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CONTENTS

Introduction
Petra Butler and Alberto Costi 289

Foreword
Andrew Byrnes 291

An International Lawyer's Odyssey: From Natural Law to Empiricism
Ivan Shearer 297

Law, Ethics and Global Governance: Accountability in Perspective
Jan Klabbers 309

The Scope of Transnational Injunctions
Richard Fentiman 323

Democracy and Regime Change in the Post-Cold War International Law
Jure Vidmar 349

What Next for Endangered Cultural Treasures? The Timbuktu Crisis and the Responsibility to Protect
Jadranka Petrovic 381

International Climate Law and the Protection of Persons in the Event of Disasters
Teresa Thorp 427

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DEMOCRACY AND REGIME CHANGE IN THE POST-COLD WAR INTERNATIONAL LAW

*Jure Vidmar**

International human rights treaties were drafted in the age of the Cold War. In this environment, they remained neutral with respect to the particular political system or electoral method. In the post-Cold War era, scholarly arguments have been made that contemporary international law should be read with a democratic bias. Analysing the practice of states and United Nations organs, this article critically considers the democratic reading of international legal norms and argues that even in the post-Cold War era, a state does not violate international law simply by not being democratic. But this conclusion is not unqualified. The article demonstrates that collective practice is emerging of denial of legitimacy to coup governments where they overthrow democratically-elected ones. Governments can also lose international legitimacy on the basis of their abusiveness, although the latter is not necessarily determined by a lack of democratic electoral practices. Finally, where a regime change is internationalised, a collective attempt is commonly made to enact a new democratic government. Although not a legal norm per se, democracy is often an international policy preference which has influenced even some legally-binding documents adopted in the post-Cold War period.

I INTRODUCTION

In *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* (the *Nicaragua case*), the International Court of Justice made it clear that international law, either treaty or custom, does not bind states to a particular political system or electoral method.[1] But that was in 1986. After the end of the Cold War, however, scholarly arguments have

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1 *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)* [1986] ICJ Rep 14 [*Nicaragua case*] at [261] and [263].

been advanced that international human rights law requires a democratic political system and elections in a multiparty setting.[2] Endorsement of the idea that democratic electoral process legitimises governmental authority can also be found in the practice of states and United Nations organs.[3] But some (rather limited) practice to this effect should not be overstated.

This article considers the normative underpinnings and collective practice of dealing with non-democratic governments in the post-Cold War era. It argues that governments do not lose their legitimacy automatically, simply by not adhering to certain democratic procedures. The practice may rather suggest that coup governments will be seen as being illegitimate where they overthrow democratically-elected ones and that, under some circumstances, *abusive* governments may be internationally denied the right to represent the people they claim to represent. Governmental abusiveness in this context is, however, *not* understood in terms of an absence of democratic electoral procedures. And even where a government loses its legitimacy, such an occurrence is not automatic but dependent on collective action.

II MARRYING AND DIVORCING HUMAN RIGHTS AND DEMOCRACY

There is no unitary definition of democracy in political theory. In a procedural understanding, democracy is defined in terms of electoral process. Democracy then becomes a synonym for a selection of civil and political rights, most commonly the right to political participation and the freedoms of speech and assembly.[4] The adherents of the substantive theory find this procedural definition inadequate.[5] Democracy is more than merely electoral process. At the same time, a substantive understanding of democracy lacks normative precision.[6] It can be a philosophical ideal, yet it is difficult to derive legal obligations (for states) on its basis. In international law, references to democracy are most commonly made with tenets of procedural democracy in mind.[7] The procedural (election-centric) understanding of democracy will thus also underpin the analysis in this part. Certain civil and political rights enjoy the label of "democratic rights".[8] Their Cold War drafting,

2 See for example Thomas Franck "The Emerging Right to Democratic Governance" (1992) 86 AJIL 46; Anne-Marie Slaughter "International Law in a World of Liberal States" (1995) 6 EJIL 503; and Fernando R Tesón "The Kantian Theory of International Law" (1992) 92 Columbia LR 53 ["The Kantian Theory of International Law"].

3 See below Parts III.A and III.C.

4 Joseph Schumpeter *Capitalism, Socialism, and Democracy* (Harper, New York, 1942) at 269.

5 Susan Marks *The Riddle of All Constitutions* (Oxford University Press, Oxford, 2000) at 51.

6 Samuel Huntington *The Third Wave* (University of Oklahoma Press, Norman, 1990) at 9.

7 See below Part II.C.1.

8 See for example Cristina Cerna "Universal Democracy: An International Legal Right or the Pipe Dream of the West?" (1995) 27 NYU JILP 289.

however, does not allow a too liberal reading of their provisions. This part is particularly concerned with the right to political participation and argues that its international elaboration reflects neutrality of international law with respect to a particular political system or electoral method.

A Democracy and Universal Human Rights Treaties

There is no reference to democracy in either the United Nations Charter or international human rights instruments. The notion "democratic society" rather appears as a limitation clause attached to certain human rights elaborations; that is, if the interest of democratic society so requires, certain rights may be limited.

Such a reference initially appeared in the *Universal Declaration of Human Rights* (*Universal Declaration*),[9] but it is questionable how broadly the adjective "democratic" can be interpreted. Its inclusion at the time of the adoption of the *Universal Declaration*, in 1948, could hardly reflect a customary rule of international law requiring a particular political system or electoral method. "Democratic" at the time could hardly be more than a synonym for "non-fascist".[10] Subsequently, the limitation clause "democratic society" found its place in a number of international human rights treaties.[11]

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9 Article 29(2) of the *Universal Declaration of Human Rights* GA Res 217A, III (1948) provides:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

10 Brad Roth *Governmental Illegitimacy in International Law* (Oxford University Press, Oxford, 1999) at 326.

11 The International Covenant on Economic, Social and Cultural Rights 993 UNTS 3 (opened for signature 19 December 1966, entered into force 3 January 1976) [ICESCR] comprehends a general limitation clause in art 4:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The ICESCR also refers to "democratic society" as part of the limitation clause in the elaboration of art 8(a) and (c) (the right to form trade unions). The International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976) [ICCPR] attaches the interest of "democratic society" as one of the limitation clauses to arts 14 (right to a fair trial), 21 (freedom of assembly) and 22 (freedom of association). The Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [CRC] invokes, inter alia, the interest of democratic society as a limitation clause to art 15 (rights of a child to freedom of association and assembly). The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families 2220 UNTS 3 (opened for signature 18 December 1990, entered into force 1 July 2003) attaches the interest of "democratic society" within the limitation clause to arts 26 (the right of migrant workers to take part in the trade unions) and 40 (the freedom of assembly of migrant workers).

The scope of the "democratic society" limitation in the universal human rights treaties has never been specified but in the Cold War environment could not be interpreted as a call for a particular political system. And it is not the limitation clauses where links between democracy and human rights are normally established. Some scholars have rather argued that a requirement for a democratic political system derives from certain human rights elaborations (and not from limitation clauses):[12]

> … by becoming a party to an international human rights instrument, a state agrees to organize itself along democratic lines by establishing independent tribunals, allowing freedom of expression, and conducting free elections.

It is questionable whether the underlying provisions of international human rights law really require a specific political system and electoral method.

B The Right to Political Participation and Democracy

The right to political participation is elaborated in art 21 of the *Universal Declaration* and in art 25 of the International Covenant on Civil and Political Rights (ICCPR). In the Cold War environment, the scope of the formulations the "will of the people"[13] and the "will of the electors"[14] were not to be read too broadly.[15] While the interpretation of the Western world referred to the model of "liberal democracy", which presupposes elections in a multiparty setting,[16] the interpretation of the Soviet bloc adhered to the model of "people's democracy".[17]

Arguably, the right to political participation in the universal elaborations could be squared with both Western and Soviet concepts of democracy; as neither art 21 of the *Universal Declaration* nor art 25 of the ICCPR specifically requires multiparty elections.[18] The drafting history indeed shows that many, if not actually most, signatory states would have refused to ratify the ICCPR were it to

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12 See for example Cerna, above n 8, at 295.

13 *Universal Declaration of Human Rights*, above n 9, art 21(3).

14 ICCPR, above n 11, art 25(b).

15 A possible interpretation could also be that, for example, democratic elections are not required if the will of the people is against them.

16 See Roth, above n 10, at 325–332.

17 At 331. Consider especially the following argument:

> In the Marxist-Leninist view, multiparty competition [otherwise a crucial postulate of the Western concept of liberal democracy] masks the inalterable structure of power rooted in the concentrated ownership and control of the major means of production, distribution and exchange.

18 The amendment to art 21 of the *Universal Declaration of Human Rights*, above n 9, which would call for multiparty elections, was withdrawn upon a protest by the Soviet government: see Roth, above n 10, at 326–327.

bind them to democratic institutions and multiparty elections.[19] Thus, the language of the *Universal Declaration* and the ICCPR is to be understood as a codification of the lowest common denominator of the right to political participation and not as a call for a particular political system.

Such a position was confirmed by the International Court of Justice in the *Nicaragua case*: "[T]he Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections."[20] The Court took this position although Nicaragua was a party to the ICCPR, and thus bound by its art 25, and continued:[21]

> … adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. … The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.

If such an interpretation of the ICCPR and of customary international law was accurate in 1986, there is a question of whether this has changed since the end of the Cold War.

C The Right to Political Participation in Post-Cold War International Law

This section is concerned with the interpretation of the scope of the right to political participation in the post-Cold war period. It critically considers the theories of normative democratic entitlement and democratic peace and argues that – for the most part – they cannot be squared with contemporary international law. Then, it turns to the practice of states and United Nations organs to consider whether the interpretation of the right to political participation in the post-Cold war era has a broader scope.

1 The theories of normative democratic entitlement and democratic peace

At the end of the Cold War, and inspired by the proclamation of the "end of history", an attempt was made to proclaim democracy itself a human right.[22] In his ground-breaking article entitled "The Emerging Right to Democratic Governance", Thomas Franck derived this right from the rights of self-determination, freedom of expression and political participation.[23]

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19 Roth, above n 10, at 332.

20 *Nicaragua case*, above n 1, at [261].

21 At [263].

22 For more on the critique of "democratic ideology", see Marks, above n 5, at 8–49.

23 Franck, above n 2, at 52.

Although the three underpinnings of the right to democratic governance had already been international legal norms binding under treaty (that is, under the ICCPR) and custom, the proponents of the theory of normative democratic entitlement argued that it was the international circumstances at the end of the Cold War which allowed the reinterpretation of their normative scope with a pro-democratic bias.[24] Especially relevant in this regard were the international responses to the coups in the Soviet Union and Haiti in 1991.[25] These events confirmed the post-Cold War global switch to democracy not only in policy but also in international law.

However, when pronouncing democracy as the universally-accepted, sole legitimate system of government, Franck gave little evidence for such a claim. Relevant evidence may exist within newly democratised Western societies,[26] while it would be an exaggeration to extend this preference to all of humanity.[27]

A related idea to normative democratic entitlement is that of bringing democratic peace theory into international law.[28] In 1795, Immanuel Kant published a work entitled "To Perpetual Peace: A

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24 Consider the following counter-argument in Cerna, above n 8, at 290:

> Democracy, or the right to live under a democratic form of government, became an international legal right in 1948 [by the *Universal Declaration of Human Rights*], although for decades it was honoured more in breach than in observance.

25 Franck, above n 2, at 47.

26 Thomas Carothers "Empirical Perspectives on the Emerging Norm of Democracy in International Law" [1992] ASIL Proceedings 261 at 262–263.

27 At 263.

28 The democratic peace theory has both philosophical and empirical foundations. Philosophically, it is founded on the Kantian assumption that people are rational and prefer peace to war: Immanuel Kant "Perpetual Peace" in Ted Humphrey (ed) *Perpetual Peace and Other Essays on Politics, History, and Morals* (Hackett, Indianapolis, 1983) at s II, First Definitive Article for Perpetual Peace. Consequently, if the people have control over decision-making and access to information, which are qualities of democratic states, their governments will conduct peaceful policies. The empirical foundation of the theory is based on the studies proving the absence of war between any two democracies. Perhaps the most influential study of this kind is that of Michael Doyle, who traces peace between democracies from 1817: Michael W Doyle "Kant, Liberal Legacies, and Foreign Affairs" (1983) 12 Philosophy and Public Affairs 205. However, the democratic peace theory is controversial for its questionable methodological manoeuvres in order to prove the absence of a war between two democracies and for not addressing the problem of wars waged by states which perceive themselves as democratic against those states which they perceive to be non-democratic. Moreover, it is questionable to what extent the "rational citizenry" in modern democracies really exercises the control over war-making. A thorough scrutiny of the democratic peace theory would fall beyond the scope of this article. For more, see for example Gerry Simpson "Two Liberalisms" (2001) 12 EJIL 537, especially at 556–560; and Jose Alvarez "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory" (2001) 12 EJIL 183 at 234–238.

Philosophical Sketch"[29] in which he laid out an idea of perpetual peace among states with a republican form of government which form a federation of peace-loving free states.[30]

In neo-Kantian scholarship, the notion of the/a republican constitution is understood as the/a constitution of a democratic state. Fernando Tesón argues: "By 'republican,' Kant means what we would call today a liberal democracy, a form of political organization that provides full respect for human rights."[31] The neo-Kantian understanding rejects the Kelsenian concept of a presupposed validity of the *Grundnorm*, and rather anchors the validity of the legal norm in the people's consent, which is presumed to be an outcome of rational choice.[32] The first premise is that people are rational and peace-loving and, therefore, their democratic choice is peace rather than war. If the second premise is that people exercise final control over decision-making, the conclusion should follow that democracies pursue peaceful behaviour in international affairs.

In part of the post-Cold War international law scholarship, the neo-Kantian ideas of democratic peace were brought to the contemporary international law governing statehood and legitimacy of governments: "Individuals must give consent to governments in order that they can possess the formal credentials of statehood."[33] Consent of people is equated with existence of a democratic political system, which is typically deemed to require the following qualities:

(1) formal legal equality for all citizens and constitutional guarantees of civil and political rights such as freedom of religion and the press;

(2) broadly representative legislatures exercising supreme sovereign authority based on the consent of the electorate and constrained only by a guarantee of basic civil rights;

(3) legal protection of private property rights justified either by individual acquisition, common agreement or social utility; and,

(4) market economies controlled primarily by the forces of supply and demand.[34]

The proponents of the democratic peace theory in international law advance the view that international law should be conceived as law among democratic states, while states with a different

29 Kant, above n 28.

30 Kant wrote: "(1) The civil constitution of every country shall be republican. (2) [International law] shall be based on a federation of free states": Kant, above n 28.

31 Tesón "The Kantian Theory of International Law", above n 2, at 61.

32 Fernando Tesón *A Philosophy of International Law* (Westview, Boulder (Colorado), 1998) at 5.

33 Gerry Simpson "Imagined Consent: Democratic Liberalism in International Legal Theory" (1994) 15 Aust YBIL 103 at 115.

34 Doyle, above n 28, at 207–208.

form of government would not be part of this system.[35] The relationship between democratic states vis-à-vis states with other forms of government would be governed by different legal rules, and democracies would have a duty to take action for the implementation of the will of the people (that is, democratic institutions) in states where the will of people is disregarded (that is, democratic institutions are absent).[36] This would include even military intervention:[37]

> … force will sometimes have to be used against nonliberal regimes as a last resort in self-defense or in defense of human rights. Liberal democracies must seek peace and use all possible alternatives to preserve it. In extreme circumstances, however, violence may be the only means to uphold the law and to defend the liberal alliance against outlaw dictators that remain nonmembers. Such … is the proper place of war in the Kantian theory.

By endorsing the use of force, the neo-Kantian theory in fact becomes anti-Kantian.[38] In terms of international law, sceptics have described this argument as consistent with democratic peace but inconsistent with art 2(4) of the United Nations Charter.[39] Indeed, the invoked right to self-defence is not questionable and applies to all states under art 51 of the United Nations Charter and customary international law. As such, it does not need to be specifically invoked as a postulate of a new international law, understood as law among democratic states. The argument, however, changes if a non-democratic government is per se seen as a threat to international peace. This is what the militaristic argument within the so-called Kantian theory of international law implies: "[A] war of self-defence by a democratic government and its allies against a despotic aggressor is a just war."[40] From the context of this statement, it is clear that reference to self-defence against a despotic aggressor is not meant as against an aggressor from outside but against an aggressor who is deemed to lack domestic (democratic) legitimacy. In this understanding, states would enjoy attributes of statehood, including protection of art 2(4) of the United Nations Charter, based on the democratic legitimacy of their governments.

A less radical proposal comes from Anne-Marie Slaughter, who concentrates on the expansion of the zone of democracy – and consequently of democratic peace – by peaceful means. Her theory looks under the layer of state sovereignty and focuses on co-operation and networking between

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35 Slaughter, above n 2, at 528–534.

36 Tesón "The Kantian Theory of International Law", above n 2, at 64–65.

37 At 90.

38 Kant's Fifth Preliminary Article reads: "No state is to interfere by force with the constitution or government of another state": Kant, above n 28.

39 See for example Alvarez, above n 28, at 236.

40 Tesón "The Kantian Theory of International Law", above n 2, at 91.

professionals from different states working in the same or similar fields.[41] The foundation for such transnational networking is a common democratic identity in which societies arguably pursue similar goals.[42] In Slaughter's view, such networking should not be an exclusive club for professionals from democratic states. Indeed, co-operation with professionals from non-democratic states is of crucial importance and serves as a means for non-democratic states to get accustomed to democratic practices.[43] Slaughter ultimately sees a possibility for an expansion of the democratic zone in this "tutorial approach" of professionals from democratic states towards counterparts from non-democratic states.[44] Such tutelage and networking between professionals from democratic and non-democratic states should lead to adoption of democratic practices in non-democratic states, which would, according to the neo-Kantian postulates, lead to peaceful behaviour in international affairs.[45]

Such a conceptualisation, however, draws parallels with the system of international law developed in the 19th century, where a "standard of civilisation" was applied in order to decide on whether a state was to be admitted into the system of international law.[46] The idea thus gets a neo-colonial spin, where the old colonial "civilising missions" would be renamed "democratisation and pacification missions".

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41 See generally Anne-Marie Slaughter *A New World Order* (Princeton University Press, Princeton, 2004) [*A New World Order*].

42 Pursuing common goals in liberal democracies is a rather risky statement. Slaughter argues that in the matter of the death penalty, the Constitutional Court of South Africa resorted to the reasoning of the courts of Hungary, India, Tanzania, Germany and of the European Court of Human Rights: Slaughter *A New World Order*, above n 41, at 186–187. However, Slaughter does not mention that in the same judgment in which foreign jurisprudence was considered in order to establish that the death penalty was unconstitutional in South Africa, the Constitutional Court of South Africa also considered the jurisprudence of the Supreme Court of the United States on this matter. The South African Constitutional Court identified several breaches of human rights standards stemming from the death penalty and decided not to follow the United States' example: see *State v T Makwanyane and M Mchunu* [1995] ZACC 3, 1995 (3) SA 391 [The *Makwanyane case*] at [40]–[62]. Notably, had the South African Constitutional Court followed the United States' doctrine, it could have reached a diametrically opposite conclusion than it did. Yet, such a conclusion would still be underpinned by a cross-jurisdictional citing from a fellow liberal democracy.

43 Anne-Marie Slaughter "The Real New World Order" (1997) 76 Foreign Affairs 183 at 194 ["The Real New World Order"].

44 At 185–186.

45 For a critical approach to such an assumption, see Jean d'Aspremont "The Rise and Fall of Democratic Governance in International Law: A Reply to Susan Marks" (2011) 22 EJIL 549 at 562.

46 Simpson, above n 28, at 546. Consider especially the following argument: "Civilisation was a usefully illusive term", however, even at that time it was perceived that "a civilised state was one that accorded basic rights to its citizens."

Understanding international law as law among democratic states rejects the principle of sovereign equality of states and replaces the concept of state sovereignty with the concept of popular sovereignty, which originates in democratic political theory. It attempts to create a system of international law based on the exclusive club approach and an expansion of this club would be sought. The proposed means for the expansion of this club differentiate and range from informal networking among professionals from different states to pro-democratic interventions. Such views are, however, difficult to reconcile with the United Nations Charter system. Yet, proponents of such a new international law do not seem to seek reconciliation with the United Nations Charter. Indeed, they seem to seek invention of a new international legal system which would take different types of governments into account.[47] Democratic governments would be at least strongly favoured by the new international system, if not actually pronounced the only legitimate ones. However, as Martti Koskenniemi points out, international law has been there before – when "civilisation" was applied as a qualifying criterion.[48]

The theories of normative democratic entitlement and the so-called Kantian international law are not reflected in the structure of the international legal system as a whole.[49] Now it will be argued that even the post-Cold War international law adheres to the *Nicaragua case* principle: the choice of the political system and electoral method is a domestic matter of states.

2 *The right to political participation in post-Cold War resolutions*

After the end of the Cold War, a number of references to democracy were made in the documents adopted in the United Nations framework. Democracy and its connection to human rights feature very prominently in some resolutions of the Commission on Human Rights.[50] Resolution 2002/46 even links democracy and multiparty elections:[51]

> … the essential elements of democracy include … the holding of periodic free and fair elections by universal suffrage and by secret ballot as the expression of the will of the people, a pluralistic system of political parties and organizations …

47 Slaughter *A New World Order*, above n 41, at 183.

48 See Martti Koskenniemi "Carl Schmitt, Hans Morgenthau and the Image of Law in International Relations" in Michael Byers (ed) *The Role of Law in International Politics* (Oxford University Press, Oxford, 2000) 17 at 34.

49 See Susan Marks "What has Become of the Emerging Right to Democratic Governance?" (2011) 22 EJIL 507 at 513.

50 Commission on Human Rights *Promotion of the right to democracy* E/CN4/RES/1999/57 (1999); Commission on Human Rights *Promoting and consolidating democracy* E/CN4/RES/2000/47 (2000); Commission on Human Rights *Further measures to promote and consolidate democracy* E/CN4/RES/2002/46 (2002) [Resolution 2002/46].

51 Resolution 2002/46, above n 50, at [1].

The legal relevance of this resolution is very weak. It is a "soft law" document, adopted by 43 votes to none, with nine abstentions.[52] Such support does not prove the existence of general practice and opinio juris and its provisions cannot be said to reflect customary international law in the same way the provisions of unanimously or near unanimously adopted General Assembly resolutions are capable of expressing customary norms.[53]

The issues of democracy and free and fair elections were also invoked in a number of General Assembly resolutions, but in all of them the understanding of democracy was expressed very cautiously, without reference to elections in a multiparty setting. The most instructive in this context are Resolutions 45/150 and 45/151.[54] Resolution 45/150, inter alia, provides:[55]

> … 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 freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other States.

And Resolution 45/151 states:[56]

> Recognizing that the principles of national sovereignty and non-interference in the internal affairs of any State should be respected in the holding of elections … [and that] there is no single political system or single model for electoral processes equally suited to all nations and their peoples.

These resolutions not only fail to specify that elections need to take place in a multiparty setting, but they also affirm that the choice of a political system is a domestic matter for each state.

References to democracy and to the will of the people also appear in the set of General Assembly resolutions, entitled "*Support by the United Nations system of the efforts of Governments*

52 At 3.

53 In the *Nicaragua case*, the International Court of Justice held that opinio juris may be, inter alia, deduced from the attitude of states toward relevant General Assembly resolutions and concluded that consent to the text of a resolution "may be understood as an acceptance of the rule or set of rules declared by the Resolution": *Nicaragua case,* above n 1, at [188]. See also David Harris *Cases and Materials on International Law* (7th ed, Sweet and Maxwell, London, 2010) at 58, arguing: "The process by which they [General Assembly Resolutions] are adopted (adopted unanimously, or nearly unanimously, or by consensus or otherwise) establishes whether the practice is a 'general' one."

54 *Enhancing the effectiveness the principle of periodic and genuine elections* GA Res 45/150, A/RES/45/150 (1990); and *Respect for the principles of national sovereignty and non-interference in the international affairs of States in their electoral processes* GA Res 45/151, A/RES/45/151 (1990).

55 GA Res 45/150, above n 54, at [4]. The resolution was adopted with a vote of 129 in favour and eight against, with nine abstentions.

56 GA Res 45/151, above n 54, preamble at [7]–[8]. The resolution was adopted with a vote of 111 in favour and 29 against, with 11 abstentions.

to promote and consolidate new or restored democracies".[57] However, when referring to elections, these resolutions use the language of the *Universal Declaration* and do not mention that elections need to take place in a multiparty setting. Furthermore, the resolutions specifically affirm that "while democracies share common features, there is no single model of democracy and that [democracy] does not belong to any country or region."[58]

References to democracy are also made in some other documents adopted in the United Nations framework, such as the *Vienna Declaration and Programme of Action* and the *Millennium Declaration*. However, these documents do not go beyond the general mentioning of democracy, no definition is attempted and no link between democracy and multiparty elections is established.[59]

Arguably, these General Assembly resolutions may be considered to reflect customary international law regarding the relationship between obligations imposed by the right to political participation and the principle of non-interference into matters essentially in domestic jurisdiction, such as adoption of a particular political system and/or electoral method. And even in the post-Cold War period, the right to political participation is not to be read too broadly. In principle, international law still does not require a particular political system or electoral method.

By being non-democratic, a government does not lose its right to represent a certain state. However, in the post-Cold War era, collective practice is emerging of denying legitimacy to *some* governments. Is this practice a limited manifestation of a post-Cold War global switch to democracy? This is where the article turns next.

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57 *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 50/133, A/RES/50/133 (1995); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 51/31, A/RES/51/31 (1996); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 52/18, A/RES/52/18 (1997); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 53/31, A/RES/53/31 (1998); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 54/36, A/RES/54/36 (1999); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 55/43, A/RES/55/43 (2000); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 58/13, A/RES/58/13 (2003); *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 60/253, A/RES/60/253 (2005); and *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 61/226, A/RES/61/226 (2006).

58 See for example GA Res 60/253, above n 57, preamble at [11]; GA Res 61/226, above n 57, preamble at [7]; and *Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies* GA Res 62/7, A/RES/62/7 (2007) preamble at [7].

59 See generally *Vienna Declaration and Programme of Action* A/CONF.157/23 (1993); and *United Nations Millenium Declaration* GA Res 55/2, A/RES/55/2 (2000) at [24]–[25].

III DEMOCRACY AND ILLEGITIMATE GOVERNMENTS IN THE PRACTICE OF STATES AND UNITED NATIONS ORGANS

A non-democratic nature of government does not constitute a per se violation of international (human rights) law and, in principle, there is no normative democratic entitlement in the international legal system. Nevertheless, contemporary international legal developments have reflected some ideas of associating democracy with peace and of seeing it as being the only legitimate political system. This part will consider international responses to coups against democratic governments and regime change where the government in question is abusive of its people. In this context, it will also address the issue of the difference in terminology: coup versus regime change. Finally, this part will consider how the United Nations, as a universal organisation, has led entities to institutional democracy. This may be another instance of "democratic preference" in international law, albeit in the absence of a right to democratic governance.

A International Response to Coup Governments

Collective responses to coups in Sierra Leone and Haiti are good examples of the developing practice that a coup government is illegitimate where it overthrows a democratically-elected one. This was confirmed in the binding Security Council resolution on Sierra Leone, which demanded 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."[60]

In relation to Haiti, the Security Council went even further and, under Resolution 940, authorised the use of force for the return of an ousted democratically-elected government of President Jean-Bertrande Aristide.[61] The Resolution, inter alia, provides that:[62]

> Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes Member States to form a multinational force … to use all necessary means to facilitate the departure from Haiti of the military leadership … the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti …

The role of the United Nations in Haiti arguably draws parallels to the above-discussed "democratic activism" within international law. The United Nations observed the Haitian election in 1990, and after it had verified the electoral results, was unwilling to accept nullification of these

60 SC Res 1132, S/RES/1132 (1997) at [1].

61 SC Res 940, S/RES/940 (1994). See generally Richard Falk "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations" (1995) 36 Harvard ILJ 341.

62 SC Res 940, above n 61, at [4].

results by a coup (four years later).[63] The Security Council then acted under Chapter VII of the United Nations Charter, although it is generally perceived that, strictly speaking, no breach of, or threat to, *international* peace existed.[64]

Evidently, however, the interpretation of art 39 of the United Nations Charter nowadays is much broader than it was at the time of drafting. A breach or threat to *international* peace can also arise in a situation which is primarily (if not exclusively) domestic. In the United Nations Charter era, human rights are protected internationally and no longer a mere domestic issue of every state. Gross and systematic human rights violations within one state's confines may be also seen as breaches of, or threats to, international peace.

Nevertheless, Security Council Resolution 940 should not be understood too broadly. Indeed, the previous engagement of the United Nations in the electoral process in Haiti makes the situation somewhat specific. And a pro-democratic intervention was not authorised by the Security Council against a firmly-established (effective) non-democratic government, but rather against a coup government which overthrew the government elected in the process run under United Nations auspices.

B Democracy and Denying Legitimacy to an Established Government

This section turns to some situations where a government is internationally denied legitimacy, although it did not come to power in a (recent) coup, but is rather a well-established government of the state in question. It will be argued that international legitimacy in such circumstances is denied on the basis of gross human rights violations and a grave humanitarian situation rather than a lack of democratic (electoral) practices. Furthermore, it appears that denial of governmental legitimacy is entangled also with a partial loss of effective control over the territory. The situations analysed in this section are Afghanistan, Libya and Syria.

1 Afghanistan

Acting under Chapter VII of the United Nations Charter, the Security Council adopted Resolution 1267, in which it insisted:[65]

> … that the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan, comply promptly with its previous resolutions and in particular cease the provision of sanctuary and training for international terrorists and their organizations, take appropriate effective

63 Preamble at [8], where the Security Council reaffirms "that the goal of the international community remains the restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrande Aristide".

64 See Falk, above n 61, at 342.

65 SC Res 1267, S/RES/1267 (1999) at [1].

> measures to ensure that the territory under its control is not used for terrorist installations and camps, or for the preparation or organization of terrorist acts against other States or their citizens, and cooperate with efforts to bring indicted terrorists to justice.

With the formulation "the Afghan faction known as the Taliban, which also calls itself the Islamic Emirate of Afghanistan", rather than "the Government of Afghanistan", the Security Council implied that it did not see the Taliban government as the legitimate authority of Afghanistan.[66]

The Security Council, in several instances, also invoked obligations of "the Taliban, as well as other Afghan factions".[67] This indicates that the Taliban government did not exercise an effective control over the territory of Afghanistan. The authority of the Taliban government of Afghanistan was, therefore, partly also denied on the grounds of non-effectiveness. This was further affirmed in subsequent resolutions where the Security Council stated that the Taliban were obliged to comply with duties imposed by international law, while it strictly avoided using the term "the government of Afghanistan". Instead, terms such as "the Afghan faction known as the Taliban",[68] "the Taliban authorities",[69] and "the territory of Afghanistan under Taliban control"[70] were used, or it was demanded that "the Taliban [and not "the government of Afghanistan"] comply"[71] with previous resolutions. These pronouncements indicate that the denial of the legitimacy of the Taliban government was partly rooted in the lack of effective control over the entire territory of Afghanistan. But this was certainly not the only consideration.

Security Council Resolution 1378, inter alia, condemned "the Taliban for allowing Afghanistan to be used as a base for the export of terrorism by the Al-Qaida network and other terrorist groups,"[72] expressed deep concern about "serious violations by the Taliban of human rights and international humanitarian law"[73] and further gave:[74]

> … its strong support for the efforts of the Afghan people to establish a new and transitional administration leading to the formation of a government, both of which:

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66 At [1].

67 See SC Res 1214, S/RES/1214 (1998) at [1].

68 See SC Res 1267, above n 65, at [1].

69 See SC Res 1333, S/RES/1333 (2000) preamble at [14].

70 See SC Res 1363, S/RES/1363 (2001) at [3(b)].

71 See SC Res 1333, above n 69, at [1]–[2].

72 SC Res 1378, S/RES/1378 (2001) preamble at [4].

73 Preamble at [10].

74 At [1].

- should be broad-based, multi-ethnic and fully representative of all the Afghan people and committed to peace with Afghanistan's neighbours,
- should respect the human rights of all Afghan people, regardless of gender, ethnicity or religion,
- should respect Afghanistan's international obligations.

The Security Council thus denied legitimacy of the Taliban government in Afghanistan based on its grave human rights violations and threats to international peace and expressed its support for a change of government. However, despite some references to democratic principles, such as "broad-based" government, which is "multi-ethnic and fully representative of all the Afghan people", one cannot conclude that the Resolution gave support for a particular political system or that it challenged the legitimacy of the Taliban authority on the basis of lacking democratic (electoral) practices.[75]

Indeed, the use of the term "democracy" itself was avoided. The resolutions also failed to call for the enactment of a particular political system or electoral method. References to a "broad-based" government clearly cannot be seen as a call for democracy. It should rather be understood as a requirement for representativeness of various ethnic groups and peoples in the context of the right of self-determination,[76] which is not to be conflated with democracy as a political system.[77] Notably, the Security Council did not define representativeness in the sense of democratic elections.

The Security Council's measures against the Taliban authorities in Afghanistan were not examples of pro-democratic activism. They rather represented a collective response to serious breaches of internationally protected human rights and involvement in international terrorism, combined with the lack of effective control. Indeed, it needs to be noted that with regard to Afghanistan the Security Council did not challenge a government that would be effective in the entire territory of that state.

2 Libya

In the binding Security Council Resolutions 1970 and 1973 on Libya, the Security Council identified the existence of a threat to international peace and security and drew a number of legal consequences, such as: a travel ban,[78] asset freezing,[79] referral to the International Criminal Tribunal,[80] and an arms embargo.[81] In order to protect civilians, the Security Council authorised the

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75 At [1].

76 See Jure Vidmar "The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?" (2010) 10 Human Rights Law Review 239 at 248–250.

77 At 266–268.

78 SC Res 1970, S/RES/1970 (2011) at [15].

79 At [17]–[21].

80 At [4]–[8].

use of "all necessary measures", which can be seen as a deliberate ambiguity that authorises the use of force.[82] However, in so doing, the Council specifically excluded "a foreign occupation force of any form on any part of Libyan territory."[83]

The resolutions are not concerned with the choice of a political system. Resolution 1970, for example, urged the Libyan authorities to: "Act with the utmost restraint, respect human rights and international humanitarian law, and allow immediate access for international human rights monitors."[84] Resolution 1973 condemned "the gross and systematic violation of human rights, including arbitrary detentions, enforced disappearances, torture and summary executions."[85]

Unlike the relevant resolutions on Afghanistan, the resolutions on Libya did not explicitly deny legitimacy of the sitting government or call for a regime change, not even when, at that time, the Benghazi-based government of the National Transitional Council was already in control of large parts of Libyan territory. Indeed, the language used in the resolutions on Afghanistan clearly denied legitimacy of the Taliban government, while the resolutions on Libya referred to the Gaddafi government as "the Libyan authorities".[86] The authorisation of the use of force was limited to the protection of the civilian population.[87]

Nevertheless, the government change in Libya was not only a domestic but an internationalised issue.[88] It is debatable whether the international support for the National Transitional Council overstepped the Security Council's mandate, and at which point the international involvement should have stopped.[89] As argued above, an internationalised government change was not authorised by the applicable Security Council resolutions and neither was a requirement expressed for an enactment of a particular political system.

Apart from the collective action taken through the Security Council, international action against Libya was also channelled through the somewhat obsolete concept of recognition of governments. A

81 At [9]–[14].

82 SC Res 1973, S/RES/1973 (2011) at [4] and [8]. See Christian Henderson "International Measures for the Protection of Civilians in Libya and Cote D'Ivoire" (2011) 60 ICLQ 767 at 770–771.

83 SC Res 1973, above n 82, at [4].

84 SC Res 1970, above n 78, at [2(a)].

85 SC Res 1973, above n 82, preamble at [5].

86 See for example SC Res 1970, above n 78, at [2], [5], [14] and [27]; and SC Res 1973, above n 832, at [3], [19], [27] and [28].

87 See Henderson, above n 82, at 772.

88 See generally Mehrdad Payandeh "The United Nations, Military Intervention, and Regime Change in Libya" (2012) 52 Virginia JIL 355.

89 At 400–403.

number of states (including the United Kingdom) departed from the so-called Estrada doctrine of no explicit recognition[90] and granted recognition explicitly to the National Transitional Council.[91] This is a notable exception to the general practice developed over the past decades. The recognising states clearly expressed preferences to one of the competing authorities and their decisions were rooted in human rights considerations and in a grave humanitarian situation. Indeed, for many states, the Gaddafi government lost its legitimacy by the escalation of abusiveness against its people.

Nevertheless, recognition of the competing authority did not come before the National Transitional Council managed to establish a degree of control over parts of the Libyan territory. In other words, governmental legitimacy was not denied to a firmly established and entirely effective government. Rather, the international community progressively shifted toward one of the competing authorities, neither of which was in effective control over the entire territory of Libya.

Attempts were also made to link Gaddafi's governmental illegitimacy with democracy. When the United Kingdom recognised the National Transitional Council as the only legitimate government of Libya, United Kingdom Foreign Secretary William Hague stated that this recognition would contribute toward a "more open and democratic Libya … in stark contrast to Gaddafi whose brutality against the Libyan people has stripped him of all legitimacy."[92] This reference to democracy should not be interpreted too broadly. It is merely political and without legal consequences. Democracy in such situations seems to be a mantra repeated by politicians but its legal value is, at least, questionable. The National Transitional Council expressed its commitment to democratic institutions and procedures, but it remains to be seen how these institutions and procedures work in practice.[93]

As was established above, no state, including Libya, is internationally bound to any particular political system or electoral method. And neither was the Gaddafi government in breach of any

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90 This doctrine is named after the Mexican Minister of Foreign Affairs Genaro Estrada who, in 1930, made a proclamation on behalf of Mexico that its government in the future shall issue:

> … no declaration in the sense of grants of recognition, since [Mexico] considers that such a course is an insulting practice and one which, in addition to the facts that it offends sovereignty of other nations, implies that judgment of some sort may be passed upon the internal affairs of those nations by other governments, inasmuch as the latter assume, in effect, an attitude of criticism when they decide, favourably or unfavourably, as to the legal qualifications of foreign regimes.

See Estrada Doctrine (1930) reprinted in Roth, above n 10, at 137–138.

91 See Dapo Akande "Recognition of Libyan National Transitional Council as Government of Libya" (23 July 2011) EJIL Talk! <www.ejiltalk.org>. See also Stefan Talmon "Recognition of the Libyan National Transitional Council" (16 June 2011) ASIL Insights <www.asil.org>.

92 See "UK Expels Gaddafi Diplomats and Recognises Libya Rebels" (27 July 2011) BBC News <www.bbc.co.uk>.

93 See "A Vision of a Democratic Libya" The Libyan Interim National Council <www.ntclibya.org>.

norm simply by not holding Western-style multiparty elections. It was rather gross and systematic violations of human rights and the grave humanitarian situation which triggered a collective response and denial of governmental legitimacy to Gaddafi. And even in this case, the international support of the National Transitional Council did not come before this authority established effective control over a part of the territory of Libya.

3 Syria

The human rights violations and grave humanitarian situation in Syria triggered an international response and a draft Security Council resolution.[94] The draft went much further than the resolutions on Libya and explicitly called for a regime change. The draft thus calls for a transition "to a democratic, plural political system"[95] and for the formation of a national unity government.[96] The draft did not specify or operationalise the meaning of a democratic, plural political system and neither did it challenge the legitimacy of the government of Syria on the basis of democracy. For this purpose, it rather invoked human rights and humanitarian grounds, but nevertheless reflected the view that the respect for human rights can only be achieved upon the change of the government and in a democratic setting.

If adopted, the resolution would have been rather far-reaching. Yet, it was subject to a double veto (China and Russia).[97] This indicates that the universal perception of governmental legitimacy has not entirely shifted away from the requirement of effective control over a territory. As Stefan Talmon argued in the context of the Gaddafi regime in Libya:[98]

> Even gross and systematic violations of human rights by a government … do not *automatically* lead to its loss of status as a government in international law or make it any less a government than it would otherwise be.

With regard to Syria, this means that in the absence of the Security Council's action or collective de-recognition of the Syrian government, the latter remains the government of Syria, despite gross and systematic human rights violations.

Subsequently, the Security Council adopted a set of legally non-binding resolutions on the situation in the Middle East, in which Syria featured prominently.[99] The resolutions call for

94 See "UN draft resolution on Syria" *The Guardian* (online ed, London, 31 January 2012).

95 At [7].

96 At [7].

97 See "Russia and China Veto Resolution on Syria at UN" (4 February 2012) BBC News < www.bbc.co.uk>.

98 Stefan Talmon "De-Recognition of Colonel Qaddafi as Head of State of Libya?" 60 ICLQ (2011) 759 at 765 (emphasis added).

99 SC Res 2042, S/RES/2042 (2012); SC Res 2043, S/RES/2043 (2012); SC Res 2051, S/RES/2051 (2012).

reaching, and implementing, a political solution to the conflict.[100] Specific references are made to the Syrian government and the opposition,[101] thus leaving no doubt that despite the grave humanitarian situation and gross violations of human rights, the incumbent government still enjoys international legitimacy to speak on behalf of Syria. In its preamble, Resolution 2042 also reaffirms "its strong commitment to the sovereignty, independence, unity and territorial integrity of Syria, and to the purposes and principles of the Charter."[102] This is a clear indication that the outcome of the internal struggle in Syria needs to be determined in a domestic process.

These otherwise non-legally binding resolutions do not make any provisions for regime change and continue to regard the Assad government as the legitimate government of Syria. However, nothing in the resolutions implies that overthrowing the government by extra-constitutional means would not be allowed. They only determine that such an outcome would need to result from domestic processes. This is different from the above-discussed resolutions on Sierra Leone and Haiti, in which the extra-constitutional changes of the governments were internationally condemned.

It seems that a terminological difference in doctrine is emerging between coup and regime change. Strictly speaking, a coup is a regime change, but in some circumstances it will be condemned and in others at least tolerated, if not endorsed. Indeed, no one speaks about a coup against Colonel Gaddafi or President Assad. Of crucial importance for the label "coup" or "regime change" appears to be the nature of the government.[103] Overthrowing democratic governments has brought universal condemnation; while overthrowing abusive governments is a practice that is internationally at least tolerated, and sometimes even specifically endorsed.

C The United Nations, State-Building and Transition to Democracy

The previous section dealt with situations where an authority tries to overthrow an incumbent government but the identity of the state remains the same. This section turns to two prominent instances where governmental abusiveness led to the creation of international territorial administration, using the binding powers of the Security Council. The parent state was thus left without an effective control over the territory and this, ultimately, led to independence. However, in the transitional process, the organs of international territorial administration also carried out the process of democratic transition. The discussed examples are East Timor and Kosovo.

100 SC Res 2042, above n 99, at [1]; SC Res 2043, above n 99, at [1]; and SC Res 2051, above n 99, at [1].

101 SC Res 2042, above n 99, at [1]; SC Res 2043, above n 99, at [1]; and SC Res 2052, above n 99, at [1].

102 SC Res 2042, above n 99, preamble at [3]. See also SC Res 2043, above n 99, at [2]–[4].

103 Compare d'Aspremont, above n 45, at 563, who argues that the debate on democracy promotion in the immediate years after the end of the Cold War has now shifted to the debate on "regime change".

1 East Timor

Details on the history of the Indonesian illegal occupation of East Timor have been competently presented elsewhere.[104] At this point, it should be recalled that on 7 December 1975, Indonesia occupied this independence-seeking Portuguese colony, claiming "to be effecting East Timorese self-determination."[105] On 17 July 1976, the President of Indonesia promulgated an act which declared East Timor an Indonesian province.[106]

In Portugal's understanding, East Timor was not properly decolonised and Portugal continued to regard itself as the administering power of the territory.[107] Subsequently, Security Council Resolution 384 called upon:[108]

> … all States to respect the territorial integrity of East Timor as well as the inalienable right of its people to self-determination in accordance with General Assembly resolution 1514 (XV);
>
> … the Government of Indonesia to withdraw without delay all its forces from the Territory [of East Timor];
>
> … the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination;
>
> [and urged] … all States and other parties concerned to co-operate fully with the efforts of the United Nations to achieve a peaceful solution to the existing situation and to facilitate the decolonization of the Territory.

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104 See generally Heike Krieger and Dietrich Rauschning *East Timor and the International Community: Basic Documents* (Cambridge University Press, Cambridge (UK), 1997); John Taylor *East Timor: The Price of Freedom* (Zed Books, London, 1999); and Iain Martin *Self-Determination in East Timor: The United Nations, the Ballot, and International Intervention* (Lynne Rienner Publishers, London, 2001).

105 Ralph Wilde *International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, Oxford, 2008) at 179.

106 Martin, above n 104, at 16.

107 At 17.

108 SC Res 384, S/RES/384 (1975) at [1]–[4]. A similar view was previously expressed in *Question of Timor* GA Res 3485, XXX (1975).

These pronouncements were reaffirmed by Security Council Resolution 389[109] and by a set of General Assembly resolutions.[110] East Timor remained on the list of Non-Self-Governing territories.[111]

Formally, independence of East Timor may be seen as an instance of belated decolonisation. However, the real issue here was independence from Indonesia, not Portugal. It was not before Indonesia's consent was given that East Timor's path to independence was confirmed. Notably, even subsequent Security Council resolutions dealing with East Timor contained preambular references to Indonesia's territorial integrity.[112]

In 1999, Indonesia for the first time indicated that it would be willing to discuss the future legal status of East Timor.[113] On 30 August 1999, upon an agreement between Indonesia and Portugal, a referendum on the future status of the territory was held. The right of self-determination requires a democratic expression of the will of the people at independence referenda.[114] But two caveats apply. First, referendum is only a necessary but not a sufficient condition for a successful change of the legal status of a territory.[115] In most circumstances, the right of self-determination is limited by the principle of territorial integrity. Secondly, democratic decision-making at independence referenda should not be conflated with democracy as a political system. It means popular consultation on the future legal status of a territory, which is not the same as national elections.[116]

At the referendum, which was supervised by the United Nations mission,[117] the people of East Timor rejected an autonomy arrangement within Indonesia and set the course toward independence. This decision led to an outbreak of violence, initiated by Indonesian forces.[118]

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109 SC Res 389, S/RES/389 (1976) at especially [1] and [2].

110 *Question of Timor* GA Res 31/53, A/RES/31/53 (1976); *Question of East Timor* GA Res 32/34, A/RES/32/34 (1977); GA Res 33/39, A/RES/33/39 (1978); *Question of East Timor* GA Res 34/40, A/RES/34/40 (1979); *Question of East Timor* GA Res 35/27, A/RES/35/27 (1980); and *Question of East Timor* GA Res 36/50, A/RES/36/50 (1981).

111 See Wilde, above n 105, at 179–180.

112 See for example SC Res 1264, S/RES/1264 (1999) preamble at [12]; and SC Res 1272, S/RES/1272 (1999).

113 See Wilde, above n 105, at 179–180.

114 *Western Sahara (Advisory Opinion)* [1975] ICJ Rep 6 at 55.

115 Vidmar, above n 76, at 245–247.

116 See Robert McCorquodale "Negotiating Sovereignty: The Practice of the United Kingdom in Regard to the Right of Self-Determination" (1996) 66 BYIL 283 at 304.

117 See SC Res 1236, S/RES/1236 (1999) at [4], [8] and [9].

118 See Alberto Costi "Hybrid Tribunals as a Viable Transitional Justice Mechanism to Combat Impunity in Post-conflict Situations" (2006) 22 NZULR 213 at 227.

Subsequently, the Security Council, acting under Chapter VII of the United Nations Charter, on 15 September 1999, adopted Resolution 1264, which established "a multinational force under a unified command structure".[119] On 25 October 1999, the Security Council, acting under Chapter VII, adopted Resolution 1272, with which it established:[120]

> … a United Nations Transitional Administration in East Timor (UNTAET), which will be endowed with overall responsibility for the administration of East Timor and will be empowered to exercise all legislative and executive authority, including the administration of justice.

Resolution 1272 in its preamble also reaffirmed "respect for the sovereignty and territorial integrity of Indonesia."[121]

Prior to the "release" of East Timor to independence and transfer of power from international territorial administration to organs of the East Timorese state, the international administrative authority supervised the creation of democratic institutions.[122] Under United Nations auspices, elections were held on 30 August 2001 and 91.3 per cent of those eligible to vote cast their votes.[123] On 15 September 2001, the Special Representative of the United Nations Secretary-General "swore in the 88 members of the Constituent Assembly."[124] On 20 September 2001, the Special Representative appointed a second transitional government, the members of which were all East Timorese and the composition of the government reflected the outcome of the elections to the Assembly.[125] The United Nations Secretary-General noted that this was "the first time that executive government in East Timor [was] controlled by East Timorese, albeit under the overall authority of [the United Nations Secretary-General's] Special Representative."[126]

On 28 November 2001, the Constituent Assembly adopted a resolution in which it expressed support for direct presidential elections.[127] The Special Representative of the United Nations

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119 SC Res 1264, above n 112, at [3]

120 SC Res 1272, above n 112, at [1].

121 Preamble at [12].

122 United Nations Security Council *Interim report of the Secretary-General on the United Nations Transitional Administration in East Timor* S/2001/436 (2001) at [2]–[7]; United Nations Security Council *Report of the Secretary-General on the United Nations Transitional Administration in East Timor* S/2001/983 (2001) at [4]–[8] [*S/2001/983 Report*].

123 *S/2001/983 Report*, above n 122, at [5].

124 At [5].

125 At [7].

126 At [7].

127 United Nations Security Council *Report of the Secretary-General on the United Nations Transitional Administration in East Timor* S/2002/80 (2002) at [7] [*S/2002/80 Report*].

Secretary-General[128] determined that presidential elections would take place on 14 April 2002.[129] On 22 March 2002, the text of the new constitution was signed by members of the East Timorese political elite, religious leaders and representatives of civil society.[130] It was determined that the Constitution would enter into force on 20 May 2002, which was the day foreseen for the proclamation of independence.[131]

East Timor's course to independence was also confirmed in Security Council Resolution 1338, adopted on 31 January 2001.[132] However, this Resolution was not adopted under Chapter VII of the United Nations Charter and it cannot be said that it was creative of a new state. The Resolution was rather an affirmation of the completion of the internationalised process which resulted in the emergence of a new state. East Timor declared independence on 20 May 2002[133] and was admitted to the United Nations on 27 September 2002.[134]

The Constitution of East Timor makes a number of specific references to a democratic political order. It provides:[135]

> The Democratic Republic of East Timor is a democratic, sovereign, independent and unitary State based on the rule of law, the will of the people and the respect for the dignity of the human person.

Section 6(c) provides that one of the fundamental objectives is "[t]o defend and guarantee political democracy and participation of the people in the resolution of national problems." Besides these general references to democracy, a number of other operative articles enact specific provisions which leave no doubt that the electoral process in East Timor is organised along democratic lines, in a multiparty setting. Section 7 expressly enacts universal suffrage and a multiparty political system, ss 46 and 47 respectively deal with the right to political participation and with the right to vote,

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128 The position of the Special Representative drew its legitimacy from SC Res 1272, above n 112, in which the Security Council at [6]:

> Welcome[d] the intention of the Secretary-General to appoint a Special Representative who, as the Transitional Administrator, will be responsible for all aspects of the United Nations work in East Timor and will have the power to enact new laws and regulations and to amend, suspend or repeal existing ones.

129 SC Res 1272, above n 112, at [6]. See also *S/2002/80 Report*, above n 127, at [7].

130 *S/2002/80 Report*, above n 127, at [4].

131 At [2] and [4].

132 SC Res 1338, S/RES/1338 (2001) at [2], [4] and [11].

133 See "East Timor: Birth of a Nation" (19 May 2002) BBC News <http://news.bbc.co.uk>.

134 *Admission of the Democratic Republic of Timor-Leste to membership in the United Nations* GA Res 57/3, A/RES/57/3 (2002).

135 Constitution of the Democratic Republic of East Timor (2002), s 1(1).

within the elaboration of which a multiparty political system is expressly demanded, and s 70 deals specifically with political parties and the "right of opposition".

According to the Constitution, the Constitutive Assembly is transformed into the Parliament.[136] The Constitution specifically regulates the election of the Parliament[137] and of the President.[138] The political system, which was designed in East Timor under United Nations auspices, is organised along democratic lines. The international territorial administration thus not only guided East Timor toward independence but also through the process of democratic transition and building of democratic institutions.[139]

The emergence of East Timor as an independent state was an internationalised process and the implementation of a democratic political system was an integral part of this process. East Timor's transition to both democracy and statehood ran under United Nations auspices.

2 *Kosovo*

Predominantly settled by ethnic Albanians, Kosovo was a province of Serbia, which had itself been a member of various Yugoslav formations.[140] In the second part of the 1980s, Serbia unilaterally suspended Kosovo's autonomy within Yugoslavia.[141] This led to more than a decade of oppression and hostilities.

The Socialist Federal Republic of Yugoslavia (SFRY) was dissolved in the early 1990s. Upon initial unilateral declarations of independence, issued by Croatia and Slovenia, and an outbreak of

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136 Sections 92–101.

137 Section 93(1).

138 Section 76(1).

139 Compare Jean d'Aspremont "Post-Conflict Administrations as Democracy-Building Instruments" (2008) 9 Chicago JIL 1. Scepticism toward such an imposition was, however, expressed by East Timor's first president, Xanana Gusmão, in the following words:

> We are witnessing … an obsessive acculturation to standards that hundreds of international experts try to convey … [,] we absorb [these] standards just to pretend we look like a democratic society and please our masters of independence. What concerns me is the noncritical absorption of [such] standards given the current stage of the historic process we are building.

As quoted in Conor Foley *The Thin Blue Line: How Humanitarianism Went to War* (Verso, London, 2008) at 141.

140 See Constitution of the Socialist Federal Republic of Yugoslavia (1974), art 2. See also the Constitution of the Socialist Autonomous Province of Kosovo (1974) translated in Helsinki Committee for Human Rights in Serbia *Kosovo: Law and Politics, Kosovo in Normative Acts Before and after 1974* (1998), especially at 41 and 45. For a historical overview, see Noel Malcolm *Kosovo: A Short History* (Macmillan, London, 1998) at 245–266.

141 See Malcolm, above n 140, at 344.

hostilities, on 27 August 1991 the European Community and its member states founded the Conference on Yugoslavia, under whose auspices the Arbitration Commission was established.[142] The Arbitration Commission was chaired by the then President of the French Constitutional Court, Robert Badinter.[143] Although its opinions were not legally binding, the so-called Badinter Commission played the central role in the legal process surrounding the dissolution of Yugoslavia. Indeed, its *Opinion 1*, holding "that the Socialist Federal Republic of Yugoslavia is in the process of dissolution", crucially determined the future course of the settlement of the Yugoslavia crisis.[144]

On 16 December 1991, the European Community Council of Ministers adopted two documents in which it expressed its recognition policy in regard to the new states emerging in the territories of the Soviet Union and the SFRY, respectively:[145] the European Community Guidelines[146] and the European Community Declaration on Yugoslavia.[147] The European Community Guidelines, inter alia, invoked that new states must "have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations."[148] Notably, this requirement was not applied strictly and, in the end, the Badinter Commission only considered it when dealing with Slovenia.[149] Overall, the clause on democracy played virtually no formal role in the process of dissolution of Yugoslavia.

According to the European Community Declaration on Yugoslavia, only republics were considered to be eligible for independence.[150] Kosovo's application for recognition was thus ignored by the Badinter Commission. In November 1995, the United States sponsored "peace talks" at Dayton, Ohio, which led to the settlement of the conflicts in Bosnia-Herzegovina and Croatia by the

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142 See James Crawford *The Creation of States in International Law* (2nd ed, Oxford University Press, Oxford, 2006) at 396.

143 The other four members of the Commission were the Presidents of the Constitutional Courts of Germany and Italy, the President of the Court of Arbitration of Belgium and the President of the Constitutional Tribunal of Spain. See Alain Pellet "The Opinions of the Badinter Arbitration Committee: A Second Breath for the Self-Determination of Peoples" (1992) 3 EJIL 178 at 178. The terms "Badinter Commission" and "Badinter Committee" are used interchangeably. References to the "Badinter Committee" in secondary sources should, therefore, be understood as synonyms for the "Badinter Commission".

144 Badinter Commission *Opinion 1* (29 November 1991) at [3].

145 See Harris, above n 53, at 132–136.

146 European Community *Guidelines on Recognition of New States in Eastern Europe and in the Soviet Union* (1991) [*EC Guidelines*].

147 European Community *Declaration on Yugoslavia* (1991) [*EC Declaration*].

148 *EC Guidelines*, above n 146, at [3].

149 Badinter Commission *Opinion 7* (11 January 1992).

150 *EC Declaration*, above n 147, at [3].

so-called Dayton Peace Accords.[151] It is argued that the disappointment that Kosovo was not included in this settlement became a turning point in the attitude of Kosovo Albanians toward the settlement of the Kosovo question.[152] After years of peaceful resistance by the Democratic League of Kosovo, the militant Kosovo Liberation Army (KLA) now emerged.[153] Serbian oppression escalated in response.[154] The situation in Kosovo was dealt with by Security Council Resolutions 1160,[155] 1199,[156] 1203[157] and 1239.[158] The Resolutions, inter alia, called for a political solution of the situation in Kosovo,[159] condemned the violence used by organs of the Federal Republic of Yugoslavia (FRY) as well as violent actions taken by Kosovo Albanians (the latter were called "acts of terrorism"),[160] and affirming the territorial integrity of Serbia,[161] expressed support for "an enhanced status for Kosovo which would include a substantially greater degree of autonomy and meaningful self-administration."[162]

Subsequent negotiations failed and violence in Kosovo continued. In 1999, NATO intervened, using the language of humanitarian intervention, but in the absence of Security Council's

151 On the Dayton Peace Accords, see Crawford, above n 142, at 528–530.

152 See Miranda Vickers *Between Serb and Albanian: A History of Kosovo* (Hurst, London, 1998) at 287, who argues that:

> … the Kosovars were both surprised and bitterly disillusioned by the outcome of the Dayton Agreement, which made no specific mention of Kosovo … It now became apparent to all that as long as there appeared to be relative peace in Kosovo, the international community would avoid suggesting any substantive changes.

153 At 292–297.

154 At 297–300.

155 SC Res 1160, S/RES/1160 (1998).

156 SC Res 1199, S/RES/1199 (1998).

157 SC Res 1203, S/RES/1203 (1998).

158 SC Res 1239, S/RES/1239 (1999).

159 See especially SC Res 1160, above n 155, at [1], [2] and [5]; SC Res 1199, above n 156, at [3], [4] and [5]; and SC Res 1203, above n 157, at [1], [2] and [5].

160 See especially SC Res 1160, above n 155, at [2]–[3]; SC Res 1199, above n 156, at [1]–[2]; and SC Res 1203, above n 157, at [3]–[4].

161 References to territorial integrity of the Federal Republic of Yugoslavia appear in SC Res 1160, above n 155, preamble at [7]; SC Res 1199, above n 156, preamble at [13]; and SC Res 1203, above n 157, preamble at [14]. SC Res 1239, above n 158, preamble at [7] comprises a more general reference to "the territorial integrity and sovereignty of all States in the region."

162 SC Res 1160, above n 155, at [5].

authorisation, the use of force was deemed illegal.[163] Subsequently, the Security Council used its binding powers in Resolution 1244 and established the regime of international territorial administration over Kosovo.[164] The regime of Resolution 1244 did not grant Kosovo the status of an independent state but rather vested all legislative, executive and judicial powers in the self-governing organs, subordinated to international administration. Kosovo declared independence in 2008 and its legal status remains controversial.[165] But this debate is beyond the scope of the present article. Here, it is rather considered how democratic institutions were implemented under the regime of Resolution 1244. Notably, the Resolution remains in force regardless of the effects of the declaration of independence.

Drawing authority from Resolution 1244, the Special Representative of the United Nations Secretary-General [166] promulgated the document entitled *A Constitutional Framework for Provisional Self-Government in Kosovo* (the *Constitutional Framework*).[167] The chapter on basic provisions of the *Constitutional Framework* provides for the institutional setting for the exercise of Kosovo's self-government,[168] enacts an electoral system based on democratic principles[169] and establishes mechanisms for the protection of human rights.[170]

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163 See Bruno Simma "NATO, the UN and the Use of Force: Legal Aspects" (1999) 10 EJIL 1 at 10; Antonio Cassese "*Ex iniuria ius oritur*: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?" (1999) 10 EJIL 23 at 24; and Christine Chinkin "Kosovo: A 'Good' or 'Bad' War?" (1999) 93 AJIL 841 at 844.

164 SC Res 1244, S/RES/1244 (1999).

165 For more on Kosovo's declaration of independence and legal status, see generally Marc Weller *Contested Statehood: Kosovo's Struggle for Independence* (Oxford University Press, Oxford, 2009); James Summers (ed) *Kosovo: A Precedent? The Declaration of Independence, the Advisory Opinion and Implications for Statehood, Self-Determination and Minority Rights* (Martinus Nijhoff Publishers, Leiden, 2011); and Jure Vidmar "International Legal Responses to Kosovo's Declaration of Independence" (2009) 42 Vand J Transnat'l L 779.

166 The position of the Special Representative was created by Security Council Resolution 1244, above n 164, at [6]:

> … requests the Secretary-General to appoint, in consultation with the Security Council, a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner.

167 *A Constitutional Framework for Provisional Self-Government in Kosovo* UNMIK/REG/2001/9 (2001) [*The Constitutional Framework*].

168 At ch 1.

169 At ch 9.1.3.

170 At ch 3.

The *Constitutional Framework* also expresses the commitment of Kosovo's self-governing institutions "through parliamentary democracy [to] enhance democratic governance and respect for the rule of law in Kosovo."[171] It further provides that "Kosovo shall be governed democratically through legislative, executive, and judicial bodies and institutions"[172] and enumerates the promotion and respect of the democratic principles among those principles, which shall be observed by the self-governing institutions.[173] The Special Representative of the United Nations Secretary-General thus promulgated a legal instrument which implemented democratic institutions. The process of democratic transition in Kosovo was thus carried out under United Nations auspices, which, as a universal organisation, thereby implemented a political system that is not universally accepted as the only legitimate one.

The democratic institutional design of the Kosovo self-governing organs under the *Constitutional Framework* was, however, not without flaws. While the institutions of self-government were vested with powers in the exercise of effective control over the territory of Kosovo which can be compared to those of authorities of sovereign states, the *Constitutional Framework* foresaw an appointed supervisor of the democratic process, that is, the Special Representative of the United Nations Secretary-General, to whom the self-governing organs remained subordinated.[174]

The *Constitutional Framework* did not foresee the organs of the FRY or Serbia having any authority over the decision-making of Kosovo's self-governing institutions. Although Resolution 1244 states that the aim of the interim administration is that "the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia,"[175] the effective situation in fact established Kosovo's autonomy within the interim administration. Indeed:[176]

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171 Preamble at [7].

172 At ch 1.1.4.

173 At ch 2(b).

174 At ch 12.

175 SC Res 1244, above n 164, at [10]. But see also William O'Neill *Kosovo: An Unfinished Peace* (Lynne Rienner Publishers, Boulder (Colorado), 2002) at 30, especially the following observation:

> No one knew what the terms "substantial autonomy" and "meaningful self-administration" really meant. What united all Kosovo Albanians, regardless of their political party loyalties, was full independence from Serbia and what was left of the FRY. They did not want to hear about autonomy, however defined.

176 Ralph Wilde "From Danzig to East Timor and Beyond: The Role of International Territorial Administration" (2001) 95 AJIL 583 at 595.

> [The United Nations Interim Administration Mission in Kosovo] has assumed what is effectively (though not in name) the federal-type role of the Serb and Federal Republic of Yugoslavia authorities, because these authorities failed to perform that role in the past.

Kosovo thus became an internationally administered territory without being put under the international trusteeship system of Chapter XII of the United Nations Charter.[177]

On 9 April 2008, after the declaration of independence, Kosovo's Parliament adopted the Constitution of the Republic of Kosovo.[178] The Constitution affirms Kosovo's commitment to democracy in both the preamble[179] and in the operative articles,[180] and proclaims that Kosovo "is a democratic Republic based on the principle of separation of powers and the checks and balances among them."[181] Apart from these generally expressed commitments, the Constitution establishes the institutions of a democratic political system. It provides for periodic elections of the Parliament[182] and of the president[183] and elections based on secret ballot and on the proportional electoral system.[184] There is no explicit reference to multiparty elections. Yet, the multiparty environment is implied in some of the provisions, such as those regulating the composition of the Parliament,[185] competencies of the president[186] and formation of the government.[187]

The competences of Kosovo's constitutional organs, however, remain subordinated to the international territorial administration. Article 147 of the Constitution reads:

> Notwithstanding any provision of this Constitution, the International Civilian Representative shall, in accordance with the Comprehensive Proposal for the Kosovo Status Settlement dated 26 March 2007, be the final authority in Kosovo regarding interpretation of the civilian aspects of the said Comprehensive

177 See Michael Bothe and Thilo Marauhn "UN Administration of Kosovo and East Timor: Concept, Legality and Limitations of Security Council-Mandated Trusteeship Administration" in Christian Tomuschat (ed) *Kosovo and the International Community: A Legal Assessment* (Kluwer Law International, The Hague, 2001) 217 at 230–235.

178 Constitution of the Republic of Kosovo (2008).

179 Preamble at [1].

180 Articles 1(1), 4, 7, 55(2) and 125.

181 Article 4(1).

182 Article 66.

183 Article 86.

184 Article 64.

185 Article 64.

186 Article 84(14).

187 Article 95(1) and (5).

Proposal. No Republic of Kosovo authority shall have jurisdiction to review, diminish or otherwise restrict the mandate, powers and obligations.

The Constitution thus not only accepts limits on Kosovo's sovereignty and on the competences of its constitutional organs, but it also unequivocally subscribes Kosovo to a continued internationalised supervision.

Kosovo is thus an example where international territorial administration was set in place to remedy governmental abusiveness. The abusive governmental practices were not underpinned directly by the lack of democracy, but rather by gross human rights violations and a grave humanitarian situation. Indeed, the non-democratic regime of Slobodan Milosevic in Serbia did not provoke an international denial of its legitimacy in the entire territory of Serbia, but only in Kosovo, where oppression had an ethnic basis. Under the regime of Security Council Resolution 1244, the international community implemented democratic institutions. But the power of self-governing (democratic) institutions is limited.[188] Any decision of these institutions can be overruled by the International Civilian Representative who can, thereby, act in a manner of an "enlightened absolutist".[189]

IV CONCLUSION

Democracy has come into international legal parlance through human rights law. In the building period of the United Nations system, an explicit reference to "democracy" was omitted from the relevant documents. The provisions of the so-called democratic rights nevertheless allow for the interpretation that international human rights standards can only be met in the setting of a democratic political system. However, in the Cold War period, the *Nicaragua case* confirmed that neither the ICCPR nor customary international law bind states to adopting a particular political system or electoral method. The International Court of Justice, therefore, affirmed that universal human rights instruments and customary international law are not to be read with the idea of a particular political system or electoral method in mind.

The age of democratic triumphalism in the post-Cold War period inspired some legal scholars to proclaim democracy to be a human right and to redesign international law as an exclusive club of democratic states. According to this view, states deemed non-democratic could even lose some attributes of statehood. However, such interpretation does not find much support in positive law. Indeed, in the post-Cold War period, references to democracy have been made in several documents adopted in the framework of the United Nations. But the scope of these references should not be overstated. The relevant General Assembly resolutions, which are capable of reflecting customary international law, make no mention of electoral method or multiparty setting. These resolutions,

188 See SC Res 1244, above n 164, at [10]–[11].

189 See Constitution of the Republic of Kosovo (2008), art 147.

indeed, commonly affirm that the choice of a political system remains in the exclusive domestic jurisdiction of states. Despite the proliferation of references to democracy in post-Cold War documents adopted in the framework of the United Nations, no attempt has been made to carve a universally accepted definition of democracy. Even in the post-Cold War period, international law does not prescribe a particular political system or electoral method.

Nevertheless, some practice is indicating that a coup against a democratically-elected government will not be internationally accepted. In this regard, a significant difference in terminology is emerging between coup and regime change. It appears that an extra-constitutional regime change in international law is generally – at least – tolerated; except where the overthrown government enjoys democratic legitimacy.

However, it is too early to claim that this distinction has matured into a rule of customary international law which would require international support for a regime change where an effective government does not enjoy domestic democratic legitimacy. While firmly established governments have been denied legitimacy internationally, their legitimacy was not challenged on the basis of (non-existing) democratic electoral procedures; it was rather a consequence of gross and systematic human rights violations. Furthermore, international legitimacy does not seem to be denied before the abusive government loses effective control over at least one part of the territory of the state it claims to represent.

It follows that a democratically elected government is internationally protected against a coup, while a non-democratic government cannot be subject to international intervention simply because it is non-democratic. International interventions in support of a regime change or in order to avert a coup have been legally binding before, but such authority has come from Chapter VII Security Council resolutions, not from customary international law.

Attachment to democracy and certain democratic principles is nevertheless evident in the international instruments that deal with post-conflict state building, including in the instruments attributable to the Security Council. This may be a limited reflection of the perception that peace can only be achieved through democracy.

The post-Cold War period did not codify democracy as a human right or reinterpret international human rights law with a pro-democratic bias. Some international practice is nevertheless emerging which promotes democratic governments at least as a policy preference. But this policy preference often finds its way into legally binding documents, including Chapter VII resolutions of the Security Council.