would become an independent state;<sup>1230</sup> (ii) referendum cannot be considered an expression of the will of the people if there exists ambiguity either in relation to the referendum question or the winning majority;<sup>1231</sup> (iii) a referendum question should unequivocally consult on independence; (iv) the required majority can be situation-specific, but a wider majority gives the secession-seeking entity stronger arguments in negotiations with its parent state on possible secession; (v) a new state creation is not only a matter of majoritarian decision-making; therefore, adequate standards for protection of numerically inferior or otherwise non-dominant peoples and minorities will need to be implemented before a secession-seeking entity could, possibly, become an independent state.<sup>1232</sup>

## **5.5. Conclusion**

The development of the principle of self-determination in its modern meaning was closely associated with the democratic political theory, most notably with ideas of President Wilson. However, its association with the political system of liberal-democracy is rather problematic. Indeed, it is not possible to assume that the will of the people would always favour a particular political system of liberal-democracy. The limitation of a people's choice to one particular political system would, however, violate the right of self-determination and not lead to its fulfilment.

As a human right, self-determination became codified in the era of the UN Charter. However, as it is not an absolute human right, the right of self-determination is limited by other human rights, including the right of self-determination of other peoples. In non-colonial situations the right of self-determination also clashes with

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<sup>1230</sup> See supra ch. 5.4.1.2.

<sup>1231</sup> See supra ch. 5.4.2.2,

<sup>1232</sup> See supra ch. 5.4.1.2.

the principle of territorial integrity of states. Therefore, two modes for the exercise of this right need to be distinguished: internal and external.

It is generally accepted that the right of self-determination would normally be consummated in its internal mode. In this regard arguments have been made that the right of self-determination has an effect of the 'right to democracy'.<sup>1233</sup> Such arguments stem from the interdependence of human rights and from the requirement of representative government expressed in the elaboration of the principle of territorial integrity in the Declaration on Principles of International Law. In regard to the 'democratic nature' of the right of self-determination stemming from the interdependence of human rights, it was concluded that such an interpretation would require a procedural (electoral-centric) definition of human rights and a liberal-democratic reading of the so-called democratic rights, both of which were rejected in Chapter 2.

The elaboration of the principle of territorial integrity qualifies a representative government as one that does not discriminate its people based on race, colour or creed.<sup>1234</sup> This qualification currently has a broader meaning than it had at the time of drafting and now covers all identities significant for a separate people. However, it does not cover identities other than those identifying a separate people. The requirement for a representative government therefore cannot be extended to mean non-discrimination based on political opinion.

A representative government can also be a government which is not an outcome of multiparty elections. Indeed, the drafting of the Declaration on Principles of International Law expressly shows that the requirement for a representative government was not meant to interfere with a specific choice of a political or

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<sup>1233</sup> See supra ch. 2.4. and 5.3.

<sup>1234</sup> See supra ch. 5.3.3.1.2.

electoral system. Practice of UN organs shows that this attitude has not changed in the post-Cold War period. Further, despite the absence of a multiparty political system and liberal-democratic electoral procedures, the Badinter Commission implied that the SFRY was representative of all of its people prior to Serbia's usurpation of the federal organs.<sup>1235</sup>

The analysis in this chapter also shows that a multiparty electoral process itself cannot guarantee respect for the right of self-determination and does not mean a *per se* fulfilment of this right. Indeed, the electoral process can lead to a situation of a tyranny of the majority. Further, party-politics is not a sufficient channel for implementation of self-determination standards as programmes of political parties cover a wide range of issues and not only those associated with the right of self-determination.<sup>1236</sup>

When the right of self-determination is (exceptionally) consummated in its external mode, the operation of this right requires that the population of the territory in question needs to consent to the change of the legal status of a territory. This has been affirmed in jurisprudence of the ICJ,<sup>1237</sup> by the Badinter Commission,<sup>1238</sup> by state practice<sup>1239</sup> and by practice of UN organs.<sup>1240</sup> Yet it is not entirely defined how the population expresses its consent. As implied by the Badinter Commission in its opinion on Bosnia-Herzegovina, referendum would be a standard procedure for ascertainment of the will of people for the purpose of the right of self-

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<sup>1235</sup> See supra notes 1016–1018.

<sup>1236</sup> See supra n. 1025.

<sup>1237</sup> See supra n. 1111. The importance of the popular support for the change of the legal status of a territory was also implicitly affirmed in the *Bosnia Genocide case*. The ICJ held that Bosnia-Herzegovina became a state on 6 March 1992, i.e. on the day when referendum results were declared. See supra n. 632.

<sup>1238</sup> See supra n. 1153.

<sup>1239</sup> See supra ch. 5.4.

<sup>1240</sup> See supra n. 1111.

determination.<sup>1241</sup> However, the reasoning of the Badinter Commission in its opinion on Bosnia-Herzegovina, as well as the reasoning of the ICJ in the *Western Sahara Advisory Opinion*, allow for situations in which referendum would not be necessary.<sup>1242</sup> This opens the possibility of an interpretation that in situations in which no objective doubt regarding the will of the people exists, a formal popular consultation may not be necessary. This question will be further dealt with in Chapter 7. As a general rule, popular consultations prior to alteration of the legal status of a territory are required, which leads to two questions: (i) what rules apply at popular consultations, and (ii) what consequences (or entitlement) brings a decision for a change of legal status?

Some guidelines on referenda rules stem from the Canadian Clarity Act, which does not prescribe a specific majority but demands for that majority represent a clear expression of the will of the people. It further prescribes that the referendum question be free of ambiguity and not obscure the actual question on independence within a broader question, in the framework of which independence would only be implied. A detailed determination of these requirements is situation-specific. The referendum practice shows that a commonly prescribed threshold for success of a referendum is fifty percent plus one vote of all valid votes cast. At the same time, a majority of all eligible to vote is often achieved. However, if political (or societal) situation implies that a differently qualified majority would represent a clear expression of the will of people, referendum rules can prescribe a majority other than that of all valid votes cast or of all eligible to vote. Montenegro was such an example – the required majority was a political compromise which contributed to the legitimacy of the referendum. Although independence was supported by less than

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<sup>1241</sup> See supra n. 1153.

<sup>1242</sup> See supra ch. 5.4.

fifty percent of all eligible to vote, the referendum results were accepted and respected even by those who opposed Montenegro's path to independence.

In regard to the consequences (or entitlement) that a positive referendum result brings, it can be concluded that a clearly expressed will of the people in favour of independence does not create a 'right to secession'. Independence may be an automatic outcome only if secession is unambiguously allowed by the constitution of the parent state (e.g. Montenegro)<sup>1243</sup> or if approval of the parent-state is given in some other way. Although an expression of the will of the people in favour of independence does not create a 'right to secession' in situations of attempts at unilateral secession, opinions of prominent writers in the situation of Québec lead to a conclusion that democratic principles demand that such an expression of the will of the people cannot be ignored.<sup>1244</sup> A clear expression of the will of the people indicating that a people favours secession may lead to an obligation on both sides to negotiate a future legal arrangement of a territory, without any predetermined outcome.<sup>1245</sup> Since the path to independence did not get approval at the Québec referendum, Canada and Québec never had to engage in such negotiations. However, other situations have proven that such negotiations are not easy and a compromise is difficult to achieve, as secession-seeking entities are unlikely to accept anything short of independence.<sup>1246</sup>

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<sup>1243</sup> It was shown that a mere constitutional proclamation of a 'right to secession' is of little use if a constitution does not provide for a mechanism leading to secession. Creations of new states in the territories of the former SFRY and of the former Soviet Union were not based on the 'right to secession' generally granted in General Principle I of the Constitution of the SFRY and Article 72 of the Constitution of the Soviet Union, respectively. On the other hand, Article 60 of the Constitution of the SUSM provided for a clear mechanism leading to secession and was followed by Montenegro on its path to independence (see *supra* ch. 5.4.2.).

<sup>1244</sup> See *supra* n. 1095.

<sup>1245</sup> See *supra* n. 1097.

<sup>1246</sup> See *infra* ch. 7.4. for discussion on Kosovo.

## VI. THE WILL OF THE PEOPLE AND THE DELIMITATION OF NEW STATES

### 6.1. Introduction

It has been established that the right of self-determination collides with the principle of territorial integrity as well as with other human rights, including the right of self-determination of other peoples and minority rights.<sup>1247</sup> The right of self-determination is thus only exceptionally exercised in its external mode. However, when new states are created there is a question of how a territorial unit in which a people exercises the right of self-determination in its external mode is determined. It needs to be considered whether and to what degree a previously existing territorial arrangement within a parent-state can limit the will of a people when the right of self-determination is exercised in its external mode.

Initially the application of the *uti possidetis* principle outside of colonial situations will be discussed. Subsequently, an argument will be made that in some circumstances international boundaries delimit self-determination units and serve as a basis for determination of the new international border. However, this means that new minorities and numerically inferior peoples may emerge and it is questionable whether their preferences on the change of the legal status of a territory would be taken into account.

### 6.2. The creation of new states and the *uti possidetis* principle

It is firmly established in international law that new state-creations do not affect existing international borders. This follows from the Vienna Convention on the Law of Treaties,<sup>1248</sup> the Vienna Convention on Succession of States in Respect of

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<sup>1247</sup> See supra ch. 5.3. and 5.4.

<sup>1248</sup> See The Vienna Convention on the Law of Treaties (1969), Article 62(2a). Notably, the ICJ has held that Article 62 codified customary international law. See the *Gabčíkovo-Nagymaros Project case*, ICJ Rep 1997, para 46.

Treaties<sup>1249</sup> and from the jurisprudence of the ICJ.<sup>1250</sup> The SFRY, for example, bordered Italy, Austria and (partly) Hungary from the territory of Slovenia. When Slovenia became an independent state, these international borders were not subject to any controversy but became borders of Slovenia with these three states.

The establishment of borders between former units of a parent-state or between a newly independent state and the remainder of its former parent-state is, however, much more controversial. In the age of decolonisation the *uti possidetis* principle was developed.<sup>1251</sup> This principle was applied to “upgrade” administrative colonial boundaries to international borders, initially in Latin America and subsequently also in Africa. The modern meaning of the *uti possidetis* principle is captured in the following observation of the Chamber of the ICJ in the *Frontier Dispute case*:

The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions of colonies all subject to the same sovereign.

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<sup>1249</sup> See The Vienna Convention on Succession of States in Respect of Treaties (1978), Article 11. This article, *inter alia*, provides that a succession of states does not affect “a boundary established by a treaty.”

<sup>1250</sup> The standard that the delimitation, which stems from a treaty, is permanent regardless of the later fate of that treaty was established in the *Temple of Preah Vihear case*, ICJ Rep 1962, p. 34, where the ICJ argued: “In general, when two countries establish a frontier between them, one of the primary objects is to achieve stability and finality. This is impossible if the line so established can, at any moment, and on the basis of a continuously available process, be called in question, and its rectification claimed, whenever any inaccuracy by reference to a clause in the parent treaty is discovered. Such a process could continue indefinitely, and finality would never be reached so long as possible errors still remained to be discovered. Such a frontier, so far from being stable, would be completely precarious.” The standard was even more unequivocally affirmed in the *Libya/Chad case*, ICJ Rep 1994, paras 72 and 73, where the ICJ argued: “A boundary established by treaty ... achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary ... [W]hen a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the treaty under which the boundary is agreed.” *Ibid.*, para 73

<sup>1251</sup> The principle otherwise originates in Roman law, where it was used to determine a provisional status of property in private land claims. However, in its modern appearance it was used to permanently determine the territory of a newly emerging state. See Ratner (1996), pp. 592–93.

In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term.<sup>1252</sup>

In Latin America, the application of *uti possidetis* in the early nineteenth century had two major purposes: First, “to ensure that no land in South America remained *terra nullius* upon independence, open to possible claim by Spain or other non-American powers”<sup>1253</sup>; and second “to prevent conflicts among the new states of the former empire by adopting a set of extant boundaries.”<sup>1254</sup> The *uti possidetis* principle, however, did not prevent border disputes and led to some controversy over the question whether it should be applied based on express possession stemming from legal documents (*uti possidetis juris*) or based on effective possession (*uti possidetis facto*).<sup>1255</sup>

The view that the *uti possidetis* principle cannot itself solve all border disputes, as well as the difference between the two understandings of the mode of application of the principle, were pointed out in the *Land, Island and Maritime Frontier Dispute case*.<sup>1256</sup> The Chamber of the ICJ also observed that the application of *uti possidetis* is difficult because in Spanish Central America “there were administrative boundaries of different kinds or degrees”<sup>1257</sup> and held that:

[I]t has to be remembered that no question of international boundaries could ever have occurred to the minds of those servants of the Spanish Crown who established administrative boundaries; *uti possidetis juris* is essentially a retrospective principle, investing as international boundaries administrative limits intended originally for quite other purposes.<sup>1258</sup>

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<sup>1252</sup> *Burkina Faso v Mali*, ICJ Rep 1986, para 23.

<sup>1253</sup> Ratner (1996), p. 593.

<sup>1254</sup> *Ibid.*, pp. 593–94.

<sup>1255</sup> A detailed analysis of these issues is beyond the scope of this thesis. For more on border disputes in Latin America and on the two different versions of application of the *uti possidetis* principle see Bartoš (1997), pp. 44–48. For the difference between *uti possidetis juris* and *uti possidetis facto* also see *El Salvador v Honduras* (Nicaragua intervening), ICJ Rep 1992, para 40.

<sup>1256</sup> *El Salvador v Honduras* (Nicaragua intervening), ICJ Rep 1992, para 41.

<sup>1257</sup> *Ibid.*, para 43.

<sup>1258</sup> *Ibid.*

Latin American states have expressly accepted the applicability of the *uti possidetis* principle on their continent. This was done “either in national constitutions or in their relations *inter se*.”<sup>1259</sup>

In Africa, borders were established by European colonial powers, with little regard for the local population. Indeed:

The European colonialists who arrived [to Africa] in large numbers in the eighteenth century did not draw lines immediately. Rather, each state made claims, leading to the recognition of spheres of influence, followed by more defined allocations, specific delimitations, and eventual alterations based on experience. Drawing these borders with only slight knowledge of or regard to local inhabitants or geography, the European powers made territorial allocations to reduce armed conflict among themselves. In that sense alone they were rational.<sup>1260</sup>

Regardless of the nature of colonial boundaries, in the time of decolonisation the *uti possidetis* principle was applied.<sup>1261</sup> Although the *uti possidetis* principle was not expressly mentioned in legally binding instruments, it was at least subsequently affirmed by the Charter of the Organisation of African Unity (OAU). Article 3(3) affirms “[r]espect for the sovereignty and territorial integrity of each State and for its inalienable right to independent existence.”<sup>1262</sup> The inviolability of borders in Africa was also affirmed by Resolution 16(I) of the Assembly of the OAU, which provided that “the borders of African States, on the day of their independence, constitute a

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<sup>1259</sup> Bartoš (1997), p. 47. Brazil, the only former colonial possession in Latin America which not Spanish, also concluded treaties affirming the *uti possidetis* principle with its neighbouring states.

<sup>1260</sup> Ratner (1996), p. 595.

<sup>1261</sup> The solution that the former colonial borders would become international borders was advanced by European states and African elites. The Pan-African movement, on the other hand, proposed an entire redrawing of African borders. For more see Ratner (1996), p. 595. See also Franck (1995), p. 151, arguing: “In Africa, there was no single, dominant, unifying culture, as there had been in Latin America. Also, unlike the dozens of European nations fashioned by Versailles, Africa was a continent of tribes and clans numbering in the thousands. What seemed to be needed was neither the *uti possidetis* of Latin America nor the self-determination of Europe, but some new normative concept combining aspects of both. Thus the emerging nationalist leaders of Africa persuaded the UN General Assembly (and the International Court of Justice in its *Namibia* Advisory Opinion) that there must be a right of self-determination, but that it would be exercised only within existing colonial frontiers.”

<sup>1262</sup> Charter of the Organisation of African Union (1963), Article 3(3).

tangible reality”<sup>1263</sup> and declared that “all Member States pledge themselves to respect the borders existing on their achievement of national independence.”<sup>1264</sup>

The application of the *uti possidetis* principle on the African continent was affirmed by the Chamber of the ICJ in the *Frontier Dispute case*. In this context references to the OAU Charter and Resolution 16(I) were also made:

The elements of *uti possidetis* were latent in the many declarations made by African leaders in the dawn of independence. These declarations confirmed the maintenance of the territorial status quo at the time of independence, and stated the principle of respect both for the frontiers deriving from international agreements, and for those resulting from mere internal administrative divisions. The Charter of the Organization of African Unity did not ignore the principle of *uti possidetis*, but made only indirect reference to it in Article 3, according to which member states solemnly *affirm* the principle of respect for the sovereignty and territorial integrity of every state. However, at their first summit conference after the creation of the Organization of African Unity, the African Heads of State [in Resolution 16(I)] ... deliberately defined and stressed the principle of *uti possidetis juris* contained only in an implicit sense in the Charter of their organization.<sup>1265</sup>

The Chamber of the ICJ also addressed the conflict between the *uti possidetis* principle and the right of self-determination:

At first sight this principle [*uti possidetis*] conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.<sup>1266</sup>

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<sup>1263</sup> AHG Res 16(I) (17–21 July 1964), preamble, para 3.

<sup>1264</sup> *Ibid.*, para 2.

<sup>1265</sup> *Burkina Faso v Mali*, ICJ Rep 1986, para 22.

<sup>1266</sup> *Ibid.*, para 25.

[T]he principle of *uti possidetis* has kept its place among the most important legal principles, despite the apparent contradiction which explained its coexistence alongside the new norms implied. Indeed it was by deliberate choice that African States selected, among all the classic principles, that of *uti possidetis*.<sup>1267</sup>

The fact that the right of self-determination gives way the *uti possidetis* principle has been interpreted in the context of the latter's contribution to peace and stability:

[W]hen the principle of *uti possidetis* collides with the right of self-determination, or, stated otherwise, when the claims of peace among states clashes with the claims of justice by peoples, then the international legal system has consistently allowed the claims of peace to prevail.<sup>1268</sup>

This observation points out that the right of self-determination is not an absolute right<sup>1269</sup> and in international law as it currently stands the right of self-determination may also be weighed against the *uti possidetis* principle. Consequently, democratic principles operating within the right of self-determination<sup>1270</sup> may also be limited by the *uti possidetis* principle.

### **6.3. Applicability of the *uti possidetis* principle**

In the *Frontier Dispute case* the Chamber of the ICJ argued:

Although there is no need, for the purposes of the present case, to show that [*uti possidetis*] is a firmly established principle of international law where decolonization is concerned, the Chamber nonetheless wishes to emphasize its general scope, in view of its exceptional importance for the African continent and for the two Parties. In this connection it should be noted that the principle of *uti possidetis* seems to have been first invoked and applied in Spanish America, inasmuch as this was the continent which first witnessed the phenomenon of decolonization involving the formation of a number of sovereign States on the territory formerly belonging to a single metropolitan State. Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general

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<sup>1267</sup> Ibid., para 26.

<sup>1268</sup> McCorquodale and Pangalangan (2001), p. 875.

<sup>1269</sup> Compare supra n. 951.

<sup>1270</sup> Compare supra ch. 5.3. and 5.4.

principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.<sup>1271</sup>

It was for this reason that, as soon as the phenomenon of decolonization characteristic of the situation in Spanish America in the 19th century subsequently appeared in Africa in the 20th century, the principle of *uti possidetis*, in the sense described above, fell to be applied. The fact that the new African States have respected the administrative boundaries and frontiers established by the colonial powers must be seen not as a mere practice contributing to the gradual emergence of a principle of customary international law, limited in its impact to the African continent as it had previously been to Spanish America, but as the application in Africa of a rule of general scope.<sup>1272</sup>

This reasoning leaves no doubt that the *uti possidetis* principle is applicable in situations of decolonisation. However, it has also served as a reference for application of this principle outside of the context of decolonisation, more precisely in the territory of the SFRY, a situation of new state creations following non-consensual dissolution of a federation. In its Opinion 3, the Badinter Commission stated:

Except where otherwise agreed, the former boundaries become frontiers protected by international law. This conclusion follows from the principle of respect for the territorial *status quo* and, in particular, from the principle of *uti possidetis*. *Uti possidetis*, though initially applied in settling decolonisation issues in America and Africa, is today recognized as a general principle, as stated by the [Chamber of the ICJ in the *Frontier Dispute case*].<sup>1273</sup>

At this point the Badinter Commission quoted a fragment of paragraph 20 of the *Frontier Dispute case*:

Nevertheless the principle is not a special rule which pertains solely to one specific system of international law. It is a general principle, which is logically connected with the phenomenon of the

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<sup>1271</sup> *Burkina Faso v Mali*, ICJ Rep 1986, para 20.

<sup>1272</sup> *Ibid.*, para 21.

<sup>1273</sup> The Badinter Commission, Opinion 3 (11 January 1992).

obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new states being endangered by fratricidal struggles...<sup>1274</sup>

This position of the Badinter Commission has attracted determined critique.<sup>1275</sup> Namely, there is nothing in the reasoning of the Chamber of the ICJ in the *Frontier Dispute case* that would suggest that the *uti possidetis* principle applies in situations other than those dealing with decolonisation.<sup>1276</sup> Further, it may be argued that the Chamber of the ICJ indeed limited the applicability of the *uti possidetis* principle to colonial situations, while the Badinter Commission ignored those parts and resorted to selective quoting in order to extend applicability of the principle beyond colonial situations.

It is argued that the context of paragraph 20 implies that the Chamber of the ICJ's reference to *uti possidetis* as "a general principle" is to be understood as an argument stating that the principle is not limited to decolonisation in Latin America but is a generally applicable principle where decolonisation is concerned.<sup>1277</sup> Further, the observation that "there is no need, for the purposes of the present case, to show that [*uti possidetis*] is a firmly established principle of international law where decolonization is concerned"<sup>1278</sup> may be a strong indication of the 'colonial scope' of the discussion on the *uti possidetis* principle in the *Frontier Dispute case*. Lastly, the omitted line at the end of the Badinter Commission's quote of the *Frontier Dispute case* refers to "the challenging of frontiers following the withdrawal of the

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<sup>1274</sup> *Burkina Faso v Mali*, ICJ Rep 1986, para 20, quoted in The Badinter Commission, Opinion 3 (11 January 1992).

<sup>1275</sup> As examples of critical approaches to the application of the *uti possidetis* principle in the dissolution of the SFRY see: Radan (2000); Pomerance (1998–1999), Bartoš (1997), Ratner (1996), McCorquodale and Pamgalangan (2001), especially p. 875. For a different account see Shaw (1997).

<sup>1276</sup> Compare supra notes 1271 and 1272.

<sup>1277</sup> See Radan (2000), pp. 60–62.

<sup>1278</sup> *Burkina Faso v Mali*, ICJ Rep 1986, para 20.

administering power.”<sup>1279</sup> Arguably, the reference to ‘administering power’ may be a clear indication that the Chamber of the ICJ had decolonisation in mind.<sup>1280</sup>

The Badinter Commission did not specifically invoke all boundaries in the former SFRY but only disputed ones: “The boundaries between Croatia and Serbia, between Bosnia-Herzegovina and Serbia, and possibly other adjacent independent states may not be altered except by agreement freely arrived at.”<sup>1281</sup> The Badinter Commission was obviously motivated by the armed conflict taking place in Croatia and Bosnia-Herzegovina at that time and applied the *uti possidetis* principle in order to bring these two states and their boundaries under the protection of Article 2(4) of the UN Charter:

The [Badinter] Commission seems to have assumed that, regardless of any differences between Yugoslavia and the decolonizations, or between the law in 1960 and 1991, only *uti possidetis* would avoid anarchy by preventing attacks by one former Yugoslav republic on another. Thus, it concluded that only by recognizing the transformation of internal boundaries into international borders protected by Article 2(4) could stop the war.<sup>1282</sup>

Despite the authority of Opinion 3 of the Badinter Commission, the applicability of the *uti possidetis* principle outside of colonial situations is not generally accepted. The analysis in this subsection shows that it may well be that the authority in support of its applicability in non-colonial situations is based on selective quoting of the ICJ’s jurisprudence and in an attempt at ‘peace activism’ in the former SFRY at that time. Nevertheless, the idea that internal boundaries need to be taken into account in some situations of secessions or dissolutions cannot be disregarded. For this purpose post-1991 non-colonial new state creations will also be examined from this aspect.

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<sup>1279</sup> Ibid.

<sup>1280</sup> See Radan (2000), p. 60.

<sup>1281</sup> The Badinter Commission, Opinion 3 (11 January 1992).

<sup>1282</sup> Ratner (1996), p. 614.

#### 6.4. Determining borders in situations of non-colonial new state creations

In the context of determining boundaries of those new state creations which are not a consequence of decolonisation, the post-1991 practice of consensual secessions, unilateral secessions and dissolutions will be examined. It will be argued whether and in what circumstances internal boundaries may be “upgraded” to international borders and how this process differs from the *uti possidetis* principle applicable in colonial situations.

It is argued that “[t]he core functional distinction between international borders and internal administrative boundaries lies in a critical antinomy: governments establish interstate boundaries to separate states and peoples, while they establish or recognize internal boundaries to unify and effectively govern a polity.”<sup>1283</sup> For this reason it is questionable whether internal administrative boundaries can necessarily determine a territory which could potentially become an independent state.<sup>1284</sup>

Internal administrative boundaries, however, can have origins of a different kind. Indeed:

In some cases [internal boundaries] ... are of relatively little importance; in others, such as is the case with federal states, they are of considerable significance. In many instances, such administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres. In other cases, borders may have been shifted for more general reasons of promoting national unity or simply as a result of local pressures. In some states, such administrative borders can only be changed with the consent of the local province or state (in the subordinate sense) or unit. In some cases, internal lines are clear and of long standing. In some of varying types and inconsistent.<sup>1285</sup>

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<sup>1283</sup> Ibid., p. 602.

<sup>1284</sup> Ibid.

<sup>1285</sup> Shaw (1997), p. 489.

While some internal boundaries may be established for pure administrative purposes, others have a strong historical pedigree and even delimit self-determination units. Indeed, the internal organisation of a multi-ethnic state, which includes delimited subunits, may be an arrangement for the exercise of the right of self-determination in its internal mode.<sup>1286</sup> An argument was made that federalism is one such possibility; however, this is not always the case.<sup>1287</sup> One counter-argument is that peoples of non-federal states cannot be simply excluded from the exercise of their right of self-determination.<sup>1288</sup> Further, there exist federal states with federal units which do not constitute self-determination units.<sup>1289</sup>

Similarly, historical roots of an internal boundary do not necessarily constitute a self-determination unit. Borders between English counties have a long history<sup>1290</sup> but the population of, for example, Nottinghamshire clearly does not constitute a people for the purpose of the right of self-determination. On the other hand, one cannot say that the internal boundary between England and Scotland is merely administrative. Not only does it have a strong historical pedigree, but there exists no doubt that the right of self-determination is applicable to the Scottish people and that Scotland is a self-determination unit.<sup>1291</sup> In the case of hypothetical independence of Scotland, the international border of this state would be easy to ascertain.<sup>1292</sup>

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<sup>1286</sup> Compare supra ch. 5.3.4.3.

<sup>1287</sup> See supra ch. 5.3.4.3.

<sup>1288</sup> See Radan (2000), p. 71.

<sup>1289</sup> See supra ch. 5.3.4.3.

<sup>1290</sup> For more on the background on English counties see A Vision of Britain through Time <[http://www.visionofbritain.org.uk/types/level\\_page.jsp?unit\\_level=4](http://www.visionofbritain.org.uk/types/level_page.jsp?unit_level=4)>.

<sup>1291</sup> In regard to the Scottish identity as a people and its historical borders Tierney (2006), p. 71: “Scotland is a curious example of a sub-state national society in that, on the one hand, it is a former nation-state, indeed one of the oldest in Europe, but on the other, it is difficult to attribute points of clear objective distinction in terms of language, religion or ethnicity between Scotland and England ... Scotland’s claim to societal discreteness is, therefore, largely based upon the historical development of indigenous institutions of civic and public life which emerged when Scotland was an independent state and which, to some extent, survived the Union of Parliaments with England in 1707.”

<sup>1292</sup> It would be the border in existence prior to the 1707 Union of Parliaments with England. Ibid.

Thus, while it is possible to agree with the above-quoted observation that internal boundaries and international borders serve different purposes, it is also true that internal boundaries are not a unitary category, serve different purposes and do not have common origins. The question is then which internal boundaries may eventually become international borders.<sup>1293</sup>

As the right of self-determination is central in situations of new state creations,<sup>1294</sup> the answer needs to be sought in its context. Arguably, a group of people to whom the right of self-determination does not apply cannot make a plausible claim for secession from their parent state.<sup>1295</sup> According to the elaboration of the right of self-determination, the right of self-determination only applies to peoples.<sup>1296</sup> Thus, when a new state-creation is in question, the only internal boundaries that should matter for this discussion are those delimiting a self-determination unit, i.e. a territory populated by a distinct people, from either the rest of a parent-state or from other self-determination units within a parent-state. Yet as will be argued on examples of the post-1990 new state creations, not even the ‘self-determination approach’ entirely resolves the question of internal boundaries becoming international borders.

#### **6.4.1. The Québec situation and its significance for the determination of international boundaries**

As secession of Québec never took place, its international borders did not have to be determined. Nevertheless, the question of borders was discussed along with other questions regarding the possibility of secession. The opinions of jurists may provide

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<sup>1293</sup> It needs to be recalled that all caveats with new state creations in the UN Charter era still apply. See supra ch. 5.3.1. and 5.4.

<sup>1294</sup> Compare supra ch. 5.4.

<sup>1295</sup> Compare supra ch. 5.3.3.1.1.

<sup>1296</sup> ICCPR (1966) and ICESCR (1966), Article 1.

some guidelines on the legal doctrine concerning the process of “upgrading” an internal boundary to an international border in the case of secession.

In the *Québec case*, the Supreme Court of Canada made no direct references to the question of borders. Arguably, the view that Québec could, possibly, become an independent state in its present provincial boundaries was implied in the observation that the ultimate success of a unilateral secession would depend on recognition of the international community.<sup>1297</sup> Since this observation refers to the entire territory of Québec and not only to one part of it, it may be interpreted in a way that international recognition could lead to Québec’s statehood in its provincial boundaries.<sup>1298</sup>

Yet it was established above that success of a unilateral secession in the UN Charter era is unlikely.<sup>1299</sup> The question of Québec’s boundaries therefore also needs to be addressed in light of consensual secession, which would be a possible outcome of negotiations on the future legal status of Québec.<sup>1300</sup> There are three major questions to be asked in this context: (i) Could Québec become an independent state within its present provincial borders or should earlier boundaries become relevant? (ii) Does the duty to negotiate a future legal status include a duty to negotiate future international borders? (ii) Could Québec become an independent state despite the wish of its minorities to remain in an association with Canada?

In the Québec Report,<sup>1301</sup> it was observed that Québec’s provincial borders are guaranteed by Canadian constitutional law, while after a possible achievement of

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<sup>1297</sup> The *Québec case* (1998), para 155.

<sup>1298</sup> See Radan (2000), p. 56. For the problem of unilateral secession and constitutive effects of recognition see supra ch. 2.3.2. and 2.3.3.5.

<sup>1299</sup> See supra ch. 5.4.

<sup>1300</sup> Compare supra n. 1097.

<sup>1301</sup> The Territorial Integrity of Québec in the Event of the Attainment of Sovereignty [hereinafter The Québec Report] <[http://www.mri.gouv.qc.ca/la\\_bibliotheque/territoire/integrite\\_plan\\_an.html](http://www.mri.gouv.qc.ca/la_bibliotheque/territoire/integrite_plan_an.html)>. The report was prepared in 1992 for the Québec Department of International Relations. Its authors were Thomas Franck, Rosalyn Higgins, Malcolm Shaw, Alain Pellet and Christian Tomuschat.

independence its borders would be protected by the principle of territorial integrity, which is firmly established in international law.<sup>1302</sup> However, there is a question of whether the borders protected by international law would be those presently determined by Canadian constitutional law. In this regard the Québec Report held that “[f]rom a strictly legal perspective, since the attainment of independence is an instantaneous occurrence, there can be no intermediate situation in which other rules would apply. Furthermore, recent precedents have demonstrated that the principle of *uti possidetis juris* can be transposed to the present case.”<sup>1303</sup> To this the Québec Report added: “[I]f the territorial limits of Québec were to be altered between now and the date of any future sovereignty ... the borders of a sovereign Québec would not be its present boundaries (nor would they inevitably be those prevailing at the time of the formation of the Canadian Federation in 1867).”<sup>1304</sup>

The Québec Report thus takes a view that the critical date for “upgrading” of internal boundaries to international borders is the moment of gaining of independence. According to this doctrine, previous territorial arrangements do not matter. The Québec Report also invoked the *uti possidetis* principle, referred to by the Badinter Commission in the case of the dissolution of the SFRY.<sup>1305</sup> However, it has been argued in this section that the applicability of the *uti possidetis* principle in non-colonial situations remains disputable and has not been generally accepted.<sup>1306</sup>

The Québec Report further strengthened its position on the question of the critical date for the determination of international borders by holding that “[a] particular problem arises in respect of the territories ceded to Québec by the

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<sup>1302</sup> The Québec Report, chapter 2.1.

<sup>1303</sup> *Ibid.*

<sup>1304</sup> The Québec Report, chapter 2.2.

<sup>1305</sup> See *supra* n. 1273.

<sup>1306</sup> See *supra* ch. 6.3.

Federation in 1912.”<sup>1307</sup> In regard to these territories, the Québec Report then concluded:

- (i) the territory of Québec is comprised of all lands contained within the administrative limits (and international frontiers) of the Province;
- (ii) including those in which the indigenous peoples have rights;
- (iii) and those ceded to the Province by the federal State in 1912;
- (iv) the constitutional rules in force guarantee that the territorial limits so defined cannot be altered without the consent of the National Assembly of Québec ...
- (v) The territorial integrity of Québec ... is firmly secured by constitutional principles in force and the demarcation of its present boundaries cannot be altered against the will of its Legislature before the attainment of a possible sovereignty.<sup>1308</sup>

This position not only affirms the view that only the latest territorial arrangement within a parent-state is relevant but also gives an idea of the position of the newly-created minorities within a new state creation. It follows from the Québec Report that such minorities neither have veto power regarding the question of secession from a parent-state nor the right to secession from the newly-created state. It needs to be recalled, however, that their status may be part of the negotiation process prior to a potential agreement on independence.<sup>1309</sup>

These views attracted criticism. It was argued on behalf of the Canadian Government:

As to the question of territorial integrity, there is neither a paragraph nor a line in international law that protects Québec’s territory but not Canada’s. International experience demonstrates that the borders of the entity seeking independence can be called into question, sometimes for reasons based

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<sup>1307</sup> The Québec Report, chapter 2.12. See also The Act to extend the Boundaries of the Province of Québec (1912), Art 2 (c), quoted in The Québec Report, chapter 2.12.

<sup>1308</sup> The Québec Report, chapter 2.14.

<sup>1309</sup> See *supra* notes 1099 and 1101.

upon democracy ... [No one] can predict that the borders of an independent Québec would be those guaranteed by the Canadian Constitution.<sup>1310</sup>

Further, in the view of the Canadian Government internal boundaries may automatically become international borders in a case of dissolution (e.g. the example of the SFRY) but not of secession.<sup>1311</sup> In this context it was noted:

In a case of secession the former sovereign state remains in existence, whereas in a case of dissolution the former sovereign state ceases to exist. This distinguishing factor may justify a different approach to the question of borders following the creation of new states. As a matter of logic, in the case of dissolution of a sovereign state, either new states emerge or parts of the dissolved state become parts of pre-existing states, thereby filling the vacuum created as a result of dissolution. Internal borders of the former sovereign state may be a sound basis for the borders of these successor states. In cases of secession no such vacuum arises. If secession is successful, the sovereign state from which secession is achieved does not cease to exist. Ultimately, the only issue in such a secession is the territorial extent of the new state that is the result of secession. In cases of a federation there is no reason to insist in all cases that the new state's territorial extent should be that of a particular federal unit of the state from which secession has taken place. This is particularly so in cases where a significant minority opposes secession and wishes to remain part of the state from which secession is sought. Just as in the case of secession from a non-federal state, the territorial extent of the new state is ultimately a political question which will be resolved either (preferably) by negotiation or by force.<sup>1312</sup>

This position leads to the question of whether negotiations on future international borders may be made a part of the negotiation process on a potential consensual secession. According to Pellet:

If Québec were to attain independence, the borders of a sovereign Québec would be its present boundaries and would include the territories attributed to Québec by the federal legislation of 1898 and 1912, unless otherwise agreed to by the province before independence, or as between the two States thereafter.<sup>1313</sup>

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<sup>1310</sup> Statement of Stéphane Dion, Federal Minister of Intergovernmental Affairs in a Letter to the Premier of Québec, 11 August 1997, quoted in Radan (1997), p. 201.

<sup>1311</sup> *Ibid.*

<sup>1312</sup> Radan (2000), p. 57.

<sup>1313</sup> Pellet (1999), quoted in English translation in Lalonde (2003), p. 137.

Pellet then relies on the modern (i.e. non-colonial) version of the *uti possidetis* principle applied by the Badinter Commission in the territory of the SFRY and concludes that “according to public international law, negotiations on Québec’s borders are possible but are not obligatory.”<sup>1314</sup> It was noted that the Supreme Court of Canada in the *Québec case* “has not ruled out the possibility that the issue of Québec’s boundaries might be the subject of future negotiations [as] nothing in the Court’s ruling precludes negotiations between the Parties dealing with the issue of Québec’s borders.”<sup>1315</sup> At the same time, international law imposes no obligation to negotiate future international borders.<sup>1316</sup>

In regard to this argument it has been held that:

According to this scenario, Québec would accede to independence within the limits of the former Canadian province, including the territories of Native peoples. Why then would Québec be interested in conducting negotiations with the Canadian party? Without even having to enter into talks, it would obtain the whole of its claims.<sup>1317</sup>

Yet it should be recalled that territorial rearrangements are always possible as a result of negotiations when new states emerge. This was also affirmed in Opinion 3 of the Badinter Commission.<sup>1318</sup> Further, a situation of dissolution of a parent-state is significantly different from that of (negotiated) secession.<sup>1319</sup> Since there exists no ‘right to unilateral secession’ in international law but, possibly, only a duty to negotiate a possible future legal status of a territory,<sup>1320</sup> it is not possible to assume that in a case of negotiated secession, a secession-seeking entity would necessarily keep its former internal boundaries as international borders. When potential independence becomes a matter of political negotiations, it is not difficult to imagine

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<sup>1314</sup> Ibid.

<sup>1315</sup> Ibid.

<sup>1316</sup> Ibid.

<sup>1317</sup> Hilling (1999), p. 445, quoted in Lalonde (2003), p. 150.

<sup>1318</sup> See supra n. 1273.

<sup>1319</sup> See supra ch. 5.4.

<sup>1320</sup> See supra n. 1097.

that borders could also become part of these negotiations. When a secession-seeking entity is presented with the dilemma of having either independence within narrower borders or no independence at all, it is not possible to predict for which option such an entity would opt. Yet state practice in regard to this question is not developed.

The Québec Report also pointed out the problem of defining international borders in a situation of secession from a unitary state where internal boundaries are not defined and peoples not attached to a certain territorial unit:

[W]hen a new State achieves sovereignty, this phenomenon must occur within the configuration of the administrative boundaries in which it was contained prior to independence. Such a rule could be difficult to implement in the case of the breakup of a unitary State, and might even be inapplicable in such a context since the territorial districts are less clearly individualized than in the framework of a federation. Indeed, this individualization of federal States is, no doubt, both cause and consequence of their greater propensity for independence.<sup>1321</sup>

Such a claim is problematic from two aspects. First, it privileges peoples who live in federal states and/or units otherwise clearly delimited from the rest of a parent-state. Independence would then not stem from the right of self-determination applicable under international law but would only be achievable if constitutional law of a certain parent-state provided for an adequate internal arrangement with clearly-delimited self-determination units. Second, the possibility of secession of a clearly-delimited self-determination unit, following ethnic lines, could discourage states from providing constitutional arrangements required for the exercise of the right of self-determination in its internal mode.<sup>1322</sup>

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<sup>1321</sup> The Québec Report, Chapter 2.49.

<sup>1322</sup> See Radan (2000), p. 71.

#### 6.4.2. Eritrea

As an Italian colony, Eritrea was an entity separate from Ethiopia and was federated with the latter in 1952.<sup>1323</sup> In the 1952 federal Constitution, Eritrea was a self-governing unit. This status was suspended by the central government of Ethiopia in 1962.<sup>1324</sup> Upon Eritrea's consensual secession from Ethiopia,<sup>1325</sup> the border between colonial Eritrea and Ethiopia was re-established.<sup>1326</sup> The Eritrea–Ethiopia Boundary Commission noted that<sup>1327</sup> “[t]he parties [Ethiopia and Eritrea] agree that a neutral Boundary Commission composed of five members shall be established with a mandate to delimit and demarcate the colonial treaty border based on pertinent colonial treaties [concluded between Ethiopia and Italy] (1900, 1902 and 1908) and applicable international law.”<sup>1328</sup>

The example of Eritrea is different from most situations of border-determinations in Africa. Indeed, “[f]or the first time the principles of the intangibility of African frontiers and opposition to secession were breached, but in a way which conformed to the basis of the other African frontiers – the colonial

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<sup>1323</sup> See supra ch. 4.4.3.

<sup>1324</sup> Ibid.

<sup>1325</sup> Ibid.

<sup>1326</sup> Notably, because of some disputed parts of the border, an armed conflict between Ethiopia and Eritrea broke out. See Gray (2006), p. 701. A peace agreement was signed in December 2000 and included provisions for the establishment of three dispute settlement bodies, including the Eritrea–Ethiopia Boundary Commission. Ibid., p. 703. The Commission was chaired by Elihu Lauterpacht, other members were: Bola Adesumbo Ajibola, W. Michael Reisman, Stephen Schwebel and Arthur Watts. The Boundary Commission delivered its decision on 13 April 2002.

<sup>1327</sup> See the Eritrea–Ethiopia Boundary Commission, Ch. I. 1.1. <<http://www.un.org/NewLinks/eebcarbitration/EEBC-Decision.pdf>>.

<sup>1328</sup> Ibid., Ch. I.1.2., para 2. See also Goy (1993), p. 350. It should be noted that despite the prior agreement of both parties that they would accept the decision of the Boundary Commission, Ethiopia continues to oppose the delimitation decided on by the Commission in some disputed areas. In Ethiopia's view, the Commission's decision, which awards some disputed areas under Ethiopian control to Eritrea, is “totally illegal, unjust and irresponsible.” Ethiopia thus proposes “that the Security Council set up an alternative mechanism to demarcate the contested parts of the boundary in a just and legal manner.” UN Doc S/2003/1186 (19 December 2003), Annex I, para 10. The implementation of the Commission's decision was called for by the Security Council in Resolutions 1586 and 1622. Neither resolution was adopted under Chapter VII of the UN Charter. See SC Res 1586 (14 March 2005) and SC Res 1622 (13 September 2005). For more see Gray (2006), pp. 707–710. See generally also Shaw (2007).

frontier was restored.”<sup>1329</sup> Nevertheless, although the colonial boundary was restored, Eritrea clearly was not an example of decolonisation.<sup>1330</sup> Therefore the establishment of its historical borders, albeit of colonial origin, cannot be ascribed to the *uti possidetis* principle.<sup>1331</sup> Significantly, reference to this principle does not appear in the decision of the Eritrea–Ethiopia Boundary Commission.

#### **6.4.3. The dissolution of Czechoslovakia**

The creation of the Czech and Slovak Republics is an example of consensual dissolution of the previous state.<sup>1332</sup> The border between the two newly-created states was determined by the Treaty on the General Delimitation of the Common State Frontiers, signed on 29 October 1992.<sup>1333</sup> According to this Treaty, the internal boundary between the two constituent parts of Czechoslovakia became the international border between the Czech and Slovak Republics.<sup>1334</sup>

The internal boundary within Czechoslovakia had a historical pedigree. It originated in the internal division within the Austro-Hungarian Monarchy. Czechs were linked to the Austrian part of the Monarchy while Slovaks were linked to its Hungarian part.<sup>1335</sup> Thus, the “[e]stablishment of the border between the present-day Czech and Slovak Republics is ... more plausibly associated with the historical pedigree of that line rather than with the line’s later status as an internal administrative subdivision of the former Czechoslovakia.”<sup>1336</sup>

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<sup>1329</sup> Anderson (1997), p. 87.

<sup>1330</sup> Eritrea was decolonised when it was federated with Ethiopia. See *supra* ch. 4.4.3. It needs to be recalled that the decolonisation process did not only foresee an emergence as an independent state but also merger with another state. See GA Res 1541, principle VI.

<sup>1331</sup> Shaw takes a different view (to some extent) and suggests that the delimitation between Ethiopia and Eritrea was about “determining the *uti possidetis* line”. Shaw (2007), p. 776. Yet this is to accept that the *uti possidetis* principle is applicable also in situations which are not a matter of decolonisation.

<sup>1332</sup> See *supra* ch. 4.4.2.

<sup>1333</sup> See Shaw (1997), p. 500.

<sup>1334</sup> *Ibid.*

<sup>1335</sup> See Anderson (1997), p. 73.

<sup>1336</sup> Bartoš (1997), p. 83.

#### 6.4.4. The regained independence of the Baltic States

Estonia, Latvia and Lithuania were independent states in the interwar period and were forcefully included in the Soviet Union by the Ribbentrop-Molotov Pact.<sup>1337</sup> It remains arguable whether their pre-Second World War independence was restored or if they were new state creations.<sup>1338</sup> Nevertheless, the process of their (re)-gaining of independence shows that even in a situation of suppressed independence, the peoples of the Baltic States did not have a “right of unilateral secession [but] rather ... a right ‘to resolve their future status through free negotiation with the Soviet authorities in a way which takes proper account of the legitimate rights and interests of the parties concerned.’”<sup>1339</sup> Thus the most plausible explanation might be that the three Baltic States should be categorised as examples of consensual secession.

After Estonia and Latvia became independent states in 1991, parts of their respective borderlines with Russia, which were subject to territorial rearrangements in the Soviet era, became disputed.<sup>1340</sup> Estonia and Latvia insisted that the present international borders are the international borders in existence prior to the suppression of independence.<sup>1341</sup> Russia, on the other hand, claimed that the latest internal boundaries between the Soviet republics of Russia on the one side and Estonia and Latvia on the other constitute the present international borders.

The Border Treaty between the Russian Federation and the Republic of Latvia foresaw delimitation along the former internal boundary between the Soviet

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<sup>1337</sup> See supra ch. 4.4.1.

<sup>1338</sup> See supra ch. 4.4.1.

<sup>1339</sup> Crawford (2006), p. 395, quoting the Minister of State, Foreign and Commonwealth Office, United Kingdom Materials on International Law (Geoffrey Marston ed.) (1991), p. 573.

<sup>1340</sup> See Russia Spurns Estonia Border Deal BBC (27 June 2005) <<http://news.bbc.co.uk/2/hi/europe/4626141.stm>>.

<sup>1341</sup> Ibid. See also Information Note, The Border Treaty between the Russian Federation and the Republic of Latvia (8 June 2006) <[http://www.europarl.europa.eu/meetdocs/2004\\_2009/documents/fd/dru20060615\\_07/dru20060615\\_07en.pdf](http://www.europarl.europa.eu/meetdocs/2004_2009/documents/fd/dru20060615_07/dru20060615_07en.pdf)>. The Latvian Constitution expressly provided that the disputable territory was part of the Republic of Latvia. Ibid., p. 5.

republics of Russia and Latvia.<sup>1342</sup> After it was initially rejected by Latvia in 2006,<sup>1343</sup> it was later signed (in 2007) and ratified by legislatures of both Latvia<sup>1344</sup> and Russia.<sup>1345</sup>

A border treaty between Russia and Estonia has not been concluded as Russia does not accept Estonia's insistence on delimitation based on the international borders prior to the suppression of independence.<sup>1346</sup> However, the border treaty between Russia and Latvia might confirm the standard proposed in the Québec Report that in the case of secession, the most recent internal boundaries are those which would become international borders.<sup>1347</sup> Nevertheless, different outcomes of negotiations are always possible.

#### **6.4.5. The dissolution of the Soviet Union and the establishment of international borders**

As previously mentioned, the Soviet Union was transformed into the Commonwealth of Independent States by the Minsk Agreement and the Alma Ata Protocol, both signed in December 1991.<sup>1348</sup> Thus, the former Soviet republics became independent states under international law.<sup>1349</sup>

In regard to the question of borders, Article 5 of the Minsk Agreement provides: "The High Contracting Parties acknowledge and respect each other's territorial integrity and the inviolability of existing borders within the Commonwealth."<sup>1350</sup> Although initially concluded only by Belarus, Russia and

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<sup>1342</sup> Ibid.

<sup>1343</sup> Ibid.

<sup>1344</sup> See Latvia Ratified Border Treaty with Russia, Kommersant (17 May 2007) <[http://www.kommersant.com/p-10733/r\\_500/border\\_treaty](http://www.kommersant.com/p-10733/r_500/border_treaty)>.

<sup>1345</sup> See State Duma Ratifies Border Treaty with Latvia, Kommersant (5 September 2007) <[http://www.kommersant.com/p-11344/r\\_500/Border\\_Latvia\\_ratify](http://www.kommersant.com/p-11344/r_500/Border_Latvia_ratify)>.

<sup>1346</sup> See supra n. 730.

<sup>1347</sup> See supra n. 1304.

<sup>1348</sup> For more see supra ch. 4.4.1.

<sup>1349</sup> Ibid.

<sup>1350</sup> The Minsk Agreement (1991), Article 5(1).

Ukraine, the Minsk Agreement was subsequently adopted by other Soviet Republics through the Alma Ata Protocol.<sup>1351</sup> In addition to the Alma Ata Protocol, the Alma Ata Declaration was adopted,<sup>1352</sup> in which the newly independent states declared that they recognise and respect “each other’s territorial integrity and the inviolability of existing borders.”<sup>1353</sup>

The Minsk Agreement and the Alma Ata Protocol and Declaration thus confined international borders along the former internal boundaries within the Soviet Union. Importantly, only entities which had republic status became independent states while subunits with autonomous status could not become states.<sup>1354</sup> Although the documents expressly invoked rights of the newly-created minorities,<sup>1355</sup> no special provision was made that would give them a right to secession and creation of a new state or merger with another state.

A significant number of secessionist attempts were witnessed in the territory of the CIS. Abkhazia and South Ossetia have attempted to break away from Georgia,<sup>1356</sup> Chechnya from Russia,<sup>1357</sup> Nagorny-Kharabakh from Azerbaijan,<sup>1358</sup> and Gagauzia from Moldova.<sup>1359</sup> Despite some recognitions none of these entities

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<sup>1351</sup> See supra ch. 4.4.1. Notably, Georgia ratified the agreement later, on 3 December 1993.

<sup>1352</sup> See supra ch. 4.4.1.

<sup>1353</sup> The Alma Ata Declaration (1991), para 3.

<sup>1354</sup> The following Autonomous Soviet Socialist Republics (ASSR) existed when Soviet Union was transformed into the CIS in 1991: within Azerbaijan: Nakhchivan ASSR; within Georgia: Abkhaz ASSR, Adjar ASSR; within Russia: Bashkir ASSR, Buryat ASSR, Chechen-Ingush ASSR, Chuvash ASSR, Dagestan ASSR, Kabardino-Balkar ASSR, Kalmyk ASSR, Karelian ASSR, Komi ASSR, Mari ASSR, Mordovian ASSR, Northern Ossentian ASSR, Tatar ASSR, Tuva ASSR, Udmurt ASSR, Yakut ASSR; within Ukraine: Crimean ASSR; within Uzbekistan: Karakalpak ASSR. See The Constitution of the Soviet Union (1977), Article 85. The Soviet Secession Law, which was never implemented in practice, on the other hand foresaw that in case a republic opted for independence, it would not necessarily keep its borders, as peoples in autonomous republics would be consulted separately. See The Law on Procedures for Resolving Questions Related to the Secession of Union Republics from the USSR, reprinted Hannum (1993), pp. 753–60, Article 3.

<sup>1355</sup> See The Minsk Agreement (1991), Articles 2 & 3. The Alma Ata Declaration (1991), para 2.

<sup>1356</sup> Crawford (2006), p. 403.

<sup>1357</sup> Ibid.

<sup>1358</sup> Ibid.

<sup>1359</sup> Ibid.

has acquired sovereignty under international law or merged with another state.<sup>1360</sup> To the present day international law has not recognised any change of the delimitation along former internal boundaries within the Soviet Union, as established by the Minsk Agreement.

It needs to be noted that Turkmenistan withdrew from full CIS membership and became an associate member on 26 August 2005.<sup>1361</sup> On 18 August 2008, Georgia announced its withdrawal from CIS membership, which is to become effective on 17 August 2009.<sup>1362</sup> It has been pointed out that the Vienna Convention on the Law of Treaties, the Vienna Convention on Succession of States in Respect of Treaties and jurisprudence of the ICJ firmly establish that state borders established by a treaty remain valid regardless of the later fate of that treaty.<sup>1363</sup> Thus, even if withdrawals from CIS membership were interpreted in a way that Turkmenistan and Georgia are no longer parties to the Minsk Agreement, which, *inter alia*, established international borders between former Soviet Republics,<sup>1364</sup> this fact would not influence the question of their borders.

#### **6.4.6. East Timor**

The border between East Timor and Indonesia was determined according to the colonial delimitation between Portuguese and Dutch possessions on the Timor Island.<sup>1365</sup> Since East Timor remained on the list of non-self-governing territories

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<sup>1360</sup> Ibid.

<sup>1361</sup> Turkmenistan at the same time announced that in the future it would only develop relations with the CIS member states bilaterally. The official reason given for such a move was Turkmenistan's decision to acquire status of a permanently neutral state. See Radio Free Europe (29 August 2005) <<http://www.rferl.org/content/article/1061002.html>>. Turkmenistan has nevertheless taken part in the meetings of the CIS leaders even after 25 August 2005, while its assembly does not cooperate in the Interparliamentary Assembly of Member Nations of the Commonwealth of Independent States. See <<http://www.iacis.ru/html/index-eng.php?id=52>>.

<sup>1362</sup> See Radio Free Europe (29 August 2005).

<sup>1363</sup> See supra notes 1249 and 1250.

<sup>1364</sup> See supra n. 1350.

<sup>1365</sup> See supra ch. 4.5.1.

after Indonesia's occupation,<sup>1366</sup> it might be possible to argue that it was properly decolonised when it declared independence in 2002.<sup>1367</sup> Based on this argument it could be plausibly maintained that the delimitation of East Timor was a matter of *uti possidetis*. Yet the real question was not East Timor's independence from Portugal but its independence from Indonesia which was not a matter of decolonisation, at least not in the traditional understanding of colonialism in the sense of European possessions of overseas territories.<sup>1368</sup> The delimitation of East Timor therefore has a colonial pedigree and yet East Timor also constitutes a self-determination unit, the independence of which was not a matter of decolonisation.

The mode of state creation of East Timor was thus secession with the approval of a parent state or even a collective state creation.<sup>1369</sup> Consequently, even the pattern of the determination of international border was that of an "upgrade" of the former internal boundary, where such a boundary had a strong historical pedigree and delimited a self-determination unit. Although the historical pedigree of this boundary was colonial, the delimitation of East Timor cannot be ascribed to the *uti possidetis* principle.

#### **6.4.7. Montenegro**

When Montenegro declared independence in 2006, the question of borders did not come into question. Montenegro is an example of consensual secession, which is obvious from both Article 60<sup>1370</sup> of the Constitution of the SUSM and from

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<sup>1366</sup> See supra n. 814.

<sup>1367</sup> See supra ch. 4.5.1.

<sup>1368</sup> The traditional doctrine of colonialism might be too narrow. Buchheit ((1978), p. 18) argues: "International law is thus asked to perceive a distinction between the historical subjugation of an alien population living on a different part of the globe and the historical subjugation of an alien population living on a piece of land abutting that of its oppressors. The former can apparently never be legitimated by the mere passage of time, while the latter is eventually transformed into a protected status quo."

<sup>1369</sup> Compare supra ch. 4.5.1.

<sup>1370</sup> See supra n. 860.

international involvement in the process of secession.<sup>1371</sup> Article 60 established a mechanism for secession and thus provided for the consent of the parent-state.<sup>1372</sup> At the same time, Article 60 also stipulated for Serbia's continuity of the international personality of the SUSM.<sup>1373</sup> Serbia also continues the membership of the SUSM in the UN.<sup>1374</sup> Thus, there is no doubt that when Montenegro declared independence this did not amount to the dissolution of the SUSM but to Montenegro's secession.

The border between Serbia and Montenegro was firmly established in Article 5 of the Constitution of the SUSM: "The border between state-members shall not be altered unless there exists mutual consensus of both sides."<sup>1375</sup> Montenegro's borders were identical to those in the FRY, in the SFRY and, with some minor changes, to those of the Montenegrin state recognised at the Congress of Berlin in 1878.<sup>1376</sup> Montenegro's borders therefore have a strong historical pedigree and previously already had a status of international borders.

#### **6.4.8. The dissolution of the SFRY and the establishment of international borders: the application of the *uti possidetis* principle re-examined in light of post-1991 state practice**

The example of the SFRY is more complex than other situations discussed in this subchapter. The dissolution was not a consensual process based on a treaty. It was rather a consequence of a chain of secessions and of a constitutional breakdown of the federation, which led the Badinter Commission to proclaim that the SFRY was in the process of dissolution.<sup>1377</sup> In order to determine the new international borders, the

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<sup>1371</sup> See supra ch. 4.4.3. and 5.4.3.6.

<sup>1372</sup> See supra n. 1036. Compare also supra ch. 5.4.

<sup>1373</sup> The Constitution of the SUSM (2003), Article 60, paras 4 & 5.

<sup>1374</sup> Ibid.

<sup>1375</sup> Constitution of the SUSM (2003), Article 5(3), my own translation.

<sup>1376</sup> Compare infra ch. 6.4.8.

<sup>1377</sup> See supra ch. 4.3.1.

Badinter Commission applied the *uti possidetis* principle. This application is still criticised.<sup>1378</sup>

To oppose the “upgrading” of internal boundaries to international borders, which the Badinter Commission did by invoking the *uti possidetis* principle, an argument has been made that “in the SFRY, municipal borders were drawn by the Communist Party’s Politbureau, taking little account of ethnic factors.”<sup>1379</sup> Such a claim implies drawing of borders which indeed reminds of colonial situations where borders were drawn by colonial powers with little regard to ethnic, religious or other identities of the local population.<sup>1380</sup> The “upgrading” of internal boundaries to international borders would then also remind of the application of the *uti possidetis* principle in colonial situations. Such an argument, however, neglects the historical pedigree of the internal boundaries in the SFRY.

The first common state of Southern Slavs was the Kingdom of Serbs, Croats and Slovenes, created on 1 December 1918.<sup>1381</sup> Slovenia and Croatia previously did not exist as independent states; the territories settled by Slovenes and Croats, respectively, were part of the Habsburg Monarchy.<sup>1382</sup> The Kingdom of Serbia had existed as an independent state since the Congress of Berlin in 1878.<sup>1383</sup> Yet not all Serbs lived within the territory of the Kingdom of Serbia. The former Habsburg territories of Vojvodina, Bosnia-Herzegovina and Croatia were also populated by significant shares of ethnic-Serb population.<sup>1384</sup> Establishment of the Kingdom of Serbs, Croats and Slovenes unified the Serb population in a common state. The new Kingdom also included the territory of Montenegro, which was otherwise also

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<sup>1378</sup> See supra ch. 4.3.1.

<sup>1379</sup> Bartoš (1997), p. 87. See also Kreća (1993), pp. 12–14.

<sup>1380</sup> See supra ch. 6.2.

<sup>1381</sup> Radan (2002), p. 136.

<sup>1382</sup> Pavlowitch (1971), pp. 42–43.

<sup>1383</sup> *Ibid.*, p. 44.

<sup>1384</sup> See Cohen (1993), p. 14.

recognised as an independent state at the Congress of Berlin in 1878,<sup>1385</sup> and Bosnia-Herzegovina, which was previously not a state but a separate unit within the Habsburg Monarchy with borders likewise established at the Congress of Berlin.<sup>1386</sup>

The Kingdom of Serbs, Croats and Slovenes was unified under the King of Serbia and created as a multiparty electoral democracy,<sup>1387</sup> while it was initially not defined whether the new Kingdom would be a federal or a unitary state.<sup>1388</sup> Since a significant Serb population lived outside of the frontiers of the former Kingdom of Serbia, the entire Serb population could not be federated within a single federal unit. Serbia was thus disinclined toward a federal arrangement. On the other hand, Slovenes and Croats feared Serbian centralism and dominance and demanded a federated state. In the end the Serbian majority within the parliament enacted the unitary Constitution of 1921.<sup>1389</sup> It is argued that “[t]he 1921 Constitution was a reflection of the official view that the Serbs, Croats and Slovenes were three tribes of one unified nation, namely the Yugoslavs.”<sup>1390</sup> The strong ideology of a unitary ‘Yugoslav people’ was also evident in the proclamation of the official language, which was ‘Serbo-Croato-Slovene’,<sup>1391</sup> a language which linguistically does not exist. In this regard the following observation was made:

According to the constitution adopted in 1921, the new state expressed the political will of the single “three-named Serbo-Croatian-Slovenian people,” who allegedly spoke a single “Serbo-Croatian-Slovenian language.” Although an ethnic alliance composed of three different “tribes” was

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<sup>1385</sup> Pavlowitch (1971), p. 44.

<sup>1386</sup> At the Congress of Berlin, Bosnia-Herzegovina was “entrusted to Austro-Hungarian administration” (ibid., p. 44). It was formally annexed by Austria-Hungary in 1908. Ibid., p. 48. In historical documents, Bosnia was first mentioned in the 10<sup>th</sup> century and in the 12<sup>th</sup> century even existed as an independent state. For more see Ibrahimagić (1998), pp. 7–11.

<sup>1387</sup> See Pavlowitch (1971), pp. 59–64.

<sup>1388</sup> Radan (2002), p. 138.

<sup>1389</sup> Ibid.

<sup>1390</sup> Ibid.

<sup>1391</sup> Constitution of the Kingdom of Serbs, Croats and Slovenes (1921), Article 3.

theoretically mandated to govern the country, the reality of power and rule was a centralized unitary kingdom, with state authority concentrated in Belgrade.<sup>1392</sup>

As a consequence of centralisation and of an attempt to establish a unitary ‘Yugoslav people’, the 1922 ministerial decree established internal boundaries of thirty-three districts which did not follow ethnic lines.<sup>1393</sup> Such a division was satisfactory for Serbs but opposed by Slovenes and Croats because it was set arbitrarily and did not delimit their respective historical territories.<sup>1394</sup> Internal clashes in the Kingdom continued and on 6 January 1929 the King dissolved the parliament and introduced his personal dictatorship, claiming that this was necessary in order “to preserve the unity of the state and its peoples.”<sup>1395</sup> At that time the Kingdom of Serbs, Croats and Slovenes was also officially renamed the Kingdom of Yugoslavia.<sup>1396</sup> In 1931, the King promulgated a new unitary constitution, which divided the Kingdom into nine administrative units called *banovina*. In some situations these units came closer to historically delimited ethnic boundaries (e.g. the unit called *Dravska banovina* followed the historically delimited territory of Slovenes) but this was not always the case.<sup>1397</sup>

During the Second World War, in 1943, the second Yugoslavia (later known as the SFRY) was established by leaders of the partisan movement led by Josip Broz-Tito.<sup>1398</sup> The new state was defined as a federation and borders of its federal units

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<sup>1392</sup> Cohen (1995), p. 14. Compare to Shaw (1997), p. 489, arguing that in some circumstances “administrative borders have been changed by central government in a deliberate attempt to strengthen central control and weaken the growth of local power centres.” It can be argued that this was the case in the Kingdom of Serbs, Croats and Slovenes.

<sup>1393</sup> Radan (2002), p. 138.

<sup>1394</sup> *Ibid.*

<sup>1395</sup> *Ibid.*

<sup>1396</sup> See Lampe (1996), p. 159.

<sup>1397</sup> See Cohen (1995), p. 18 (map).

<sup>1398</sup> For more see Lampe (1996), pp. 197–228.

were established by the Presidency of the Anti-Fascist Council of the National Liberation of Yugoslavia<sup>1399</sup> on 24 February 1945:

Slovenia is taken in the borders of the former Dravska *banovina* [administrative unit within the former Kingdom of Yugoslavia]; Croatia in the borders of the former Savska *banovina* with 13 districts of the former Primorska *banovina* and the Dubrovnik district of the former Zetska *banovina*; Bosnia-Herzegovina in the borders specified in the Berlin agreement; Serbia in the borders before the Balkan wars with districts taken from Bulgaria in the Treaty of Versailles; Macedonia—Yugoslav territories south of Kacanik and Ristovac; Montenegro in the borders before the Balkan wars with the Berane and Kotor districts and Plav and Gusinje.<sup>1400</sup>

In this regard it is argued that:

This decision relied largely on older historical borders, both as they existed in interwar Yugoslavia and in the former Austro-Hungarian and Ottoman Empires. In many respects the decision accepted borders that coincided with, either exactly or approximately, the borders claimed by the various nationalist movements of the nineteenth and early twentieth century.<sup>1401</sup>

Boundaries of no historical pedigree only had to be drawn between Slovenian and Croatian parts of the former Zone B of the Free Territory of Trieste,<sup>1402</sup> between Croatia and Vojvodina (the former Habsburg territory with a majority Serb population)<sup>1403</sup> and between Serbia and Macedonia.<sup>1404</sup> In these situations ethnic compositions of the territories were taken into account and geographical boundaries (i.e. rivers) were used for the purpose of delimitation.<sup>1405</sup> In the end, the boundary between Slovenia and Croatia (apart from the short part within the former Zone B of the Free Territory of Trieste) followed the former division between Austrian and

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<sup>1399</sup> At the time, the Anti-Fascist Council of the National Liberation of Yugoslavia was the provisional legislature. See Pavlowitch (1971), p. 175.

<sup>1400</sup> Cavoski (1995), p. 25, quoted in Radan (2002), p. 149.

<sup>1401</sup> Radan (2002), p. 149.

<sup>1402</sup> For more on the Free Territory of Trieste see Crawford (2006), p. 553.

<sup>1403</sup> Radan (2002), p. 151.

<sup>1404</sup> *Ibid.*

<sup>1405</sup> *Ibid.*

Hungarian parts of the Habsburg (Dual) Monarchy.<sup>1406</sup> Croatia and Serbia only bordered in Vojvodina where ethnic and geographical principles were used for the exact delimitation.<sup>1407</sup> Bosnia-Herzegovina was re-established along the lines determined at the Congress of Berlin,<sup>1408</sup> which originated in the delimitation of the medieval Bosnian state and of the Bosnian entity within the Ottoman Empire.<sup>1409</sup> Both Serbia and Montenegro were generally re-established along their pre-First World War international borders.<sup>1410</sup> The only significant exception to the rule of boundaries of historical pedigree was Macedonia, which was part of the Kingdom of Serbia before the First World War.<sup>1411</sup> To determine its boundaries, the boundaries of *Vardarska banovina*, a unit within the Kingdom of Yugoslavia, were taken into account, although they were significantly narrower and followed ethnic division lines between Serbs, Macedonians and Kosovo.<sup>1412</sup> An autonomous province of Kosovo was also established within its historical borders.<sup>1413</sup>

After borders between the republics were established, Josip Broz-Tito made a statement: “The lines between federated states in a federal Yugoslavia are not lines of separation, but of union.”<sup>1414</sup> This statement might imply the understanding that internal boundaries were created with an aim better to govern a state and not with the view that internal boundaries could one day become international borders,<sup>1415</sup> which

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<sup>1406</sup> See Pavlowitch (1971), p. 43. The Hungarian-Croatian compromise of 1868 recognised Croatia the status of a separate unit linked to the Hungarian Crown (ibid.).

<sup>1407</sup> See Radan (2002), p. 151.

<sup>1408</sup> Ibid.

<sup>1409</sup> See Ibrahimagić (1998), pp. 9-26.

<sup>1410</sup> Ibid. The exceptions were Kosovo and Vojvodina, which were not part of the Kingdom of Serbia but formally came under Serbian sovereignty in the time of the Kingdom of Serbs, Croats and Slovenes. See Malcolm (1998), pp. 264–66.

<sup>1411</sup> For more on the Creation of the Macedonian republic and recognition of Macedonian ethnicity see Pavlowitch (1971), pp. 198–204.

<sup>1412</sup> Radan (2002), p. 151–52.

<sup>1413</sup> For more on the historic background of Kosovo see infra ch. 7.2.

<sup>1414</sup> Tito's speech in Zagreb in May 1945, quoted in Radan (2002), p. 152.

<sup>1415</sup> Compare supra n. 1283.

might indeed remind of drawing of colonial boundaries.<sup>1416</sup> However, there is a crucial difference between drawing internal boundaries in colonial situations and in the SFRY.

Unlike the administrative units within the Kingdom of Yugoslavia – which resembled the arbitrariness of colonial boundary drawing – the federal units of the SFRY were not created along arbitrary lines but followed boundaries of a historical pedigree, often even former international borders. Federalism and drawing internal boundaries along the lines of borders of historical pedigree also re-created the problem of Serbs settled outside of the boundaries of Serbia. This was, however, not a problem originally created by the internal boundary arrangement within the SFRY but a problem inherited from the past. Further, the internal boundaries in the SFRY did not create (or try to create) new ethnic identities within artificially-defined territorial arrangements but merely took into account the historically-created identities which the constitutional arrangement of the Kingdom of Yugoslavia disregarded and (unsuccessfully) tried to melt into a common Yugoslav ethnic identity.<sup>1417</sup> Different identities were expressly recognised by the 1974 Constitution of the SFRY, which did not promote the idea of a common Yugoslav ethnic identity but rather created a federal arrangement which enabled the peoples of Yugoslavia to

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<sup>1416</sup> See *El Salvador v Honduras* (Nicaragua intervening), ICJ Rep 1992, para 43.

<sup>1417</sup> Compare supra ch. 4.2.1. The last reliable census in the SFRY dates to 1981 (the next one in 1990 was already heavily influenced by the crisis in the federation and was subject to some organised boycotts). The ethnic composition at the 1981 census was the following: Serbs (36.3 percent), Croats (19.7 percent), Muslims (7.9 percent), Slovenes (7.8 percent), Macedonians (6.0 percent), Albanians (5.8 percent), Yugoslavs (5.4 percent), Montenegrins (2.6 percent), Hungarians (2.3 percent). Other ethnic identities included: Italians, Roma, Turks, Slovaks, Bulgarians, Romanians and Germans. What is significant is that most of the population identified itself along ethnic lines. In this perception individuals belonged to one of the constitutive peoples of the SFRY and only a small percentage of barely over five percent identified itself with a common Yugoslav identity. See *The 1981 Census in the SFRY* (1983).

exercise the right of self-determination in its internal mode and vested wide powers within the republics.<sup>1418</sup>

When the SFRY disintegrated, the internal boundaries “upgraded” to international borders were thus not random, colonial-like boundaries (this would be the case if internal boundaries within the Kingdom of Yugoslavia became international borders), but for the most part historically firmly established borders between groups of peoples with different ethnic identities. Thus, the Badinter Commission should not be criticised for “upgrading” the internal boundaries to international borders. Indeed:

Any attempted ethnic reconfiguration of the Former Yugoslavia on a totally free-for-all basis ... would most likely have produced an even worse situation than that which did occur ... The absence of *uti possidetis* presumption would leave in place as the guiding principle only effective control or self-determination. To rely on effective control as the principal criterion for the creation of international boundaries would be to invite the use of force as the inexorable first step ... Self-determination is a principle whose definition in this extended version is wholly unpredictable. Precisely which group would be entitled in such situations to claim a share of a territory?<sup>1419</sup>

In other words, it is not possible to accept that in situations of non-consensual dissolutions all borders are in flux as this calls for ethnic-cleansing to claim effective possession of a territory. Instead, drawing borders along historically well-established boundaries, which separate people with different identities, seems to be a reasonable alternative. In a way, the Badinter Commission did what was later achieved consensually in Czechoslovakia.<sup>1420</sup> It is, however, probably incorrect to term this process *uti possidetis*. Besides the disputable question of whether this principle

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<sup>1418</sup> The 1974 Constitution defined republics as states (Article 3) and proclaimed borders of the republics inviolable without consent of the republic (Article 5(1)), empowered republics to adopt their own legislation applicable only in their respective territories and to exercise effective control in their territories (Article 268) and gave republics powers to conduct their own foreign policies, subject to limitation by the general framework of the federal foreign policy (Article 271).

<sup>1419</sup> Shaw (1997), p. 502.

<sup>1420</sup> See supra ch.6.4.3.

applies outside of colonial situations,<sup>1421</sup> the colonial practice of its application implies confinement of international borders along arbitrarily drawn internal boundaries. It was shown in this section that this was not the case in the SFRY. It is, however, significant that the confinement of international borders along the lines of former internal boundaries of strong historical pedigree created ethnic minorities and numerically inferior peoples.

### **6.5. Conclusion**

The post-1991 practice of new state creations shows that in such situations internal boundaries are commonly “upgraded” to international borders. However, it is questionable whether this practice confirms the applicability of the *uti possidetis* principle outside of the colonial context. It may well be that “to classify all cases where internal lines become international boundaries as instances of *uti possidetis* in operation, simply because the operation of *uti possidetis* may produce this effect in some cases, is to commit a logical fallacy.”<sup>1422</sup> Namely, if the *uti possidetis* principle “upgrades” internal boundaries to international borders, this does not necessarily imply that all such “upgrades” can be ascribed to *uti possidetis*.

It is significant that in the process of decolonisation the right of self-determination enabled all colonial territories to become independent states, regardless of the nature of their boundaries.<sup>1423</sup> In non-colonial situations, the principle of territorial integrity virtually confines the exercise of the right of self-determination to its internal mode and subunits of states only exceptionally become independent states.<sup>1424</sup> Thus, outside of colonial situations the “upgrading” of internal boundaries to international borders does not mean that just any internal

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<sup>1421</sup> See supra ch. 6.3.

<sup>1422</sup> Bartoš (1997), pp. 83–84.

<sup>1423</sup> See supra ch. 6.2. and 6.3.

<sup>1424</sup> See supra ch. 5.3.1. and 5.4.

boundary, regardless of how and why it was established, may potentially become an international border. As post-1991 practice shows, the new international boundaries commonly have a strong historical pedigree. The historical pedigree, however, has a close link to the right of self-determination. It has been argued that a sub-unit of a state can potentially become a state only if its population qualifies as a people and the right of self-determination applies.<sup>1425</sup> In case of consensually-created states where it is not clear whether the right of self-determination is applicable, the state-creation may itself create new identities and thus crystallise identities of a separate people. The historic pedigree of borders can thus imply that the population of certain territory shared common identities which have constituted a distinct people. This may work in both directions: the border might have been established because of separate identities and a historical border may itself lead to the creation of distinct identities significant of a separate people.<sup>1426</sup>

Therefore, it is probably incorrect to proclaim *uti possidetis* wherever internal boundaries become international borders. *Uti possidetis* implies “upgrading” of former colonial boundaries which were drawn with little regard to local populations or their identities and were never meant to be international borders.<sup>1427</sup> On the other hand, in the post-1991 state-creations, most new international borders have had a history as international borders, borders between empires and ethnic-based internal boundaries within empires. There is, however, a problem of the critical date in situations in which historic borders were altered within the most recent broader state formation.

Despite the strong historical pedigree, the exact borders may be negotiable and may become part of the process of negotiations on consensual secession or

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<sup>1425</sup> See supra 6.5.

<sup>1426</sup> Compare supra ch. 6.4.

<sup>1427</sup> See supra ch. 6.2.

dissolution. In the absence of a specific agreement at the time of secession or dissolution, the question of the critical date remains disputable. The Badinter Commission applied the SFRY's last constitutional arrangement, and Latvia and Russia subsequently agreed to apply the last Soviet constitutional arrangement, while Estonia has not accepted this principle.

Another issue of concern relates to minorities that are either newly-created in the new states or previously existed and enjoyed a certain level of protection within the previous state formation. As mono-ethnic "nation-states" do not exist in reality, it cannot be expected that new states could be created without the emergence of minorities and/or numerically inferior peoples. The post-1991 practice of new state-creations shows that the status of such newly-created minorities and numerically inferior peoples can play an important role not only in the recognition of a new state but also in its creation. Indeed, as positions on the possible secession of Québec imply, the question of the status of minorities can become part of the negotiation process on a possible consensual secession.<sup>1428</sup> Further, the situation of Québec also indicates that the new state has an obligation to maintain the level of rights of minorities in its territory, which was formerly guaranteed by the previous sovereign.<sup>1429</sup>

In a case of dissolution, the status of the newly-created minorities and their rights may be specified in the dissolution agreement (Soviet Union, Czechoslovakia). In a non-consensual dissolution, the status and rights of minorities have become a matter of international involvement leading to recognition of the new states (SFRY). Minority rights also play an important role in the situation of international territorial

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<sup>1428</sup> See supra ch. 6.4.1.

<sup>1429</sup> See supra ch. 6.4.1.

administration (East Timor).<sup>1430</sup> In a case of unilateral secession, it may be argued that the (unlikely) success of such secession would, among other factors, depend also on the mechanisms put in place for the protection of minorities and numerically inferior peoples. Arguably, this is part of the ‘legality and legitimacy considerations’ before states decide to recognise a unilateral secession.<sup>1431</sup>

The post-1991 practice of new state-creations thus suggests that an entity cannot become a state if it does not adopt adequate mechanisms for protection of minorities and numerically inferior peoples in its territory. At the same time, the post-1991 practice also shows that minorities and numerically inferior peoples hold neither a veto right in regard to secession nor the right to secession or merger with another state.

In the post-1991 state-creations the commonly used “upgrade” of internal boundaries to international borders is not to be ascribed to the *uti possidetis* principle. Unlike in colonial situations, in the post-1991 practice of state creations, the “upgraded” boundaries had a strong historical pedigree and were in service of delimiting historically established self-determination units. The Badinter Commission’s reference to the *uti possidetis* principle and its extension beyond the colonial framework was probably wrong and yet the Badinter Commission was right when it “upgraded” the internal boundaries to international borders. In the situation of non-consensual dissolution of the SFRY, the Badinter Commission probably resorted to *uti possidetis* in order to find a cover of a well-established legal principle to justify such an “upgrading”, while the correct approach would probably be to discuss the historical pedigree of the internal boundaries within the SFRY. In subsequent practice of secessions and dissolutions, it has been proven that internal

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<sup>1430</sup> See supra ch. 7 for Kosovo.

<sup>1431</sup> See the *Québec* case (1998), para 155.

boundaries, where they delimit self-determination units along historical lines, form a solid base for drawing international borders. The SFRY was such an example, with republics representing self-determination units, divided along historically-established ethnic lines.

What the post-1991 practice of new state-creations does not indicate is how borders are to be drawn in situations in which a people exercises its right of self-determination in its external mode but the territory of a self-determination unit is not defined (e.g. peoples within unitary states). It may well be that peoples within federations are privileged in this regard.<sup>1432</sup> However, the question of borders may become the issue of negotiations on potential independence.<sup>1433</sup> It is thus not excluded that a people could negotiate a future territory of its state with a present parent-state. The final decision will then be a matter of politics.

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<sup>1432</sup> See supra n. 1322.

<sup>1433</sup> See supra ch. 6.4.1.

## VII. DEMOCRACY AND INTERNATIONAL INVOLVEMENT IN KOSOVO

### 7.1. Introduction

The aim of this chapter is to clarify the legal positions and issues related to Kosovo's declaration of independence and the legal significance of international involvement. Initially, it will be examined what circumstances led the Security Council to determine that Kosovo had a governance problem that needed to be addressed by establishing international territorial administration. It will be then argued that this authority created liberal-democratic institutions in order to procure 'good governance' in Kosovo. Subsequently, the role of international involvement was in the creation of the state of Kosovo and how this involvement determined the mode of state creation will be considered. Consideration for Kosovo's democratic development will be especially relevant in the context of state creation. This chapter also considers whether Kosovo can be an example in support of the 'remedial secession' doctrine.

### 7.2. Background on the Kosovo problem: suspension of autonomy and international involvement

After the medieval Serbian state lost the battle of Kosovo,<sup>1434</sup> the territory came under Turkish rule.<sup>1435</sup> In modern times, Ottoman Turks lost control over Kosovo in 1912.<sup>1436</sup> Kosovo came under the *de facto* authority of the Kingdom of Serbia but, due to the outbreak of the First World War, no treaty was ever ratified between the Kingdom of Serbia and the Ottoman Empire on the ceding of Kosovo.<sup>1437</sup> After the First World War, Kosovo became part of the newly-created Kingdom of Serbs,

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<sup>1434</sup> For more on the battle of Kosovo, both fact and myth, see Vickers, (1998), pp. 12–16; Malcolm (1998), pp. 58–80.

<sup>1435</sup> See Vickers (1998), pp. 16–21.

<sup>1436</sup> See Malcolm (1998), p. 252.

<sup>1437</sup> *Ibid.*, pp. 264–65. In 1913 Albania became a state by the Treaty of London; however, Kosovo Albanians were left in Serbia against their will. For more see Vickers (1994), pp. 5–6.

Croats and Slovenes in 1918.<sup>1438</sup> In the federal Yugoslav constitution of 1946, Kosovo was formally defined as an autonomous province within the republic of Serbia,<sup>1439</sup> though at that time it had no organs for the exercise of self-government.<sup>1440</sup> The autonomous status was further expanded in the last Constitution of the SFRY from 1974, which established Kosovo's political organs, necessary for the exercise of self-government.<sup>1441</sup>

In 1989, with Milošević already firmly in power in Serbia,<sup>1442</sup> Kosovo's autonomous status within the federation was suspended by extra-constitutional means.<sup>1443</sup> On 7 September 1989, Albanian members of Kosovo's dissolved assembly met in a secret meeting and proclaimed the Constitutional Act of the Republic of Kosovo.<sup>1444</sup> This was not a declaration of independence. The act adopted by this group aimed to create a republic of Kosovo within the framework of the SFRY.

The dissolution of the SFRY<sup>1445</sup> resulted in a push by ethnic Albanians for Kosovo to become an independent state.<sup>1446</sup> On 22 September 1991, the unofficial, underground parliament of Kosovo Albanians proclaimed the Resolution on Independence and Sovereignty of Kosovo.<sup>1447</sup> The decision was subsequently confirmed at an unofficial referendum, held in secrecy between 26 and 30 September

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<sup>1438</sup> See Malcolm (1998), p. 266. This did not only apply to Kosovo Albanians but also to Albanians living in other parts of the Kingdom of Serbs, Croats and Slovenes (later called Yugoslavia).

<sup>1439</sup> Constitution of the Federative Peoples' Republic of Yugoslavia (1946), Article 2.

<sup>1440</sup> Vickers (1998), p. 146.

<sup>1441</sup> Constitution of the SFRY (1974), Article 2. See also the Constitution of the Socialist Autonomous Province of Kosovo (1974), translated in Helsinki Committee for Human Rights in Serbia (1998), Kosovo: Law and Politics, Kosovo in Normative Acts Before and After 1974, especially p. 41 and p. 45. [Hereinafter Kosovo in Normative Acts].

<sup>1442</sup> *Ibid.*

<sup>1443</sup> For more see Kosovo in Normative Acts (1998), p. 49; Malcolm (1998), p. 344.

<sup>1444</sup> *Ibid.*, p. 347.

<sup>1445</sup> For more see supra ch. 4.2. and 4.3.

<sup>1446</sup> See Vickers (1998), p. 251.

<sup>1447</sup> *Ibid.*

1991.<sup>1448</sup> Reportedly, eighty-seven percent of all eligible to vote cast their votes at the referendum and 99.87 percent of those voted in favour of independence.<sup>1449</sup> Following the referendum, the underground parliament declared independence on 19 October 1991.<sup>1450</sup> Recognition was granted only by Albania.<sup>1451</sup>

On 24 May 1992, elections for the underground Kosovo assembly were held and overwhelming support was given to the Democratic League of Kosovo.<sup>1452</sup> The League supported a peaceful revolt against the oppression, tried to internationalise developments, and created parallel institutions of the putative Republic of Kosovo.<sup>1453</sup> Meanwhile the actions against ethnic Albanians by Serbian forces continued. Writing in 1998, Noel Malcolm observed:

To produce an adequate survey of the human rights abuses suffered by the Albanians of Kosovo since 1990 would require several long chapters in itself. Every aspect of life in Kosovo has been affected. Using a combination of emergency measures, administrative fiats and laws authorizing the dismissal of anyone who had taken part in one-day protest strike, the Serb authorities have sacked the overwhelming majority of those Albanians who had any form of state employment in 1990. Most Albanian doctors and health workers were also dismissed from the hospitals; deaths from diseases such as measles and polio have increased, with the decline in the number of Albanians receiving vaccinations. Approximately 6,000 school-teachers were sacked in 1990 for having taken part in protests, and the rest were dismissed when they refused to comply with a new Serbian curriculum which largely eliminated teaching of Albanian literature and history.<sup>1454</sup>

In this environment Kosovo Albanians not only organised parallel political institutions but also a parallel system of education and healthcare.<sup>1455</sup> Kosovo

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<sup>1448</sup> Ibid.

<sup>1449</sup> Ibid.

<sup>1450</sup> Ibid., p. 252.

<sup>1451</sup> See Crawford (2006), p. 408

<sup>1452</sup> The Democratic League of Kosovo won 96 out of 130 seats in the underground parliament. See Vickers (1998), p. 260.

<sup>1453</sup> See Malcolm (1998), p. 48.

<sup>1454</sup> Ibid.

<sup>1455</sup> Ibid.

became an entity of two parallel societies in which the majority population was discriminated in virtually all segments of life due to its ethnic background.

In November 1995, the United States sponsored ‘peace talks’ at Dayton, Ohio, which led to the settlement of the conflicts in Bosnia-Herzegovina and Croatia by the so-called Dayton Peace Accords.<sup>1456</sup> It is argued that the disappointment that Kosovo was not included in this settlement became a turning point in the attitude of Kosovo Albanians toward the settlement of the Kosovo question.<sup>1457</sup> After years of peaceful resistance by the Democratic League of Kosovo, the militant Kosovo Liberation Army (KLA) now emerged.<sup>1458</sup> Serbian opposition escalated in response.<sup>1459</sup> The situation in Kosovo was dealt with by Security Council Resolutions 1160,<sup>1460</sup> 1199,<sup>1461</sup> 1203<sup>1462</sup> and 1239.<sup>1463</sup> The first three were adopted under Chapter VII. The resolutions, *inter alia*, called for a political solution of the situation in Kosovo,<sup>1464</sup> condemned the violence used by organs of the Federal Republic of Yugoslavia (FRY) as well as violent actions taken by Kosovo Albanians (the latter were called ‘acts of terrorism’),<sup>1465</sup> and, affirming the territorial integrity of Serbia,<sup>1466</sup> expressed support for “an enhanced status of Kosovo which would

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<sup>1456</sup> For more on the Dayton Peace Accords see Crawford (2006), pp. 528–30. See also *supra* n. 676.

<sup>1457</sup> See Vickers (1998), p. 287, arguing that “the Kosovars were both surprised and bitterly disillusioned by the outcome of the Dayton Agreement, which made no specific mention of Kosovo ... It now became apparent to all that as long as there appeared to be relative peace in Kosovo, the international community would avoid suggesting any substantive changes.”

<sup>1458</sup> See Vickers (1998), pp. 292–97.

<sup>1459</sup> *Ibid.*, pp. 297–300.

<sup>1460</sup> SC Res 1160 (31 March 1998).

<sup>1461</sup> SC Res 1199 (23 September 1998).

<sup>1462</sup> SC Res 1203 (24 October 1998).

<sup>1463</sup> SC Res 1239 (14 May 1999).

<sup>1464</sup> See especially SC Res 1160, paras 1, 2, 5; SC Res 1199, paras 3, 4, 5; SC Res 1203, paras 1, 2, 5.

<sup>1465</sup> See especially SC Res 1160, paras 2–3; SC Res 1199, paras 1–2; SC Res 1203, paras 3–4.

<sup>1466</sup> References to territorial integrity of the FRY appear in the preambles of SC Res 1160, para 7; SC Res 1199, para 13; and SC Res 1203, para 14. The preamble to Resolution 1239, para 7, comprehends a more general reference to “the territorial integrity and sovereignty of all States in the region.”

include a substantially greater degree of autonomy and meaningful self-administration.”<sup>1467</sup>

While violence in Kosovo continued, negotiations between the FRY and Kosovo Albanians aiming for a political settlement began in February 1999 at Rambouillet, France.<sup>1468</sup> On 23 February 1999, the Rambouillet Accords on Interim Agreement for Peace and Self-Government in Kosovo were drafted.<sup>1469</sup> The document sought to establish conditions for the termination of hostilities in Kosovo<sup>1470</sup> and foresaw meaningful self-government for Kosovo based on democratic principles.<sup>1471</sup> In this context the Rambouillet Accords included a Constitution for Kosovo,<sup>1472</sup> which established self-governing organs with wide powers.<sup>1473</sup> The document further foresaw a withdrawal of Serbian military and police forces from Kosovo<sup>1474</sup> and NATO peacekeeping.<sup>1475</sup> Importantly, the Rambouillet Accords stressed territorial integrity of the FRY in both the preamble<sup>1476</sup> and in the operative articles.<sup>1477</sup>

The Rambouillet Accords notably foresaw a comprehensive arrangement for the exercise of the right of self-determination for Kosovo Albanians, while avoiding

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<sup>1467</sup> SC Res 1160, para 5.

<sup>1468</sup> See Crawford (2006), p. 557.

<sup>1469</sup> See Interim Agreement for Peace and Self-Government in Kosovo (23 February 1999) [hereinafter The Rambouillet Accords] <<http://www.ess.uwe.ac.uk/kosovo/Rambouillet%20Index.htm>>. The draft was prepared by the Contact Group composed of the United States, the United Kingdom, Russia, France and Italy. See Herring (2000), p. 225. Herring, p. 226, further argues: “The Contact Group proposal was effectively a NATO proposal as Russia was in many ways a dissenting voice within the Contact Group.” The Rambouillet Accords foresaw signatures by the FRY, Serbia and by representatives of Kosovo Albanians. Signatures of the United States, the EU and Russia were foreseen as witnesses. See The Rambouillet Accords, chapter 8, Article II.

<sup>1470</sup> See The Rambouillet Accords (1999), chapter 8, Article II, paras 1, 2.

<sup>1471</sup> Ibid. chapter 8, Article II, para 4.

<sup>1472</sup> Ibid. chapter 1.

<sup>1473</sup> See *ibid.* (the organs established by the proposed Constitution were the Assembly [Article II], President of Kosovo [Article III], Government and Administrative Organs [Article IV] and Judiciary [Article V]).

<sup>1474</sup> Ibid. chapter 7, Articles IV & VI.

<sup>1475</sup> Ibid. chapter 7, Article I, para 1 (a).

<sup>1476</sup> Ibid., preamble, para 4. The preamble to the Rambouillet Accords, *inter alia*, recalls “the commitment of the international community to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia.”

<sup>1477</sup> Ibid. chapter 7, Article I, para 1 (a).

use of this term. At the same time, unequivocal references to the territorial integrity of the FRY excluded the possibility of secession. Further, despite the wide powers of the self-governing organs in Kosovo, clear links were established between those organs and their federal counterparts.<sup>1478</sup> Kosovo was thus meant to be an entity with a high degree of self-government, but still legally anchored within the international borders of the FRY.

The Accords were signed by the representatives of Kosovo Albanians on 18 March 1999, while the FRY and Serbia refused to sign.<sup>1479</sup> Following this refusal, on 24 March 1999, NATO started a military campaign against the FRY.<sup>1480</sup> A full discussion of the legality question of the NATO intervention is outside of the scope of this thesis. Suffice it here to recall that given the absence of the authorisation of the use of force in the relevant Security Council resolutions,<sup>1481</sup> the NATO intervention is generally perceived to be in breach of the UN Charter.<sup>1482</sup>

The end of hostilities between NATO and the FRY was achieved on 9 June 1999 by the signing of the Military Technical Agreement at Kumanovo, Macedonia.<sup>1483</sup> The Agreement reaffirmed “deployment in Kosovo under UN auspices of effective international civil and security presences” and noted that “the UN Security Council is prepared to adopt a resolution, which has been introduced [Resolution 1244], regarding these presences.”<sup>1484</sup> It foresaw a “phased withdrawal

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<sup>1478</sup> See *ibid.*, chapter 1, Article II, para 5 a (ix). In regard to the powers of Assembly, the proposed Constitution, *inter alia*, foresaw “[c]ooperating with the Federal Assembly, and with the Assemblies of the Republics, and conducting relations with foreign legislative bodies.” See also *ibid.* chapter 1, Article III, para 2 (vi) in regard to the powers of President of Kosovo, the proposed Constitution, *inter alia*, foresaw “[m]eeting regularly with the Federal and Republic Presidents.”

<sup>1479</sup> See Crawford (2006), pp. 557–58.

<sup>1480</sup> See Kritsiotis (2000), p. 330.

<sup>1481</sup> See SC Res 1160; SC Res 1199; SC Res 1203; SC Res 1239.

<sup>1482</sup> See Simma (1999), p. 10; Cassese (1999), p. 24; Chinkin (1999), p. 844; Kritsiotis (2000), p. 340.

<sup>1483</sup> The Military-Technical Agreement between the International Security Force (“KFOR”) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia (9 June 1999) <<http://www.nato.int/kosovo/docu/a990609a.htm>>.

<sup>1484</sup> *Ibid.*, Article I, para 1.

of FRY forces from Kosovo to locations in Serbia outside of Kosovo”<sup>1485</sup> and provided that:

[T]he international security force ("KFOR") will deploy following the adoption of the UNSCR [United Nations Security Council Resolution] ... and operate without hindrance within Kosovo and with the authority to take all necessary action to establish and maintain a secure environment for all citizens of Kosovo and otherwise carry out its mission.<sup>1486</sup>

The Military Technical Agreement thus severely limited the sovereign powers of the FRY (Serbia) in Kosovo and adopted the spirit of the Rambouillet Accords.<sup>1487</sup> It may be possible to argue that, given the use of force against Serbia,<sup>1488</sup> the latter was coerced into signing this Agreement. However, similar provisions were adopted and further developed by Resolution 1244.

### **7.3. Resolution 1244 and international territorial administration**

The international territorial administration in Kosovo was established by Resolution 1244, which was adopted under Chapter VII of the UN Charter, on 10 June 1999.<sup>1489</sup>

The preamble to Resolution 1244, *inter alia*, reaffirms “the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and other states of the region, as set out in the Final Act of Helsinki and annex 2.”<sup>1490</sup> Yet the Resolution’s operative paragraphs created an effective situation in which the FRY exercised no sovereign powers in Kosovo.<sup>1491</sup>

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<sup>1485</sup> Ibid., Article II, para 2.

<sup>1486</sup> Ibid., Article I, para 2. See also *ibid.* appendix B.

<sup>1487</sup> Compare *supra* n. 1469.

<sup>1488</sup> See *supra* n. 1482.

<sup>1489</sup> SC Res 1244 (10 June 1999). Resolution 1244 refers to the FRY but now applies to Serbia. Compare *supra* n. 860.

<sup>1490</sup> SC Res 1244, preamble, para 10.

<sup>1491</sup> The Resolution initially demanded “that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.” (SC Res 1244, para 3). It allowed for the return of “an agreed number of Yugoslav and Serb military personnel” (*ibid.*, para 4) after the withdrawal. However, as follows from Annex 2, to which the commitment to territorial integrity expressed in the preamble refers, this return was merely symbolic (*ibid.*, annex 2, Article 6) and the number of personnel was severely limited (*ibid.*, annex 2,

In accordance with Resolution 1244, the Special Representative of the Secretary-General promulgated a document which vested wide authority in the United Nations Interim Administration Mission in Kosovo (UNMIK). Section I of the regulation (entitled “On the Authority of the Interim Administration in Kosovo”) provides:

1. All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.
2. The Special Representative of the Secretary-General may appoint any person to perform functions in the civil administration in Kosovo, including the judiciary, or remove such person. Such functions shall be exercised in accordance with the existing laws, as specified in section 3, and any regulations issued by UNMIK.<sup>1492</sup>

Resolution 1244 does not make an express reference to the right of self-determination. However, it invokes several principles associated with the exercise of this right. In this regard the Resolution spelled out that the international civil presence in Kosovo was established:

[I]n order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.<sup>1493</sup>

The Resolution, *inter alia*, identifies “promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo”<sup>1494</sup> and “[o]rganizing and overseeing the development of provisional institutions for

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note 2). The Resolution further decided to deploy “international civil and security presences,” (ibid., para 5) requested “the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil and security presence” (ibid., para 6) and authorised “Member States and relevant international organizations to establish the international security presence in Kosovo.” (Ibid., para 7).

<sup>1492</sup> UNMIK/REG/1999/1 (25 July 1999), Section 1.

<sup>1493</sup> SC Res 1244, para 10.

<sup>1494</sup> Ibid. para 11 (a).

democratic and autonomous self-government pending a political settlement, including the holding of elections”<sup>1495</sup> as the main responsibilities of the international civil presence.

Drawing authority from Resolution 1244, the Special Representative promulgated the document entitled Constitutional Framework for Provisional Self-Government.<sup>1496</sup> The chapter on basic provisions of the Constitutional Framework provides:

1.1 Kosovo is an entity under interim international administration which, with its people, has unique historical, legal, cultural and linguistic attributes.

1.2 Kosovo is an undivided territory throughout which the Provisional Institutions of Self-Government established by this Constitutional Framework for Provisional Self-Government (Constitutional Framework) shall exercise their responsibilities.

1.3 Kosovo is composed of municipalities, which are the basic territorial units of local self-government with responsibilities as set forth in UNMIK legislation in force on local self-government and municipalities in Kosovo.

1.4 Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions in accordance with this Constitutional Framework and UNSCR 1244(1999).

1.5 The Provisional Institutions of Self-Government are:

(a) Assembly;

(b) President of Kosovo.<sup>1497</sup>

By invoking ‘self-government’ and ‘unique historic, legal, cultural and linguistic attributes’ of the people of Kosovo, the Constitutional Framework adopted self-determination language.<sup>1498</sup> Further, it also created an institutional framework for the exercise of self-government.<sup>1499</sup> In regard to representation in these institutions, the

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<sup>1495</sup> Ibid., para 11 (c).

<sup>1496</sup> UNMIK/REG/2001/9 (15 May 2001) [hereinafter The Constitutional Framework].

<sup>1497</sup> Ibid. chapter 1.

<sup>1498</sup> Compare supra ch. 5.3.

<sup>1499</sup> The Constitutional Framework, chapter 9.

Constitutional Framework enacted an electoral system based on democratic principles<sup>1500</sup> and stipulated for the protection of human rights.<sup>1501</sup>

The Constitutional Framework also expresses the commitment of Kosovo's self-governing institutions "through parliamentary democracy [to] enhance democratic governance and respect for the rule of law in Kosovo."<sup>1502</sup> It further provides that "Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions"<sup>1503</sup> and enumerates the promotion and respect of the democratic principles among those principles, which shall be observed by the self-governing institutions.<sup>1504</sup> Significantly, the Special Representative of the UN Secretary-General thus promulgated a legal instrument which implemented democratic institutions and implemented the political system of liberal-democracy.<sup>1505</sup> The process of democratic transition in Kosovo was therefore carried out under UN auspices, which, as a universal organisation, thus implemented a political system that is not universally accepted as the only legitimate one.<sup>1506</sup>

The democratic institutional design of the Kosovo self-governing organs under the Constitutional Framework was, however, not without flaws. While the institutions of self-government were vested with powers in the exercise of effective control over the territory of Kosovo which can be compared to those of authorities of sovereign states, the Constitutional Framework foresaw an appointed supervisor of the democratic process, i.e. the Special Representative of the UN Secretary General, to whom the self-governing organs remained subordinated.<sup>1507</sup>

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<sup>1500</sup> Ibid. chapter 9.1.3.

<sup>1501</sup> Ibid. chapter 3.

<sup>1502</sup> Ibid., Preamble, para 7.

<sup>1503</sup> Ibid., chapter 1.1.4.

<sup>1504</sup> Ibid., chapter 2.b.

<sup>1505</sup> Compare supra ch. 2.3.3.

<sup>1506</sup> See supra ch. 2.3. and 2.4.

<sup>1507</sup> Ibid. ch. 12.

The Constitutional Framework did not foresee the organs of the FRY or Serbia having any authority over the decision-making of Kosovo's self-governing institutions. Thus, although Resolution 1244 states that the aim of the interim administration is that "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,"<sup>1508</sup> the effective situation in fact implies Kosovo's autonomy within the interim administration. Indeed, "UNMIK has assumed what is effectively (though not in name) the federal-type role of the Serb and FRY authorities, because these authorities failed to perform that role in the past."<sup>1509</sup> Kosovo thus became an internationally administered territory without being put under the international trusteeship system of Chapter XII of the UN Charter.<sup>1510</sup>

While establishing international administration, Resolution 1244 did not define a future territorial status of Kosovo but called for a political process leading toward a final settlement.<sup>1511</sup> However, in this period of an unclear future status, the international administration, which had been established to solve the governance problem, ended up "affecting or creating a sovereignty problem."<sup>1512</sup> The political process aiming to lead toward a final settlement was thus greatly influenced by the unclear future status, the presence of international administration and the fact that Serbia had no sovereign powers in Kosovo.

#### **7.4. The political process aiming to lead toward settlement of Kosovo's status**

On 12 December 2003, the Security Council endorsed the document called "Standards for Kosovo", which was launched under the auspices of the Special

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<sup>1508</sup> SC Res 1244, para 10. But see also O'Neill (2002), p. 30, especially the following observation: "No one knew what the terms 'substantial autonomy' and 'meaningful self-administration' really meant. What united all Kosovo Albanians, regardless of their political party loyalties, was full independence from Serbia and what was left of the FRY. They did not want to hear about autonomy, however defined."

<sup>1509</sup> Wilde (2001), p. 595.

<sup>1510</sup> See Bothe and Marauhn (2002), pp. 230–35.

<sup>1511</sup> See supra n. 1494.

<sup>1512</sup> See Wilde (2001), p. 605.

Representative and upon an initiative of the informal contact group for Kosovo, composed of the United Kingdom, the United States, Russia, France, Germany and Italy.<sup>1513</sup> The document spelled out eight standards to be implemented in Kosovo prior to the determination of its status.<sup>1514</sup> The “standards before status” policy, however, did not lead to the anticipated results. This was acknowledged in the report on the situation of Kosovo, submitted on 30 November 2004 by the Special Envoy of the UN Secretary-General.<sup>1515</sup>

Stemming from these observations, in his subsequent report on 7 October 2005 the Special Representative stated that: “The risks that would follow from a continued ‘wait and see’ policy – in terms of increasing political, economic and social frustration – could soon be far greater than the risks related to a future status process.”<sup>1516</sup> Consequently, the commencement of the process leading toward the final status was proposed.<sup>1517</sup> On 24 October 2005, support for the commencement of the political process was given by the Security Council.<sup>1518</sup> Former Finnish President Martti Ahtisaari was appointed Special Envoy of the UN Secretary-General on Kosovo’s status talks.<sup>1519</sup>

After more than a year of unproductive negotiations and even occasional outbursts of ethnic violence,<sup>1520</sup> the UN Secretary-General on 26 March 2007

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<sup>1513</sup> UN Doc S/PRST/2003/26 (12 December 2003), para 2.

<sup>1514</sup> Ibid., para 3, the following standards were invoked: “[D]emocratic institutions; rule of law; freedom of movement; returns and reintegration; economy; property rights; dialogue with Belgrade; and the Kosovo Protection Corps.” The Security Council further urged: “[T]he Provisional Institutions of Self-Government to participate fully and constructively in the working groups within the framework of the direct dialogue with Belgrade on practical issues of mutual interest, to demonstrate their commitment to the process.”

<sup>1515</sup> UN Doc S/2004/932 (30 November 2004), p. 4. The report was prepared by Special Envoy Kai Eide, who was appointed by the UN Secretary-General to undertake comprehensive review of Kosovo. Ibid., p. 1.

<sup>1516</sup> UN Doc S/2005/635 (7 October 2005), para 10.

<sup>1517</sup> Ibid., paras 62–72.

<sup>1518</sup> UN Doc S/PRST/2005/51 (24 October 2005), pp. 1–2.

<sup>1519</sup> See the Security Council Report, Kosovo Historical Chronology [hereinafter Kosovo Historical Chronology] <<http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.2693009>>.

<sup>1520</sup> Ibid.

addressed a document to the President of the Security Council entitled “Report of the Special Envoy of the Secretary-General on Kosovo’s Future Status”,<sup>1521</sup> in which he recommended independence, supervised by the international community.<sup>1522</sup> Special Envoy Ahtisaari, *inter alia*, observed that “both parties have reaffirmed their categorical, diametrically opposed positions: Belgrade demands Kosovo’s autonomy within Serbia, while Pristina will accept nothing short of independence.”<sup>1523</sup> In his view “the negotiation’s potential to produce any mutually agreeable outcome on Kosovo’s status is exhausted.”<sup>1524</sup> The effective situation was pointed out in following terms:

For the past eight years, Kosovo and Serbia have been governed in complete separation. The establishment of the United Nations Mission in Kosovo (UNMIK) pursuant to resolution 1244 (1999), and its assumption of all legislative, executive and judicial authority throughout Kosovo, has created a situation in which Serbia has not exercised any governing authority over Kosovo. This is a reality one cannot deny; it is irreversible. A return of Serbian rule over Kosovo would not be acceptable to the overwhelming majority of the people of Kosovo. Belgrade could not regain its authority without provoking violent opposition. Autonomy of Kosovo within the borders of Serbia – however notional such autonomy may be – is simply not tenable.<sup>1525</sup>

Consequently, the effective situation suggested that the only alternative to independence was the status quo. However, the latter was rejected by Special Envoy Ahtisaari:

Uncertainty over its future status has become a major obstacle to Kosovo’s democratic development, accountability, economic recovery and inter-ethnic reconciliation. Such uncertainty only leads to further stagnation, polarizing its communities and resulting in social and political unrest. Pretending

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<sup>1521</sup> UN Doc S/2007/168 (16 March 2007) [hereinafter The Ahtisaari Plan].

<sup>1522</sup> *Ibid.*, para 2. See also *ibid.*, para 13.

<sup>1523</sup> *Ibid.*, para 2.

<sup>1524</sup> *Ibid.*, para 3.

<sup>1525</sup> *Ibid.*, para 7.

otherwise and denying or delaying resolution of Kosovo's status risks challenging not only its own stability but the peace and stability of the region as a whole.<sup>1526</sup>

Serbia and Russia rejected the Ahtisaari Plan and Russia made it clear that it would veto any draft Security Council resolution expressing support of Kosovo's independence.<sup>1527</sup> As a result, the Ahtisaari Plan was not endorsed by the Security Council.

In August 2007, the troika made up of the EU, the United States and Russia was given a 120-day period to broker talks between Serbia and Kosovo Albanians on the future status of Kosovo. The troika was expected to report to the UN Secretary-General on the outcome by 10 December 2007.<sup>1528</sup> In the course of this round, Serbia proposed the so-called Aaland-Islands-Model for Kosovo, which would be put in place for twenty years.<sup>1529</sup> Once again, it became clear that Kosovo Albanians were not willing to accept anything but independence.<sup>1530</sup>

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<sup>1526</sup> Ibid., para 4.

<sup>1527</sup> For more see Kosovo Historical Chronology.

<sup>1528</sup> Ibid.

<sup>1529</sup> Belgrade's Proposal Freezes Kosovo Status for 20 Years, Tanjug (20 November 2007). <[http://www.mfa.gov.yu/Policy/CI/KIM/211107\\_6\\_e.html](http://www.mfa.gov.yu/Policy/CI/KIM/211107_6_e.html)>. The so-called Aaland-Islands-Model is summarised in following terms: "Serbia's sole jurisdiction in the case of Kosovo would be in the sphere of the foreign policy, control of the borders, protection of the Serb religious and cultural heritage. Serbia would solely be in charge of defence and this would not be applied in Kosovo ... Kosovo would be solely in charge of its budget, economic policy, agriculture, the media, education, protection of the environment, youth, sports, fiscal policy, internal affairs, health care, energy, infrastructure and employment. Kosovo would independently elect and develop its institutions, and Serbia would not interfere in this. Kosovo would have legislative powers in the spheres of its sole jurisdiction and in other cases determined by the agreement. Serbia could not change and abolish laws in Kosovo, Kosovo would have executive powers, an independent and complete judicial system in charge of disputes in the sole jurisdiction of Kosovo and in other cases determined in the agreement. Belgrade's proposal calls for a transitional period under EU monitoring and the presence of international judges. In keeping with the example of Finland and the Aland Islands, in the case of Kosovo Serbia is the subject of international law and Kosovo is offered as its exclusive jurisdiction the negotiating of agreements with other states and international organizations. Kosovo prepares agreements in consultations with Serbia, while Belgrade formally signs the agreements along with the signature with Kosovo and Metohija."

<sup>1530</sup> Kosovo Troika Press Communiqué, The Baden Conference (28 November 2007) <[http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/declarations/97300.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/declarations/97300.pdf)>.

## **7.5. The Declaration of Independence, statehood and the right of self-determination**

### **7.5.1. The proclamation of independence and implementation of democratic standards**

The additional round of negotiations merely reaffirmed the observations of Special Envoy Ahtisaari – that a mutual agreement on the future status of Kosovo was not achievable and that the political process called for by Resolution 1244 had failed.<sup>1531</sup> Despite some warnings by the EU to Kosovo leaders against a unilateral declaration of independence,<sup>1532</sup> officials of the United States and of the EU soon expressed a general willingness to recognise Kosovo as an independent state.<sup>1533</sup> Ultimately, Kosovo's declaration of independence on 17 February 2008 came as no surprise. Indeed, media reports in the weeks and days prior to the declaration suggest that the latter was coordinated between Kosovo officials on the one hand and the EU and the United States on the other.<sup>1534</sup> It thus became obvious that the EU and the United States decided to implement the Ahtisaari Plan without a Security Council resolution.

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<sup>1531</sup> See supra n. 1531.

<sup>1532</sup> See Europe Warns Kosovo on Separation, NY Times (20 November 2007) <<http://query.nytimes.com/gst/fullpage.html?res=9B05E7DC1038F933A15752C1A9619C8B63&scp=104&sq=kosovo&st=nyt>>.

<sup>1533</sup> See Talks on Kosovo Hit a Dead End, Rice Says, NY Times (8 December 2007) <<http://query.nytimes.com/gst/fullpage.html?res=9F06E4DB1F3EF93BA35751C1A9619C8B63&scp=94&sq=kosovo&st=nyt>>.

<sup>1534</sup> See Here Comes Kosovo, NY Times (14 February 2008) <<http://www.nytimes.com/2008/02/14/opinion/14cohen.html?scp=57&sq=kosovo&st=nyt>>. See also the protocol drafted (in Slovene) by an official of the Slovenian foreign ministry after meeting with representatives of the United States Department of State on 24 December 2007 (in the first half of 2008 Slovenia lead the Presidency of the Council of the EU), which leaked to media, at <<http://www.delo.si/media/faksimile02.pdf>> & <<http://www.delo.si/media/faksimile03.pdf>>. The protocol proves that Kosovo's declaration of independence was coordinated between Kosovo's leaders on the one hand and the United States and the EU on the other. The following notes are especially instructive: "The prevailing view in the EU is that independence of Kosovo needs to be declared after the elections in Serbia (20 January [2008] and 3 February [2008]) .... The session of the Kosovo Parliament, at which declaration of independence would be adopted, should take place on Sunday, so RF [the Russian Federation] has no time to call for the meeting of the UNSC [United Nations Security Council]. In the mean time the first recognitions could already arrive .... The United States ... after Kosovar authorities declare independence, will be among the first to recognise Kosovo. The United States strives for recognition of Kosovo by as many non-EU states as possible. The United States is lobbying with Japan, Turkey, Arab states, that have showed readiness to recognise Kosovo without hesitation .... The United States is currently drafting a constitution with Kosovars. The situation on the ground is favourable. The United States hopes that Kosovars are not going to lose self-confidence, as this could result in United States' loss of influence." (Translations from Slovene are my own).

In this context, on 16 February 2008 (one day prior to the declaration of independence) the EU Council launched the European Union Rule of Law Mission (EULEX) in Kosovo, which aims “to support the Kosovo authorities in their efforts to build a sustainable and functional Rule of Law system.”<sup>1535</sup> The EULEX mission goals, *inter alia*, provide: “Meanwhile [UNMIK] will continue to exercise its executive authority under UN Security Council Resolution 1244. The philosophy of the EULEX Kosovo mission is that it will not replace UNMIK but rather support, mentor, monitor and advise the local authorities.”<sup>1536</sup>

The Declaration of Independence, proclaimed by the Kosovo Assembly on 17 February 2008<sup>1537</sup> makes references to the democratic legitimacy of the Assembly, which consequently declares independence in the name of the people of Kosovo and points out Kosovo’s commitment to the Ahtisaari Plan. Article 1 of the Declaration of Independence provides: “We, the democratically-elected leaders of our people, hereby declare Kosovo to be an independent and sovereign state. This declaration reflects the will of our people and it is in full accordance with the recommendations of UN Special Envoy Martti Ahtisaari and his Comprehensive Proposal for the Kosovo Status Settlement.”<sup>1538</sup>

By adopting the Ahtisaari Plan,<sup>1539</sup> Kosovo, *inter alia*, expressed its commitment to democracy and human rights,<sup>1540</sup> a prolonged international presence

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<sup>1535</sup> See the European Union Rule of Law Mission in Kosovo <[http://www.consilium.europa.eu/cms3\\_fo/showPage.asp?lang=en&id=1458&mode=g&name=>](http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=en&id=1458&mode=g&name=>).

<sup>1536</sup> *Ibid.*

<sup>1537</sup> See *supra* n. 10.

<sup>1538</sup> The Declaration of Independence (2008), Article 1. Compare also *supra* ch. 5.3.4.2. for an argument that the right of self-determination cannot be exercised solely through free elections. However, it has also been argued (see *infra* n. 1525) that in Kosovo no doubt exists that independence is the will of virtually all Kosovo Albanians, who constitute at least ninety percent of Kosovo’s population.

<sup>1539</sup> *Ibid.*, Articles 3, 4, 5, 8, 12.

<sup>1540</sup> See The Declaration of Independence (2008), Article 4.

in its territory,<sup>1541</sup> the inviolability of borders<sup>1542</sup> and rights and duties previously accepted on its behalf.<sup>1543</sup> Kosovo thus also accepted some significant restraints on its sovereignty.

Kosovo's Declaration on Independence, *inter alia*, makes reference to "years of strife and violence in Kosovo, that disturbed the conscience of all civilised people,"<sup>1544</sup> and expresses gratefulness that "in 1999 the world intervened, thereby removing Belgrade's governance over Kosovo and placing Kosovo under United Nations interim administration."<sup>1545</sup> It declares Kosovo to be "a democratic, secular and multi-ethnic republic, guided by the principles of non-discrimination and equal protection under the law,"<sup>1546</sup> welcomes "the international community's continued support of ... democratic development through international presences established in Kosovo,"<sup>1547</sup> and states that "independence brings to an end the process of Yugoslavia's violent dissolution."<sup>1548</sup> As of 20 March 2009, Kosovo has been recognised by fifty-six states.<sup>1549</sup>

On 9 April 2008, Kosovo's Parliament adopted the Constitution of the Republic of Kosovo.<sup>1550</sup> The Constitution affirms Kosovo's commitment to

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<sup>1541</sup> Ibid., Article 5.

<sup>1542</sup> Ibid., Article 8.

<sup>1543</sup> Ibid., Article 9.

<sup>1544</sup> Ibid., preamble, para 7.

<sup>1545</sup> Ibid., preamble, para 8.

<sup>1546</sup> Ibid., para 2.

<sup>1547</sup> Ibid., para 5.

<sup>1548</sup> Ibid., para 10.

<sup>1549</sup> As of 20 March 2009, the following states have granted recognition (in alphabetical order): Afghanistan, Albania, Australia, Austria, Belgium, Belize, Bulgaria, Burkina Faso, Canada, Colombia, Costa Rica, Croatia, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Malaysia, Maldives, Malta, the Marshall Islands, Micronesia, Monaco, Montenegro, Nauru, the Netherlands, Norway, Palau, Panama, Peru, Poland, Portugal, Samoa, San Marino, Senegal, Sierra Leone, Slovenia, South Korea, Sweden, Switzerland, Turkey, the United Arab Emirates, the United Kingdom, and the United States. See Who Recognized Kosova as an Independent State <<http://www.kosovothanksyou.com>>.

<sup>1550</sup> The Constitution of the Republic of Kosovo (2008).

democracy in both the preamble<sup>1551</sup> and in the operative articles<sup>1552</sup> and proclaims that Kosovo “is a democratic Republic based on the principle of separation of powers and the checks and balances among them.”<sup>1553</sup> Apart from these generally expressed commitments, the Constitution establishes the institutions of a liberal-democratic political system. It calls for periodic elections of the parliament<sup>1554</sup> and of the president<sup>1555</sup> and elections based on secret ballot and on the proportionality electoral system.<sup>1556</sup> There is no explicit call for multiparty elections. Yet the multiparty environment is implied in some of the provisions, such as those regulating the composition of the parliament,<sup>1557</sup> competencies of the president<sup>1558</sup> and formation of the government.<sup>1559</sup>

The competencies of Kosovo’s constitutional organs, however, remain subordinated to the international territorial administration. Article 147 of the Constitution reads:

Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations....<sup>1560</sup>

The Constitution thus not only accepts limits on Kosovo’s sovereignty and on competencies of its constitutional organs but also unequivocally subscribes Kosovo to the Ahtisaari Plan.<sup>1561</sup>

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<sup>1551</sup> Ibid., Preamble, para 1.

<sup>1552</sup> Ibid., Articles 1(1), 4, 7, 55(2), 125.

<sup>1553</sup> Ibid., Article 4(1).

<sup>1554</sup> Ibid., Article 66.

<sup>1555</sup> Ibid., Article 86.

<sup>1556</sup> Ibid., Article 64.

<sup>1557</sup> Ibid.

<sup>1558</sup> Ibid., Article 84 (14).

<sup>1559</sup> Ibid., Article 95(1) and 95(5).

<sup>1560</sup> Ibid., Article 147.

<sup>1561</sup> Compare supra n. 1521.

### 7.5.2. Issues of statehood

Based on Resolution 1244 and with promulgation of the Constitutional Framework, Kosovo's government has been established.<sup>1562</sup> Further, based on Resolution 1244, Serbia effectively lost its control over Kosovo.<sup>1563</sup> Consequently, Kosovo has a government independent of Serbia. However, under the statehood criterion of government, independence of any other government, and not only of one particular government, is required.<sup>1564</sup> Since Resolution 1244 remains in force even after Kosovo's declaration of independence [i.e. there is still international territorial administration present],<sup>1565</sup> it is questionable whether Kosovo really has such a government.<sup>1566</sup>

It needs to be noted that Kosovo is not the only example of a state put under international administration with significant powers in internal decision-making, which may even override the decisions of state-authorities.<sup>1567</sup> Despite the extensive power of the international administration, it is not disputed that Bosnia-Herzegovina is a state. Kosovo may thus be a protected state, and its status could indeed be regarded as similar to that of Bosnia-Herzegovina.<sup>1568</sup> It is, however, questionable whether the situation of Kosovo can be compared to that of Bosnia-Herzegovina.

As to restraints on independence, it is argued that they do not infringe upon a state's statehood if they are accepted voluntarily.<sup>1569</sup> Further, statehood criteria are considered in the process of the creation of a new state. Once a state has acquired statehood, the latter is difficult to lose, even when the effectiveness-based criteria are

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<sup>1562</sup> See supra ch. 7.3.

<sup>1563</sup> See supra ch. 7.3.

<sup>1564</sup> Compare supra ch. 3.2.1.

<sup>1565</sup> See The Declaration of Independence (2008), para 1.

<sup>1566</sup> For more on the relationship between the Kosovo authorities and the international administration see supra ch. 7.3.

<sup>1567</sup> See supra n. 1456.

<sup>1568</sup> For more on the status of Bosnia-Herzegovina see Crawford (2006), pp. 528–30.

<sup>1569</sup> See Charlesworth and Chinkin (2000), p. 134, arguing that “a fully sovereign entity can only voluntarily accept restraints on its activities.”

no longer met.<sup>1570</sup> One should also look at the differences between Bosnia-Herzegovina and Kosovo in this context.

Bosnia-Herzegovina obtained first recognitions after the declaration of the results of the referendum on independence on 6 March 1992<sup>1571</sup> and was admitted to the UN on 22 May 1992.<sup>1572</sup> The current federal arrangement for Bosnia-Herzegovina was, however, established by the General Framework Agreement for Peace in Bosnia and Herzegovina, signed in Dayton, Ohio, on 21 November 1995.<sup>1573</sup> The parties to this agreement were the Republic of Bosnia-Herzegovina, the Republic of Croatia, the FRY, the Federation of Bosnia and Herzegovina, and Republika Srpska.<sup>1574</sup> This arrangement also foresaw the institution of the High Representative which severely limits sovereign powers of the authorities of Bosnia-Herzegovina.<sup>1575</sup> Nevertheless, the limitation on the independence of its government was accepted by Bosnia-Herzegovina voluntarily and after it had already been a state. In contrast to this, Resolution 1244 and the Constitutional Framework were adopted before Kosovo declared independence.<sup>1576</sup> Since provisions of both remain in force after Kosovo's declaration of independence, this implies that Kosovo did not accept restrictions to independence on its government voluntarily but in order to comply with the pre-existing legal arrangements governing its territory.<sup>1577</sup> Kosovo's meeting of the (independent) government criterion for statehood is therefore deficient.

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<sup>1570</sup> See supra n. 285.

<sup>1571</sup> The EC member states recognised Bosnia-Herzegovina on 6 April 1992 (see supra n. 629).

<sup>1572</sup> See GA Res 46/237 (22 May 1992). Recognition of Bosnia-Herzegovina was not without controversy since the central government was obviously not in effective control over the territory of the state. For more see supra ch. 4.3.4.

<sup>1573</sup> See The General Framework Agreement for Peace in Bosnia and Herzegovina (1995). See supra n. 676.

<sup>1574</sup> Ibid.

<sup>1575</sup> Ibid., annex 10.

<sup>1576</sup> See supra ch. 7.3.

<sup>1577</sup> Compare SC Res 1244, para 5.

Another possible problematic aspect from the point of view of the traditional statehood criteria stems from the criterion of the capacity to enter into relations with other states. Such a capacity is said to be a corollary of the sovereign and independent government, which exercises jurisdiction on the territory of the state,<sup>1578</sup> and is rather “a consequence of statehood, not a criterion for it.”<sup>1579</sup> In the case of Kosovo, the self-fulfilling nature of this criterion is obvious.<sup>1580</sup> Apparently, Kosovo has the capacity to enter into relations with states which have recognised it, while it does not have this capacity vis-à-vis those states which have not.

### **7.5.3. Kosovo Albanians and the right of self-determination**

Given the historical developments, governance in separation from Albania, and the institutional frameworks for the exercise of self-government within the SFRY and under international territorial administration, Kosovo Albanians, who represent roughly ninety percent of the Kosovo population, probably developed a separate identity, characteristic of a people.<sup>1581</sup> The right of self-determination is thus applicable.<sup>1582</sup> According to the Constitutional Framework, Kosovo’s parliament is

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<sup>1578</sup> See Aust (2005), pp. 136–37. See also supra ch. 3.2.1.

<sup>1579</sup> Crawford (2006), p. 61.

<sup>1580</sup> See supra ch. 3.2.1.

<sup>1581</sup> Compare supra n. 974. Reference to the people of Kosovo and their “unique historical, legal, cultural and linguistic attributes” has also been made by the Constitutional Framework. See UNMIK/REG/2001/9, Chapter 1.1. (infra n. 1497).

<sup>1582</sup> Compare supra ch. 5.3.3.1.1., 7.2. and 7.3. A counter-argument could be made that Kosovo Albanians are not a separate people but an Albanian ethnic minority. As such they would be protected by Article 27 of the ICCPR and not by the common Article 1. The difference between peoples and minorities can be fuzzy and subject to subjective interpretations. However, it has been suggested that groups traditionally qualified as minorities should be regarded as peoples and consequently become beneficiaries of the right of self-determination. See Ermacora (1983), p. 327. Arguably, the Badinter Commission adopted such a position when asked to decide on whether the Serbian population in Bosnia-Herzegovina and in Croatia had the right of self-determination. The Badinter Commission implicitly answered this question by applying common Article 1 of the Covenants. See the Badinter Commission, Opinion 2 (11 January 1992), paras 2 and 4. In the Badinter Commission’s view, the shared ethnic, religious and linguistic background of Serbs from Bosnia-Herzegovina and Croatia with Serbs in Serbia, obviously did not preclude them from being considered beneficiaries of the right of self-determination. Importantly, the applicability of the right of self-determination to Kosovo Albanians was implicitly acknowledged even by the foreign minister of Serbia, who argued that independent Kosovo would establish a precedent which “transforms the right of self-determination into a right to independence.” Address to the Permanent Council of the Organization for Security and

elected based on democratic principles.<sup>1583</sup> Consequently, when Kosovo's parliament declared independence,<sup>1584</sup> it acted as a representative of the people of Kosovo. Yet an argument has been made that the electoral system is not an adequate mechanism for the exercise of the right of self-determination.<sup>1585</sup>

Significantly, no popular consultation on the change of the legal status of Kosovo was held in the era of the effective situation established by Resolution 1244. A popular consultation took place in September 1991 in significantly different circumstances.<sup>1586</sup> It is possible to dispute the legality of the referendum, which was part of underground political activities of Kosovo Albanians.<sup>1587</sup> Nevertheless, despite these possible procedural objections, there exists no doubt that independence is the wish of virtually all ethnic Albanians in Kosovo and thus of roughly ninety percent of Kosovo's population.<sup>1588</sup> As was held by the ICJ in the *Western Sahara Advisory Opinion* and by the Badinter Commission in the opinion on Bosnia-Herzegovina, there may exist circumstances in which popular consultation would not be necessary for the ascertainment of the will of people.<sup>1589</sup>

In 2001, the percentage of the Albanian population in Kosovo amounted to eighty-eight percent and the Serb population to approximately seven percent.<sup>1590</sup> According to some estimates, the shares have changed to ninety-two percent of Albanians and four percent of Serbs.<sup>1591</sup> From the aspect of the will of the people in

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Co-operation in Europe by H.E. Mr. Vuk Jeremić, Minister of Foreign Affairs of the Republic of Serbia, Vienna (19 February 2008) <[http://www.osce.org/documents/pc/2008/02/29767\\_en.pdf](http://www.osce.org/documents/pc/2008/02/29767_en.pdf)>.

<sup>1583</sup> See supra ch. 7.3.

<sup>1584</sup> See supra n. 10.

<sup>1585</sup> See supra ch. 5.3.4.2.

<sup>1586</sup> See supra n. 1448.

<sup>1587</sup> Ibid.

<sup>1588</sup> This is, *inter alia*, affirmed in Ahtisaari Plan, see supra n. 1521.

<sup>1589</sup> See supra ch. 4.3.4. and 5.4.3.3.

<sup>1590</sup> Other ethnic groups include Bosniaks, Roma and Turks. See the Provisional Institutions of Self-Government, Ministry of Environment and Spatial Planning <<http://enrin.grida.no/htmls/kosovo/SoE/popullat.htm>>.

<sup>1591</sup> Ibid.

the context of the right of self-determination, the question is whether the will of the Albanian majority can prevail over the will of the Serb minority.

According to the standard established by the Québec Report, secession requires a prior establishment of sufficient mechanisms for protection of minorities.<sup>1592</sup> Kosovo committed itself to minority protection standards in the Declaration of Independence<sup>1593</sup> and, even more unequivocally, in its Constitution. The Constitution declared the direct applicability of the following universal and regional human rights instruments: UDHR; ECHR and its Protocols; ICCPR and its Protocols; Council of Europe Framework Convention for the Protection of National Minorities; Convention on the Elimination of All Forms of Racial Discrimination; Convention on the Elimination of All Forms of Discrimination Against Women; Convention on the Rights of the Child; Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment.<sup>1594</sup> Further, Article 53 provides: “Human rights and fundamental freedoms guaranteed by this Constitution shall be interpreted consistent with the court decisions of the European Court of Human Rights.”<sup>1595</sup> The Constitution proclaimed both Albanian and Serbian the official languages of Kosovo, while Bosnian, Turkish and Roma have the status of official languages at a municipal level.<sup>1596</sup> The Constitution further grants specific rights to members of Kosovo’s communities<sup>1597</sup> and introduces quotas for political representation of minorities at both municipal and state levels.<sup>1598</sup>

These commitments to some degree diminished the possibility of dominance of majority over minorities and, at the institutional level, enabled representation of

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<sup>1592</sup> See supra ch. 6.4.1.

<sup>1593</sup> The Declaration of Independence (2008), see especially paras 2, 3, 4.

<sup>1594</sup> The Constitution of the Republic of Kosovo (2008), Article 22.

<sup>1595</sup> Ibid., Article 53.

<sup>1596</sup> Ibid., Article 5.

<sup>1597</sup> Ibid., Article 59.

<sup>1598</sup> Ibid., Article 62 (1) & Article 64(2).

minorities in the government of Kosovo. Arguably, by the adoption of the Constitution, Kosovo has, at least at the institutional level, adopted mechanisms for protection of minorities and enabled their political participation. Yet it remains to be seen how these minority protection standards are implemented in practice.

## **7.6. The question of recognition and non-recognition**

### **7.6.1. Serbia and Russia**

Prior to Kosovo's declaration of independence, the Government of the Republic of Serbia on 14 February 2008 adopted a decree which proclaimed Kosovo's declaration of independence null and void in advance.<sup>1599</sup> A day after the declaration of independence was adopted, on 18 February 2008, the government's Decree was confirmed by the National Assembly of Serbia.<sup>1600</sup> The Decree, *inter alia*, annulled those acts of the self-governing organs in Kosovo which proclaim Kosovo's independence,<sup>1601</sup> confirmed that Kosovo is an integral part of Serbia,<sup>1602</sup> confirmed that all citizens of the autonomous province of Kosovo are considered equal citizens of Serbia,<sup>1603</sup> declared the willingness of the government of Serbia to extend Serbian legal order to Kosovo,<sup>1604</sup> and demanded from all states to respect the sovereignty and territorial integrity of the Republic of Serbia.<sup>1605</sup>

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<sup>1599</sup> See The Decree on the Annulment of Illegal Acts of Interim Organs of Self-Government in Kosovo and Metohija on the Unilateral Declaration of Independence (2008) [hereinafter The Decree] <<http://www.srbija.sr.gov.yu/kosovo-metohija/index.php?id=83040>>.

<sup>1600</sup> See The Decree on Confirmation of the Decree of the Government of the Republic of Serbia on the Annulment of Illegal Acts of Interim Organs of Self-Government in Kosovo and Metohija on the Unilateral Declaration of Independence (2008). <[http://www.parlament.sr.gov.yu/content/lat/akta/akta\\_detalji.asp?id=367&t=O#>](http://www.parlament.sr.gov.yu/content/lat/akta/akta_detalji.asp?id=367&t=O#>).

<sup>1601</sup> The Decree, para 1.

<sup>1602</sup> *Ibid.*, para 2.

<sup>1603</sup> *Ibid.*, para 3.

<sup>1604</sup> *Ibid.*, para 4.

<sup>1605</sup> *Ibid.*, para 8.

The annulment of Kosovo's organs declaring independence has no legal effect because organs of Serbia have no authority over Kosovo.<sup>1606</sup> This points out that while Serbia, under international law, has the right to oppose the secession of Kosovo with all legal means,<sup>1607</sup> the legal arrangement for Kosovo, stemming from Resolution 1244, severely restricts the means that Serbia has at its disposal and leaves Serbia without any effective measure under its constitutional law. Nevertheless, the Decree is an express pronouncement of the fact that no consent of the parent state exists in the case of Kosovo's secession. Further, the Decree makes specific references to Resolution 1244. In this context the view is expressed that the Resolution prohibits Kosovo's secession.<sup>1608</sup>

References to the illegality of Kosovo's declaration of independence, stemming from Resolution 1244, were also made by the President of Serbia, Boris Tadić, in his statement to the Security Council on 18 February 2008: "This illegal declaration of independence by the Kosovo Albanians constitutes a flagrant violation of Security Council resolution 1244 (1999), which reaffirms the sovereignty and territorial integrity of the Republic of Serbia, including Kosovo and Metohija."<sup>1609</sup>

President Tadić further stated:

We request the [UN] Secretary-General ... to issue, in pursuance of the previous decisions of the Security Council, including resolution 1244 (1999), a clear and unequivocal instruction to his Special

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<sup>1606</sup> See supra ch. 7.3. This was also implied in paragraph 4 of the Decree which states Serbia's willingness to extend its legal order to Kosovo. The Decree thus acknowledged that Serbian legal order has no force in Kosovo and therefore organs of the Republic of Serbia do not exercise any powers in matters of Kosovo. See also infra n. 1610 for the call of Serbian president Boris Tadić to the Special Representative to annul the declaration of independence. This call implicitly acknowledges that constitutional organs of the Republic of Serbia have no legal powers in the territory of Kosovo and cannot take legal action against Kosovo's independence under Serbian constitutional law.

<sup>1607</sup> Compare Crawford (2006), pp. 388–91.

<sup>1608</sup> The Decree, paras 1, 5, 7, 8.

<sup>1609</sup> UN Doc S/PV.5839 (18 February 2008).

Representative for Kosovo ... to use his powers within the shortest possible period of time and declare the unilateral and illegal act of the secession of Kosovo from the Republic of Serbia null and void.<sup>1610</sup>

The Serbian position was expressly supported by Russia, whose representative in the Security Council stated:

The Russian Federation continues to recognize the Republic of Serbia within its internationally recognized borders. The 17 February declaration by the local assembly of the Serbian province of Kosovo is a blatant breach of the norms and principles of international law – above all of the Charter of the United Nations – which undermines the foundations of the system of international relations. That illegal act is an open violation of the Republic of Serbia’s sovereignty, the high-level Contact Group accords, Kosovo’s Constitutional Framework, Security Council resolution 1244 (1999) – which is the basic document for the Kosovo settlement – and other relevant decisions of the Security Council.<sup>1611</sup>

#### **7.6.2. The European Union and the United States**

The representative of the United Kingdom expressed the view that provisions of Resolution 1244, which refer to the final settlement, need to be read independently from the provisions regulating the interim administration.<sup>1612</sup> In this context the representative of the United Kingdom concluded: “Resolution 1244 (1999) placed no limits on the scope of that status outcome, and paragraph 11 (a) of the resolution is clear that the substantial autonomy which Kosovo was to enjoy within the Federal Republic of Yugoslavia was an interim outcome pending a final settlement.”<sup>1613</sup>

The representative of the United States most clearly expressed the understanding that Kosovo is a situation *sui generis*, which creates no precedent: “My country’s recognition of Kosovo’s independence is based upon the specific circumstances in which Kosovo now finds itself. We have not, do not and will not

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<sup>1610</sup> Ibid., p. 5.

<sup>1611</sup> Ibid., p. 6.

<sup>1612</sup> UN Doc S/PV.5839, p. 13.

<sup>1613</sup> Ibid. The representative of the United States expressed a similar position, however, without giving the reasoning behind the conclusion that secession is not prohibited by Resolution 1244, *ibid.*, p. 18.

accept the Kosovo example as a precedent for any other conflict or dispute.”<sup>1614</sup> The representative of the United Kingdom expressed a similar position and suggested Kosovo’s ‘unique circumstance’ legitimised its secession.<sup>1615</sup>

The United States and those EU member-states which granted recognition to Kosovo, stressed the commitment to Resolution 1244. In this regard the EU member-states expressed the view that the EULEX Mission in Kosovo was part of this commitment.<sup>1616</sup> The representative of Belgium held:

In recent days the European Union has taken important decisions, in full conformity with resolution 1244 (1999). These unambiguously show that the EU itself is ready to shoulder its responsibilities and work alongside the Kosovar authorities on their important commitments towards the international community. The new European Union Rule of Law Mission in Kosovo (EULEX) is concrete testament to that.<sup>1617</sup>

The representative of France expressed a similar position.<sup>1618</sup>

All EU member-states, which were represented in the Security Council on 18 February 2008, expressed support for the Ahtisaari Plan. The representative of Belgium held: “Belgium has always felt that the Ahtisaari plan was the only realistic and viable option.”<sup>1619</sup> A similar argument was made by the representative of Italy,<sup>1620</sup> while the representative of the United Kingdom expressed the following position:

The international community cannot be party to a settlement that is opposed by more than 90 per cent of the territory’s population. Apart from anything else, that would be contrary to our overriding priority of upholding peace and security. My Government is convinced that the proposal of the United

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<sup>1614</sup> Ibid., p. 19.

<sup>1615</sup> Ibid., p. 14.

<sup>1616</sup> Compare supra notes 1535 and 1536.

<sup>1617</sup> UN Doc S/PV.5839, p. 9. See also statement of the Italian representative, *ibid.*, p. 10.

<sup>1618</sup> Ibid., p. 20.

<sup>1619</sup> Ibid., p. 9.

<sup>1620</sup> Ibid., p. 10.

Nations Special Envoy for supervised independence, which the Kosovo Assembly has embraced and committed itself to implement, is the only viable way forward.<sup>1621</sup>

Notably, the Ahtisaari Plan, *inter alia*, invokes democratic development among the criteria legitimising the creation of the state of Kosovo.<sup>1622</sup> Since some recognising states make express references to the Ahtisaari Plan, they, arguably, also adopt the perception that democratic development is an important factor which legitimises unilateral secession in this particular circumstance. Nevertheless, the assessment of legitimacy of a claim for secession is part of a political (not legal) deliberation of each state.<sup>1623</sup> In the example of Kosovo, the decision of some recognising states to take democratic development into consideration was thus merely political and does not reflect any obligation under international law that would require from states to recognise those entities which could pursue a better democratic development if they emerged as independent states.

Lastly, the United Kingdom and the United States, arguably, also advanced ‘remedial secession’ arguments. The representative of the United Kingdom argued: At the heart of today’s controversy is [Resolution 1244]. In that resolution, the Council took an unprecedented step: it effectively deprived Belgrade of the exercise of authority in Kosovo. It did so because the then regime in Belgrade had not just unilaterally deprived Kosovo of its powers of self-government ... it had tried in 1999 to expel the majority population from the territory of Kosovo. Hundreds of thousands of men, women and children were driven from Kosovo by the State forces of Slobodan Milosevic. People being herded onto trains provoked images from the 1940s. The events of 1999 shape the events we see now.<sup>1624</sup>

And the representative of the United States:

Towards the end of the decade [1990s], the Serbian Government of Slobodan Milosevic brought ethnic cleansing to Kosovo. Responding to that humanitarian disaster and clear threats to international

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<sup>1621</sup> Ibid., p. 13.

<sup>1622</sup> See supra n. 1526.

<sup>1623</sup> Compare the *Québec case* (1998), para 155.

<sup>1624</sup> Ibid., p. 12.

peace and security, NATO led a military intervention that stopped the violence and brought peace to Kosovo ... The Security Council solidified that peace by adopting resolution 1244 ... an unprecedented resolution that provided for an interim political framework and circumscribed Serb sovereignty in that territory, and that called for the determination of Kosovo's final status.<sup>1625</sup>

While 'remedial secession' arguments may be found in these two statements, they were employed in order to clarify the origins of the effective situation and in the context of pointing out the *sui generis* character of the situation. Statements of the representatives of the United Kingdom and of the United States otherwise clearly refer to Resolution 1244, which did not grant the right to secession to Kosovo Albanians.<sup>1626</sup> This suggests that in their perception the human rights and humanitarian situation prior to the adoption of Resolution 1244 did not directly lead to the right to secession but rather created an effective situation which ultimately legitimised secession. Therefore not even the recognising states consider that Kosovo's declaration of independence could fall within the 'remedial secession doctrine'.<sup>1627</sup> Indeed, the 'remedial secession' doctrine is to be interpreted very narrowly, i.e. as a last resort for ending of oppression.<sup>1628</sup> It could be perhaps possible to accept such an argument if Kosovo declared independence in 1999 but the effective situation suggests that secession in 2008 was not necessary for the purpose of ending the oppression.

## 7.7. Conclusion

Kosovo was put under international territorial administration because of the governance problem. This problem was not associated with the absence of liberal-democratic practices but with gross human rights violation and with a grave

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<sup>1625</sup> Ibid., p. 18.

<sup>1626</sup> See supra n. 1490.

<sup>1627</sup> Compare supra ch. 5.4.

<sup>1628</sup> See supra notes 1044 and 1048.

humanitarian situation. However, the international territorial administration, whose actions are attributable to the UN,<sup>1629</sup> implemented the institutional design of liberal-democracy and thus carried out the process of democratic transition.<sup>1630</sup> The situation in Kosovo was thus comparable to that in East Timor. Yet in the example of Kosovo, no negotiated solution on its future status was found. Ultimately, Kosovo, with some significant international support, declared independence unilaterally.

From the perspective of the traditional statehood criteria, it is questionable whether Kosovo has an independent government. Further, there are considerations whether the state of Kosovo was established illegally. The answer to the illegal-creation issue depends on the interpretation of Resolution 1244.

Serbia and Russia refer to the text of the preamble to Resolution 1244 invoking the territorial integrity of the FRY and, thus, of Serbia,<sup>1631</sup> and interpret the reference to territorial integrity as an inherent part of the Resolution as a whole and not as only applicable to the part establishing international administration. In their view the right of the territorial integrity of Serbia was doubtlessly affirmed by Resolution 1244. As a consequence, the observance of this right cannot be waived by other states. A unilateral secession is thus illegal and other states are under obligation not to recognise this illegality.

The EU and the United States understand references to territorial integrity in the context of interim administration but not necessarily in the context of final status.<sup>1632</sup> In their understanding the final settlement was meant to be an open-ended process. However, with references to the Ahtisaari Plan,<sup>1633</sup> they make it clear that the open-ended nature of this process did not give Kosovo Albanians a self-executing

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<sup>1629</sup> See Bothe and Marauhn (2002), p. 228.

<sup>1630</sup> Compare supra ch. 2.2.3.

<sup>1631</sup> See supra ch. 7.6.2.

<sup>1632</sup> The position of the United Kingdom especially clearly establishes this dualism. See supra n. 1612.

<sup>1633</sup> Compare supra n. 1521.

right to secession. The latter instead became legitimate after the political process failed. Referring to the Ahtisaari Plan, Kosovo's status needs to be settled in order to enable democratic development.<sup>1634</sup> The recognising states accepted this as an aim that could legitimise secession. Although the Ahtisaari Plan was not endorsed by the Security Council in a subsequent resolution, it importantly shaped the policies of some states in regard to recognition. Further, the Assembly of Kosovo has adopted the Ahtisaari Plan as a foundation of the state of Kosovo.<sup>1635</sup> Implicitly, the recognising states have also adopted the view that this document is now part of Kosovo's legal order and has thus become legally relevant. Commitment to the Ahtisaari Plan is also expressed in Kosovo's Constitution. The recognising states maintain that Resolution 1244 is still in force and that, according to the Ahtisaari Plan, Kosovo's sovereignty is restricted.<sup>1636</sup>

The recognising states invoked special circumstances and a *sui generis* situation in Kosovo, stemming from the current situation, which was put in place due to gross human rights violations, and in which Serbia does not exercise effective control over Kosovo.<sup>1637</sup> The *sui generis* nature is also invoked in regard to international territorial administration. Such a situation was created by a Chapter VII Resolution 1244 and is thus different from other situations in which secession-seeking entities exercise effective control over their respective territories – the loss of Serbia's effective control over Kosovo stems from Resolution 1244 and not from unconstitutional activities of secessionists. At the same time, the vast majority of the population of Kosovo opposes any return of Serbia's authority.<sup>1638</sup> Thus, if the status of Kosovo is not to be determined against the wishes of its population, only

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<sup>1634</sup> See supra n. 1526.

<sup>1635</sup> See The Declaration of Independence (2008), para 5.

<sup>1636</sup> See generally The Ahtisaari Plan.

<sup>1637</sup> See supra ch. 7.6.3.

<sup>1638</sup> See supra n. 1525.

independence or the status quo are possibilities. The Ahtisaari Plan, however, suggests that the status quo is not a viable option.<sup>1639</sup>

The following conclusions shall be made in regard to the state practice in the Kosovo recognition issue: (i) There are strong indicators suggesting that it is generally not disputed whether the right of self-determination applies to Kosovo Albanians – the latter seems to have been acknowledged even by Serbia;<sup>1640</sup> (ii) The dispute is around the question of whether Kosovo Albanians may exercise this right in its external mode; (iii) Resolution 1244 makes references to territorial integrity and states denying recognition argue that the state of Kosovo was created illegally, which leads to a collective duty to withhold recognition; (iv) States granting recognition interpret Resolution 1244 as a legal instrument not automatically precluding secession and that, consequently, the obligation to withhold recognition does not apply. In this context they also invoke the effective situation in Kosovo as well as the Ahtisaari Plan which, arguably, make secession legitimate.

Despite grave human rights violations in the 1990s and references to these circumstances made by a number of recognising states, in 2008 secession cannot be interpreted as the last resort for the ending of oppression. Indeed, oppression was ended already by the effective situation put in place in 1999. As follows from the Ahtisaari Plan, secession was rather perceived as the last resort for Kosovo's democratic development.<sup>1641</sup> Accepting this argument as 'remedial' would, however, significantly stretch the otherwise narrowly-defined 'remedial secession' doctrine.<sup>1642</sup>

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<sup>1639</sup> See supra n. 1526.

<sup>1640</sup> See statement of the minister of foreign affairs of Serbia, supra n. 1582.

<sup>1641</sup> See the Ahtisaari Plan, para 4.

<sup>1642</sup> See supra ch. 7.6.3.

Nevertheless, one cannot deny that the oppression in the 1990s played a significant role in the creation of the state of Kosovo. It was the reason why a Chapter VII Resolution created a legal arrangement under which Serbia exercises no sovereign powers in the territory of Kosovo. Resolution 1244 put Kosovo under international administration. Significantly, the international territorial administration, drawing its legitimacy from Resolution 1244, designed Kosovo's political system along liberal-democratic lines, which includes multiparty elections, although such a political system is not universally-accepted and practised by all UN member states.<sup>1643</sup> The liberal-democratic nature of Kosovo's political system is, however, severely curtailed by the fact that the ultimate legislative, executive and judiciary power is vested in the international territorial administration. It is possible to argue that this is not only problematic from the point of view of Kosovo's democratic performance but also from the point of view of the right of self-determination. It may well be that such an arrangement, by allowing for indeterminate foreign governance, violates the right of self-determination of the people of Kosovo. Importantly, even after the declaration of independence such an arrangement remains in place and it can be argued that Kosovo does not have an independent government.

Resolution 1244 stipulates for a political process leading toward a final settlement of the status question, while the settlement was inherently determined by the legal arrangement put in place by the same resolution. The real question was not whether Serbia would transfer its sovereign powers to another authority (Serbia had already done so in 1999) but rather whether it would regain its sovereign powers. Unsurprisingly, it became clear during the political process that Kosovo Albanians were not willing to accept any settlement under which any degree of control would

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<sup>1643</sup> Compare *supra* ch. 2.3.

be transferred back to Serbia. Such a transfer would consequently mean a violation of the applicable right of self-determination.

The political process did not lead to Serbia's consent to secession. Kosovo did not follow the East Timor model in which international administration led the entity into pre-negotiated independence, affirmed by a subsequent Security Council resolution.<sup>1644</sup> Yet, the Ahtisaari Plan, which rejects the status quo and proposes a "supervised independence", albeit not endorsed by the Security Council, significantly shaped state practice in regard to the creation of the state of Kosovo. The recognising states refer to the Ahtisaari Plan, which provides for Kosovo's development in the areas of democracy, human rights and economy. They perceive the effective situation and circumstances which led to its establishment as well as the Ahtisaari Plan and its objectives as the necessary legitimacy-background for secession. Recognition, it was argued above, is a political act with legal consequences<sup>1645</sup> and not necessarily based on legal reasoning. If some states have adopted Kosovo's democratic development (i.e. democratic consolidation) as a legitimacy criterion when granting recognition, this does not mean that 'democratic development' has become a legal criterion governing the act of state recognition.

While Kosovo's secession was unilateral, many states found it legitimate and thus it attracted a significant number of recognitions. The Kosovo situation was inherently determined by the legal arrangement which established the international territorial administration. So it is generally not a precedent for other secessionist attempts. However, it points out the problem of arrangements for international territorial administration: if the territory is transferred back to the effective control of a previous sovereign against the wishes of its people or if the status quo continues

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<sup>1644</sup> See supra ch. 4.5.1.

<sup>1645</sup> See supra n. 302.

indeterminately, both circumstances breach the right of self-determination. In the example of Kosovo, the possibility of territorial division was not (or, perhaps, has not been) seriously discussed and the recognising states have recognised Kosovo in its historical borders.<sup>1646</sup> However, a possible territorial division could perhaps be another option left for negotiations, which would make a consensual state-creation in such situations more feasible.<sup>1647</sup>

Kosovo probably does not satisfy all of the traditional statehood criteria; however, entities that did not satisfy them have become states before.<sup>1648</sup> Views on the legality of its creation differ and there is no universally accepted interpretation on whether there exists a collective duty to withhold recognition. Kosovo is thus a situation in which the declaratory theory of recognition faces its limits. Is Kosovo a state? If so, would it be a state without the recognitions which have been granted? If recognition is always declaratory, why can Kosovo be considered a state now but was not after the declaration of independence in 1991? The FRY's claim to territorial integrity existed then and Serbia's claim to territorial integrity exists now. In 1991, the government which declared independence was not the effective government of Kosovo. In 2008, the government which declared independence was not an independent government of Kosovo. Similar legal considerations to Kosovo's status of a state under international law thus existed in 1991 as exist now. Notably, however, after the declaration of independence in 1991, recognition was granted only

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<sup>1646</sup> Compare supra n. 1413.

<sup>1647</sup> Representatives of Serbia have recently hinted that they would be potentially willing to accept partition of Kosovo. See Serbia's President Considers Kosovo Division, International Herald Tribune (30 September 2008) <<http://iht.nytimes.com/articles/ap/2008/09/30/europe/EU-Serbia-Kosovo.php>>.

<sup>1648</sup> See supra ch. 7.5.2.

by Albania,<sup>1649</sup> while the 2008 declaration of independence recognition has been granted by fifty-six states.<sup>1650</sup>

The most probable answer is that in the case of Kosovo an informally practised collective recognition had the effects of a collective state creation. The problem, however, is that the new state creation is not (or, perhaps, has not been) acknowledged by the entire international community. To put it differently, if recognition has constitutive effects, are fifty-six recognitions enough for a state creation? Is, then, Kosovo a state for fifty-six states but not for others? These controversies might be of a temporary nature and over time there might be no question of whether a certain entity is a state or not. Such is the example of Bangladesh.<sup>1651</sup>

The institutions of liberal-democracy were created in Kosovo under UN auspices. Yet UN organs did not confirm Kosovo's path to independence. At the same time some recognising states find democratic development a factor that may legitimise Kosovo's secession. The commitment to a democratic political system is also expressed in Kosovo's Constitution, which was probably drafted by the United States.<sup>1652</sup> Therefore it is possible to argue that in the example of Kosovo a number of states not only attempted collectively (albeit informally) to create a new state but also attempted to create a democratic state.

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<sup>1649</sup> See supra n. 1451.

<sup>1650</sup> See supra n. 1549.

<sup>1651</sup> See supra ch. 5.4.

<sup>1652</sup> See supra n. 1534.

## VIII. CONCLUSIONS

### 8.1. Democracy and statehood: an analysis from two perspectives

The early 1990s not only marked the demise of the communist/socialist social, political and economic model but also the emergence of a number of new states in the territories of the Soviet Union and of the SFRY.<sup>1653</sup> The impact of the political developments at the end of the Cold War on international law came from two perspectives. Some scholars argued that pro-democratic change should have an impact on international law governing the rights and duties of existing states.<sup>1654</sup> At the same time pro-democratic change was also reflected in international law governing the creation of new states and the exercise of the right of self-determination.<sup>1655</sup> The latter impact was the main focus of this thesis and it can be argued that some support for the role of democracy and democratic principles in the creation of states and for the exercise of the right of self-determination can be found in state practice<sup>1656</sup> and the practice of UN organs.<sup>1657</sup>

This chapter initially summarises the idea that international law would differentiate existing states based on the (democratic) nature of their governments. Subsequently, conclusions are given on the impacts of the nature of government on entities wishing to become states. However, one should be aware that the discussion on new state creations also deals with existing states, i.e. the (former) parent states of the newly created ones. In this context, an especially relevant question is whether and how the type of government of a parent state can legitimise secession of a part of its territory.

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<sup>1653</sup> See supra ch. 4.3. and 4.4.1.

<sup>1654</sup> See supra ch. 2.4. and 2.5.

<sup>1655</sup> See supra ch. 4.2.

<sup>1656</sup> See supra ch. 4.3., 4.4. and 4.5.

<sup>1657</sup> See supra ch. 4.5.1.

## 8.2. Democracy and the attributes of statehood of existing states

After the end of the Cold War an argument was made that liberal-democracy is the only legitimate system of government and that this needs to be acknowledged even by international law.<sup>1658</sup> In this view, the body of international human rights law should be interpreted with a liberal-democratic bias<sup>1659</sup> and states not adhering to liberal-democratic practices could lose some attributes of statehood.<sup>1660</sup> International law would no longer be a universal and inclusive system but rather law among liberal-democratic states.<sup>1661</sup> In the most extreme interpretations, states not adhering to liberal-democratic practices would even lose protection of Article 2(4) of the UN Charter.<sup>1662</sup>

More modest proponents of the idea of international law as law among democratic states, however, do not speculate about the use of force and rather see international cooperation as a means for expansion of the liberal-democratic zone of law.<sup>1663</sup> Through cooperation between officials of democratic and non-democratic states, the latter, so it is suggested, become accustomed to liberal-democratic practices.<sup>1664</sup>

This thesis has established that such interpretations of post-Cold War international law are problematic from the point of view of contemporary international law based the UN Charter system and from the aspects of its underpinnings in democratic political theory.

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<sup>1658</sup> See especially Franck (1992), Franck (1994), Franck (2001), Slaughter (1995), Slaughter (1997), Teson (1992), Teson (1998).

<sup>1659</sup> *Ibid.*

<sup>1660</sup> *Ibid.*

<sup>1661</sup> See Slaughter (1995), pp. 528–34.

<sup>1662</sup> See Teson (1998), p. 90.

<sup>1663</sup> See Slaughter (1997), pp. 185–86.

<sup>1664</sup> *Ibid.*, p. 194.

### 8.2.1. Democracy, human rights and political theory

Proponents of the liberal-democratic bias in post-Cold War international human rights law have argued that a state party to the ICCPR needs to organise itself along liberal-democratic lines.<sup>1665</sup> In this view democracy is seen in terms of electoral procedures, which are defined by a selection of civil and political rights.<sup>1666</sup> Since elections are at the centre of such an understanding of democracy, the right to political participation is treated as the core right of the democratic political system.<sup>1667</sup> In this context the importance of some other so-called democratic rights, most commonly freedom of expression, freedom of assembly and freedom of religion and conscience is acknowledged.<sup>1668</sup> Yet such a definition of democracy with a selection of civil and political rights is problematic from aspects of both procedural and substantial democracy.

Even if one accepts that democracy is merely a matter of electoral process, it would not be possible to assume that the elaboration of the right to political participation in the ICCPR<sup>1669</sup> binds state parties to hold multiparty elections and/or to adopt a particular political system. Such an interpretation is not possible in light of the drafting history of the ICCPR,<sup>1670</sup> the ICJ's reasoning in the *Nicaragua case*,<sup>1671</sup> or in light of subsequent (post-Cold War) state practice and *opinio juris* on this matter. Indeed, a set of General Assembly resolutions entitled "Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections", adopted at the end of the Cold War, established that electoral method and political system are in the

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<sup>1665</sup> See Cerna (1992), p. 295.

<sup>1666</sup> See supra ch. 2.3., 2.4. and 2.5.

<sup>1667</sup> See supra ch. 2.2.1.

<sup>1668</sup> See supra ch. 2.2.1., 2.3., 2.4., 2.5.

<sup>1669</sup> ICCPR, Article 25.

<sup>1670</sup> See Roth (1999), p. 332.

<sup>1671</sup> The *Nicaragua case*, ICJ Rep 1986, paras 261 & 263.

essential domestic jurisdiction of states.<sup>1672</sup> The resolutions did not mention that elections need to be held in a multiparty setting, nor does the HRC General Comment on the right to political participation, adopted in the post-Cold War period, stipulate for multiparty elections.<sup>1673</sup>

The election-centric definition of democracy has also been disputed in light of democratic political theory. Proponents of the election-centric definition argue that a more comprehensive definition would lack normative clarity<sup>1674</sup> and thus it would also be impossible to define democracy with a selection of human rights norms. Yet such a view is criticised for being too narrow and based on democratic institutions and procedures.<sup>1675</sup> In other words, too much substance is sacrificed for a clear normative definition of democracy.

The following critical argument captures the inadequacy of a definition of democracy in terms of certain civil and political rights and the existence of electoral procedures:

[D]emocracy cannot be conceived purely as an ‘institutional arrangement’, organizational form or checklist of procedures. Rather, it must be understood as an ongoing process of enhancing the possibilities for self-rule and the prospects for political equality, against a background of changing historical circumstances ... [P]olitical legitimacy cannot be approached as a matter of episodic procedure. The fact that parliaments are subject to periodic popular recall is not, of itself, sufficient to justify public power. Democracy demands that state authority be required to justify itself to the citizenry on a continuing basis.<sup>1676</sup>

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<sup>1672</sup> GA Res 43/177, GA Res 44/146, GA Res 46/137, GA Res 47/138, GA Res 48/131.

<sup>1673</sup> HRC, General Comment 25 (1996).

<sup>1674</sup> See Schumpeter (1942), p. 296; Huntington (1990), p. 7.

<sup>1675</sup> See supra ch. 2.2.2.

<sup>1676</sup> Marks (2000), p. 59.

This thesis thus took the position that “[t]he core idea of democracy is that of ... popular control over collective decision-making [and] its starting point is with the citizen rather than with the institutions of government.”<sup>1677</sup>

Popular control over collective decision-making demands equality of the citizenry, which stretches beyond equal enjoyment of civil and political rights:

[P]olitical equality must be seen to require more than the constitutional guarantee of civil rights. Universal suffrage has not put an end to inequalities in the capacity of citizens to exercise and influence state power, because that capacity is affected by disparities in society ... Efforts to ensure political and civil rights must go hand in hand with moves to secure respect for social, economic, and cultural rights.<sup>1678</sup>

Democratic procedures and institutions are thus seen a necessary, but not sufficient, condition for democracy.<sup>1679</sup> Further, democracy is not only a matter of respect of civil and political rights.

Lastly, this thesis took a stance against the perception of human rights and democracy as synonyms.<sup>1680</sup> Human rights and democracy reinforce each other but at the same time human rights and democratic principles can work in opposite directions.<sup>1681</sup> Democratic procedures of decision-making may not only fail to adequately protect human rights but actually lead to their violation. An example of such a situation is the so-called tyranny of the majority. It is human rights standards that protect minorities from majority rule and a broader understanding of democracy requires that a democratic society implement adequate minority protection standards and respect them.<sup>1682</sup>

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<sup>1677</sup> Beetham (1999), p. 91.

<sup>1678</sup> Marks (2000), p. 59.

<sup>1679</sup> See supra ch. 2.2.2.

<sup>1680</sup> See supra ch. 2.2.2.

<sup>1681</sup> Beetham (1999), p. 114.

<sup>1682</sup> See supra ch. 2.2.

### **8.2.2. The conceptual problem of international law as law among liberal-democratic states**

The idea of international law as law among liberal-democratic states is based on the neo-Kantian postulates of the theory that democracies do not fight wars among themselves.<sup>1683</sup> A proposal was made to use this theory of democratic peace as an underpinning to reconceptualise international law to take into account differences between states with different types of government.<sup>1684</sup>

This thesis took a sceptical position toward both the postulates of the democratic peace theory in general and toward its proposed implications for international law. It was argued that one cannot accept that there exist two systems of international law, one governing the relations between states deemed democratic and the other the relationship of states deemed democratic vis-à-vis those deemed non-democratic.<sup>1685</sup> Notably, while democracy might play some role in the process of new state creations, it cannot be argued that ‘democratic government’ is an ongoing statehood criterion and that absence of such a government could result in a loss of statehood or loss of certain attributes of statehood (e.g. protection by Article 2(4) of the UN Charter).<sup>1686</sup> At the same time an argument was made that the democratic peace theory is founded on questionable empirical premises proving the absence of war between democracies and on false assumptions that popular control over decision-making on the domestic plane fosters peace-prone behaviour internationally.<sup>1687</sup>

The idea that type of government could determine the attributes of statehood of existing states is thus disputable from the aspect of both the postulates in political

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<sup>1683</sup> Kant (1795).

<sup>1684</sup> See Teson (1992), Teson (1998), Slaughter (1995), Slaughter (1997).

<sup>1685</sup> See especially Teson (1998), 64–65.

<sup>1686</sup> Compare *ibid.*, p. 90.

<sup>1687</sup> See *supra* ch. 2.5.2.

theory on which they are built and the idea of contemporary international law as a universal and inclusive system. The normative democratic entitlement idea and the theory of international law as law among liberal-democratic states build their prescriptions on the election-centric understanding of democracy, equate democracy with a hierarchical selection of civil and political rights and reflect the democratic self-image of states of European cultural origin. Their prescriptions may undermine the system of the UN Charter and appear to be similar to nineteenth century international law as law among “civilised states” (i.e. those of European cultural origin).<sup>1688</sup> On the other hand, democracy might have become an important consideration in the practice of the post-Cold War new state creations.

### **8.3. Democracy in relation to the statehood criteria and the act of recognition**

The traditional statehood criteria stem from the Montevideo Convention on Rights and Duties of States and are essentially based on effectiveness.<sup>1689</sup> Yet in the UN Charter era there exists significant practice of states and UN organs suggesting that an effective entity will not necessarily become a state. This follows from the international responses to the respective declarations of independence of the TRNC, Southern Rhodesia and the South African “Homelands”.<sup>1690</sup>

In these situations recognitions were collectively withheld based on illegality of state creations. It is undisputed that the creation of a state as a result of an illegal use of force, in breach of the right of self-determination and/or in pursuance of racist policies makes such a state creation illegal.<sup>1691</sup> There are, however, different interpretations regarding the consequences of illegality.

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<sup>1688</sup> See supra n. 222.

<sup>1689</sup> See supra ch. 3.2.

<sup>1690</sup> See supra ch. 3.2.2. and 3.3.

<sup>1691</sup> See supra ch. 3.2.2.

Crawford argues that a result of an illegal state creation is that such an entity, albeit effective, is not a state.<sup>1692</sup> In this perception the legality considerations in the creation of states have a status of additional statehood criteria, while the purpose of non-recognition is to confirm the fact that such an entity is not a state.<sup>1693</sup> The relationship between additional statehood criteria and the duty to withhold recognition to an illegally created effective entity is thus similar to the relationship between the traditional statehood criteria and the prohibition of premature recognition.<sup>1694</sup>

Talmon, on the other hand, makes an argument against the additional statehood criteria and sees the legality considerations for new state creations as recognition requirements.<sup>1695</sup> In his view states may be illegally created but are nevertheless states, albeit illegal and non-recognised ones.<sup>1696</sup> According to Talmon, if effective entities are not deemed states, a call for non-recognition only implies that recognition may constitute a state.<sup>1697</sup>

This thesis took the view that the act of recognition is, generally, based on political reasoning.<sup>1698</sup> Yet the legality considerations for new state creations have a legal, not political, quality. The prohibition of illegal use of force, the right of self-determination and prohibition of racial discrimination are all norms of international law. At the same time, the reaction of the international community in situations of illegal state creations suggests that there exist both state practice and *opinio juris* in support of a norm of customary international law requiring that a state may not be

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<sup>1692</sup> Crawford (2006), pp. 106–07.

<sup>1693</sup> See Raič (2002), p. 105.

<sup>1694</sup> See supra ch. 3.3.2.

<sup>1695</sup> Talmon (2004), p. 126.

<sup>1696</sup> Ibid., p. 125. See also Talmon (2006), p. 238.

<sup>1697</sup> Talmon (2004), p. 138.

<sup>1698</sup> See supra ch. 3.3.1. and 3.3.2.

created in violation of these norms.<sup>1699</sup> However, if there is a legal norm in question, this can only be considered a part of statehood criteria, which have a legal quality, and not part of recognition requirements, which are based on political considerations.<sup>1700</sup> The requirements that a state must not be created as a result of an illegal use of force, in violation of the right of self-determination and/or in pursuance of racist policies, should be thus perceived as additional statehood criteria, which are of a legal nature, and not as recognition requirements, which are of a political nature.

This thesis has also taken a position that it should be acknowledged that universal recognition would sometimes have constitutive effects. It is indeed difficult to defend the argument that recognition of an illegally-created effective entity could not create a state. This does not mean that one must always perceive recognition as a constitutive act. Indeed, recognition can still be seen as an act of acknowledging the fact that a new state has emerged. Yet such a fact is not always clear. This is especially the case when there exists a claim to territorial integrity of a parent state and/or it is not clear whether an entity meets the statehood criteria.<sup>1701</sup> In such circumstances the international response may either crystallise or produce a fact that a new state has emerged. The international response may often be channelled through (collective) recognition, which can have effects of collective state creation.<sup>1702</sup>

The question of legality and illegality of state creations can be determined by some democratic principles which operate within certain norms of international law. This is, notably, the case with the right of self-determination. Indeed, in response to Southern Rhodesia's declaration of independence, the General Assembly called for elections based on the one-man-one-vote principle and, *inter alia*, invoked the

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<sup>1699</sup> See supra ch. 3.3.3.5.

<sup>1700</sup> Compare supra n. 302.

<sup>1701</sup> See supra n. 346. Compare also the *Québec case* (1998), para 155.

<sup>1702</sup> See supra ch. 3.3.2.

prohibition of political parties of native Africans as a source of illegality of the state creation.<sup>1703</sup> Yet it was established in this thesis that these arguments were made in the context of the exercise of the right of self-determination and not as a call for a specific political system.<sup>1704</sup> However, international involvement into post-Cold War state creations is significantly more concerned with democracy as a political system and not only limited to the exercise of the right of self-determination.

#### **8.4. Democracy considerations and international involvement in the situations of Yugoslavia and the Soviet Union**

##### **8.4.1. EC involvement and the scope of democratic requirements**

In 1991, the emergence of new states in the territories of the Soviet Union and the SFRY was closely associated with an international commitment to implement democratic institutions, human rights protection standards and to commit the new states to international peace. The most express association of these three goals with the new state creations stems from the EC Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union.<sup>1705</sup>

The EC Guidelines express a willingness to recognise states constituted on a democratic basis.<sup>1706</sup> They implicitly make reference to the statehood criteria<sup>1707</sup> and to the Charter of Paris, which unequivocally demands elections in a multiparty setting.<sup>1708</sup> Through the Charter of Paris, the EC Guidelines thus adopted the liberal-democratic image of democracy. The EC Guidelines, however, did not address questions of substantial democracy but largely remained confined to electoral

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<sup>1703</sup> GA Res 2022, para 8

<sup>1704</sup> See supra ch. 3.3.3.3.

<sup>1705</sup> The EC Guidelines (1991).

<sup>1706</sup> Ibid., para 2.

<sup>1707</sup> Ibid.

<sup>1708</sup> See Charter of Paris (1990), especially Annex 1, Article 7.

procedures.<sup>1709</sup> Further, the EC Guidelines also refer to the Final Act of Helsinki, which expresses a commitment to peaceful behaviour in the international community.<sup>1710</sup>

Notably, the Final Act of Helsinki and the Charter of Paris were adopted as documents applicable to the existing states and without prejudice to the attributes of their statehood.<sup>1711</sup> Their application to entities which are not (yet) states therefore brings a new dimension into the process of state creation, as the requirements of these two documents have a much wider scope than the additional statehood criteria. Indeed, the Final Act of Helsinki expresses an absolute commitment to peaceful behaviour in the international community,<sup>1712</sup> while the statehood criterion stemming from the prohibition of the use of force more narrowly demands that a state itself may not be created as a result of an illegal use of force.<sup>1713</sup> The Charter of Paris demands a liberal-democratic political system, while democratic principles operating within the statehood criteria are confined to the exercise of the right of self-determination.<sup>1714</sup>

#### **8.4.2. The legal significance of EC involvement and democratic requirements**

The creation of new states in the territory of the Soviet Union significantly differed from that in the SFRY. The dissolution of the Soviet Union was a process for which consent had been expressed at least among all of its republics, although not among all organs of the federation.<sup>1715</sup> The creation of new states was thus a fact, which was merely acknowledged by the international community and recognition was granted

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<sup>1709</sup> See supra ch. 4.2.2.1.

<sup>1710</sup> Final Act of Helsinki (1975), Chapter II, para 1.

<sup>1711</sup> See supra ch. 4.2.3.

<sup>1712</sup> See supra notes 549–552.

<sup>1713</sup> See supra ch. 3.2.2., 3.3.2. and 3.3.3.

<sup>1714</sup> See supra ch. 3.3.3.3.

<sup>1715</sup> See the Minsk Agreement (1991) & the Alma Ata Protocol (1991). See also Kotkin (2001), pp. 96–108.

without examining the (non-)democratic practices of the governments of the emerging new states.<sup>1716</sup>

In the situation of the SFRY, the EC's involvement became crucial for the determination that the federation was in the process of dissolution and thus also for the determination of the mode of new state creations.<sup>1717</sup> Indeed, it was the authority of the Badinter Commission which rejected the view that attempts at unilateral secession were at issue.<sup>1718</sup> Further, the Badinter Commission also discussed recognition of the former Yugoslav republics and application of the EC Guidelines.

Significantly, the implementation of liberal-democratic institutions was thoroughly discussed only in the Badinter Commission's opinion on Slovenia,<sup>1719</sup> while this issue was virtually ignored in the opinions on other republics. Importantly, Slovenia at that time met the statehood criteria and, since the Badinter Commission (by establishing that the SFRY no longer existed) removed the legal significance of Yugoslavia's claim to territorial integrity, there was no legal ground to maintain that Slovenia was not a state.<sup>1720</sup>

The situations in Croatia and in Bosnia-Herzegovina were different as these two entities clearly did not meet the traditional statehood criteria.<sup>1721</sup> Yet the question of effective control over the territory was not discussed by the Badinter Commission.<sup>1722</sup> In the opinion on Croatia, the Badinter Commission thoroughly discussed rights of the Serb minority and established that they were not sufficiently guaranteed. Despite this reservation, recognition was universally granted.<sup>1723</sup>

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<sup>1716</sup> See supra ch. 4.4.1.

<sup>1717</sup> See supra ch. 4.2.1. and 4.3.

<sup>1718</sup> The Badinter Commission, Opinion 1 (29 November 1991), para 3.

<sup>1719</sup> The Badinter Commission, Opinion 7 (11 January 1992).

<sup>1720</sup> See supra ch. 4.3.1. and 4.3.2.

<sup>1721</sup> See supra ch. 4.3.3. and 4.3.4.

<sup>1722</sup> The Badinter Commission, Opinion 5 (11 January 1992), especially para 3.

<sup>1723</sup> See supra ch. 4.3.3.

In its opinion on Bosnia-Herzegovina, the Badinter Commission held that a new state cannot be established without the express consent of its peoples.<sup>1724</sup> Consequently, a referendum on independence was held, but was boycotted by ethnic Serbs.<sup>1725</sup> The Badinter Commission did not specify whether one of the three constitutive peoples of Bosnia-Herzegovina could be outvoted by the other two peoples; however, the international community was obviously ready to accept this view and extended recognition.<sup>1726</sup> Both the Badinter Commission and the ICJ held that Bosnia-Herzegovina became a state on the day of proclamation of the referendum results.<sup>1727</sup>

The EC Guidelines were not entirely followed in the dissolution of the SFRY. This observation refers to both the requirements expressed in the EC Guidelines that refer to the statehood criteria (traditional and additional) and to the requirements that stretch beyond the scope of these criteria.<sup>1728</sup> Sometimes the EC Guidelines were ignored by the Badinter Commission<sup>1729</sup> and sometimes by the recognising states (even when the Badinter Commission pointed out some deficiencies).<sup>1730</sup>

The doubtful quality of democratic practices, human rights abuses and involvement in armed conflicts did not prevent some of the newly-emerged states in the territories of the SFRY and of the Soviet Union from acquiring an international personality. Further, it was shown in this thesis that Macedonia and the FRY were considered states although they, for a period of time, largely remained unrecognised

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<sup>1724</sup> The Badinter Commission, Opinion 4 (11 January 1992), para 4.

<sup>1725</sup> See supra ch. 4.3.4. and 5.4.3.3.

<sup>1726</sup> See supra ch. 4.3.4.

<sup>1727</sup> The Badinter Commission, Opinion 11 (16 July 1993), para 6 & *The Bosnia Genocide case*, ICJ Rep 1996, para 23.

<sup>1728</sup> See supra ch. 4.2.

<sup>1729</sup> The EC Guidelines made a reference to the traditional statehood criteria, which were, however, not discussed by the Badinter Commission. See supra ch. 4.3.

<sup>1730</sup> See supra ch. 4.3.3.

and were not members of the UN.<sup>1731</sup> Significantly, nothing implies that the undemocratic nature of the Milošević regime, gross human rights violations and involvement in armed conflicts in Croatia and in Bosnia-Herzegovina resulted in the FRY's lack of statehood.<sup>1732</sup>

The EC Guidelines therefore clearly did not have the status or effect of statehood criteria.<sup>1733</sup> Their scope reaching beyond the traditional and additional statehood criteria could be understood as part of the recognition policy of EC member (and also some non-member) states.<sup>1734</sup> At the same time, broader EC involvement into the non-consensual dissolution of the SFRY showed a pattern of producing a legal fact of an emergence of new states. Recognition that later followed was expressly declaratory, while international involvement as a whole had constitutive effects.<sup>1735</sup> International involvement in the creation of new states also reflected an attempt to create liberal-democratic institutions in these states; the democracy requirements for recognition were, however, not applied strictly.

### **8.5. The differing modes of post-1991 state creations and the imposition of democratic requirements**

Even in subsequent post-1991 state creations, modes of state creation were not unitary and where initial consent of the parent state was not achieved, international involvement focused on securing such consent. While the consensual dissolution of Czechoslovakia<sup>1736</sup> and the consensual secession of Eritrea from Ethiopia (in specific political circumstances after a lengthy armed conflict)<sup>1737</sup> were mere facts that had to

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<sup>1731</sup> See supra ch. 4.3.5. and 4.3.6.

<sup>1732</sup> See supra ch. 4.3.6.

<sup>1733</sup> See supra ch. 4.3. See also the Badinter Commission, Opinion 11 (16 July 1993), para 7, holding that the FRY became a state on 27 April 1992, i.e. the day it adopted its constitution.

<sup>1734</sup> See supra ch. 4.2.2. and 4.3.

<sup>1735</sup> Compare Caplan (2005), pp. 61–62.

<sup>1736</sup> See Stein (1997); Crawford (2006), p. 402.

<sup>1737</sup> See Haile (1994); Crawford (2006), p. 402.

be acknowledged by the international community, the state creations of East Timor, Montenegro and Kosovo attracted significant international involvement.

International involvement in the territorial statuses of East Timor and Kosovo was channelled through the UN Security Council. In both situations human rights abuses led to the establishment of international territorial administration and loss of effective control of the respective parent states over the territories of East Timor and Kosovo.<sup>1738</sup> Such arrangements were put in place by the Security Council, acting under Chapter VII of the UN Charter.<sup>1739</sup>

In both East Timor and Kosovo, the international territorial administration, whose actions are attributable to the UN,<sup>1740</sup> implemented liberal-democratic institutions and sponsored multiparty elections.<sup>1741</sup> The UN, as a universal organisation, thus formally enacted a political system which is not universally perceived as the only legitimate political system.<sup>1742</sup>

After the declaration of independence, Kosovo adopted a constitution in which it unilaterally bound itself to the provisions of the ECHR as interpreted by the ECtHR.<sup>1743</sup> Given the Court's interpretation of the so-called democratic rights,<sup>1744</sup> Kosovo legally bound itself to organise its political system along liberal-democratic lines. On the other hand, in the example of East Timor, the European image of (procedural) democracy was applied (by the UN) outside of Europe and to a society which does not perceive itself as a part of the European public order.<sup>1745</sup>

The legal arrangements for international territorial administration established in East Timor and in Kosovo influenced the question of sovereignty over these two

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<sup>1738</sup> See supra ch. 4.5.1. and 7.3.

<sup>1739</sup> See SC Res 1244 (Kosovo); SC Res 1272 (East Timor).

<sup>1740</sup> See Bothe and Marauhn (2002), p. 228.

<sup>1741</sup> See supra ch. 4.5.1. and 7.3.

<sup>1742</sup> Compare supra ch. 2.3.

<sup>1743</sup> See The Constitution of the Republic of Kosovo (2008), Article 22.

<sup>1744</sup> See supra ch. 2.3.3.

<sup>1745</sup> See Foley (2008), p. 141.

territories.<sup>1746</sup> In East Timor, international involvement led to Indonesia's consent to holding a referendum on independence, which was conducted under UN auspices.<sup>1747</sup> East Timor's path to independence was ultimately affirmed by a subsequent Security Council resolution which was not adopted under Chapter VII of the UN Charter.<sup>1748</sup>

In Kosovo, international involvement did not lead to Serbia's consent to independence and no Security Council resolution was passed which would affirm Kosovo's path to independence (against the wishes of its parent state). However, it is significant that independence was proposed by the Special Envoy of the UN Secretary-General, Martti Ahtisaari.<sup>1749</sup> The Ahtisaari Plan, *inter alia*, suggested that lack of statehood hindered Kosovo's democratic development. Since democratic institutions had already been established by international territorial administration, Special Envoy Ahtisaari thus implied that Kosovo's democracy could not be consolidated in the absence of statehood.<sup>1750</sup>

This, however, does not mean that democratisation can play a role in the legal argument regarding creation of a new state. In the example of Kosovo, such a view was not affirmed by the Security Council. Kosovo's democratic development was nevertheless considered by some states which have extended recognition,<sup>1751</sup> yet this was part of political (not legal) deliberations of some states when considering the legitimacy of this particular attempt at unilateral secession.<sup>1752</sup>

In the absence of Serbia's consent, from the legal point of view, Kosovo's secession was unilateral.<sup>1753</sup> As identified by the Supreme Court of Canada in the *Québec case*, success of a unilateral secession ultimately depends on recognitions,

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<sup>1746</sup> See Wilde (2001), p. 605.

<sup>1747</sup> See supra ch. 5.4.3.8.

<sup>1748</sup> See SC Res 1338 (31 January 2001).

<sup>1749</sup> See supra n. 1526.

<sup>1750</sup> The Ahtisaari Plan, para 7.

<sup>1751</sup> See supra ch. 7.6.3.

<sup>1752</sup> Compare the *Québec case* (1998), para 155.

<sup>1753</sup> See supra ch. 7.6.2.

while the recognising states take legality and legitimacy criteria into consideration when they decide whether to grant recognition.<sup>1754</sup> Thus, when unilateral secession is in question, recognition by definition has constitutive effects. The democratic legitimacy of secession in such circumstances might be accommodated within the category of ‘legitimacy considerations’ before recognition is granted. However, it would be an exaggeration to conclude that democratic legitimacy of a new state creation has become a statehood criterion.

The creation of the state of Montenegro saw significant involvement of the EU. The EU sponsored the transformation of the FRY to a transitional state formation, the SUSM, the constitution of which explicitly allowed for secession, foresaw holding of a referendum and even solved the problem of state succession and continuity of international personality in advance.<sup>1755</sup> Yet the referendum rules at that time remained undefined by the constitution.

Prior to the referendum, the EU also imposed the referendum rules,<sup>1756</sup> which were designed to provide for the democratic legitimacy of the decision-making. The fifty-five percent threshold obviously sought to avoid decision-making with a very narrow majority and gave reasonable hope to both sides for winning the referendum.<sup>1757</sup> A liberal-democratic political system was not imposed, as institutions of procedural democracy had already been implemented in Montenegro.<sup>1758</sup>

A pattern that can be identified within some of the post-1991 state creations is significant international involvement that begins prior to the declaration of independence. In this process consent of a parent state is sought and the development

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<sup>1754</sup> The *Québec case* (1998), para 155.

<sup>1755</sup> The Constitution of the State Union of Serbia and Montenegro (2003), Article 60.

<sup>1756</sup> See International Crisis Group Briefing No 42 (30 May 2006), p. 6.

<sup>1757</sup> See *supra* ch. 5.4.3.6.

<sup>1758</sup> See *supra* n. 868.

of democratic institutions initiated. Even in the case of Kosovo, where no consent of the parent state was achieved, there exists significant evidence that Kosovo's declaration of independence was approved by part of the international community and that recognition was promised in advance.<sup>1759</sup> Thus, in the case of Kosovo recognition had constitutive effects and it is one example where it is difficult to differentiate collective recognition from collective state creation.<sup>1760</sup>

The practice of post-1991 state creations has thus witnessed some examples where new states were effectively created by international involvement. The international community notably tried to prevent attempts at unilateral secession and rather sought to produce a fact that a new state (or more new states) had emerged. This was done either by negotiating approval of the parent state or by providing an authority for the interpretation that the parent state no longer existed. In both circumstances, the parent states' claim to territorial integrity is removed and emergence of a new state becomes merely a matter of fact.<sup>1761</sup> In the example of Kosovo, however, it is possible to argue that statehood was constituted by collective recognition by a number of states.

In these processes of post-1991 state creations, where the mode of state creation attracted international involvement beyond merely a granting of recognition, an attempt was made to impose democratic standards. These standards stretched beyond the operation of democratic principles within the right of self-determination, such as monitoring referenda on independence and confirming their results. Indeed,

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<sup>1759</sup> See supra n. 1534.

<sup>1760</sup> Compare supra ch. 3.3.2.

<sup>1761</sup> See supra ch. 2.2. and 2.3. (the dissolution of the SFRY), ch. 2.5.1. (East Timor) and ch. 2.5.2. (Montenegro).

in East Timor and Kosovo, the international territorial administration established democratic institutions and thus carried out the process of democratic transition.<sup>1762</sup>

## **8.6. The operation of and limits on democratic principles within the right of self-determination**

### **8.6.1. Democracy and the qualification of ‘representative government’**

The principle of self-determination and modern democratic political theory have common origins in the ideals of the American and French revolutions.<sup>1763</sup> The underlying principle of both is that a government must be representative of its people.<sup>1764</sup> However, it is questionable whether the qualification of a representative government for the purpose of self-determination as a human right can be perceived as identical to the qualification of a representative government within democratic political theory.

In the UN Charter era, self-determination is codified as a human right.<sup>1765</sup> The drafting history of this specific right and of the ICCPR and of the ICESCR in general show that self-determination as a human right is not to be understood through the prism of the liberal-democratic political system. Indeed, “it was the former Eastern Bloc nations that played the most significant role in developing and promoting self-determination following World War II, usually in the face of great reluctance from Western democracies.”<sup>1766</sup> Further, it can be assumed that Socialist states would not have ratified the Covenants if they meant to bind the state parties to a liberal-democratic political system.<sup>1767</sup>

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<sup>1762</sup> See supra ch. 4.5.1. and 7.3.

<sup>1763</sup> Cassese (1995), p. 11.

<sup>1764</sup> Ibid.

<sup>1765</sup> ICCPR & ICESCR, Article 1.

<sup>1766</sup> R Miller (2003), p. 612.

<sup>1767</sup> See Roth (1999), p. 332.

The right of self-determination, importantly, only applies to peoples.<sup>1768</sup> The qualification of a representative government can therefore only be defined in regard to identities which define a separate people. This does not include identities based on political opinion and/or identities stemming from party politics.<sup>1769</sup> Thus, it cannot be said that a government which is not a result of multiparty elections *prima facie* violates the right of self-determination. The exclusion of Kosovo Albanians from political life in the FRY under the Milošević regime resulted in a breach of the right of self-determination of Kosovo Albanians.<sup>1770</sup> Yet the non-democratic nature of the Milošević regime did not breach the right of self-determination of Serbs and Montenegrins within the FRY.<sup>1771</sup> The qualification of a representative government for the purpose of the right of self-determination is therefore significantly narrower than its qualification for the purpose of democratic political theory.

Further constraints on self-determination in the UN Charter era stem from its codification as a human right and not as an absolute principle:

[T]he right of self-determination is not an absolute right without any limitations. Its purpose is not directly to protect the personal or physical integrity of individuals or groups as is the purpose of the absolute rights and, unlike the absolute rights, the exercise of this right can involve major structural and institutional changes to a State and must affect, often significantly, most groups and individuals in that State and beyond that State. Therefore, the nature of the right does require some limitations to be implied on its exercise.<sup>1772</sup>

The right of self-determination thus needs to be weighed against other human rights and against the principle of territorial integrity of states.<sup>1773</sup>

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<sup>1768</sup> ICCPR & ICESCR, Article 1, paras 1 & 2.

<sup>1769</sup> See supra ch. 5.3.3.1.

<sup>1770</sup> See supra ch. 7.2.

<sup>1771</sup> See supra n. 1771.

<sup>1772</sup> McCorquodale (1994), p. 876.

<sup>1773</sup> See the Declaration on Principles of International Law (1970), annex, principle 5, para 7.

### 8.6.2. Secession, human rights and democracy

As a consequence of limitations on the right of self-determination, secession is not an entitlement under international law and in the UN Charter era, the right of self-determination will normally be consummated in its internal mode.<sup>1774</sup> The success of a unilateral secession will depend on international recognition and, when states consider granting recognition, even democratic legitimacy of secession may play some role.<sup>1775</sup>

The only post-1991 example of unilateral secession that has attracted a significant number of international recognitions is Kosovo.<sup>1776</sup> Kosovo's declaration of independence in 1991 was ignored by the international community.<sup>1777</sup> Further, in 1999, independence was not proclaimed but rather an arrangement for international territorial administration was established.<sup>1778</sup> In other words, Serbia's and the FRY's abuses of sovereign powers did not directly lead to the creation of a new state. For this reason Kosovo's secession in 2008 cannot be deemed to support the 'remedial secession doctrine', which stems from an inverted reading of the elaboration of the principle of territorial integrity in the Declaration on Principles of International Law<sup>1779</sup> but acutely lacks state practice.

Other post-1991 state creations, either resulting from dissolution or secession, had a significant consensual element. Sometimes consent was the outcome of a rather complicated political situation in a parent state (e.g. the dissolution of the Soviet

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<sup>1774</sup> See the *Québec case* (1998), para 126.

<sup>1775</sup> *Ibid.*, para 155.

<sup>1776</sup> See *supra* n. 1549.

<sup>1777</sup> See Vickers (1998), p. 251. See also Crawford (2006), p. 408.

<sup>1778</sup> See SC Res 1244.

<sup>1779</sup> See the Declaration on Principles of International Law (1970), annex, principle 5, para 7. Arguments have been made that the elaboration of the principle of territorial integrity allows for an interpretation that a state, which has a government non-representative of all of its peoples, might not be entitled to limit the exercise of the right of self-determination of its oppressed peoples to the internal mode of this right. For more see *supra* ch. 5.3.3.1.2. and 5.4.

Union and the secession of Eritrea). In some other examples consent was achieved by international involvement.

There is a caveat that a consensual state creation does not override the norms of international law. As the examples of the South African “Homelands” have shown, even in the absence of a claim to territorial integrity, a state cannot be created in violation of the right of self-determination and/or in pursuance of racist policies.<sup>1780</sup> The example of the South African “Homelands” proves that even when a state creation is consensual, it must not be illegal. Yet although human rights law has an effect on the law of statehood, this cannot be extended to mean that there is a prescribed threshold of human rights protection or even a prescribed political system which influences the question of whether an effective entity would become a state. It might be possible to argue that the only human rights standards that determine the illegality of a state creation are those of *jus cogens* character.<sup>1781</sup>

### **8.6.3. The will of the people in the creation of new states**

Before the legal status of a territory is altered, the operation of the right of self-determination requires a consultation of the people inhabiting it. Such a requirement was expressed by the ICJ in the *Western Sahara Advisory Opinion*<sup>1782</sup> and later affirmed by the Badinter Commission in its opinion on Bosnia-Herzegovina.<sup>1783</sup> It remains questionable how the consent of the people is to be expressed and what the limits are of its application.

In the circumstances of an attempt to change the legal status of a territory, a referendum is the most common expression of the will of the people. While a referendum does not seem to be the only acceptable means of such an expression, it

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<sup>1780</sup> See supra ch. 3.3.3.4.

<sup>1781</sup> See supra ch. 3.3.3.4.

<sup>1782</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 55.

<sup>1783</sup> The Badinter Commission, Opinion 4 (11 January 1992), para 4.

is not entirely clear under what circumstances a referendum may be considered unnecessary. In this regard two observations can be made. First, a referendum may not be required when the will of the people is obvious. This was implied even by the ICJ in the *Western Sahara Advisory Opinion*.<sup>1784</sup> Further, in the absence of a referendum in Kosovo, there have been no doubts expressed regarding the will of Kosovo Albanians.<sup>1785</sup> Second, it cannot be argued that general electoral results imply a decision regarding the legal status of a territory or that the right of self-determination can be exercised through general elections alone. In other words, an overwhelming vote for a political party advocating secession does not necessarily imply a support for secession. Indeed, the voting behaviour of people depends on a variety of issues, not only those concerning the exercise of the right of self-determination.<sup>1786</sup>

When referenda on the change of the legal status of a territory are held, the democratically-expressed will of a people in favour of the founding of a new state will not necessarily create a new state. Indeed, observance of the principle of territorial integrity will normally prevail over the will of a people.<sup>1787</sup> Nevertheless, the democratically-expressed will of a people in favour of secession cannot be ignored.<sup>1788</sup> This means that such a will of the people would put an obligation on both the independence-seeking entity and on the parent state to negotiate a future constitutional arrangement of the entity in question. Significantly, such negotiations do not begin on the premise that the entity in question would necessarily become an independent state.<sup>1789</sup>

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<sup>1784</sup> *Western Sahara Advisory Opinion*, ICJ Rep 1975, para 59.

<sup>1785</sup> See supra n. 1525.

<sup>1786</sup> See McCroquodale (1996), pp. 309–10.

<sup>1787</sup> See the *Québec case* (1998), paras 112 & 126.

<sup>1788</sup> The *Québec case* (1998), para 87.

<sup>1789</sup> *Ibid.*, para 91. See also Dumberry (2006), p. 429.

The example of Québec set the standard that both the referendum question and the deciding majority need to be clear.<sup>1790</sup> It is difficult to prescribe a universally applicable standard of clarity. Some referenda questions in situations of post-1991 state creations might have seemed unclear,<sup>1791</sup> however, more direct wordings were probably prevented by complicated political situations (in some cases even by an emerging armed conflict). Further, even in such circumstances there existed no doubt among the people that they were consulted on independence.

In regard to the clear majority, it can be argued that in each situation, differently qualified majorities may be considered legitimate. In most post-1991 state creations, a majority of all valid votes cast was prescribed, while the majority of all eligible to vote was commonly achieved.<sup>1792</sup> At the same time, the case of Montenegro shows that in a complicated internal socio-political situation, a situation-specific majority may be prescribed in order to achieve legitimacy of the decision-making.<sup>1793</sup>

#### **8.6.4. The will of the people and the delimitation of new states**

In the process of international involvement in the dissolution of the SFRY, the Badinter Commission interpreted the decision of the Chamber of the ICJ in the *Burkina Faso/Mali case* as an authority supporting the applicability of the *uti possidetis* principle outside of colonial situations.<sup>1794</sup> Such an interpretation was criticised on two grounds. First, it was argued that the *uti possidetis* principle is inherently associated with the process of decolonisation and therefore not applicable

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<sup>1790</sup> The *Québec case* (1998), para 87. See also The Clarity Act (2000), Articles 1 and 2.

<sup>1791</sup> See supra ch. 5.4.3.2., 5.4.3.3. and 5.4.3.4.

<sup>1792</sup> The majority of all eligible to vote was unequivocally demanded only in Slovenia (see supra ch. 4.3.1.) At the same time, of all successful post-1991 state-creations where independence referenda were held, a majority of all eligible to vote was not achieved only in Montenegro (see supra ch. 4.3.8.).

<sup>1793</sup> See supra ch. 5.4.3.6.

<sup>1794</sup> The Badinter Commission, Opinion 3 (11 January 1992).

in non-colonial situations.<sup>1795</sup> Second, the “upgrading” of the former Yugoslav internal boundaries to international borders, arguably, disregarded people’s ethnic identities, limited the will of the people and has been deemed to be a wrong approach in a situation of dissolution.<sup>1796</sup>

In the Badinter Commission’s view, the Chamber of the ICJ in the *Burkina Faso/Mali case* established that *uti possidetis* is a generally applicable principle of international law, i.e. a principle not confined to decolonisation.<sup>1797</sup> Yet a full reading of the relevant paragraph of the *Burkina Faso/Mali case* shows that the Chamber of the ICJ held that *uti possidetis* was a general principle of international law where decolonisation is concerned.<sup>1798</sup> In the particular case this meant a principle not limited to decolonisation in Latin America but also applicable to decolonisation in Africa.<sup>1799</sup> Thus, it may well be that the Badinter Commission selectively quoted the *Burkina Faso/Mali case* in order to prove the applicability of the *uti possidetis* principle in non-colonial situations.

In relation to the criticism that the *uti possidetis* principle implies drawing international borders along lines which, at the same time, disregard people’s existing identities and create new ones,<sup>1800</sup> it is questionable whether those new state creations, which are not a consequence of decolonisation, imply such a border-drawing, especially when new international borders in Europe, i.e. borders of strong historical pedigree, are in question. In the practice of all post-1991 state creations so far, international borders were confined along former internal boundaries.<sup>1801</sup> The international borders of Eritrea and East Timor otherwise have colonial origins but

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<sup>1795</sup> See Radan (2000), pp. 60–62.

<sup>1796</sup> See Radan (2002), pp. 234–43

<sup>1797</sup> The Badinter Commission, Opinion 3 (11 January 1992).

<sup>1798</sup> *Burkina Faso/ Mali*, ICJ Rep 1986, para 20.

<sup>1799</sup> *Ibid.*

<sup>1800</sup> See supra notes 1260 and 1427.

<sup>1801</sup> See supra ch. 6.4.

these state creations were not consequences of decolonisation. Therefore *uti possidetis* was not applied in these two situations.<sup>1802</sup> In other new post-1991 state creations, former internal boundaries which became international borders commonly had a historical pedigree of more than arbitrarily-drawn internal administrative boundaries. Indeed, the internal boundaries frequently adopted the lines of former international borders or internal borders within empires which delimited territories settled by distinct peoples.<sup>1803</sup> In other words, a common pattern of post-1991 new state creations is that international borders were confined along not just any former internal boundary but along those boundaries which delimited historically-established self-determination units. The SFRY was not an exception to this pattern but the situation was more complex due to its non-consensual dissolution and ethnically-mixed populations in Croatia and in Bosnia-Herzegovina.<sup>1804</sup>

International law does not support an automatic “upgrade” of an internal boundary to an international border outside of the process of decolonisation. Indeed, the exact definition of borders may become part of the negotiation process for the determination of the future legal status of a territory and an entity’s possible path to independence.<sup>1805</sup> Where internal boundaries have a strong historical pedigree of delimiting self-determination units, practice has shown that these boundaries would form a strong base for the determination of the new international borders. On the other hand, where internal boundaries were subject to relatively recent arbitrary changes, an argument in favour of “upgrading” of an internal boundary to an international border will be weaker, though not irrelevant.<sup>1806</sup>

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<sup>1802</sup> See supra ch. 6.4.2. and 6.4.6.

<sup>1803</sup> See supra ch. 6.5.

<sup>1804</sup> See supra ch. 6.4.8.

<sup>1805</sup> See supra ch. 6.4.1.

<sup>1806</sup> See supra ch. 6.4.1. and 6.4.4.

The different pedigree of internal boundaries and the fact that there is no presumption that international borders are not automatically confined along the lines of internal boundaries in non-colonial situations thus show that it is probably incorrect to equate this process with the *uti possidetis* principle. However, the non-colonial determination of the new international border, just like *uti possidetis*, also limits the will of the people and cannot accommodate the wishes of all peoples and minority groups inhabiting the territory in question.

#### **8.6.5. Limitations on the will of people in situations of new state creations and their delimitation**

When new states are created, rights of minorities and numerically inferior or otherwise non-dominant peoples within an entity wishing to become a state are an important consideration. This was expressly affirmed in the *Québec case*.<sup>1807</sup> Further, protection of minorities and numerically inferior or otherwise non-dominant peoples were dealt with in situations of both consensual and non-consensual post-1991 state creations.<sup>1808</sup>

At the same time, the newly-created minorities and numerically inferior peoples do not have a right to veto the secession or claim their own 'right to secession'.<sup>1809</sup> Nevertheless, the numerically inferior or otherwise non-dominant peoples are not precluded from secession from the newly-created state. Even in such circumstances, international law remains neutral on the question of secession and, ultimately, secession may or may not follow. The status of peoples within newly-created states does not differ from the status of peoples in any other state.<sup>1810</sup>

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<sup>1807</sup> The *Québec case* (1998), especially paras 74 & 76.

<sup>1808</sup> See supra ch. 4.2.3, 4.4 and 4.5

<sup>1809</sup> See supra ch. 6.4.1.

<sup>1810</sup> See supra ch. 6.5.

When new states are established non-consensually, the situation is more difficult. The question is not only who then decides on a new state creation but also who decides on the new international delimitation. When a unilateral secession is in question, the reasoning in the *Québec case* implies that when states decide on granting recognition, the recognition of a new international border along the lines of the internal boundary is part of the legality and legitimacy considerations taken into account prior to the granting of recognition.<sup>1811</sup> The recognising states recognised the internal boundary between Kosovo and Serbia, which otherwise has a strong historical pedigree, as the new international border.<sup>1812</sup> When a non-consensual dissolution was in question in the SFRY, the determination of international borders was also left to international involvement, and internal boundaries (which had a strong historical pedigree of delimiting self-determination units)<sup>1813</sup> were upgraded to international borders (though the Badinter Commission probably incorrectly invoked the *uti possidetis* principle).<sup>1814</sup>

Further, when internal boundaries are “upgraded” to international borders, the constitutional order of the disintegrating states would seem to be determinative for both the state creation and the determination of its borders. In the case of the SFRY, the EC only invited republics to choose independence, although it could be argued that the right of self-determination was also applicable in some other subunits which were also delimited by internal boundaries of historical pedigree.<sup>1815</sup> Very notably, Kosovo is a self-determination unit, although it only had a constitutional status of an

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<sup>1811</sup> The *Québec case* (1998), para 155.

<sup>1812</sup> See supra ch. 7.2. For more on the historic origins of the borders of Kosovo see maps in Malcolm (1998), pp. xvii–xxv.

<sup>1813</sup> See supra ch. 6.4.8.

<sup>1814</sup> See supra ch. 4.3.1.

<sup>1815</sup> See supra ch. 4.2.1. and 4.3.1.

autonomous province and not of a republic within the SFRY.<sup>1816</sup> In the example of the consensual dissolution of the Soviet Union, it was also only republics that became states.<sup>1817</sup> Thus, in post-1991 dissolutions, the possibility of a new state creation has been overtly dependent on the constitutional order of the parent state. This puts peoples within federal states in a better position and discourages parent states from establishing clearly-delimited (federal) self-determination units as this could be (mis)used as a step toward independence.<sup>1818</sup>

### **8.7. Final remarks: how democracy considerations are applied when new states are created**

It cannot be concluded that in the post-Cold War era international law demands democracy as a continuous requirement for statehood or that adoption of liberal-democratic institutions has become a statehood criterion. At the same time it is not enough to say that the post-1991 practice of new state creations only shows that some states require democratic legitimacy of governments before recognition to new states is granted.

Democratic principles most notably operate in international law through the right of self-determination. International law requires that prior to a change of the legal status of a territory, such a decision must be supported by the will of the people, expressed freely and on equal footing.<sup>1819</sup> However, the will of the people in such circumstances will only exceptionally result in the creation of a new state. Further, when new states are created, the new border arrangement will often be unable to accommodate the will of all peoples populating the newly-created state. The

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<sup>1816</sup> In this context it is argued that if Kosovo had acquired the status of a republic in the SFRY, it would have become an independent state in 1992. Caplan (2005), p. 70.

<sup>1817</sup> See supra ch. 4.4.1.

<sup>1818</sup> The Québec Report, Chapter 2.49.

<sup>1819</sup> See supra ch. 5.4.

numerically inferior or otherwise non-dominant peoples will then need to seek realisation of the right of self-determination in its internal mode.

Apart from the operation of democratic principles in international law governing the creation and recognition of states, there is some evidence that even democracy as a political system has been a consideration in the post-1991 practice of state creations. However, when the emergence of a new state is only a matter of fact (i.e. a result of a negotiated secession or a negotiated dissolution) and thus there is little place left for international involvement, even in the post-1991 practice, new states emerged and their statehood was not disputed even where practices of their governments did not adhere to liberal-democratic procedural standards. The fact that entities in the territories of the SFRY and the Soviet Union, which did not meet the democratic government requirement expressed in the EC Guidelines, were considered states (albeit in some circumstances non-recognised ones) proves that such a requirement did not have effects on statehood criteria.<sup>1820</sup>

Where new state creations are subject to greater international involvement, there is a clear tendency that one aspect of the international involvement will also be an attempt to create liberal-democratic institutions and thus impose a particular political system. In the examples of East Timor and Kosovo, this was done by international territorial administration, whose actions are attributable to the UN.<sup>1821</sup> Further, in the example of Kosovo, democratic development (i.e. democratic consolidation) was advanced to legitimise the creation of a new state. Such an interpretation was not universally accepted (e.g. it was not endorsed by a Security Council resolution) but has been accepted as plausible by the recognising states.

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<sup>1820</sup> See supra ch. 4.3. and 4.4.1.

<sup>1821</sup> See supra n. 1629.

There is room for bringing democratic legitimacy to the process of state creation in situations of unilateral secessions. In such circumstances the success of a state creation would depend on international recognition.<sup>1822</sup> There is some evidence that part of the international community might find the democratic legitimacy of an attempted new state creation a relevant criterion when granting recognition and thus, in the circumstances of unilateral secession, effectively constituting a state. However, democratic legitimacy will still be weighed against the principles of international law (including the principle of territorial integrity of states) and the success of a unilateral secession, even if coupled with an attempt at democratisation, remains very unlikely.<sup>1823</sup>

In new state creations democracy considerations apply on two grounds: First, through the operation of democratic principles within the right of self-determination. This operation should not be understood too broadly. The applicability of the right of self-determination does not require the political system of liberal-democracy. Further, the will of the people within the right of self-determination is subject to considerable limitations. Second, in the practice of (informal) collective state creations in the post-1991 period, democratic institutions have been created along with the creation of new states. Not even this practice of states and UN organs should be understood too broadly. When the emergence of a new state is merely a fact that only needs to be acknowledged by international recognition, even in the post-1991 practice, there will be no enquiry into the democratic quality of the government of a new state. Indeed, the existence of liberal-democratic institutions is not a statehood criterion. However, in the post-1991 practice, when new states are (informally) collectively created, attempts have been made to create states with liberal-democratic

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<sup>1822</sup> See the *Québec case* (1998), para 155.

<sup>1823</sup> See supra ch. 5.4.

institutions of government. This practice has significant universal support and is perhaps a limited reflection of the view that in the post-Cold War era liberal-democracy is considered the preferred method of government.

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