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## The Principal of Democratic Teleology in International Law

Niels Petersen

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# THE PRINCIPLE OF DEMOCRATIC TELEOLOGY IN INTERNATIONAL LAW

Niels Petersen\*

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\* Dr. iur. (Frankfurt). Senior Research Fellow at the Max Planck Institute for Research on Collective Goods, Bonn, Germany. This paper is an extract of my Ph.D. thesis. I am very grateful to Armin von Bogdandy, Sergio Dellavalle, Thomas Franck, Matthias Goldmann, Stefan Kadelbach, Benedict Kingsbury, Thomas Kleinlein, Mattias Kumm, Ingo Venzke, Silja Vöneky, and Joseph Weiler, as well as the members of the J.S.D. Forum of the New York University School of Law for valuable comments and stimulating discussions. Finally, I would like to thank Brian Cooper for his excellent linguistic revision of this Article. Any remaining mistakes are, of course, my own.

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## INTRODUCTION

For a long time, democracy was a non-issue in international law. In 1986, the International Court of Justice declared:

However 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>1</sup>

This perspective changed dramatically in the 1990s following the end of the ideological dichotomy of the Cold War. A new interventionist U.N. Security Council and a large number of newly emerging democracies in Latin America, Africa, and Asia led to a widespread euphoria about democracy. In response, Francis Fukuyama predicted the “end of history,”<sup>2</sup> and legal scholars started discussing an emerging right to democratic governance.<sup>3</sup>

The first major international document addressing this issue was the Vienna Declaration of the World Conference on Human Rights (“Vienna Declaration”), which recognized that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”<sup>4</sup> The Vienna Declaration not only promotes democracy as a form of government, but also emphasizes the beneficial impact of democracy on development.<sup>5</sup> This statement runs against the traditional assumption of modernization theory<sup>6</sup> that the stability of a democracy depends on a State’s level of socio-economic development.<sup>7</sup> It promotes democracy as a universal cure for poverty and assumes that democracy can be established at almost any stage in the developmental process and in any society.

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1. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 123 (June 27).

2. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* xii (1992).

3. See, e.g., Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *YALE J. INT’L L.* 539 (1992); Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 *AM. J. INT’L L.* 46 (1992).

4. World Conference on Human Rights, June 14–25, 1993, *Vienna Declaration and Programme of Action*, ¶ 8, U.N. Doc. A/CONF.157/23 (July 12, 1993) [hereinafter *Vienna Declaration*].

5. *Id.*

6. For an account of modernization theory, see *infra* Part I.B.2.

7. Adrian Leftwich, *Governance, Democracy and Development in the Third World*, 14 *THIRD WORLD Q.* 605, 605 (1993).

The purpose of this Article is to examine these underlying assumptions and to reconsider democratic entitlement theory in light of democratization theory in order to redefine the claim to democracy by making a more modest proposal. Instead of finding evidence supporting the emergence of an unequivocal right to democratic governance, the practices of regional bodies and treaty obligations suggest the existence of a principle of democratic teleology, according to which States are obligated to develop towards democracy. Part I of the Article sets forth an analytical framework that clarifies the definition of democracy and assesses the principal approaches conceptualizing democratization processes. It will show that there is much uncertainty within the social sciences on what constitutes an ideal path to democracy. There is consensus that democracy cannot be introduced overnight, but is, rather, a complex and long-term process. Part II addresses approaches to democratic entitlement and proposes a more differentiated approach that focuses on the process of democratization rather than the existence of democratic governance. The subsequent analysis will show that there is no right to democratic governance in international law. Instead, States have an obligation to develop towards democracy.

#### I. THEORETICAL FRAMEWORK

Section A of this portion of the Article establishes a working definition of democracy. After locating two intertwined aspects to the concept—a binary classification and a gradation—this section argues that the definition of “democracy” should be grounded in the former and should be minimalist: democracy can be said to exist when a government has been chosen through periodic and contested elections. In contrast, the gradual dimension of the concept takes into account normative components to democracy. These two dimensions will be the basis for the analysis that follows on democracy in international law.

Section B further develops the theoretical framework of this Article by critically evaluating three major theories of democratization: cultural prerequisites theory, modernization theory, and social homogeneity theory. We will see that democratization is too multifaceted and complex to be fully captured in any one theory. As various internal as well as external factors interdependently influence democratization, it is difficult to predict precisely what facilitates transitions to democracy. Instead, democratization, as demonstrated in this Article, is a complex process, which can take different forms and shapes.

### A. Definition of Democracy

Democracy is a contested concept. Although it seems to be “nonnegotiable” in the Western Hemisphere,<sup>8</sup> there remains little consensus on what “democracy” actually means.<sup>9</sup> Scholars flesh out the term with different content. Some propose “thin” or “minimalist” models of democracy,<sup>10</sup> while others advocate “thick” or demanding conceptions.<sup>11</sup> The search for a definition of democracy is complicated by the fact that there is disagreement on whether democracy is a question of kind or one of degree.<sup>12</sup> The former interpretation is a simple binary one—a political system is either a democracy or not. The latter, in contrast, is gradual—democracy is a question of degree. Both conceptions, however, are complementary and not mutually exclusive. Conceiving democracy in a gradual way presupposes that an anterior classification has been made because it would deprive the concept of every heuristic value to qualify authoritarian or totalitarian regimes as democratic to a certain degree.<sup>13</sup> Once a binary classification has been made, it may be valuable to distinguish different types of democracy on a gradual scale, as long as democracy is not solely perceived to be an ideal concept. The notion of democracy, thus, has two dimensions: a binary classification, which differentiates between democracies and nondemocracies, and a graduation, which distinguishes between democracies of different quality.

Regarding the binary approach, there are two ways to address the issue of defining democracy. On the one hand, one can look at whether relevant sources either explicitly or implicitly provide a definition. On the other hand, one can establish a proper definition of democracy and analyze whether such a concept exists in international law, notwithstanding whether it is actually called democracy. Although, at first glance, the first approach seems to be appealing, its application is deceptive. The term

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8. IAN SHAPIRO, *THE STATE OF DEMOCRATIC THEORY* 1 (2003).

9. LAURENCE WHITEHEAD, *DEMOCRATIZATION: THEORY AND EXPERIENCE* 14 (2002).

10. See, e.g., Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in *DEMOCRACY'S VALUE* 23, 23 (Ian Shapiro & Casiano Hacker-Cordón eds., 1999).

11. See Susan Marks, *Human Rights, Democracy and Ideology*, in 8 *COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, BOOK 2: THE PROTECTION OF HUMAN RIGHTS IN EUROPE* 51 (Acad. of Eur. Law ed., 1997).

12. GIOVANNI SARTORI, *THE THEORY OF DEMOCRACY REVISITED* 184 (1987).

13. *Id.* at 184–85. See also Armin von Bogdandy, *Demokratisch, demokratischer, am demokratischsten? Zur Steigerungsfähigkeit eines Verfassungsprinzips am Beispiel einer Neugestaltung der Verordnungsgebung [Democratic, More Democratic, the Most Democratic? On the Gradual Character of a Constitutional Principle Based on the Example of a Reform of Executive Regulations]*, in *VERFASSUNG—PHILOSOPHIE—KIRCHE. FESTSCHRIFT FÜR ALEXANDER HOLLERBACH ZUM 70. GEBURTSTAG* 364, 367 (Joachim Bohnert et al. eds., 2001) (F.R.G.).

“democracy” is used very rarely in international legal documents—perhaps precisely because of its vagueness. Where it can be found, its meaning is unspecified.<sup>14</sup> The aforementioned Vienna Declaration<sup>15</sup> and the U.N. Secretary General’s Agenda for Peace, for example,<sup>16</sup> only allude to democracy’s positive effects on human rights, development, and peace. International human rights instruments reference notions of democratic society in savings clauses, yet fail to elucidate the meaning of the word.<sup>17</sup>

There is one prominent exception, however. In 2000, the U.N. General Assembly adopted a resolution entitled “Promoting and Consolidating Democracy.”<sup>18</sup> According to the resolution, democracy consists of a number of different elements: the promotion of pluralism, the protection of human rights, a separation of powers, the rule of law, elections, the development of civil society, good governance, sustainable development, solidarity, and social cohesion.<sup>19</sup> Nonetheless, this appears to be more of a wish list than an attempt to propose a coherent definition of democracy. It mingles substantive and procedural issues without saying anything about their interrelation. In addition, the resolution fails to distinguish between the institutional framework of government and certain programmatic issues, such as sustainable development or social cohesion.<sup>20</sup>

Turning to political science literature, several definitions of democracy can be found. Some are minimalist, focusing primarily on elections,<sup>21</sup> while others incorporate additional elements, for example, the rule of

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14. *But cf.* STEVEN WHEATLEY, DEMOCRACY, MINORITIES AND INTERNATIONAL LAW 128–34 (2005) (noting that democracy is defined by international legal documents as a political system in which power is based on the will of the people). However, the concept of the will of the people is as abstract as the concept of democracy, making Wheatley’s definition just as unspecific.

15. *Vienna Declaration*, *supra* note 4.

16. The Secretary-General, *Report of the Secretary-General on an Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping*, U.N. Doc. S/24111, A/47/277 (June 17, 1992).

17. *See* American Convention on Human Rights: “Pact of San José, Costa Rica” arts. 15, 16(2), 22(3), 32(2), Nov. 22, 1969, 1144 U.N.T.S. 144 [hereinafter American Convention]; International Covenant on Civil and Political Rights arts. 14(1), 21, 22(2), Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms arts. 6(1), 8(2), 9(2), 10(2), 11(2), Nov. 4, 1950, 213 U.N.T.S. 222.

18. G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Dec. 4, 2000).

19. *Id.*

20. *See* SARTORI, *supra* note 12, at 90 (explaining this distinction).

21. Przeworski, *supra* note 10.

law,<sup>22</sup> the preservation of civil and political rights,<sup>23</sup> minority protection,<sup>24</sup> or the existence of social rights.<sup>25</sup> Defining democracy is such a difficult task because the debates on what democracy *is* and what democracy *should be* are often intermingled.<sup>26</sup> As its definition is highly contested and malleable at its borders,<sup>27</sup> this analysis will concentrate on the core of democracy: the legitimation of public power through elections. A political system may be deemed a democracy when its government is designated through periodic and contested elections.<sup>28</sup> Elections are contested when their outcomes are uncertain *ex ante* and irreversible *ex post*.<sup>29</sup>

This definition is meant to be purely descriptive, not normative. It does not ignore that there are good reasons for more demanding concepts of democracy. However, because the implementation of the rule of law or the protection of human rights, for example, are separate institutions, distinguishable from the establishment of democracy, they should be subject to independent analyses.<sup>30</sup> It is possible to imagine an autocratic regime observing the rule of law or complying with human rights obligations. An autocracy in which the government is appointed through contested elections, however, is a *contradictio in adjecto*.

As previously mentioned, democracy also has a second, qualitative dimension. Recently, Susan Marks cautioned against adopting a minimalist concept of democracy in international law.<sup>31</sup> If States have

22. See, e.g., Armin von Bogdandy, *Globalization and Europe: How to Square Democracy, Globalization, and International Law*, 15 EUR. J. INT'L L. 885, 889–90 (2004).

23. ROBERT ALAN DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 3 (1971) (including freedom of expression, information, and association, as well as an inclusive status of citizenship in his definition of democracy).

24. Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 INT'L & COMP. L.Q. 225, 247 (2002).

25. See generally DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS (1999) (advocating a democracy theory based on social rights).

26. In particular, theorists proposing a “thick” concept of democracy often take an idealist position, allowing their vision of an ideal political system to influence their definition of democracy.

27. WHITEHEAD, *supra* note 9, at 15.

28. See ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL INSTITUTIONS AND WELL-BEING IN THE WORLD, 1950–1990 at 14–18 (2000) (proposing this definition).

29. *Id.* at 16.

30. Manfred G. Schmidt, *Ist die Demokratie wirklich die beste Staatsverfassung? [Is Democracy Really the Best Form of Government?]*, 28 ÖSTERREICHISCHE ZEITSCHRIFT FÜR POLITIKWISSENSCHAFT 187, 191–92 (1999) (Austria).

31. Susan Marks, *The “Emerging Norm”: Conceptualizing “Democratic Governance,”* 91 AM. SOC'Y INT'L L. PROC. 372, 373 (1997); Marks, *supra* note 11, at 78–88.



reached a certain minimum threshold, they would become immune from further critique, which is an undesirable consequence, given the tendency in international relations to idealize democracy.<sup>32</sup> Marks, therefore, proposes a gradual definition of democracy.<sup>33</sup> Nevertheless gradual conceptualizations are not a substitute for classificatory ones. Instead of incorporating normative concerns into the definition of democracy itself, this Article addresses this critique by including a gradual dimension in the concept of democracy, supplementing the proposed binary definition, which centers upon the role of elections.

### *B. Theories of Democratization*

The transition from an authoritarian regime to a democratic system is not simply a shift in political status, but a social process influenced by various external factors. When the debate on democratization started in the late 1950s, it addressed the issue by analyzing the “prerequisites of democracy.”<sup>34</sup> In its strict sense, the term suggests that democracy has certain requirements, without which democracy is unable to function. Still today, there are authors who promote such a strict approach and argue that certain cultural environments are hostile to democracy. The majority of scholars, however, pursue a more moderate approach. They try to identify socio-economic factors that may be favorable to the establishment of democracy. The earliest and most influential school is that of modernization theory, which seeks to establish a correlation between economic development and democracy. Other scholars inquire into the relationship between ethnic, social, or religious homogeneity and the prospects for democracy.

#### 1. Cultural Prerequisites

The theory of cultural prerequisites argues that the establishment of democracy depends on the cultural environment of a State. Samuel Huntington, the most prominent proponent of this theory, divides the world into eight major civilizations: Japanese, Latin American, Western, African, Buddhist, Orthodox, Confucian, and Islamic.<sup>35</sup> Among these, only the first three cultures are regarded as favorable for democracy. Confu-

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32. Marks, *supra* note 11, at 81–82.

33. *Id.* at 87.

34. See Seymour Martin Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, 53 AM. POL. SC. REV. 69 (1959) [hereinafter Lipset, *Some Social Requisites*].

35. Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFF. 22, 25–26 (1993).

cian and Islamic civilizations are seen as hostile to democracy, while the remaining three are viewed as neutral.<sup>36</sup> There is some empirical evidence supporting Huntington's thesis,<sup>37</sup> but his argument is unconvincing. Experience shows that Confucianism and Islam are not per se inimical to democracy.<sup>38</sup> Although a lack of separation between belief systems and politics may present an obstacle to the establishment of a democratic society, such fluidity is not particular to Confucianism or Islam, but rather an expression of socio-economic progression.<sup>39</sup> Religious or cultural patterns are subject to change during the course of social development.<sup>40</sup> An example in this respect is the development of Catholic societies. Although Catholicism was regarded as a major obstacle to democratization a few decades ago,<sup>41</sup> many states with predominantly Catholic populations have since developed into stable democracies. Therefore, religion or culture is not an absolute impediment to, but at most a surmountable difficulty in, the process of democratization.

However, the question of the cultural prerequisites of democracy is not purely empirical. It also has a normative dimension. If the preconditions for democratization are established in a certain society, these necessarily

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36. SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 300 (1991).

37. According to the IMF, Brunei Darussalam, Hong Kong, Kuwait, Qatar, Singapore, and the United Arab Emirates are among the thirty most developed States based on their per capita incomes of more than 20,000 USD. These States, which could be classified under Huntington's political and cultural taxonomy as Confucian or Islamic, do not qualify as electoral democracies according to Freedom House's Annual Global Survey of Political Rights and Civil Liberties. *Compare* INT'L MONETARY FUND, *WORLD ECONOMIC OUTLOOK DATABASE* (Apr. 2007), <http://www.imf.org/external/pubs/ft/weo/2007/01/data/index.aspx> (providing GDP data for 2004), *with* FREEDOM HOUSE, *SELECTED DATA FROM FREEDOM HOUSE'S ANNUAL GLOBAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES* (2007), [http://www.freedomhouse.org/uploads/press\\_release/fiw07\\_charts.pdf](http://www.freedomhouse.org/uploads/press_release/fiw07_charts.pdf).

38. Japan, South Korea, and Taiwan, as well as Indonesia can be considered electoral democracies. The first three countries are influenced by Confucianism, while Indonesia is home to the largest Muslim population in the world.

39. Pippa Norris & Ronald Inglehart, *Islamic Culture and Democracy: Testing the "Clash of Civilizations" Thesis*, 1 COMP. SOC. 235, 239–41 (2002).

40. WOLFGANG MERKEL & HANS-JÜRGEN PUHLE, *VON DER DIKTATUR ZUR DEMOKRATIE: TRANSFORMATIONEN, ERFOLGSBEDINGUNGEN, ENTWICKLUNGSPFADE* [FROM DICTATORSHIP TO DEMOCRACY: TRANSFORMATIONS, CONDITIONS FOR SUCCESS, TRAJECTORIES] 40 (1999) (F.R.G.); Seymour Martin Lipset, *The Social Prerequisites of Democracy Revisited*, 59 AM. SOC. REV. 1, 7 (1994) [hereinafter Lipset, *Democracy Revisited*].

41. *Cf., e.g.*, Kenneth A. Bollen, *Political Democracy and the Timing of Development*, 44 AM. SOC'Y REV. 572, 584 (1979) (noting support for the view that "the greater the extent to which a culture is Protestant-based, the greater the level of political democracy"); Pierre Elliott Trudeau, *Some Obstacles to Democracy in Quebec*, in *CANADIAN DUALISM* 241, 245 (Mason Wade & Jean-C. Falardeau eds., 1960).

lead to cultural changes. From a normative perspective, this raises some problems. In the 1990s, some Asian governmental leaders, such as Malaysia's former Prime Minister, Mahathir bin Mohamed, and Singapore's former Head of State, Lee Kuan Yew, engaged in a debate on Asian values. They argued that Western democracy should not be imposed on Asian societies because it conflicts with certain Asian traditions. While Western democracy is a system of rights, according to these leaders, Asian societies perceive political communities to be embedded in a system of obligations and emphasize community-oriented values.<sup>42</sup>

Significant weight, however, should not be afforded to the assertion that cultural values exempt a State from pursuing democracy. Politicians may be strategically seeking to preserve the status quo from which they benefit. Moreover, making appeals to culture-based exceptions assumes an authority to define a given set of values.<sup>43</sup> Furthermore, cultural relativism fails to answer the question of who determines the composition of the group whose cultural tradition shall be relevant. It is not imperative to take the collectivity of citizens as the point of reference because a population can be very heterogeneous.<sup>44</sup> If the argument referring to Asian values is not of a purely strategic nature, its main purpose is to reinforce collective values.<sup>45</sup> As long as we understand democracy as a procedural framework, though, the concept has sufficient flexibility to realize a wide range of different value systems. Consequently, cultural diversity does not per se discredit the universal promotion of democratic rules.

## 2. Modernization Theory and its Modifications

Modernization theory attempts to establish a relationship between the development of a State and its degree of democratization.<sup>46</sup> In 1959, Martin Seymour Lipset made the groundbreaking claim that "the more well-to-do a nation, the greater the chances that it will sustain democra-

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42. Diane Mauzy, *The Human Rights and "Asian Values" Debate in Southeast Asia: Trying to Clarify the Key Issues*, 10 PAC. REV. 210, 215 (1997).

43. WOLFGANG MERKEL, *DEMOKRATIE IN ASIEN. EIN KONTINENT ZWISCHEN DIKTATUR UND DEMOKRATIE* [DEMOCRACY IN ASIA. A CONTINENT BETWEEN DICTATORSHIP AND DEMOCRACY] 91 (2003) (F.R.G.).

44. Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 488-89 (1989).

45. Jürgen Habermas, *Remarks on Legitimation Through Human Rights*, in *THE POSTNATIONAL CONSTELLATION: POLITICAL ESSAYS*, 113, 124-25 (Max Pensky ed. & trans., Blackwell Publishers Ltd. 2001).

46. See Larry Diamond, *Economic Development and Democracy Reconsidered*, in *REEXAMINING DEMOCRACY: ESSAYS IN HONOR OF SEYMOUR MARTIN LIPSET* 93, 93 (Gary Marks & Larry Diamond eds., 1992); Lipset, *Some Social Requisites*, *supra* note 34.

cy.”<sup>47</sup> Lipset argued that economic development leads to higher levels of urbanization<sup>48</sup> and education,<sup>49</sup> and to the establishment of a middle class with increased socio-economic mobility. This mobility deprives the underclass of its revolutionary potential and thus supports the stability of a democratic system.<sup>50</sup> Political elites are also less likely to be disadvantaged during periods of governmental change because the relative effect of a policy change is stronger in poorer countries.<sup>51</sup>

Since the publication of Lipset’s theory, several empirical studies have confirmed a correlation between economic development and democratization, showing that higher economic prosperity increases the probability that a State will have a stable democratic system.<sup>52</sup> However, there is no causal relationship between both factors.<sup>53</sup> Economic development is neither a necessary nor a sufficient precondition for democracy. There are important examples that disprove a determinist relationship. India, for example, has been a relatively stable democracy for several decades notwithstanding its per capita GDP, which has remained below 1000 USD.<sup>54</sup> In contrast, several Arab States with higher per capita incomes have yet to develop democratic structures. Furthermore, data suggests that economic development is not the principle cause for transitions to democracy. Economic prosperity merely stabilizes democratic institutions once they have developed.<sup>55</sup> Poor democracies also face a high probability of collapsing; only after reaching a certain stage of development are democracies sufficiently stable to survive economic crises.<sup>56</sup>

However, economic development is not the only factor that influences the democratization process. All political systems have informal rules and

47. Lipset, *Some Social Requisites*, *supra* note 34, at 75.

48. *Id.* at 78.

49. *Id.* at 78–82; Seymour Martin Lipset, et al., *A Comparative Analysis of the Social Requisites of Democracy*, 45 INT’L SOC. SCI. J. 155, 167 (1993).

50. Lipset, *Some Social Requisites*, *supra* note 34, at 83.

51. *Id.* at 84.

52. PHILIP COULTER, SOCIAL MOBILIZATION AND LIBERAL DEMOCRACY (1975); Kenneth A. Bollen & Robert W. Jackman, *Economic and Noneconomic Determinants of Political Democracy in the 1960s*, 1 RES. POL. SOC. 27, 42 (1985); Diamond, *supra* note 46, at 93–96; Lipset, et al., *supra* note 49.

53. MANFRED G. SCHMIDT, DEMOKRATIETHEORIEN [DEMOCRACY THEORIES] 441 (2000) (F.R.G.); MERKEL & PUHLE, *supra* note 40, at 33; Bruce J. Bueno de Mesquita & George W. Downs, *Development and Democracy*, 84 FOREIGN AFF. 77 (2005) (noting that China’s tremendous economic growth has not yielded democratic development).

54. See INT’L MONETARY FUND, *supra* note 37.

55. Adam Przeworski & Fernando Limongi, *Modernization: Theories and Facts*, 49 WORLD POL. 155, 166 (1997).

56. *Id.* at 169–70.

arrangements that support political processes.<sup>57</sup> While such mechanisms may ideally complement formal constitutional institutions and increase their flexibility, informal networks can be used to pervert democratic rules if the democratic system is unstable or defective.<sup>58</sup> This involves political actors strengthening their power by relying on exclusive networks outside of constitutional institutions. Such defective democracies are thus likely to breakdown in social or economic crises or to transform into open autocracies.

How do defective democracies differ from functional ones? Tatu Vanhanen suggests a rational approach, positing a relationship between the degree of democratization and the degree to which social power resources are distributed.<sup>59</sup> If power resources are widely dispersed, it is difficult for a specific group within a society to oppress other social groups by establishing and maintaining hegemonic structures.<sup>60</sup> The degree of distribution is related to other socio-economic factors, including economic development and level of education.<sup>61</sup> Vanhanen's approach thus supplements rather than modifies modernization theory.

Charles Tilly offers another decisive factor, state institutional capacity.<sup>62</sup> According to Tilly, strong civil and political institutions increase the prospects for a successful democratization process, as these institutions can offset one of the most significant obstacles to this process, "autonomous power centers."<sup>63</sup> Of course, there are limits: if a State is too strong, political actors have incentives to claim exclusive power and undermine democratization. Thus, informal "trust networks" have to be integrated into the public political space.<sup>64</sup> While power dispersion continues to serve an important function, it must take place within state institutions, rather than in opposition to them.

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57. CHARLES TILLY, DEMOCRACY 88 (2007) (analysing how the establishment of trust networks facilitates democratic development); Wolfgang Merkel & Aurel Croissant, *Formale und informale Institutionen in defekten Demokratien* [*Formal and Informal Institutions in Defective Democracies*], 41 POLITISCHE VIERTELJAHRESSCHRIFT 3, 16 (2000) (F.R.G.).

58. WOLFGANG MERKEL ET AL., DEFEKTE DEMOKRATIE [DEFECTIVE DEMOCRACY] 28 (2003) (F.R.G.).

59. TATU VANHANEN, PROSPECTS OF DEMOCRACY 5 (1997); Tatu Vanhanen, *Social Constraints of Democratization*, in STRATEGIES OF DEMOCRATIZATION 19, 21 (Tatu Vanhanen ed., 1992).

60. VANHANEN, *supra* note 59, at 5.

61. Vanhanen, *supra* note 59, at 21.

62. TILLY, *supra* note 57, at 161–85.

63. *Id.* at 164.

64. *Id.* at 80–105.

Turning to cultural scholarship, commentators have argued that democratization depends on citizens and political elites internalizing similar understandings of democratic values.<sup>65</sup> Certainly, democratic values are not embraced over night. These values must be learned, accumulated, and assimilated as social capital.<sup>66</sup> Forming them requires education and experience with democratic institutions.<sup>67</sup> Furthermore, socio-economic change may lead to a transformation of political values.<sup>68</sup>

In summary, the following conclusions can be drawn. First, the functioning and stability of democracy depend on several interdependent factors: socio-economic development, the diffusion of power resources, stable civil and political institutions, and a democratic culture. Accordingly, democratization rarely takes place abruptly: it is usually a gradual process.<sup>69</sup>

### 3. Cultural and Ethnic Homogeneity

The debate on cultural, religious, and ethnic homogeneity as a precondition for a stable democracy dates back to John Stuart Mill, according to whom:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist.<sup>70</sup>

As belonging to a particular cultural, religious, or ethnic group heavily influences identity, in many pluralistic societies, voting often follows

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65. GABRIEL ABRAHAM ALMOND & SIDNEY VERBA, *THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS* 498 (1963); Larry Diamond & Juan José Linz, *Introduction: Politics, Society, and Democracy in Latin America*, in 4 *DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA* 1, 10 (Larry Diamond et al. eds., 1989).

66. ROBERT D. PUTNAM ET AL., *MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY* 99–116 (1993) (tracing the history of civil communities in Italy).

67. ALMOND & VERBA, *supra* note 65, at 501. In this context, it is interesting to note that former British colonies had far more success with the installation of democracy than the former colonies of other European nations. *See also* Lipset, *Democracy Revisited*, *supra* note 40, at 5 (comparing the practice of the British with that of other colonial powers in introducing certain democratic institutions in their colonies). *See* Bollen & Jackman, *supra* note 52; Myron Weiner, *Empirical Democratic Theory*, in *COMPETITIVE ELECTIONS IN DEVELOPING COUNTRIES* 3, 19 (Myron Weiner & Ergun Özbudun eds., 1987).

68. Diamond & Linz, *supra* note 65, at 12.

69. Lipset, *Democracy Revisited*, *supra* note 40, at 4.

70. JOHN STUART MILL, *CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 310 (photo. reprint 1991) (1861).

social affiliations.<sup>71</sup> It is thus barely surprising that empirical studies suggest that the probability of establishing democracy in homogeneous societies is twice as high as in segmented societies.<sup>72</sup>

Scholars have proposed various remedies to overcome problems associated with diverse societies. The most widely recognized proposal is Arend Lijphart's model of consociational democracy.<sup>73</sup> Lijphart seeks to describe a system in which every major social group is represented, identifying four fundamental characteristics: government created by "grand coalition"; mutual veto rights to protect minority interests; proportional representation in politics and civil service, as well as proportional distribution of public funds; and a federal structure that gives each social group significant autonomy.<sup>74</sup>

However, consociationalism implicitly assumes that human identity is unalterable. Identity is not an inherent characteristic of human beings, but a social construct.<sup>75</sup> Although identity is not infinitely alterable, it can change with time and circumstance.<sup>76</sup> Research in social psychology also shows that the interaction among different social groups can enhance the possibility of forming a common superordinate identity.<sup>77</sup> Consociationalist models thus run the risk of deepening rather than overcoming divisions in society. This does not mean, though, that democracy is impossible in pluralistic societies. One solution is to put in place voting procedures that discourage incentives to vote according to cultural, religious, or ethnic cleavages.<sup>78</sup>

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71. Dirk Berg-Schlosser, *Empirische Voraussetzungen und allgemeine Konstituierungsbedingungen von Demokratie* [Empirical Premises and Necessary Conditions of Democracy], in *PERSPEKTIVEN DER DEMOKRATIE: PROBLEME UND CHANCEN IM ZEITALTER DER GLOBALISIERUNG* 57, 57 (Dirk Berg-Schlosser & Hans-Joachim Giegel eds., 1999) (F.R.G.).

72. Adrian Karatnycki, *The Decline of Illiberal Democracy*, 10 J. DEM. 112, 117 (1999).

73. AREND LIJPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 21–36 (1984); AREND LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES: A COMPARATIVE EXPLORATION* (2d ed. 1980) [hereinafter LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*].

74. LIJPHART, *DEMOCRACY IN PLURAL SOCIETIES*, *supra* note 73, at 25.

75. DONALD L. HOROWITZ, *ETHNIC GROUPS IN CONFLICT* 684 (1985).

76. SHAPIRO, *supra* note 8, at 95.

77. Samuel L. Gaertner et al., *The Common Ingroup Identity Model: Recategorization and the Reduction of Intergroup Bias*, 4 EUR. REV. SOCIAL PSYCHOL. 1, 2–3 (1993).

78. See HOROWITZ, *supra* note 75, at 628–52 (offering proposals for overcoming political divides along ethnic lines, including mechanisms whereby parties must obtain a certain minimum number of votes from more than one social group in order to be elected).

Nevertheless, attempts to unify through incentive-based voting mechanisms carry certain risks. Without a consensus on the fundamental rules of the political game, they cannot surmount social divisions.<sup>79</sup> The remedy in these circumstances is to promote socio-economic development. States with highly segmented societies often have weak institutional structures.<sup>80</sup> Thus, formal institutions have to be strengthened, and trust in these institutions must be developed, while a common identity is concurrently established. Consequently, in the ideal case, nation- and capacity-building precede the transition to democracy.<sup>81</sup>

#### 4. Conclusions

The different theories explaining democratization present a complex picture. The approaches are not mutually exclusive, but rather highlight different aspects of the process of democratization. Transition to and consolidation of democracy are dependent on a variety of factors, defying monocausal explanations.<sup>82</sup> Therefore, democracy has no necessary or sufficient prerequisites, meaning that neither low levels of economic development nor significant cultural, religious, or ethnic heterogeneity preclude the establishment of a relatively stable democracy.<sup>83</sup> Conversely, significant economic prosperity or social homogeneity do not lead to an automatic transition to democracy.

Despite the lack of causal explanations, there still remain significant correlations between economic development and social cohesion, and democratization. Low economic development or weak social homogeneity can endanger the consolidation of democracy. These obstacles are malleable,<sup>84</sup> but they are subject to long-term processes that are not necessarily steady.<sup>85</sup> As a result, sometimes it may be more effective to compromise short-term successes in order to pursue long-term goals.<sup>86</sup> Furthermore, in certain circumstances, it may be advisable to engage in nation- and

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79. Andrew Reynolds, *Constitutional Medicine*, 16 J. DEM. 54, 57 (2005).

80. TILLY, *supra* note 57, at 176–77.

81. Philippe C. Schmitter & Javier Santiso, *Three Temporal Dimensions to the Consolidation of Democracy*, 19 INT'L POL. SCI. REV. 69, 81 (1998).

82. MERKEL & PUHLE, *supra* note 40, 62; SHAPIRO, *supra* note 8, at 80.

83. MAMODOU GAZIBO, LES PARADOXES DE LA DÉMOCRATISATION EN AFRIQUE [THE PARADOXES OF DEMOCRATIZATION IN AFRICA] 228 (2005) (Fr.).

84. Juan José Linz & Alfred Stephan, *Toward Consolidated Democracies*, 7.2 J. DEM. 14, 23 (1996).

85. RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 99–100 (2005); Schmitter & Santiso, *supra* note 81, at 82–84.

86. Javier Santiso, *A la recherche des temporalités de la démocratisation* [In Search of the Temporalities of Democratization] 44 REVUE FRANÇAISE DE SCIENCE POLITIQUE 1079, 1082 (1994) (Fr.).



identity-building before fostering the establishment of institutions. Because there is no universally valid formula for success, many political scientists stress the unpredictable character of democratization, describing it as a “complex, long-term, dynamic and open-ended process.”<sup>87</sup> Although elections are typically a step in the overall process, they are not necessarily the first step.<sup>88</sup> Democratization is thus a teleological process,<sup>89</sup> and its final objective is the establishment of a legitimate form of government. This process, though, does not necessarily have to be democratic itself.<sup>90</sup>

## II. DEMOCRATIC TELEOLOGY IN POSITIVE INTERNATIONAL LAW

Given the process-like character of democratization, Part II of this Article examines how this understanding of democracy is reflected in positive international law, while paying particular attention to how our working definition of democracy, which centers upon the role of elections, is represented in institutional and regional practice. Towards this end, this section critically reviews two approaches to identifying customary norms: deductive and inductive. The first relies on an interpretative methodology in identifying customary norms.<sup>91</sup> According to this approach, some scholars try to deduce customary norms from more abstract principles. Based on the assumption that the legal system is holistic and without internal contradictions, a rule must be considered customary law if it follows necessarily from a more general principle that has already been accepted.<sup>92</sup> Section A considers the attempts of some scholars to employ this interpretative approach in order to deduce a right to democratic governance from the principle of self-determination.

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87. WHITEHEAD, *supra* note 9, at 27.

88. Marks, *supra* note 11, at 87.

89. Andreas Schedler, *What is Democratic Consolidation?*, 9 J. DEM. 91, 95 (1998). When Whitehead emphasizes the open-endedness of the process, he does not want to contest the teleological character of democratization. See WHITEHEAD, *supra* note 9, at 28 (observing that democracy is a concept that is, to a certain extent, indeterminate and can be implemented in a variety of different ways).

90. See Schmitter & Santiso, *supra* note 81, at 79 (discussing the undemocratic nature of many democratization processes).

91. See Bruno Simma & Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 AUST. Y.B. INT'L L. 82 (1992) (showcasing the development towards more interpretative methods in identifying customary international law).

92. Albert Bleckmann, *Völkergewohnheitsrecht trotz widersprüchlicher Praxis? [Customary International Law Despite Contrary Practice?]* 36 HEIDELBERG J. INT'L L. 374, 390 (1976) (F.R.G.); Christian Tomuschat, *Obligations Arising for States Without or Against Their Will*, 241 RECUEIL DES COURS 195, 293–300 (1993).

According to the inductive approach, customary norms are identified by inducing them from state practice and *opinio juris*.<sup>93</sup> In Section B, we will thus analyze the relevant international practice on democracy, such as different U.N. resolutions, regional mechanisms designed to preserve democracy, and the reactions of the international community to coups against elected regimes. This analysis will show that international law does not contain a right to democratic governance. Instead, it will identify a principle of democratic teleology, that is, States are legally obliged to develop towards democracy.

#### A. *Self-Determination*

Scholars have used the deductive approach in an attempt to derive a right to democratic governance from the principle of self-determination.<sup>94</sup> There are two strands to this argument, one contextual and the other logical. This Section argues that both fall short. Although there is a textual relationship between democracy and self-determination within the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”), it does not translate into a customary principle of self-determination. The logical argument fails because it does not take into account the difference between establishing a political system and the content of the political system itself. Instead, this Section proposes that self-determination only requires a government to be representative, not democratic.

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93. See Statute of the International Court of Justice art. 38(1)(b), June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 933.

94. See, e.g., ANTONIO CASSESE, SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL 311 (1995); Antonio Cassese, *The Self-Determination of Peoples*, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 92, 97 (Louis Henkin ed., 1981); Juan Francisco Escudero Espinosa, *Hacia una Intervención Armada en Favor de la Democracia?: El “Precedente” de Haití [Towards Armed Intervention in Favor of Democracy?: The “Precedent” of Haiti]*, 12 ANUARIO DE DERECHO INTERNACIONAL 297, 344–56 (1996); Allan Rosas, *Internal Self-Determination*, in MODERN LAW OF SELF-DETERMINATION 225, 241–46 (Christian Tomuschat ed., 1993); Linos-Alexandre Sicilianos, *Les Nations Unies et la démocratisation de l’Etat: Nouvelles tendances*, [The United Nations and the Democratization of the State: New Trends], in LA CONTRIBUTION DES NATIONS UNIES À LA DÉMOCRATISATION DE L’ÉTAT 13, 24 (Rostane Mehdi ed., 2002); Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in MODERN LAW OF SELF-DETERMINATION, *supra*, at 101, 134–37; Daniel Thürer, *Self-Determination*, in 4 ENCYCLOPEDIA OF PUB. INT’L L. 364, 372 (Rudolf Bernhardt ed., 2000).

### 1. Democracy as Mandatory Consequence of Self-Determination

Originally, self-determination had a primarily external direction, its strongest impact occurring in the context of decolonization.<sup>95</sup> However, through its incorporation into Common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights,<sup>96</sup> it also gained an internal dimension.<sup>97</sup> According to this provision, the principle of self-determination grants every people, *inter alia*, the right to determine their political status freely. The U.N. General Assembly soon after affirmed this interpretation in its Declaration on Principles of International Law Concerning Friendly Relations ("Friendly Relations Declaration").<sup>98</sup>

Two main arguments attempt to deduce a democratic principle from the right to self-determination. The first argument is contextual and interprets Article 1 of the ICCPR<sup>99</sup> in the context of the Covenant's other provisions, in particular in conjunction with the right to democratic elections, as prescribed in Article 25.<sup>100</sup> According to this argument, the right to participate in elections informs how the right to determine political status is exercised.<sup>101</sup> However, it seems more convincing to interpret Articles 1 and 25 in a way that affords them independent normative

95. James Crawford, *The Rights of Peoples: "Peoples" or "Governments"?*, in *THE RIGHT OF PEOPLES* 55, 58 (James, Crawford ed., 1988).

96. ICCPR, *supra* note 17, art. 1; International Covenant on Economic, Social and Cultural Rights art. 1, Dec. 16, 1966, 993 U.N.T.S. 3.

97. Cassese, *supra* note, at 94; Christoph Gusy, *Selbstbestimmung im Wandel. Von der Selbstbestimmung durch den Staat zur Selbstbestimmung im Staat [Self-Determination in Flux. From Self-Determination Through the State to Self-Determination in the State]*, 30 *ARCHIV DES VÖLKERRECHTS* 385, 405 (1992) (F.R.G.).

98. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. Doc. A/2625 (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

99. See ICCPR, *supra* note 17, art. 25.

100. *Id.*

101. Cassese, *supra* note at 94; Christian Hillgruber & Bernhard Kempen, *Das Selbstbestimmungsrecht des deutschen Volkes und der Teso-Beschluß des Bundesverfassungsgerichts [The German People's Right to Self-Determination and Teso-Decision of the Federal Constitutional Court]*, 33 *RECHT IN OST UND WEST* 323, 325–26 (1989) (F.R.G.); Alexandre-Charles Kiss, *The Peoples' Right to Self-Determination*, 7 *HUM. RTS. L.J.* 165, 171 (1986); Rosas, *supra* note 94, at 244; Hans A. Stöcker, *Europäische Menschenrechtskonvention, Ordre-Public-Vorbehalt und nationales Selbstbestimmungsrecht [The European Convention on Human Rights, the Public Order Exception and the National Right to Self-Determination]*, 14 *EUROPÄISCHE GRUNDRECHTE ZEITSCHRIFT* 473, 477 (1987) (F.R.G.); Thornberry, *supra* note 94, at 134–37; Thürer, *supra* note 94, at 372.

scope.<sup>102</sup> If the guarantees of self-determination, as shaped by Article 25 of the ICCPR, do not exceed the right to democratic elections, then the linkage is unnecessary. In order to ensure elections, Article 25 offers a sufficient normative basis. If one wants to draw further conclusions, a mere connection between and abstraction from essentially independent principles is not enough. If we interpret, for instance, the customary principle of self-determination outside the ICCPR's framework and in light of Article 25, then the scope of the electoral guarantee would extend impermissibly beyond the limits of the Covenant.

The second argument is more fundamental. Instead of focusing on the normative context, it seeks to establish a logical relationship between self-determination and democracy. The right to choose a political system belongs to the people, not their government. It has been argued that this decision must be effectuated through democratic mechanisms, as non-democratic means are not attributable to a people.<sup>103</sup> However, this "logical" relationship is based on a problematic premise.<sup>104</sup> It fails to distinguish between the act of creating a political system, and the actual content and structure of government, namely, the *pouvoir constituant* and the *pouvoir constitué*.<sup>105</sup> The right to self-determination involves the former, but not necessarily the latter. History provides several examples where citizens opted through electoral means to delegate power to political elites who then established authoritarian rule.<sup>106</sup>

One solution to this dilemma is to distinguish formally between the act of establishing a political system and the political system itself. The participation of citizens is limited to the former. If they choose a system other than democracy, they have, by this act, exhausted their right to self-determination.<sup>107</sup> However, this view cannot explain why the act of self-

102. Christian Tomuschat, *Democratic Pluralism: The Right to Political Opposition*, in HUMAN RIGHTS AND PLURALIST DEMOCRACY 27, 40 (Allan Rosas et al. eds., 1992).

103. Rosas, *supra* note 94, at 229; Sicilianos, *supra* note 94, at 24.

104. Cf. Russel A. Miller, *Self-Determination in International Law and the Demise of Democracy?*, 41 COLUM. J. TRANSNAT'L L. 601 (2003) (presenting a historical argument to challenge the assumed correlation between democracy and self-determination).

105. On this distinction, see Ernst-Wolfgang Böckenförde, *Die verfassungsgebende Gewalt des Volkes—Ein Grenzbegriff des Verfassungsrechts* [The Constituent Power of the People—A Limit-Concept of Constitutional Law], in STAAT, VERFASSUNG, DEMOKRATIE 90, 98–107 (1991) (F.R.G.).

106. Jürgen Gebhardt, *Das demokratische Prinzip und die moderne politische Ordnung* [The Democratic Principle and the Modern Political Order], in DEMOKRATIE—CHANCEN UND HERAUSFORDERUNGEN IM 21. JAHRHUNDERT 19, 28 (André Kaiser & Wolfgang Leidhold eds., 2005) (F.R.G.).

107. Karl Doehring, *Demokratie und Völkerrecht* [Democracy and International Law], in TRADITION UND WELTOFFENHEIT DES RECHTS. FESTSCHRIFT FÜR HELMUT STEINBERGER

determination should be irreversible. Electoral outcomes depend on specific historical circumstances, and these circumstances may change over time, just as citizens' preferences or the very composition of a population itself. Therefore, it is difficult to justify why the citizenry of one historical moment should have the power to bind future generations.

Gregory Fox and Georg Nolte set forth another solution in their contribution on "intolerant democracies."<sup>108</sup> Addressing whether democracies should be allowed to fight political tendencies directed against the system itself, they propose a substantive concept of democracy. According to their concept, electoral results may be disregarded in order to prevent an undemocratic opposition from coming to power, thereby protecting democracy as such. This argument, though, exhibits a predisposition towards democracy.<sup>109</sup> Democracy, or even a specific type of substantive democracy, is considered to be an absolute value *a priori*. It has been shown, however, that the value of democracy always depends on socio-economic circumstances.<sup>110</sup> Thus, Alberto Asor Rosa's statement is quite astute:

[D]emocracy, precisely because it is a *system of mediocrity* that cannot make itself out to be an absolute or an end in itself . . . is a *game* whose defining feature is that it allows its own rules to be called into question. *If it does not, it is already something else.*<sup>111</sup>

## 2. Representation and Self-Determination

Nevertheless, this observation does not lead to the conclusion that the right to self-determination does not impose any restrictions on the power of political elites to choose a form of government. With regard to the principle of self-determination, the United Nations stated in its Friendly Relations Declaration:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or

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127, 129 (Hans-Joachim Cremer, Thomas Giegerich & Dagmar Richter eds., 2002) (F.R.G.).

108. Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L.J. 1 (1995).

109. Martti Koskenniemi, "Intolerant Democracies": A Reaction, 37 HARV. INT'L L.J. 231, 232–33 (1996).

110. See *supra* Part I.B.

111. Alberto Asor Rosa, *La felicità e la politica [Happiness and Politics]*, LABORATORIO POLITICO Mar./Apr. 1981, at 10, 30–31 (Italy) ("[L]a democrazia, proprio in quanto *sistema delle mediocrità*, che non si assolutizza e non si erige esso stesso a fine . . . è quel tale *gioco* che accetta di rimettere in discussione le proprie regole. *Se non lo fa, è già un'altra cosa.*") (author's translation).

in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a *government representing the whole people* belonging to the territory without distinction as to race, creed or colour.<sup>112</sup>

Consequently, not every form of government is compatible with self-determination. To conform, a government must be representative. A further argument supports this observation. If a government could exclusively determine the content of self-determination, then the principle of self-determination would not differ from the principle of state sovereignty and thus lose any independent value.<sup>113</sup>

However, representation does not necessarily have to be realized through elections. It may be realized by a government acting in the public interest, functioning as a government *for* the people. In this circumstance, the problem is determining what form of government should be recognized as representative. Unlike democracy, representativeness cannot be determined by the sole existence of certain institutions. Offering a helpful, substantive proposal, Georg Sørensen distinguishes among development-oriented regimes, growth-oriented regimes, and self-enriching regimes.<sup>114</sup> While development-oriented regimes strive to promote economic development as well as individual well-being, growth-oriented regimes focus on fostering economic growth without taking into account its effects on society.<sup>115</sup> Of the three, self-enriching regimes are incompatible with the right to self-determination. A second indicator of a representative government is its human rights record. Not every human rights violation renders a government illegitimate, as such violations occur even in the most advanced political systems.<sup>116</sup> However, where systematic violations of core human rights take place within its borders, a State is not representative of its citizens. It is illegitimate and, as a result, infringes upon the right of its population to self-determination.

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112. Friendly Relations Declaration, *supra* note 98, pmb. (emphasis added).

113. Crawford, *supra* note 95, at 56.

114. GEORG SØRENSEN, DEMOCRACY AND DEMOCRATIZATION. PROCESS AND PROSPECTS IN A CHANGING WORLD 76–81 (1998).

115. *Id.*

116. Certainly, a State remains responsible for its human rights violations even if the violations do not directly undermine the legitimacy of the State.

*B. International Practice: Establishing Democratic Teleology*

The inductive approach relies on the practice of international institutions.<sup>117</sup> This Section examines the approach to democracy in international law through the lens of democratization theory. It argues that international law does not contain a strict right to democratic governance, but rather a principle of democratic teleology. This principle has two dimensions.<sup>118</sup> States are not required to transition to democracy right away, but rather, must to develop towards democracy. Similarly, they are also obligated to prevent regressions in the process of democratization.<sup>119</sup>

Evidence supporting these two dimensions can be found in various fields of international law. The following analysis concentrates on three areas of especial importance. First it focuses on universal human rights instruments and the practice of international institutions, including the U.N. General Assembly. This appraisal reveals that the relevant documents predominantly employ process-oriented language that focuses on democratization instead of democracy. Moreover, the practices of regional bodies in the Americas, Europe, and Africa will be considered.<sup>120</sup> Instead

117. See JUDE I. IBEGBU, RIGHT TO DEMOCRACY IN INTERNATIONAL LAW 141–205 (2003); WHEATLEY, *supra* note 14, at 135–36; Tom J. Farer, *The Promotion of Democracy: International Law and Norms*, in THE UN ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEALS AND REALITY 32, 32 (Edward Newman & Roland Rich eds., 2004); Fox, *supra* note 3; Franck, *supra* note 3; Christian Fulda, Demokratie und pacta sunt servanda [Democracy and *Pacta Sunt Servanda*] (May 8, 2002) (unpublished Dr. iur. dissertation, Humboldt University, Berlin) (on file with the Brooklyn Journal of International Law) (F.R.G.); Dodzi Kokoroko, *Souveraineté étatique et principe de légitimité démocratique* [State Sovereignty and the Principle of Democratic Legitimacy], 16 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 37, 40 (2003) (Can.); Juliane Kokott, *Souveräne Gleichheit und Demokratie im Völkerrecht* [Sovereign Equality, and Democracy in International Law], 64 HEIDELBERG J. INT'L L. 517, 526–27 (2004) (F.R.G.); Christian Pippan, *Gibt es ein Recht auf Demokratie im Völkerrecht? [Is There a Right to Democracy in International Law?]*, in POPPER UND DIE MENSCHENRECHTE 119, 137–60 (Erwin Riefler ed., 2007) (F.R.G.); Roland Rich, *Bringing Democracy into International Law*, 12.3 J. DEM. 20, 21 (2001); Sicilianos, *supra* note 94; Attila Tanzi, *Remarks on Democracy in Contemporary International Law*, 61 LA COMUNITÀ INTERNAZIONALE 289 (2006); Christian Tomuschat, *L'intervention structurelle des Nations Unies* [The Structural Intervention of the United Nations], in LA CONTRIBUTION DES NATIONS UNIES À LA DÉMOCRATISATION DE L'ÉTAT, *supra* note 94, at 101; David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUS. J. INT'L L. 659, 665–68 (1997); Jan Wouters et al., *Democracy and International Law*, 34 NETH. Y.B. INT'L L. 137 (2003).

118. See Schedler, *supra* note 89, at 98.

119. *Id.*

120. The following analysis omits a detailed account on Asia. This is due to the fact that commitments to democracy are at best embryonic. Nevertheless, some positive trends can be observed in the framework of the Association of South East Asian Nations (“ASEAN”). Democracy is first mentioned in the ASEAN’s Vientiane Action Program

of dealing with positive progress, these bodies focus on enforcement mechanisms meant to prevent setbacks once democracy has been introduced. The Section concludes by looking at military interventions in the name of democracy. Implicitly condemning the ousting of elected heads of state, these interventions also emphasize the need to prevent setbacks in the process of democratization.

### 1. International Institutions

#### (a) Right to Democratic Elections Under the ICCPR

Universal treaties are a well-recognized indicator for the existence of customary norms. When States enter into treaty obligations, they express their intent to be bound by its norms and thus manifest a corresponding *opinio juris*.<sup>121</sup> The most important treaty norm in this context is Article 25 of the ICCPR. It ensures the right to genuine, periodic elections, which thereby guarantees the free expression of the electorate's will.<sup>122</sup> Although socialist States originally argued—based on the *travaux préparatoire*—that one-party systems could conform to Article 25, there is now consensus among international legal scholars that voters must have a more “meaningful choice” in order for a State to meet the Covenant's requirements.<sup>123</sup> A “free expression of the will of the electors”<sup>124</sup> and

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(“VAP”). Under Title II of the VAP, the enhancement of democracy is listed as one of the goals of ASEAN. The declaration employs process-oriented language, stating that democracy should be enhanced and presenting democracy as a goal, not a strict obligation. Vientiane Action Program Title II (1), Nov. 29, 2004, available at <http://www.aseansec.org/VAP-10th%20ASEAN%20Summit.pdf>. For more detailed accounts of democracy in the context of ASEAN, see Amitav Acharya, *Democratization and the Prospects for Participatory Regionalism in Southeast Asia*, 24 *THIRD WORLD Q.* 375, 378 (2003); Richard Burchill, *Regional Integration and the Promotion and Protection of Democracy and Human Rights in Asia: Lessons from ASEAN* (Working Paper), <http://law.nus.edu.sg/aslasi/workingpapers/2007/doc/Mr%0Richard%20Burchill.pdf> (last visited Oct. 20, 2008).

121. *North Sea Continental Shelf* (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20). For additional commentary on the issue of treaties as indicators of customary law, see generally Richard R. Baxter, *Treaties and Custom*, 129 *RECUEIL DES COURS* 25 (1970).

122. ICCPR, *supra* note 17, art. 25.

123. SARAH JOSEPH ET AL., *THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS AND COMMENTARY* ¶ 22.31 (2d ed. 2004); Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 48, 57–59 (Gregory H. Fox & Brad R. Roth eds., 2000); Karl Josef Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS*, *supra* note 94, at 209, 240; Niels Petersen, *Elections, Right to Participate in, International Protection*, in *MAX PLANCK ENCYCLOPEDIA OF PUB. INT'L L.* ¶ 3, available at <http://www.mpepil>.



“[participation] in the conduct of public affairs”<sup>125</sup> are only possible when voters have a choice between not only different persons, but also different political agendas.<sup>126</sup>

Thus far, 160 States have ratified the ICCPR.<sup>127</sup> More than eighty percent of the international community has agreed to select their governments through free and fair elections. However, there are notable exceptions. China and Pakistan, two of the ten most populous States in the world, have failed to ratify the ICCPR.<sup>128</sup> Furthermore, the list of abstaining countries shows patterns of regional concentration. Especially in East and Southeast Asia,<sup>129</sup> a considerable number of States have not committed themselves to holding periodic elections. Moreover, the number of States parties becomes less impressive when actual state practice is considered. Many of the States that have ratified the ICCPR do not actually practice electoral democracy. According to a 2007 survey of Freedom House, only two-thirds of the signatory States qualify as electoral democracies.<sup>130</sup> Mere commitment to Article 25 without accompanying state practice is insufficient to establish a customary principle of democracy.<sup>131</sup>

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com/subscriber\_article?script=yes&id=/epil/entries/law-9780199231690-e785&recno=1&searchType=Advanced&author=petersen (last visited Oct. 27, 2008).

124. ICCPR, *supra* note 17, art. 25(b).

125. *Id.* art. 25(a).

126. U.N. Human Rights Committee, *Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights—Forty-Eighth Session—Concerning Communication No. 314/199 (Bwalya v. Zambia)*, ¶ 6.6, U.N. Doc. CCPR/C/48/D/314/1988 (Mar. 30, 1988).

127. As of October 17, 2008, the following States have yet to ratify the Covenant: Antigua and Barbuda, Bahamas, Bhutan, Brunei, China, Comoros, Cuba, Fiji, Guinea-Bissau, Kiribati, Laos, Malaysia, Marshall Islands, Micronesia, Moldova, Myanmar, Oman, Pakistan, Palau, Papua New Guinea, Saint Kitts and Nevis, Saint Lucia, São Tomé and Príncipe, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates, and Vanuatu. See Office of the U.N. High Commissioner for Human Rights, Status of Ratifications, International Covenant on Civil and Political Rights, <http://www2.ohchr.org/english/bodies/ratification/4.htm> [hereinafter ICCPR Ratifications] (last visited Nov. 13, 2008).

128. *Id.* (both Pakistan and China are signatories to the Convention).

129. Bhutan, Brunei, China, Laos, Malaysia, Myanmar, Pakistan, and Singapore have yet to ratify the Covenant. *Id.*

130. Arch Puddington, *Freedom in the World 2007: Freedom Stagnation Amid Push-back Against Democracy*, <http://www.freedomhouse.org/template.cfm?page=130&year=2007> (last visited Nov. 14, 2007).

131. VALENTINA GRADO, *GUERRE CIVILI E TERZI STATI* [CIVIL WAR AND THIRD STATES] 260 (1998) (Italy); BRAD R. ROTH, *GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW* 417 (1999); Dietrich Schindler, *Völkerrecht und Demokratie* [International Law and Democracy], in *LIBER AMICORUM PROFESSOR SEIDL—HOHENVELDERN—IN HONOUR OF HIS 80TH BIRTHDAY* 611, 622 (Gerhard Hafner et al. eds., 1998) (Neth.); Ste-

*(b) Declarations of the U.N. General Assembly*

The U.N. General Assembly has put forth a more modest approach. Since 1988, it has been issuing resolutions in a series entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.”<sup>132</sup> The first resolution does not contain an explicit affirmation of a right to democratic elections. Instead, in the resolution, the General Assembly

2. [s]tresses 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, including political, economic, social, and cultural rights;

3. [d]eclares that determining the will of the people requires an electoral process which accommodates distinct alternatives, and this process should provide an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others.<sup>133</sup>

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fan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, in *THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 499, 534 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); Same Varayudej, *A Right to Democracy in International Law: Its Implications for Asia*, 12 *ANN. SURV. INT’L & COMP. L.* 1, 8, 17 (2006); Wheatley, *supra* note 24, at 233; Mirko Zambelli, *La démocratie: principe universel et fondamental de l’ordre juridique international? [Democracy: Universal and Fundamental Principle of the International Legal Order?]*, 10 *AKTUELLE JURISTISCHE PRAXIS* 667, 673 (2001) (Fr.). For opposing evaluations, see Thomas M. Franck, *Legitimacy and the Democratic Entitlement*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 123, at 25, 27; Fulda, *supra* note 117, at 86; Nigel D. White, *The United Nations and Democracy Assistance: Developing Practice Within a Constitutional Framework*, in *DEMOCRACY ASSISTANCE: INTERNATIONAL CO-OPERATION FOR DEMOCRATIZATION* 67, 72 (Peter Burnell ed., 2000).

132. G.A. Res. 62/150, U.N. Doc. A/RES/62/150 (Dec. 18, 2007); G.A. Res. 60/162, U.N. Doc. A/RES/60/162 (Dec. 16, 2005); G.A. Res. 58/180, U.N. Doc. A/RES/58/180 (Dec. 22, 2003); G.A. Res. 56/159, U.N. Doc. A/RES/56/159 (Dec. 19, 2001); G.A. Res. 54/173, U.N. Doc. A/RES/54/173 (Dec. 17, 1999); G.A. Res. 52/129, U.N. Doc. A/RES/52/129 (Dec. 12, 1997); G.A. Res. 50/185, U.N. Doc. A/RES/50/185 (Dec. 22, 1995); G.A. Res. 49/190, U.N. Doc. A/RES/49/190 (Dec. 23, 1994); G.A. Res. 48/131, U.N. Doc. A/RES/48/131 (Dec. 20, 1993); G.A. Res. 47/138, U.N. Doc. A/RES/47/138 (Dec. 18, 1992); G.A. Res. 46/137, U.N. Doc. A/RES/46/137 (Dec. 17, 1991); G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); G.A. Res. 44/146, U.N. Doc. A/RES/44/146 (Dec. 15, 1989); G.A. Res. 43/157, U.N. Doc. A/RES/43/157 (Dec. 8, 1988).

133. G.A. Res. 43/157, *supra* note 132, ¶¶ 1–2 (emphasis added).

Instead of imposing a strict obligation, the resolution stresses the importance of elections. Paragraph 2 emphasizes that elections are a necessary precondition for output legitimacy, while also invoking an empirical justification.<sup>134</sup> In contrast, Paragraph 3 is of a normative nature, referring to the “will of the people” and highlighting the necessity of implementing their will through an electoral process.<sup>135</sup>

This resolution was slightly amended in following years. The successive versions contain reservations underlining the autonomy of States to develop their own political systems. Adopted in 1991, Resolution 46/137, for example,

[r]ecogniz[es] that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State's sovereign right, in accordance with the will of its people, freely to choose and *develop* its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.<sup>136</sup>

Furthermore, in the operative part, this Resolution

[u]nderscores the duty of each Member State, in accordance with the provisions of the Charter of the United Nations, to respect the decisions taken by other States, in accordance with the will of their people, in freely choosing and *developing* their electoral institutions.<sup>137</sup>

Concurrently, in 1989 the General Assembly adopted a counter-resolution series, “Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in their Electoral Processes,”<sup>138</sup> which stresses the right of peoples to determine their polit-

134. *Id.*

135. *Id.*

136. G.A. Res. 46/137, *supra* note 132, ¶ 5 (emphasis added). The two resolutions passed in 1989 and 1990 include this paragraph in the operative part instead of the preamble. G.A. Res. 45/150, *supra* note 132; G.A. Res. 44/146, *supra* note 132.

137. *Id.* (emphasis added).

138. G.A. Res. 54/168, U.N. Doc. A/RES/54/168 (Dec. 17, 1999); U.N. Doc. A/RES/52/119 (Dec. 12, 1997); G.A. Res. 50/172, U.N. Doc. A/RES/50/172 (Dec. 22, 1995); G.A. Res. 49/180, U.N. Doc. A/RES/49/180 (Dec. 23, 1994); G.A. Res. 48/124, U.N. Doc. A/RES/48/124 (Dec. 20, 1993); G.A. Res. 47/130, U.N. Doc. A/RES/47/130 (Dec. 18, 1992); G.A. Res. 46/130, U.N. Doc. A/RES/46/130 (Dec. 17, 1991); G.A. Res. 45/151, U.N. Doc. A/RES/45/151 (Dec. 18, 1990); G.A. Res. 44/147, U.N. Doc. A/RES/44/147 (Dec. 15, 1989). From 2001, the resolutions were adopted with a revised text that stresses the relationship between a people's right to determine their political system and the development of electoral institutions. *See* G.A. Res. 60/164, U.N. Doc.

ical, economic, and social systems. In this Resolution, the General Assembly

1. [r]eiterates that, by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right, freely and without external interference, to determine their political status and to pursue their economic, social and cultural development, and that every State has the duty to respect that right in accordance with the provisions of the Charter;

2. Affirms that it is the concern solely of peoples to determine methods and to establish institutions regarding the *electoral process*, as well as to determine the ways for its implementation according to their constitution and national legislation;

[. . .]

4. Urges all States to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system.<sup>139</sup>

At first glance, the two strands in these series appear to contradict each other.<sup>140</sup> While one praises the advantages of an electoral system of government, the other emphasizes the importance of national autonomy as well as a people's authority to choose a proper political, economic, and social system without external interference. However, any seeming contradiction is not as great as some scholars maintain. Even if a people have the right to determine their political system, the choice is not unlimited. As discussed in the previous section, a legitimate government must be representative.<sup>141</sup> Paragraph 5 of Resolution 46/137 expresses this point by emphasizing that the choice has to be made "in accordance with the will of the people."<sup>142</sup> Considering the difficulties of consolidat-

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A/RES/60/164 (Dec. 16, 2005); G.A. Res. 58/189, U.N. Doc. A/RES/58/189 (Dec. 22, 2003); G.A. Res. 56/154, U.N. Doc. A/RES/56/154 (Dec. 19, 2001).

139. G.A. Res. 44/147, *supra* note 138 (emphasis added).

140. Rafâa Ben Achour, *Égalité souveraine des états, droit des peuples à disposer d'eux-mêmes et liberté de choix du système politique, économique, culturel et social* [*The Sovereign Equality of States, the Peoples' Right to Self-determination, and the Freedom of Choice of the Political, Economic, Cultural, and Social System*], in FEDERICO MAYOR AMICORUM LIBER: SOLIDARITÉ, ÉGALITÉ, LIBERTÉ 785, 793 (Karel Vasak et al. eds., 1995) (Belg.); Slim Laghmani, *Vers une légitimité démocratique?* [*Towards a Democratic Legitimacy?*], in LES NOUVEAUX ASPECTS DU DROIT INTERNATIONAL 249, 269 (Rafâa Ben Achour & Slim Laghmani eds., 1994) (Fr.) (noting that they are an "exacte négation" of the pro-election resolutions).

141. See *supra* Part II.A.2.

142. G.A. Res. 46/137, *supra* note 132, ¶ 5.

ing the *pouvoir constituant* and *pouvoir constitué*,<sup>143</sup> though, this right to choose does not amount to an automatic right to democracy.

The resolutions, rather, suggest a teleological view of elections and democracy, upholding the desirability of electoral institutions without imposing a strict obligation to establish and honor them. In the above analysis of democratization theories, it has been shown that democratization is a long-term process, not a simple shift from one status to another.<sup>144</sup> By using the terms “developing” and “enhancing” to discuss electoral institutions, the language of these resolutions stresses this process-like character of democratization.

In addition, several other resolutions and declarations of the international community support this understanding of democratization. A prime example is General Assembly Resolution 55/96, which was adopted in 2000.<sup>145</sup> Its central purpose is to “call upon states to promote and consolidate democracy.”<sup>146</sup> Thus, the Resolution also uses process-oriented terminology by employing the words “promoting” and “consolidating.” The latter is often used in the social sciences to describe the teleological nature of democratization processes.<sup>147</sup> Similarly, the term “consolidation” bolsters the point that in international law democracy is both a classificatory and a gradual concept. Democratization not only involves the process leading to a transition to democracy, but also requires subsequent consolidation.

The aforementioned Vienna Declaration of Human Rights also includes a paragraph dedicated to democratization:

The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.<sup>148</sup>

Again, the language focuses on the process of realizing rather than the status of democracy. Finally, in the U.N. Millennium Declaration, one can find two statements championing the promotion of democracy or advocating the development of U.N. Member States' capacity for democratization.<sup>149</sup>

143. See *supra* Part II.A.1.

144. See *supra* Part I.B.4.

145. G.A. Res. 55/96, *supra* note 18.

146. *Id.* ¶ 1.

147. Schedler, *supra* note 89, at 95.

148. *Vienna Declaration*, *supra* note 4, ¶ 9.

149. G.A. Res. 55/2, ¶¶ 24–25 U.N. Doc. A/RES/55/2 (Sept. 8, 2000) (“We will spare no effort to promote democracy and strengthen the rule of law . . . . We resolve therefore

## 2. Regional Developments

*(a) The Americas*

Some of the most extensive guarantees concerning democracy can be found in the context of the Organization of American States (“OAS”). Article 23 of the American Convention on Human Rights<sup>150</sup> prescribes the right to participate in democratic elections. Furthermore, according to Article 2(b) of the OAS Charter,<sup>151</sup> the promotion of democracy is one of the Organization’s principal objectives. At the start of the 1990s, the OAS established a mechanism to implement this objective. In June 1991, the General Assembly of the OAS adopted Resolution 1080, which authorized the OAS Permanent Council to employ coercive measures against a Member State whose democracy was compromised.<sup>152</sup>

One year later, the Washington Protocol modified the founding charter.<sup>153</sup> Revised Article 9 of the Charter provides for suspending a State’s membership rights if its elected government has been overthrown by force. The mechanism governing this suspension is now outlined in greater detail in Articles 17 through 22 in the Inter-American Democratic Charter,<sup>154</sup> which was adopted in 2001.<sup>155</sup>

The OAS has applied this sanction mechanism several times. In September 1991, shortly after the adoption of Resolution 1080, it was first employed in response to Haiti’s president, Jean-Bertrand Aristide, being

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. . . [t]o strengthen the capacity of all our countries to implement the principles and practices of democracy.”)

150. American Convention, *supra* note 17.

151. Charter of the Organization of American States art. 2(b), Apr. 30, 1948 1948 T.I.A.S. 2361, 119 U.N.T.S. 3.

152. O.A.S. Doc. AG/RES 1080 (XXI-O/91) (June 5, 1991) (authorizing the Permanent Council to “devise a set of proposals that will serve as incentives to preserve and strengthen democratic systems”).

153. Protocol of Amendments to the Charter of the Organization of American States “Protocol of Washington,” 33 I.L.M 1005 (1994).

154. Inter-American Democratic Charter arts. 17–21, O.A.S. Doc. OEA/Ser.P/AG/Res.1 (XXVIII-E/01) (Sept. 11, 2001).

155. See Enrique Lagos & Timothy D. Rudy, *The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly*, 96 AM. J. INT’L L. 173 (2002); Sonia Picado, *The Evolution of Democracy and Human Rights in Latin America: A Ten-Year Perspective*, 11 HUM. RTS. BRIEF 28 (2004) (providing a more in-depth discussion of the Democratic Charter). Although the Democratic Charter is not directly binding as a resolution of the OAS General Assembly, according to Article 31 of the Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679, the mechanism in question can be regarded as an “interpretation” of Article 9 of the OAS Charter. See Enrique Lagos & Timothy D. Rudy, *In Defense of Democracy*, 35 U. MIAMI INTER-AM. L. REV. 283, 303–05 (2004).

ousted in a coup. The OAS Permanent Council convened immediately and condemned the coup, demanding that Aristide be reinstated.<sup>156</sup> Three days later, the OAS suspended trade relations with Haiti and all forms of non-humanitarian aid.<sup>157</sup> Subsequently, the United Nations assumed the case, and two years after the coup, it finally authorized the United States to intervene militarily to force the military junta to step down.<sup>158</sup>

In April 1992, the President of Peru, Alberto Fujimori, staged an auto-coup, in which he dissolved the parliament and arrested several opposition members.<sup>159</sup> The OAS Permanent Council expressly condemned this action,<sup>160</sup> and the international community suspended loans to Peru. The international pressure prompted Fujimori to concede the election of a constitutional assembly in November 1992.<sup>161</sup> Nevertheless, the effectiveness of these international measures was limited, as in the end Fujimori won the elections and maintained power.<sup>162</sup>

One year later, Guatemala's president, Serrano Elías, also initiated an auto-coup, dissolving the parliament, suspending several constitutional rights, and dismissing the constitutional court.<sup>163</sup> In this case, the OAS initiated sanctions severer than those used against Fujimori.<sup>164</sup> The Permanent Council unanimously condemned Serrano's coup and ultimately forced him to step down.<sup>165</sup>

Peru again became the focus of international attention in 2000 when the OAS sent a mission to Peru to monitor presidential elections.<sup>166</sup> The monitoring mission found itself unable to guarantee the technical minimum standards for counting the votes in the decisive ballot between

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156. O.A.S. Doc. CP/RES. 567 (870/91) (Sept. 30, 1991).

157. O.A.S. Doc. MRE/RES. 1/91, Ser. F/V.1 (Oct. 3, 1991).

158. See *infra* Part II.B.3.b (referring to the case of Haiti in more detail).

159. Picado, *supra* note 155, at 29.

160. O.A.S. Doc. MRE/RES. 1/92, OES/Ser. F./V.2 (Apr. 13, 1992).

161. Picado, *supra* note 155, at 29.

162. Tom J. Farer, *Collectively Defending Democracy in the Western Hemisphere: Introduction and Overview*, in *BEYOND SOVEREIGNTY: COLLECTIVELY DEFENDING DEMOCRACY IN THE AMERICAS* 1, 19–20 (1996).

163. Barry Steven Levitt, *A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter*, 48 *LATIN AM. POL. & SOC'Y* 93, 104 (2006).

164. See *id.* at 116 (noting that the reason for the different treatment was probably the fact that the Peruvian people supported Fujimori more than the Guatemalan people supported Serrano).

165. *Id.* at 105.

166. See *OAS Mission for Peru*, BBC NEWS, June 6, 2000, <http://news.bbc.co.uk/2/hi/americas/809399.stm>.

Fujimori and his contender, Alejandro Toledo.<sup>167</sup> The OAS thus cancelled the mission.<sup>168</sup> In its report, the delegation stated that the elections failed to meet international standards.<sup>169</sup> Despite this report, OAS Member States could not agree to condemn Peru on the basis of Resolution 1080.<sup>170</sup> The Permanent Council, adopting a compromise, sent a mission to Peru to investigate the situation in more detail.<sup>171</sup> The mission, however, was not completed because Fujimori stumbled into a corruption scandal and had to cede power.<sup>172</sup>

In February 2004, Haiti's President Aristide was toppled for a second time.<sup>173</sup> Following brief hostilities, Aristide was forced to step down and flee the country.<sup>174</sup> The president of the supreme court, Boniface Alexandre, succeeded Aristide as transitional president.<sup>175</sup> The reaction of the international community was much more lukewarm compared to thirteen years earlier. Although the OAS General Assembly reacted four months later, adopting a resolution that called upon Haiti to return to democracy and condemned the acts of violence since the coup,<sup>176</sup> the OAS failed to authorize formal sanctions or suspend Haiti's membership rights.<sup>177</sup> Most probably, this mild international reaction was due to Aristide's weak legitimacy, considering he won elections in 2000 that were subject to irregularities.<sup>178</sup> Furthermore, many human rights organizations blamed Aristide for the deteriorating human rights situation and political violence in the country.<sup>179</sup> This case suggests that the OAS treats coups d'état differently. Rather than automatically condemning every coup, the OAS considers the perceived legitimacy of an ousted head of state to be a decisive factor.

References to democracy are not limited to the OAS. Legal documents addressing democracy and elections can also be found in the framework

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167. *Fujimori Insists Poll 'Fair,'* BBC NEWS, May 30, 2000, <http://news.bbc.co.uk/2/hi/americas/768893.stm>.

168. *Id.*

169. *Toledo Withdraws from Peru Election,* BBC NEWS, May 22, 2000, <http://news.bbc.co.uk/2/hi/americas/759691.stm>.

170. *OAS Mission for Peru,* *supra* note 166.

171. *Id.*

172. Michele Wucker, *Haiti: So Many Missteps*, 21 *WORLD POL'Y J.* 41, 41-42 (2004).

173. *Id.*

174. *Id.*

175. David S. Berry, *Non-Democratic Transitions: Reactions of the OAS and CARICOM to Aristide's Departure*, 33 *SYRACUSE J. INT'L L. & COM.* 249, 256 (2005).

176. O.A.S. Doc. AG/RES. 2058 (XXXIV-O/04) (June 8, 2004).

177. Berry, *supra* note 175.

178. Wucker, *supra* note 172, at 41, 45.

179. *Id.* at 47.



of some Latin American regional organizations. In 1998, the Member States of the Andean Community ("CAN") adopted the Andean Community Commitment to Democracy<sup>180</sup> as a legally binding additional protocol to the founding statute of the CAN, the Cartagena Agreement.<sup>181</sup> In addition to expressing a commitment to democracy in Article 1, the protocol sets up a sanction mechanism in Article 4.<sup>182</sup> If the democratic order is disrupted in violation of Article 2, this mechanism provides for coercive measures ranging from the suspension of membership rights to ineligibility for loans from the financial institutions of the CAN.<sup>183</sup> Furthermore, Article 13 of the Human Rights Charter of the CAN prescribes a right to democracy, which is further specified in Articles 14 through 18.<sup>184</sup>

A similar mechanism was included in the framework of the *Mercado Común del Sur* ("MERCOSUR"). In 1996, the Member States adopted a declaration on democracy stating that the establishment and maintenance of democratic institutions are fundamental preconditions for cooperation with the MERCOSUR.<sup>185</sup> Violations may lead to the suspension of membership rights.<sup>186</sup> With the Protocol of Ushuaia, this mechanism has been transformed into an international treaty, applying to Bolivia and Chile in addition to the member signatories.<sup>187</sup>

Article 3 of the Protocol of Tegucigalpa, the founding statute of the System of Central American Integration ("SICA"),<sup>188</sup> identifies the promotion and strengthening of democracy as one of the organization's principal objectives.<sup>189</sup> In 1995, this objective was reaffirmed in the

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180. Additional Protocol to the Cartagena Agreement: "Andean Community Commitment to Democracy," Aug. 7, 1998, available at <http://www.comunidadandina.org/INGLES/normativa/democracy.htm>.

181. Official Codified Text of the Cartagena Agreement, May 26, 1969, 28 I.L.M. 1165, amended by the Quito Protocol (May 12, 1987).

182. Additional Protocol to the Cartagena Agreement, *supra* note 180, arts. 1, 4.

183. *Id.* art. 4.

184. Andean Charter for the Promotion and Protection of Human Rights arts. 13–18, Jul. 26, 2002, available at [http://www.comunidadandina.org/INGLES/documentos/documents/andean\\_charter.htm](http://www.comunidadandina.org/INGLES/documentos/documents/andean_charter.htm).

185. Declaración Presidencial sobre Compromiso Democrático en el MERCOSUR, June 25, 1996, ¶ 1, available at [http://www.mercosursalud.org/espanhol/mercosul/historico/Decl\\_compr\\_Pres.htm](http://www.mercosursalud.org/espanhol/mercosul/historico/Decl_compr_Pres.htm).

186. *Id.* ¶ 4.

187. Protocolo de Ushuaia sobre Compromiso Democrático en el MERCOSUR, la Republica de Bolivia y la Republica de Chile, July 24, 1998, available at <http://www.mercosur.int/msweb/portal%20intermediario/es/index.htm> (follow "Protocolo de Ushuaia" hyperlink).

188. *Sistema de Integración Centroamericana*.

189. Protocolo de Tegucigalpa a la Carta de la Organización de Estados Centroamericanos (ODECA) art. 3, Dec. 13, 1991, 1695 U.N.T.S. 382.

Framework Treaty on Democratic Security in Central America.<sup>190</sup> In addition to noting that the SICA is based on the principles of democracy and the rule of law, Article 1 of the Treaty obligates States to elect governments through universal and free elections.<sup>191</sup>

*(b) Europe*

As in the Americas, the institutional design of European international organizations shows a strong commitment to democracy. Article 3 of the first additional protocol to the European Convention on Human Rights<sup>192</sup> prescribes a right to participate in democratic elections. In contrast to the OAS, however, the principle of democracy has not been enshrined in the founding Statute of the Council of Europe (“Statute”).<sup>193</sup> Rather, Article 3 of the Statute provides that Member States “must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the objective of the Council as specified in Chapter I.”<sup>194</sup> Although missing in the operative part of the Statute, democracy is mentioned in the preamble. There, democracy is described as originating from the “spiritual and moral values which are the common heritage of the [European] peoples.”<sup>195</sup> According to Article 1(a) of the Statute, fulfilling these values is one of the main objectives of the Council.<sup>196</sup>

In practice, a State’s level of democratization has had an influence on its membership in the Council of Europe. When the parliamentary democracy in Greece was succeeded by a military dictatorship in 1967, the European Council’s Parliamentary Assembly recommended the exclusion of Greece to the Committee of Ministers.<sup>197</sup> Greece responded by withdrawing from the Council of Europe on December 12, 1969.<sup>198</sup> Similarly, the Council only admitted Portugal and Spain as members after each

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190. Tratado Marco de Seguridad Democrática in Centroamérica, Dec. 15, 1995, 2007 U.N.T.S. 191, available at [http://www.sieca.org.gt/publico/Reuniones\\_Presidentes/xvii/tratado1.htm](http://www.sieca.org.gt/publico/Reuniones_Presidentes/xvii/tratado1.htm)

191. *Id.* art. 1.

192. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 3, Mar. 20, 1952, Europ.T.S. No. 9.

193. Statute of the Council of Europe, May 5, 1949, Europ. T.S. No. 1.

194. *Id.* art. 3

195. *Id.* pmb1.

196. *Id.* art. 1(a).

197. Council of Europe, Recommendation 547 of the Consultative Assembly (Jan. 30, 1969) 17 Eur. Y.B. 277–79 (1969).

198. See Notification of the Greek Government Denouncing the Statute of the Council of Europe (Dec. 17, 1969) 17 Eur. Y.B. 327–29 (1969).

country reinstated democratic governments.<sup>199</sup> And after the dissolution of the Soviet Union, Russia's admission to the Council was delayed for several years because, *inter alia*, a report of experts testified that Russia had failed to meet "the Council of Europe's standards."<sup>200</sup>

In the Charter of Paris, enacted during the Conference for Security and Cooperation in Europe in 1990, European heads of state declared that democracy is the only admissible form of government.<sup>201</sup> Although the Charter of Paris does not have immediate binding force, consistent with Article 31 of the Vienna Convention on the Law of Treaties,<sup>202</sup> it can be used as a tool to interpret existing obligations such as those of the Council of Europe.<sup>203</sup>

The supranational institution in which the democracy principle is the most developed, but also the most widely criticized, is the European Union.<sup>204</sup> According to Article 6(1) of the Treaty on the European Union, democracy is one of the EU's fundamental principles.<sup>205</sup> It is part of the *acquis communautaire*, which every potential member must observe in order to be admitted to the European Union.<sup>206</sup> Moreover, Article 7 of the

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199. YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS 249 (1994).

200. Ronald St. J. Macdonald, *The Entry of New Member States into the Council of Europe*, 91 AM. SOC'Y INT'L L. PROC. 523, 523-24 (1997).

201. Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 193 (1991).

202. See *supra* note 155.

203. Jochen Abr. Frowein, *Demokratie und Völkerrecht in Europa [Democracy and Public International Law in Europe]*, in VÖLKERRECHT ZWISCHEN NORMATIVEM ANSPRUCH UND POLITISCHER REALITÄT. FESTSCHRIFT FÜR KARL ZEMANEK ZUM 65. GEBURTSTAG 365, 368 (Konrad Ginther et al. eds., 1994) (F.R.G.).

204. See, e.g., Renaud Dehousse, *Beyond Representative Democracy: Constitutionalism in a Polycentric Polity*, in EUROPEAN CONSTITUTIONALISM BEYOND THE STATE 135 (J.H.H. Weiler & Marlene Wind eds., 2003); Augustín José Menéndez, *Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint*, 11 EUR. PUB. L. 105 (2005); Anne Peters, *European Democracy After the 2003 Convention*, 41 COMMON MKT. L. REV. 37 (2004); Niels Petersen, *The Democracy Concept of the European Union: Coherent Constitutional Principle or Prosaic Declaration of Intent?*, in THE UNITY OF THE EUROPEAN CONSTITUTION 97 (Philipp Dann & Michal Rynkowski eds., 2006) (proposing different conceptualizations of the democracy principle in the European Union); Joseph H.H. Weiler et al., *European Democracy and Its Critique*, 18 W. EUR. POL. 4 (1995).

205. Consolidated Version of the Treaty on European Union, Mar. 10, 2001, art. 6, 2002 O.J. (C 325), as amended by the Treaty of Nice (Mar. 10, 2001).

206. *Id.* art. 49.

Treaty provides for a sanction mechanism whereby certain membership rights may be suspended if Article 6(1) of the Treaty is violated.<sup>207</sup>

(c) *Africa*

Regarding the African Union (“AU”), Article 13 of the African Charter on Human and Peoples’ Rights (“Banjul Charter”) does not explicitly mention a right to elections.<sup>208</sup> It does, however, guarantee a right to participate in public affairs.<sup>209</sup> According to the African Commission on Human Rights (“African Commission”), this participation involves legitimating a sovereign power through elections.<sup>210</sup> Articles 3(g) and 4(m) of the AU Charter also identify the promotion of and respect for democratic principles and institutions as fundamental objectives of the AU.<sup>211</sup> Moreover, the AU as well as its predecessor, the Organization of African Unity (“OAU”), have established protection mechanisms against coups d’état. The starting point was a 1994 resolution of the African Commission, which condemned military overthrows of government and appealed to military regimes to transfer their power to elected governments.<sup>212</sup>

In practice, the turning point was the ousting of Ahmed Kabbah in Sierra Leone in 1997.<sup>213</sup> The OAU supported the military intervention of the Economic Community of West African States (“ECOWAS”)<sup>214</sup> and

207. *Id.* art. 7. For a detailed discussion of the sanction mechanisms established by Article 7 of the EU Treaty, see AMARYLLIS VERHOEVEN, *THE EUROPEAN UNION IN SEARCH OF A DEMOCRATIC AND CONSTITUTIONAL THEORY* 349–54 (2002).

208. Organization of African Unity: Banjul Charter of Human and Peoples’ Rights, Jun. 27, 1981, 21 I.L.M. 58, available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> [hereinafter Banjul Charter]. However, it should be noted that Article 13 discusses the right of every citizen to “participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law.” *Id.* art. 13.

209. *Id.*

210. Constitutional Rights Project and Civil Liberties Organisation/Nigeria ¶¶ 49–50, Doc. ACHPR/102/93 (Oct. 31, 2008), reprinted in African Commission on Human Rights and Peoples’ Rights, *Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights (1998–1999)* 45, Doc. AHG/215 (XXV) (1998), available at [http://www.achpr.org/english/activity\\_reports/activity12\\_en.pdf](http://www.achpr.org/english/activity_reports/activity12_en.pdf).

211. Constitutive Act of the African Union arts. 3(g), 4(m), O.A.U. Doc. CAB/LEG/2315 (July 11, 2000), available at [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) [hereinafter Act of the AU].

212. Resolution on the Military, OAU Doc. ACHPR/Res.10(XVI)94 (Nov. 3, 1994), available at [http://www.achpr.org/english/\\_doc\\_target/documentation.html?../resolutions/resolution15\\_en.html](http://www.achpr.org/english/_doc_target/documentation.html?../resolutions/resolution15_en.html).

213. Paul D. Williams, *From Non-Intervention to Non-Indifference: The Origins and Development of the African Unions Security Culture*, 106 AFR. AFF. 253, 272 (2007).

214. See *infra* Part II.B.3.b for a discussion of this intervention.

called upon the international community not to recognize the junta of Paul Koroma.<sup>215</sup> The OAU reacted similarly towards military coups in the Comoros, Ivory Coast, and Niger, refusing to acknowledge the legitimacy of rebel governments in these states.<sup>216</sup>

This position was translated into a formal legal rule during the foundation of the AU. Article 4 of the AU Charter condemns unconstitutional changes of government.<sup>217</sup> Correspondingly, Article 30 of the AU Charter allows a State's membership rights to be suspended where the government has come to power by "unconstitutional means."<sup>218</sup> Reading Article 4 in conjunction with Article 30 suggests that the latter permits such sanctions only when an elected regime has been ousted.

In a 2000 declaration ("Declaration"), AU Member States further elaborated upon this sanction mechanism.<sup>219</sup> The Declaration provides for a six-month period in which the implicated State has the opportunity to restore its constitutional order, and during this time, the AU can suspend its right to participate in the policy-making organs of the AU.<sup>220</sup> If it does not comply with this obligation, the AU may then institute sanctions against the noncompliant State.<sup>221</sup> The Declaration contains a nonexhaustive list of possible sanctions, ranging from denying visas for illegitimate government officials, to limiting government-to-government contacts, to restricting trade with other AU countries.<sup>222</sup>

This mechanism has been applied in several cases. In 2003, the AU barred the Central African Republic from taking part in its organs after military forces overthrew the elected president, Ange-Félix Patassé.<sup>223</sup> The AU allowed the country to resume its participation following presidential elections held in 2005.<sup>224</sup> Likewise, when Faure Gnassingbé captured power in Togo by military force after the death of his father in

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215. OAU Council of Ministers, Doc. CM/Dec. 356 (LXVI) (May 28–31, 1997).

216. Tiyanjana Maluwa, *The Constitutive Act of the African Union and Institution-Building in Postcolonial Africa*, 16 LEIDEN J. INT'L L. 157, 165 (2003).

217. Act of the AU, *supra* note 211, art. 4.

218. *Id.*

219. Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government, O.A.U. Doc. AHG/Decl.5 (XXXVI) (July 10–12, 2000), available at [http://www.africa-union.org/Special\\_Programs/CSSDCA/cssdca-solemndeclaration.pdf](http://www.africa-union.org/Special_Programs/CSSDCA/cssdca-solemndeclaration.pdf).

220. *Id.*

221. *Id.*

222. *Id.*

223. A.U. Doc. Central Organ/MEC/AMB/Comm. (XC), ¶ 4 (Mar. 17, 2003), available at [http://www.africa-union.org/News\\_Events/Communiqu%C3%A9s/Communiqu%C3%A9\\_20\\_Eng\\_17mar03.pdf](http://www.africa-union.org/News_Events/Communiqu%C3%A9s/Communiqu%C3%A9_20_Eng_17mar03.pdf).

224. A.U. Doc. PSC/PR/Comm. (XXXIII)–(ii), ¶ 2 (June 24, 2005), available at [http://www.iss.co.za/Af/RegOrg/unity\\_to\\_union/pdf/centorg/PSC/comm33.pdf](http://www.iss.co.za/Af/RegOrg/unity_to_union/pdf/centorg/PSC/comm33.pdf).

February 2005, in addition to condemning the coup and welcoming the sanctions that ECOWAS initiated, the AU suspended Togo's membership rights.<sup>225</sup> This pressure prompted Gnassingbé to step down and hold elections, which he ultimately won.<sup>226</sup> Despite doubts about the legitimacy of Gnassingbé's election,<sup>227</sup> the Peace and Security Council readmitted Togo's government.<sup>228</sup>

This last example indicates that the current practice of the AU is problematic in two respects: on the one hand, its sanctions are too far-reaching, and on the other hand, as in the case of Togo, they are not inclusive enough.<sup>229</sup> Regarding the over-inclusiveness of sanctions, military coups have been condemned, notwithstanding the legitimacy of ousted regimes. There is thus a danger that the mechanism is a reinforcer of the status quo rather than a catalyst for democratization.<sup>230</sup> Mauritania's President, Maaouya Sid Ahmed Ould Taya, for example, whose legitimacy was questionable at best, was overthrown in a bloodless coup in August 2005.<sup>231</sup> Although the military government announced that it would hold elections within two years and exclude its own participation, the AU condemned the coup and subjected Mauritania to sanctions.<sup>232</sup> However, some African politicians voiced dissent. The South African Ambassador to Mauritania, for example, declared: "[although] the principle of the AU is not to agree with coups . . . we believe we shall not have one policy to fit every situation."<sup>233</sup> The sanctions against Maurita-

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225. A.U. Doc. PSC/PR/Comm. (XXV), ¶ 3–4 (Feb. 25, 2005) available at [http://www.issafrica.org/AF/RegOrg/unity\\_to\\_Union/pdfs/centorg/PSC/2005/25com.pdf](http://www.issafrica.org/AF/RegOrg/unity_to_Union/pdfs/centorg/PSC/2005/25com.pdf).

226. *Doubts Hang over Togo Election*, BBC NEWS, Apr. 29, 2005, <http://news.bbc.co.uk/2/hi/africa/4497787.stm>.

227. *See id.*

228. A.U. Doc. PSC/PR/Comm. (XXX), ¶ 3 (May 27, 2005), available at [http://www.issafrica.org/AF/RegOrg/unity\\_to\\_Union/pdfs/centorg/PSC/2005/30comm.pdf](http://www.issafrica.org/AF/RegOrg/unity_to_Union/pdfs/centorg/PSC/2005/30comm.pdf).

229. Williams, *supra* note 213, at 274.

230. *See* Djacoba Liva Tehindrazanarivelo, *Les sanctions de l'union africaine contre les coups d'état et autres changements anticonstitutionnels de gouvernement: potentialités et mesures de renforcement* [*The African Union's Sanctions Against Coups d'État and Other Unconstitutional Changes of Government: Efficacy and Enforcement Strategies*], 12 AFR. Y.B. INT'L L. 255, 280 (2004) (Neth.).

231. *Mauritania Officers "Seize Power,"* BBC NEWS, Aug. 4, 2005, <http://news.bbc.co.uk/2/hi/africa/4741243.stm>.

232. A.U. Doc. PSC/PR/Stat. (XXXVI)-(ii) (Aug. 4, 2005), available at <http://www.africa-union.org/psc/36th/36th%20Stat%20Mauritania%20PSC%20Eng.pdf>.

233. *AU Seeks Mauritanian Junta Talks*, BBC NEWS, Aug. 9, 2005, <http://news.bbc.co.uk/1/hi/world/africa/4135350.stm>.

nia were nonetheless lifted only after presidential elections were held in the spring of 2007.<sup>234</sup>

However, there are also positive signs. In two other cases, the AU issued formal condemnations without further sanctions in response to coups against regimes of doubtful legitimacy. The December 1999 military coup against a corrupt regime in the Ivory Coast was publicly criticized, but the transitional government was recognized shortly thereafter.<sup>235</sup> When President Kumba Yalla was ousted in Guinea-Bissau in 2003, after dissolving the parliament and adopting several dictatorial decrees, the AU only denounced the coup.<sup>236</sup>

At the same time, the AU has been very reluctant to act when it comes to other constitutional infringements such as falsifying elections, amending constitutions to consolidate more power, or permitting additional terms in office.<sup>237</sup> A recent example is the March 2008 presidential election in Zimbabwe. Although the legitimacy of the reelection of Robert Mugabe was questionable at best, the AU General Assembly only adopted a resolution encouraging the opposing parties to enter into a constructive dialogue and failed to impose any sanctions.<sup>238</sup>

Some regional organizations in Africa have established mechanisms similar to those of the AU. The 1991 Declaration of Political Principles of the Economic Community of West African States asserts:

We believe in the liberty of the individual and in his inalienable right to participate by means of free and democratic processes in the framing of the society in which he lives. We will therefore strive to encourage and promote in each of our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage.<sup>239</sup>

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234. A.U. Doc. PSC/PR/Comm. (LXXVI), ¶ 3–7 (Apr. 10, 2007), available at [http://www.iss.co.za/dynamic/administration/file\\_manager/file\\_links/REP76.PDF?link\\_id=22&slink\\_id=4297&link\\_type=12&slink\\_type=13&tmpl\\_id=3](http://www.iss.co.za/dynamic/administration/file_manager/file_links/REP76.PDF?link_id=22&slink_id=4297&link_type=12&slink_type=13&tmpl_id=3).

235. Christof Hartmann, *Demokratie als Leitbild der afrikanischen Staatengemeinschaft? Zur Theorie und Praxis demokratischer Schutzklauseln in der Afrikanischen Union* [Democracy as a Model for the African Community of States? On Theory and Practice of Democratic Protection Clauses in the African Union], 38 VERFASSUNG UND RECHT IN ÜBERSEE 201, 218 (2005) (F.R.G.).

236. A.U. Doc. Central Organ/MEC/AMB/Comm. (XCV) (Sept. 18, 2003).

237. Hartmann, *supra* note 235, at 219–20; Williams, *supra* note 213, at 274–75.

238. A.U. Doc. Assembly/AU/Res.1 (XI) (July 1, 2008), available at [http://www.africa-union.org/root/au/Conferences/2008/june/summit/dec/ASSEMBLY%20DECISIONS%20193%20-%20207%20\(XI\).pdf](http://www.africa-union.org/root/au/Conferences/2008/june/summit/dec/ASSEMBLY%20DECISIONS%20193%20-%20207%20(XI).pdf).

239. Declaration of Political Principles of the ECOWAS, Doc. A/DCL.1/7/91, ¶ 6 (Jul. 6, 1991).

The essence of this declaration was incorporated into the 1993 Treaty of ECOWAS.<sup>240</sup> Subsections (h) and (j) of Article 4 provide that the right to participate in the conduct of government and promote democracy is one of the organization's fundamental principles.<sup>241</sup> Moreover, in accordance with Article 58(2)(g), the organization is to offer its support in the holding of elections upon a Member State's request.<sup>242</sup> The ECOWAS reaffirmed these principles in the Protocol on Democracy and Good Governance,<sup>243</sup> which explicitly emphasizes the obligation to hold free, fair, and transparent elections.<sup>244</sup>

Furthermore, in Article 4(c) of the Charter of the South African Development Community ("SADC"), the promotion of democracy is enshrined as one of the SADC's guiding principles.<sup>245</sup> According to Article 5(1), the organization's objectives feature, *inter alia*, the promotion of common political values "transmitted through institutions which are democratic, legitimate and effective,"<sup>246</sup> as well as the "consolidation, defence and maintenance of democracy."<sup>247</sup> The SADC Principles and Guidelines Governing Democratic Elections, adopted in August 2004 during the organization's summit in Mauritius, also support these principles.<sup>248</sup>

#### (d) Evaluation

The analysis of emerging regional commitments to democracy presents a heterogeneous picture. In the Americas and Europe, a democracy principle has been established under regional customary law.<sup>249</sup> Both human

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240. Economic Community of West African States Revised Treaty, Jul. 24, 1993, 35 I.L.M. 660.

241. *Id.* art. 4(h)–(j).

242. *Id.* art. 58(2)(g).

243. Protocol on Democracy and Good Governance, Doc. A/SP1/12/01 (Dec. 22, 2001), available at <http://www.ecowas.int>.

244. *Id.* art. 1.

245. Treaty of the Southern African Development Community art. 4(c), Aug. 17, 1992, available at <http://www.sadc.int/index/browse/page/120>.

246. *Id.* art. 5(1)(b).

247. *Id.* art. 5(1)(c).

248. SADC Principles and Guidelines Governing Democratic Elections, Aug. 2004, [http://www.sadc.int/english/documents/political\\_affairs/index.php](http://www.sadc.int/english/documents/political_affairs/index.php).

249. On the democracy principle in Europe, see Frowein, *supra* note 203. On the democracy principle in the Americas, see Dexter S. Boniface, *Is There a Democratic Norm in the Americas? An Analysis of the Organization of American States*, 8 GLOBAL GOVERNANCE 365 (2002) (analyzing events supporting the argument that a customary democracy principle is developing in the Americas); Dinah Shelton, *Representative Democracy and Human Rights in the Western Hemisphere*, 12 HUM. RTS. L.J. 353 (1991) (discussing the OAS's emphasis on democratic institutions).



rights treaties and documents of the regional political organizations contain extensive electoral and democratic guarantees. American and European regional bodies have also developed effective sanction mechanisms against States that fail to meet democratic standards. In Europe especially, these sanctions not only concentrate on the central element of democracy—elections—but also strive to implement a more substantive vision of democracy.

With regard to Africa, locating a coherent democratic principle is more difficult. Although the AU Charter has deemed democracy one of its vital objectives,<sup>250</sup> and the Banjul Charter prescribes a right to participate in public affairs,<sup>251</sup> many governments in Africa remain undemocratic. However, instead of actively promoting democracy, the established sanction mechanisms exclusively address regressions in the process of democratization, which supports the argument that the democracy principle must be read in a teleological manner rather than in a strict sense.

### 3. Democracy and the Use of Force

Military intervention in the name of democracy has attracted the most attention in the literature on democracy in international law. The following analysis focuses on five possible precedents for the use of force to promote democracy. In doing so, this section compares the unilateral military interventions of the United States in Grenada, Panama, and Iraq with the U.N. Security Council-backed interventions in Haiti and Sierra Leone.

#### (a) *Unilateral Interventions in Grenada, Panama, and Iraq*

In response to a coup d'état against the government of Maurice Bishop, U.S. troops invaded Grenada on October 25, 1983, with the support of neighboring Caribbean States.<sup>252</sup> Three days after the invasion, the U.S. military succeeded in overthrowing the military council, which had come to power after the coup.<sup>253</sup> In the ensuing debate among legal scholars on the legality of the U.S. intervention, some argued that restoring democracy was a sufficient legal justification.<sup>254</sup> However, there are several facts

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250. Act of the AU, *supra* note 211, art. 3.

251. Banjul Charter, *supra* note 208, art. 13.

252. John Burgess, *Most Residents of Nearby Barbados Appear to Support Grenada Invasion*, WASH. POST, Oct. 29, 1983, at A15.

253. Loren Jenkins, *U.S. Forces Seize Fugitive Leader of Grenadan Coup: Barbados Says Austin Flown to USS Guam*, WASH. POST, Oct. 31, 1983, at A1.

254. ROTH, *supra* note 131, at 309 (noting positive developments following the invasion of Grenada and suggesting that the case of Grenada serves as a positive precedent). See also FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW

that undercut this position. First, Bishop himself attained power not by democratic means, but through a coup d'état in 1979.<sup>255</sup> Second, the U.S. administration did not attempt to justify the intervention on the grounds of restoring democratic order.<sup>256</sup> The opinions of academic commentators alone are insufficient for an *opinio juris*.<sup>257</sup> Finally, and most importantly, the U.N. General Assembly condemned the intervention as illegal by an overwhelming majority.<sup>258</sup> While resolutions of the General Assembly are certainly not directly binding, they are an expression of *opinio juris* that the U.S. invasion cannot be regarded as a precedent for a right to pro-democratic intervention.<sup>259</sup>

The U.S. offensive in Panama is a second possible precedent for the idea that democracy may justify military intervention.<sup>260</sup> On December 20, 1989, the U.S. army invaded Panama in order to overthrow the regime of Manuel Noriega and capture the head of state himself. This time, President George H.W. Bush explicitly justified the action on the basis of protecting democracy, in addition to citing the need to protect U.S. citizens, combat drug trafficking, and secure implementation of the Panama Canal treaties.<sup>261</sup> However, the U.N. General Assembly again condemned

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AND MORALITY 258 (3rd ed. 2005); William Michael Reisman, Editorial, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642 (1984) (defending unilateral intervention by arguing that restrictions of Article 2(4) are possible because of the U.N. Security Council's lack of effectiveness in many circumstances).

255. L. Doswald-Beck, *The Legality of the United States Intervention in Grenada*, 24 INDIAN J. INT'L L. 200, 201 (1984).

256. Michael Byers & Simon Chesterman, "You, the People": *Pro-Democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 123, at 259, 273; Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645, 648 (1984).

257. Wouters et al., *supra* note 117, at 169.

258. G.A. Res. 38/7, ¶ 1, U.N. Doc. A/RES/38/7 (Nov. 2, 1983) ("Deeply deplor[ing] the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that [s]tate"). The vote was 108-9-27. Byers & Chesterman, *supra* note 256, at 273 n.64.

259. SCOTT DAVIDSON, GRENADA: A STUDY IN POLITICS AND THE LIMITS OF INTERNATIONAL LAW 147 (1987); Byers & Chesterman, *supra* note 256, at 274.

260. TESÓN, *supra* note 254, at 269; William Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 19 FORDHAM INT'L L.J. 794, 800-01 (1995); Abraham D. Sofaer, *The Legality of the United States Action in Panama*, 29 COLUM. J. TRANSNAT'L L. 281, 288-91 (1991). *But see* Anthony D'Amato, *The Invasion of Panama Was a Lawful Response to Tyranny*, 84 AM. J. INT'L L. 516, 519 (1990) (referring to the human rights violations of the Noriega regime and explicitly rejecting the possibility of a pro-democratic intervention).

261. George Bush, President, Address to the Nation Announcing U.S. Military Action in Panama, ¶ 2 (Dec. 20, 1989), <http://www.presidency.ucsb.edu/ws/print.php?pid=17965>.

the intervention by a clear majority.<sup>262</sup> Therefore, the intervention in Panama should likewise not serve as evidence of a right to democracy in international law.<sup>263</sup>

The U.S.-led invasion of Iraq in March 2003 is the most recent case in which regime change was invoked as a justification for war.<sup>264</sup> In his State of the Union address on January 28, 2003, President George W. Bush declared: "And tonight I have a message for the brave and oppressed people of Iraq: Your enemy is not surrounding your country—your enemy is ruling your country. And the day he and his regime are removed from power will be the day of your liberation."<sup>265</sup> Among the political considerations that finally led to the war, Iraq's democratization was a major factor.<sup>266</sup> It is telling, though, that in official legal justifications for the war, neither the United States nor Great Britain mentioned regime change as the principle reason.<sup>267</sup> Instead, they justified the intervention by interpreting Resolutions 678,<sup>268</sup> 687,<sup>269</sup> and 1441<sup>270</sup> of the

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262. G.A. Res. 44/240, ¶ 1, U.N. Doc. A/RES/44/240 (Dec. 29, 1989) ("*Strongly deplo[r]ing* the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of states"). The vote was 75-20-40. Byers & Chesterman, *supra* note 256, at 275 n.79.

263. Byers & Chesterman, *supra* note 256, at 275; Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L L. 293, 298 (1991); Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 500 (1990); John Quigley, *The Legality of the United States Invasion of Panama*, 15 YALE J. INT'L L. 276, 303-06 (1990); Sarah A. Ramage, *Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right*, 10 ARIZ. J. INT'L & COMP. L. 1, 54-57 (1993); Oscar Schachter, *Is There a Right to Overthrow an Illegitimate Regime?*, in LE DROIT INTERNATIONAL AU SERVICE DE LA PAIX, DE LA JUSTICE ET DU DEVELOPPEMENT. MÉLANGES MICHEL VIRALLY. 423, 426-28 (Jean Boulouis & René-Jean Dupuy eds., 1991).

264. See TESÓN, *supra* note 254, at 392 (considering humanitarian intervention as the primary justification of the invasion for Iraq); Davis Brown, *Iraq and the 800-Pound Gorilla Revisited: Good and Bad Faith, and Humanitarian Intervention*, 28 HASTINGS INT'L & COMP. L. REV. 1 (2004); Robert F. Turner, *Operation Iraqi Freedom: Legal and Policy Considerations*, 27 HARV. J. L. & PUBL. POL'Y 765, 778 (2004). However, all the above authors emphasize the human rights violations of Saddam Hussein's regime. Implicit is the position that the totalitarian form of government alone is not sufficient to justify an intervention.

265. Press Release, President George W. Bush, President Delivers "State of the Union" (Jan. 28, 2003).

266. James Kurth, *Humanitarian Intervention After Iraq*, 50 ORBIS 87, 97 (2005).

267. Dino Kritsiotis, *Arguments of Mass Confusion*, 15 EUR. J. INT'L L. 233, 271, 273-74 (2004).

268. S.C. Res. 678, U.N. Doc. S/RES/678 (Nov. 29, 1990).

269. S.C. Res. 687, U.N. Doc. S/RES/687 (Apr. 8, 1991).

U.N. Security Council respectively.<sup>271</sup> Nonetheless, a considerable part of the international community condemned the intervention. Among its opponents were Belgium, Canada, China, France, Germany, and Russia.<sup>272</sup> Accordingly, the Iraq War also cannot be regarded as support for the emergence of an international democracy principle.<sup>273</sup>

(b) *Collective Interventions in Haiti and Sierra Leone*

In the search for precedents that ground such a norm, collective interventions authorized by international institutions are more promising indicators than the unilateral interventions examined thus far. Many legal scholars argue that the 1991 intervention in Haiti, which was authorized by the U.N. Security Council, serves as a paradigmatic precedent.<sup>274</sup> In 1990, Jean-Bertrand Aristide was elected as Haiti's president with sixty-seven percent of the votes.<sup>275</sup> The United Nations<sup>276</sup> and the OAS<sup>277</sup>

270. S.C. Res. 1441, U.N. Doc. S/RES/1441 (Nov. 8, 2002).

271. Compare Letter from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2003/351 (Mar. 20, 2003), with Statement by the Attorney General, Lord Goldsmith, in Answer to a Parliamentary Question (Mar. 18, 2003), available at <http://www.fco.gov.uk/servlet/Front?pagename=OpenMarket/Xcelerate/ShowPage&c=Page&cid=1007029391629&a=KArticle&aid=1047661460790>.

272. Elizabeth Bumiller, *White House Letter: Who's Cool at the Group of 8 Meeting It's All in Bush's Gestures*, N.Y. TIMES, June 2, 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0DE2DB1230F931A35755C0A9659C8B63&sec=&spn=&pagewanted=1>; *Opposition to Iraq War Widens*, BBC NEWS, Jan. 23, 2003, [http://news.bbc.co.uk/2/hi/middle\\_east/2688117.stm](http://news.bbc.co.uk/2/hi/middle_east/2688117.stm); Tracy Wilkinson & Sebastian Rotella, *Al Qaeda May Be Widening War of Terror*, L.A. TIMES, May 18, 2003, at A1.

273. Michael Bothe, *Der Irak-Krieg und das völkerrechtliche Gewaltverbot [The Iraq War and the Prohibition of the Use of Force in Public International Law]*, 41 ARCHIV DES VÖLKERRECHTS 255, 258 (2003) (F.R.G.); Richard A. Falk, *What Future for the UN Charter System of War Prevention?*, 97 AM. J. INT'L L. 590, 597 (2003); Mary Ellen O'Connell, *La doctrine américaine et l'intervention en Iraq [The American Doctrine and the Intervention in Iraq]*, 49 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 3, 12–14 (2003) (Fr); Andreas Paulus, *The War Against Iraq and the Future of International Law: Hegemony or Pluralism?*, 25 MICH. J. INT'L L. 691, 711 (2004); Jason Pedigo, *Rogue States, Weapons of Mass Destruction, and Terrorism: Was Security Council Approval Necessary for the Invasion of Iraq?*, 32 GA. J. INT'L & COMP. L. 199, 223 (2004).

274. TESÓN, *supra* note 254, at 307–17; Escudero Espinosa, *supra* note 94, at 375; Morton H. Halperin & Kristen Lomasney, *Guaranteeing Democracy: A Review of the Record*, 9 J. DEM. 134, 138 (1998); Kokoroko, *supra* note 117, at 52; William Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 123, at 239, 248.

275. For a detailed account, see Christina M. Cerna, *The Case of Haiti Before the Organization of American States*, 86 AM. SOC. INT'L L. PROC. 378 (1992).

276. G.A. Res. 45/2, U.N. Doc. A/RES/45/2 (Oct. 10, 1990).

277. A. Schanchetines, *A Real Choice for Haiti's Voters*, L.A. TIMES, Dec. 15, 1990.

monitored this election at Haiti's request. On September 29, 1991, the military overthrew Aristide.<sup>278</sup> Though not responding immediately, in June 1993, the U.N. Security Council adopted Resolution 841, which imposed economic sanctions on Haiti.<sup>279</sup> As a result, Haiti's military regime concluded the so-called Governors Islands Agreement, in which it conceded the reinstatement of Aristide to power.<sup>280</sup> However, the implementation of the Agreement failed when members of the junta exercised force against Aristide partisans in the autumn of 1993. In response, the Security Council set up a naval blockade<sup>281</sup> and continued the economic sanctions.<sup>282</sup> On July 31, 1994, it adopted Resolution 940, which permitted all U.N. Member States to use force to reinstall the legitimate government in Haiti.<sup>283</sup> On September 18, 1994, just hours before a multinational troop under U.S. leadership was scheduled to land in Haiti, former U.S. President Jimmy Carter, with the support of Senator Sam Nunn and General Colin Powell, convinced the junta to cede power to Aristide and leave the country.<sup>284</sup>

Several authors have refused to recognize this case as setting a precedent for collective pro-democratic intervention, arguing that through its actions, the Security Council was primarily addressing the protection of peace and security in the region.<sup>285</sup> The response of the United Nations, however, should be examined within the context of the Security Council's new activism during the 1990s. In a series of resolutions, the body broadly interpreted the notion of peace and security in Chapter VII of the U.N. Charter. The Security Council held that peace and security do not simply mean the absence of the use of military force. According to the Council, these two terms may be invoked in the case of

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278. Julia Leininger, *Democracy and UN Peace-Keeping—Conflict Resolution Through State-Building and Democracy Promotion in Haiti*, 10 MAX PLANCK Y.B. OF U.N. L. 465, 495 (2006).

279. S.C. Res. 841, U.N. Doc. S/RES/841 (June 16, 1993).

280. The Secretary-General, *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary General* ¶ 5, U.N. Doc. A/47/975, S/26063 (July 12, 1993) (including the text of the Governor's Island Agreement)

281. S.C. Res. 875, U.N. Doc. S/RES/875 (Oct. 16, 1993).

282. S.C. Res. 873, U.N. Doc. S/RES/873 (Oct. 13, 1993).

283. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

284. Jason B. Johnson, *Leading Junta Figure Flees the County*, BOSTON HERALD, Oct. 5, 1994, at 4.

285. BARDO FASSBENDER, UN SECURITY COUNCIL REFORM AND THE RIGHT OF VETO: A CONSTITUTIONAL PERSPECTIVE 218 (1998); Byers & Chesterman, *supra* note 256, at 287.

internal crises, such as those in Rwanda and Somalia.<sup>286</sup> While formally respecting the text of the U.N. Charter, the Security Council, with overwhelming support from the legal literature,<sup>287</sup> expanded its authority to cope with the new world order that emerged after the end of the Cold War. Thus, despite the reference to peace and security in the region, Resolution 940 was clearly focused on restoring internal order in Haiti.<sup>288</sup>

Moreover, some scholars have doubted the competence of the U.N. Security Council to intervene for the purpose of reinstating democratic order,<sup>289</sup> while others have argued that the case of Haiti cannot be generalized because of the specific regional context.<sup>290</sup> Some commentators have even maintained that the general human rights situation in Haiti<sup>291</sup> or the violation of the Governors Islands Agreement justified the Security Council resolution.<sup>292</sup> However, these objections cannot account for the fact that the restoration of democracy was the explicit objective of Resolution 940. This objective is expressed in its preamble: “[r]eaffirming that the goal of the international community remains the

286. See Hermann-Josef Blanke, *Menschenrechte als völkerrechtliche Interventions-titel [Human Rights as a Justification for Intervention Under International Law]*, 36 ARCHIV DES VÖLKERRECHTS 257, 278–80 (1998) (F.R.G.).

287. TESÓN, *supra* note 254, at 279; Blanke, *supra* note 286; Antonio Cassese, *Ex Iniuria Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?*, 10 EUR. J. INT’L L. 23, 26–27 (1999); Richard B. Lillich, *The Role of the UN Security Council in Protecting Human Rights in Crisis Situations: UN Humanitarian Intervention in the Post-Cold War World*, 3 TUL. J. INT’L & COMP. L. 1 (1995).

288. TESÓN, *supra* note 254, at 312; Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT’L L. 329, 366–69 (1995); Mary Ellen O’Connell, *Regulating the Use of Force in the 21st Century: The Continuing Importance of State Autonomy*, 36 COLUM. J. TRANSNAT’L L. 473, 487–88 (1997).

289. Byers & Chesterman, *supra* note 256, at 290–92; Douglas Lee Donoho, *Evolution or Expediency: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT’L L.J. 329, 365–67 (1996); Michael J. Glennon, *Sovereignty and Community After Haiti: Rethinking the Collective Use of Force*, 89 AM. J. INT’L L. 70, 72 (1995).

290. Olivier Corten, *La résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti: L’émergence d’un principe de légitimité démocratique en droit international? [Security Council Resolution 940 Authorizing a Military Intervention in Haiti: The Emergence of a Democratic Legitimacy Principle in International Law?]*, 6 EUR. J. INT’L L. 116, 129 (1995); Leininger, *supra* note 278, at 489 (arguing that the intervention in Haiti should not serve as a global precedent because of the specific regional context).

291. Lillich, *supra* note 287, at 10. See also KARIN VON HIPPEL, *DEMOCRACY BY FORCE: US MILITARY INTERVENTION IN THE POST-COLD WAR WORLD 98–99* (2000) (noting the human rights violations committed by the Cedras regime).

292. Corten, *supra* note 290, at 126.

restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement.<sup>293</sup> Also, supporting the legitimate government of Haiti plays an important role in its operative part:

1. [The Security Council welcomes] the report of the Secretary-General of 15 July 1994 (S/1994/828) and takes note of his support for action under Chapter VII of the Charter of the United Nations in order to *assist the legitimate Government of Haiti in the maintenance of public order;*

[...]

4. Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, *the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti*, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States . . . .<sup>294</sup>

Although the preamble also refers to the human rights situation in Haiti,<sup>295</sup> human rights violations are not the focus of the operative part of the Resolution, as it concentrates on re-establishing the legitimate order.<sup>296</sup> Furthermore, the reference to the Governors Islands Agreement itself is inessential. It is implausible that the Security Council would have implemented an agreement between a *de facto* regime and a *de jure* government irrespective of the latter's content. The Governors Islands Agreement was only implemented *because* the goals of the Agreement were to restore democratic order to the country. Finally, with regard to the competence of the Security Council, normative concerns are irrele-

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293. S.C. Res. 940, *supra* note 283.

294. *Id.* (emphasis added).

295. *Id.* ("Gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal *de facto* regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission, which was condemned in its Presidential statement of July 12, 1994.") (internal parentheses omitted).

296. See, e.g., Corten, *supra* note 290, at 127 (emphasizing that, in terms of gravity and intensity, the atrocities in Haiti cannot be compared to those committed in Bosnia, Rwanda, or Somalia).

vant when examining practice and *opinio juris* concerning democracy.<sup>297</sup> The crucial point here is that the Security Council Resolution is an indicator of the international community's reception of the intervention.

Nevertheless, the scope of the Haiti precedent is limited.<sup>298</sup> The intervention addressed the restoration of a disrupted, preexisting constitutional order. It cannot be regarded, therefore, as an indicator of a universal democracy principle. However, it does fit into the patterns already observed in the context of General Assembly resolutions. If the democracy principle in international law is teleological and process-oriented, then countries are indeed not obliged to turn into democracies overnight. Teleology, though, prohibits setbacks in the process of democratization. If collective interventions, such as the intervention in Haiti, occur after coups d'état against elected governments, this practice confirms the principle of democratic teleology.

The intervention of Nigeria and ECOWAS in Sierra Leone further supports this argument. In Sierra Leone, a country plagued by civil war, the parties to the conflict signed peace accords following the 1996 presidential elections.<sup>299</sup> In these elections, Ahmad Tejan Kabbah was voted president.<sup>300</sup> As the Rebel Unity Front were militarily weak and lost the elections, it signed the Abidjan Accord in November 1996, in which the parties consented to an immediate ceasefire and the disarmament of the combatants.<sup>301</sup> This agreement did not, however, contribute to a détente. On the contrary, on May 25, 1997, the President of Sierra Leone was

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297. This point also applies to the critique of the democratic intentions of the intervening States. See Richard A. Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 314, 353–54 (1995); Anne Orford, *Muscular Humanitarianism: Reading the Narratives of the New Interventionism*, 10 EUR. J. INT'L L. 679, 701 (1999) (raising such critique in discussing NATO's intervention in Kosovo).

298. ROTH, *supra* note 131, at 386; James Crawford, *Democracy in International Law—A Reprise*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 123, at 114, 117. *Contra* John C. Pierce, *The Haitian Crisis and the Future of Collective Enforcement of Democratic Governance*, 27 LAW & POL'Y INT'L BUS. 477, 485–96 (1996) (claiming that the Haiti intervention is a full-scale precedent for the emergence of a right to democratic governance in international law); Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 MICH. J. INT'L L. 323, 355 (1996) (regarding the Haiti intervention as a precedent for the emergence of a full-scale right to democratic intervention).

299. *Timeline: Sierra Leone*, BBC NEWS, Jun. 18 2008, [http://news.bbc.co.uk/2/hi/africa/country\\_profiles/1065898.stm](http://news.bbc.co.uk/2/hi/africa/country_profiles/1065898.stm).

300. *Id.*

301. United Nations Mission in Sierra Leone, <http://www.un.org/Depts/dpko/missions/unamsil/background.html> (last visited Nov. 14, 2008).



overthrown.<sup>302</sup> This prompted Nigerian troops of the ECOWAS Monitoring Group ("ECOMOG") to intervene. In June 1997, Nigerian forces invaded Sierra Leone and helped to reinstate Kabbah as president in March 1998. The U.N. Security Council only retroactively approved the intervention. In October 1997, it expressed support for the ECOWAS action,<sup>303</sup> and on March 16, 1998, it welcomed President Kabbah's return to office.<sup>304</sup>

The legal scholarship identifies several justifications for the ECOMOG intervention, including pro-democratic intervention,<sup>305</sup> humanitarian intervention,<sup>306</sup> and invitation by the *de jure* government.<sup>307</sup> Some authors have raised doubts concerning the democratic intentions of the intervening States, noting that Nigeria, the leader of the intervention, was itself ruled by an autocratic government.<sup>308</sup> However, in evaluating the intervention as a precedent for the emergence of a democracy principle, the reception of the international community is more significant than the intentions of the intervening parties or the legality of the intervention itself. The Security Council resolutions on Sierra Leone stress the importance of restoring democratic order. Resolution 1132 requests the military junta

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302. *Id.*

303. S.C. Res. 1132, ¶ 3, U.N. Doc. S/RES/1132 (Oct. 8, 1997) ("Express[ing] its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourag[ing] it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations").

304. S.C. Res. 1156, S/RES/1156 (Mar. 16, 1998) ("Welcom[ing] the return to Sierra Leone of its democratically elected president on 10 March 1998").

305. Valentina Grado, *Il ristabilimento della democrazia in Sierra Leone [Restoring Democracy in Sierra Leone]*, 83 RIVISTA DI DIRITTO INTERNAZIONALE 361, 395 (2000) (Italy) (basing her argument on the defense of the internal dimension of the right to self-determination rather than on an explicit defense of democracy); Jeremy Levitt, *Humanitarian Intervention by Regional Actors in Internal Conflicts: The Cases of ECOWAS in Liberia and Sierra Leone*, 12 TEMP. INT'L & COMP. L.J. 333, 370 (1998).

306. Lee F. Berger, *State Practice Evidence of the Humanitarian Intervention Doctrine: The ECOWAS Intervention in Sierra Leone*, 11 IND. INT'L & COMP. L. REV. 605, 626–32 (2001); Marco Gestri, *ECOWAS Operations in Liberia and Sierra Leone: Amnesty for Past Unlawful Acts or Progress Toward Future Rules?*, in REDEFINING SOVEREIGNTY: THE USE OF FORCE AFTER THE COLD WAR 211, 247 (Michael Bothe et al. eds., 2005).

307. Matthias Goldmann, *Sierra Leone: African Solutions to African Problems?*, 9 MAX PLANCK Y.B. OF U.N. L. 457, 471–72 (2005); Karsten Nowrot & Emily W. Schacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321, 401–02 (1998).

308. Byers & Chesterman, *supra* note 256, at 290; Goldmann, *supra* note 307, at 473–74.

to reinstate democratic order,<sup>309</sup> while Resolution 1156 welcomes the country's return to democracy.<sup>310</sup> Therefore, the case of Sierra Leone, confirms the patterns already observed with regard to Haiti. The international community views the overthrow of an elected government as a violation of international law,<sup>311</sup> and this supports the existence of a principle of democratic teleology in international law.

#### 4. Resume

International law does not provide for a strict right to democratic governance, as international documents and corresponding practice emphasize the process-oriented character of democratization. Democracy, rather, is perceived as a teleological principle, according to which States and societies are obliged to develop towards democracy. This principle has two dimensions. First, it is directed against regressions in the process of democratization. Obvious setbacks are military coups. This is underlined by the practice of the U.N. Security Council, which endorsed military action after elected governments were overthrown in Haiti and Sierra Leone and by the sanction mechanisms of the OAS and the AU.

Regressions, though, are not limited to coups d'état. They also encompass other setbacks in the process towards and consolidation of democracy, such as increased centralization of power by heads of state or the cession of political control to the military. Examples include the 1992 *autogolpe* of Alberto Fujimori in Peru and the 1995 "constitutional referendum" of Alexander Lukashenko in Belarus.<sup>312</sup> In particular, this is reflected in the sanctioning practice of the OAS and, to a certain extent, in that of the AU. Both organizations have the power to impose sanctions not only for military coups, but also for other efforts to erode democracy. Regional institutions have shown reluctance to act in cases where formal elections have been held, but election results have been falsified by undue influence. In theory, such cases should constitute setbacks in the process of democratization, which run counter to the principle of democratic teleology.

Democratic teleology is not merely concerned with avoiding setbacks and regressions. It also imposes a second obligation whereby States must

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309. S.C. Res. 1132, *supra* note 303, ¶ 1 ("Demand[ing] that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order").

310. See *supra* note 304.

311. See ROTH, *supra* note 131, at 393.

312. See Laurence Whitehead, *The Consolidation of Fragile Democracies: A Discussion with Illustrations*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM 76, 76-95 (Robert A. Pastor ed., 1989) (providing further examples from Latin America).

actively develop towards democracy and then consolidate democratic institutions. As an ideal type of democracy as well as an ideal method of democratization are lacking, this duty does not require specific performance. Governments have a certain margin of flexibility, and only clearly defective strategies can be regarded as illegal. In order to assess strategies, the same classification proposed in the context of the principle of self-determination may be used.<sup>313</sup> According to this proposal, regimes that are not self-enriching and that observe core human rights principles should be considered legal and legitimate.

#### CONCLUSION

Nearly two decades after the fall of the Berlin Wall, the euphoria surrounding democracy has cooled down considerably. Democracy is not the cure-all it was widely considered to be. Moreover, the third wave of democratization in the early 1990s<sup>314</sup> was much weaker in the end than many observers had predicted. Although there is near consensus in philosophy and political sciences that, in the long run, there can be no suitable alternative to democracy as a form of government, democratization is not a simple change of the political status. Instead, it is a long-term, complex, social process, and its preconditions are still very much debated in social science research.

This contribution attempts to address these concerns by framing democracy as a teleological principle. In international law, democracy is neither an absolute right nor a strict obligation. The identified norm, rather, focuses on the process-like character of democratization. States are merely obliged to develop towards democracy. This understanding of the democratic principle in international law better comports with existing legal documents, which use process-oriented rather than prescriptive language. What constitutes concrete development in the process of democratization is, to a considerable extent, subject to a State's own discretion.

Due to the binary character of legal norms, though, lawyers prefer clear standards. Karl-Heinz Ladeur once offered a metaphor where he compared the law to a blind man who uses "a stick to test the stability of the ground on which he walks."<sup>315</sup> Throughout this process, the man distinguishes between stable and unstable ground.<sup>316</sup> In so doing, he creates a system of orientation without being able to evaluate the world in its

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313. See *supra* Part II.A.2.

314. HUNTINGTON, *supra* note 36, at 280.

315. Karl-Heinz Ladeur, *The Theory of Autopoiesis as an Approach to a Better Understanding of Postmodern Law: From the Hierarchy of Norms to the Heterarchy of Changing Patterns of Legal Inter-Relationships* 12 (EUI Working Paper Law No. 99/3. 1999).

316. *Id.*

entire complexity.<sup>317</sup> Lawyers act in a similar fashion when they merely ask about the legality or illegality of actions or conditions. In this context, they need standards that allow them to make clear binary distinctions. The stricter the legal standards are, the higher the determinacy of the legal norms. Against this background, the principle of democratic teleology fails to meet the standards most legal scholars favor. Whether a State has held elections or not is a question of fact that can be answered quite easily.<sup>318</sup> In contrast, whether a government acts in the interests of its population requires difficult normative evaluations.

Nonetheless, strict normative standards do not always take into account the complexity of reality. Martti Koskenniemi has argued that the “indeterminacy” of norms is inherent to international legal principles.<sup>319</sup> According to Koskenniemi, absolute legal standards are always over- or under-inclusive.<sup>320</sup> International law thus suffers from an inherent tension between determinacy and justice. The more determinate the legal standards are, the less apt they are to take into account the complexity of reality. Alternatively the more they adjust to complexity, the less determinate they are. In particular, as the effectiveness of international law depends upon its level of acceptance in the international community, international law cannot afford to impose strict standards. It must apply to circumstances and strategies as diverse as global democratization itself.

Francis Fukuyama’s diagnosis of “the end of history”<sup>321</sup> is premature. Democracy still has a long way to go, and this is reflected by the present state of international law. In the legal debate of the 1990s, even those authors who favored democratic entitlement did not claim the existence of an unconditional right to democratic governance.<sup>322</sup> Instead, most of them identified a democratic trend,<sup>323</sup> or most famously, an “*emerging*

317. *Id.*

318. See Marks, *supra* note 11, at 87 (suggesting that this is likely why the discussion on the right to democratic governance is dominated by a static concept of democracy focused only on elections). However, it is important to mention that this question is not totally free of normative considerations either, given that judging elections as free and fair requires some assessment. Guillermo O’Donnell, *Illusions About Consolidation*, 7.2 J. DEM. 34, 45 (1996).

319. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF THE INTERNATIONAL LEGAL ARGUMENT 590–96 (2005).

320. *Id.* at 591.

321. FUKUYAMA, *supra* note 2.

322. Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 123, at 1, 13.

323. Rich, *supra* note 117, at 33.

right to democratic governance.”<sup>324</sup> As the present Article has argued, this position should be reformulated: international law contains a principle of democratic teleology, namely, a right to the emergence of democratic governance.

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324. Franck, *supra* note 3.