Introduction

Reconstructing the Law of State Creation

This book is about the creation of states. It argues that international law permits state creation only when two abstract conditions are fulfilled. First, emerging states must constitute what I call 'genuine political communities': collectives within which particular kinds of ethically valuable behaviour are possible. Second, such communities must emerge in a manner consistent with the ethical importance of individual political action. These two conditions ground, justify, and nuance several more concrete and familiar legal propositions, such as the notion that new states must have 'effective' governments and that they cannot emerge via the unlawful use of force. Together, they enable the law governing the creation of new states to be reconstructed as a normatively coherent whole, with an intelligible and attractive set of philosophical foundations. Throughout what follows, I call this explanatory and justificatory framework 'statehood as political community'.

The legal claims presented in this book are highly unorthodox for two reasons. First, they require attention to ethical, moral, and philosophical concepts that have hitherto received very little attention from doctrinal scholars. Second, they utilise an approach to the identification of legal principles that many readers may consider alien. Rather than proceeding solely with recourse to the relevant social facts, such as treaty texts or patterns of behaviour among states, this text seeks to ascertain the content of international law through a 'rational reconstruction' of those facts, which places the normative attractiveness of putative laws on an equal footing with their factual provenance. This approach, and its relationship to the widely accepted sources of international law, is explained in greater detail in Section 2 of this Introduction. First, however, an overview of state creation within the international legal order, and of its political importance, shall be provided. These two tasks being complete, I then outline the legal framework I endorse and summarise the argumentative structure of this book as a whole.

1 STATE CREATION AND THE INTERNATIONAL LEGAL ORDER

We live in a world of states. With the exception of the high seas, outer space, and the continent of Antarctica, the entirety of our currently inhabitable environment falls within the jurisdiction of one state or another. States are some of the most powerful entities on our planet in terms of their social, environmental, and economic influence. For instance, almost without exception, it is states alone that possess full military capacity. Moreover, it is characteristically through independent statehood that political communities exercise collective self-determination,[1] gain a sense of shared identity,[2] and enjoy legal benefits such as diplomatic protection and rights of residence and return in relation to a particular territory.[3] When coupled with the fact that states are the primary creators and interpreters of international law,[4] any suggestion that a new community has joined this company of leviathans must be taken very seriously.

It is also no surprise that moments of state creation can be so politically controversial. Communities seceding from their 'parent' states characteristically take with them the people and natural resources within their new territories,[5] along with any rights to maritime territory and airspace associated with that land.[6] The political opposition faced by contemporary independence movements, such as those in Catalonia, Hong Kong, or Scotland, demonstrates the extent to which the governments of established states can be resistant to any alteration of their extant borders. Moreover, even if territorial distribution were not a zero-sum game, the creation of new states would nonetheless have sweeping legal implications. Emerging as a state for legal purposes establishes the new entity within a complex network of international 'jural relations', including rights, duties, liberties,

[1] Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI: Article 1(2); United Nations General Assembly (UNGA) Resolution 1514 (VX) (14 December 1960) UN Doc A/RES/1514(XV).

[2] Sari Nusseibeh, *What Is a Palestinian State Worth?* (Harvard University Press 2011) 61–70.

[3] For example: International Law Commission (ILC) 'Draft Articles on Diplomatic Protection with Commentaries' 9 August 2006 UN Doc A/61/10: Article 1.

[4] Rosalyn Higgins, *Problems and Processes: International Law and How We Use It* (Oxford University Press 1994) 17–38; Vaughan Lowe, *International Law* (Oxford University Press 2007) 90–97.

[5] James Crawford, *The Creation of States in International Law* (Oxford University Press 2006) 52–53; UNGA Resolution 3171 (XXVIII) (17 December 1973) UN Doc A/RES/3171(XXVIII).

[6] Suzanne Lalonde, 'The Role of the *uti possidetis* Principle in the Resolution of Maritime Boundary Disputes' in Christine Chinkin and Freya Baetens (eds.), *Sovereignty, Statehood and State Responsibility: Essays in Honour of James Crawford* (Cambridge University Press 2015).

and powers.[7] This juridical positioning brings not only formal equality with other states but also a range of entitlements that are substantively beneficial.[8] For example, it is by now well established that the Russian Federation's 2014 military occupation of the Crimea was contrary to international law. However, explaining *why* requires invoking the territorial integrity of Ukraine, which the latter holds by virtue of its statehood.[9] Indeed, if we understand the legal personality of a given community as its capacity to 'avail itself of obligations' at the international level,[10] statehood supplies the archetypal reason why that capacity exists. This reason-giving role is what it means for statehood to be an international legal status: states hold a unique place within the international community, and it is their statehood that establishes this fact.[11]

As a result, to borrow from James Crawford, 'the criteria for statehood are of a special character, in that their application conditions the application of most other international law rules'.[12] Given this point, it might seem natural that international legal practice would provide clear answers about when and how states emerge, as well as an evident justification for why those answers hold. However, nothing could be further from the truth. The law of state creation is notoriously contentious and complex, characterised more by scholarly disagreement and ambiguity in legal practice than by settled uniformity in either sphere. The extent of this actual and potential disagreement is a point I shall return to later on; however, a brief exemplification is necessary here

[7] Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *The Yale Law Journal* 710.

[8] As Crawford notes, there is no automatic correspondence between statehood and the *complete* list of jural relations that hold in relation to a particular state (Crawford (n 5) 44). Not all communities will have the same treaty obligations, nor will customary law entail the same set of rights for every state. Different states will have signed and ratified different treaty texts and customs may apply to different communities in different ways. For example, a customary standard that requires all states to respect the territorial waters of coastal communities will entail *duties* for every seafaring state but *rights* only for those that possess a coastline.

[9] Thomas Grant, 'Annexation of Crimea' (2015) 109(1) *American Journal of International Law* 68; Anne Peters, 'Crimea: Does "The West" Now Pay the Price for Kosovo?' *EJIL: Talk!*, 22 April 2018: www.ejiltalk.org/crimea-does-the-west-now-pay-the-price-for-kosovo/ (last accessed 2 October 2023).

[10] *Reparation for injuries suffered in the service of the United Nations* (Advisory Opinion) [1949] ICJ Rep 174, 178.

[11] Indeed, normative status in general can be understood in terms of the positionality it establishes within a given community, for which status within the international community is no exception, see: Thomas Nagel, 'Personal Rights and Public Space' (1995) 24(2) *Philosophy & Public Affairs* 83, 85.

[12] Crawford (n 5) 45.

since much of what motivates this text comes from my desire to move forward within our otherwise deadlocked doctrinal debates.

Consider the debate that still exists over the legal effect of foreign recognition on the accrual of statehood. This so-called 'great debate' between the constitutive and declaratory views of recognition is something I return to in Chapters 4 and 5; however, for now, it suffices to remark upon the wide divergence that still pertains, even within anglophone scholarship. The constitutive view, in a nutshell, is that acts of foreign recognition by the governments of already established states themselves establish the statehood of nascent entities. This was the view, in essence, of Hersch Lauterpacht.[13] The declaratory view, by contrast, holds that recognition serves merely to acknowledge new states, which arise only once some set or other of independent legal criteria have been satisfied. This was, for instance, largely the position that Crawford endorsed.[14] It has been argued by some that the declaratory view predominates within anglophone scholarship;[15] however, this is no longer really the case, if indeed it ever was. By way of example, taking two recent and particularly influential texts, Rowan Nicholson and Jure Vidmar adopt two discrete and opposing views. Nicholson argues that statehood can in general arise whenever 'effectiveness' (in the sense of demonstrable factual control of both territory and population) is established.[16] However, although this puts him in agreement with those such as Crawford, who adopt a declaratory position, he in fact rejects that view, arguing instead that statehood can *also* accrue as a result of foreign recognition, even though effectiveness itself is absent.[17] Although he agrees with Nicholson on the possibility of foreign recognition acting as an independent basis for state creation, Vidmar takes yet another approach, arguing that the emergence of new states is always the result of a legally governed international political process, through which state creation via foreign recognition represents only one possible route.[18] Frustratingly, all three contemporary authors (Crawford, Nicholson, and Vidmar) each advance their respective and conflicting positions as the single correct interpretation

[13] Lauterpacht's analysis was in fact quite a bit more nuanced than this simple characterisation implies, due largely to his own non-positivist methodology, see: Hersch Lauterpacht, *Recognition of States in International Law* (Cambridge University Press 1947) 1–78.

[14] Crawford (n 5) 26–28.

[15] Ibid 25; Steven Ratner, *The Thin Justice of International Law: A Moral Reckoning of the Law of Nations* (Oxford University Press 2015) 184–187.

[16] Rowan Nicholson, *Statehood and the State-Like in International Law* (Oxford University Press 2019) 106–108.

[17] Ibid 127–142.

[18] Jure Vidmar, *Democratic Statehood: The Emergence of New States in Post-cold War Practice* (Hart Publishing 2013) 239–253.

of largely the same set of social facts: the same treaties, recognition practices, UN General Assembly Resolutions, and so on.

In light of such disagreement, some scholars are drawn to the view that there is no law at all governing state creation: how can there be any such law, they argue, when so many conflicting but otherwise plausible interpretations of the same social facts exist?[19] Such sceptics often consider state creation to be 'pre-legal',[20] following Lassa Oppenheim's famous contention that the 'formation of a new State is…a matter of fact, and not of law'.[21] For instance, Anthony Carty argues that '[l]aw governs neither the coming into existence nor the disappearance of states', whilst Duncan French suggests that '[w]ith no central organizing agency either to prescribe the specific conditions of or to determine the attainment or otherwise of the requirements of statehood, international law on this issue remains notionally mandatory, apparently persuasive, but ultimately contingent upon claim and response'.[22]

Unsurprisingly, I disagree with these conclusions. However, given the controversial nature of state creation and the scholarly disagreement that persists in relation to the relevant law, clarity over how precisely we should proceed when attempting to discover that law is particularly important. Indeed, I suspect that both the extent of our existing doctrinal disagreements, and the illusion of indeterminacy that such disagreements create, turns in large part on the method of identifying international law that currently dominates, both within the law of state creation and elsewhere.[23] This method, which is called either 'formalism' or 'positivism', depending upon one's legal tradition, focuses entirely upon establishing international laws by pointing to some set of social facts upon which they are taken to be grounded.[24] In the

[19] This claim often has roots in the postmodern critique that international law in general lacks determinacy, see: Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2006) 586.

[20] Jean d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (2014) 29 *Connecticut Journal of International Law* 201, 205.

[21] Lassa Oppenheim, *International Law: A Treatise, Volume 1* (Longmans, Green, and Company 1905) 264.

[22] Anthony Carty, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs* (Manchester University Press 1986) 43; Duncan French (ed.), *Statehood and Self-Determination: Reconciling Tradition and Modernity in International Law* (Cambridge University Press 2013) 2.

[23] For my views on this issue in general, see: Alex Green, 'The Precarious Rationality of International Law: Critiquing the International Rule of Recognition' (2021) 22(8) *German Law Journal* 1613.

[24] The clearest theoretical rendition of this approach can be found in: John Gardener, 'Legal Positivism: 5½ Myths' (2001) 46 *American Journal of Jurisprudence* 199.

case of state creation, this means paying exclusive attention to facts such as the foreign recognition of nascent entities, the text and legislative history of relevant treaty provisions, and any salient comments made by international courts and tribunals.

Social facts of this kind are descriptive, in that when we identify them, we do so via propositions about what has been done, said, or thought, rather than by making arguments about what *ought* to be entailed, either in belief or in deed, by virtue of these facts pertaining. The difficulty with this approach is that, for any given set of such facts, there is an indefinitely large number of putative legal standards that might be entailed.[25] This is demonstrated by the divergence of scholarly opinion already cited: working from largely the same set of international legal practices, various positivist authors advance starkly different and incompatible views of what it takes for new states to emerge. What is more, such common and exclusive reliance upon social fact means that there is no way to solve their disagreements. Discrete facts, such as the non-recognition of some particular entity, that function as paradigms under one approach appear as aberrant cases under another, with no means to determine which characterisation should be preferred. For example, Gérard Krejin argues that the circumstances of the Federal Republic of Somalia in the 1990s were 'a nail in the coffin of the declaratory theory'.[26] In 1991, during a protracted civil war that has continued on and off ever since, the territory of what is now the Republic of Somaliland purported to secede.[27] In the decades that followed, Somalia itself was frequently without effective government, while Somaliland swiftly gained relative 'calm' and maintains it to this day.[28] Nonetheless, Somalia continues to receive foreign recognition, whereas Somaliland has received none.[29] Jure Vidmar and Lea Raible effectively endorse Krejin's analysis, arguing that Somaliland cannot be a state because without foreign recognition or the consent of its parent state, the secession of Somaliland is forestalled by the principle of territorial integrity.[30] For these authors, and all others who reject the declaratory view, Somaliland thus constitutes a paradigmatic case: clear proof that statehood is not

[25] Mark Greenberg, 'How Facts Make Law' (2004) 10 *Legal Theory* 157, 181.
[26] Gérard Krejin, *State Failure, Sovereignty and Effectiveness: Legal Lessons from the Decolonization of Sub-Saharan Africa* (Nijhoff 2004) 355.
[27] Helen Metz, *Somalia: A Country Study*, 4th edition (Library of Congress 1993) 169–170.
[28] United Nations Security Council (UNSC) 'Report of the Secretary-General on the Situation in Somalia' (19 December 2000) UN Doc S/2000/1211, para 34.
[29] Crawford (n 5) 415.
[30] Jure Vidmar and Lea Raible, 'State Creation and the Concept of Statehood in International Law' in Jure Vidmar, Sarah McGibbon, and Lea Raible (eds.), *Research Handbook on Secession* (Edward Elgar 2022) 21.

something that arises in response to discrete legal criteria but instead a status constituted by international legal processes, including those of foreign recognition. Conversely, for scholars such as Crawford and Nicholson, Somaliland is an aberrant case, best understood as an exception to the rule that factual effectiveness is sufficient for state creation.[31] They stop short of arguing that it possesses statehood, yet advance no convincing reason for why this is not so. Indeed, Nicholson himself puts this methodological problem in a persuasive manner:

> …not every case of apparently divergent practice is necessarily evidence of anything…in an area of law as politicized as statehood, some divergent or potentially misleading practice might still emerge. The scholar of statehood cannot always assume that the practice of states is invariably consistent with international law, then form a conclusion from that practice about whether a particular entity is a state, and then work backwards to an explanation. An attempt to resolve every anomaly by that method might lengthen the list of exceptions and caveats until it really is doubtful whether any 'general' rules remain.[32]

This is undoubtedly true, in that no legal theory can possibly aim for total explanatory power, unless we are to abandon the obvious truth that sometimes laws are broken. However, Nicholson's sensible admission does nothing to address the more fundamental issue that we must have some means to discriminate between various plausible but nonetheless competing theories. Debate will persist, in other words, unless we can find some way to identify which principles of state creation we *should* endorse, amongst the complete set of those that *might* explain the preponderance of international practice. The problem here is that such an answer cannot be provided by social facts alone. Even a rejection of obviously absurd or deeply unjust legal standards must rely on something beyond the descriptive. We must, in other words, rely upon the sort of normative considerations that positivism excludes as the ultimate bases or 'grounds' of international law. In the following section, I outline my own approach, which proceeds in precisely this manner. My aim is to generate an account of the law that governs state creation that is not only doctrinally apt but also independently appealing, in that it makes normative sense for us to endorse *this* account of the law rather than any other. Naturally, I do not expect to convince every reader. Nonetheless, by shifting the terms of debate onto an explicitly normative footing, I hope that we can at least begin having disagreements of a more productive kind.

[31] Crawford (n 5) 417; Nicholson (n 16) 190–192.
[32] Nicholson (n 16) 191.

2 RATIONAL RECONSTRUCTION AND INTERNATIONAL LAW

I offer what Habermas calls a 'rational reconstruction' of state creation.[33] At its most basic, this is an interpretation of one or more texts, social practices, speech acts, or practical maxims.[34] Given my object of study, my own reconstruction focuses upon the complete set of international legal practice concerned with the creation of states. By 'international legal practice' I intend a deliberately inclusive set of descriptive facts. These encompass not only the text but also the social and historical context of international instruments, including but not limited to formally binding treaties, as well as that of international judgments and official statements about state creation made by the representatives of established states.[35] They also include, as one might expect within a book on state creation, international recognition practices. International laws themselves, whether thought of as genuine normative principles,[36] distinctly legal norms, or social rules,[37] are different in kind from these descriptive facts about what particular people, such as state representatives and international judges, did, said, or believed.[38] Nonetheless, some of these more basic facts have *prima facie* legal relevance. For instance, the text of treaty documents, the law-related statements of state representatives, and the judgements of international courts and tribunals are all presumptively relevant to the content of international law, as are the custom-forming behaviours undertaken by state representatives and other international actors, which lack any obvious semantic content.[39] The challenge is to explain how these more basic facts

[33] Jürgen Habermas, *Moral Consciousness and Communicative Action*, Christian Lenhardt and Shierry Nicholson (trans.) (Polity Press 1992) 29–32.

[34] Ibid 29.

[35] In adopting this broad understanding of legally relevant material, I follow: Greenberg (n 25) 157.

[36] By 'genuine normative principles' I mean abstract formulations that capture some set of other-regarding reasons that actually apply to us, as a matter of normative fact. I take 'facts' in this context to mean 'true propositions', see: Frank Ramsey, 'Facts and Propositions' in *Proceedings of the Aristotelian Society, Supplementary Volumes, Vol. 7, Mind, Objectivity and Fact* (1927) 153–206; Peter Strawson, 'Truth' (1949) 9(6) Analysis 83. Following this approach, a 'legal fact' is a 'true proposition of law', whilst a 'normative fact' is 'a proposition that is normatively true'. My previous references to 'descriptive facts' and 'social facts' have similar connotations, denoting true propositions about what is the case in our natural or social worlds. Normative facts pertain to the extent that they are supported by the normative reasons that actually apply to us, whether those reasons are all-things-considered or only *pro tanto*.

[37] The latter two possibilities are most famously forwarded by Hans Kelsen ('The Pure Theory of Law and Analytical Jurisprudence' (1941) 55(1) *Harvard Law Review* 44) and Herbert Hart (*The Concept of Law*, 2nd edition (Oxford University Press 1994) 79–99).

[38] Greenberg (n 25) 157–159.

[39] Jean d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press 2011) 161–174.

ground and explain the normative content of international law: why, in other words, they should be taken to produce one particular set of international legal standards, rather than any other.

Placing this material within the context of the traditional 'sources' of international law, as enumerated for example within Article 38(1) of the Statute of the International Court of Justice (ICJ),[40] 'international legal practice' includes at least all the relevant descriptive facts ordinarily used to establish the pedigree of putative legal standards under each of the three primary sources: international conventions, international custom, and general principles of law.[41] In addition, I sometimes reference the unilateral acts of states, which some lawyers invoke either as independent sources of legal obligation or as evidence of customary law.[42] Whatever the traditional classification of such material might be, what matters for the purposes of my argument is its descriptive nature and its putative legal relevance.

What distinguishes rational reconstruction from other interpretive approaches to such material is its relation to normative reasons.[43] Rather than 'merely' settling upon legal principles that more-or-less fit the relevant international practice, rational reconstruction assumes that any plausible conception of the law must also have an immanent rationality, which the interpreter therefore should explicate. Such reconstructions take seriously, in other words, the idea that the prescriptive content of international law

[40] 18 April 1946.

[41] The standard positivist view of international law insists that only the facts implicated by these 'formal' sources have a direct law-determining role: they are not only necessary for the existence and validity of international legal norms but also sufficient (Hugh Thirlway, *The Sources of International Law* (Oxford University Press 2014) 8–9). As such, positivists see the grounds of international law as exhausted by material such as the text of treaty documents, along with any relevant reservations; the behaviour and statements of state representatives that suggest the existence of customary norms; and any textual or behavioural evidence of generally recognised legal principles that are neither customary nor treaty based. Rational reconstruction rejects this exclusive reliance upon social fact, in the manner I outline below.

[42] ILC 'Unilateral Acts of States: Report of the Working Group – Conclusions of the International Law Commission on Unilateral Acts of States' (20 July 2006) UN Doc. A/CN.4/L./703; ILC 'Report of the International Law Commission on the Work of its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10; *Nuclear Tests (Australia v France)* (Merits) [1974] ICJ Rep 253, paras. 43–46; *Nuclear Tests (New Zealand v France)* (Merits) [1974] ICJ Rep 457, paras. 46–49; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction and Admissibility: Judgment) [2006] ICJ Rep 6, para. 50.

[43] Following Derek Parfit, I take 'reasons' to be 'considerations that count either in favour or against something' and 'normative reasons' to be 'considerations that count in favour of doing or not doing something', either simpliciter or in some specific manner (such as with particular intentions, attitudes, and so on), see: *On What Matters: Volume One* (Oxford University Press 2011) 31.

reflects some set of independently attractive normative reasons, such that part of what it means to discover the law on any given topic is to identify those reasons and articulate why they matter. This means that the interpreter must place as much emphasis upon the normative attractiveness of any putative laws as upon their descriptive or historical basis within a given text or practice. To borrow language from Ronald Dworkin, this means finding an appropriate balance between the interpretive dimensions of 'fit' and 'justification' when ascertaining the content of international law.[44] All of this follows because, to quote Habermas, international law, like any reason-giving practice, can only be properly understood in light of the reasons that animate it, and 'reasons can be *understood* only insofar as they are taken seriously as reasons and *evaluated*' [emphasis in original].[45] As mentioned above, this may strike more rigidly doctrinal international lawyers as somewhat alien, given that it requires explicit reliance upon moral, political, and other forms of normative argumentation when developing an account of the relevant law. Chapters 1 and 2 of this monograph, for example, are almost wholly exercises in normative political theory, within which international legal practice itself features only sparingly. They comprise, as it were, the 'justificatory' part of my argument. Conversely, Chapters 3 and 4 focus far more upon the 'fit'-based demonstration that my normative arguments – about the nature and value of politics, the function of governance institutions, and so on – have explanatory power in relation to our legal practices, such that they help to 'fix' which version of the law of state creation we *should* accept.

Although rational reconstruction of this sort is now uncommon within anglophone international legal scholarship, it is by no means unprecedented. Both Başak Cali and John Tasioulas have advocated for a similar 'interpretivist' approach within both international law as such and the identification of customary international law in particular.[46] Its true provenance, however, lies in the 'workable synthesis of natural law and State practice' that Lauterpacht famously described as 'Grotian'.[47] As Georg Schwarzenberger describes this approach, which was most prevalent in the first half of the last century, the Grotian must:

[44] Ronald Dworkin, *Law's Empire* (Hart Publishing 1986) 50–53.
[45] Habermas (n 33) 30.
[46] Başak Cali, 'On Interpretivism and International Law' (2009) 20(3) *European Journal of International Law* 805; John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case' (1996) 16(1) *Oxford Journal of Legal Studies* 85.
[47] Hersch Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23(1) *British Yearbook of International Law* 1, 5.