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**International Law, Domestic Political Orders, and the ‘Democratic Imperative’:  
Has Democracy Finally Emerged as a Global Legal Entitlement?**

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# INTERNATIONAL LAW, DOMESTIC POLITICAL ORDERS, AND THE 'DEMOCRATIC IMPERATIVE': HAS DEMOCRACY FINALLY EMERGED AS A GLOBAL LEGAL ENTITLEMENT?\*

By Christian Pippan\*\*

## Abstract

After the end of the Cold War, democratic transitions in many parts of the world, a significant increase in the number of signatories to global and regional human rights instruments containing participatory rights, and a growing interest in 'free and fair' elections on the part of the UN and other international organizations have led some legal scholars to assert the emergence of an internationally constituted 'right to democratic governance'. In a certain sense, this was in line with the predominantly liberal reading of the events of 1989 in social science, which interpreted the demise of European communism as a confirmation of the superiority of Western-style democracy over other political regimes. In the controversial debate that followed its initial articulation in the early 1990s, the 'democratic entitlement thesis' was hailed by some commentators as finally giving substance to widely accepted but highly ambiguous international concepts such as self-determination, popular sovereignty and political participation, whereas others criticized it as a form of 'liberal messianism', or even as a 'democratic jihad'.

The present essay aims to revisit the discussion in light of recent international developments, particularly within the United Nations. Following a general introduction (Section 1), it briefly recapitulates the major strands of the democratic norm thesis and the vivid critique it has received (Section 2). In order to better grasp the overall *problématique* raised by the thesis, the main section of the paper (Section 3) then addresses three interrelated, yet ultimately distinct, questions: Does the international legal system display any preference for democracy over other domestic political regimes and concurrent constitutional orders? If so, does the contemporary international order embrace any particular vision of democracy? Finally, provided the two prior questions can

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\* This essay is dedicated to the memory of Thomas M. Franck (1931-2009).

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be answered in the affirmative, do any of the components of an emerging international vision of democracy have a universal legal character? The essay concludes (in Section 4) by arguing that, unless one (inappropriately) equates democracy with free and fair elections, no general rule of international law can be identified requiring states to design their domestic political and constitutional orders in accordance with a particular (e.g. liberal) model of democracy. Moreover, while the persistent refusal to allow for the holding of periodic and genuine elections may today be regarded as constituting a violation of a customary norm (an argument supported here), the responsible government usually does not forfeit its legal standing in the international arena. Notwithstanding these findings, it will be argued that an international regime on domestic democratic governance is progressively taking shape. This regime is comprised of principles, norms, rules, and standards with varying degrees of normativity, around which the expectations of international actors regarding efforts of states 'to implement the principles and practices of democracy' increasingly converge.

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## 1. Introduction

More than 20 years after the fall of the Berlin Wall and the opening of the Iron Curtain in Europe, the legacy of the ‘year of the truth’<sup>1</sup> is mostly approached from a general-political, historical, and/or socio-cultural perspective. From the perspective of international law, however, it is particularly worthwhile to recall the inspirational impact of 1989 on normative theories of democracy and its role in the international system. Their basis was a decidedly liberal reading of the revolutions of 1989, which were widely regarded as a confirmation of the superiority of Western-style multi-party democracy (with its typical emphasis on political pluralism, individual rights and the rule of law) over other political regimes and forms of government. Indeed, in both Europe and the United States, influential political thinkers interpreted the dramatic changes in Central- and Eastern Europe as a belated ‘catching-up’ of the region with the achievements of Enlightenment and the French Revolution and as the expression of a liberal revolutionary tradition deeply rooted in American and modern European notions of democratic constitutionalism.<sup>2</sup>

International institutions, in Europe and elsewhere, quickly reacted to the events of the epoch and the new era of democracy that they promised to evoke. Only a year after the advent of what in German is referred to as “die Wende” (the turning point), the then Conference on Security and Cooperation in Europe (CSCE), which included among its members the main rivals of the waning East-West conflict, solemnly professed to ‘build, consolidate and strengthen democracy as the only system of government of our nations’.<sup>3</sup> In mid-1991, the Organization of American States (OAS) likewise affirmed that ‘representative democracy is the form of government of the region’.<sup>4</sup> Another six months later, eleven former Soviet Republics adopted the Alma Ata De-

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<sup>1</sup> Timothy G. Ash, ‘The Year of the Truth’ in Vladimir Tismăneanu (ed), *The Revolutions of 1989* (Routledge, London 1999) 105.

<sup>2</sup> Paul Blokker, *The Impact of 1989 on Theoretical Perceptions of Democracy*, Research Network 1989, Working Paper 21/2008 <[www.cee-socialscience.net/1989/papers/papers.html](http://www.cee-socialscience.net/1989/papers/papers.html)> (accessed 1 May 2010) 3-4. Blokker cites Jürgen Habermas, *Die nachholende Revolution* (3<sup>rd</sup> edn Suhrkamp, Frankfurt aM 1999) and Bruce Ackerman, *The Future of Liberal Revolution* (Yale University Press, New Haven 1992) as archetypical representatives of the predominant view in social and political science that reads 1989 as an affirmation of the irresistible appeal of liberal democracy. More radical, of course, was Francis Fukuyama, who took the demise of Eastern European communism as the last step in the ideological evolution of mankind, which would pave the way for the universalisation of liberal democracy as the final form of human government: Francis Fukuyama, *The End of History and the Last Man* (The Free Press, New York 1992).

<sup>3</sup> Charter of Paris for a New Europe (21 November 1990) (1991) 30 ILM 190, 193.

<sup>4</sup> Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS General Assembly, 21<sup>st</sup> Sess (4 June 1991) OAE/Ser.P/AG Doc 2734/91; Representative Democracy, OAS General Assembly Res 1080 (5 June 1991) OAE/Ser.P/AG Doc 2739/91.

claration, which confirmed the formation of the Commonwealth of Independent States (CIS) and the intention of its members ‘to build democratic states under the rule of law’.<sup>5</sup>

Against the backdrop of political transition and reform in many regions of the world and a growing interest in democracy on the part of a number of international organizations, Thomas Franck famously proclaimed the emergence of an internationally constituted *right to democratic governance*. In a path-breaking article, published in 1992, he asserted that ‘both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance’.<sup>6</sup> As is well known, Franck’s thesis had a significant resonance in international legal scholarship and ushered in what came to be labelled as the ‘democratic entitlement school’. Though the debate over the sweeping claim that, in the post-Cold War era, democracy was gradually becoming a universal norm has probably seen its heyday in the 1990s,<sup>7</sup> it still lost neither attraction nor relevance. Indeed, the claim’s provocative nature (in light of international law’s traditional indifference towards domestic constitutional orders), its assumptions about the kind of democracy advanced by the international system, and its potential consequences for states deemed to be in violation of the purported norm continue to inspire scholars of international law and fuel a controversial discussion that is still ongoing.<sup>8</sup>

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<sup>5</sup> Alma Ata Declaration and Protocol (21 December 1991) (1992) 31 ILM 147. On the basis of the Alma Ata documents, eight newly independent states joined the so-called ‘Minsk Agreement’, initially concluded by the CIS founding states Belarus, Russia and Ukraine: Minsk Agreement Establishing the Commonwealth of Independent States (8 December 1991) (1992) 31 ILM 138.

<sup>6</sup> Thomas M. Franck, ‘The Emerging Right to Democratic Governance’ (1992) 86 AJIL 46, 91. See also by the same author: ‘The Democratic Entitlement’ (1994) 29 U Richmond L Rev 1; ‘Democracy as a Human Right’ in Louis Henkin and John L Hargrove (eds), *Human Rights: An Agenda for the Next Century* (ASIL, Washington 1994) 73; *Fairness in International Law and Institutions* (Clarendon Press, Oxford 1995) 83 (ch 4: ‘Fairness to Persons: The Democratic Entitlement’).

<sup>7</sup> A number of seminal contributions to the debate (for the most part adapted by their authors from previously published work) can be found in Gregory H. Fox and Brad R. Roth (eds), *Democratic Governance and International Law* (CUP, Cambridge 2000). A further useful collection of essays originally published elsewhere is provided by Richard Burchill (ed), *Democracy and International Law* (Ashgate, Aldershot 2006).

<sup>8</sup> Among the more recent literature see Euan Macdonald, ‘International Law, Democratic Governance and September the 11<sup>th</sup>’ (2002) 3 German LJ <[www.germanlawjournal.com](http://www.germanlawjournal.com)> (accessed 1 May 2010); Steven Wheatley, ‘Democracy and International Law: A European Perspective’ (2002) 51 ICLQ 225; Jude I. Ibegbu, *Right to Democracy in International Law* (Mellen Press, Lewiston 2003); Jackson N. Maogoto, ‘Democratic Governance: An Emerging Customary Norm?’ (2003) 5 U Notre Dame Austl L Rev 55; Jan Wouters, Bart de Meester and Cedric Ryngaert, ‘Democracy and International Law’ (2003) 34 NYIL 139; Tom J. Farer, ‘The Promotion of Democracy: International Law and Norms’ in Edward Newman and Roland Rich (eds), *The UN Role in Promoting Democracy: Between Ideals and Reality* (UNU Press, Tokyo 2004) 32; Juliane Kokott, ‘Souveräne Gleichheit und Demokratie im Völkerrecht’ (2004) 64 Heidelberg J Intl L 517; Ndiva Kofele-Kale, ‘The Global

A central aspect of Franck's thesis is its distinctly normative character, with the right advocated by him 'always falling short of the law of the moment, always "emerging", not quite yet there, though well under way'.<sup>9</sup> As such, it comes squarely within what David Kennedy has referred to as the 'Manhattan School of human rights'.<sup>10</sup> Interestingly, in a speech reprinted in the very same issue of the *American Journal of International Law* that included Franck's first elaboration of his thesis, Sir Robert Jennings stated that '[a] right – even human rights – does not amount to much in practice unless it is established and seen to be established as an integral part of the whole system of international law which alone can create effective corresponding obligations in the international community'.<sup>11</sup> Although Sir Robert's remark was of course not directly related to Franck's article, the question suggests itself: Is the democratic entitlement today, nearly two decades after Franck predicted its global expansion, established as an 'integral part of the whole system of international law'? Put differently, does the "democratic imperative", which is frequently qualified as an essential, if not axiomatic, feature of the contemporary international order,<sup>12</sup> indeed imply that democracy has become 'a universal norm'?<sup>13</sup>

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Community's Role in Promoting the Right to Democratic Governance and Free Choice in the Third World' (2005) 11 L & Business Rev Americas 205; Same Varayudej, 'A Right to Democracy in International Law: Its Implications for Asia' (2006) 12 Ann Surv Intl & Comp L 17; Véronique Huet, 'Vers l'Emergence d'un Principe de Légitimité Démocratique en Droit International?' (2006) 67 RTDH 573; Christian Pippan, 'Gibt es ein Recht auf Demokratie im Völkerrecht? [Is There a Right to Democracy in International Law?]' in Erwin Riefler (ed), *Sir Karl Popper und die Menschenrechte* (Lang, Frankfurt a. M. 2007) 119; Jean d'Aspremont, *L'Etat Non Démocratique en Droit International* (Pedone, Paris 2008); Karl Doehring, 'Democracy and International Law' in Sienho Yee and Jacques-Yvan Morin (eds), *Multiculturalism and International Law* (Nijhoff, The Hague 2009) 199; Niels Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* [Democracy as a Teleological Principle. On the Legitimacy of Governments under International Law] (Springer, Berlin 2009).

<sup>9</sup> Martti Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2003) 35 NYU J Intl L & Pol 471, 484.

<sup>10</sup> According to Kennedy, '[t]his is not a codified right, consented to by states, available now for enforcement by institutions, still less by hegemonic lone rangers. This is a description, for the future, of where we are as a universe. ... This is the Manhattan School of human rights, but not the rights of remedies, or the rights of correlative duties. These rights are states of mind': David Kennedy, 'Tom Franck and the Manhattan School' (2003) 35 NYU J Intl L & Pol 397, 432-33.

<sup>11</sup> Sir Robert Jennings, Speech on the Report of the International Court of Justice (1992) 86 AJIL 249, 254.

<sup>12</sup> See Boutros Boutros-Ghali, 'L'ONU et l'Impératif de la Démocratisation' in Antônio A. Cançado Trindade and Christophe Swinarski (eds), *Hector Gros Espiell Amicorum Liber: Persona Humana y Derecho Internacional* (Emile Bruylant, Bruxelles 1997) 117; David Miliband, 'The Democratic Imperative' (2008) No 12 Democratiya 62 <[www.dissentmagazine.org/democratiya/article.php?article=194](http://www.dissentmagazine.org/democratiya/article.php?article=194)> (accessed 1 May 2010).

<sup>13</sup> See Theodor Meron, *The Humanization of International Law* (Nijhoff, Leiden 2006) 497 (positing that 'on the balance, it is undeniable that democracy has become both an expectation of peoples and a universal norm').

The present essay aims to revisit the democracy and international law puzzle in light of recent international developments, particularly within the United Nations (UN). Following this introduction, Section 2 briefly recapitulates the major strands of the democratic entitlement thesis and some of the more fundamental critique it has received. In order to better grasp the overall *problématique* raised by the thesis, the article's main section (Section 3) then addresses three inter-related, yet ultimately distinct, legal issues: Does the global legal system display any preference for democracy over other political regimes and concurrent constitutional orders? If so, does the contemporary international system embrace any particular vision of democracy? Finally, provided the two prior questions can be answered in the affirmative, are any of the elements of an emerging international framework for democracy of a universal legal character? The essay concludes by arguing that, unless one (inappropriately) equates democracy with periodic and genuine elections, no general rule of international law can be identified requiring states to design their domestic political and constitutional orders along liberal-democratic lines. Moreover, while the persistent refusal to allow for the holding of "free and fair" elections may today be regarded as a violation of a global norm (an argument supported in this article), the responsible government will usually not forfeit its international legitimacy, i.e. its legal standing in the international arena. Notwithstanding these findings, it is suggested that an international regime on domestic democratic governance is progressively taking shape. This regime is comprised of principles, norms, rules, and standards with varying degrees of normativity, around which the expectations of international actors regarding efforts of states 'to implement the principles and practices of democracy'<sup>14</sup> increasingly converge.

## **2. The Democratic Norm Thesis and its Discontents**

### **2.1. From aspiration to entitlement: A beginner's guide to the democratic norm thesis**

The basic ingredients of the "Franckian" conception of democracy as a global legal entitlement are well known. At its heart lies the idea of democracy as a *sine qua non* for the validation of governance. This idea is no longer limited to states that, by their own choice, have subscribed to it as a matter of their domestic constitutional law. Rather, it is also seen as a requirement of international law, 'applicable to all and implemented through global standards'.<sup>15</sup> According to this view, the democratic entitlement is the synthesis of three functionally interrelated 'sub-

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<sup>14</sup> UN Millennium Declaration, UNGA Res 55/2 (8 September 2000) UN Doc A/RES/55/2 para 25.

<sup>15</sup> Franck 1992 (n 6) 47.

entitlements’, which are grounded in part in customary law and in part in a new interpretation of international treaties. The peoples’ right to self-determination is thereby seen as the oldest and most basic element of the democratic entitlement.<sup>16</sup> It was later supplemented by discursive and associational entitlements in the form of internationally guaranteed individual rights such as freedom of speech, freedom of the press and freedom of assembly.<sup>17</sup> The latest and most significant addition to this catalogue is the ‘internationally constituted right to electoral democracy’, which is considered ‘to extend the ambit of other protected rights to ensure meaningful participation by the governed in the formal political decisions by which the quality of their lives and societies are shaped’.<sup>18</sup> Eventually, this latter aspect would become the fulcrum of the democratic norm thesis.

It is evident that Franck’s argument about the place of electoral democracy in international law was inspired by the widespread optimism, prevailing at the time, regarding the advent of a ‘New World Order’ based on generally accepted community values.<sup>19</sup> In constructing his thesis, Franck pointed to the growing number of states that, following the end of the Cold War, had joined the older democracies in committing themselves to the principle of periodic and free elections.<sup>20</sup> He further referred to the firm support for electoral democracy by the UN and many regional organizations, which is generally based on the understanding that the will of the people shall be expressed in ‘free and fair’ elections.<sup>21</sup> For Franck, these developments were clear confirmations by international practice of both the principle of popular sovereignty and the right of citizens to vote and to be elected, as enshrined in Article 21 of the Universal Declaration of Human Rights (UDHR) and other UN human rights documents.<sup>22</sup> Accordingly, he also ascribed great significance to the fact that, by the early 1990s, the International Covenant on Civil and Political Rights

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<sup>16</sup> Self-determination, as understood by Franck, postulates ‘the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion’ (ibid 52).

<sup>17</sup> Franck 1992 (n 6) 61-63.

<sup>18</sup> Thomas M. Franck, ‘Legitimacy and the Democratic Entitlement’ in Fox and Roth (n 7) 25, 26.

<sup>19</sup> For a contemporary critical account see David Kennedy, ‘A New World Order: Yesterday, Today, and Tomorrow’ (1994) 4 *Transnat’l L & Contemp Probs* 329.

<sup>20</sup> Franck 1992 (n 6) 47-49.

<sup>21</sup> Ibid 63-69.

<sup>22</sup> UNGA Res 217 (III) (10 December 1948) UN Doc A/810. It is important to note here that Franck considered the UDHR (which was originally adopted as a legally non-binding instrument by the UN General Assembly) as reflecting, in its entirety, ‘a customary rule of state obligation’: Franck 1992 (n 6) 61. For a similar argument see Christina M. Cerna, ‘Universal Democracy: An International Legal Right or the Pipe Dream of the West?’ (1995) 27 *NYU J Intl L & Politics* 289, 294-97; Regina Ezetah, ‘The Right to Democracy: A Qualitative Inquiry’ (1997) 22 *Brook J Intl L* 495, 507.

(ICCPR) – clearly the most relevant global instrument giving legal effect to the rights contained in the UDHR – had been ratified by more than two-thirds of all states.<sup>23</sup> Adding this to the observation that the balance within the community of states was increasingly tilting toward a ‘substantial new majority ... actually practicing a reasonably credible version of electoral democracy’, Franck concluded that Article 25 of the ICCPR (on the right to political participation) ‘also begins to approximate prevailing practice and thus may be said to be stating what is becoming a customary legal norm applicable to all’.<sup>24</sup>

Once its universal character is deduced from its articulation in the UDHR and subsequent UN resolutions,<sup>25</sup> international treaties,<sup>26</sup> and a purportedly corresponding practice of a vast majority of states, the focus shifts to the actual meaning and scope of the democratic entitlement; that is, the normative determinacy of a right to democratic governance. At this juncture, adherents to the democratic norm thesis usually turn to the jurisprudence of bodies charged with the interpretation of human rights treaties and to the standards used by various international actors in the field of electoral assistance and election monitoring (aside from the UN, especially the OSCE, the OAS, the EU, the African Union, and the Commonwealth). For one, the large number of requests for electoral assistance from practically all regions of the world is seen as further proof that elections are regarded as the most reliable way of ascertaining popular will.<sup>27</sup> Moreover, it is argued that international election monitoring, which has evolved into a routine exercise in recent years, particularly in countries striving for transition to or a consolidation of democracy,<sup>28</sup> has produced a coherent set of international standards and benchmarks on free and fair elections. As

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<sup>23</sup> As of January 2010, the number of states party to the ICCPR has risen to 164; see United Nations, Multilateral Treaties Deposited with the Secretary-General <<http://treaties.un.org/Pages/ParticipationStatus.aspx>> (accessed 1 May 2010).

<sup>24</sup> Franck 1992 (n 6) 64.

<sup>25</sup> Since the late 1980s, the General Assembly periodically adopts specific resolutions on the role of the UN in enhancing the effectiveness of the principle of periodic and genuine elections, which regularly reaffirm the central message embodied in Art 21 UDHR; see *infra* (n 96).

<sup>26</sup> In addition to the ICCPR, see at the regional level: Protocol to the European Convention on Human Rights and Fundamental Freedoms (20 March 1952) (1952) ETS No 9 (Art 3); American Convention on Human Rights (22 November 1969) (1969) 9 ILM 99 (Art 23); African Charter of Human and Peoples’ Rights (27 June 1981) (1982) ILM 21 58 (Art 13).

<sup>27</sup> From 1989 to 2007, the UN alone has received more than 400 official requests for electoral assistance: Report of the Secretary-General, *Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization* (2007) UN Doc A/62/293, para 3.

<sup>28</sup> See Christina Binder and Christian Pippan, ‘Election Monitoring, International’ in Rüdiger Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn) (OUP, Oxford 2008) <[www.mpepil.com](http://www.mpepil.com)> (accessed 1 May 2010).

a result, the ordinary meaning of provisions in international treaties affirming the right to take part in periodic and genuine elections is said to be sufficiently clear and to have acquired a ‘universal understanding’.<sup>29</sup>

The idea that domestic governments are under an emerging international obligation to comply with global standards of electoral democracy clearly forms the core of the democratic norm thesis. Even among its proponents, however, opinions differ as to the potential legal consequences of the purported norm for non-democratic states. In the view of some, the norm’s gradual acceptance by the international community necessarily calls for a new approach to the concept of governmental legitimacy in international law; an approach that looks beyond the traditional criteria of effective territorial control and habitual obedience of the bulk of the population concerned. In this sense, Franck indicated that a regime’s non-compliance with an internationally guaranteed right to democracy will inevitably cast doubt on its legitimacy, which may even put the international legal position of the state that the regime purports to represent at risk.<sup>30</sup> In a similar vein, Gregory Fox has opined that, if faced with a systematic violation of democratic rights, ‘the international community ... would seem obliged to avoid treating the illegitimate regime as the proper agent of its state’.<sup>31</sup> Fox himself, however, has called this a ‘rather black and white conception of governmental legitimacy’ and conceded that – notwithstanding the occasional non-recognition of regimes resulting from coups against freely elected leaders – there is virtually no international practice suggesting that the capacity of long-standing authoritarian regimes to act on behalf of their respective states would be called into question simply because of the absence of free and fair electoral processes.<sup>32</sup>

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<sup>29</sup> Gregory H. Fox, ‘The Right to Political Participation in International Law’ in Fox and Roth (n 7) 48, 85. See also Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections. Self-Determination and Transitions to Democracy* (Nijhoff, Dordrecht 1994) 148; Engelbert Theuermann, ‘Legitimizing Governments Through International Verification: The Role of the United Nations’ (1995) 49 *Austrian J Public & Intl L* 129, 146.

<sup>30</sup> In the forward-looking, idealistic tone that is typical of his writings on the subject, Franck posited that ‘we stand on the cusp of a remarkable new idea: that each state owes an obligation of democratic governance to all other states as a price of its membership in the community of nations’: Franck 1994 (n 6) 7.

<sup>31</sup> Gregory H. Fox, ‘Election Monitoring: The International Legal Setting’ (2001) 19 *Wisconsin Intl LJ* 295, 312.

<sup>32</sup> *Ibid* 314. Perhaps, the most prominent scholar firmly advocating a robust enforcement of the democratic entitlement was Michael Reisman, who even viewed unilateral forcible action in support of democracy as justifiable under international law, provided that UN Security Council authorization for such action is unavailable (a view resolutely rejected by both Franck and Fox). See Michael Reisman, ‘Sovereignty and Human Rights in Contemporary International Law’ in Fox and Roth (n 7) 239, 257; Reisman, ‘Humanitarian Intervention and Fledgling Democracies’ (1995) 18 *Fordham Intl LJ* 794. However, in the wake of the 2003 US/UK invasion in Iraq, Reisman

Eventually, it is here where the normative assumptions of the democratic entitlement school meet the prescriptive assertions of the new “liberal international law school”.<sup>33</sup> In an attempt to redefine the international order along the lines of liberal internationalism, Anne-Marie Slaughter, for example, clearly supports the idea that international law should pay more attention to a distinction between different types of states based on their internal structure and ideology.<sup>34</sup> While she does not directly address the legitimacy of governments as a distinctive legal category, she nevertheless takes the premises upon which the democratic norm thesis is based as indications that international law has begun to commit itself to the construction of a ‘world of liberal states’.<sup>35</sup> According to Slaughter, embracing the liberal project is crucial for international law and the fundamental values it aims to achieve. Not only were liberal democracies generally more peaceful (at least vis-à-vis their peers) than non-democratic states, they were also more likely to honour international obligations.<sup>36</sup> In essence, the same line of thought is reflected in Fernando Tesón’s ‘Kantian approach’ to international law. Like Slaughter, Tesón draws on the controversial democratic peace theory to hold that international law undermines its main purposes of securing peace and promoting rule-based international cooperation if it validates illiberal regimes as legitimate members of the international community.<sup>37</sup> Ultimately, Slaughter and Tesón’s deliberately po-

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man adopted a more cautious approach. He now argues that the unilateral use of force to effectuate the change of a foreign state’s political regime is lawful only if it is used as an ‘extraordinary remedy’; that is, when the formal international system cannot operate in time to prevent the most egregious instances of widespread human rights violations: Reisman, ‘Why Regime Change Is (Almost Always) a Bad Idea’ (2004) 98 AJIL 516, 517, 521.

<sup>33</sup> For an overview of liberal international law theory and its main representatives see David Armstrong, Theo Farrell and Helene Lambert, *International Law and International Relations* (CUP: Cambridge 2007) 83-95.

<sup>34</sup> See Anne-Marie Burley (Slaughter), ‘Toward an Age of Liberal Nations’ (1992) 33 Harv Intl LJ 393; Slaughter, ‘International Law in a World of Liberal States’ (1995) 6 EJIL 503; Slaughter, ‘A Liberal Theory of International Law’ (2000) 94 ASIL Proceedings 240.

<sup>35</sup> See Slaughter 1995 (n 34) 538 (‘[t]o the extent that the existing catalogue of fundamental human rights expands to include a right of “democratic governance” ... international law will take the first step toward an explicit distinction among States based on domestic regime-type’).

<sup>36</sup> Slaughter 1995 (n 34) 532-34. More recently, Slaughter has focussed less on states and their political regimes but rather on ‘government networks’ and their role for the furtherance of liberal democracy. In her view, a new transgovernmentalism is being created by regulatory agencies, judges and legislators who engage with counterparts in other states and international organizations, which leaves the state increasingly ‘disaggregated’. Slaughter perceives these networks as ‘transmission belts’ for principles of good governance (transparency, accountability, professionalism etc). Because they subtly influence the quality of the institutions participating in them, the expansion of government networks ‘help[s] expand the liberal democratic order’: Slaughter, ‘Government Networks: The Heart of the Liberal Democratic Order’ in Fox and Roth (n 7) 199, 235. See also Slaughter’s opus magnum *A New World Order* (Princeton University Press, Princeton 2005).

<sup>37</sup> Fernando R. Tesón, ‘The Kantian Theory of International Law’ (1992) 92 Colum L Rev 53, 89-92, 97. More recently, Allen Buchanan has similarly argued that a ‘moral theory of international law’ requires the international community to refrain from recognizing governments as legitimate if they fail to meet a ‘minimal internal justice

licity-based brand of liberal international law theory, which at times had attracted considerable attention, failed to gain substantial support among scholars of international law and essentially remained an episode of the academic discourse of the 1990s.<sup>38</sup> It was already indicated in the introduction to this essay that one could hardly say the same of the more rule-based democratic entitlement school. Of course, this is not to imply that the school's arguments and assumptions were at any time uncritically endorsed by the broader international legal scholarship.

## **2.2. Going too far, or not going far enough? Two major concerns about the democratic norm thesis**

One line of critique of the democratic entitlement rests on a more conservative reading of the relevant sources and practices cited by its advocates as evidence for the emergence of a right to democracy in international law.<sup>39</sup> As a general matter, it is not disputed that the ICCPR, as well as most regional human rights conventions, require state parties to ensure some form of competitive electoral processes within their domestic jurisdictions.<sup>40</sup> However, in light of the absence of free elections in a number of states, including leading regional powers, such as China and Saudi Arabia, it is questioned whether a global legal standard of democratic electoral governance has truly emerged. Scholars sceptical of the democratic entitlement do not deny that the world community has come to regard the holding of free and fair elections as the preferred method for the selection of national leaders. They do, however, take issue with the view that states were now obliged, as a matter of general international law, to apply a particular procedure in order to ascertain the will of the people. Brad Roth, for example, emphasizes that election monitoring by international observers is carried out only upon request by the country concerned.<sup>41</sup> Moreover, UN resolutions that proclaimed support for the principle of periodic and genuine elections were usually accompanied by counterpart resolutions reaffirming "respect for the principles of national sove-

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requirement, [which] should be understood as including a minimal democracy condition'; Allen Buchanan, *Justice, Legitimacy, and Self-Determination. Moral Foundations for International Law* (OUP, Oxford 2004) 278.

<sup>38</sup> See José E. Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 EJIL 183; Christian Reus-Smit, 'The Strange Death of Liberal International Theory' (2001) 12 EJIL 573; Patrick Capps, 'The Kantian Project in Modern International Legal Theory' (2001) 12 EJIL 1003; Macdonald (n 8) 4; David Schleicher, 'Liberal International Law Theory and the United Nations Mission in Kosovo: Ideas and Practice' (2005) 14 Tulane J Intl & Comp L 179.

<sup>39</sup> For a concise account of this critique see Gregory H. Fox and Brad R. Roth, 'Democracy and International Law' (2001) 27 Rev Intl Stud 327, 343.

<sup>40</sup> See Alex Conte, 'Democratic and Civil Rights' in Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights* (Ashgate, Aldershot 2004) 43, 73; Steven Wheatley, *Democracy, Minorities and International Law* (CUP, Cambridge 2005) 136.

<sup>41</sup> Brad R. Roth, *Governmental Illegitimacy in International Law* (OUP, Oxford 1999) 338-43.

reignty and diversity of democratic systems in electoral processes".<sup>42</sup> While he agrees that, based on a modern understanding of self-determination, sovereignty ultimately belongs to peoples and not to governments, Roth insists that international law does not reduce popular sovereignty to the outcome of a particular participatory process.<sup>43</sup> Rather, a government's effective control over a defined territory, coupled with the habitual obedience of the population, were still generally taken by international law as the litmus test for its recognition and as presumptive evidence that the regime is the legitimate representative of the state and its people in international affairs. According to Roth, this presumption is rebutted only if 'well-nigh incontrovertible evidence exists to the contrary'; in particular, when a regime's effectiveness is the result of a coup against a legitimate, democratically elected *de iure* government, or if a regime has 'itself conceded a crises of legitimacy by agreeing to predicate its authority on processes certified by the international community'.<sup>44</sup>

A second key concern about the democratic norm thesis pertains to the limited conception of democracy ('low intensity democracy', in Susan Marks' term) that it involves. The focus on periodic elections – which, pursuant to Franck, is currently all a positivistic approach to the identification of an international norm of democracy can support – is deemed by many as insufficient to attain the beneficial substantive ends that almost all democratic theories ultimately aspire to.<sup>45</sup> Specifically, it is questioned whether the exclusive reliance on the rights and freedoms functionally related to electoral processes is adequate to achieve what David Beetham has identified as the common core objectives of virtually all concepts of democracy: popular control *and* political equality.<sup>46</sup> Indeed, a universal norm subjecting political leaders to regular control by citizens may be of little value to those lacking the capacities necessary to effectively exercise that control. In other words, if control of public decision-making is to be exercised by all on a basis of equality, then 'all must be not just entitled, but also enabled to undertake it, and that calls for access to the requisite social, economic and cultural resources'.<sup>47</sup> For advocates of an 'inclusio-

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<sup>42</sup> See *infra* (n 98).

<sup>43</sup> Roth (n 41) 343-44.

<sup>44</sup> *Ibid* 419.

<sup>45</sup> See Susan Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (OUP, Oxford 2000) 52-53; Martti Koskenniemi, 'Whose Intolerance, Which Democracy?' in Fox and Roth (n 7) 436, 438; Brad R. Roth, 'Evaluating Democratic Progress: A Normative Theoretical Approach' in Fox and Roth (n 7) 493, 498.

<sup>46</sup> David Beetham, *Democracy and Human Rights* (Polity Press, Cambridge 1999) 5.

<sup>47</sup> Susan Marks and Andrew Clapham, *International Human Rights Lexicon* (OUP, Oxford 2005) 64-65.

nary' vision of democracy, therefore, the realization of social and economic rights is no less relevant than the guarantee of participatory and other political rights.<sup>48</sup> A related misgiving about the democratic entitlement is that by focussing on procedural democracy as the decisive determinant for governmental legitimacy, international responses to failures of democracy may become vulnerable to manipulation. Ruling elites may secure international validation by adhering to certain procedures (such as periodic elections), while they in fact remain unaccountable to large parts of the populace by keeping existing inequalities and established structures of social and economic power untouched.<sup>49</sup>

To be sure, practically all international actors engaged in the promotion of democracy at the domestic level firmly subscribe today to the idea that democratic governance entails more than the holding of periodic and free elections.<sup>50</sup> In the case of the most prominent actor on the global stage – the United Nations – a particularly illustrative example is provided by Resolution 55/96 of the General Assembly, adopted in December 2000, on 'Promoting and consolidating democracy'.<sup>51</sup> By calling on states to take action in a wide range of areas – including human rights, electoral systems, the rule of law, civil society participation, good governance, sustainable development, and social cohesion – the Assembly signalled its support for a broad approach to democracy that comprises both procedural and substantive elements. In 2005, the UN World Summit underscored the international community's support for a non-exclusive and dynamic understanding of democracy. In the General Assembly resolution that resulted from the event, the participating Heads of State and Government explicitly recognized democracy as a 'universal value' but also added that, 'while democracies share common features, there is no single model of democracy'.<sup>52</sup>

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<sup>48</sup> For Susan Marks, inclusionary democracy entails 'not only a particular set of institutions and procedures, but also, more generally, an ongoing call to enlarge the opportunities for popular participation in political processes and end social practices that systematically marginalize some citizens while empowering others': Marks (n 45) 109.

<sup>49</sup> Molly Beutz, 'Functional Democracy: Responding to Failures of Accountability' (2003) 44 Harv Intl L J 387, 399.

<sup>50</sup> For a useful overview, see Edward R. McMahon and Scott H. Baker, *Piecing a Democratic Quilt? Regional Organizations and Universal Norms* (Kumarian Press, Bloomfield 2006) 17-34.

<sup>51</sup> UNGA Res 55/96 (4 December 2000) UN Doc A/RES/55/96 (adopted by 157 votes to none, with 16 abstentions).

<sup>52</sup> World Summit Outcome, UNGA Res 60/1 (16 December 2005) UN Doc A/RES/60/1 para 135.

Overall, the notion – originally developed by political theorists – that democracy constitutes an “essentially contested concept” appears to be well reflected in both international legal scholarship and international practice.<sup>53</sup> It should be recalled, however, that the international legal system frequently operates with under-defined terms and concepts, which may nevertheless provide the basis for generally accepted norms. The right of peoples to self-determination – according to Franck one of the building blocks of the democratic entitlement – is a case in point. Although the right’s recognition as a fundamental principle of international law is beyond any doubt,<sup>54</sup> the international system has not clarified its exact meaning beyond the decolonization context, or conclusively answered questions about how ‘peoples’ are to be distinguished from ‘minorities’ (whose members are endowed with specific individual rights but not, according to prevailing doctrine, a collective right to self-determination). Taken by itself, the proclamation that self-determination entails a right of peoples ‘to freely determine their political status and freely pursue their economic, social and cultural development’<sup>55</sup> does not seem to offer more substance or determinacy than, say, the UN World Conference on Human Rights’ proposition that ‘democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives’.<sup>56</sup> Arguably, this latter account of democracy, which combines the basic idea of self-determination (popular sovereignty) with a vague notion of popular participation, will hardly be rejected today by any state. And yet, this still leaves unanswered whether international law embraces this – or, for that matter, any other – understanding of democracy as the basis of a global norm, the respect of which each state would now owe to the international community as a whole.

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<sup>53</sup> On Walter B. Gallie’s famous analysis of essentially contested concepts and its application to the principle of democracy see David Collier, Fernando D. Hidalgo and Andra O. Maciuceanu, ‘Essentially Contested Concepts: Debates and Applications’ (2006) 11 *J Pol Ideologies* 211, 222.

<sup>54</sup> See *East Timor Case (Portugal v Australia)* (Judgment) [1995] ICJ Rep 90, 102 para 29.

<sup>55</sup> This standard definition of self-determination first appeared in the UN General Assembly’s ‘Declaration on the Granting of Independence to Colonial Countries and Peoples’, UNGA Res 15/1514 (14 December 1960) UN Doc A/RES/15/1514 para 2. It was later prominently affirmed in common Art 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).

<sup>56</sup> World Conference on Human Rights, Vienna Declaration and Programme of Action (25 June 1993) UN Doc A/CONF.157/23 (12 July 1993) para 8.

### **3. Democratic Governance and the International Legal Order: A Rapprochement in Three Steps**

#### **3.1. Does the international legal order display any preference for democracy over other political regimes?**

Given the international community's recent advocacy of democracy, along with human rights and the rule of law, the question above almost seems superfluous. At least at the global level, however, clear-cut commitments to democracy can at present only be found in legally non-binding instruments.<sup>57</sup> Hence, further evidence is needed to sustain the argument that the global legal order has accommodated a preference for democracy over other political regimes. Clearly, one area to turn to in order to find such evidence is international human rights law, where the relevance of democratic internal structures is recognized, at least implicitly, in a number of key legal instruments. Most notably, both of the 1966 Human Rights Covenants as well as important regional treaties employ the vision of a 'democratic society' as a normative standard to control the reasons under which certain rights may be restricted.<sup>58</sup> While it had hardly any practical significance under the adverse conditions of pre-1989 world politics, the criterion's inclusion in major global and regional human rights treaties may nevertheless be understood as a sort of 'value judgment': In view of the spirit and purpose of the treaties, the reference point for lawful limitations of individual rights is not any society; it is a 'democratic' society. Until recently, international standards providing guidance on the interpretation of these treaty-based 'democratic society clauses' were of course scarce. From today's perspective, however, they appear to be an early affirmation in major international legal instruments of the more general and now widely supported normative principle that 'human rights, the rule of law and democracy are interlinked and mutually reinforcing'.<sup>59</sup>

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<sup>57</sup> See, *inter alia*, World Conference on Human Rights (n 56): 'The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world'; United Nations Millennium Declaration (n 14) para 24: 'We will spare no effort to promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms ....'; World Summit Outcome (n 52) para 119: 'We recommit ourselves to actively protecting and promoting all human rights, the rule of law and democracy and recognize that they are interlinked and mutually reinforcing and belong to the universal and indivisible core values and principles of the United Nations'.

<sup>58</sup> See Arts 14(1), 21, and 22(2) ICCPR; Art 4 (general limitation clause) and Art 8(1) ICESCR; Art 15 of the Convention on the Rights of the Child; Arts 15, 16, 22, and 32 of the American Convention on Human Rights; Arts 6(1), 8(2), 9(2), 10(2), and 11(2) of the European Convention on Human Rights and Fundamental Freedoms.

<sup>59</sup> See 'Interdependence between Democracy and Human Rights', UNCHR Res 2003/36 (23 April 2003) UN Doc E/CN.4/RES/2003/36; World Summit Outcome (n 52) para 119; 'Support by the United Nations system of the

The belief that human rights are generally better protected in a democratic than an authoritarian or otherwise non-democratic constitutional setting is also deeply entrenched in the normative fabric of the United Nations. The UN's engagement with democracy can thereby no longer be understood in purely instrumental terms; in the sense that democracy is seen as merely a means of achieving other (primary) UN objectives, such as the maintenance of international peace and security and universal respect for human rights and fundamental freedoms.<sup>60</sup> Though this aspect remains important, democracy is today viewed as a general good – or, in UN parlance, a ‘universal core value and principle of the United Nations’.<sup>61</sup> It is true that UN activities in this area (electoral assistance, including election monitoring; UNDP governance assistance; project support by the recently established Democracy Fund etc) usually require a request of the state concerned. Only if a situation gives rise to a threat to or breach of international peace and security, may the Security Council use its powers under Chapter VII of the Charter to authorize action in support of democracy, even if local consent is unavailable or unclear.<sup>62</sup> These rules, however, only apply to activities on the ground and to enforcement measures. Beyond that, the competent UN bodies, including the General Assembly, are in no way barred from passing judgment on political and constitutional issues arising in a member state, from addressing the responsible government, or from calling on other states to act in a particular manner vis-à-vis the state concerned. The Assembly's unrelenting calls for democratic transition in Myanmar,<sup>63</sup> or its recent con-

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efforts of Governments to promote and consolidate new or restored democracies’, UNGA Res 62/7 (8 November 2007) UN Doc A/RES/62/7, preamble paras 4 and 5.

<sup>60</sup> Charter of the United Nations Art 1(1), (3) and Art 55 (c).

<sup>61</sup> See, for instance, UNGA Res 62/7 (n 59) para 4. The resolution, which was adopted without a vote, was sponsored by states as diverse as Albania, Germany, Japan, Kuwait, Libya, Mali, Saudi Arabia, and Thailand; see UN Doc 62/PV.46 (8 November 2007) 1.

<sup>62</sup> The adoption of enforcement measures against regimes that seized power by way of a coup against a democratically elected government (the Haiti scenario) is a case in point; the integration of a democracy component into the mandate of UN-backed post-conflict governance missions (the Kosovo scenario) is another. On ‘pro-democratic interventions’ under the aegis of the Security Council see John Pierce, ‘The Haitian Crises and the Future of Collective Enforcement of Democratic Governance’ (1996) 27 L & Policy Intl Bus 477; Michael Byers and Simon Chesterman, “‘You, the People’: Pro-Democratic Intervention in International Law’ in Fox and Roth (n 7), 259, 281. On the role of democracy in post-conflict reconstruction and state-building see Gregory H. Fox, *Humanitarian Occupation* (CUP, Cambridge 2008) 52; Jean d’Aspremont, ‘Post-Conflict Administrations as Democracy-Building Instruments’ (2008/09) 9 Chicago J Int’l L 1.

<sup>63</sup> In 2004, the General Assembly called upon Rangoon ‘to respect the results of the 1990 elections’ and ‘to formulate a clear and detailed plan for the transition to democracy which includes concrete timing and the involvement of all political groups and ethnic nationalities ...’: UNGA Res 59/263 (23 December 2004) UN Doc A/RES/59/263 para 3 lit (c) and (m). Two years later, the Assembly urged Myanmar ‘to complete the drafting of the Constitution and to ... set a clear timetable for the transition to democracy’: UNGA Res 61/232 (22 December

demnation of the disruption of the democratic constitutional order in Honduras,<sup>64</sup> are just two of many examples confirming this point.

The UN's espousal of democratic principles is of course not entirely new. Even before 1989, it has been the driving force behind the international denunciation of fascist, colonial and racist regimes and thus, arguably, of some of the most extreme negations of democratic governance.<sup>65</sup> The organization's latest emphasis on democracy, however, is of a different quality. This is no longer the selective outlawing of some particularly repulsive regimes, typically characterized by the systematic oppression and disfranchisement of large parts of the population, by an institution that otherwise remains strictly committed to the principle of political and ideological neutrality. Rather, less than two decades into the post-Cold War era, democracy has ascended to a core UN principle that is now advocated vis-à-vis all member states. Given the near-universal membership of the UN – an organization, it should be recalled, which is empowered by its Charter to ensure that even non-members act in accordance with its principles<sup>66</sup> – these developments cannot remain without effect for the international legal order as a whole. At a minimum, they support the view that domestic constitutional issues, including the origin and structure of government, have ceased to be dogmatically regarded as 'matters which are essentially within the domestic jurisdiction of any state' and are therefore increasingly becoming 'internationalized'.

Of course, this does not answer the question about how far, in terms of international law, external actors may go in promoting democratic domestic governance. As a matter of principle, non-coercive measures will usually be unproblematic. This includes the widely used instrument of political conditionality, which may be applied in a number of areas of international cooperation, as well as a range of 'unfriendly acts', provided they do not encroach on specific (e.g. contrac-

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2006) UN Doc A/RES/61/232 para 4(a). These calls were made regardless of the fact that Myanmar is neither a party to the ICCPR nor to any other international convention containing an explicit right of citizens to political participation.

<sup>64</sup> See UNGA Res 63/301 (1 July 2009) UN Doc A/RES/63/301. Within days after Honduras' elected President was ousted by a coup d'état in June 2009, the General Assembly called on states not to recognize the new regime and demanded 'the immediate and unconditional restoration of the legitimate and constitutional Government of the President of the Republic [...], so that he may fulfil the mandate for which he was democratically elected by the people of Honduras' (ibid para 2).

<sup>65</sup> See Christopher C. Joyner, 'The United Nations: Strengthening an International Norm' in Peter J. Schraeder (ed), *Exporting Democracy. Rhetoric vs. Reality* (Lynne Rienner, London 2002) 147. See also Farer (n 8) 35 (describing the UN's efforts to bring about majority rule in South Africa as 'one of the clearest precedents for unconsented action to promote and defend democracy').

<sup>66</sup> Charter of the United Nations Art 2(6).

tual) legal positions held by the state concerned. The lawfulness of countermeasures to sanction a state's anti-democratic behaviour, however, hinges on the actual existence of an international norm committing the affected state – either vis-à-vis the individual actor taking the measure or vis-à-vis the international community as a whole – to refrain from such behaviour.<sup>67</sup>

### **3.2. Does the international legal order embrace any particular vision of democracy?**

As alluded to earlier, no generally agreed definition of democracy can be identified at the global level of international cooperation and law making.<sup>68</sup> Indeed, the mantra that, 'while all democracies share common features, there is no one universal model of democracy' runs through almost all UN documents on democracy and its promotion since the adoption of UNGA Resolution 55/96 (2000).<sup>69</sup> At the same time, an international framework for democratic governance has undeniably taken shape in recent years. Rooted largely in the existing international human rights canon, it sets out some of the basic components regarded by the international community as indispensable for any democratic constitutional order. According to a formula used both by the UNGA and the UN Commission on Human Rights (in resolutions which in neither case provoked any explicit protest),

... the essential elements of democracy include respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media.<sup>70</sup>

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<sup>67</sup> See Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (CUP, Cambridge 2005) 220; d'Aspremont (n 8) 294; Petersen (n 8) 177.

<sup>68</sup> See *supra* (n 52). See also Armin von Bogdandy and Sergio Dellavalle, *Universalism and Particularism as Paradigms of International Law*, IILJ Working Paper 2008/3 (New York University School of Law, New York 2008) 19 <[www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf](http://www.iilj.org/publications/documents/2008-3.Bogdandy-Dellavalle.pdf)> (accessed 1 May 2010); Gregory H. Fox, 'Democracy, Right to' in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn) (OUP, Oxford 2008) <[www.mpepil.com](http://www.mpepil.com)> (accessed 1 May 2010) para 12.

<sup>69</sup> UNGA Res 55/96 (n 51) preamble para 8.

<sup>70</sup> UNGA Res 59/201 (20 December 2004) UN Doc A/RES/59/201 para 1 (adopted by 172 votes to none, with 15 abstentions); UNCHR Res 2005/32 (19 April 2005) UN Doc E/CN.4/2005/L.10/Add.11 para 1 (adopted by 46 votes to none, with 7 abstentions).

Differences in detail notwithstanding, there is a striking degree of convergence between the ‘essential elements of democracy’, as defined by the UN, and the democracy-related criteria elaborated by other (mostly regional) inter-governmental institutions.<sup>71</sup> Obviously, this does not end debates over the precise form of democracy in diverse social and cultural settings. In the light of recent standard-setting processes within the UN and other international fora, however, it appears evident that the meaning of references in various international texts and instruments to ‘global standards of democracy’,<sup>72</sup> ‘universally recognized democratic principles’,<sup>73</sup> or ‘international democratic standards’<sup>74</sup> is no longer entirely obscure. Though most UN and regional documents dealing with democracy and democratization on a conceptual basis are formally non-binding, they nonetheless reflect a broad international consensus on some of the procedural and institutional building blocks of democratic governance. The result is not a comprehensive international blueprint for democracy. Rather, it is a normative minimum standard that provides guidance for states embarking on democratic reforms as well as for international actors in those (e.g. post-conflict) situations in which they are called upon to support a country’s democratic transition. The emerging international standard may also be used to judge adherence by states to unspecified political commitments accepted by them regarding the promotion of democratic governance, such as those contained in the UN Millennium Declaration and the UN World Summit Outcome.<sup>75</sup>

To be sure, asserting the existence of an increasingly coherent international framework for democratic governance does not imply the argument that this framework is, in its entirety, of a universal legal character. In fact, while the contemporary international system has generated a fairly

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<sup>71</sup> See Conference for Security and Co-operation in Europe, Document of Copenhagen of the Meeting on the Human Dimension of the CSCE (29 June 1990) (1990) 29 ILM 1305; Charter of Paris for a New Europe (n 3); The Commonwealth, Harare Declaration (20 October 1991) <[www.thecommonwealth.org](http://www.thecommonwealth.org)> (accessed 1 May 2010); Inter-Parliamentary Union, Universal Declaration on Democracy (16 September 1997) <[www.ipu.org/cnl-e/161-dem.htm](http://www.ipu.org/cnl-e/161-dem.htm)> (accessed 1 May 2010); Council for a Community of Democracies, Warsaw Declaration: Toward a Community of Democracies (27 June 2000) (2000) 39 ILM 1306; Organisation Internationale de la Francophonie, Bamako Declaration (3 November 2000) <[www.francophonie.org/doc/txt-reference/decl\\_bamako\\_2000.pdf](http://www.francophonie.org/doc/txt-reference/decl_bamako_2000.pdf)> (accessed 1 May 2010); Organisation of American States, Inter-American Democratic Charter (11 September 2001) (2001) 40 ILM 1289; African Union, African Charter on Democracy, Elections and Governance (adopted 30 January 2007) <[www.africa-union.org/root/au/Documents/Treaties/treaties.htm](http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm)> (accessed 1 May 2010).

<sup>72</sup> New Partnership for Africa’s Development (NEPAD) (October 2001) para 79 <[www.nepad.org/home/lang/en](http://www.nepad.org/home/lang/en)> (accessed 1 May 2010).

<sup>73</sup> Agreement amending the Partnership Agreement signed in Cotonou on 23 June 2000 between the members of the African, Caribbean and Pacific Group of States, of the one part, and the European Community and its Member States, of the other part (adopted 25 July 2005) EU Doc [2005] OJ L 209/27 Art 9(2).

<sup>74</sup> UNSC Presidential Statement 50 (2005) UN Doc S/PRST/2005/50.

<sup>75</sup> See *supra* (n 57).

clear picture of at least some core elements of democracy, this cannot be taken as evidence that all these elements are now also binding on states as a matter of international law. Even if the normative content of the relevant framework is restricted to the ‘essential elements’ of democracy listed in UNGA Res 59/201 (2004),<sup>76</sup> the question remains as to which, if any, of the criteria included in the Assembly’s list can be considered as reflecting ‘hard’ international law applicable to all states, rather than being merely programmatic standards, or norms which only apply to certain states (e.g. signatories to international treaties requiring participating states to respect democratic rights). Since it goes directly to the heart of the democratic norm thesis, this issue deserves a more in-depth discussion.

### **3.3. Does the normative core of an emerging international framework for democracy have a universal legal character?**

#### *3.3.1. Assessing the customary legal potential of the principle of genuine periodic elections*

In 1999, in a remarkable resolution entitled ‘Promotion of the right to democracy’, the UN Commission on Human Rights (UNCHR) pointed to ‘the large body of international law and instruments ... which confirm the right to full participation and the other fundamental democratic rights and freedoms inherent in any democratic society’.<sup>77</sup> Ten years later, the UN Secretary-General similarly explained that the organization’s position on democracy was based on ‘universal principles, norms and standards’ derived, in particular, from references to essential democratic underpinnings in the preamble and Article 1 of the UN Charter (‘life in larger freedom’, ‘self-determination’, ‘human rights, ‘fundamental freedoms’) as well as provisions on political rights contained in the UDHR and subsequent UN treaties and instruments.<sup>78</sup> If these pronouncements of the UNCHR and the Secretary-General are accepted, the question of whether segments of an overall larger international framework for democracy are legally binding on states is ultimately a

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<sup>76</sup> UN Doc A/RES/59/201 (n 70).

<sup>77</sup> UNCHR Res 1999/57 (27 April 1999) UN Doc E/CN.4/RES/1999/57 preamble para 5 (adopted by 51 votes to none, with 2 abstentions). A Cuban initiative against the title of the resolution was subject to a separate vote but was eventually defeated by 28 votes to 12, with 13 abstentions; UNCHR, 55<sup>th</sup> Session, Summary Record of the 57<sup>th</sup> Meeting (27 April 1999) UN Doc E/CN.4/1999/SR.57.

<sup>78</sup> United Nations, Guidance Note of the Secretary-General on Democracy (September 2009) <[www.un.org/democracyfund/Docs/UNSG\\_Guidance\\_Note\\_on\\_Democracy.pdf](http://www.un.org/democracyfund/Docs/UNSG_Guidance_Note_on_Democracy.pdf)> (accessed 1 May 2010) 1-2. The Secretary-General also recalled that the commitment to support democracy was accepted by ‘all the world’s governments’ at the 2005 World Summit (ibid 2).

question about the universality of human rights – or at least of those rights which, taken together, form the "political part" of the often cited *International Bill of Rights*.<sup>79</sup>

Arguably, among the set of internationally recognized ‘fundamental democratic rights and freedoms’, the right of citizens to vote and to be elected at genuine periodic elections takes the most prominent place. Indeed, if taken as a general normative statement, few will take issue with the view of the Human Rights Committee (the monitoring body established within the framework of the ICCPR) that the right to political participation ‘lies at the core of democratic government based on the consent of the people’.<sup>80</sup> But has this right, the ‘trans-national’ roots of which can be traced back to Article 21 of the Universal Declaration of Human Rights,<sup>81</sup> evolved into a rule of customary international law? Admittedly, addressing this question is a somewhat daunting task, because not only it has caused such a formidable rift in international legal scholarship but also because, in a way, it threatens to re-open the Pandora’s Box of the entire international human rights discourse. Are human rights truly universal, not only in a moral and political but also in a legal sense? If this is rejected, have at least some of the rights contained in the International Bill of Rights been transformed, through subsequent practice and *opinio juris*, into customary legal entitlements (as the prevailing doctrine seems to hold)? If so, is the right to vote and to be elected at genuine elections among those entitlements?

In its judgment in the 1986 *Nicaragua* case, the International Court of Justice professed itself unable to find ‘an instrument with legal force ... whereby Nicaragua has committed itself in respect of the principle or methods of holding elections’.<sup>82</sup> As James Crawford noted, this aspect of the Court’s decision is rather unsatisfactory, given that – at the time that had to be considered by the ICJ – Nicaragua was a party both to the ICCPR and to the American Convention on Hu-

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<sup>79</sup> The International Bill of Rights is commonly understood to consist of the human rights-related provisions of the UN Charter, the UDHR, and the two UN Human Rights Covenants (ICCPR, ICESCR).

<sup>80</sup> Human Rights Committee (CCPR), General Comment No 25 (12 July 1996) <[www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)> (accessed 1 May 2010) para 1. As early as in 1988, the General Assembly has stressed ‘its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms ...’: UNGA Res 43/157 (8 December 1988) UN Doc A/RES/43/157 para 2.

<sup>81</sup> Art 21 UDHR reads as follows: (1) ‘Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. [...] (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’

<sup>82</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States)* (Judgment) [1986] ICJ Rep 14, 132 para 261.

man Rights, ‘both of which contain clear commitments with respect to the principle of free elections and their regularity’.<sup>83</sup> Be this as it may, the ICJ also took the *Nicaragua* case to hold in more general terms that

[h]owever the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.<sup>84</sup>

On a *prima facie* basis, this statement- which was enunciated at a time when the ideological rivalry of the Cold War was still in full swing- supports a rather extensive, "etatistic" interpretation of the sovereignty principle and the traditional international law dogma of non-interference in a state’s domestic affairs. It would be inaccurate, however, to read the ICJ’s dictum as foreclosing any possibility of the emergence of a customary international law rule regarding the holding of periodic and free elections in the post-Cold War era. First, the principle of genuine periodic elections does not as such constitute a particular political doctrine or ideology; rather, it refers to a specific technique of ascertaining the will of the people when ‘the people’ are called upon to freely determine the political, social, economic, and cultural future of the polity. Second, despite the apodictic tone of the relevant passage in the ICJ’s judgment, it cannot be ignored that, by the mid 1980s, international law had already developed to a point at which the principle of state sovereignty no longer included an unconditional right of states to opt for whatever political or constitutional doctrine they saw fit. Thus, one can hardly assume that the Court, in *Nicaragua*, had intended to imply that adherence by a state to the doctrine of apartheid (which was still in place in South Africa when the ICJ handed down its judgement), or to ‘other ideologies and practices, in particular Nazi, Fascist or neo-Fascist, based on racial or ethnic exclusiveness or intolerance, hatred, terror, [and] systematic denial of human rights and fundamental freedoms’,<sup>85</sup> would be fully in line with customary international law. It is still less imaginable that the ICJ would subscribe to such a position today. As the Court itself confirmed in its decision in the *Nicaragua* case, ‘a State’s domestic policy falls within its exclusive jurisdiction, provided of

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<sup>83</sup> James Crawford, ‘Democracy and the Body of International Law’ in Fox and Roth (n 7) 91, 100.

<sup>84</sup> *Military and Paramilitary Activities in and against Nicaragua* (n 82) 133 para 263.

<sup>85</sup> UNGA Res 36/162 (16 December 1981) UN Doc A/RES/36/162. According to the General Assembly, such ideologies and practices are ‘incompatible with the purposes and principles of the Charter of the United Nations’ (ibid para 1).

course that it does not violate any obligations of international law'.<sup>86</sup> Evidently, the interpretation and scope of such obligations, which may emanate from international agreements as well as from customary law, are not static but may change over time.

Since, as of early 2010, more than eighty percent of all states had become parties to the ICCPR,<sup>87</sup> the question about the universal legal character of the principle of periodic and free elections may today be seen as having lost much of its provocative nature. As mentioned above, the Political Covenant enshrines the right to political participation in Article 25; a provision widely seen as the spiritual child of Article 21 UDHR.<sup>88</sup> While the opening statement of Article 21 para 3 UDHR ('the will of the people shall be the basis of the authority of government') is not repeated in Article 25 ICCPR, there can be little doubt that the Covenant affirms the earlier instrument's vision of an inherent link between popular sovereignty and genuine elections. The Covenant expressly provides that every citizen must have the right and opportunity to take part in the conduct of public affairs 'directly or through freely chosen representatives' and that elections must guarantee 'the free expression of the will of the electors'.<sup>89</sup> Considering the principles of equality and non-discrimination reflected in Articles 2 and 3 ICCPR, the electors must generally comprise the entire adult population of a state. Their will and the 'will of the people' can thus be understood as synonymous empirical phenomena. Hence, if read in conjunction with Article 1, according to which all peoples are entitled to freely determine their political, economic and cultural destiny,<sup>90</sup> Article 25 ICCPR can arguably be taken to affirm that the sovereignty of the people

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<sup>86</sup> *Military and Paramilitary Activities in and against Nicaragua* (n 82) 131 para 258. The Court also explicitly affirmed the possibility of a state to bind itself internationally in relation to issues 'relating to the holding of free and fair elections' (ibid para 259).

<sup>87</sup> See *supra* (n 23).

<sup>88</sup> See Henry Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77, 79; Farer (n 8) 37; Manfred Nowak, *U.N. Covenant on Civil and Political Rights - CCPR Commentary* (2<sup>nd</sup> edn Engel, Kehl 2005) 567.

<sup>89</sup> Art 25 ICCPR reads in full: 'Every citizen shall have the right and the opportunity, without [any distinctions] and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his [her] country.'

<sup>90</sup> The Human Rights Committee has repeatedly emphasized the internal dimension of the right to self-determination. In a General Comment on the interpretation of the right, the Committee noted that Art 1 ICCPR imposes specific obligations on states 'in relation to their own people' and that, when drawing up their periodic reports under the Covenant, states should 'describe the constitutional and political processes which in practice allow the exercise of this right': CCPR General Comment No 12 (13 March 1984) <[www.unhchr.ch/tbs/doc.nsf](http://www.unhchr.ch/tbs/doc.nsf)> (accessed 1 May 2010) paras 4 and 6. In its jurisprudence, the Committee confirmed that 'it may take article 1 into account when interpreting article 25 of the Covenant'; see, for instance, *Gillot v France*, UN Doc CCPR/C/75/D/932/2000 para 13.4. Moreover, in its Concluding Observations on the Second Periodic Report of the Republic

shall find its expression – perhaps not exclusively, but definitely also – in periodic and genuine elections.<sup>91</sup>

It is generally accepted that multilateral treaties may be considered as elements of state practice relevant for determining the existence of a rule of customary international law.<sup>92</sup> Of course, for such a rule to be actually established, additional evidence of pertinent practice and *opinio juris* is needed.<sup>93</sup> As the ICJ has confirmed, such evidence may be deduced, among other things, from the attitude of states towards certain UN General Assembly resolutions. Their content, as well as ‘the conditions of [their] adoption’, are viewed by the Court as particularly relevant in determining the significance of such resolutions for the establishment of the existence of a general rule of international law.<sup>94</sup> In considering the customary legal potential of the right to political participation, due account must therefore be accorded to the fact that the General Assembly has consistently recalled, in a ‘series of resolutions’,<sup>95</sup> both ‘the principle that the will of the people, as expressed through periodic and genuine elections, shall be the basis of government authority and the right freely to choose representatives through periodic and genuine elections (...)’.<sup>96</sup> In recent

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of the Congo, the Committee explicitly called on the Republic of the Congo ‘to organize general elections as soon as possible in order to enable its citizens to exercise their rights under articles 1 and 25 of the Covenant ...’; UN Doc CCPR/C/79/Add.118 (27 March 2000) para 20.

<sup>91</sup> See Nowak (n 88) 570 (noting that Art 25 ICCPR implies that ‘the government ultimately is responsible to the people and may also be controlled and deposed by it’); Allan Rosas, ‘Article 21’ in Gudmundur Alfredsson and Asbjorn Eide (eds), *The Universal Declaration of Human Rights - A Common Standard of Achievement* (Nijhoff, The Hague 1999) 431, 440 (concluding that the difference between Art 21 UDHR and Art 25 ICCPR ‘is apparently more symbolic than substantial’); Henry Steiner, ‘Do Human Rights Require a Particular Form of Democracy?’ in Eugene Cotran and Adel O. Sherif (eds), *Democracy, Human Rights and Islam* (Kluwer, London 1999) 193, 201 (explaining that, if taken seriously, Art 25 ICCPR is irreconcilable with the existence of any authoritarian regime that denies its citizens the right to take part in free and fair elections); Peter R. Baehr, ‘Democracy and the Right to Political Participation’ in David P. Forsythe (ed), *Encyclopedia of Human Rights Volume I* (OUP, Oxford 2009) 487, 490 (arguing that Art 25 ICCPR requires governments to be accountable to their citizens).

<sup>92</sup> See Tullio Treves, ‘Customary International Law’ in Wolfrum (ed), *The Max Planck Encyclopedia of Public International Law* (online edn) (OUP, Oxford 2008) <www.mpepil.com> (accessed 1 May 2010) para 47. According to the International Court of Justice, ‘multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them’: *Continental Shelf Case (Libyan Arab Jamahiriya v Malta)* (Judgement) [1985] ICJ Rep 3, 20 para 27.

<sup>93</sup> See *Continental Shelf Case* (ibid). Specifically regarding democratic rights, see Wheatley (n 8) 232-33; Varayudej (n 8) 17; Niels Petersen, ‘The Principle of Democratic Teleology in International Law’ (2008) 34 *Brook J Intl L* 33, 56.

<sup>94</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 12, 226 para 70.

<sup>95</sup> As noted by the ICJ in its *Nuclear Weapons* Advisory Opinion, ‘a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule’ (ibid).

<sup>96</sup> UNGA Res 64/155 (18 December 2009) UN Doc A/RES/64/155 preamble para 8, UNGA Res 62/150 (18 December 2007) UN Doc A/RES/62/150 preamble para 4, and UNGA Res 60/162 (16 December 2005) UN Doc A/RES/60/162 preamble para 4 are the three most recent examples.

years, open rejections of this reconfirmation by the Assembly of the essence of Article 21 UDHR and Article 25 ICCPR have not only dwindled in numbers – they have practically disappeared.<sup>97</sup> The fact that these so-called “Enhancing Resolutions” (the full title of which reads: ‘Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization’) emphasize that electoral assistance is only provided at the request of the state concerned does not affect the significance of the Assembly’s routine affirmation of the right in question. Nothing in these resolutions indicates that its applicability is limited to states that request assistance in the preparation and conduct of elections. The Assembly simply clarifies that, in light of the sovereignty and territorial integrity of states, no assistance is provided by the UN without domestic consent.<sup>98</sup>

When assessing the relevance of state conduct for the creation of customary international law, it could be argued that a distinction must be drawn between the voting behaviour of states in international organizations and their actual practice “at home”. While broad support for affirmations by UN bodies of the right to vote and to be elected at genuine elections may point to the existence of corresponding *opinio juris*, some states are obviously still loath to the idea of guaranteeing truly free and fair elections, which could be taken as evidence that a respective customary rule has not yet emerged. Alternatively, one could hold that the rule only applies to those states that in practice have indicated its acceptance by allowing for genuine periodic elections, whereas states that do not – and that have not accepted any treaty obligations to this effect – would have a valid claim to be regarded as ‘persistent objectors’.<sup>99</sup> Upon closer inspection, however, neither of these approaches is compelling. First, it must be recalled that the practice relevant for the formation of customary international law has to be general (and not universal) and must therefore

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<sup>97</sup> UNGA Res 64/155 (ibid) was adopted without a vote; UNGA Res 62/150 (ibid) was adopted by 182 votes to none, with two abstentions; UNGA Res 60/162 (ibid) was adopted by 182 votes to none, with one abstention.

<sup>98</sup> Even the UNGA’s notorious resolutions on Respect for the Principles of National Sovereignty and Diversity of Democratic Systems in Electoral Processes (the so-called “Respecting Resolutions”) now contain an explicit affirmation of the right to political participation as described by Art 21 UDHR. For recent examples, see UNGA Res 60/164 (16 December 2005) UN Doc A/RES/60/164 para 7 (adopted by 110 votes to 6, with 61 abstentions); UNGA Res 58/189 (22 December 2003) UN Doc A/RES/58/189 para 7 (adopted by 111 votes to 10, with 55 abstentions); UNGA Res 56/154 (19 December 2001) UN Doc A/RES/56/154 para 8 (adopted by 99 votes to 10, with 59 abstentions). In the past, these resolutions were routinely tabled by countries of the Non-Aligned Movement as a counterpart to the Assembly’s “Enhancing Resolutions”. Tellingly, perhaps, this practice seems to have been discontinued following the UNGA’s adoption of the World Summit Outcome in 2005.

<sup>99</sup> See d’Aspremont (n 8), who argues that, while the holding of free and fair elections can be seen as a customary international law obligation, China and certain states in the Middle East and South-East Asia are – based on the persistent objector rule – effectively exempted from it (290).

neither necessarily include all states nor be entirely homogeneous.<sup>100</sup> Second, it is widely recognized that a state can be considered a persistent objector only if it has consistently and clearly expressed its opposition to the rule in question during the process of its formation.<sup>101</sup> Given these strict requirements for the application of the doctrine, it seems highly problematic to regard as persistent objectors to the right to political participation states that have repeatedly acquiesced in international documents affirming the universal nature of all human rights in the clearest conceivable terms.<sup>102</sup> The truism that these documents are as such not legally binding is thereby irrelevant; what counts is that they express a collective interest of the international community against which no state has elected to explicitly object.

### 3.3.2. *Do genuine elections require political pluralism?*

Even if one is willing to accept the customary law character of the principle of periodic and genuine elections, the question arises whether there also exists a generally shared understanding among states and other international actors as to how exactly the norm is to be interpreted. After all, while elections must certainly be by universal and equal suffrage, held by secret ballot, and free from any form of coercion of the electors, neither Article 21 UDHR nor Article 25 ICCPR explicitly require a pluralistic electoral process. In fact, it was precisely the provisions' indeterminacy upon which the former Soviet Union and its allies (joined by a number of African and Asian states) had based their claim that single-party elections were fully compatible with the UDHR and their obligations under the ICCPR.<sup>103</sup> With the end of the Cold War, of course, this

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<sup>100</sup> See, in particular, Art 38 para 1(b) of the ICJ Statute, which defines international custom as 'evidence of a *general practice* accepted as law' (emphasis added).

<sup>101</sup> See *Fisheries Case (United Kingdom v Norway)* (Judgment) [1951] ICJ Rep 116, 131; Ian Brownlie, *Principles of Public International Law* (6<sup>th</sup> edn OUP, Oxford 2003) 11. It should be added that the persistent objector thesis is viewed with a heavy dose of scepticism by a number of scholars; see, for instance, Treves (n 92) para 39; Jonathan I. Charney, 'Universal International Law' (1993) 87 AJIL 529, 538. According to Shaw, 'constant protest on the part of a particular state when reinforced by the acquiescence of other states might create a recognized exception to the rule, *but it will depend on a great extent on the facts of the situation and views of the international community*'; Malcolm N. Shaw, *International Law* (6<sup>th</sup> edn CUP, Cambridge 2008) 91 (emphasis added).

<sup>102</sup> See World Conference on Human Rights (n 56) para 5 ('While the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms'); World Summit Outcome (n 52) para 120 ('We reaffirm the solemn commitment of our States to fulfil their obligations to promote universal respect for and the observance and protection of all human rights ... in accordance with the Charter, the Universal Declaration of Human Rights and other instruments [...]. The universal nature of these rights and freedoms is beyond question'); UNGA Res 63/116 (10 December 2008) UN Doc A/RES/63/116 para 6 ('We, the Member States of the United Nations ... reaffirm our commitment towards the full realization of all human rights for all, which are universal, indivisible, interrelated, interdependent and mutually reinforcing').

<sup>103</sup> Steiner (n 88) 91; Roth (n 41) 329-32.

anti-liberal reading of the right to political participation has lost many of its erstwhile supporters. Within the scope of the Political Covenant, it is also firmly rejected by the Human Rights Committee.<sup>104</sup> Moreover, political pluralism is a standard criterion in the area of international election monitoring that is used by numerous international, regional and sub-regional organisations in order to assess whether a given electoral process was ‘free and fair’.<sup>105</sup>

In view of the ideological contestation at the time of the adoption of the ICCPR and the textual ambiguity of the right to political participation resulting from it, Brad Roth nevertheless argues that it is difficult to justify an interpretation of the principle of genuine elections ‘that simply excludes the openly espoused understandings of non-liberal-democratic signatories’.<sup>106</sup> He further holds that, under the terms of Article 31 of the Vienna Convention on the Law of Treaties,<sup>107</sup> the evaluation standards applied by organizations engaged in international election monitoring do not qualify as ‘subsequent practice’ relevant to the interpretation of Article 25 ICCPR, since they were not formally developed within the framework of the Covenant or comparable human rights treaty regimes.<sup>108</sup> While these concerns need to be taken seriously, it appears that Roth unduly privileges a historic interpretation of the right in question over a teleological and systematic interpretation, which would also have to take the underlying purpose of the right (the ability of citizens to freely take part in their government ‘without distinction of any kind’) as well as other, functionally related rights and freedoms (e.g. freedom of expression, assembly and association)

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<sup>104</sup> The Committee addressed the issue of compatibility of a single-party system with Art 25 ICCPR for the first time in Communication No 314/1988 (*Bwalya v Zambia*) (27 July 1993) CCPR/C/48/D/314/1988 (1993). Following a complaint by a member of an opposition party banned under the Zambian constitution from standing for parliamentary elections, the Committee concluded that ‘restrictions on political activity outside the only recognized political party amount to an unreasonable restriction of the right to participate in the conduct of public affairs’ (ibid para 6.6). In General Comment No 25 (n 80), the Committee affirmed that ‘party membership should not be a condition of eligibility to vote, nor a ground of disqualification’ (para 10), that the full enjoyment of the right to political participation implies ‘[...] freedom to engage in political activity individually and through political parties and other organizations’ (para 25) and that ‘political parties and membership in parties play a significant role in the conduct of public affairs and the election process’ (para 26). According to Nowak (n 88), restricting the choice of the electorate to candidates of one party is compatible with the notion of genuine elections only ‘when this system can be justified on the basis of the specific political circumstances in the State concerned, when the structures within the party are pluralistic, and when the party represents a broad spectrum of the population’ (575).

<sup>105</sup> See Fox (n 29) 55-59; Guy S. Goodwin-Gill, *Free and Fair Elections* (2<sup>nd</sup> edn Inter-Parliamentary Union, Geneva 2006) 134, 163.

<sup>106</sup> Roth (n 41) 332.

<sup>107</sup> Vienna Convention on the Law of Treaties (23 May 1969) (1969) 8 ILM 679.

<sup>108</sup> Roth (n 41) 342. See also, along the same lines, Jure Vidmar, ‘Multiparty Democracy: International and European Human Rights Law Perspectives’ (2010) 23 *Leiden J Intl L* 209, 223 (arguing that – outside the European public order – a clear link between international human rights law and multiparty elections has yet to be established in international law).

into account. Moreover, an isolated look at the – undoubtedly significant – standard-setting practice of international election monitoring does not provide a full picture of recent international developments in the area of participatory rights.

Because of its universal membership, the UN is clearly the preferred forum to turn to if the aim is to identify the prevailing position held by the international community with regard to ambiguous international principles and norms – provided, of course, applicable UN practice exists. In its routinely adopted “Enhancing Resolutions”, which consistently employ the language of Article 21 UDHR, the General Assembly has only occasionally referred to the requirement of political pluralism in the context of elections. The very first of these resolutions (at the time simply entitled ‘Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections’), however, was remarkably clear on this point. Resolution 43/157, adopted without a vote in December 1988, declared that ‘determining the will of the people requires an electoral process which accommodates distinct alternatives’ and that ‘this process should provide an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others’.<sup>109</sup> A similar formulation was used in the following years, though a supplementary reference to the states’ internal legal framework for elections suggested the adoption of a generally more cautious approach.<sup>110</sup> In 1994, the Assembly redirected the focus of its “Enhancing Resolutions” to mainly organizational and technical issues of electoral assistance and election monitoring, which also led to a modification of the resolution’s title in order to highlight more clearly the role of the UN in the promotion of the principle of genuine periodic elections. Henceforth, the task of ensuring coherence in the application of international standards for free and fair elections was primarily left to the Secretary-General and the relevant bodies within the UN Secretariat.<sup>111</sup>

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<sup>109</sup> UNGA Res 43/157 (8 December 1988) UN Doc A/RES/43/157 para 3.

<sup>110</sup> According to UNGA Resolution 44/146 of 15 December 1989 (UN Doc A/RES/44/146), ‘determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, *within the constitution and national legislation*’ (para 3) (emphasis added).

<sup>111</sup> See in particular the biennial *Report of the Secretary-General: Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, available at <[www.un.org/Depts/dpa/ead/sg\\_reports.html](http://www.un.org/Depts/dpa/ead/sg_reports.html)> (accessed 1 May 2010). In the 2009 report, the Secretary-General reaffirmed that the focus of UN electoral assistance is on supporting Member States ‘to conduct credible elections in accordance with the principles outlined in international human rights instruments’: UN Doc A/64/304 (14 August 2009) para 2. Within the UN Secretariat, the Under-Secretary-General for Political Affairs serves as the United Nations focal point for electoral assistance; he is thereby supported by the Electoral Assistance Division in the

In contrast to the more recent version of its “Enhancing Resolution”, the Assembly’s so-called “Respecting Resolutions” (which typically emphasize ‘the richness and diversity of ... models of free and fair electoral processes in the world, based on national and regional particularities’ as well as ‘the right of peoples to determine methods and to establish institutions regarding electoral processes’)<sup>112</sup> have always remained extremely controversial. Unlike their counterpart (the “Enhancing Resolutions”), these resolutions never received near-universal support by UN member states.<sup>113</sup> It is nevertheless true that the repeated backing of these resolutions by many African, Asian and Middle Eastern states can be viewed as a clear rejection by a considerable section of the UN membership of an interpretation of the right of citizens to political participation that would impose upon them any particular electoral system or method.<sup>114</sup> That said, these resolutions can hardly be taken as an endorsement by the General Assembly of an “everything goes approach” to the ‘genuineness’ of elections, the world-wide support of which has become such a prominent part of its agenda. While it is within the sovereign discretion of each state to determine the exact formula by which elections will bring about the transfer of power to prevailing candidates, it is – in accordance with undisputed international standards – still indispensable for genuine elections to enable a truly free expression of the will of the electorate.<sup>115</sup> As the Assembly has indicated on a number of occasions, the latter requires, *inter alia*, offering an actual choice to the electorate by enabling the political opposition to participate freely in the electoral process.<sup>116</sup> This position was also shared by the (now defunct) UN Commission on Human

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Department for Political Affairs. For a compilation of standards used by the UN in the context of electoral assistance, see Centre for Human Rights, *Human Rights and Elections – A Handbook on the Legal, Technical and Human Rights Aspects of Elections* (United Nations: New York - Geneva 1994).

<sup>112</sup> See, for example, UNGA Res 60/164 (n 98) preamble para 6; UNGA Res 58/189 (n 98) preamble para 6; UNGA Res 56/154 (n 98) preamble para 6.

<sup>113</sup> As already noted, no “Respecting Resolution” accompanied the 2007 and 2009 “Enhancing Resolutions” of the General Assembly (*supra* n 98).

<sup>114</sup> Vidmar (n 108) 220.

<sup>115</sup> In practice, this can be accomplished in a variety of ways. As far as elections to legislative bodies are concerned, a state’s electoral framework may provide for a majoritarian system (so-called single-member constituency or “first past the post” system), proportional representation (party-list voting), or any other system that reliably gives effect to the freely expressed will of the people; see UN Handbook on Elections (n 111) para 77.

<sup>116</sup> See, for instance, UNGA Res 55/96 (n 51) para 1(d) lit [iv] (‘The General Assembly ... calls upon states [to ensure], through legislation, institutions and mechanisms, the freedom to form democratic political parties that can participate in elections ...’). See also ‘Situation of Human Rights in the Islamic Republic of Iran’, UNGA Res 64/176 (18 December 2009) UN Doc A/RES/64/176 paras 3(a) and 4(h); ‘Situation of Human Rights in Myanmar’, UNGA Res 61/232 (22 December 2006) UN Doc A/RES/61/232 paras 2(c) and (d); ‘Situation of Human Rights in Uzbekistan’, UNGA Res 60/174 (16 December 2005) UN Doc A/RES/60/174 paras 2(e) and 4(k).

Rights and it continues to be supported by its successor, the UN Human Rights Council.<sup>117</sup>

Evidence that elections are no longer considered genuine by the international community if political groups peacefully opposing the incumbent regime are unreasonably inhibited from participating in the electoral process is also provided by the relevant practice of the Security Council. Thus, in the context of the June 2005 extension of the mandate of the UN Stabilization Mission in Haiti (MINUSTAH), the Council reiterated that ‘free and fair elections, open to all political parties that have renounced violence and with the broadest possible participation of the Haitian people, must take place in 2005’.<sup>118</sup> A similar stance was taken by the highest UN body in June 2008, ahead of the second round of presidential elections in Zimbabwe. Following reports of systematic acts of repression against members of the main opposition party in the run up to the elections, the Council declared that ‘violence and the restrictions on the political opposition have made it impossible for a free and fair election to take place [in Zimbabwe]’.<sup>119</sup> Unsurprisingly, then, comparable considerations are guiding the Council in its handling of the ongoing crises in Côte d’Ivoire. From the outset, it left no doubt that the electoral process foreseen in the Ouagadougou Political Agreement (which was signed by the main Ivorian political players in March 2007) must ensure ‘all the necessary guarantees for the holding of open, free, fair and transparent presidential and legislative elections in accordance with international standards’.<sup>120</sup> More recently, the Council affirmed that the UN will certify all stages of the electoral process and that its assessment of the elections (which have been postponed several times and are now scheduled for October 2010) will depend on, *inter alia*, the inclusiveness of the process, including the full participation of the population and all candidates.<sup>121</sup>

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<sup>117</sup> See UNCHR Res 2005/32 (n 70) para 2 (‘... reaffirms the right of every citizen to vote and be elected at genuine periodic elections without discrimination of any kind ... and stresses that persons entitled to vote must be free to vote for any candidate for election and free to support or to oppose Government, without undue influence or coercion of any kind that may distort or inhibit the free expression of the elector’s will ...’). See also ‘Political Prisoners in Myanmar’, HRC Res 12/20 (2 October 2009) UN Doc A/HRC/RES/12/20 para 2.

<sup>118</sup> UNSC Res 1608 (22 June 2005) UN Doc S/RES/1608 (2005) preamble para 3.

<sup>119</sup> UNSC Presidential Statement 23 (2008) UN Doc S/PRST/2008/23 para 3. The Council also called on the authorities in Harare to cooperate fully with international efforts ‘aimed at finding a peaceful way forward ... that allows a legitimate government to be formed that reflects the will of the Zimbabwean people’ (ibid para 4).

<sup>120</sup> UNSC Res 1765 (17 July 2007) UN Doc S/RES/1765 (2007) para 6.

<sup>121</sup> UNSC Res 1880 (30 July 2009) UN Doc S/RES/1880 (2009) paras 8 and 9. For the relevant benchmarks, which were elaborated by the UN Special Representative in Côte d’Ivoire (and endorsed by the Council), see ‘Report of the Secretary-General on the United Nations Operation in Côte d’Ivoire’, UN Doc S/2008/250 (15 April 2008) para 32.

Given its limited membership, the Council can of course not itself develop or modify rules of customary international law. Nevertheless, as confirmed by the ICJ in the *Hostages Case*, UN Security Council resolutions repeatedly giving expression to particular principles (including, it seems, principles on the interpretation of a specific norm) can be regarded as ‘evidencing the importance attached by the international community as a whole to the observance of those principles’.<sup>122</sup> Moreover, more often than not, the practice of the Council will itself considerably influence the *opinio juris* of the broader international community on matters on which it passes resolutions.<sup>123</sup> The fact that the Council has repeatedly acted on the assumption of a clear link between free elections and political pluralism in cases in which domestic struggles over political power were deemed to constitute, at least potentially, a threat to international peace and security, has therefore to be taken into consideration in an overall assessment of the status and meaning of the principle of periodic and genuine elections within the international legal order.

#### **4. Conclusion: Towards an International Regime on Democratic Domestic Governance**

In his account of democracy as an emerging global norm, Thomas Franck did not concern himself with the intricacies involved in the identification of customary international law in any detail. For him, the growing number of states that are committed by their own constitutional systems to the holding of periodic multi-party elections, combined with the solid entrenchment of participatory rights in global and regional human rights instruments and an increasingly coherent international practice regarding their interpretation, provided sufficient evidence to bolster the argument that democracy, ‘while not yet fully word made law, is rapidly becoming in our time a normative rule of the international system’.<sup>124</sup> Indeed, if one subscribes to the Franckian conception of the democratic entitlement, it may be concluded that its ascendance into ‘word made law’ is now almost complete. It has to be kept in mind, though, that the right to democracy, as conceived by Franck, does not involve a ‘Lockian or Montesquieuian ideal’ but rather entails the fairly

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<sup>122</sup> *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)* (Judgment) [1980] ICJ Rep 3, 19 para 36.

<sup>123</sup> The fact that it represents some of the most prominent members of the international community, combined with the fact that it is empowered to adopt decisions with binding effect on all UN member states, certainly lends weight to the view that consistent Security Council practice ‘can be considered to indicate the future direction of evolution of customary law’ on matters dealt with in its resolutions; see Kirsti Samuels, *Political Violence and the International Community: Developments in International Law and Policy* (Martinus Nijhoff, Leiden – Boston 2007) 60.

<sup>124</sup> Franck 1992 (n 6) 46.

modest claim that ‘... international law protects the right of people, anywhere, to a legitimate political process, which is one in which the people are given an opportunity to participate in their national process of value-formation and decision-making’.<sup>125</sup>

If it is understood in these narrow terms, democracy’s status as an international legal entitlement is certainly well grounded in a modern interpretation of the right of peoples to (internal) self-determination and the ever-growing normative strength of the principle that the will of the people, as expressed in periodic and genuine elections, shall be the basis of government authority. Eventually, the problem with this approach is less one of content but rather one of terminology. Over the past two decades, states and international institutions have come to understand democracy not in the purely procedural, election-focused terms suggested by Franck, but rather in the ‘Lockian or Montesquieuian’ terms he has excluded as material determinants of the democratic entitlement. To verify this, one only needs to look to the General Assembly and its recent pronouncements on the promotion and consolidation of democracy<sup>126</sup> or, in more practical terms, to the democracy-related activities of the UN and other organisations in the field of post-conflict reconstruction and state-building.<sup>127</sup> This is not to say that a global consensus on a specific interpretation of democracy has already emerged in international law but rather that international practice has obviously coalesced into a widely shared understanding that democracy entails, in any event, more than the holding of elections at regular intervals.<sup>128</sup> Grand assertions regarding the emergence of democracy as a global norm thus seem to be beside the point, when all that the norm is said to entail is one (albeit highly important) element of a broader, yet so far mostly programmatic, international vision of democracy.

That said, international law certainly speaks ‘the language of democracy’ in a number of areas, from the promotion and protection of human rights to membership in international organizations, international development cooperation, international territorial administration, and (increasingly)

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<sup>125</sup> Franck 1994 (n 6) 82.

<sup>126</sup> See, in particular, UNGA Res 55/96 (n 51).

<sup>127</sup> See Fox (n 62) 52, 154; Ralph Wilde, *International Territorial Administration – How Trusteeship and the Civilizing Mission Never Went Away* (OUP, Oxford 2008) 216; Carsten Stahn, *The Law and Practice of International Territorial Administration* (CUP, Cambridge 2008) 266, 751.

<sup>128</sup> A similar view is taken by more than twenty inter-governmental and international non-governmental organizations concerned with the monitoring of elections in ‘Declaration of Principles for International Election Observation’ (adopted 27 October 2005) <[http://ec.europa.eu/europeaid/observer/declaration\\_of\\_principles\\_code\\_of\\_conduct\\_en.pdf](http://ec.europa.eu/europeaid/observer/declaration_of_principles_code_of_conduct_en.pdf)> (accessed 1 May 2010) paras 1 and 2.

the recognition of states and governments.<sup>129</sup> Arguably, recent developments in these fields illustrate democracy's ongoing normative consolidation as a 'teleological principle' of the contemporary international order.<sup>130</sup> It does not follow, however, that states are now required by international law to organize themselves in accordance with the broad spectrum of liberal-democratic principles usually promoted by today's international community, notwithstanding the possible existence of legal commitments to this effect based on regional treaties and/or regional customary law.

Neither can it be maintained that governments that persistently disregard the right to political participation and other democratic rights of their citizens will, as a rule, find their international legal standing challenged by the international community. Here, as in other areas of international law, questions regarding the existence and scope of a particular norm must be distinguished from questions regarding the legal consequences of its violation.<sup>131</sup> As a matter of principle, the recognition of governments is still a largely para-legal area of international affairs. The decision to recognize a new government usually falls within the political discretion of states (safe for the international prohibition of premature recognition) and there is, as yet, no general rule obliging states to refrain from recognizing a regime in effective control over a defined territory simply by virtue of it being non-democratic or having attained political power by means other than free and fair elections.<sup>132</sup> Of course, it cannot be ignored that, in cases of violent coups against democratically elected leaders, the international community has occasionally refused to consider the new *de facto* regime as the legitimate representative of the state concerned and has instead continued to recognize the ousted regime as the *de iure* government, irrespective of its loss of *effectivité*. As the reactions of the UN to the coups in Haiti (1991/94), Sierra Leone (1997/98) and, most recently, Honduras (2009) suggest, the conventional effective control doctrine has ceased to provide a reliable shield of protection for coup-based regimes against collective international action (including non-recognition) in support of democratically elected governments.<sup>133</sup> However, while un-

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<sup>129</sup> Richard Burchill, 'Introduction' in Burchill (n 7) xi, xxiii. See also Roland Rich, 'Bringing Democracy into International Law' (2001) 12 J of Democracy 20.

<sup>130</sup> Petersen (n 8) 138-41.

<sup>131</sup> See Christian B. Fulda, *Demokratie und pacta sunt servanda* [Democracy and *pacta sunt servanda*] (BoD, Norderstedt 2003) 91.

<sup>132</sup> See Sean D. Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' in Fox and Roth (n 7) 123, 151.

<sup>133</sup> On Haiti, see UNSC Res 917 (6 May 1994) UN Doc S/RES/917, and UNSC Res 940 (31 June 1994) UN Doc S/RES/940; on Sierra Leone, see UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132; on Honduras, see

doubtedly significant, this development cannot and should not be taken as the dawn of a new era in which all non-democratic regimes would – based on a new international rule on governmental legitimacy – forfeit their entitlement to speak as the proper agent of their respective states.

The recognition practice of states and international organizations has confirmed time and again that the international community normally proceeds from the presumption that the effective government of a state, regardless of its political character, constitutes a legitimate expression of self-determination by the people concerned.<sup>134</sup> It is true that this presumption is no longer tenable if it is beyond reasonable doubt that a regime is not, or is no longer, ‘representative’ of the people as a whole.<sup>135</sup> Some notable counter-examples notwithstanding, recent state practice indicates that such a situation arises, in particular, if a legitimate democratic government, which reflects the will of the people as expressed in free and fair elections, falls prey to an unconstitutional attack by self-appointed military or civilian elites. Yet, in the absence of such clear evidence of a regime’s lack of representativeness, the international community has little option but to presume what has been called a ‘fit’ between the government and its people.<sup>136</sup> This is not to ignore that the level of popular support of long-standing authoritarian regimes will often remain elusive, particularly to outsiders. In fact, it is for this reason – and because any formal “de-legitimation” of foreign governments is, by its very nature, a highly interventionist enterprise – that mere assumptions of “non-representativeness” cannot be accepted as an appropriate title for international action. Thus, even though the stubborn refusal to allow for the holding of free and fair elections may amount today to a violation of an international norm, such behaviour will normally not suffice to render the responsible government illegitimate under international law. Indeed, states’

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UNGA Res 63/301 (1 July 2009) UN Doc A/RES/63/301. In all these instances, the Security Council (in the case of Honduras: the General Assembly) called on states not to recognize the coup-based regimes, demanded the prompt return of the democratically elected government, and called for the restoration of constitutional order.

<sup>134</sup> Murphy (n 132) 139; Wheatley (n 40) 134.

<sup>135</sup> Roth (n 41) 415-16. According to the UNGA’s 1970 ‘Friendly Relations Declaration’, a state is in compliance with the right of peoples to self-determination when it is ‘possessed of a government representing the whole people belonging to the territory without distinction (...)’: Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, UNGA Res 2625 (XXV) (24 October 1970) GAOR 25<sup>th</sup> Sess (A/8082) 121, 124; see also World Conference on Human Rights (n 56) para I.2. The Security Council’s response to the situation in Iraq after the US-led invasion of March 2003 can be viewed as an affirmation of this postulate. In its first resolution on Iraq following the end of major military combat, the Council not only emphasized ‘the right of the Iraqi people freely to determine their own political future’ but also encouraged ‘efforts of the people of Iraq to form a representative government based on the rule of law that affords equal rights and justice to all Iraqi citizens’: UNSC Res 1483 (22 May 2003) UN Doc S/RES/1483 preamble paras 4 and 5.

<sup>136</sup> Fox (n 31) 314 (quoting Michael Walzer, ‘The Moral Standing of States’ (1980) 9 *Phil & Pub Affairs* 209, 216-18).

ruling apparatuses violate international rules, including internationally guaranteed human rights, usually without forfeiting their status as “government”.<sup>137</sup>

On a final note, it may be useful to borrow from international relations theory the notion of international regimes in order to obtain an alternative and perhaps more complete picture of the present status of democracy in the international legal system. According to a standard definition developed by Stephan Krasner in the 1980s, an international regime can be defined as a set of ‘implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations’.<sup>138</sup> International regimes, thus understood, ‘create the context for the framing of national policies’ in those areas that are covered by the regimes, ‘ultimately influence the choice of policies, and thereby constrain the behaviour of states’.<sup>139</sup> Taking these conceptual approaches as a basis, it seems possible to perceive the international community’s manifold efforts at defining, promoting and – under certain circumstances – safeguarding participatory rights and democratic principles as a dynamic process gradually leading to the creation of an international regime on democratic governance.<sup>140</sup>

It lies in the nature of an evolving regime that its contours are not yet finally settled. As is typical for most international regimes, its constitutive elements are endowed with varying degrees of “normativity”. Situated at its core is the right of citizens to take part in periodic and genuine elections; a right that – based on a growing amount of circumstantial evidence – may be said to have evolved into a customary international rule. Also endowed with a comparatively high degree of normativity are the political freedoms functionally associated with free and fair elections; e.g. the freedoms of assembly, association, expression, and opinion. This group of well-defined entitle-

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<sup>137</sup> Allan Rosas, ‘International Legitimacy of Governments’, in Gudmundur Alfredsson and Peter Macalister-Smith (eds), *The Living Law of Nations* (Engel, Kehl et al 1996) 201, 204.

<sup>138</sup> Stephan D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ in Krasner (ed), *International Regimes* (Cornell University Press, Ithaca 1983) 1, 2. For Krasner, ‘[p]rinciples are beliefs of fact, causation, and rectitude. Norms are standards of behavior defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice’ (ibid). Though several attempts have been made to clarify, modify, or even supplant Krasner’s definition, it is still widely seen as the consensus definition of the term “international regime” – in part precisely because of its flexibility and relative openness to a variety of general IR theories, be they interest-, power-, or knowledge-based. See Andreas Hasenclever, Peter Mayer and Volker Rittberger, *Theories of International Regimes* (CUP, Cambridge 1997) 8.

<sup>139</sup> Shah M. Tarzi, ‘The Role of Norms and Regimes in World Affairs: A Grotian Perspective’ (1998) 14 *Int’l Relations* 71, 72.

<sup>140</sup> For a similar argument see UNCHR, ‘Promotion and Consolidation of Democracy’, Expanded working paper by Manuel Rodríguez Cuadros on the measures provided in the various international human rights instruments for the promotion and consolidation of democracy; UN Doc E/CN.4/Sub.2/2002/36 (10 June 2002) para 91.

ments, which are firmly entrenched in the international human rights canon, is followed by some of the more general principles of democracy; e.g. the rule of law, separation of powers, inclusion of minorities etc. While they, too, are to some extent rooted in international human rights law, these principles usually do not constitute (at least not at the universal level) clearly defined rules of conduct and are therefore characterized by a considerably lesser degree of normativity. Finally, an international regime on democratic governance would also seem to embrace criteria often associated with the broader notion of ‘good governance’; e.g. transparency, accountability, civil society participation, civil control of the military etc. However, since these standards are still largely undefined and only incoherently applied by the UN and other international actors,<sup>141</sup> they are – contrary to other components of the emerging regime – so far largely useless as normative benchmarks for a meaningful evaluation of state behaviour.

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<sup>141</sup> Jackson N. Maogoto, ‘The "Good Governance" Crusade in the Third World’ (2007) 9 ICLR 375. But see Achilles Skordas, ‘Hegemonic Custom?’ in Michael Byers and Georg Nolte (eds), *United States Hegemony and the Foundations of International Law* (CUP, Cambridge 2003) 317, at 333 (arguing that the principle of good governance is recognized and affirmed by the UN as a constitutive element of democracy).