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The principle of democratic teleology in international law

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The Principle of Democratic Teleology in International Law

Niels Petersen
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April 2008
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By Niels Petersen

Abstract

In the early 1990s, after the fall of the Berlin wall, legal scholars initiated a debate on the existence of a right to democratic governance in international law. Many of the adherents to the democratic entitlement school seem to assume that democratization is a simple shift in the political status, a change from one form of government to another. This contribution seeks to analyze this underlying assumption by taking a look at the current discussion on democratization theory in the political sciences. Through this lens, it will reconsider the international practice and the corresponding legal documents related to the existence of a possible democracy principle. In this respect, a special emphasis will be put on three areas of potential precedents – resolutions of the UN General Assembly, the practice of regional organizations such as the Organization of American States or the African Union, and military interventions in the name of democracy. The analysis will show that the legitimacy principle of international law is, at the same time, more modest and more demanding than the claim of the democratic entitlement school. It will be argued that democracy is no strict obligation, but rather a teleological principle. States are obliged to develop towards democracy and to consolidate and to optimize democracy, once electoral institutions have been established.
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I. Introduction

Democracy has for a long time been a non-issue in international law. In 1986, the International Court of Justice declared:

However the régime 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 and cultural system of a State.¹

This changed dramatically in the 1990ies, after the end of the ideological dichotomy of the Cold War. The new interventionism of the UN Security Council and a large number of newly emerging democracies in Latin America, Asia and Africa led to a widespread euphoria about democracy. Francis Fukuyama predicted the end of history,² and legal scholars started to discuss the emergence of a right to democratic governance.³ The first major international document addressing this issue was the Vienna Declaration of the World Conference on Human Rights, which recognized that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”⁴

The linguistic connection of democracy and development already shows that the right to democratic governance is not primarily concerned with the industrialized countries of Western Europe and North America. Its principal addressees are developing countries. Democracy differs, however, from traditional human rights in important aspects. While the latter impose either positive or negative obligations on governments and public officials, electoral democracy is addressed to the whole society. Furthermore, the Vienna Declaration does not only independently promote democracy as form of government, but also emphasizes the beneficial influence of democracy on development. This statement turns traditional assumptions of modernization theory, which see economic development as a prerequisite of democratization,⁵ on its head. Democracy is thus promoted as a universal cure for the fight against poverty. It is assumed that it can be instituted at almost any stage in the developmental process and in any society.⁶ This contribution seeks to analyze these underlying assumptions. It tries to reconsider the democratic entitlement thesis through the lens of democratization theory and attempts to redefine the claim by making a more modest proposal.

The analysis will commence with the development of an analytical framework. I will clarify the definition of democracy and then analyze the principal approaches conceptualizing democratiza-

⁵ See infra Part II.B.2 for an account of modernization theory.
⁶ Adrian Leftwich, Governance, democracy and development in the Third World, 14 THIRD WORLD QUARTERLY 605, 605 (1993).
tion processes (II.). The second part will deal with the debate on the democratic entitlement. I will discuss the existing approaches to this topic and propose a more differentiated approach (III.).

II. Theoretical Framework: Democracy and Democratization

In this section, the theoretical foundations of democracy in international law shall be analyzed. I will first define the notion of democracy which shall be the basis of this contribution (A.). In a second step, I will analyze the potential economic, cultural and social preconditions of democracy (B.).

A. Definition of Democracy

Democracy is a contested concept. Although the democratic idea seems to be non-negotiable at least in the Western hemisphere, there is no consensus on what democracy actually means. Different scholars fill the concept with different content. Some people propose rather thin or minimalist models of democracy, while others advocate thick or demanding conceptions. 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. The former concept is a binary one. A political system can either be or not be a democracy. The latter, in contrast, is gradual. Democracy is not an either-or-question, but one of degree, of more or less. Both concepts are, however, complementary, not mutually exclusive. Even to conceive democracy in a gradual way presupposes that we have made an anterior classification. For it would deprive the concept of every heuristic value to qualify authoritarian or totalitarian regimes as a democracy to a certain degree. Once we have made a binary classification, it may, however, be valuable to distinguish different types of democracy on a gradual scale, as long as we do not perceive democracy solely to be an ideal concept. The notion of democracy thus has two dimensions: on the one hand, a binary classification, a distinction between democracies and non-democracies, and, on the other hand, a graduation, which distinguishes democracies of different quality.

Turning to the binary dimension, there are two ways to address the issue of defining the concept. On the one hand, we can look at whether the relevant sources either explicitly or implicitly pro-

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8 LAURENCE WHITEHEAD, DEMOCRATIZATION: THEORY AND EXPERIENCE 14 (2002).
12 Id. at 184-85; Armin von Bogdandy, Demokratisch, demokratischer, am demokratischsten? Zur Steigerungsfähigkeit eines Verfassungsprinzips am Beispiel einer Neugestaltung der Verordnungsgebung, in VERFASSUNG - PHILOSOPHIE - KIRCHE. FESTSCHRIFT FÜR ALEXANDER HOLLERBACH ZUM 70. GEBURTSTAG 364, 367 (Joachim Bohmert et al. eds., 2001).
provide a definition of democracy. On the other hand, we can also establish a proper definition of democracy and analyze whether such a concept exists in international law, notwithstanding whether it is actually called democracy. At first glance, it seems tempting to go the first way. Such an analysis is, however, deceptive. The term ‘democracy’ is used very rarely in international legal documents – perhaps precisely because of its vagueness. Where it can be found, its meaning is not further specified.\(^\text{13}\) The aforementioned Vienna Declaration\(^\text{14}\) or the Agenda for Peace of the UN Secretary General\(^\text{15}\) only allude to the positive effects of democracy on human rights, development and peace. Savings clauses of international human rights instruments like to recur to the notion of democratic society,\(^\text{16}\) without defining the meaning of this term.

There is, however, one prominent exception: in 2000, the UN General Assembly adopted a resolution under the title “Promoting and Consolidating Democracy”\(^\text{17}\) according to which democracy consists of a number of different elements: the promotion of pluralism, the protection of human rights, the separation of powers, the rule of law, elections, the development of a civil society, good governance, sustainable development, solidarity, and social cohesion. This definition, however, appears to be more of a wish list, a conglomeration of desirable ideas and institutions, than the attempt to propose a coherent conception of democracy. On the one hand, it mingles substantive and procedural issues without saying anything about their interrelation; on the other, it does not distinguish between the rule of the political game, the institutional framework of government, and certain programmatic issues,\(^\text{18}\) such as social cohesion and sustainable development.

If we turn to the political science literature, we find a number of different definitions of democracy. Some are minimalist, concentrating on elections.\(^\text{19}\) Other scholars add elements such as the rule of law\(^\text{20}\) or the guarantee of certain political rights to their definition. In his influential contribution on political polyarchies, Robert Dahl also includes other institutions in his definition: certain political human rights, like freedom of expression, information and association, as well as

\(^\text{13}\) But cf. also 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 not less abstract than that of democracy so that this kind of definition is not of much help in specifying the latter.

\(^\text{14}\) Vienna Declaration, supra note 4.


\(^\text{18}\) See SARTORI, supra note 11, at 90 (explaining this distinction).

\(^\text{19}\) Przeworski, supra note 9.

an inclusive status of citizenship. Other scholars add even further human rights or institutions, such as the protection of minorities or social rights.

Defining democracy is such a difficult issue because often the debates on what democracy is and on what democracy should be are intermingled. Most scholars advocating a thick concept of democracy that goes beyond the mere legitimation of governance through elections take an idealist position and include their idea of what a political system should look like in their conception of democracy. One ideal democracy concept will, however, not be detectable in international law because of the great number of different traditions and cultures which shape and are part of the international order. For this reason, I would like to choose a different way. As democracy is highly contested and malleable at its borders, this analysis shall concentrate on the core, the legitimation of public power through elections. A political system may be called a democracy, when its government is designated in periodic and contested elections. Elections are contested when their outcome is uncertain ex ante and irreversible ex post.

This definition is meant to be purely descriptive and does not contain a normative argument. It does not exclude that there are good reasons for other, more demanding concepts of democracy. However, the protection of human rights or the implementation of the rule of law are separate institutions which can be distinguished from the establishment of democracy and subject to independent analyses. 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 is, however, a contradictio in adjecto.

As mentioned, democracy has also a second dimension. Recently, Susan Marks has cautioned against adopting a minimalist concept of democracy in the realm of international law. Concurrently, there is a tendency in international relations to idealize democracy. In this context, it may be dangerous to promote undemanding democracy concepts as legal standards. For, if states have reached this minimum threshold, they are immune against further critique. Marks thus proposes to employ a gradual concept of democracy. But gradual conceptions are, as I have pointed out earlier, only a complement, no substitute to classificatory conceptualizations. The critique shall thus be addressed not by substituting our binary definition, but by adding a second, gradual dimension to our conception of democracy.

23 DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS (1999).
24 WHITEHEAD, supra note 8, at 15.
26 Id. at 16.
28 Susan Marks, The "Emerging Norm": Conceptualizing "Democratic Governance", 91 ASIL PROCEEDINGS 372-76 (1997); Marks, supra note 10, at 78-88.
29 Id. at 81-82.
B. The Theory of Democratization

The transition from an authoritarian regime to a democratic system is not only a simple shift in political status, but a social process which is influenced by different external factors. When the debate on democratization started in the late 1950s, it addressed the issue by analyzing the ‘pre-requisites of democracy’.30 In its strict sense, the term suggests that democracy has certain necessary requirements, without which democracy is not able to function. Still today, there are authors who promote such a strict approach and argue that certain cultural environments are hostile to democracy (a.). The majority of scholars, however, pursue a more moderate approach. They try to identify socio-economic factors which may be favorable to the establishment of democracy. The earliest and most influential school is the so-called modernization theory, which tries to establish a correlation between economic development and democracy (b.). Further scholars inquire into the relationship of ethnic, social or religious homogeneity and the prospects for democracy (c.). While the three approaches mentioned so far are concerned with the social environment of democratization on the macro level, a further school instead concentrates on the micro-processes of democratization. Its adherents analyze the behavior of political elites in transition processes (d.).

1. Cultural Prerequisites of Democracy

The theory of democracy’s cultural prerequisites argues that the establishment of democracy depends on the cultural environment of the respective state. Most prominently, this was put forward by Samuel Huntington, who divides the world into eight major civilizations: the Western, the Confucian, the Japanese, the Islamic, the Buddhist, the Orthodox, the Latin American, and the African Cultures.31 Among these, only the Western, the Latin American and the Japanese culture are regarded as favorable to democracy. Three further civilizations are supposed to be neutral with regard to democracy, while Islam and Confucianism are conceived as hostile to democracy.32 On first glance, there is some empirical evidence for Huntington’s thesis. Among the about thirty highly-developed states having a per capita income of more than 20,000 USD,33 only states coming from one of the two cultural environments classified by Huntington as hostile to democracy are not qualified as electoral democracies by the Freedom House’s Survey of Civil and Political Rights.34 These states are Brunei Darussalam, Hong Kong, Kuwait, Qatar, Singapore, and the United Arab Emirates.

Nevertheless, Huntington’s analysis is not convincing. There is some empirical evidence against the thesis that Islam or Confucianism are *per se* hostile to democracy. Japan, Taiwan or South Korea, states which are molded by Confucianism, can be qualified as electoral democracies. Equally, Indonesia, the country with the largest Muslim population can be considered as an electoral democracy. Although certain religious or cultural values, such as the lack of separation between the religious and the political sphere, may be an obstacle to the establishment of a democratic society, this is no particularity of Islam or Confucianism, but rather an expression of socioeconomic progression.\(^{35}\) Religious or cultural patterns are subject to change in the course of social development.\(^{36}\) In this context, a short glance into the academic past might be illuminating: In the middle of the 20th century, Catholic societies had been qualified by a number of political scientists as hostile to democracy.\(^{37}\) However, many states with a predominantly Catholic population have meanwhile developed into stable democracies. It thus seems that culture is no determinant factor in the process of democratization. Impediments which have been attributed to culture often have other reasons. Therefore, culture is no absolute obstacle to democracy, 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. Culture and democracy are interdependent. Thus, if the preconditions for democratization are to be established in a certain society, this leads to a necessary change of its culture. From a normative perspective, such a development is not without problems. In order to illustrate the point, Michael Walzer once introduced a hypothetical example into the discussion. Algerian fundamentalists establish a repressive military dictatorship and a ‘religious republic’ without individual liberties.\(^{38}\) Walzer assumes that this régime is deeply rooted in the political and religious culture of Algeria. In this hypothetical situation, the Swedish government allegedly has a chemical weapon which allows the transformation of every Algerian into a Swedish social democrat. Walzer argues that it is morally prohibited to use this weapon because we would then impose our political and cultural values on an Algerian people which has a fundamentally different system of values.\(^{39}\)

This question does not only concern the Islamic region. In the 1990s, some Asian governmental leaders, such as Malaysia’s Prime Minister Mahathir bin Mohamad and Singapore’s Head of State Lee Kuan Yew initiated a debate on Asian values. They argued that Western democracy could not simply be imposed on Asian societies because they were not compatible with certain Asian traditions. Asian societies tend to perceive political communities as a system of obliga-


\(^{39}\) Id. at 226.
tions rather than a system of rights, and their values are rather community-oriented. There may be two different motivations behind this argument. The first one is of strategic nature. Brought forward by politicians, who are beneficiaries of the status quo and who claim the authority to define what Asian values are, the argument merely has an apologetic function.

If it is not only supposed to justify a certain government, it has a functional rather than a normative character. The main purpose is to stress collective values. However, if we understand democracy as a procedural framework, then the concept has sufficient flexibility in order to realize different values and hierarchies of values. Cultural relativism has no answer to too many questions: Who defines the cultural tradition of a certain people? Who determines the composition of the group whose cultural tradition shall be relevant? With regard to the latter question, it is not imperative to take the collectivity of the citizens as the point of reference because the population can be very heterogeneous. Against this background, we can see that Walzer’s parable is exaggerated. It is, of course, not justified to transform Algerian fundamentalists into Swedish ‘social’ democrats. However, this does not discredit the promotion of democratic rules in general.

2. Modernization Theory and the Socio-Economic Requisites of Democracy

Modernization theory seeks to establish a relationship between the development of a state and its degree of democratization. The work of Martin Seymour Lipset, who claimed in 1959 that “the more well-to-do a nation, the greater the chances that it will sustain democracy,” was groundbreaking. For this relationship, Lipset offers several reasons. In particular, economic development leads to a higher level of urbanization and education. Furthermore, economic prosperity causes the establishment of a middle class and an increased vertical mobility and permeability among classes. Both deprive the underclass of its revolutionary potential and thus support the stability of the democratic system. Finally, political elites have to fear less disadvantages in case of a change of government, because the relative effect of a policy change is stronger in poor than in rich countries.

Since the publication of Lipset’s theory, several empirical studies have confirmed a correlation between economic development and democratization: a higher economic prosperity increases the

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41 WOLFGANG MERKEL, DEMOKRATIE IN ASIEN. EIN KONTINENT ZWISCHEN DIKTATUR UND DEMOKRATIE 91 (2003).
44 See the seminal work by Lipset, supra note 30; IDEM, POLITICAL MAN. THE SOCIAL BASES OF POLITICS 45-76 (1960). See also DANIEL LERNER, THE PASSING OF TRADITIONAL SOCIETY. MODERNIZING THE MIDDLE EAST 63-64 (1958).
45 Lipset, supra note 30, at 75.
46 Id. at 78.
48 Lipset, supra note 30, at 83.
49 Id. at 84.
probability that a state has a stable democratic system.\textsuperscript{50} However, there is no causal relationship between both factors.\textsuperscript{51} Economic development is neither a necessary nor a sufficient precondition for democracy. There are important exceptions which disprove a determinist relationship. India, for example, has been a relatively stable democracy for several decades, although the GDP \textit{per capita} is below 1,000 USD. On the other hand, several Arab states have not yet developed democratic structures, notwithstanding a high \textit{per capita} income.

Furthermore, empirical data suggests that economic development does not primarily influence the transition to democracy. Economic prosperity rather stabilizes democratic institutions once they have developed.\textsuperscript{52} In particular, poor democracies face a high probability of collapsing.\textsuperscript{53} Only after having reached a certain stage of development are democracies sufficiently stable to survive economic crises. However, economic development is not the only factor that influences the democratization process.

All political systems know informal rules and arrangements in their political process.\textsuperscript{54} Such mechanisms may ideally complement the formal constitutional institutions and increase their flexibility. However, if the democratic system is unstable or defective, such informal networks are often used to pervert the democratic rules.\textsuperscript{55} The political actors try to strengthen their power by relying on particularistic networks outside of the constitutional institutions. Such defective democracies are thus likely to break down in social or economic crises or to transform into open autocracies.

How do defective democracies differ from functioning ones? An approach elaborated by Tatu Vanhanen takes a rationalistic standpoint and establishes a relationship between the degree of democratization and the dispersion of social power resources.\textsuperscript{56} If power resources are widely dispersed, it is difficult for a specific group of society to suppress other social groups and to establish or maintain hegemonic structures.\textsuperscript{57} The degree of dispersion is related to other socio-

\begin{itemize}
\item \textsuperscript{50} PHILIP COULTER, \textit{SOCIAL MOBILIZATION AND LIBERAL DEMOCRACY} (1975); Kenneth A. Bollen & Robert W. Jackman, \textit{Economic and Noneconomic Determinants of Political Democracy in the 1960s}, \textit{1 RES. POL. SOC.} 27, 42 (1985); Larry Diamond, \textit{Economic Development and Democracy Reconsidered}, \textit{in REEXAMINING DEMOCRACY. ESSAYS IN HONOR OF SEYMOUR MARTIN LIPSET} 93 (Gary Marks & Larry Diamond eds., 1992); Lipset, Seong & Torres, \textit{supra} note 47.
\item \textsuperscript{52} Adam Przeworski & Fernando Limongi, \textit{Modernization: Theories and Facts}, \textit{49 WORLD POLITICS} 155 (1997).
\item \textsuperscript{53} \textit{Id.} at 170.
\item \textsuperscript{54} Wolfgang Merkel & Aurel Croissant, \textit{Formale und informale Institutionen in defekten Demokratien}, \textit{41 POLITISCHES VIERTELJAHRRESSCHRIFT} 3, 16 (2000); CHARLES TILLY, \textit{DEMOCRACY} 88 (2007).
\item \textsuperscript{55} WOLFGANG MERKEL ET AL., \textit{DEFEKTE DEMOKRATIE} 28 (2003).
\item \textsuperscript{57} \textit{Id.} at 24.
\end{itemize}
economic factors, such as economic development and level of education.\textsuperscript{58} Vanhanens’s approach is thus a supplement rather than a contrast to modernization theory.

Another explanation has been offered by Charles Tilly, who argues that state capacity is the decisive factor for a successful democratization process.\textsuperscript{59} Strong institutions increase the prospects of success. In contrast, the emergence of autonomous power centers is one of the biggest obstacles.\textsuperscript{60} Of course, there are limits: if the state is too strong, political actors have incentives to claim exclusive power and to undermine democratization. Thus, informal ‘trust networks’ have to be integrated into the public political space.\textsuperscript{61} Power dispersion thus continues to have an important function. However, it has to take place within state institutions and shall not be in opposition to them.

Turning to cultural scholarship, we find that democracy depends on the internalization of democratic values by citizens and political elites.\textsuperscript{62} Certainly, the embrace of democratic values does not happen over night. They rather have to be learned, internalized and accumulated as social capital.\textsuperscript{63} They require experience with democratic institutions and a corresponding education.\textsuperscript{64} Furthermore, socio-economic change may lead to a transformation of political values.\textsuperscript{65}

Summarizing these findings, we can draw the following conclusions: the functioning and stability of democracy depend on several different factors – a democratic culture, socio-economic development, stable institutions, the integration of trust networks into the public political space and the dispersion of power resources. These factors are interdependent. Democratization does thus not only depend on sound institutional design. It is rather rarely an abrupt transition, but subject to a gradual process.\textsuperscript{66}

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

\textsuperscript{58} Id. at 25.
\textsuperscript{59} TILLY, supra note 54, at 161-85.
\textsuperscript{60} Id. at 164.
\textsuperscript{61} Id. at 80-105.
\textsuperscript{62} GABRIEL ABRAHAM ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS 498 (1963); Larry Diamond & Juan José Linz, Politics, Society, and Democracy in Latin America, in DEMOCRACY IN DEVELOPING COUNTRIES: LATIN AMERICA 1, 10 (Larry Diamond, Juan José Linz & Seymour Martin Lipset eds., 1989).
\textsuperscript{63} ROBERT D. PUTNAM, MAKING DEMOCRACY WORK: CIVIC TRADITIONS IN MODERN ITALY 99-116 (1993).
\textsuperscript{64} ALMOND & VERBA, supra note 62, at 501. In this context, it is interesting to note that former British colonies have far more success with the installation of democracy than their French, Belgian, Dutch, Spanish or Portuguese counterparts. See Bollen & Jackman, supra note 50; Myron Weiner, Empirical Democratic Theory, in COMPETITIVE ELECTIONS IN DEVELOPING COUNTRIES 3, 19 (Myron Weiner & Ergun Özbudun eds., 1987). See also Lipset, supra note 36, at 5 (noting that this is probably due to the fact that the British – in contrast to other colonial powers – introduced certain democratic institutions in their colonies).
\textsuperscript{65} Diamond & Linz, supra note 62, at 12.
\textsuperscript{66} Lipset, supra note 36, at 4.
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.\footnote{John Stuart Mill, Considerations on Representative Government 230 (1861).}

In many plural societies where identity is heavily influenced by the belonging to a single cultural, ethnic or religious group, voting often follows social affiliations.\footnote{Dirk Berg-Schlosser, Empirische Voraussetzungen und allgemeine Konstituierungsbedingungen von Demokratie, in Perspektiven der Demokratie: Probleme und Chancen im Zeitalter der Globalisierung 57 (Dirk Berg-Schlosser & Hans-Joachim Giegel eds., 1999).} It is thus barely surprising that empirical studies suggest that the probability to establish democracy in an ethnically homogeneous society is twice as high as in a segmented society.\footnote{Adrian Karatnycki, The Decline of Illiberal Democracy, 10.1 J. DEM. 112, 117 (1999).}

Different authors have proposed remedies to overcome the problem of segmentation. The most widely recognized proposal is Martin Lijphart’s model of consociational democracy.\footnote{Arend Lijphart, Democracy in Plural Societies (1977); idem, Democracies: Patterns of Majoritarian and Consensus Government in Twenty-One Countries 21-36 (1984).} Lijphart proposes to establish a system in which every major social group is represented. He identifies four fundamental characteristics: government by a grand coalition, mutual veto rights in order to protect minority interests, proportional representation in politics and civil service, as well as a proportional allocation of public funds, and a federal structure giving each segment a high amount of autonomy.\footnote{Lijphart, PLURAL SOCIETIES, supra note 70, at 25.}

However, consociationalism implicitly assumes that human identity is unalterable. Yet, identities are no natural characteristic of human beings, but social constructs.\footnote{Donald L. Horowitz, Ethnic Groups in Conflict 684 (1985).} They can evolve and change with time and circumstance although not being infinitely malleable.\footnote{Shapiro, supra note 7, at 95.} Research in social psychology shows that the interaction between different social groups can be enhanced if it is possible to establish a common superordinate identity.\footnote{Samuel L. Gaertner et al., The Common Ingroup Identity Model: Recategorization and the Reduction of Intergroup Bias, 4 Eur. Rev. Social Psychology 1 (1993).} Consociationalist models thus run the risk of deepening rather than overcoming segmentations in society. This does not mean that democracy is not possible in plural societies. The solution should instead be to establish voting procedures which discourage incentives to vote according to ethnic or religious cleavages.\footnote{See the proposals of HOROWITZ, supra note 72, at 628-52.}

Such procedures may prescribe that parties have to rely on votes of more than one social group in order to be elected, which could, for example, be managed by the introduction of certain minimum quota.

But even the latter form of democratization bears certain risks. Without a consensus about the fundamental rules of the political game, incentive-based voting mechanisms cannot surmount social cleavages.\footnote{Andrew Reynolds, Constitutional Medicine, 16 J. DEM. 54, 57 (2005).} The recipe in these cases resembles the approaches to socio-economic devel-
opment. States with highly segmented societies often have a weak institutional structure. Thus, formal institutions have to be strengthened and trust in these institutions has to be developed. At the same time, it is necessary to establish a common identity. Consequently, nation and capacity building in these cases ideally precedes the transition to democracy.

4. **Actor Theories**

While the approaches presented so far have dealt with the macro-environment of democratization, the actor theories focus on the political actors involved in democratization periods. Under a rational choice perspective, transition to democracy occurs if it is rational for the relevant political elites to establish a democratic system in order to pursue their interests. This is mostly the case if no political group possesses a clear advantage over its adversaries so that democracy, as institutionalized insecurity about the future policy, appears to be the best compromise, giving everyone the theoretical opportunity to attain a share of the power. In the period of democratic consolidation, democracy survives if the government has incentives not to manipulate the outcome of elections and if it hands over its power after losing the elections. In established democracies, it is an important factor that politicians trust to have the opportunity to regain power in future elections. If such a trust has not yet been established, it is important that the members of the parting government have suitable professional alternatives in order to reduce the costs of losing power – and thus the incentives to keep it against the law – as much as possible. Socio-economic development is thus again a decisive aspect of the political game. Further factors influencing the incentive structure of political elites are the internalization of democratic values and the dispersion of power within society. The incentives of the political actors are thus dependent on the macro environment.

5. **Conclusions**

The different attempts to explain democratization draw a complex picture. They do not exclude each other mutually, but highlight different aspects in the process of democratization. Transition

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77 TILLY, supra note 54, at 176-77.
81 SØRENSEN, supra note 79, at 28.
82 PRZEWORSKI, supra note 79, at 10-34.
83 I owe this idea to Professor Thomas Franck.
84 Burton, Gunther & Higley, supra note 79, at 30.
85 SHAPIRO, supra note 7, at 90.
to and consolidation of democracy do not permit monocausal explanations, but depend on a variety of different factors. They show that democracy has no necessary or sufficient prerequisites – neither a low level of economic development nor a significant ethnic and cultural heterogeneity as such exclude the establishment of a relatively stable democracy. Nor does economic prosperity lead to an automatic transition to democracy.

However, despite the lack of causal explanations, there are significant correlations. It is likely that low economic development or social heterogeneity endanger the consolidation of democracy. Indeed, these obstacles are malleable. But they are subject to long-term processes that are not necessarily steady. Sometimes it may be reasonable to compromise on short-term success in order to pursue long-term goals. In certain circumstances, it may, furthermore, be advisable to engage in nation- and identity-building before pursuing the establishment of institutions. Because there is no universally valid formula for success, many political scientists stress the process-like character and the unpredictability of democratization. It does not suffice to establish certain institutions, but it is a “complex, long-term, dynamic and open-ended process”. Even if elections have to enter the stage at a certain point, they are not necessarily the first step. Rather, democratization is a teleological process, the final objective of which is the establishment of a legitimate form of government, but which does not necessarily have to be democratic itself.

III. Democracy in Positive International Law

The legal democratic entitlement school tries to establish a right to democratic governance as part of customary international law. According to the general definition contained in art. 38 (1) lit. b of the ICJ Statute, customary law consists of two elements: state practice and opinio iuris. Customary Norms are thus principally identified by an inductive abstraction from patterns of state behavior. However, there is an important trend in legal scholarship which recognizes an additional way of identifying customary norms, particularly in the Continental literature. Under the premise that the legal system is perceived as a coherent and holistic system without internal contradictions, customary norms may also be justified through deduction. If a certain principle follows necessarily from a more abstract principle which has already been accepted as customary

86 MERKEL & PUHLE, supra note 36, 62; SHAPIRO, supra note 7, at 80.
87 MAMOUDOU GAZIBO, LES PARADOXES DE LA DÉMOCRATISATION EN AFRIQUE 228 (2005).
88 Juan José Linz & Alfred Stephan, Toward Consolidated Democracies, 7.2 J. DEM. 14, 23 (1996).
89 Schmitter & Santiso, supra note 78, at 82-84; RALF DAHRENDORF, REFLECTIONS ON THE REVOLUTION IN EUROPE 99-100 (2005).
91 WHITEHEAD, supra note 8, at 27.
92 Marks, supra note 10, at 87.
93 Andreas Schedler, What is Democratic Consolidation?, 9.2 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 8, at 28 (expressing that democracy is a concept which is, to a certain extent, indeterminate and can be implemented in a variety of different ways).
94 See Schmitter & Santiso, supra note 78, at 79 on the undemocratic nature of many democratization processes.
95 Statute of the International Court of Justice, June 26, 1945, 30 U.N. Y.B. 1052.
law, then the former principle has equally to be part of the custom because the legal order would otherwise be contradictory. With regard to the right to democratic governance, we can find both approaches to justify a customary norm, an inductive and a deductive one. In the following, I will first turn to the latter.

A. Democracy and Self-Determination

The deductive approach, which is primarily promoted in European scholarship, tries to deduce a right to democratic governance from the principle of self-determination. Self-determination had at first a primarily external direction. The principle had its strongest impact in the context of de-colonization. However, by its incorporation into the common art. 1 of the two human rights covenants from 1966, it also received an internal dimension. According to this provision, the right to self-determination attributes to every people, inter alia, the right freely to determine its political status. This internal dimension has been affirmed by the friendly relations declaration of the UN General Assembly, which also underlined the right to determine the own political status.
1. Democracy as Mandatory Consequence of Self-Determination

There are two different lines of arguments trying to deduce a democratic principle from the right to self-determination. The first argument is a contextual one: as part of the Covenant on Civil and Political Rights (CCPR), art. 1 has to be interpreted in the context of the other provisions of the Covenant, in particular the right to democratic elections prescribed in art. 25. The right to participate in elections specifies how the right to determine the own political system has to be exercised. However, it seems more convincing to interpret both provisions in a way that leaves them an independent normative scope. If the guarantees of a self-determination principle which is shaped by art. 25 CCPR do not surpass the scope of the right to democratic elections, self-determination is not needed. In order to guarantee elections, art. 25 CCPR is a sufficient normative basis. If one wants to draw further conclusions, a mere connection of and abstraction from basically independent principles is not enough. This becomes obvious if we consider the practical relevance of the discussion. Within the framework of the CCPR, it does not make any difference whether we interpret art. 1 CCPR in the light of art. 25 CCPR because the latter guarantees that elections will be held in any case. This is different for the customary principle of self-determination outside the CCPR. If we interpret this principle equally in the light of art. 25 CCPR, then the scope of the electoral guarantee would be impermissibly extended over the limits of the Convention.

The second argument is more fundamental. It tries to establish a logical relationship between democracy and self-determination. Taking seriously that the right to determine the political system is a right of the people, the decision on the political status has to be one of the people, not of the government. Such a decision is necessarily dependent on democratic mechanisms because a different mode of decision attributable to the people is not conceivable. This ‘logical’ relationship is, however, based on problematic premises. It does not distinguish between the act of framing the political system and its actual content, the pouvoir constituant and the pouvoir constitué. The right to self-determination only refers to the former, but not necessarily to the lat-

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104 See supra note 16.
107 Rosas, supra note 99, at 229; Sicilianos, supra note 99, at 24.
ter. History provides examples in which citizens opted by electoral means to delegate power to political elites, which then established authoritarian rule.\textsuperscript{110}

One solution to address this dilemma is to distinguish formally between the act of establishing a political system, and the political system itself. The participation of the citizens is limited to the former act. If they choose a system other than democracy, they have, by this act, exhausted their right to self-determination.\textsuperscript{111} This view can, however, not explain why the act of self-determination should be irreversible. Votes often do depend on the special circumstances of a certain historic situation. However, circumstances may change, just as citizens’ preferences may change. Moreover, the composition of the population itself is subject to change. It is difficult to justify that the citizenry in a historically accidental moment shall have the power to bind future generations.

Another solution has been put forward by Gregory Fox and Georg Nolte in their contribution on ‘Intolerant Democracies’. In their analysis, they discuss whether democracies are allowed to fight political tendencies directed against the system as such.\textsuperscript{112} They propose a substantive concept of democracy in which electoral results may be disregarded in order to prevent an undemocratic opposition to come to power and to protect democracy as such. However, this argument implies a predisposition towards democracy.\textsuperscript{113} Democracy or even a specific type of substantive democracy is considered to be an absolute value \textit{a priori}. We have, however, seen that the value of democracy always depends on the specific circumstances.\textsuperscript{114} We can thus stick to what Alberto Asor Rosa remarked as early as twenty-five years ago:

\begin{quote}
        democracy, precisely because it is a \textit{system of mediocrates} that cannot make itself out to be an absolute or an end in itself [...] , is a \textit{game} whose defining feature is that it allows its own rules to be called into question. \textit{If it does not, it is already something else.}\textsuperscript{115}
\end{quote}

2. \textbf{Self-Determination and Representation}

This does, however, not lead to the conclusion that the right to self-determination does not impose any restrictions on the political elites’ choice of the form of government. This is expressed in the friendly relations declaration, which declares with regard to the principle of self-determination:

\begin{quote}
...[...]
\end{quote}

\begin{thebibliography}{9}
\bibitem{114} See supra Part II.B.
\bibitem{115} Alberto Asor Rosa, \textit{La felicità e la politica}, 1.2 \textit{LABORATORIO POLITICO} 10, 30-31 (1981) ("la democrazia, proprio in quanto \textit{sistema delle mediocrità}, che non si assoluziza e non si erige esso stesso a fine [...] , è qual tale \textit{gioco} che accetta di rimettere in discussione le proprie regole. \textit{Se non lo fa, è già un'altra cosa.}") (Translation by the author, emphasis in the original).
\end{thebibliography}
Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.116

Consequently, not every form of government is compatible with self-determination. Rather, the government has to be representative. Excluded are thus governments which are authoritarian or only represent particularistic interests. These considerations are underlined by a further argument. If the content of self-determination could exclusively be determined by the respective government, the principle would not differ from the principle of state sovereignty and thus not have any independent value.117

However, representation does not necessarily have to be realized through elections. It may also be by government in the public interest, government for the people. The problem will certainly be to determine when a form of government can be considered as representative. Unlike democracy, representativeness cannot be determined by the sole existence of certain institutions. We rather have to recur to substantial criteria. In this respect, a distinction proposed by Georg Sørensen may be helpful. Sørensen distinguishes between development-oriented régimes, whose purpose is economic development as well as the promotion of individual well-being, growth-oriented régimes, who focus exclusively on economic growth without taking into account its effects on society, and self-enriching régimes.118 Only the first type can be regarded as compatible with the right to self-determination. A further indicator is the human rights record of a government. Not every violation of human rights accounts for the illegitimacy of a government as human rights violations occur even in the most advanced political systems.119 However, in cases of systematic violations of core human rights, the government would not be representative of its citizens anymore. It would be to qualify as illegitimate, and the state would infringe upon the right to self-determination of its population.

B. The International Practice: Democratic Teleology

In contrast to the deductive approach, the inductive approach relies in particular on the practice of international institutions.120 The argumentation is based on a thin concept of democracy,

116 Friendly relations declaration, supra note 103 (emphasis added).
117 Crawford, supra note 100, at 56.
118 SØRENSEN, supra note 79, at 76-81.
119 Certainly, a state remains responsible for its human rights violations even if they do not cross the threshold to illegitimacy.
120 See Franck, supra note 3; Fox, supra note 3; David Wippman, Defending Democracy through Foreign Intervention, 19 HOUSTON J. INT'L L. 659, 665-68 (1997); Roland Rich, Bringing Democracy into International Law, 12.3 J. DEM. 20 (2001); Fulda, Democratie und pacta sunt servanda (2002); Sicilianos, supra note 99; Christian Tomuschat, L’intervention structurelle des Nations unies, in LA CONTRIBUTION DES NATIONS UNIES À LA DÉMOCRATISATION DE L’ÉTAT 101 (Rostane Mehdi ed., 2002); JUDE I. IBEGBU, RIGHT TO DEMOCRACY IN INTERNATIONAL LAW 141-205 (2003); Dodzi Kokoroko, Souveraineté étatique et principe de légitimité démocratique, 16 REVUE QUÉBÉCOISE DE DROIT INTERNATIONAL 37 (2003); Jan Wouters, Bart De Meester &
which is principally identified by periodic elections.\textsuperscript{121} Further support is drawn from political human rights like the freedoms of speech, assembly and association.\textsuperscript{122} However, democratization is more complex than just being the introduction of a simple assembly of certain political rights and institutions. The debate in legal academia often seems to presuppose that democracy can easily be established in any given state. But the establishment of democracy was already a complex and slow development in the Western hemisphere. Many developing countries are in a different social and economic situation than most Western states were when they began their transition to democracy. When establishing our theoretical framework, we have already seen that democratization is a complex and long-term process.\textsuperscript{123} Therefore, this section tries to reexamine the evidence on democracy in international law through the lens of democratization theory. The thesis which shall be put forward is that international law does not know a strict right to democratic governance, but rather contains a principle of democratic teleology. States are not required to introduce democracy right away, but to develop towards democracy.

Evidence for the emergence of a democracy principle can be found in various fields of international law. The following analysis shall concentrate on three areas, which I deem especially important. First, we will have a look at universal human rights instruments and the practice of international institutions, like resolutions of the UN General Assembly (1.). Then, we will briefly examine the institutional practice at the regional level (2.), before finally dealing with the issue of military interventions in order to establish democracy (3.).

1. Practice of International Institutions

(a) Right to Democratic Elections: CCPR and UDHR

One strong indicator for the existence of customary international law is universal treaties, such as the international human rights instruments. If states enter into treaty obligations, they express their intent to be bound by the treaty norms and thus manifest a corresponding \textit{opinio iuris}.\textsuperscript{124} The most important treaty norm in this context is art. 25 CCPR. It guarantees the participation in genuine, periodic elections, which are supposed the guarantee the free expression of the will of the electors. Although socialist states originally argued – based on the \textit{travaux préparatoire} – that one-party systems would be in conformity with art. 25 CCPR, there is consensus among international legal scholars today that voters have to be given a meaningful choice in order to meet

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\item\textsuperscript{122} See Franck, supra note 3, at 61; Fulda, supra note 120, at 22; Sicilianos, supra note 99, at 30.
\item\textsuperscript{123} See supra Part II.B.5.
\end{itemize}
\end{footnotesize}
the requirements of the Covenant. A “free expression of the will of the electors” (lit. b) and the “participation in the conduct of public affairs” (lit. a) is only possible when the voters’ choice is not restricted to a choice of persons, but also to one of different political agendas.

The CCPR has, as yet, been ratified by 160 states. Indeed, more than eighty percent of the international community have agreed to select their government by free and fair elections. However, there are notable exceptions – the abstinent states China and Pakistan belong to the ten most populous states in the world. Furthermore, the list of abstaining countries shows patterns of regional concentration. Especially in East and Southeast Asia, a considerable number of states has not committed itself to hold periodic elections. Moreover, the number becomes less impressive when we take a look at the actual state practice. Many of the states having ratified the CCPR do not actually practice electoral democracy. According to the 2007 survey of Freedom House, only two thirds of the members of the international community of states can be qualified as electoral democracies. Mere commitment to art. 25 CCPR alone is thus not sufficient in order to establish a customary principle of democracy. Art. 21 of the Universal Declaration of Human Rights encounters the same problem. Indeed, in para. 3, this norm establishes a right to participate in periodic and genuine elections – however, this declaration equally is not supported by state practice.


127 Status: Jan. 25, 2008. The states, which have not (yet) ratified the Covenant are 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, Samoa, São Tomé and Príncipe, Saudi Arabia, Singapore, Solomon Islands, Tonga, Tuvalu, United Arab Emirates, Vanuatu.

128 Bhutan, Brunei, China, Laos, Malaysia, Myanmar, Pakistan, Singapore.


130 VALENTINA GRADO, GUERRE CIVILI E TERZI STATI 260 (1998); Dietrich Schindler, Völkerecht und Demokratie, in LIBER AMICORUM PROFESSOR SEIDL-HOHENVELDERN - IN HONOUR OF HIS 80TH BIRTHDAY 611, 622 (Gerhard Hafner et al. eds., 1998); BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 417 (1999); Stefan 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 BROWNLE 499, 534 (Guy S. Goodwin-Gill & Stefan Talmon eds., 1999); Mirko Zambelli, La démocratie: principe universel et fondamental de l’ordre juridique international?, 10 AKTUELLE JURISTISCHE PRAXIS 667, 673 (2001); Wheatley, supra note 22, at 233; Same Varayudej, A Right to Democracy in International Law: Its Implications for Asia, 12 ANN. SURV. INT’L & COMP. L. 1, 17 (2006). However, see also the opposing evaluations of Fulda, supra note 120, 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); Thomas M. Franck, Legitimacy and the democratic entitlement, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 25, 27 (Gregory H. Fox & Brad R. Roth eds., 2000).

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

A more modest approach is put forward by the UN General Assembly in a couple of resolutions on elections and democracy. From 1988 onwards, the General Assembly issued a series of resolutions under the title “Enhancing the Effectiveness of the principle of periodic and genuine elections”. The first resolution of this series states in its operative part that the General Assembly

1. Emphasizes the significance of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which establish that the authority to govern shall be based on the will of the people, as expressed in periodic and genuine elections;

2. Stresses 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. Declares 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 co-operation with others;

The resolution does not contain an explicit affirmation of a right to democratic elections. Instead of imposing a strict obligation, the resolution rather gives reasons for the suitability of elections. Para. 2 attempts an empirical justification (“as a matter of practical experience”) and emphasizes that elections are a necessary precondition for output legitimacy (“to protect the rights and interests of the governed”) because they are crucial for the enjoyment of human rights. In contrast, para. 3 is of normative nature, referring to the will of the people and stressing the necessity to implement the latter through an electoral process.

The resolution was changed slightly in the following years. The successive versions of the resolution contained reservations stressing the autonomy of states to develop their political system. Resolution 46/137, which was adopted in 1991, stated in its preamble:

Recognizing 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


133 G.A. Res. 43/157, supra note 132 (emphasis added).
and cultural systems, whether or not they conform to the preferences of other states.\footnote{G.A. Res. 46/137, supra note 132 (emphasis added). The two preceding resolutions from 1989 and 1990 still had this paragraph in the operative part instead of the preamble.}

Furthermore, in the operative part, it said:

5. Underscores 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;\footnote{Id. (emphasis added).}


[The General Assembly]

1. Reiterates 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;

3. [...]"

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.\footnote{G.A. Res. 44/147, supra note 136 (emphasis added).}

At first glance, the two strands of resolutions seem to contradict each other.\footnote{Slim Laghmani, Vers une légitimité démocratique?, in LES NOUVEAUX ASPECTS DU DROIT INTERNATIONAL 249, 269 (Rafâa Ben Achour & Slim Laghmani eds., 1994) ("exacte négation"). Accord. Rafâa Ben Achour, Égalité souveraine des Etats, droit des peuples à disposer d'eux-mêmes et liberté de choix du système politique, économique, culturel et social, in SOLIDARITÉ, ÉGALITÉ, LIBERTÉ - FREDERICO MAYOR AMICORUM LIBER 785, 793 (Karel Vasak et al. eds., 1995).} On the one hand, the pro-elections resolutions praise the advantages of electoral systems of government. But these praises are taken away with the other hand emphasizing the importance of national autonomy to
choose a proper political system without external interference. However, the contradiction is not as great as some scholars would like it to appear. Even if peoples have the right to determine their political, economic and social system, this does not mean that the choice of the political system is unlimited. As we have seen in the previous section, the government has to be representative.\textsuperscript{139} Para. 5 of resolution 46/137 underlines this by emphasizing that the choice has to be made “in accordance with the will of the people”. Considering the difficulties of equalizing the \textit{pouvoir constituant} and the \textit{pouvoir constitué},\textsuperscript{140} this does, however, not constitute an automatic obligation to democracy.

The resolutions rather suggest a teleological attitude towards elections and democracy. They emphasize the desirability of electoral institutions without imposing a strict obligation. In our analysis of the democratization theories, we have seen that democratization is perceived as a long-term process rather than a shift from one status to another.\textsuperscript{141} By using the terms “developing” or “enhancing” in the context of electoral institutions, the language of the resolution stresses exactly this process-like character of democratization. The establishment of electoral institutions is only one element, not necessarily the first in this process.

These results are underlined by several other resolutions and declarations of the international community. The primary example is General Assembly resolution 55/96, titled “Promoting and Consolidating Democracy”, which was adopted in 2000. The central claim of this resolution is to “call upon states to promote and consolidate democracy”.\textsuperscript{142} Thus, it equally uses a process-oriented terminology by employing terms such as “promoting” and “consolidating”. In particular, the latter term is often used in the social sciences to describe the teleological character of democratization processes.\textsuperscript{143} Furthermore, the term “consolidation” underlines that democracy is understood both as a classificatory and as a gradual concept in international law. The process of democratization certainly marks the process leading to a transition to democracy. It does, however, not stop there, but requires also a subsequent consolidation.

The aforementioned Vienna Declaration of Human Rights\textsuperscript{144} also contains 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.\textsuperscript{145}

Again, the language rather focuses on democratization and the process of transition than on the status of democracy. Finally, in the UN millennium declaration\textsuperscript{146} we can find several declara-

\textsuperscript{139} \textit{See supra} Part III.A.2.
\textsuperscript{140} \textit{See supra} Part III.A.1.
\textsuperscript{141} \textit{See supra} Part II.B.5.
\textsuperscript{142} G.A. Res. 55/96, \textit{supra} note 17, ¶ 1.
\textsuperscript{143} Schedler, \textit{supra} note 93, at 95.
\textsuperscript{144} \textit{Supra} note 4.
\textsuperscript{145} Vienna Declaration, \textit{supra} note 4, ¶ 9.
tions to promote democracy\textsuperscript{147} or to strengthen the capacity of UN member states for democrati-

2. Regional Developments

Indications for an increasing acceptance of democracy as an international legal principle cannot only be found at universal, but also at regional level. As the following analysis will show, there are, however, significant differences between the various regions.

(a) Americas

The most extensive guarantees concerning democracy – outside the European Union – can be found in the system of the Organization of American States (OAS). On the one hand, art. 23 of the American Convention of Human Rights\textsuperscript{149} prescribes the right to participate in democratic elections. Furthermore, the promotion of democracy is, according to art. 2 lit. b of the OAS Charter\textsuperscript{150}, one of the principal objectives of the organization. Art. 9 of the OAS Charter provides the possibility to suspend membership rights of a Member State if the elected government of the latter has been overthrown by force. The mechanism governing the suspension of membership rights has been outlined in a more detailed way in the Inter-American Democratic Charter\textsuperscript{151}, which was adopted by the OAS General Assembly on September 11, 2001.\textsuperscript{152} The Charter guarantees the American peoples a right to democracy and establishes an implementation mechanism in its art. 17-22. Although, as resolution of the General Assembly the democratic Charter has no directly binding force, the established implementation mechanism can, according to art. 31 of the Vienna Convention on the Law of Treaties (VCLT)\textsuperscript{153}, be regarded as specification of OAS Charter art. 9.\textsuperscript{154}

This sanction mechanism has been applied several times in practice. The baptism of fire came shortly after the adoption of resolution 1080, when Haiti’s president Aristide was ousted in September 1991. The Permanent Council convened immediately, condemned the coup and requested the reinstallation of Aristide.\textsuperscript{155} Two days later, the OAS suspended the trade relations with Haiti

\begin{itemize}
\item[147] See id. at ¶ 24 (“We will spare no effort to promote democracy and strengthen the rule of law [...]").
\item[148] See id. at ¶ 225 (“We resolve therefore: [...] To strengthen the capacity of all our countries to implement the principles and practices of democracy [...]”).
\item[149] American Convention on Human Rights, supra note 16.
\item[154] Lagos & Rudy, supra note 152, at 304.
\end{itemize}
and all forms of non-humanitarian aid. Subsequently, the United Nations assumed the case. Two years after the coup, they finally authorized the United States to intervene with military means, thus forcing the military junta to step down.

In April 1992, the Peruvian president Fujimori staged an auto-coup, in which he dissolved the parliament and commanded the arrest of several members of the opposition. The Permanent Council of the OAS expressly condemned this action. The international community suspended several loans which had been envisaged to support the country. The international pressure prompted Fujimori to concede the election of a constitutional assembly in November 1992. The effectiveness of these international measures was limited, however, as Fujimori won the elections and maintained his power in the end. One year later, Jorge Serrano Elias, the president of Guatemala, also initiated an auto-coup. He dissolved the parliament, suspended several constitutional rights and dismissed the judges of the constitutional court. The sanctions of the OAS were much more severe than in the case of Peru. The Permanent Council condemned Serrano’s coup unanimously and forced him finally to step down and to flee to El Salvador.

In 2000, Peru again came into the focus of public attention. The OAS sent a mission to Peru in order to monitor the presidential elections. However, the monitoring mission perceived itself to be unable to guarantee the technical minimum standards for the vote counting of the decisive ballot between Fujimori and his contender, Alejandro Toledo. The OAS thus canceled the mission. In its report to the Secretary General, the delegation called the elections insufficient with regard to international standards. Despite this report, the member states of the OAS could not agree to condemn Peru on the basis of resolution 1080. The Permanent Council adopted a compromise and sent a mission to Peru in order to investigate the case in more detail. The mission was, however, not completed because Fujimori stumbled on a corruption scandal and had to cede power.

In February 2004, Haiti’s president Aristide was toppled a second time. A three-week rebellion forced him to step down and to leave the country. The president of the Supreme Court, Boniface Alexandre, succeeded Aristide as transitional president. The reaction of the international community was much more lukewarm than thirteen years earlier. The General Assembly of the OAS reacted four months later, adopting a resolution in which it called upon Haiti to return to democracy and condemning the committed acts of violence. However, the OAS neither authorized

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157 See infra Part III.B.3.b (referring to the case of Haiti in more detail).
160 See Barry Steven Levitt, A Desultory Defense of Democracy: OAS Resolution 1080 and the Inter-American Democratic Charter, 48.3 LATIN AM. POL. & SOC’Y 93, 116 (2006) (noting that the reason for the different treatment was probably that the Peruvian people backed Fujimori more than the population of Guatemala did Serrano).
162 O.A.S. Doc. AG/RES. 2058 (XXXIV-O/04) (June 8, 2004).
formal sanctions, nor did it suspend membership rights.\textsuperscript{163} The reason for this mild international reaction was probably Aristide’s weak legitimacy.\textsuperscript{164} He had still been elected in 2000, but the elections had been subject to irregularities. Furthermore, many human rights organizations condemned Aristide for the deteriorating human rights situation and the political violence in the country. This case demonstrates that the OAS treats \textit{coups d’État} in a differentiated manner. Not every coup is automatically condemned. Rather, the perceived legitimacy of the ousted head of state has a decisive influence on the reaction of the OAS.

\textbf{(β) Regional Organizations}

References to democracy are, however, not limited to the OAS. Legal documents referring to democracy and elections can also be found in the framework of some Latin American regional organizations. In 1998, the Member States of the Andean Community (Comunidad Andina – CAN) adopted the Andean Community Commitment to Democracy\textsuperscript{165} as a legally binding additional protocol to the founding statute of the CAN, the Cartagena Agreement.\textsuperscript{166} Save a commitment to democracy in art. 1, the protocol sets up a sanction mechanism (art. 4), which enables coercive measures ranging from the suspension of membership rights (lit. a) to the disallowance of the eligibility for loans of the financial institutions of the CAN (lit. c) if the democratic order is disrupted (art. 2). Furthermore, art. 13 of the Human Rights Charter of the CAN\textsuperscript{167} prescribes a right of the Andean peoples to democracy, which is further specified in the arts. 14-18.

A similar mechanism was installed in the framework of the MERCOSUR. In 1996, the heads of state of the four Member States adopted a declaration for democracy\textsuperscript{168}, in which the establishment and maintenance of democratic institutions is regarded as a fundamental precondition for the cooperation within the MERCOSUR (para. 1). Violations may lead to the suspension of membership rights (para. 4). With the protocol of Ushuaia\textsuperscript{169}, this mechanism has been transformed into an international treaty that has been extended also to Bolivia and Chile, countries not currently members of the MERCOSUR.

The system of Central American Integration (Sistema de Integración Centroamericana – SICA) has included the promotion and strengthening of democracy as one of the principal objectives of

\textsuperscript{166} Andean Subregional Integration Agreement (Cartagena Agreement), May 26, 1969, 28 I.L.M. 1165.
the organization into art. 3 of its founding statute, the protocol of Tegucigalpa.\textsuperscript{170} This objective was confirmed in 1995 by concluding the treaty on democratic security in Central America\textsuperscript{171}, which affirms that SICA is based on the principles of democracy and the rule of law, leading to the obligation to elect governments in universal, free and secret elections (art. 1 (1)).

(b) \textit{Europe}

As for the Americas, the institutional design of Europe’s international organisations shows a great commitment to democracy. Art. 3 of the first additional protocol to the European Convention on Human Rights\textsuperscript{172} prescribes the right to participate in democratic elections. In contrast to the OAS, however, the democracy principle has not been enshrined in the founding Statute of the Council of Europe\textsuperscript{173}. In its art. 3, it says that the 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.”

Although missing in the operative part of the statute, democracy is mentioned in the preamble. There, democracy is described as a value which originates from the “spiritual and moral values which are the common heritage of the [European] peoples”.\textsuperscript{174} According to art. 1 lit. a of the Statute, the realization of the latter principles is one of the main objectives of the organization.

In practice, the level of democratization had an influence on the membership in the Council of Europe. When, in 1967, the parliamentary democracy in Greece was succeeded by a military dictatorship, the parliamentary assembly recommended the exclusion of Greece to the Committee of Ministers. Greece preceded this step by quitting the Council of Europe on December 12, 1969. Equally, Portugal and Spain were admitted as members only after the reintroduction of democracy in both countries.\textsuperscript{175} After the dissolution of the Soviet Union, the admission of Russia to the Council was delayed for several years. The reason was, \textit{inter alia}, a report of experts testifying about Russia that it had departed on its journey towards democracy, but had not yet arrived.\textsuperscript{176}

In the context of the Conference for Security and Cooperation in Europe, the Heads of State and Government declared in the Charter of Paris that they would promote democracy as the only admissible form of government. In essence, the democracy principle is specified as an implementa-
tion of the will of the people by means of free and fair elections and the respect of the rule of law. Although the Charter of Paris is no international treaty with immediately binding force, it can – according to VCLT art. 31 – be used as a tool of interpretation in order to specify existing obligations such as those of the Council of Europe.\footnote{Jochen Abr. Frowein, \textit{Demokratie und Völkerrecht in Europa}, in \textit{Völkerrecht zwischen normativem Anspruch und politischer Realität} 365, 368 (Konrad Ginther et al. eds., 1994).}

The supranational institution, in which the democracy principle is developed the strongest – but in which it is also criticized the most – is the European Union.\footnote{See, e.g., Joseph H.H. Weiler, Ulrich Haltern & Franz C. Mayer, \textit{European Democracy and Its Critique}, 18 W. EUR. POL. 4 (1995); Renaud Dehousse, \textit{Beyond representative democracy: constitutionalism in a polycentric polity}, in \textit{European Constitutionalism Beyond the State} 135 (Joseph H.H. Weiler & Marlene Wind eds., 2003); Anne Peters, \textit{European Democracy after the 2003 Convention}, 41 COM. Mkt. L. Rev. 37 (2004); Augustín José Menéndez, \textit{Between Laeken and the Deep Blue Sea: An Assessment of the Draft Constitutional Treaty from a Deliberative-Democratic Standpoint}, 11 EUR. PUBL. L. 105 (2005); Niels Petersen, \textit{The Democracy Concept of the European Union - Coherent Constitutional Principle or Prosaic Declaration of Intent?}, in \textit{The Unity of the European Constitution} 97 (Philipp Dann & Michal Rynkowski eds., 2006) (proposing different conceptualizations of the democracy principle in the EU).} According to art. 6 (1) of the Treaty on European Union\footnote{Treaty on European Union, Feb. 7, 1992, O.J. C 325 (Dec. 24, 2002) [hereinafter: TEU].} democracy is one of the fundamental principles of the EU. It is part of the \textit{acquis communautaire}, which every potentially new member has to observe in order to be admitted to the EU. Moreover, TEU art. 7 provides a sharp mechanism of sanctions according to which certain membership rights may be suspended if TEU art. 6 (1) is violated.\footnote{See AMARYLLIS VERHOEVEN, \textit{The European Union in Search of a Democratic and Constitutional Theory} 349-354 (2002) on the sanction mechanism established by TEU art. 7.}

\textbf{(c) Africa}

\textbf{(a) African Union}

In the context of the African Union (AU), art. 13 of the African Charter on Human and Peoples’ Rights\footnote{African (Banjul) Charter of Human and Peoples’ Rights, Jun. 27, 1981, 21 I.L.M. 58.} does not mention a right to elections explicitly. However, it guarantees a right to participate in the conduct of public affairs. According to the African Commission on Human Rights, this participation requires the legitimation of sovereign power through elections.\footnote{Constitutional Projects and Civil Liberties Organisation v. Nigeria, Communication 102/93, in: Twelth Annual Activity Report of the African Commission on Human and Peoples’ Rights – 1998-1999, at 45, ¶ 50.} Furthermore, art. 3 lit. g and art. 4 lit. m of the AU Charter\footnote{Constitutive Act of the African Union, July 11, 2000, O.A.U. Doc. CAB/LEG/23.15.} mention the promotion and the respect of democratic principles and institutions as a fundamental objective of the AU. Moreover, the AU and its predecessor, the Organization of African Unity (OAU), have established protection mechanisms against \textit{coups d’état}. The beginning was a resolution of the African Commission of Human Rights, dating from 1994, which condemned military overthrows of government and appealed to military regimes to transfer their power to elected governments.\footnote{Resolution on the Military, Afr. Comm. Hum. & Peoples’ Rts., Res. 10(XVI)94 (1994).}
In practice, the turning point was the ousting of Ahmed Kabbah in Sierra Leone in 1997. The OAU supported the military intervention of the ECOWAS and called upon the international community to deny the recognition to the junta of Paul Koroma. It reacted similarly in response to military coups on the Comoros, in the Ivory Coast and in Niger and did not recognize the rebels as legitimate governments of the respective states.

This position was translated into a legal rule with the foundation of the AU. The AU Charter contains, beneath the mentioned commitments to democracy, a condemnation of unconstitutional coups d’état. The implementation mechanism is embodied in art. 30 of the AU Charter, according to which membership rights of states, in which the government has come to power by unconstitutional means, may be suspended. Reading AU Charter art. 30 together with the guarantee of the democracy principle in art. 4 lit. m of the Charter suggests an interpretation of art. 30 according to which only the ousting of elected regimes is subject to the mentioned sanctions.

The sanctions mechanism is specified by a declaration of the Heads of State and Government of the AU/OAU. The declaration provides a period of six months in which the concerned state shall have the opportunity to restore its constitutional order. During this time, it shall be suspended from the policy-making organs of the AU/OAU. If it does not comply with this obligation, sanctions may be instituted. The declaration contains a non-exhaustive list of possible sanctions, ranging from the denial of visas for members of the government in question, via restriction of government-to-government contacts, to trade restrictions.

The mechanism has been applied in several cases. The participation of the Central African Republic in the organs of the AU was suspended after the elected president Ange-Félix Patassé had been overthrown by military force. The suspension was withdrawn after presidential elections had been held in 2005. As Faure Gnassingbé captured power in Togo by military force after the death of his father in February 2005, the AU condemned the coup, suspended Togo’s membership rights and welcomed the sanctions which had been established by the ECOWAS. This pressure prompted Gnassingbé to step down and hold elections, which he finally won. The Peace and Security Council reacted by readmitting Togo’s government.

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186 See *infra* Part III.B.3.b on this intervention.
192 A.U. Doc. PSC/PR/Comm. (XXXIII) - (ii), ¶ 2 (June 24, 2005).
However, the current practice is problematic in a two-fold way. In certain respects, it is too far-reaching, and in others, it is not inclusive enough. So far, military coups have been condemned, notwithstanding the legitimacy of the ousted regime. There is, thus, a danger that the mechanism is an instrument to cement the status quo rather than a motor of democratization.

For example, the Mauritanian president Taya, whose legitimacy was questionable at best, was overthrown in a bloodless coup in August 2005. Although the military government announced that it would hold elections within two years and excluded its own participation, the coup was condemned by the African Union and made subject to sanctions. However, some African politicians voiced critique. 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.“

However, the sanctions against Mauritania were only lifted after the presidential elections in spring 2007. In two other cases, in which the coup was directed against regimes of doubtful legitimacy, the AU only issued a formal condemnation without imposing further sanctions. The military coup against a corrupt regime in the Ivory Coast in December 1999 was formally condemned, but the transitional government was recognized quite quickly thereafter. In 2003, president Kumba Yalla was ousted in Guinea-Bissau after having dissolved the parliament and having adopted some dictatorial decrees. Equally, the AU formally condemned the coup, but did not impose further sanctions.

In contrast, the AU is very reluctant when it comes to other constitutional infringements, like falsifying elections or changing the constitution in order to capture more power or to permit an additional term in office. However, there may recently have been a step in the right direction. In Madagaskar, the AU imposed sanctions reacting on a constitutional infringement below the threshold of a military coup. In 2001, Madagascar had a constitutional crisis, when Marc Ravalomanana got the most votes, but failed to get an absolute majority against president Didier Ratsiraka. This result led to demonstrations in the whole country. On mediation of the AU, a commission of the Supreme Court was authorized to count the votes for a second time. According to this vote count, Ravalomanana had gained the absolute majority. However, he declared himself president and captured power by military means. The AU reacted by not recognizing the

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195 Williams, supra note 185, at 274.
202 Williams, supra note 185, at 275; Hartmann, supra note 200, at 219-220.
203 Tehindrazanarivelo, supra note 196, at 275.
new government and requested Mr. Ravalomanana to hold new elections. Furthermore, it sus-
pended Madagascar’s participation in the organs of the AU.204

(b) Regional Organizations

Some regional organizations in Africa have established mechanisms which are similar to the one
of the AU. For the ECOWAS, the heads of state and government have declared in the Declara-
tion of Political Principles of the ECOWAS205 in 1991 in Abuja:

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 our countries, politi-
cal pluralism and those representative institutions and guarantees for personal safety
and freedom under the law that are our common heritage.206

The essence of this declaration was introduced into the ECOWAS treaty207 in 1993. Art. 4 lit. h
and j regard participation in the conduct of government and the promotion of democracy as one
of the fundamental principles of the organization. Moreover, art. 58 (2) lit. g offers support in the
organization of elections upon the request of a Member State. These principles have been con-
firmed by the heads of state and government of the ECOWAS in the Protocol on Democracy and
Good Governance208, which explicitly emphasizes the obligation to hold free, fair and transpar-
ent elections:

The following shall be declared as constitutional principles shared by all Member
States:

[...] 

b) Every accession to power must be made through free, fair and transparent elec-
tions.

c) Zero tolerance for power obtained or maintained by unconstitutional means.

d) Popular participation in decision-making, strict adherence to democratic principles
and decentralization of power at all levels of governance.209

The promotion of democracy is also enshrined in art. 4 lit. c of the founding statute of the South
African Development Community (SADC)210 as one the fundamental principles. According to
art. 5 (1), the objectives of the organization feature, among others, the promotion of common political values “which are transmitted through institutions which are democratic, legitimate and
effective” (lit. b) and the consolidation, defense and maintenance of democracy (lit. c). These

204 A.U. Doc. ASS/Dec. 7 (I) (July 10, 2002).
205 Declaration of Political Principles of the ECOWAS, Doc. A/DCL.1/7/91 (Jul. 6, 1991).
206 Id. at ¶ 6.
209 Id. at ¶ 1.
principles are concretized by the SADC Principles and Guidelines Governing Democratic Elections\textsuperscript{211}, which were adopted by the SADC summit in Mauritius in August 2004.

\textbf{(d) Asia}

The continent that is the most reluctant with regard to the promotion of democracy is Asia. There is neither a political organization nor a human rights treaty covering the whole continent. Indeed, there are some sub-regional institutions and treaty mechanisms, which show, however, little enthusiasm towards the idea of electoral legitimacy and democracy. For the Arab region, the Council of the League of Arab States adopted the Arab Charter on Human Rights\textsuperscript{212} in 1994. However, the Charter does not mention any right to participation in elections or even to democracy.

Certainly, one of the most active political organizations on the Asian continent is the Association of Southeast Asian Nations (ASEAN).\textsuperscript{213} Although ASEAN originally had a strong emphasis on the sovereignty of each member with regard to the form of government,\textsuperscript{214} there have recently been modest trends towards a stronger commitment to democracy.\textsuperscript{215} While the founding documents are mute with regard to the internal organization of the member states, democracy has for the first time been mentioned in the Vientiane Action Program (VAP) of the ASEAN Heads of State and Government.\textsuperscript{216} Under title II of the VAP, the enhancement of democracy is mentioned as one of the goals of ASEAN. Further specifications are lacking, however, a circumstance which suggests that the inclusion of democracy among the principles is nothing but mere rhetoric.\textsuperscript{217} The teleological nature of the applied language is noticeable nonetheless: there is no strict right to democracy, but democracy is enhanced and this enhancement is a goal, not an obligation.

\textbf{(e) Evaluation}

The analysis of the emergence of different regional commitments to democracy provides an incoherent picture. In Europe and in the Americas, a democracy principle has been established as part of regional customary law.\textsuperscript{218} The human rights treaties, on the one hand, and the founding statutes of the regional political organizations, on the other, contain extensive electoral and democratic guarantees. Furthermore, there are effective sanction mechanisms for states which do

\begin{itemize}
  \item \textsuperscript{213} Joakim Öjendal, \textit{Back to the Future? Regionalism in South-East Asia under unilateral pressure}, 80 INT’L AFF. 519, 520 (2004).
  \item \textsuperscript{217} More optimistic Burchill, \textit{supra} note 215.
\end{itemize}
not meet democratic standards. In particular in Europe, these sanctions do not only concentrate on the existence or absence of elections, but try to implement a more substantive vision of democracy.

For Africa, the evaluation is less clear. The African Union has included democracy as one fundamental objective in its founding statute. Furthermore, the Banjul Charter prescribes a right to participation in the conduct of public affairs. However, although many African states have still to be classified as non-democratic, there is no active institutional promotion of democracy. The established sanction mechanisms exclusively refer to regressions in the process of democratization, which suggests a teleological rather than a strict reading of the established democracy principle.

The least developed commitments to democracy can be found in Asia. There are only modest allusions to democracy in a Plan of Action of the Heads of State and Government of ASEAN which are not sufficient to establish a corresponding democracy principle. This lack of commitment to democracy on the regional level is in line with the reluctance of South East Asian states to enter into treaty obligations concerning political rights at the universal level.

3. Democracy and the Use of Force

The most attention in the literature on the emergence of a democracy principle has been absorbed by military interventions in the name of democracy. Such interventions could be an indicator for the emergence of a customary principle with regard to democracy. The following analysis will concentrate on five possible precedents: on the one hand, the unilateral military interventions of the United States in Grenada, Panama and Iraq (a); on the other hand, the interventions in Haiti and Sierra Leone, which were approved by the U.N. Security Council (b).

(a) Unilateral Interventions in Grenada, Panama and Iraq

Reacting 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. Three days after the invasion, the U.S. military succeeded in overthrowing the military council which had come to power after the coup d’état. In the subsequent debate among legal scholars on the legality of the U.S. intervention, some authors put forward the restoration of democracy as a legal justification. However, there are several reasons against such an interpretation: First, Bishop himself attained power not by democratic means, but by a coup d’état in 1979. Second, restoration of democracy was not put forward by the U.S. administration in its attempt to justify the interven-

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tion.221 Only the subsequent evaluation of the intervention by academic commentators is barely sufficient as a basis for an emerging practice or *opinio iuris*.222 Finally and most importantly, the U.N. General Assembly condemned the intervention as illegal with an overwhelming majority (108-9-27).223 Certainly, resolutions of the U.N. General Assembly are not directly binding. However, they are expression of the *opinio iuris* of the international community that the intervention cannot be regarded as a precedent for the emergence of a right to a pro-democratic intervention.224

A second potential precedent for democracy as a title for intervention is the U.S. invasion in Panama in 1989.225 On December 20, 1989, the U.S. army invaded Panama in order to overthrow the regime of Manuel Noriega and to capture the head of state himself. Among other reasons, like the protection of U.S. citizens, the combat of drug trafficking, and the implementation of the Panama Canal treaties, President George Bush Sr. explicitly mentioned the protection of democracy as justification for the intervention.226 However, the U.N. General Assembly again condemned the intervention with a clear majority (75-20-40) as illegal.227 Therefore, the intervention in Panama may not serve as precedent for the emergence of a democracy principle in international law either.228

The most recent case in which regime change was discussed as justification for the beginning of a war was the invasion of the U.S. and the “Coalition of the Willing” in Iraq in March 2003.229 In

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222 Wouters, De Meester & Ryngaert, *supra* note 120, at 169.

223 G.A. Res. 38/7, U.N. Doc. A/RES/38/7 (Nov. 2, 1983): "Deeply deplores the armed intervention in Grenada, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of that state." (emphasis in the original).


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."230

Among the political considerations, which finally led to the war, Iraq’s democratization was a major reason. It is telling, however, that neither the U.S. nor Great Britain mentioned regime change as title for intervention in their official legal justifications of the Iraq war.231 The intervention was instead justified by a corresponding interpretation of resolutions 678232, 687233 and 1441234 of the U.N. Security Council.235 Furthermore, the intervention was condemned by a considerable part of the international community. Among the opponents were states like Belgium, Canada, China, Germany, France, New Zealand, Russia, Sweden and Switzerland. Thus, the Iraq war can equally not be regarded as precedent for the emergence of an international democracy principle.236

(b) Collective Interventions in Haiti and Sierra Leone

In the search for precedents for the emergence of a democracy principle in international law, collective interventions, which have been authorized by an international institution, might be more promising indices than the unilateral interventions we have examined so far. In this respect, many legal scholars qualify the intervention in Haiti in 1991, which had been authorized by the U.N. Security Council, as a paradigmatic precedent.237 In 1990, Jean-Bertrand Aristide was

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elected as Haitian president with 67% of the votes.238 The elections were monitored by the United Nations239 and the OAS240 upon Haiti’s request. On September 30, 1991, Aristide was overthrown by the military. After remaining passive in the beginning, the U.N. Security Council adopted Resolution 841 in June 1993, which imposed economic sanctions on Haiti.241 Because of the sanctions, the military regime in Haiti agreed to conclude the so-called Governors Islands agreement, in which it conceded to bring Aristide back into power. However, the implementation of the agreement failed when members of the junta exercised force against partisans of Aristide in autumn 1993. The Security Council again adopted economic sanctions242 and set up a naval blockade.243 On July 31, 1994, it finally adopted Resolution 940, which permitted all U.N. member states to use force to reinstall the legitimate government in Haiti.244 On September 18, the former U.S. President Jimmy Carter convinced the junta – with the support of Senator Sam Nunn and General Colin Powell – to cede power to Aristide and to leave the country, just hours before a multinational troop under U.S. leadership was going to land in Haiti.

Several authors deny the intervention in Haiti the character as a precedent for a collective pro-democratic intervention. Some argue that the Security Council primarily addresses the protection of peace and security in the region.245 However, this reference has to be seen in the context of the new activism of the Security Council in the 1990s. In a series of resolutions, the Security Council interpreted the notion of peace and security in Chapter VII of the U.N. Charter broadly. Peace and security was not only understood as the absence of the use of military force. It also referred to internal crises in order to cover catastrophes such as in Somalia or Rwanda.246 While formally respecting the text of the Charter, the Security Council has, with overwhelming support of the legal literature,247 broadened its competences in order to cope with the changed circumstances after the end of the Cold War. Thus, despite the reference to peace and security in the region, Resolution 940 was clearly focused on the restoration of the internal order in Haiti.248

Some scholars doubted the competence of the U.N. Security Council to authorize an intervention in order to restore democracy. Others argued that the case of Haiti could not be generalized because of the specific regional context. Further commentators refer to the general human rights situation in Haiti or the violation of the Governors Islands Agreement as a justification for the Security Council resolution. However, these objections cannot call into question that the restoration of democracy was the explicit objective of resolution 940. This is, on the one hand, expressed in the preamble: “Reaffirming that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement.”

On the other hand, the support of the legitimate government of Haiti also plays an important role in the operative part:

1. 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, 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.

Although the preamble also refers to the human rights situation in Haiti, the latter does not have the same importance as the restoration of the legitimate order as becomes apparent in the operative part. Furthermore, the reference to the Governors Islands Agreement is not essential, but only supportive. It has to be taken into account that it was the main purpose of the agreement to:

- Restore democracy in Haiti.
- Return the legitimately elected President, Jean-Bertrand Aristide.
- Implement the Governors Island Agreement.

References:

249 Michael J. Glennon, Sovereignty and Community after Haiti: Rethinking the Collective Use of Force, 89 AM. J. INT’L L. 70 (1995); Donoho, supra note 248; Byers & Chesterman, supra note 221, at 290-92.


252 Corten, supra note 250, at 126.

253 S.C. Res. 940, supra note 244.

254 Id. (emphasis added).

255 Id., (Cravely 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 (MICIVIH), which was condemned in its Presidential statement of July 12, 1994 (S/PRST/1994/32)).

256 See equally Corten, supra note 250, at 127 (emphasizing that Haiti cannot be compared to Bosnia, Somalia or Rwanda concerning the intensity and the gravity of the atrocities).
to reinstall the preceding order. It is not plausible why the Security Council should have had the competence to implement an agreement between a *de facto* regime and a *de jure* government, independent of its content. Even if it was the purpose of the resolution to implement the Governors Islands agreement, this was just because of the content of the latter. The normative concerns with regard to the competence of the Security Council, finally, are irrelevant for the examination of a practice and an *opinio iuris* on the emergence of a democracy principle. Only the reception of the intervention by the international community is of importance in this respect.

Nevertheless, the scope of the Haiti precedent is limited. The intervention addressed the restoration of a disrupted, but previously already existing, constitutional order. It can, thus, not be regarded as an indicator for the emergence of a universal democracy or legitimacy principle. However, it fits into the patterns we have already observed in the context of the resolutions of the General Assembly. If the democracy principle in international law is teleological and process-oriented, then countries are indeed not obliged to turn into a democracy from one day to the other. Teleology, however, 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.

In a similar line is the second precedent, the intervention of Nigeria, or of ECOWAS respectively, in Sierra Leone. In the latter, a country plagued by Civil War, the parties of the conflict agreed in 1996 to hold presidential elections. In these elections, Ahmad Tejan Kabbah was elected for president. As the Rebel Unity Front (RUF) did not only lose the elections, but was also weakened on the battlefield, the parties concluded the *Abidjan Accord* on September 30, 1996, in which they agreed on an immediate ceasefire and the disarmament of the combatants. This agreement did, however, not contribute to a détente. On the contrary, on May 25, 1997, the president of Sierra Leone was overthrown. This prompted the Nigerian troops of the ECOWAS Monitoring Group (ECOMOG) to intervene. In June 1997, the Nigerian forces invaded Sierra Leone and helped to reinstall Kabbah as president in March 1998. The U.N. Security Council did not approve the intervention until afterwards. In October 1997, the Security Council expressed

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its support for the ECOWAS action, and on March 16, 1998 it welcomed the return of president Kabbah into office.

The legal literature discusses different justifications for the ECOMOG intervention: they range from a pro-democratic intervention, via a humanitarian intervention, to an intervention on invitation by the de jure government. Some authors have raised doubts concerning the democratic intention of the intervening states, as Nigeria, being the leader of the intervention, was itself ruled by an autocratic government. However, in order to evaluate the character of the intervention as a precedent, the reception by the international community is more important than the intention of the intervening parties, because the former is the indication for the existence of an opinio iuris. The Security Council resolutions on Sierra Leone emphasize the restoration of the democratic order. Resolution 1132 asks the military junta to restore the democratic order, while resolution 1156 welcomes the return to democracy. Therefore, the case of Sierra Leone confirms the patterns we have observed with regard to Haiti. The international community regards the overthrow of an elected government as violation of international law, which confirms the existence of a principle of democratic teleology in international law.

4. Résumé

International law does not provide for a strict right to democratic governance. The international documents and the corresponding practice rather emphasize the process-oriented character of democratization. Democracy is perceived as a teleological principle. States and societies are

259 S.C. Res. 1132, S/RES/1132 (Oct. 8, 1997) („Expresses its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourages it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations“) (emphasis in the original).

260 S.C. Res. 1156, S/RES/1156 (March 16, 1998) („Welcomes the return to Sierra Leone of its democratically elected president on 10 March 1998“) (emphasis in the original).


264 Byers & Chesterman, supra note 221, at 290; Goldmann, supra note 263, at 473.

265 S.C. Res. 1132, supra note. 259: „Demands 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“ (emphasis in the original).

266 See supra note 260.

267 ROTH, supra note 130, at 393.

268 From a theoretical perspective, one might object to the normative interpretation proposed in this contribution that it contradicts the binary character of law. According to Niklas Luhmann, law only knows the distinction between legal and illegal, but no differentiation of more or less; see NIKLAS LUHMANN, LAW AS A SOCIAL
thus obliged to develop towards democracy. In this context, democratization has two directions of impact. On the one hand, it is directed against democratic erosion, regressions in the process of democratization. These can be obvious cases, such as military coups. This is underlined by the practice of the U.N. Security Council, which endorsed military action after elected governments had been overthrown in Haiti and Sierra Leone. In contrast, the sole illegitimacy of a regime has never been a reason for the Security Council to take any action.

But regressions are not limited to coups d’état. They also include other setbacks in the process of democratization and consolidation of democracy, such as increasing centralizations of power with the head of the executive or the cession of political control to the military. Examples are the autogolpe of Alberto Fujimori in Peru in 1992 or the ‘constitutional referendum’ of Alexander Lukashenko in Belarus in 1995. This is emphasized, in particular, by the sanction mechanisms of the OAS and the AU. Both are meant to impose sanctions not only for military coups, but also for other measures intended to erode democracy. The regional practice is more reluctant in cases in which formal elections have been held, but if these have been falsified by undue influence. In theory, however, such cases equally constitute setbacks in the process of democratization, which run counter to the principle of democratic teleology.

On the other hand, democratization is not only concerned with avoiding setbacks and regressions. There is also a second aspect, which concerns the positive and active development towards democracy and, once the transition has occurred, towards democratic consolidation. As we lack an ideal type of democracy as well as an ideal way of democratization, however, this second aspect cannot be turned into a concrete obligation to perform a specific action. Governments have a certain margin of appreciation in this respect, and we can only classify those strategies as illegal which are clearly defective. In order to determine such strategies, we may adopt the same classification which I have proposed in the context of the principle of self-determination. According to this proposal, regimes which are not self-enriching, but development-oriented, and which observe core human rights have to be regarded as legal and legitimate. Legitimacy under international law does therefore not necessarily require a state to be democratic.

269 See Schedler, supra note 93, at 98.
271 See supra Part III.A.2.
IV. Conclusion

Nearly two decades after the fall of the Berlin Wall, the democracy euphoria of scholars in international relations and international law cooled down considerably. Democracy is not the cure-all it was widely considered to be. Moreover, the third wave of democratization was weaker in the end than many observers had foreseen in the beginning of the 1990s. Even though there is nearly a consensus in philosophy and political sciences that, in the long run, there can be no suitable alternative to democracy as a form of state, we have seen that democratization is not purely a simple change of the political status. Instead, it is a long-term and complex social process and its preconditions are still very much under discussion in social science research.

This contribution has attempted to meet 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 can also better be reconciled with the existing legal documents. These do not use a prescriptive, but rather a process-oriented language. The concrete development of the process of democratization is, to a large extent, part of the appreciation of each state.

Because of the binary character of legal norms, lawyers like to have clear standards. Karl-Heinz Ladeur once offered a metaphor in which he compared the law to a blind man who uses a stick in order to scan the ground on which he is walking. In this process, he always makes the distinction between a stable and an unstable ground. In so doing, he creates a system of orientation without being able to evaluate the world in its whole complexity. Lawyers act in a similar fashion when they merely ask about the legality or the illegality of certain actions or conditions. In this context, they need standards that allow them to make clear binary distinctions. The stricter legal standards are, the higher the determinacy of legal norms is. Against this background, the principle of democratic teleology does not deserve very good marks. Whether a state has held elections or not is a question of fact that can be answered quite easily. In contrast, the question whether a government acts in the interest of its population requires difficult normative valuations.

However, strict normative standards do not always take into account the complexity of reality. Martti Koskenniemi has shown in his dissertation that the determinacy of international legal norms is always subject to a necessary structural deficit. According to Koskenniemi, absolute

272 HUNTINGTON, supra note 32.
274 See Guillermo O'Donnell, Illusions About Consolidation, 7.2 J. DEM. 34, 45 (1996); Marks, supra note 10, at 87 (indicating that this is probably the reason, why the discussion on the right to democratic governance is dominated by a static concept of democracy, which is only focused on elections). It has to be remarked, however, that this question is not totally free of normative evaluations either, as the judgment whether elections have been free and fair requires some assessment.
legal standards are always either over- or under-inclusive.\textsuperscript{276} International law thus suffers from an inherent tension between determinacy and justice. The more determinate legal standards are, the less apt they are to take into account the complexity of reality; and the more they adjust to complexity, the less determinate they are.\textsuperscript{277} International law, in particular, depending in its effectiveness on the acceptance of the actors it addresses, cannot afford to impose strict standards if the evaluation of different circumstances and strategies is as diverse as in the context of global democratization.

Francis Fukuyama’s diagnosis of “the end of history”\textsuperscript{278} has been 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 favourable of the democratic entitlement did not claim the unconditional establishment of a right to democratic governance.\textsuperscript{279} Instead, most of them have identified a democratic trend\textsuperscript{280} or, most famously, an emerging right to democratic governance.\textsuperscript{281} The preceding analysis suggests reformulating this thesis: international law contains a teleological democracy principle, a right to the emergence of democratic governance.

\begin{itemize}
\item \textsuperscript{276} Id. at 591.
\item \textsuperscript{277} But see also id. (arguing that the tension is always solved to the detriment of determinacy because even standards which seem to be absolute may be softened through interpretation).
\item \textsuperscript{278} FUKUYAMA, supra note 2.
\item \textsuperscript{279} Gregory H. Fox & Brad R. Roth, The spread of liberal democracy and its implications for international law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 1, 13 (Gregory H. Fox & Brad R. Roth eds., 2000).
\item \textsuperscript{280} Rich, supra note 120, at 33.
\item \textsuperscript{281} Franck, supra note 3.
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