

DEMOCRATIC LEGITIMACY AND THE RECOGNITION OF STATES AND GOVERNMENTS

SEAN D. MURPHY*

In a seminal 1992 article Thomas Franck postulated the emergence in international law of a right to democratic governance.¹ Franck argued that, increasingly, the acceptance of a government by other States turns on whether the government governs with the consent of its people.

In supporting this notion, Franck pointed to events such as the 1991 effort by Haitian military and police authorities to overthrow the elected President of Haiti, Jean-Bertrand Aristide. Although those authorities exercised complete control over Haiti, the international community condemned the coup leaders, refused to engage in normal diplomatic relations with them or to seat their representatives at international organisations, and instead continued to recognise the exiled President Aristide as representing the legitimate government of Haiti. Severe economic and ultimately military sanctions were imposed on Haiti, and finally, in 1994, the coup leaders were forced to relinquish power. President Aristide then returned to Haiti to complete his term as president.

The reaction to the Haitian crisis may be important evidence that the international community finds relevant, at least in certain situations, that governing authorities have not been democratically elected. But do this incident, and other examples of State practice, support the proposition set forth by Franck? Certainly, the first and most fundamental element in legal relations between States is whether a particular political community is “recognised” as a State, for only in this way can that community engage as a State in legal relations with other States. A further critical element concerns which political authorities within a State are “recognised” as representing the State in the conduct of its foreign relations. It is through those legal relations that the State can lawfully request military support from other States; can lawfully refuse entry to foreign military forces; can lawfully negotiate and conclude international agreements; can avail itself of other rights accorded sovereigns under international law and vindicate

* Associate Professor of Law, George Washington University, Washington DC. I am grateful to Professors Louis Sohn and Brad Roth for helpful comments on an earlier draft.

1. Thomas M. Franck, “The Emerging Right to Democratic Governance” (1992) 86 *A.J.I.L.* 46. For a collection of essays testing Franck’s thesis in various areas of international law, including an abbreviated essay based on this article, see Gregory Fox and Brad Roth (Eds), *Democratic Governance and International Law* (forthcoming).

those rights before available international forums; and can demand respect by other States for sovereign acts exercised within its territory, including the enactment and enforcement of civil and criminal laws.

So, if it can be shown that one of the criteria in "recognition" practice by States is whether the entity is democratic, that would be powerful evidence that democracy is on its way to becoming a global entitlement. When political authorities within a territory seek to have the territory recognised as a new State, does the international community consider it important that democratic institutions exist within the territory? Similarly, when political authorities within a State seek recognition as the government of that State, does the international community consider it important that they came to power through the consent of those they govern? And, to the extent that democracy is relevant in the recognition of new States and governments, does that relevance reflect the existence of a *legal* norm, as opposed to some other norm that is political or discretionary in nature?²

I. DEMOCRACY AND RECOGNITION OF STATES

A. *Traditional Theory*

Under traditional international legal theory, an entity aspiring to be recognised as a new State first had to meet certain factual conditions, which did not expressly include the existence of democratic institutions within the entity, or the consent of the population to the creation of the State. The aspiring entity had to have: (1) a defined territory; (2) a permanent population; (3) an effective government; and (4) the capacity to enter into relations with other States.³ For the most part, these conditions continue to be taught today as the fundamental elements of the recognition of States.

2. There are different faces of "recognition". One face is the express or tacit acknowledgment by States of the legal capacity of a new State to avail itself of international rights and obligations or for a new government to engage in foreign relations on behalf of its State. (In particular, "tacit" acknowledgment arises for States that prefer not to view changes of government as a question of "recognition" but, rather, as a question of the level of relations with the new government.) In some cases, even if recognition is not acknowledged, the new entity may be accorded some type of special status. A further face of "recognition" occurs when a new State is granted admission to an international organisation or when an organ of an international organisation accepts the credentials of the delegates of a new government. Yet another face concerns the effects of recognition (or non-recognition) on rights and obligations within a State's national legal system (e.g. litigation in the State's courts).

3. The standard point of departure on these conditions is the 1933 Montevideo Convention on the Rights and Duties of States, *League of Nations T.S.* 165 (1936), p.19. See also J. L. Brierly, *The Law of Nations* (6th edn, H. Waldock (Ed.), 1963), p.137. See generally Thomas D. Grant, "Defining Statehood: The Montevideo Convention and its Discontents" (1999) *Col. J.Trans. L.* 37, 403.

Two observations are warranted in considering whether there is now a democratic gloss on these conditions. With respect to the third condition—historically, the existence of an “effective” government—the emphasis has been on the control that the government exercises over the relevant territory, to the exclusion of other entities. James Crawford’s review of State practice indicates that the degree of control necessary may be a function of the manner in which the government came to power; if the Statehood is “opposed under title of international law” then a relatively high degree of control may be necessary, whereas, if the prior sovereign in the territory has consented to the creation of a new State under a government, a relatively lower degree of control by the government may be tolerable in finding Statehood.⁴

Similarly, a high degree of consent by the people of a new State to the authority of the new government no doubt evidences a high degree of control by that government and, in that sense, can be an important element in meeting a traditional condition for recognition of Statehood. However, “effective control” under traditional theory has not required democratic consent. In part, this is attributable to the interest of the international community in promoting other values, such as non-intervention. Thus, with respect to an authoritarian society, where democratic consent to internal political governance is lacking, the international community nevertheless appears disposed to a norm of international law (i.e. one that permits recognition) that discourages external intervention.⁵

Second, for the traditional conditions on recognition of a state to be met, they must in some sense stabilise. Popular support for Statehood, which might be expressed through a referendum, can be an important element in establishing that the traditional conditions have stabilised, since normally the referendum would cover a defined territory, would be directed toward persons permanently residing within that territory, and would be for the purpose of asking whether they wish to establish an independent State with its own government.⁶ A referendum solely on the issue of whether the population wishes to establish a new State is not in itself the same as the establishment of a democratic government in the new State, yet it injects notions of popular will into the process of State creation.

While the conditions for Statehood are broadly accepted in traditional international legal theory, the issue of who gets to decide whether these conditions have been met has been less clear. Some theorists contend that

4. James Crawford, *The Creation of States in International Law* (1979), pp.44–45.

5. Brad R. Roth, *Governmental Illegitimacy in International Law* (1999); cf. B. R. Bot, *Nonrecognition and Treaty Relations* (1968), pp.23–24.

6. P. K. Menon, *The Law of Recognition in International Law* (1994), p.39; H. M. Blix, “Contemporary Aspects of Recognition” (1970–II) 130 Hag. Rec. 636.

an entity is *ipso facto* a State once these conditions are met, regardless of what other States do or say (the “declaratory theory of recognition”).⁷ Other theorists, however, contend that only when other States decide that such conditions have been met, and consequently acknowledge the legal capacity of the new State, is a new State actually constituted (the “constitutive theory of recognition”).⁸ Understanding the jurisprudence that drives these different theories is important in assessing the role of democratic legitimacy in the recognition of States. Constitutive theorists heavily emphasise consent by States as the building blocks of international law. Prior to acknowledging the existence of a legal norm favouring democratic legitimacy in the recognition of States, a constitutive theorist would be likely to wish to see many instances where a wide variety of states have consented to such a norm. The remainder of this part will explore whether such instances can be said to exist.

By contrast, declarative theorists are less interested in the practice of the international community when a State is being created; what is important is whether, objectively, the State exists. Obviously, it is possible for States to exist without democratic institutions; indeed, the history of international law is largely a history of non-democratic States, and dozens continue to exist today. A declarative theorist, however, might argue that a State cannot properly be said to exist in the absence of democratic legitimacy, perhaps by reference to philosophical, political or natural law theories. For instance, through a new-Kantian theory of jurisprudence, one might postulate that a non-democratic State loses key attributes of its sovereignty—loses, in other words, its right to be recognised fully as a State—which might, in turn, justify actions by other States in certain situations that would otherwise violate international law.⁹ Due to space limitations, this part will not explore those theories in any depth, although it will highlight competing values of relevance to those theories, such as the need for stability and conflict-avoidance in the development of international law.

7. In other words, a new State emerges once it has a defined territory, permanent population and an effective government capable of entering into foreign relations, and the act of recognition by other States merely declares something that has already occurred. Brierly, *op. cit. supra* n.3, at p.139; Ti-Chiang Chen, *The International Law of Recognition* (1951); see also Charter of the Organisation of American States, Art.9, 30 Apr. 1948, U.N.T.S. 119 (1952), p.54, *United States Treaties and Other International Agreements*, Vol.2 (1952), p.2419 (“The political existence of the State is independent of recognition by other States”).

8. Of these constitutive theorists, some see the act of recognising a new State as driven by the national interests or convenience of other States; while others, notably Hersch Lauterpacht, argue that once the conditions are met States are under a duty to recognise the new State: Hersch Lauterpacht, *Recognition in International Law* (1947), p.6, and (Ed.), *Oppenheim’s International Law* (8th edn, 1955, 2 vols), Vol.I, sec. 71.

9. Fernando Tesón, *Humanitarian Intervention: An Inquiry Into Law and Morality* (2nd edn, 1997), and “The Kantian Theory of International Law” (1992) 92 *Col. L. Rev.* 53.

B. Past Practice

From the Peace of Westphalia to the advent of modern democratic States in the late eighteenth century, recognition practice did not concern itself with democratic legitimacy as we know it today. Since the rise of modern democratic States, however, the relationship between those who govern and those governed, at times, has had a powerful effect on the formation and recognition of States.

Consider, for example, the effort to establish the "Confederate States of America" as a break-away republic from the United States of America.¹⁰ By the autumn of 1862, events appeared auspicious for the recognition of this new State by European powers; many persons in the United States, North and South, and in Europe, believed that efforts to maintain the Union were futile.¹¹ Heavily influenced by the South's "King Cotton" diplomacy and the Union blockade, which left three-quarters of UK cotton-mill workers unemployed or on short time,¹² UK Foreign Minister Lord John Russell, supported by Chancellor of the Exchequer William Gladstone, nearly succeeded in convincing the UK government, in autumn 1862, to recognise the Confederacy, which no doubt would have been followed by declarations of recognition from Emperor Napoleon III's France, and perhaps Russia as well.¹³

A key influence that restrained UK recognition was the attitude of the UK public (including, surprisingly, textile workers); for them, the Union stood for popular government, equal rights and the dignity of labour, while the Confederacy stood for aristocracy, privilege and slavery.¹⁴ For

10. In 1861 the "Confederate States of America" was declared by Southern leaders, with its capital in Richmond, Virginia, based on a written constitution. Under this constitution, elected members of executive and congressional branches proceeded to promulgate wide-ranging laws affecting some 10 million people in ten clearly defined States that had seceded. Once established, the Confederacy deployed diplomatic representatives to several foreign States, including England, France and Russia, fully empowered to act on its behalf.

11. By October 1862 the Confederacy had decisively repulsed several Union advances and had unleashed spectacular offensives of its own. Many believed that continuing the war was futile, since it was necessary for the North to conquer vast stretches of southern territory, cripple southern resources and destroy the fighting power of the Confederate armies. Thus, by autumn 1862, the Confederacy had a serious claim on recognition by foreign governments: James M. McPherson, *Battle Cry of Freedom: The Civil War Era* (1988), pp.546–557.

12. *Idem*, p.548.

13. *Idem*, p.556; David Herbert Donald, *Lincoln* (1995), p.414; Shelby Foote, *The Civil War: A Narrative* (First Vintage Books edn, 1986, 3 vols), Vol.I, pp.791–792. For a thorough treatment of the relationship of the UK with the Confederacy, see Brian Jenkins, *Britain and the War for the Union* (1974–80, 2 vols).

Had recognition by the UK occurred, the outcome of the American Civil War might have been quite different, much as the outcome of the American Revolution turned in no small part on France's recognition of and alliance with the US in early 1778. See Robert Middlekauff, *The Glorious Cause: The American Revolution, 1763–1789* (1982), pp.404–405.

14. McPherson, *idem*, p.549. On Lincoln's own propaganda campaign directed at the UK working class, see Donald, *idem*, pp.415–416; Foote, *idem*, Vol.II, pp.154–155.

decades before the American civil war, the UK working class had fought for democratisation of British politics and improved conditions for the working class, and, in considering the American Confederacy, democratic principle transcended economic self-interest.¹⁵ In part as a means of capitalising on this sentiment, President Lincoln publicly announced in September 1862 that he would issue a proclamation emancipating slaves in all areas under Confederate control, a proclamation which, after it was signed in January 1863, totally changed the character of the war and forever precluded any possibility of UK recognition of the Confederacy or intervention.¹⁶

Two salient observations may be made regarding this nineteenth-century example of UK non-recognition of the Confederacy. First, a concern with the lack of consensual governance can be seen in recognition practice even preceding the dramatic flourishing of democracy that has occurred in the twentieth century.¹⁷ Second, the influence of democracy on the recognition of the Confederacy was strong in the United Kingdom because—as a democratic nation itself—popular opinion influenced governing authorities who might otherwise have acted differently. By contrast, in France, where Emperor Napoleon III was without popular objection to restrain him, Napoleon continued to work in favour of finding a means to recognise the Confederacy even after the Emancipation Proclamation. Although he dared not do so without similar action by the United Kingdom (for fear of confronting the Union Navy without UK support), Napoleon both wanted cotton from the Confederacy and wanted support from the Confederacy in extending French colonial influence in Mexico.¹⁸

15. The position taken here is not that democratic legitimacy was the sole reason the UK failed to recognise the Confederacy. There were other important factors as well, such as the UK's fear of a rupture of diplomatic relations with the Union, if not outright war: McPherson, *idem*, pp.384, 553; Foote, *idem*, Vol.II, p.154.

16. See e.g. Donald *op. cit. supra* n.13, at p.379 (“Eventually, immense throngs in London, Birmingham, and other British cities would rally to celebrate Lincoln’s declaration of freedom and an outraged public opinion would make it impossible for any British government to intervene on behalf of the slaveholding Confederacy”); Reid Mitchell, “The Perseverance of the Soldiers”, in Boritt (Ed.), *Why the Confederacy Lost*, p.117 (“The Emancipation Proclamation destroyed the possibility of European intervention in the Civil War. It established that what had looked to some liberals like a war for self-determination against a central government was actually a war of slavery against freedom”).

17. Indeed, similar influences can be divined in the recognition of new States spun off from the decaying Ottoman Empire during the 19th century (e.g. Greece), which turned in large part on increasing European concern for protection of the rights—including representative rights—of minority groups under Ottoman control. See Manouchehr Ganji, *International Protection of Human Rights* (1962), pp.17–38. However, at the same time, the Concert of Europe helped suppress popular rebellion in various European countries, such as Spain, Italy, Poland, and Hungary.

18. McPherson, *op. cit. supra* n.11, at pp.553–554, 650–651; Foote, *op. cit. supra* n.13, at Vol.II, pp.155–158. On the French and US machinations in Mexico during this period, see Ralph Roeder, *Juarez and His Mexico* (1968 [1947], 2 vols).

Moving forward to the twentieth century, certain key developments have heightened notions of democratic legitimacy in the practice of recognising States. The first key development was the realisation that the seeds of international armed conflict in part can lie in the failure of States to protect adequately minority groups under their control. After the First World War, numerous entities were elevated to Statehood that had been part of the Austro-Hungarian,¹⁹ British²⁰ and other empires. Although the League Covenant itself did not make the admission of members conditional on the existence of democratic institutions,²¹ many non-original members were required to guarantee protections to their nationals prior to their admission to the League, which, in turn, largely meant that such protections were required before Statehood was recognised.²² Denial of admission to the League technically did not mean an entity was not recognised as a State, but it was an important means of establishing Statehood and, as such, resulted in a process of State formation that concerned itself with the relationship of the government to its people. At the same time, Germany's colonies and some portions of the collapsed Ottoman Empire were placed under a novel system of "mandates". The mandate system entailed control by certain allies of these former colonies so that they could prepare themselves for self-governance and emerge at some later date as fully fledged States.²³ Mention should also be made of the extensive efforts during this period to adjust State boundaries (e.g. those of Poland) to reflect popular will through the use of plebiscites.

Similarly, the dissolution of colonial empires in the aftermath of the Second World War resulted in a tripling of the aggregate number of

19. Those States included Poland, Czechoslovakia and Yugoslavia. The post-war peace agreements might also have included the return of Danzig (Gdansk) to Poland (its main port on the Baltic), but the city's overwhelmingly German population resulted in it being established as a "free city" whose internal affairs were to be democratic and under international supervision, while its foreign policy and trade affairs were subject to Polish control.

20. Those States included Australia, Canada, New Zealand and South Africa.

21. For the admission procedure, see Covenant of the League of Nations, Art. 1.

22. See e.g. Treaty Between the Allied and Associated Powers and Poland (Protection of Minorities), 28 June 1919, reprinted in Manley O. Hudson, *International Legislation* (1931, 9 vols), Vol. I, p. 283 (Art. 7(1) provides that "All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language, or religion"); John Dugard, *Recognition and the United Nations* (1987), pp. 23–24 ("International concern for human rights was still in its early days in 1920, but the minority treaties and declarations imposed upon States with linguistic, religious and racial minorities as a pre-condition for League membership, served clear notice on an aspirant State that its performance in the field of human rights was a factor that would be considered in the recognition of its statehood by the international community").

23. Examples are the ex-German colony of Southwest Africa (now Namibia), which was placed under a South African mandate, and the Ottoman territory of Syria, which was placed under a UK mandate.

States worldwide, such that the overall thrust of this period was a global acceptance that entities were more properly organised under home rule (however imperfect) than under distant colonial rule. Again, plebiscites were often conducted to determine the wishes of those persons affected by the creation of the state and the determination of its boundaries.²⁴

A second key development during the twentieth century has been the emergence of global international human rights instruments, such as the 1948 Universal Declaration of Human Rights, which sets forth “the right to take part in the government of [one’s] country”,²⁵ and the 1966 International Covenant on Civil and Political Rights, which sets forth rights to participate in public affairs and to free elections.²⁶ Although most of these instruments did not expressly deal with democratic legitimacy as a part of the process of State formation, at times they served as important benchmarks when States weighed recognition of a new State. For instance, the anti-apartheid values of the international community permitted near universal non-recognition of Southern Rhodesia when it declared independence in November 1965.²⁷ Like the example of slavery in the US Confederacy, apartheid was a form of non-democracy found particularly repugnant by the international community and, as such, served as an organising principle during the “Cold War era” (1945–89) in a way that more general notions of democracy could not. Towards the end of the Cold War era, States across the East–West divide made more concrete their commitment to democratic legitimacy—principally in the 1985 Helsinki Final Act (from which

24. See e.g. Marian Nash (Leich), “Contemporary Practice of the United States Relating to International Law” (1995) 89 A.J.I.L. 96 (transition of Palau from a trust territory to a self-governing sovereign State in free association with the US, subsequent to a plebiscite whereby the people of Palau approved). On consultation of the population, see *Case Concerning Western Sahara*, I.C.J. Rep. 1975, 33.

25. Universal Declaration of Human Rights, Art.21(1), G.A. Res.217A, *United Nations General Assembly Official Records*, 3rd Sess., pt.I at 71, UN Doc.A/810 (1948), reprinted in Burns Weston (Ed.), *International Law and World Order: Basic Documents* (1994, 5 vols.), Vol.III, sec. A.1.

26. International Covenant on Civil and Political Rights, Art.25, 16 Dec. 1966, U.N.T.S. 999 (1976), p.171, reprinted in Weston, *idem*, Vol.III, sec. A.3.

27. See International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 Nov. 1973, U.N.T.S. 1015 (1973), p.243, reprinted in Weston, *idem*, Vol.III, sec. I.2; International Convention on the Elimination of All Forms of Racial Discrimination, 7 Mar. 1966, U.N.T.S. 660 (1966), p.195, reprinted in *idem*, Vol.III, sec. I.1; Vera Gowlland-Debbas, *Collective Responses to Illegal Acts in International Law: United Nations Action in the Question of Southern Rhodesia* (1990), pp.273–361. On the General Assembly’s refusal to accept the credentials of the delegates of South Africa’s apartheid government, see Dan Ciobanu, “Credentials of Delegations and Representation of Member States at the United Nations” (1976) 25 I.C.L.Q. 351.

emerged the Conference on Security and Co-operation in Europe)²⁸ and the 1990 Charter of Paris for a New Europe²⁹—such that, as issues of State recognition arose, those commitments encouraged those States to take democratic legitimacy into account.

It cannot, however, be argued that the principle of self-determination, or the human right to free elections, was fully incorporated into recognition practice during the Cold War era. Far too many States were formed and welcomed into the international community which were non-democratic in nature (e.g. virtually all African States).³⁰ Perhaps self-determination *should* be conceived as both freedom from outside interference *and* freedom for people to choose political leaders within their national system.³¹ However, the latter element is not supported in the general practice of States during the twentieth century, let alone in their recognition practice.

Further, to the extent that there is during this period evidence of a right of “internal” self-determination for a discrete group, that evidence typically does not support the establishment of a new State by secession; at best, it supports human rights protections for that group within an existing State.

Thus, during the Cold War era, many entities were not recognised as States even though, arguably, doing so would have advanced the general principle of self-determination. Various regions such as Basque in

28. Important commitments in favour of democratic pluralism, free elections and the rule of law were incorporated in the 1975 Helsinki Final Act signed by the US, Canada and European States, including the USSR: Conference on Security and Co-operation in Europe: Final Act, 1 Aug. 1975, reprinted in (1975) 14 I.L.M. 1292. Whether these provisions of the Helsinki Final Act constitute legal as opposed to political commitments is unclear; see e.g. Thomas Buergenthal, “The CSCE Rights System” (1991) 25 Geo. Wash. J.Int. L. Econ. 333, but their influence on State attitudes cannot be overstated.

29. Conference on Security and Co-operation in Europe: Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, 21 Nov. 1990, reprinted in (1991) 30 I.L.M. 190. Under the Charter of Paris, OSCE States “undertake to build, consolidate and strengthen democracy as the only system of government of our nations”: *idem*, p.193. See also the 1991 Organisation of American States Santiago Declaration, whereby OAS States declared their “inescapable commitment to the defense and promotion of representative democracy and human rights in the region, within the framework of respect for the principles of self-determination and non-intervention”: Santiago Commitment to Democracy and the Renewal of the Inter-American System, 4 June 1991, OAS General Assembly, 21st Sess., 3rd plenary meeting at p.1, OAS Doc.OEA/Ser.P/AG/Doc.2734/91.

30. See Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* (1963), p.23 (“the anti-colonial pressures upon Western European states, and uneconomic costs for them to remain by force in their colonial possessions, have caused these states in several cases to withdraw from territories which they previously governed before any adequate indigenous system of government had been formed”).

31. International Covenant on Civil and Political Rights Art.1; International Covenant on Economic, Social and Cultural Rights, 16 Dec. 1966, Art.1, U.N.T.S. (1976), p.171, reprinted in Weston, *op. cit. supra* n.25, at Vol.III, sec. A.2.

Spain,³² Biafra in Nigeria,³³ Katanga in the Congo,³⁴ Turkish-dominated northern Cyprus³⁵ and others all fell short in their quest for recognition. This failure was not due to lack of popular support in the relevant region but, rather, to other factors, including a presumption of international law that often runs against self-determination: the principle of *uti possidetis*.

Uti possidetis arose from an international consensus that States created through decolonisation should normally maintain the external colonial borders existing at the time of their independence,³⁶ regardless of whether those borders made any sense in terms of the tribal, ethnic, religious or political affiliations of those who had been colonised. Over time, the principle has been referred to in a non-colonial context and with respect to both historical external and internal boundaries. The attraction of the principle lies in its promotion of stability, by disfavouring unpredictable and excessive fragmentation. At the same time, however, the principle can disfavour the creation of a new State from a region in which the majority of the people wish to secede, simply because that region has no historical boundaries. Although associated with the period of decolonisation, the principle retains vitality in contemporary times with respect to recognition of new states in non-colonial contexts, as will be discussed in the next section.

A third key development, which has run somewhat parallel to the emergence of human rights norms, is the general prohibition on the use of force. The tightening of this prohibition, from the League of Nations to the Kellogg-Briand Pact to the UN Charter, has had an obvious effect; States that invade other States are shunned and the fruits of their aggression denied legitimacy (e.g. the League of Nations' collective non-recognition of Japan's aggression in Manchukuo³⁷). Less obvious is the implicit premise in this prohibition, which is that it is for the victim State to decide its own political fate, not other States. This norm no doubt has helped shape attitudes regarding the formation of States as being based not on notions of power but on notions of self-rule.

32. The Basque separatist group ETA began violent actions in 1968 in an effort to secede from Franco's Spain. After Franco's death in 1975, Spain became a democratic country and, over time, the four Basque provinces achieved considerable self-governance under a new system of regional autonomy, which gradually weakened violence by the separatist movement. Nevertheless, as of 1997, the largest party in the region remains the Basque Nationalist Party, which runs the regional government and seeks a separate Basque State. See "The Basques: A Murder Too Far", *The Economist*, 19 July 1997, p.30.

33. See David A. Ijalaye, "Was 'Biafra' at Any Time a State in International Law?" (1971) 65 A.J.I.L. 551.

34. Georges Abi-Saab, *The United Nations Operation in the Congo 1960-1964* (1978).

35. Suzanne Palmer, "The Turkish Republic of Northern Cyprus: Should the United States Recognize it as an Independent State?" (1986) 4 Boston Univ. Int. L.J. 423.

36. *Case Concerning Frontier Dispute (Burkina Faso/Mali)*, I.C.J. Rep. 1986, 565.

37. See Dugard, *op. cit. supra* n.22, at pp.27-35.

Norms on the use of force and non-intervention have sought to take account of notions of self-determination. In the Declaration on Friendly Relations,³⁸ the General Assembly interpreted the principle of self-determination in a manner that disfavoured secession *so long as* the government of a State is “representing the whole people belonging to the territory without distinction as to race, creed, or colour”. At the same time, when regions have fought to secede from an existing state (e.g. Tibet from China, Kashmir from India, or Kurdistan from Iraq, Turkey, Iran and Syria), the international community has been reluctant to recognise a new state, in part because it would transform the situation from one of internal conflict to one of international armed aggression, thereby raising considerably the gravity of the situation. This concern no doubt has detracted from shaping attitudes favouring formation of new States based purely on notions of self-rule.

Finally, the extensive use of international organisations as a means for co-ordinating behaviour among States is one of the most profound developments of the twentieth century. A limited number of those organisations have established admission and credentials procedures that turn on the existence of democratic institutions within a State. For instance, the Statute of the Council of Europe, which entered into force in 1949, provides that members “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms”.³⁹ Consequently, in considering admission of a new member, the Council assesses the member’s commitment to democracy, as evidenced not just by the existence of elections but by the presence of a stable political process that accords rights to minority groups.⁴⁰

However, for the most part, international organisations have not established admission procedures that turn on the existence of democratic institutions in the emerging State. For instance, although one of the purposes of the United Nations is to “develop friendly relations among nations based on respect for the principle of equal rights and self-

38. Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance with the Charter of the United Nations, 24 Oct. 1970, G.A. Res.2625 (XXV), *United Nations General Assembly Official Records*, 25th Sess., Supp. No.28, p.121 (annex), UN Doc.A/8028(1970), reprinted in Dietrich Rauschnig, Katja Wiesbrock and Martin Lailach (Eds), *Key Resolutions of the United Nations General Assembly 1946–96* (1997), p.3.

39. Statute of the Council of Europe, 5 May 1949, Art.3, U.N.T.S. 87 (1953), p.103. See Hans Winkler, “Democracy and Human Rights in Europe: A Survey of the Admission Practice of the Council of Europe” (1995) 47 *Austrian J.Pub and Int. L.* 147.

40. See e.g. Recommendation 1338(1997) on the Obligations and Commitments of the Czech Republic as a Member State, Pt.4, Council of Europe Parliamentary Assembly, 1997 Ordinary Session, (22–26 Sept. 1997), p.1.

determination of peoples”,⁴¹ this aspiration has not precluded the admission of States that were non-democratic, nor would such conditionality appear permissible under the UN Charter.⁴² Consequently, for decades after enactment of the Charter numerous States that were not democratic were admitted to the United Nations and to other international organisations. Similar practice may be found in a wide range of other international and regional organisations.

C. Contemporary Practice

There is certainly no evidence today that States refuse to recognise the existence of another State simply because it has a non-democratic form of government. Determining whether a State is “democratic” requires the application of subjective criteria, but most studies would regard at least 25 per cent of States today as having non-democratic governments (e.g. China) and perhaps another 25 per cent as having only part democratic governments, in the sense that the accountability of the government to its people is qualified.⁴³ Yet both tiers (non-democratic and partly democratic) of States enjoy widespread recognition as States by the international community.⁴⁴ The international community acknowledges their right to be members of international organisations⁴⁵ and their right to avail themselves of the benefits and protections of international law.

41. UN Charter, Art.1(2).

42. The Charter provides that membership is open to all “peace-loving states” which accept the obligations of the Charter and which, in the judgment of the UN, are able and willing to carry out those obligations: Art.4(1). The ICJ advised that it was illegal to impose any additional conditions on States seeking membership: *Advisory Opinion on the Conditions of Admission of a State to Membership in the United Nations (Charter, Art.4)*, I.C.J. Rep. 1948, 62–65; see also *Advisory Opinion on the Competence of the General Assembly for the Admission of a State to the United Nations*, I.C.J. Rep. 1950, 4.

Recently, the ICJ also rejected arguments by Serbia (Yugoslavia) that Bosnia-Herzegovina was incapable of becoming a party to the Genocide Convention because it achieved independence through a process that violated the principles of equal rights and self-determination. Rather than consider whether Bosnia-Herzegovina’s Statehood ran afoul of fundamental human rights, the ICJ simply noted that the Genocide Convention was open to “any Member of the United Nations”: *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, I.C.J. Rep. 1996, para.19.

43. See e.g. David Potter *et al.* (Eds), *Democratization* (1997), pp.1, 38.

44. E.g. although the US places considerable emphasis on democratic legitimacy in the conduct of its foreign policy, it nevertheless recognises (and maintains diplomatic relations with) numerous States that are non-democratic, including Afghanistan, Algeria, Burma, China, Nigeria, Oman, Saudi Arabia and Syria. Even non-democratic States with which the US does not have diplomatic relations are recognised as independent States, such as Cuba, Iran, Iraq, Libya and North Korea. See “Fact Sheet: Independent States and Dependencies as of August 20, 1996”, *US Department of State Dispatch*, 7 (26 Aug. 1996), p.433.

45. See e.g. Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (1994), p.94.

Even when a State's government lapses from being democratic to non-democratic, the international community continues to respect the international legal status of the State (as opposed to its government), although certain economic or diplomatic sanctions might be imposed on the State. For instance, through an amendment to its Charter that entered into force in September 1997, the Organisation of American States became the first regional organisation to permit suspension of a member whose government takes power through undemocratic means.⁴⁶ However, in doing so, the Organisation does not question the existence of the State.

Further, to the extent that there is concern about the failure of a democratic State to allow a minority group to participate in the democratic process, the international community does not promote those rights by non-recognition of the state, with an eye toward carving up the State to protect particular minority groups.⁴⁷ Rather, the international community favours maintaining the integrity of the state, while promoting minority rights by monitoring and reporting on the situation, with reference to the extensive array of human rights instruments. In some situations, minority rights to democratic access may be protected explicitly by an international instrument.⁴⁸

The most interesting developments in contemporary practice concerning recognition of States and democratic legitimacy relate to the former Soviet Union, which broke up after 1989, and the former Yugoslavia, which broke up after 1991.

1. *The former Soviet Union*

The fragmentation of the Union of Soviet Socialist Republics after 1989 resulted in the establishment of several new states. In December 1989 the Congress of the USSR People's Deputies found that the July 1939 Molotov-Ribbentrop Accords, by which the Soviet Union first occupied and then annexed the Baltic States (Estonia, Latvia and Lithuania), were contrary to international law.⁴⁹ On this basis, the Baltic States held

46. See Marian Nash (Leich), "Contemporary Practice of the United States Relating to International Law" (1994) 88 A.J.I.L. 719. Suspension requires a two-thirds majority vote in the OAS General Assembly.

47. Of course, the international community acknowledges a State's right to hold referenda on whether it should fragment into smaller States, as recently occurred in the Caribbean State of St Kitts and Nevis: Serge F. Kovaleski, "Secession Move Fails on Caribbean Island", *Washington Post*, (11 Aug. 1998), p.A18.

48. See e.g. Hungary-Romania Treaty on Understanding, Cooperation, and Good Neighborliness, 16 Sept. 1996, Arts.15-16, reprinted in (1997) 36 I.L.M. 348-350 (requiring protections for the rights of ethnic Hungarians living in Romania and ethnic Romanians living in Hungary, including the right to effective participation in the political life of their country).

49. Evans, *op. cit. infra* n.9, at pp.19-21; Antonio Cassese, *Self-Determination of Peoples* (1995), pp.258-261.

referenda in early 1991 on whether to seek independence; the overwhelming response was positive, so the Baltic States then waged a successful campaign for full independence.⁵⁰ The State Council of the Soviet Union released the Baltic States and recognised their independence on 6 September 1991. The Baltic States were then admitted to the United Nations on 17 September 1991.

The presence of democratic institutions within the Baltic States does not appear to have been a significant factor in promoting foreign recognition. Indeed, many States would have preferred to see the Baltic States stand down from pursuing their political independence, due to fears of what a disintegrated Soviet Union would entail.⁵¹ At the same time, it should be noted that Western States had never recognised the legal validity of the Soviet incorporation of the Baltic States. Thus, there was no need for those States to recognise the existence of new Baltic States, although ultimately most Western States issued statements noting that the Baltic States had reacquired political independence.

With respect to the dissolution of the other republics of the Soviet Union,⁵² some of those republics during the course of 1991 held referenda on whether to secede. All (except Kazakhstan) then proceeded to proclaim their independence during 1991, except that Russia proclaimed itself as the successor State to the former Soviet Union.⁵³ Virtually all other States then recognised the republics of the former Soviet Union as new States and they were admitted as members of the United Nations.⁵⁴

A notable development in this recognition practice was the approach taken by the United States and by the Foreign Ministers of the European Community. The United States announced that, in addition to the traditional criteria for recognition of States, recognition should be accorded only in the light of, *inter alia*, the prospective State's adherence to democracy and the rule of law, including respect for the Helsinki Final Act and the Charter of Paris.⁵⁵ Shortly thereafter, in December 1991, the

50. Cassese, *idem*, p.262, n.9.

51. *Idem*, p.264.

52. Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Krygyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine and Uzbekistan.

53. See Decision by the Council of Heads of State of the Commonwealth of Independent States, 21 Dec. 1991, para.1, reprinted in (1992) 31 I.L.M. 151 (all former Soviet republics except Georgia establishing a commonwealth of independent States); see also Yehuda Z. Blum, "Russia Takes Over the Soviet Union's Seat at the United Nations" (1992) 3 E.J.I.L. 354; Ralph Gaillard Jr, "The Baltic Republics", *Washington Post*, 3 Sept. 1991, p.A12.

54. Azerbaijan, Armenia, Kazakhstan, Krygyzstan, Moldova, Tajikistan, Turkmenistan and Uzbekistan were admitted as members of the UN on 2 Mar. 1992. Georgia was admitted on 31 July 1992. Belarus and Ukraine were original UN members and consequently did not require admission upon obtaining independence. Russia assumed the membership of the former USSR, taking over the former Soviet seat in the General Assembly and its permanent membership in the Security Council.

55. "Testimony by Ralph Johnson, Deputy Assistant Secretary of State for European and Canadian Affairs, 17 Oct. 1991", *Foreign Policy Bulletin* 2 (Nov.-Dec. 1991), p.42.

European Community issued a "Declaration on the 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union' ". In that Declaration, the European Community and its member States said that they:⁵⁶

affirm their readiness to recognise, 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.

The Declaration then set down general conditions requiring the new State: (1) to respect the UN Charter, the Helsinki Final Act and the Charter of Paris, "especially with regard to the rule of law, *democracy* and human rights"; (2) to guarantee rights for ethnic and national groups and minorities; (3) to respect existing borders; (4) to accept relevant arms control commitments; and (5) to commit to settle by agreement all questions regarding State succession and regional disputes. The European Community⁵⁷ and United States⁵⁸ recognised the Statehood of the republics of the former Soviet Union based on these principles.

The US statement and EC Declaration were quite significant; they expressly conditioned recognition on the basis of democratic rule. Yet, the EC Declaration was also predicated on "the normal standards of international practice and the political realities in each case", which provided ample opportunity to suppress the emergence of new States from regions within the Soviet republics.

For instance, the western Azerbaijan province of Nagorno-Karabakh, containing a 75 per cent ethnic Armenian majority, long sought autonomy within the Soviet Union without success. With the Soviet Union on the verge of collapse, Nagorno-Karabakh declared independence in July 1988 and by 1991 was at war with Azerbaijan (which has an ethnic Azeri majority) in an effort to secede. Within three years the forces of Nagorno-Karabakh had gained complete control of the region, in the process of which it forced out just about the entire minority population.

56. Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union", 16 Dec. 1991, reprinted in (1992) 31 I.L.M. 1486-1487 and in (1993) 4 E.J.I.L. 72 (emphasis added). For a discussion, see Colin Warbrick, "Recognition of States: Recent European Practice", in Malcolm D. Evans (Ed.), *Aspects of Statehood and Institutionalism in Contemporary Europe* (1996), p.9.

57. Evans *idem*, p.23.

58. See "President Bush Welcomes Commonwealth of Independent States, 25 Dec. 1991", *Foreign Policy Bulletin* 2 (Jan.-Apr. 1992), p.12. For the US government's attitude on various issues relating to the break-up of the former USSR and the former Yugoslavia, see Edwin Williamson and John Osborn, "A U.S. Perspective on Treaty Succession and Relating Issues in the Wake of the Breakup of the USSR and Yugoslavia" (1993) 33 Virginia J.Int. L. 261 (views of former State Department Legal Adviser and his Special Assistant).

Although Nagorno-Karabakh has held democratic elections, it has not been recognised by any other State. Even its closest ally and supporter, Armenia, has withheld recognition for fear of economic sanctions by Azerbaijan.⁵⁹ Similar efforts by the people of the Russian republic of Chechnya to gain international recognition of its independence, culminating in a brutal war during 1994–96, were also for naught.

If regions such as Nagorno-Karabakh and Chechnya stand little chance of secession from democratic States, even more tenuous is the fate of regions found within non-democratic States. Few States in the international community remark upon—let alone consider diplomatic action in support of—Uighur efforts for the province of Xinjiang (once known as East Turkestan) to secede from China. The majority Uighurs seek relief from the effective relegation of all regional power to the minority Han, who were moved into the region by China after 1949.⁶⁰

2. *The former Yugoslavia*

Prior to its dissolution, the former Yugoslavia consisted of six republics (Bosnia-Herzegovina, Croatia, Serbia, Slovenia, Macedonia and Montenegro) and two autonomous regions (Kosovo and Vojvodina). These republics and regions all had their own local governments; in addition, there was a federal government directed by a Presidential Council (or collective presidency), whose chairmanship rotated among the heads of the republics and autonomous regions.⁶¹

In late 1990 Slovenia and Croatia proclaimed that federal law would no longer be supreme in their republics, and Slovenia held a referendum in which the vast majority of Slovenians voted for independence. When the chairmanship of the collective presidency failed to rotate from a Serb to a Croat leader in May 1991, Croatia held a referendum in which the vast majority of Croats voted for independence. On 25 June both Slovenia and Croatia declared their independence, prompting the Serb-dominated federal armed forces to move against militias in both republics. To add confusion to the situation, Serbia claimed that it was protecting Serbs within Croatia who did not wish to secede.

Thus, by the summer of 1991, there were two Yugoslav republics—Croatia and Slovenia—with defined territories, permanent populations, somewhat effective (but not unchallenged) governments, and a capacity to enter into foreign relations seeking recognition as independent States. The European Community, the Conference on Security and Co-oper-

59. See David Rieff, "Nagorno-Karabakh: Case Study in Ethnic Strife", *Foreign Affairs* 76 (Mar.–Apr. 1997), p.118.

60. "China's Rebellious Province", *The Economist*, 23 Aug. 1997, p.43.

61. Marc Weller, "The International Response to the Dissolution of the Socialist Federal Republic of Yugoslavia" (1992) 86 A.J.I.L. 569.

ation in Europe and the United States all initially hoped to maintain the integrity of Yugoslavia as a single State. On 7 July EC mediators negotiated an agreement for the withdrawal of federal forces to their barracks in Slovenia, as well as the disarmament of the Slovenian militia. In turn, Croatia and Slovenia suspended their declarations of independence. An EC plan to deploy armed forces into the region, however, was thwarted, since it was viewed as legally necessary to have the consent of the Serb-dominated federal government, which was not forthcoming.

As violence continued over the summer, primarily in Croatia, the European Community began to doubt the wisdom of maintaining a single State of Yugoslavia. On 27 August the Community issued a declaration in which it called upon the parties to the conflict in Yugoslavia to submit their differences to an arbitration commission of five members chosen from the presidents of the Constitutional Courts of EC countries. After four of the eight members of the Yugoslav collective presidency decided in early October that they alone would conduct the affairs of federal Yugoslavia, Croatia and Slovenia reinstated their declarations of independence. At the same time, after a meeting in The Hague of EC, Serbian and Croatian representatives, the participants agreed that recognition of those republics seeking independence would be granted "in the framework of a general agreement" having the following components: (1) a loose association or alliance of sovereign or independent republics; (2) adequate arrangements to be made for the protection of minorities, including human rights guarantees and possibly special status for certain areas; and (3) no unilateral changes in borders. It should be noted that these EC-generated criteria for recognition went somewhat beyond the traditional criteria, but, at the same time, did not include a requirement that democratic institutions exist within the new States. In November 1991 Macedonia declared its independence.

Although, in early November, the European Community tabled a "general agreement" that fleshed out the three components set forth above, the agreement was not acceptable to Serbia. At this point, the interest in recognition shifted to establishing conditions that each republic had to meet whether or not there was agreement among all relevant parties. Consequently, the Community issued its December 1991 Declaration containing guidelines on recognition, as discussed above.⁶² Each Yugoslav republic was invited to state by 23 December whether it sought recognition as a State and, if so, whether it agreed to the EC

62. "Declaration on Guidelines", *supra* n.56. In addition, each State had to pledge that it had no territorial claims against any neighbouring EC State and that it would not use a name that implied such claims. This condition was prompted by Greece's concerns regarding potential territorial claims by Macedonia. Greece believed even the name "Macedonia" implied territorial ambitions toward Greece, since its northernmost province is also named Macedonia: "Macedonia: Next on the List", *The Economist*, 8 Feb. 1992, p.46.

conditions.⁶³ Bosnia-Herzegovina, Croatia, Macedonia and Slovenia all responded affirmatively,⁶⁴ submitting documentation to show that they had met the EC conditions.

The EC-sponsored Arbitration Commission, under the chairmanship of Robert Badinter, issued a series of opinions over the course of late 1991 relevant to the Community's decisions on recognition.⁶⁵ The Badinter Commission found that Yugoslavia was in the process of dissolution and that it was up to those republics that wished to work together to form within the existing borders of Yugoslavia "a new association endowed with the democratic institutions of their choice".⁶⁶ Further, even before individual republics were recognised as States, it was appropriate to accord them certain protections arising out of international law, including norms relating to the use of force, based on existing internal boundaries.⁶⁷ According to the Badinter Commission, the principle of *uti possidetis* was alive and well and applicable to Yugoslavia notwithstanding the non-colonial context. While the principle of self-determination and other human rights norms served to protect minority groups within existing units of a federal State (e.g. Serbs in Croatia or Serbs in Bosnia-Herzegovina), they did not support forcible actions to modify existing internal borders. Individuals of such minority groups could choose to reject allegiance to a new State, but could not collectively choose to secede.⁶⁸

In early January 1992, the Arbitration Commission considered the applications of the Yugoslav republics for EC recognition. While it found that Slovenia had met the EC conditions and recommended that Slovenia be recognised,⁶⁹ the Arbitration Commission found that Croatia had not taken sufficient steps under its constitution to protect minorities such that it had satisfied the EC recognition requirements.⁷⁰ Nevertheless, the Community decided to proceed with the recognition of both Slovenia and Croatia on 15 January 1992.

The Arbitration Commission found that Macedonia had met the Community's recognition criteria,⁷¹ but the Community did not decide to proceed with recognition of "Macedonia" due to resistance by Greece.

63. Declaration on Yugoslavia, 16 Dec. 1991, reprinted in (1993) 4 E.J.I.L. 73.

64. *Ibid.*

65. The Arbitration Commission was established by the Peace Conference to address issues arising in connection with the break-up of Yugoslavia. Judges were chosen from the Constitutional Courts of Belgium, France, Italy, Germany and Spain.

66. Conference on Yugoslavia, Arbitration Commission Opinion No.1, para.3, reprinted in (1992) 31 I.L.M. 1494.

67. *Idem*, Opinion No.3, 11 Jan. 1992, reprinted in *idem*, p.1499.

68. *Idem*, Opinion No.2, 11 Jan. 1992, reprinted in *idem*, p.1497.

69. *Idem*, Opinion No.7, 11 Jan. 1992, reprinted in *idem*, p.1512.

70. *Idem*, Opinion No.5, 11 Jan. 1992, reprinted in *idem*, p.1503.

71. *Idem*, Opinion No.6, 11 Jan. 1992, reprinted in *idem*, p.1507.

Instead, it issued a declaration making clear that a State had come into existence, which allowed EC States on their own to decide to recognise that State. On 7 April 1993, however, the UN Security Council approved UN membership for Macedonia under the provisional name of the "Former Yugoslavia Republic of Macedonia".⁷²

With respect to Bosnia-Herzegovina, the Arbitration Commission found that the popular will within Bosnia-Herzegovina to establish an independent State had not been clearly established since there had been no internationally supervised referendum, open to all citizens without discrimination, on independence.⁷³ Bosnia-Herzegovina proceeded to hold a referendum on 1 March 1992, in which—despite the boycott by Bosnian Serbs (a substantial minority)—an overwhelming majority opted for independence. On 6 April the European Community decided to recognise Bosnia-Herzegovina.

The Arbitration Commission's finding on Bosnia is interesting in that the EC conditions had not required such a referendum. Perhaps this should be viewed as "reflecting an additional criterion for recognition of statehood in cases of secession, based on the principle of self-determination and on considerations of general international law, including human rights law".⁷⁴ While this may be the case, the particular circumstances of the Badinter Commission finding should be kept in mind; Bosnia-Herzegovina was a republic, on the verge of a civil war, containing three sizeable ethnic groups, any two of which outnumbered the third, and which had close links to neighbouring republics. Calling for a referendum on secession was particularly appropriate in such a case and might, or might not, be considered essential in other cases.

Most States followed the European Community in its recognition of Croatia, Slovenia and Bosnia-Herzegovina. On 7 April the United States announced that it recognised the three new States, but, like the Community, did not yet recognise Macedonia. The United States did not specify the criteria on which its recognition was based, but did indicate that it thought the democratic expression from the referenda in each country in favour of independence was relevant.⁷⁵ On 18 May the Security Council recommended (without a vote) that the three States be admitted

72. Security Council Res. 817, *United Nations Security Council Official Records*, 48th Sess., 3, 196th meeting, p.132, UN Doc.S/RES/817(1993). On the erratic application of the EC Guidelines, see Evans, *op. cit. supra* n.56, at pp.29–30.

73. Conference on Yugoslavia, Arbitration Commission Opinion No.4, 11 Jan. 1992, reprinted in (1992) 31 I.L.M. 1501.

74. Weller, *op. cit. supra* n.61, at p.593.

75. The US asserted that it was recognising the three new States "because we are satisfied that these states meet the requisite criteria for recognition. We acknowledge the peaceful and democratic expression of the will of citizens of these states for sovereignty": "US Recognition of Former Yugoslav Republics", *US Department of State Dispatch* 3 (13 Apr. 1992), p.287.

to the United Nations. Consistent with the UN Charter and the *Admissions* case (discussed *supra* note 42), the issue of democratic institutions, and even of referenda in favour of independence, was not expressly a factor in this decision. Rather, the President of the Security Council, for each of the new States, issued a simple statement noting “with great satisfaction [the new State’s] solemn commitment to uphold the Purposes and Principles of the Charter of the United Nations, which include the principles relating to the peaceful settlement of disputes and the non-use of force, and to fulfil all the obligations contained in the Charter”.⁷⁶ On 22 May the General Assembly by acclamation then admitted the three States to membership.⁷⁷

Despite international recognition of the State of Bosnia, the viability of the new State remained in doubt from 1992 to late 1995. Due to the severe ethnic warfare, it was unclear whether Bosnia would break apart, with Bosnian Serb territory merging with Serbia and Bosnian Croat territory merging with Croatia. In late 1995 the war was brought to a close under the Dayton Peace Accords, which were signed not just by the leaders of Bosnia, Croatia and Serbia, but also by a representative of the European Union and the leaders of France, Germany, Russia, the United Kingdom and the United States. The Dayton Accords provided, *inter alia*, that Bosnia “shall continue its legal existence under international law as a state, with its internal structure modified as provided herein and with its present internationally recognised borders”. Further, Bosnia “shall be a democratic state, which shall operate under the rule of law and with free and democratic elections”.⁷⁸

In April 1992 the federal Yugoslav authorities in Belgrade announced the existence of a “Federal Republic of Yugoslavia” consisting of the borders of the republics of Serbia and Montenegro, and further declared that it was the successor to the rights and obligations of the Socialist Federal Republic of Yugoslavia.⁷⁹ On 12 May 1992 the European

76. For Croatia, Security Council Res.753, *United Nations Security Council Official Records*, 47th Sess., 3,076th meeting, p.115, UN Doc.S/INF/48(1992); Statement by the President of the Security Council, UN Doc.S/23945(1992), *ibid*. For Slovenia, Security Council Res.754, *idem*, 3,077th meeting, p.115, UN Doc.S/INF/48(1992); Statement by the President of the Security Council, UN Doc.S/23946(1992), *ibid*. For Bosnia-Herzegovina, Security Council Res.755, *idem*, 3,079th meeting, p.116, UN Doc.S/INF/48(1992); Statement by the President of the Security Council, UN Doc.S/23982(1992), *ibid*.

77. G.A. Res.46/236, *United Nations General Assembly Official Records*, 46th Sess., Supp. No.49A, p.5, UN Doc.A/46/49/Add.1(1992) (Slovenia admission); G.A. Res.46/237, *ibid*, UN Doc.A/46/49/Add.1(1992) (Bosnia-Herzegovina admission); G.A. Res.46/238, *ibid*, UN Doc.A/46/49/Add.1(1992) (Croatia admission).

78. Constitution of Bosnia and Herzegovina, Art.1, reprinted in *US Department of State Dispatch*, Supp.7 (Mar. 1996), p.25.

79. See letter dated 27 Apr. 1992 from the Chargé d’Affaires A.I. of the Permanent Mission of Yugoslavia to the United Nations addressed to the President of the Security Council, UN Doc.S/23877 (1992), annex.

Community stated that recognition of this new State (whether as a successor or not) was contingent on its compliance with various conditions, including withdrawal of federal military forces from Bosnia, the facilitation of humanitarian relief, and respect for human rights and the rights of minorities.⁸⁰ Democratic legitimacy was not at issue, in that the political authorities in Serbia and Montenegro operated throughout this period on the basis of democratic elections. On 4 July 1992 the Arbitration Commission decided that the Federal Republic of Yugoslavia was a new State, but that it could not be considered the sole successor to the Socialist Federal Republic.⁸¹ Thereafter, the Security Council asserted that this new State could not claim UN membership on the basis of the prior UN membership of the former Yugoslavia. In the light of this, the General Assembly decided that the new State would have to apply for membership before it could participate further in the work of the General Assembly.⁸²

The recognition practice of the international community with respect to the break-up of the former Yugoslavia clearly contained notions of democratic legitimacy that went beyond the traditional requirements for Statehood. At the same time, critics have charged that the international community's recognition practice was wholly inappropriate; on the one hand, the State of Bosnia was recognised even though the traditional requirements for Statehood (e.g. a stable population and a government in effective control of the State's territory) had not been met; on the other

80. See letter dated 12 May 1992 from the Permanent Representatives of Belgium, France and the United Kingdom to the United Nations addressed to the President of the Security Council, UN Doc.S/23906(1992), annex. For the position of the US, see letter dated 5 May 1992 from the Permanent Representative of the United States to the United Nations addressed to the President of the Security Council, UN Doc.S/23879(1992)

81. Conference on Yugoslavia, Arbitration Commission Opinion No.10, 4 July 1992, para.5, reprinted in (1992) 31 I.L.M. 1525, and in *United Nations General Assembly Official Records*, 48th Sess., Annex, Agenda Item 8, p.2, UN Doc.A/48/874-S/1994/189(1994). Interestingly, the Commission found that recognition was "purely declaratory" and was not a requirement for the creation of a State.

82. For the Security Council, see Security Council Res.777, *United Nations Security Council Official Records*, 47th Sess., 3,116th meeting, p.34, UN Doc.S/RES/777(1992) (adopted by 12 votes, with China, India and Zimbabwe abstaining). The Security Council previously had noted that Serbia and Montenegro's claim to continue automatically the UN membership of the former Yugoslavia "has not been generally accepted". Security Council Res.757, *idem*, 3,082nd meeting p.13, UN Doc.S/RES/757(1992). For the General Assembly, see G.A. Res.47/1, *United Nations General Assembly Official Records*, 47th Sess., 7th plenary meeting, Supp. No.49, p.12, UN Doc.A/47/49(1992), reprinted in Rauschnig *et al.*, *op. cit. supra* n.38, p.197.

For the debate on the legal right of Serbia and Montenegro to continue as a member of the UN based on the membership of the former Yugoslavia, compare Yehuda Z. Blum, "UN Membership of the 'New' Yugoslavia: Continuity or Break?" (1992) 86 A.J.I.L. 830 with "Correspondents' Agora: UN Membership of the Former Yugoslavia" (1993) 87 A.J.I.L. 240.

hand, Macedonia exhibited the characteristics of a State but for a long time was left with an uncertain status.⁸³

In sum, notions of democratic legitimacy are certainly present in contemporary practice concerning recognition of States. However, the evidence of these notions is not uniform, and it derives exclusively from the practice of States that are themselves democratic. Further, there is no effort even by democratic States to apply these notions to existing States where governments lack legitimacy.

II. DEMOCRACY AND RECOGNITION OF GOVERNMENTS

A. *Traditional Theory*

Under traditional international legal theory, the establishment of a new government through normal, constitutional processes within a State does not result in questions regarding the recognition of the government; the new government is entitled to all the rights and obligations accorded under international law. By contrast, an entity that comes to power through non-constitutional means is not automatically accorded such rights and obligations. Rather, its status as the government of the State is in doubt until such time as it is widely recognised by other States.⁸⁴

The central (and often determinative) issue for a State when deciding whether to recognise a newly formed government has been whether the new government is in “effective control” of its State (sometimes referred to as the “*de facto* control test”).⁸⁵ “Effective control” has largely been measured by the degree to which the government commands the obedience of the people within the State. Although in a given case there may be extremely complicated facts concerning what factions control what portions of a territory, the “effective control” test is a relatively simple one, and allows States to proceed pragmatically in their relations with the new government.

The decision by States to recognise a new government, however, has not always been dictated simply by whether the new government passes the effective control test. For instance, capital-exporting States, such as the United States, at one time found relevant whether the new government had declared its willingness to honour the international obligations of its predecessor, including debt obligations, before granting recog-

83. See Raju Thomas, “Self-Determination and International Recognition Policy” (1997) *World Affairs* 160 17; Robert M. Hayden, “Bosnia’s Internal War and the International Criminal Tribunal” (1998) 22 *Fletcher Forum of World Affairs* 45.

84. See generally M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815–1995* (1997); Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile* (1998).

85. See e.g. Lauterpacht (1997) *op. cit. supra* n.8 at p.98; Hans Kelsen, *General Theory of Law and State* (1949 [1945]), pp.228–229.

dition, even if the new government was effectively in control of its State.⁸⁶ Further, States often refused to recognise a government's authority over territory that the government had acquired through aggression. And, as will be discussed further *infra*, historically, States have also found relevant the political nature of the new government, including the degree to which it is democratic.

The whole idea of States "recognising" a new government of a State, however, is anathema to those States that see it as an insulting interference in national affairs. The 1930 Estrada Doctrine, named for the Mexican Foreign Secretary Genaro Estrada, stands for the proposition that the manner in which a new government comes to power is wholly a matter of national concern.⁸⁷ As such, States should not seek to influence the outcome of an internal power struggle by granting or withholding recognition. The Estrada Doctrine is attractive, not just for the reason stated by Estrada, but also because many States view it as politically difficult to announce publicly, one way or another, whether they "recognise" a new government, and would prefer simply to open diplomatic channels or otherwise develop relations with the new government without issuing a pronouncement that could be construed as approval of the new government. In such instances, determination of the legal effects of the new relationship is often left to national courts, which must pass upon the legal rights and obligations of the new government in the absence of a clear statement of recognition.

B. Past Practice

As was the case for State practice concerning recognition of States, practice concerning recognition of governments at times has concerned itself with issues of democratic governance. This is particularly apparent in the recognition practice in Europe as democracies emerged there and US recognition practice with respect to democracies that emerged in the Western Hemisphere.

European monarchies in the late seventeenth and eighteenth centuries made it their policy not to recognise democratic revolutionary governments, because such governments represented a threat to the status quo. Initially prompted by the French Revolution, this reactionary policy was one of the driving purposes of the Holy Alliance after the Congress of Vienna in 1815.⁸⁸

86. See L. Thomas Galloway, *Recognizing Foreign Governments: The Practice of the United States* (1978), pp.21–24.

87. See Philip C. Jessup, "The Estrada Doctrine" (1931), 25 J.I.L. 719.

88. See René Albrecht-Carrié, *A Diplomatic History of Europe Since the Congress of Vienna* (revised edn, 1973).

Over time, monarchical views fell into disfavour, displaced by Kantian notions of republican government, and this had an effect on the manner in which at least democratic States regarded other States. In the United States Thomas Jefferson declared: "It accords with our principles to acknowledge any Government to be rightful which is formed by the will of the nation, substantially declared."⁸⁹ Yet, for Jefferson, the "will of the nation" was not necessarily expressed through democracy; he accepted that States may engage in foreign relations through a monarchy.⁹⁰ Consequently, State practice during this period, including US practice, regarded "the will of the people" as present simply by a population's tacit acquiescence in a government in effective control of a State.

The first part of the twentieth century did not see radical inroads for notions of democracy in the practice of recognising governments, although exceptions did occur.⁹¹ However, as in many areas of his foreign policy, US President Woodrow Wilson injected some notions of democracy into US recognition practice. The Mexican Revolution, which began in 1911, pitted urban middle classes and agrarians, led by Francisco Madero, against the country's wealth elite.⁹² Madero succeeded in ousting Mexico's director, Porfirio Diaz, but the Mexican military, led by General Victoriano Huerta, staged a *coup d'état* and executed Madero. While the European powers recognised the new government of Huerta, Wilson was appalled and refused to do so, not only imposing economic sanctions but ultimately occupying Veracruz with military forces. Wilson's support allowed the revolutionary forces to gain strength. Huerta was forced from power in 1914 and the revolution resumed its course. In 1917 Venustiano Carranza was installed as president under a new constitution, which was built upon agrarian, land, church and oil reforms of the Mexican revolution. In that regard, it is important to note that US and British firms at this time controlled 90 per cent of the Mexican oil industry and virtually all Mexico's railroads, yet Wilson eschewed recognition of a military regime whose control of the country offered security for those investments in favour of a radical revolution, explaining: "I am willing to get

89. Quoted in Marjorie M. Whiteman, *Digest of International Law* (1963 15 vols), Vol.II pp.68–69; Lauterpacht (1947), *op. cit. supra* n.8, at pp.125–126.

90. Whiteman, *idem* p.69.

91. For an example of this, see a 1913 US Department of State memorandum reported in Green Haywood Hackworth, *Digest of International Law* (1940 13 vols), Vol.I, p.176.

92. Thomas J. Knock, *To End All Wars: Woodrow Wilson and the Quest for a New World Order* (1992), pp.25–30; Jules Davids, *America and the World of Our Time: United States Diplomacy in the Twentieth Century* (1970), pp.37–42.

anything for an American that money and enterprise can obtain, except the suppression of the rights of other men."⁹³

Wilson's distaste for military suppression of the constitutional democracies that had emerged in Latin and South America led him to endorse the 1907 Tobar Doctrine, named for Ecuador's foreign minister Carlos Tobar. Under the Tobar Doctrine, States of the Western Hemisphere should deny recognition to governments that come to power pursuant to non-constitutional means. Wilson applied the doctrine when considering recognition of new governments in the Dominican Republic, Ecuador, Haiti, Cuba, Portugal and the Soviet Union.⁹⁴

However, the Tobar Doctrine proved difficult to maintain in practice; by definition, the issue of recognition of a new government arises only in situations where non-constitutional change has occurred, and in those situations the new regime establishes a new constitution that purports to (and may even in terms of democracy) legitimise its existence. Consequently, Wilson's approach did not have an enduring effect on US government practice or that of other States. In the famous 1923 *Tinoco Arbitration* US Chief Justice (and former President) William Howard Taft found that international obligations incurred by a non-recognised government that had assumed power unconstitutionally were nevertheless binding on its successor, an acknowledgement that the existence of such governments could not be denied by other States.

During the Cold War era, notions of democracy in recognition practice gained special importance for many governments in the West. Having overcome the onslaught of fascism that prompted the Second World War, the foreign policy of Western States was built upon expanding liberal democracies as a bulwark against the new threat, the spread of communism. To that end, the Federal Republic of Germany, Italy and Japan were provided with extensive assistance in establishing democratic governments, as were South Korea and South Vietnam. Conversely, the West sought to isolate, often through a practice of non-recognition, communist governments, such as those in China, North Korea and North Vietnam. The United States even backed this up, at times, with military

93. "Woodrow Wilson Address of July 4, 1914", quoted in Knock, *idem*, p.28. The government of Mexico was recognised only in 1923 by Wilson's successor, primarily on the basis of Mexico's willingness to protect US nationals and property in Mexico: Hackworth, *loc. cit. supra* n.91.

94. Galloway, *op. cit. supra* n.86, at pp.27–29; see also Division of Historical Policy Research, Department of State, *The Problem of Recognition in American Foreign Policy*, Research Project No.174 (1950), pp.35–45; Taylor Cole, *The Recognition Policy of the United States Since 1901* (1928); Frederic Paxson, *The Independence of South-American Republics: A Study in Recognition and Foreign Policy* (1903).

intervention, such as occurred against the purported communist subversion in the Dominican Republic in 1965⁹⁵ and in Grenada in 1983.⁹⁶ It made no difference that these communist-orientated governments exercised extensive, sometimes complete, control over the population of their State. Western policy, however, was often more “anti-communist” than it was “pro-democratic”, in that many anti-communist regimes qualified for support regardless of their democratic pedigree (for example, the nationalist government of China, holed up on the island of Taiwan, held no elections throughout the decades it was recognised by the West as the legitimate government of China). The most extreme version of Western attitudes is found in the Reagan Doctrine, named for US President Ronald Reagan, which favoured support for insurgencies seeking to establish a democratic government against a non-democratic regime.

While some Western States advanced these notions of democracy in their recognition practice, most other States (and in particular non-democratic States, such as the Soviet Union and China and their allied States) rejected such notions. Soviet efforts to crush democratic movements in Hungary in 1956 and Czechoslovakia in 1968 culminated in the articulation of the Brezhnev Doctrine, named for Soviet President Leonid Brezhnev, which denied the legitimacy of any government that ousted a “socialist” (i.e. communist) government. The refusal to accept Western notions of democracy meant that recognition practice at international organisations (e.g. the practice of the UN Credentials Committee), and international law more generally, declined to adopt democracy as a linchpin of governmental legitimacy.⁹⁷ Indeed, dozens of non-democratic governments were fully represented at the various conferences that spawned the human rights treaties now pointed to as evidencing an emerging right of democratic governance.

C. Contemporary Practice

As has been fully documented elsewhere, the international community in recent years has been significantly involved in ending civil conflict within

95. Arguably there was no communist threat. See Theodore Draper, “The Dominican Crisis: A Case Study in American Policy”, *Commentary*, Dec. 1965, p.33. Regardless, it seems clear that the US essentially backed a junta installed through a military coup against the democratically elected President, Juan Bosch.

96. According to President Reagan’s Secretary of State: “What kind of country would we be, [Reagan] asked, if we refused to help small but steadfast democratic countries in our neighborhood to defend themselves against the threat of this kind of tyranny and lawlessness?”: George Shultz, *Turmoil and Triumph: My Years as Secretary of State* (1993), p.329. For a classic exchange on the issue of foreign support for the installation of a democratic government, see W. Michael Reisman, “Coercion and Self-Determination: Construing Charter Article 2(4)” (1984) 78 A.J.I.L. 642; Oscar Schachter, “The Legality of Pro-Democratic Invasion”, (1984) 78 A.J.I.L. 645.

97. See e.g. Bot, *op. cit. supra* n.5, at p.25.

States through a process of national reconciliation that includes UN-monitored elections.⁹⁸ Once elections occur, recognition of the new government by other States is virtually automatic.

However, as is the case regarding recognition of States, the international community does not refuse to recognise governments simply by virtue of their being non-democratic. China is the premier example of a state whose non-democratic, communist government is fully recognised within the international community, to the point of its representatives participating not just in the work of the United Nations generally but also as a permanent member of the Security Council. Yet there are dozens of other non-democratic States that are also generally recognised by the international community—mostly in Africa and the Middle East—and that participate fully in the work of international organisations. Even the United States, which in recent years has emphasised the importance of democracy in its foreign policy, recognises and maintains diplomatic relations with several non-democratic States.⁹⁹ Understandably, the many non-democratic governments that continue to exist globally do not conduct their recognition practice so as to disfavour non-democratic States.

The continuing recognition of non-democratic governments by democratic governments cannot be explained as vestiges of history anomalously “grandfathered in” amid contemporary pro-democratic practice. Consider, for instance, the case of China. From its assumption of effective control of the Chinese mainland in 1949 until 1979, the Beijing-based communist government was not generally recognised as the government of China outside the communist bloc States. Rather, the Taiwan-based (also non-democratic) nationalist government was recognised by most States as the government of China. General recognition of the Beijing-based government occurred only recently, in 1979, when representatives of the communist Chinese government were (at the expense of the now de-recognised Taiwan authorities) permitted to participate in the work of the United Nations on behalf of China. Thus, the international community has in recent years affirmatively recognised the non-democratic government in Beijing as the legitimate government of China.¹⁰⁰

Even more recently, the international community fully accepted the transfer of governance of the democratically governed Hong Kong from the democratic United Kingdom to non-democratic China on 1 July

98. Gregory Fox, “The Right to Political Participation in International Law” (1992) 17 *Yale J.I.L.* 570–587.

99. “Fact Sheet: Independent States and Dependencies as of August 20, 1996”, *US Department of State Dispatch* 7 (26 Aug. 1996), p.433.

100. See e.g. “Chronicle of State Practice” (1992) 2 *Asian Y.I.L.* 298 (Israel—China diplomatic relations established in 1992).

1997.¹⁰¹ On its first day in power, the Beijing-appointed legislature voted to restrict public demonstrations, prompting activists to take to the streets demanding free and fair legislative elections immediately,¹⁰² and within days established a new electoral system that was expected to limit sharply the ability to elect pro-democracy candidates.¹⁰³

China is not the only example of contemporary recognition of non-democratic governments.¹⁰⁴ After its reunification of Vietnam in July 1976, the communist government of the Socialist Republic of Vietnam gradually gained widespread global recognition, although it experienced some setbacks when it invaded Cambodia in 1978.¹⁰⁵ The United States held back recognition of Vietnam's communist government for many years, but ultimately normalised diplomatic relations in July 1995. In doing so, the United States emphasised the progress that had been made with the communist government in recovering the remains of US soldiers missing in action in Vietnam, but was silent on the government's lack of democratic legitimacy.¹⁰⁶

In short, in determining whether to recognise another government, States do not find the democratic quality of the government as decisive; other factors are taken into consideration as well. The stated reason for recognising the government may be that the transition to democracy is better achieved by engaging in relations with the non-democratic government, rather than isolating it. Indeed, the willingness to recognise a non-democratic government is not necessarily detrimental to the best interests of its people; respectable arguments are made by respectable commentators that a democratic form of government is not the best form for some States depending on their stage of economic and political

101. The reversion of Hong Kong to China was agreed to by the UK and China in a Sino-British Joint Declaration on the Question of Hong Kong, signed on 19 Dec. 1984.

102. Velisarios Kattoulas, "A New Order Takes Its Place in Hong Kong", *International Herald Tribune*, 2 July 1997, p.1. By contrast, Spain has been unsuccessful in its efforts to have Gibraltar revert to Spanish control, no doubt largely because Gibraltar's 30,000 population prefer to remain a UK colony. Barbara Crossette, "As It Seeks New Status, Island Helps a UN Panel", *New York Times*, 8 June 1997, p.19. Some 16 other territories remain classified by the UN as colonies: American Samoa, Anguilla, Bermuda, British Virgin Islands, Cayman Islands, East Timor, the Falklands, Guam, Montserrat, New Caledonia, Pitcairn, Tokelau, Turks and Caicos, St Helena, US Virgin Islands and Western Sahara.

103. Edward A. Gargan, "Hong Kong Scraps Its Voting System", *International Herald Tribune*, 9 July 1997, p.1.

104. See e.g. "Chronicle of State Practice" (1991) 1 *Asian Y.I.L.* 283 (Philippines–North Korea diplomatic relations established in 1991).

105. See e.g. *idem*, p.281 (Belgium–Vietnam diplomatic relations downgraded in 1978 and then upgraded in 1991); "Chronicle of State Practice" (1993) 3 *Asian Y.I.L.* 281 (South Korea–Vietnam diplomatic relations established in 1993).

106. "US Normalizes Diplomatic Relations with Vietnam", *US Department of State Dispatch* 6 (10 July 1995), p.551; Marian Nash (Leich), "Contemporary Practice of the United States Relating to International Law", (1996) 90 *A.J.I.L.* 79.

development.¹⁰⁷ At the same time, such recognition may be for non-altruistic reasons, such as seeking trade opportunities.

Actions by a non-democratic government against the flowering of democracy also do not trigger non-recognition of that government. Chinese treatment of dissidents seeking democratic change, including the treatment of student protestors in Tianenman Square, has not led to non-recognition of the Chinese government. More recently, the violent crushing of pro-democracy demonstrations in Kenya in July 1997 led to no significant reaction by the international community in terms of non-recognition.¹⁰⁸

US efforts to direct sanctions against the non-democratic government of Cuba through the Helms–Burton Act¹⁰⁹ was roundly condemned by the international community as an effort by the United States to dictate its foreign policy to other States. Yet that foreign policy, on its face, was an effort to pressure a non-democratic government by inhibiting “trafficking” in property owned by US nationals that was confiscated by the government, *until such time as the government transitioned toward democracy*.¹¹⁰ The international reaction to the Helms–Burton Act confirms the belief of many States that they are entitled to recognise and engage in trade relations with a non-democratic government.¹¹¹

When a non-democratic regime is ousted without outside involvement, the new regime typically promises to undertake elections at some future point, thereby promoting recognition by foreign governments. This provides some evidence that there is a belief by many States within the international community that democracy is the preferred form of government. For instance, when rebel forces under Laurent Kabila ousted Zaire’s dictator Mobutu Sese Seko in 1997, Kabila established the “Democratic Republic of the Congo”, promised elections by 1999 and

107. Robert D. Kaplan, “Was Democracy Just a Movement?”, *Atlantic Monthly*, Dec. 1997, p.55. Efforts by the UN to promote democracy have been extensive, but have not included systematic non-recognition of non-democratic governments: Beigbeder, *op. cit. supra* n.45, at pp.91–118. For some recent efforts by the General Assembly and the Secretary-General to promote the transition to democracy not by isolating non-democratic States and governments but, rather, by working with them and other relevant actors, see *Yearbook of the United Nations 1995* (1997), pp.293–295.

108. James C. McKinley Jr, “Moi Keeps Foes at Bay”, *International Herald Tribune*, 10 July 1997, p.1.

109. Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996, Pub. L. No.104–114, 110 Stat. 785 (1996).

110. “Promoting a Peaceful Transition to Democracy in Cuba”, *US Department of State Dispatch* 7 (15 July 1996), p.364.

111. The reaction to the Helms–Burton law is unfortunate in that imposing risks on third parties, including companies, that deal with a non-democratic government has been advanced as an attractive alternative to the more draconian measure of blanket non-recognition of that government: James Crawford, “Democracy and International Law” (1993) 64 B.Y.I.L. 113.

secured widespread international recognition of his government. However, Kabila's promise of elections was shortly followed by the banning of political party activity and public rallies, to muted criticism from abroad.¹¹² Thus, the aspiration for democracy is not always borne out in practice and, when it is not borne out, the consequences that flow often do not include a withdrawal of recognition of the new government.

If there is an emphasis on democratic legitimacy in the recognition of governments, it arises primarily in situations where a democratic government is internally overthrown by non-democratic (often military) authorities. As mentioned at the beginning of this article, Haiti is an important potential precedent for an emerging norm of democratic governance. The 1990 election of President Aristide was usurped by Haitian military and police authorities in 1991, but, despite the complete control of the new regime, the international community rallied around Aristide, refusing to recognise the legitimacy of the *de facto* government in Haiti, and instead gradually increasing sanctions until Aristide was restored to power in 1994. Arguably, this is the first step in the creation of a new international legal norm of non-recognition of governments that overthrow democratic governments. Similar co-ordinated action by States, albeit on a much less dramatic scale, has occurred since that time, such as the reaction to the threat to democracy in Sao Tome and Principe in August 1995,¹¹³ in Niger in January 1996¹¹⁴ and in Paraguay in April 1996.¹¹⁵ The 1991 Moscow Meeting of the Conference on the Human Dimension of the CSCE issued a statement affirming that participating States "will support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law".¹¹⁶

However, it is difficult to see that the international community has taken the second step of crystallising this notion as a legal norm, or is even over time moving toward such a legal norm. Some situations that might help support the emergency of such a norm are clouded by the complexity

112. Howard W. French, "The Honeymoon is Over for Kabila", *International Herald Tribune*, 14 July 1997, p.9.

113. See e.g. "Condemnation of Military Coup in Sao Tome and Principe", *US Department of State Dispatch* 6 (28 Aug. 1995), p.665; "US Welcomes Restoration of Government of Sao Tome and Principe", *ibid.*

114. See e.g. "US Suspends Assistance to Niger Following Military Coup", *US Department of State Dispatch* 7 (12 Feb. 1996), p.44.

115. See e.g. "Hemispheric Support for Democracy in Paraguay", *US Department of State Dispatch* 7 (22 Apr. 1996), p.203.

116. Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, 3 Oct. 1991, Art.II, para.17.2, reprinted in (1991) 30 I.L.M. 1670, and in Weston *op. cit. supra* n.25, at Vol.III, sec. B22.

of their circumstances; often the reaction of the international community is in the nature of a withdrawal of economic benefits, or perhaps the imposition of economic sanctions, but not a refusal to recognise the new government.¹¹⁷ Rather than isolate the *de facto* government through a comprehensive process of non-recognition, often the reaction is to maintain diplomatic relations with the new government, but with a policy that seeks to promote re-establishment of democratic rule.

Consider the case of Cambodia. Hun Sen's Cambodian People's Party ran Cambodia as a communist one-party State throughout the 1980s. In 1993 elections were held in Cambodia under UN supervision, resulting in a coalition government, headed by First Prime Minister Norodom Ranariddh (the son of the head of State, King Norodom Sihanouk) and Second Prime Minister Hun Sen. In July 1997 Prince Ranariddh was deposed by Hun Sen, who then appointed Ung Huot as First Prime Minister. The initial reaction by the international community to the coup was negative, but also somewhat muted.¹¹⁸ In September 1997 the UN Credentials Committee refused to accept credentials signed by King Sihanouk (presenting a delegation headed by Hun Sen and Ung Huot), but also refused to accept the credentials of Prince Ranariddh (in exile in France, presenting a delegation headed by himself). On the one hand, most donor States suspended non-humanitarian aid, the World Bank pulled back from starting new projects, and the Association of South East Asian Nations (ASEAN) suspended Cambodia's application for admission.¹¹⁹ On the other hand, States did not impose comprehensive economic sanctions and continued to maintain diplomatic relations with the new government through their embassies in Phnom Penh. The Hun Sen regime allowed internationally monitored elections in July 1998, but

117. US legislation in recent years has precluded the provision of US foreign assistance to any country whose elected head of government is deposed by military coup or decree. See e.g. 1996 Foreign Operations, Export Financing, and Related Programs Appropriations Act, s.508, Public Law 104-107, 110 Stat. 704, 723 (1996). The US Congress, however, probably could not constitutionally require the president not to recognise a foreign government, since the US Constitution art.II, sec. 3, allocates to the president the power to "receive Ambassadors and other Public Ministers".

118. "The Tigers' Fearful Symmetry", *The Economist*, 19 July 1997, p.53 (noting tepid reactions in the West); "Cambodia: The Last Battle?", *The Economist*, 23 Aug. 1997, p.44 ("Prince Ranariddh has been touring the world, appealing for help. He has received little more than the occasional kind word").

119. David Lamb, "High Price of Coup Becomes Clear to Despairing Cambodia", *Los Angeles Times*, 9, Dec. 1997, p.A1. Founded in 1967, ASEAN consisted at the time of Cambodia's application of nine States: Brunei, Indonesia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

the regime's victory was the product of its control over the election infrastructure, the national media and local administration.¹²⁰

Consider also the recent situation in West Africa with respect to Nigeria, Sierra Leone and Liberia. A several-year process of transition to civilian rule in Nigeria was to culminate in the election of a civilian president in June 1993. The election was held and it appeared that Chief M. K. O. Abiola won, but before the formal results could be announced the existing military-backed government annulled the election. By November the military's strong man, General Sani Abacha, formally assumed control of the country, and proceeded to engage in significant human rights abuses, including executions of dissidents. Exactly one year after the elections were annulled, General Abacha placed the apparent winner, Chief Abiola, in a "detention" that would last until his death.¹²¹ In response to this military suppression of democracy, however, most States did not sever diplomatic relations with the Nigerian government or refuse to recognise the Abacha government. The United States terminated most economic and military aid to Nigeria, but other than withdrawing its military attaché from the US Embassy in Abuja, it took no steps to downgrade diplomatic relations with the new government.¹²² In 1995 Nigeria was suspended from the 54-nation British Commonwealth,¹²³ but was not expelled, nor did the Commonwealth impose comprehensive economic sanctions let alone threaten intervention. Why a different result from that in Haiti? Nigeria has a population of 100 million, is a major oil exporter globally, and has an enormous army capable not only of defending Nigeria but also of projecting considerable force throughout the region. As is the case of the treatment of China (discussed further *infra*), one might say that practicalities in recognition practice at times trump principle.

In May 1997 Sierra Leone's army ousted the democratically elected President, Ahmad Tejan Kabbah. The Organisation of African Unity Council of (Foreign) Ministers condemned the coup and called on all African countries, and the international community at large, to refrain

120. Stephen J. Morris, "Brutocracy Wins: The Travesty of Cambodia's 'Fair' Elections", *Washington Post*, 9 Aug. 1998, p.C1; Tim Rosenberg, "Hun Sen Stages an Election: From Cambodia, a Post-Cold-War Parable", *NY Times Magazine*, 30 Aug. 1998, p.26. After the election, Cambodia was admitted to ASEAN. See e.g. "Cambodia Gains Full Status In Southeast Asian Group" *New York Times*, 30 Apr. 1999, p.A10.

121. Reuters, "Nigerian Opposition Leader Passes 3d Year in Detention", *International Herald Tribune*, 25 June 1997, p.6.

122. For a description of the US reaction to the annulment of the 1993 elections, see "Assessment of US-Nigeria Relations", *US Department of State Dispatch* 6 (31 July 1995), p.604.

123. "Bloc Gives Nigeria a Year on Reforms", *International Herald Tribune*, 28 Oct. 1997, p.6 The US supported the actions taken by the Commonwealth. See e.g. "Nigeria: Commonwealth Ministerial Group Recommends New Measures on Nigeria", *US Department of State Dispatch* 7 (6 May 1996), p.235.

from recognising the new regime.¹²⁴ However, the primary means by which the international community assisted the ousted government was through an intervention led by none other than the non-democratic, military regime of Nigeria. Nigeria's motivation for intervening appears to lie less in its attraction to democracy, and more in either its desire for stability in Western Africa (achievable through either democratic or non-democratic governments, depending on the government) or, worse, its effort to extend Nigerian dominance throughout the region.¹²⁵

That desire to dominate may be seen in a similar Nigerian-led intervention in Liberia in 1990. That intervention checked the forces of Charles Taylor, who had ousted the non-democratic regime of Samuel Doe and seized control of the vast majority of Liberia. While the intervention probably prevented widespread human rights atrocities by Taylor's forces in Monrovia, it could not definitively end the Liberian civil war. Seven years and 150,000 lives later, the exhausted competing factions submitted to internationally monitored elections. Ironically, with 85 per cent of the people voting, Taylor was elected president with 75 per cent of the vote and his party achieved a majority in Liberia's parliament.¹²⁶ In situations such as these, the international community as a whole appears to favour the maintenance or establishment of a democratic government, but the fundamental motivations of the most relevant actor(s) are far less clear.

Thus, the precedent for recognition practice in situations involving the ouster of democratic governments in Cambodia and in West Africa were far more equivocal than in Haiti. Similar precedents may be seen repeatedly in recent years with respect to *de facto* governments that usurped or annulled democratic elections. Although much criticism has been directed against the military-backed government of Myanmar (formerly Burma) for disregarding the 1990 election,¹²⁷ that government—the State Law and Order Restoration Council—remains the recognised government of Myanmar; its representatives are accredited to international organisations and Myanmar was admitted to ASEAN in 1997. After the Islamic Salvation Front won a resounding victory in

124. Decision of the Organisation of African Unity Council of Ministers, 28 May–4 June 1997 Meeting, OAU Doc.CM/DEC(LXVI)(1997).

125. Howard W. French, "Lagos Imposes Its Will on West Africa", *International Herald Tribune*, 27 June 1997, p.1 (quoting a former Nigerian Foreign Minister, now in exile, that Nigeria's military ruler "would have intervened even if it had been a military regime that was overthrown" because "he cannot tolerate a coup against a government perceived to be under his protection").

126. James Rupert, "Liberian Leader Lost the War, But May Have Won the Battle", *International Herald Tribune*, 22 July 1997, p.1; "Liberia: Farewell Guns?", *The Economist*, 26 July 1997, p.37.

127. See e.g. UN G.A. Res. 49/197, *United Nations General Assembly Official Records*, 49th Sess., 94th plenary meeting, p.217, UN Doc.A/49/197(1994)); "US Policy Toward Burma", *US Department of State Dispatch* 6 (24 July 1995), p.584.

Algeria's 1991 municipal elections, the military-backed Algerian government cancelled the second round of parliamentary elections which the Islamic Salvation Front appeared set to win and banned the Front from future elections. The action was mostly applauded by the international community, apparently on the grounds that the Algerian people were not entitled to select a fundamentalist government.¹²⁸ Many States of the international community condemned Peruvian President Fujimori's 1992 "coup from above" assumption of plenary powers at the expense of the Peruvian legislature and judiciary, yet still continued to recognise his government while pressing for a return to democratic rule. Indeed, it was hard to protest too vehemently in the face of Fujimori's success in weakening the Shining Path guerilla movement, reducing inflation from some 7,500 per cent to 10 per cent, and bringing investment and jobs back to Peru (leading to Fujimori's overwhelming re-election in 1995). In 1997 forces loyal to the former dictator of the Republic of Congo, Denis Sassou-Nguesso, succeeded in sweeping from power the government of Pascal Lissouba, who had been democratically elected in 1993.¹²⁹ However, the international community maintained diplomatic relations with the new government.

The failure of the international community to deny recognition to authoritarian governments that suppress democracy is particularly significant given that the international community can act when it so chooses. In this sense, Haiti helps disprove the existence of an emerging norm of non-recognition of non-democratic governments, for similar action could be repeated elsewhere but is not. At the same time, the international community has denied recognition to advance values other than democracy, most notably to punish transnational uses of force, whether or not the victim State is democratic. To that end, the Security Council called upon States not to recognise any regime set up by Iraq, which invaded and *de facto* controlled non-democratic Kuwait from August 1990 to January 1991.¹³⁰ Similarly, to punish Serbian aggression against Croatia and Bosnia, the Security Council ordered States to reduce the level of their staff at diplomatic missions and consular posts in Serbia and Montenegro, to prevent persons of those States from participating in international sporting events, and to suspend scientific and technical co-operation and cultural exchanges and visits with those States.¹³¹ These

128. Milton Viorst, "Algeria's Long Night", *Foreign Affairs* 76 (Nov.-Dec. 1997) p.86. For a discussion of why Western democracies should consider some democratically elected governments as the "wrong" kind of democracy (i.e. democracy but without the rule of law and basic human rights), see Fareed Zakaria, "The Rise of Illiberal Democracy", *idem*, p.22.

129. Howard W. French, "Former Dictator Sweeps Back into Control of Congo Republic", *International Herald Tribune*, 16 Oct. 1997, p.1

130. Security Council Res. 661, *United Nations Security Council Official Records*, 45th Sess., 2,933rd meeting, at p.13, UN Doc.S/RES/661(1990).

131. Security Council Res.757, *idem* 3,082nd meeting, p.13. UN Doc.S/RES/757(1992).

instances of non-recognition (or at least diplomatic isolation) were triggered by an effort to suppress armed conflict; similar non-recognition by the Security Council or by regional organisations apparently is not uniformly triggered by the simple ouster of a democratic government by a non-democratic one, notwithstanding the reaction with respect to Haiti.

III. CONCLUSION

ONE need look to no other authority than Thomas Franck himself for the proposition that international rules can command compliance only when they are true and coherent. In accordance with this proposition, an international rule on the recognition of States and governments must turn on effective control, not democratic control.

Franck has expounded a detailed theory on why States comply with rules of international law. That theory argues that the "legitimacy" of rules and institutions (such as States and governments) exerts a "compliance pull" on those addressed. States comply with rules and institutions that have been "symbolically validated" by the international community, which occurs when a signal is used as a cue to elicit compliance with a command.¹³² For Franck, the validation of a State of government is "symbolically cued" by the rite of recognition; however, the cue used succeeds only when those addressed perceive it as symbolic of truth.¹³³ Realistic cuing in the field of recognition remains tied to effective governance and if this changed the cue would lose its effectiveness.¹³⁴ With respect to membership of the United Nations, Franck writes:¹³⁵

A self-proclaimed regime may be denied validation only if it does not exercise effective control. A new state should be denied membership only if its existence is still precarious or if it does not want to, or cannot assume the duties of membership ... For example, it is not permissible to vote to deny membership on the ground ... that the government has come to power in a coup.

Further, Franck appears to believe that efforts to depart from this approach are destined to lead to "incoherence" in the application of the rule, thereby undercutting its legitimacy. By occasionally refusing to accredit representatives of governments that were in effective control, the United Nations has impugned its membership process, and if continued the "very notion of a community of states becomes one of doubtful validity".¹³⁶

Notions of democratic legitimacy have existed to varying degrees in the practice of recognising states and governments since the advent of

132. Thomas M. Franck, *The Power of Legitimacy Among Nations* (1990), p.92.

133. *Idem*, pp.111–112.

134. *Idem*, pp.118, 127–128.

135. *Idem*, pp.122–123.

136. *Idem*, pp.136–137, 140–142.

democracy. The traditional criteria for recognising States and governments have often been mixed with other factors. One of those factors is that democratic States, driven by deep-seated beliefs within their populace, tend to want to promote democracy in other States. With the considerable increase in the number of democratic States worldwide, there is little doubt that the trend is toward greater use of democratic legitimacy as a factor in recognition practice, and leads to certain tentative conclusions:

- (1) There is no international norm obligating States not to recognise an emerging State simply because its political community is not democratic in nature. Were there such a norm, it might be accompanied by a norm permitting intervention so as to establish a democratic government.¹³⁷
- (2) When a political community seeks recognition as a State, the existence of a democratic referendum whereby the people of the community proclaim themselves in favour of independence will be one important, but not decisive, element in the international community's decision to recognise it as a State. However, other elements will be equally important, including the international community's adherence to the modern version of the principle of *uti possidetis* and other means for maintaining peace and stability.
- (3) When a non-democratic regime usurps a democratically elected government, the international community may react by refusing to recognise the new *de facto* government and imposing comprehensive economic sanctions, in an effort to cajole the new government into a transition back to democratic rule.
- (4) However, while the international community is increasingly interested in democratic legitimacy as a factor in its recognition practice, there is an enduring desire to promote economic development, international peace and stability as well. These values—legitimacy, development and stability—do not always go hand in hand. Depending on the situation, one or the other value may dominate the decision within the international community regarding whether to recognise the State or government.

Regarding the role of democratic legitimacy as just another policy element in the practice of recognising States and governments may be regarded as an unattractive conclusion. Rather than resorting to a

137. For a discussion, see Jean Salmon, "Internal Aspects of the Right to Self-Determination: Towards a Democratic Legitimacy Principle?", in Christian Tomuschat (Ed.), *Modern Law of Self-Determination* (1993), pp.253–282.

ready-made legal framework on recognition, policy-makers are left weighing various amorphous policy elements that provide little concrete guidance. Yet, finding the right solutions through the application of differing policies to different cases is what diplomacy is all about. Democratic legitimacy is an important concept and tool, but it should not serve as a straitjacket for governments and others as they seek to find solutions, on a case-by-case basis, that promote the welfare of peoples worldwide. Whether nurturing new democracies, restoring overthrown democracies, promoting the gradual transition from non-democracy to democracy, or pursuing values that do not necessarily entail “democratic” means (such as promoting regional stability, economic development), the international community has an array of diplomatic and economic tools at its disposal, of which recognition practice is merely one.