DEMOCRACY AND INTERNATIONAL LAW*

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Abstract

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1. INTRODUCTION

Traditionally, international law has barely paid attention to the democratic legitimacy of its most important subjects: states, having been concerned only with relations *between* states and not *within* them. Based on the classical concept of sovereignty, states were given *carte blanche* to choose their own polity. Confounded by ideological tensions during the Cold War, the widespread acceptance of a democratic polity founded on the rule of law as the ultimate constitutional model proved elusive. Diversity was the rule and in the mid-1980s, only one-third of all states could be deemed 'democratic'.¹ The lack of democratic state practice crippled attempts to impose democracy as an international norm (Section 2).

The neutral position of international law *vis-à-vis* a state's internal form of government changed only after the collapse of communism. In the 1990s, bearing in mind the experiences with the 20th century fascist and communist dictatorships, a consensus on the democratic market economy as the sole feasible social structure emerged.² In this context, the question of whether the citizen could claim democratic governance, made headway³ (Section 3).

The normative value of democracy has deeply influenced the foreign policy of a large number of states. Since the 1990s, part of the community of states considers respect for democracy a condition for recognizing a new state (Section 4). Indeed, for a number of regional international organizations, a democratic polity is a membership requirement and is seen by the members as indispensable for the organization's survival (Section 5). Whether, on the other hand, states can, on the basis of international law, go so far as to not only deny states their recognition or membership, but also to forcibly impose democracy, is doubtful (Section 6).

Finally, this paper examines whether international law itself is made in a democratic manner. The achievement of international law through treaties or custom, for instance, is inherently suffering from a democracy deficit, even though some remedies seem possible. Where democratic gaps in this formation of law are mainly situated in the relationship *vis-à-vis* the citizen, the undemocratic character of decision-making in international organizations primarily concerns the relation between states. Powerful states are able to use decision-making

1. See J. Crawford, 'Democracy and the Body of International Law', in G.H. Fox and B.R. Roth, eds., *Democratic Governance and International Law* (Cambridge, Cambridge University Press 2000) p. 95.

2. See for instance F. Fukuyama, *The End of History and the Last Man* (Harmondsworth, Penguin Books 1992); S. Marks, 'International Law, Democracy, and the End of History', in Fox and Roth, eds., *ibid.*, at pp. 532-566.

to their advantage by using all kinds of formal and informal mechanisms, *inter alia*, in the World Trade Organization (Section 7).

2. TRADITIONAL INTERNATIONAL LAW: A 'STEPMOTHERLY' TREATMENT OF INTRA-STATE DEMOCRACY

2.1 The concept of sovereignty

Classical international law, based on co-existence between sovereign states, left the state's internal public organization wholly to its will and whim. It accepted no external patronizing or intervention. In Article 2(7) of the UN Charter, it is stated that the Charter gives no competence to the UN or to the UN Members to intervene in matters that are substantially under the national jurisdiction of a state.⁴ Defining a constitutional model is undoubtedly the *nec plus ultra* of a matter under the national jurisdiction. From that perspective, exporting the democratic model to so-called 'non-democratic' states is an impressive example of neo-colonialist arrogance and, thus, internationally unacceptable.⁵ The clear prohibition of intervention in sovereign states is therefore not conducive to inserting the principle of democracy into the corpus of international law. This does not mean that international law rejects democracy. In the classic view, international law and democracy are simply not related, as international law is to remain neutral *vis-à-vis* any political model.

2.2 'Odious debts' and state succession

The neutral position of classic international law on democracy is illustrated by the transfer of debts from undemocratic to democratic regimes. As a contracting party, a state cannot call on its new constitutional structure so as to refuse to redeem debts contracted by a former undemocratic regime. While various authors

3. Thomas Franck fired the opening shot for the discussion in a much-discussed article from 1992. See T.M. Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) pp. 46-91.

4. According to Art. 2(4) of the UN Charter, states would not be authorized to impose democracy by forcible means. See on the prohibition to intervene also the 'Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among states in Accordance with the Charter of the United Nations, annex to UNGA Res. 2625 (XXV) of 24 October 1970. See also *infra* Section 6.

5. See also Art. 1(1) of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights: 'All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.' See also the Declaration on the Granting of Independence to Colonial Countries and Peoples, UNGA Res. 1514 (XV) of 14 December 1960, para. 2.

have tried for some time to develop a theory on ‘*odious debts*’ (‘*dettes odieuses*’)⁶, the continuity of debts, contracted on behalf of the state, is a well-established principle. ‘*Odious debts*’ are debts contracted by a despotic regime to strengthen the dictatorship and to oppress the citizens. Allegedly, since they do not serve the interests and needs of the country, such debts should not bind the state, but only the regime that contracted them.⁷ Yet the international rules concerning state succession refuse to question the principle of continuity of agreements for *odious debts*, because the state – despite the regime change – survives.⁸ Therefore, debts contracted by undemocratic regimes must be repaid, even if this extracts resources from the post-dictatorial reconstruction and endangers the viability of a fledgling democracy.⁹

3. BEYOND STATE SOVEREIGNTY: THE INCREASING IMPORTANCE OF DEMOCRACY IN INTERNATIONAL LAW

3.1 The democratic peace

Influential writings have long called for a democratic society as a basis for peaceful international relations. In 1795, Immanuel Kant envisioned the idea of a democratic peace: the republican polity would temper the demand for war by the states and make eternal peace on earth possible.¹⁰ In 1917, during World War I, the link was made with international law. At the annual conference of the American Society of International Law Elihu Root, president of the Society, gave a

6. See for instance A.N. Sack, *Les effets de transformations des Etats sur leurs dettes publiques et autres obligations financières* (Paris, Recueil Sirey 1927). See on this matter also E. Feilchenfeld, *Public Debts and State Succession* (New York, MacMillan 1931). See also recently M. Kremer and S. Jayachandran, ‘Odious Debt’, *Finance & Development*, June 2002, Nr. 2, also available on <<http://www.imf.org/external/pubs/ft/fandd/2002/06/kremer.htm>>; a long version of their contribution is available under the title ‘Odious debt’ on <<http://www.imf.org/external/np/res/seminars/2002/poverty/mksj.pdf>>. See also, by the same authors, the opinion ‘Make Odious Debt Too Risky To Issue’, *Financial Times* (9 May 2003).

7. See <<http://www.odiousdebts.org>>. *Odious debts* is an organization that particularly advocates debt relief for the Third World. Under pressure of the United States, the idea of odious debts was also raised in the aftermath of the war in Iraq (2003). However, creditors proclaimed a moratorium on the relief of the debts contracted by Saddam Hussein.

8. J. Crawford, ‘Democracy and the Body of International Law’, in Fox and Roth, eds., op. cit. n. 1, at p. 97.

9. This argument is used for the remittal of the Iraqi debts contracted under the regime of Saddam Hussein. A moratorium on debt repayment has been imposed, awaiting the debt reshuffling by the most important creditors, united in the Paris Club. See <<http://www.odiousdebts.org/odiousdebts/index.cfm>>; <<http://www.washingtontimes.com/commentary/20030409-69247226.htm>>; <<http://www.jubileeraq.org>>; <<http://www.theweeklystandard.com>>.

10. See I. Kant, *Zum Ewigen Frieden* (Erlangen, Fischer 1984).

speech entitled 'The effect of democracy on international law', in which he stated that democracy was an existential condition for international law.¹¹ Democracy was supposed to be at its heart.

Root claimed that historical experience had proven the failure of the Westphalian system based on sovereign equality. The peace treaties that followed the Westphalian Peace (1648) were systematically broken and could not avoid the large European wars of the modern age. According to Root absolute national sovereignty could never be the basis on which an international legal system could be maintained and enforced. On the contrary, he concluded – somewhat optimistically – that democratically elected governments steadily dominated the international arena. Root saw in this breakthrough of democracy a remedy against the warlike claims of nations. Familiarity with the normative framework of the domestic democracy would enable states to honour international agreements. Autocracies that deny the rule of law at the internal level, on the other hand, will also not be eager to comply with their agreements at the international level.¹²

A parallelism can be perceived between the vision of Root and the present-day idea that democratic states almost never fight wars with one another.¹³ In an open society the continuous militarization and the maintenance of an external enemy image would be impossible. Citizens would be unwilling to continue to sacrifice resources and youth for a war of aggression and would concentrate at most on defensive warfare.¹⁴

3.2 The right to political participation during the Cold War

Despite classic international law's indifference to achieving intra-state democracy, notions of democracy gradually entered international law through the back door of human rights protection.

During the 20th century, the state's exclusive power over all its citizens' doings was eroded by the breakthrough of human rights. Aside from typical political human rights like the right to freedom of expression, assembly and religion, the Universal Declaration on Human Rights (hereinafter UDHR), proclaimed on 10 December 1948, also stated in its Article 21 the right to political participation. Every person has, according to this provision, the right to 'take part in the gov-

11. See E. Root, 'The effect of democracy on international law', *Proceedings of the American Society of International Law* (Washington DC, Endowment 1917) pp. 2-11.

12. See also B. Boutros-Ghali, 'An Agenda for Democratization', Supplement to the Reports A/50/332 and A/51/512 on Democratization, 17 December 1996, § 18.

13. For a critical evaluation of this these see more particularly J.S. Gowa, *Ballots and Bullets: the Elusive Democratic Peace* (Princeton NJ, Princeton University Press 1999).

14. See J.M. Owen, IV, 'International Law and the "Liberal Peace"', in Fox and Roth, eds., op. cit. n. 1, at pp. 343-385.

ernment of his country, directly or through freely chosen representatives.’¹⁵ Since ‘democracy’ etymologically means ‘governance by the people’, Article 21 undeniably identifies political participation with democracy. The UDHR also defines the way in which the will of the people forms the foundation of government’s authority. This authority should ‘be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.’¹⁶ Free elections would form the core of democracy. The International Covenant on Civil and Political Rights (hereinafter ICCPR)¹⁷, which has been ratified on a large scale and is, hence, binding on the majority of states, retook almost unchanged the relevant provisions of the UDHR in its Article 25. Similar provisions can also be found in Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, Article 23 of the American Convention on Human Rights and Article 13 of the African Covenant on Human Rights and Peoples’ Rights.

The question remained, however, as to what the precise content of the right to political participation actually was, particularly whether effective political participation presupposes a multi-party system. While the Western liberal democracies claimed that democracy holds real freedom of choice, the people’s democracies from Eastern Europe and the developing countries often opposed party pluralism. The people’s democracies feared that parties would form themselves along ethnic lines and thus give ground to civil war. During the Cold War, the idea prevailed that a one-party democracy is acceptable under the ICCPR as long as different political factions had a voice in the party,¹⁸ a condition most states could easily fulfil. The elasticity of the concept of democracy robbed it of all normative value in international law: democracy could mean everything and, therefore, meant nothing.¹⁹

3.3 **Electoral democracy: the United Nations, the Council of Europe and other European Organizations**

After the disappearance of the people’s democracies in Central and Eastern Europe at the end of the 1980s and the beginning of the 1990s, the pluralistic party democracy seemed society’s sole viable political model. This historical water-

15. Art. 21(1) UDHR.

16. Art. 21(3) UDHR.

17. Adopted by the UN General Assembly on 16 December 1966, internationally entered into force on 23 March 1976. At present, 149 states are party.

18. G.H. Fox, ‘The Right to Political Participation in International Law’, in Fox and Roth, eds., op. cit. n. 1, at pp. 55-57.

19. Marks, in Fox and Roth, eds., loc. cit. n. 2, at p. 532.

shed was translated into United Nations (hereinafter UN) resolutions that are nonetheless imbued with the tensions between democracy and sovereignty. On the one hand, they identify liberal democracy as the one and only legitimate form of governance, but on the other hand, the classic principle of sovereignty and non-intervention has not allowed them to affirm an outright *right* to democracy. Certainly, in the mid-1990s, the opposition to elections as a symbol of democracy fell silent. The sovereignty argument continues to play its role, however, on the 'rule of law' side of democracy.²⁰

Since 1988, the General Assembly has paid attention to democracy annually. Up to 1994 its resolutions on the matter possessed the title: 'Enhancing the effectiveness of the principle of periodic and genuine elections'. Thereafter the title became: 'Support by the United Nations system of the efforts of Governments to promote and consolidate new or restored democracies.'

In 1988 the General Assembly again drew attention to the provisions concerning political participation as provided in the UDHR and the ICCPR and emphasized its strong conviction that 'periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms.'²¹ With these words, the General Assembly held elections to be the core of democracy.²² Through elections, political participation is assured, which in turn helps achieve fundamental human rights.²³ Whereas in 1988, the General Assembly did not pay attention to the sovereignty of states to develop their own political system, in 1989 the Assembly recognized that 'the efforts of the interna-

20. See *infra* Section 3.4.

21. UNGA Res. 43/157, 8 December 1988, para. 2.

22. Cf., the Declarations of the (at that time) Conference for Security and Co-operation in Europe (CSCE) [The CSCE, i.e., the Conference for Security and Co-operation in Europe, started in 1975 in Helsinki. It changed its name to OSCE, Organization for Security and Co-operation in Europe]: 'The participating states declare that the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government' (Art. 6 of the Document of the meeting of Copenhagen, Conference on the Human Dimension of the CSCE, 29 June 1990, *ILM* (1990) 1309) and 'Democratic government is based on the will of the people, expressed regularly through free and fair elections' (CSCE, Charter of Paris for a new Europe, Paris, 21 November 1990, *ILM* (1991) 194). In the first years after the Cold War, the attention of the international community was only to the electoral side of democracy.

23. The UN General Assembly had at that time not paid any attention to the dialectic relationship between democracy and human rights. It is asserted that democracy cannot take root if participation rights, such as the freedom of expression and assembly, are not first constitutionally guaranteed (Crawford, in Fox and Roth, eds., loc. cit. n. 8, at pp. 94-95). The negative experience with democracy in a number of previously totalitarian states led, in the 1990s, to more attention to the interrelation of democracy and the rule of law (see *infra*).

tional 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.²⁴ No single political system or electoral method would be fit for all states. This limitation was taken up again in the coming years.²⁵

Remarkably, from 1992, the sovereignty caveat disappeared from the resolutions, after the General Assembly had asked the Secretary-General in 1991 to report on electoral assistance.²⁶ According to some scholars, this could suggest that the right to fair and periodic elections is acquired and that states can no longer resist it.²⁷ If so, the role of the UN is to enforce the practical and procedural aspects of such a right to electoral democracy.²⁸

The right to democracy got an extra boost in 1996 when UN Secretary-General Boutros Boutros-Ghali submitted *An Agenda for Democratization* to the General Assembly.²⁹ Boutros-Ghali was convinced that a *right* to democracy existed and intended, through the *Agenda*, to clarify the *opinio iuris* which is required to have a new customary international norm established.³⁰ In the *Agenda for Democratization*, the Secretary-General stated, in a daring manner, that the purposes and principles of the United Nations were the basis for efforts to promote democracy and that the non-intervention principle of Article 2(7) of the Charter (*supra* section 2.1) and the absence of the term 'democracy' did not oppose this.³¹ The activities of the UN would not be aimed at enforcing foreign models of democracy, but to provide support and advice concerning democratization. Without 'grassroots' support, democracy would surely not be able to survive.³²

24. UNGA Res. 44/146, 15 December 1989, para. 4.

25. See R. Ben Achour, 'La contribution de Boutros Boutros-Ghali à l'émergence d'un droit international positif de la démocratie', in *Boutros Boutros-Ghali Amicorum Discipulorumque Liber* (Brussels, Bruylant 1998) p. 917.

26. UNGA Res. 46/137, 17 December 1991, para. 18.

27. Ben Achour, loc. cit. n. 25, p. 917.

28. UNGA Res. 47/138, 18 December 1992; UNGA Res. 48/131, 20 December 1993; UNGA Res. 49/30, 7 December 1994; UNGA Res. 49/190, 23 December 1994; UNGA Res. 50/133, 20 December 1995; UNGA Res. 51/31, 6 December 1996; UNGA Res. 52/18, 15 January 1998; UNGA Res. 53/31, 23 November 1998; UNGA Res. 54/36, 29 November 1999; UNGA Res. 55/44, 27 November 2000; UNGA Res. 56/96, 14 December 2001.

29. See *supra* n. 12.

30. Boutros-Ghali had, already in 1992, upon request of the Security Council, drafted *An Agenda for Peace* (A/47/277-s/24111, 31 January 1992) and, in 1994, upon request of the General Assembly, *An Agenda for Development* (A/48/935, 6 May 1994), in which he pleaded for democracy as means to realise peace and development.

31. B. Boutros-Ghali, *An Agenda for Democratization*, para. 8 and para. 28.

32. *Ibid.*, para. 41.

The UN has taken its support task seriously. To make a successful democratic transition possible, it has, since 1989, monitored elections in a large number of countries in Africa, Latin America and Asia.³³ In 1989, the UNTAG (United Nations Transition Assistance Group) monitored the elections in Namibia before it became formally independent.³⁴ The ONUVEN (United Nations Observer Mission to verify the electoral process in Nicaragua) validated the elections in Nicaragua³⁵ and the ONUVEH (United Nations Observer Group for the Verification of the Elections in Haiti) the elections in Haiti.³⁶ Then followed Eritrea³⁷, Cambodia³⁸, Mozambique³⁹ and South Africa⁴⁰, where 1.800 election observers monitored the first free elections since the end of apartheid. In 2002, the UN guided the first free parliament elections in East Timor.⁴¹ Inspired by the UN's example, regional international organizations like the Organization for American States (hereinafter OAS), the Organization for Security and Co-operation in Europe (hereinafter OSCE) and the European Union (hereinafter EU) also monitor elections.⁴²

To help international organizations perform election monitoring, some guidelines are needed. There are already a number of international documents with reference to election practices. One can, *inter alia*, refer to Article 21 of the UDHR⁴³, Article 25 of the International Covenant on Civil and Political Rights⁴⁴, Article 3 of the First Protocol to the European Convention on Human

33. Some go even further back in time. On the basis of Chapters XI and XII of the UN Charter, the UN General Assembly could validate the democratic process in the so-called trust areas. To legitimize the transfer from colonial oppression to independence, the General Assembly frequently monitored the elections in the newly independent countries in the 1960s.

34. UNSC Res. 628 and 629 (1989).

35. UNSC Res. 637 (1989).

36. UNGA Res. 45/2 (1990).

37. UNGA Res. 47/114 (1992).

38. UNSC Res. 717 and 745 (1991).

39. UNSC Res. 782 and 797 (1992).

40. UNSC Res. 894 (1994).

41. East Timor is a special case, since the territory was since 1999 under UN administration (UNTAET) on the basis of UNSC Res. 1272.

42. On election monitoring and international law, see T.M. Franck, 'Legitimacy and the Democratic Entitlement', in Fox and Roth, eds., op. cit. n. 1, at pp. 32-46; Fox, loc. cit. n. 18, at pp. 70-84.

43. '1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. 2. Everyone has the right to equal access to public service in his country. 3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be held by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.'

44. 'Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonable restrictions: (a) to take part in the conduct of public affairs, directly or through freely chosen representatives; (b) to vote and to be elected at genuine

Rights and Fundamental Freedoms⁴⁵, the Charter of Paris for a New Europe – CSCE Summit II (1990)⁴⁶ and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE.⁴⁷ It is also important to consider the case-law on these primary sources developed by supervisory bodies such as the European Court of Human Rights and the UN Human Rights Committee. Even though this overview shows that a number of instruments have been elaborated upon, there are no generally accepted standards for election monitoring. Therefore, there is a need to ‘set forth the basic components of a legal framework governing elections, and the minimum standard relevant to each component, that are necessary in order for a country’s legal framework to ensure democratic elections.’⁴⁸

The need for election standards was also recognized in Resolution 1264 (2001) of the Parliamentary Assembly of the Council of Europe. This resolution stated that, ‘despite the work which international organisations such as the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR) and the Council of Europe have been doing for some years, there is no single text setting out the basic rules for the conduct of elections’.⁴⁹ The Assembly invited the European Commission for Democracy through Law (also called the ‘Venice Commission’)⁵⁰ to ‘set up a working group with the aim of discussing electoral issues

periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) to have access, on general terms of equality, to public service in his country.’

45. ‘The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure free expression of the opinion of the people in the choice of the legislature.’

46. Under the heading ‘Human Rights, Democracy and Rule of Law’: ‘Democratic government is based on the will of the people, expressed regularly through free and fair elections. Everyone also has the right: [...] to participate in free and fair elections.’ CSCE, *Charter of Paris for a New Europe*, Paris, 21 November 1991, available at <<http://www.osce.org/docs/english/1990-1999/summits/paris90e.htm#Anchor-Huma-3228>>.

47. CSCE, *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Copenhagen, 29 June 1990, available at <<http://www.osce.org/docs/english/1990-1999/hd/cope90e.htm>>.

48. ODIHR Guidelines for reviewing a legal framework for elections, Warsaw, January 2001, p. 1, <http://www.osce.org/odihr/documents/guidelines/gl_rlfir_eng.pdf>.

49. Parliamentary Assembly of the Council of Europe, Res. 1264 (2001) of 8 November 2001, para. 3, available at <http://assembly.coe.int/Documents/AdoptedText/ta01/eres1264.htm#_ftn1>.

50. The European Commission for Democracy through Law was established on 10 March 1990 by the Committee of Ministers of the Council of Europe. As a supplementary organ of the Council of Europe it is based on the Partial Agreement Establishing the European Commission for Democracy through Law. (Council of Europe Committee of Ministers, Res. (90) 6 of 10 May 1990, <<http://conventions.coe.int/Treaty/EN/PartialAgr/Html/Venise9006.htm>>). Meanwhile, all Member States of the Council of Europe have become Member to the said agreement. The Commission is composed of independent experts who have achieved international fame through their experience in democratic

on a regular basis, to devise a code of practice in electoral matters and to compile a list of underlying principles of European electoral systems.⁵¹

The working group drafted a Code of Good Practice in Electoral Matters, which was adopted by the Venice Commission in July 2002.⁵² It is stated that the guidelines contained in the Code of Good Practice 'are based on the underlying principles of Europe's electoral heritage' and that they 'constitute the core of a code of good practice in electoral matters.'⁵³ The draft explanatory report of the Code of Good Practice clarifies that the '*European Electoral Heritage*' is comprised of two main aspects: (1) the constitutional principles of electoral law such as universal, equal, free, secret and direct suffrage, at regular intervals (the 'hard core') and (2) the principle that truly democratic elections can only be held if certain basic conditions of a democratic state based on the rule of law, such as fundamental rights, stability of electoral law and effective procedural guarantees, are met.

The first aspect of the electoral heritage, i.e., the hard core, must be scrupulously respected by all European states. It consists mainly of international rules, the First Protocol to the European Convention on Human Rights and Fundamental Freedoms and other principles recognized in human rights case-law, but also of rules that can be found in the national constitutions. The hard core consists of six constitutional principles of electoral law. (i) *Universal suffrage* implies in principle that all human beings have the right to vote and stand for elections. This right may, however, be subject to a minimum age, nationality and/or residence.⁵⁴ A law may deprive people of this right in the case of mental incapacity

institutions or through their contribution to the enhancement of law or political science. They work in their individual capacity and shall not receive or accept any instructions. The Commission is nowadays governed by a Revised Statute (Council of Europe Committee of Ministers, Res. 3 (2002) of 21 February 2002, <<http://conventions.coe.int/Treaty/EN/PartialAgr/Html/Venise2002-3.htm>>). The Commission is set up as a consultative body that co-operates with the Member States of the Council of Europe and also with non-Member States. It can formulate opinions on its own initiative or upon request of the organs of the Council of Europe, any Member State, an international organization or any institution that is related to the Venice Commission (Art. 1 Revised Statute).

51. Parliamentary Assembly of the Council of Europe, Res. 1264 (2001) of 8 November 2001, para. 6, <http://assembly.coe.int/Documents/AdoptedText/ta01/eres1264.htm#_ftn1>.

52. More precisely on 5-6 July 2002, at the 51st plenary session of the Venice Commission: see Code of Good Practice in Electoral Matters. Guidelines and Draft Explanatory Report, Opinion Nr. 190/2002_el, CDL-EL (2002), <[http://venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.html](http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.html)>.

53. Introduction to the Code of Good Practice in Electoral Matters, Opinion Nr. 190/2002_el, CDL-EL (2002), 5, <[http://venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.html](http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.html)>.

54. The right for foreign residents to vote and stand for elections in local authority elections is recognized in Art. 6 of the Council of Europe Convention on participation of foreigners in public life at local level, done at Strasbourg on 5 February 1992, ETS Nr. 144, <<http://conventions.coe.int/Treaty/en/Treaties/Word/144.doc>>. However, only 7 Member States of the Council of Europe have ratified this convention. Also the granting of the right to vote to nationals living abroad is a contentious issue, especially when nationality is granted on an ethnic basis. The draft explanatory report of

or criminal conviction for a serious offence, taking into account the proportionality principle. (ii) *Equal suffrage* includes the principle that each voter has one vote (or as many votes as each other voter), the principles of equality in voting power⁵⁵ and equality of opportunity for parties and candidates (especially relating to coverage by the media and public funding). Due regard must be given to equal representation of the sexes⁵⁶ and representation of national minorities.⁵⁷ (iii) *Free suffrage* is the third constitutional principle of electoral law. Voters should have the freedom to form an opinion⁵⁸ and be able to vote according to simple and reliable procedures. (iv) The *secrecy of elections* is, according to the Code of Good Practice, not only a right of the voter, but also a duty.⁵⁹ (v) *Direct election* of at least one of the chambers of the national parliament should be possible.⁶⁰ Sub-national legislative bodies and local councils must always be directly elected.⁶¹ (vi) Finally, elections should be held *periodically*. The legislative assembly's term should not exceed five years while a longer term is possible for presidential elections (with a maximum of seven years).

The aforementioned hard core can only be guaranteed if the *basic conditions of a democratic state* are fulfilled. (i) This supposes first of all respect for fundamental rights such as freedom of expression, of the press, of assembly and association. (ii) Furthermore, electoral law should enjoy a relative stability in order to avoid the impression with voters that 'electoral law is simply a tool in the hands of the powerful'.⁶² One must prevent manipulation of the law to the advantage of

the Code of Good Practice points to the example of Croatia conferring political rights on Croats living in Bosnia-Herzegovina. This is held unreasonable, particularly where local elections are concerned. See Explanatory Report to the Code of Good Practice, Opinion Nr. 190/2002_el, CDL-EL (2002), 14, <[http://venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.html](http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.html)> (hereafter 'Draft Explanatory Report').

55. This implies a balanced distribution of seats among constituencies, in order to avoid active (i.e., distribution of seats causing inequalities in representation as soon as it is applied) and passive (i.e., inequalities arising from protracted retention of an unaltered territorial distribution of seats and constituencies) 'electoral geometry'. *Idem.*, 16.

56. See N. Lenoir, 'The representation of women in politics', *ICLQ* (2001) pp. 217-247.

57. See, *inter alia*, C. Brolmann, R. Lefebvre and M. Zieck, eds., *Peoples and Minorities in International Law* (Dordrecht, Martinus Nijhoff 1995).

58. The state should make sure each party has even-handed access to media, billposting, funding. The state should also prevent and punish buying of votes by individuals. Explanatory Report to the Code of Good Practice, Opinion Nr. 190/2002_el, CDL-EL (2002), 19, <[http://venice.coe.int/docs/2002/CDL-AD\(2002\)023rev-e.html](http://venice.coe.int/docs/2002/CDL-AD(2002)023rev-e.html)>.

59. According to the Code of Good Practice, non-compliance must be punishable by disqualification of any ballot paper whose content is disclosed.

60. F. Delperée, ed., *La participation directe du citoyen à la vie politique et administrative* (Brussels, Bruylant 1986).

61. See also Art. 3.2 of the European Charter of local self-government, ETS Nr. 122, <<http://conventions.coe.int/Treaty/en/Treaties/Html/122.htm>>.

62. Draft Explanatory Report, p. 25.

the party in power and even mere semblance of manipulation. Therefore, according to the Code, electoral law should not be modified less than a year before an election, or be included in the constitution or any level higher than ordinary law. (iii) Finally, elections have to be accompanied by procedural guarantees. Impartial electoral commissions can ensure that elections are properly conducted, applying the electoral law. In order to provide evidence of whether or not elections have been regular, national and international observers should be able to monitor them.⁶³ Failure to comply with the election rules must be open to an effective appeal. An electoral commission or a court can hear this appeal, but it is desirable that some form of judicial supervision is in place.

The Code of Good Practice does not express a preference for a certain electoral system, provided that the underlying principles of European electoral systems are respected. Both proportional and majority election systems are possible.⁶⁴ The Code notes that electoral systems cannot simply be exported from one country to another, without taking into account local circumstances.⁶⁵ However, one should also be careful when introducing a little used and therefore little tested electoral system.

The Parliamentary Assembly of the Council of Europe has in its Recommendation 1595 (2003) of 30 January 2003⁶⁶ declared that the Code of Good Practice is of great importance, as it sets out the underlying principles of European electoral systems and stipulates the conditions for their application. The Assembly considered that 'used as a reference document for the Member States, the Code of Good Practice in Electoral Matters would reinforce the credibility of the electoral observation and monitoring activities conducted by the Council of Europe'. It therefore made a recommendation to the Committee of Ministers to transform the Code of Good Practice into a European convention (also taking into account the draft convention on election standards, electoral rights and freedoms by the Conference of Central and Eastern European Election Officials (cf., *infra*)). In its reply to the recommendation of the Parliamentary Assembly, the Committee of Ministers has recognized the 'importance of the code and that it is pleased to note that it is already serving as a useful reference document for re-

63. See, *inter alia*, Y. Beigbeder, *Le contrôle international des élections* (Brussels, Bruylant 1994); Idem, *International monitoring of plebiscites, referenda and national elections: self determination and transition to democracy* (Dordrecht, Martinus Nijhoff 1994); G. Van Haegendoren, 'International Election Monitoring', 20 *RBDI* (1987) pp. 86-123; *Freedom of elections and international observation of elections* (Brussels, Bruylant, 1995).

64. See on the differences and consequences B. Grofman and A. Lijphart, *Electoral laws and their political consequences* (New York, Agathon Press 1986).

65. Draft Explanatory Report, p. 33.

66. Code of Good Practice in Electoral Matters, Parliamentary Assembly Recommendation 1595 (2003), 30 January 2003, <<http://assembly.coe.int/Documents/AdoptedText/TA03/EREC1595.htm>>.

lated Council of Europe activities'.⁶⁷ However, the Committee of Ministers considers that 'it would be premature at this stage to initiate work on its transformation into a legally binding instrument'.⁶⁸

The importance of the Code of Good Practice as a tool for election monitoring can hardly be overestimated. References to it can be found in the OSCE Office for Democratic Institutions and Human Rights Guidelines for Reviewing a Legal Framework for Elections. These guidelines set out standards and attitudes for examiners of a legal electoral framework.⁶⁹ There is also a reference to it in the document of the OSCE 'Existing Commitments for *Democratic Elections in OSCE Participating States. A progress report*'.⁷⁰ This report tried to 'compile a comprehensive document, in effect an inventory of existing norms, political, commitments and principles'.

In addition, other international gremia have paid attention to election standards. The Association of Central and Eastern European Election Officials (hereinafter ACEEEO)⁷¹ established a Draft Convention on Election Standards, Electoral Rights and Freedoms⁷², 'with the aim of summarizing in a legally binding international-law act the experience of legal regulation and administration of democratic elections accumulated by the Council of Europe and various state'.⁷³ The Draft Convention also aims at 'specifying and amplifying the basic provisions set forth in Article 3 of Protocol No. 1 [...] to the European Convention for the Protection of Human Rights and Fundamental Freedoms [...] and in the other

67. Code of Good Practice in Electoral Matters, Parliamentary Assembly Recommendation 1595 (2003) (reply adopted by the Committee of Ministers on 9 October 2003 at the 855th meeting of Ministers' Deputies), CM/AS (2003) Rec. 1995 final, 13 October 2003, para 2, <<https://wcm.coe.int/ViewDoc.jsp?id=74515&Lang=en>>.

68. Ibid., para 4.

69. ODIHR Guidelines for reviewing a legal framework for elections, Warsaw, January 2001, p. 1, <http://www.osce.org/odihr/documents/guidelines/gl_rlf_eng.pdf>.

70. OSCE, 'Existing Commitments for Democratic Elections in OSCE Participating states. A progress report', October 2003, p. 55, <http://www.osce.org/documents/odihr/2003/10/772_en.pdf>.

71. The ACEEEO was created in November 1991 in Budapest. It is a non-governmental non-profit organization with the aim to contribute to democratic and fair elections in the Central and Eastern European region. The Association consists of Central and Eastern European election organs (with voting power) and also election organs from non-European states and interested national and international organizations, non-governmental organizations and individuals (all without voting power). The ACEEEO has consultative status in the Council of Europe. See Charter of the ACEEEO, adopted in Vilnius on 27 November 1998 and modified in Warsaw on 16 June 2000, <<http://www.aceeoo.org/about/2.htm>>.

72. Draft Convention 'On Election Standards, Electoral Rights and Freedoms', approved by the ACEEEO in Moscow on 26-28 September 2002, <<http://assembly.coe.int/Documents/WorkingDocs/doc02/EDOC9646.htm>>.

73. Explanatory Note to the Draft Convention 'On Election Standards, Electoral Rights and Freedoms', <http://www.cikrf.ru/conference/conference_konv_en_proekt2.htm>.

documents; defining the international-law features of the modern democratic electoral process in new integrated Europe.⁷⁴ The principles of the Draft Convention are similar to those in the Code of Good Practice, albeit some being more elaborated upon.⁷⁵ The Chairman of the ACEEEEO transmitted the Draft Convention to the President of the Parliamentary Assembly of the Council of Europe with the hope that, together with the Code of Good Practice, it would become the foundation of a uniform European document. However, as indicated above, the Committee of Ministers thought it too early to draft a legally binding convention.

A similar document was approved by the Inter-Parliamentary Assembly of the Commonwealth of Independent States (hereinafter CIS). The Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States⁷⁶ was drafted on the initiative of the Inter-Parliamentary Assembly Human Rights Commission and now has to be adopted by each Member State individually. The Inter-Parliamentary Assembly called in its Resolution of 7 December 2002 'for further efforts directed to improvement of the mechanism for the legal regulation of the electoral process' and urged Member States to ratify the convention.⁷⁷

In sum, it seems that while efforts have been made to draw up international instruments with guidelines for democratic elections, as of yet no binding document has been created with clearly defined rules. Surely, various international human rights conventions contain a reference to the right to participate and to fair and free elections, but there is no legally binding instrument that elaborates the basic components of a legal framework governing democratic elections. The ACEEEEO Draft Convention has not (yet) been adopted, the Convention of the Inter-Parliamentary Assembly of the CIS has not yet entered into force and there is as of yet no political will in the Council of Europe to transform the Code of Good Practice of the Venice Commission into a legally binding instrument. Nevertheless, these documents have at least a high moral value and it is conceivable that various principles laid down in them may at some point in time obtain a legally binding status as regional customary law, provided they are – unlike now – supported by a consistent body of state practice in Europe.

74. *Idem*.

75. For a comment on the Draft Convention, see C. Grabenwarter, *Comments on the Draft Convention on Election Standards, Electoral Rights and Freedoms*, Venice Commission opinion Nr. 253/2003, CDL-EL (2003)14, <<http://www.venice.coe.int/site/interface/english.htm>>.

76. Convention on the Standards of Democratic Elections, Electoral Rights and Freedoms in the Member States of the Commonwealth of Independent States (non-official translation), done at Kishinev on 7 October 2002.

77. Commonwealth of Independent States, Inter-Parliamentary Assembly, Res. 20-6 of 7 December 2002, <http://www.cikrf.ru/conference/resolution_7-12-02.htm>.

At any rate, it should be noted that, neither the UN nor any other international organization have an intrinsic competence to monitor elections.⁷⁸ Most states accept only occasional or *ad hoc* monitoring. States will indeed be tempted to accept international observers to legitimize the election results, but it remains an option and not an obligation.⁷⁹

3.4 A right to democracy?

According to Boutros-Ghali, today a number of democratic procedures, techniques, practices and precedents that indicate the existence of a coherent entirety of rules exist. This would affirm a true international right to democracy.⁸⁰

To Boutros-Ghali, the practice of election monitoring seems especially to be decisive. He considers that the pluralistic party criteria that are used by the observers of international organizations and, in particular, the UN appear to be a clarification of the vague provisions in human rights treaties concerning political participation (*supra* section 3.3). Since the monitoring missions are approved by states that are a party to the human rights treaties concerned and treaty provisions also have to be interpreted in the context of any subsequent practice in their application,⁸¹ it is not irrational to see the development of electoral standards as a more explicit formulation of Article 25 ICCPR. There does not seem to be any *persistent objector* against the use of these objective criteria. The occasional resistance against monitoring does not emanate from ideological resistance to the criteria being used, but rather from the fear of being limited in the attempts to rig the election results.

In 1999, the UN Commission on Human Rights adopted a resolution entitled 'a right to democracy'.⁸² The resolution itself was adopted unanimously, but its title was the object of a fierce debate. A Cuban proposal to remove the 'right to democracy' from the title, was only narrowly rejected by a majority of 28 votes against 12 and 13 abstentions. In their opposition to the 'right to democracy', the developing countries in particular expressed their fear of foreign interference.

78. The UN has to receive a formal request of a Member State. See Boutros-Ghali, *An Agenda for Democratization*, para. 12.

79. Franck, in Fox and Roth, eds., loc. cit. n. 42, at pp. 43-44. The case of Zimbabwe may serve as an example of resistance to 'neo-colonialist' election monitoring. See K. Matiosa, 'Election Monitoring and Observation in Zimbabwe: Hegemony versus Sovereignty', 7 *African Journal of Political Science* (2002) pp. 129-154.

80. Speech on the occasion of the reception of the degree of *Doctor Honoris Causa* from the University Montesquieu- Bordeaux IV, 22 March 1996, cited in Ben Achour, loc. cit. n. 25, at p. 916.

81. Art. 31 (3) (b) Vienna Convention on the Law of Treaties, 23 May 1969 (hereinafter Vienna Convention).

82. E/CN.4/1999/L.55/Rev.2.

Without casting doubt on the principle of democracy, they stated that, taking into account the disparate historical backgrounds, different forms of democracy are possible.⁸³ Hence, resistance to the title of the resolution seems to reveal that there is no agreement on a true *right* to democracy. This is also clear from the 'Universal Declaration on Democracy',⁸⁴ a declaration adopted by the Interparliamentary Council (i.e., a body of the Interparliamentary Union, an organization of parliaments of sovereign states, established in 1889) in 1997, and from the so-called 'Warsaw declaration', in which democracy is not stated as a real right but rather as an ideal and aim.⁸⁵

Arguably, resistance to the right to democracy is directed at the enlarged right to democracy and not the procedural, electoral democracy. Indeed, undemocratic regimes use elections as well, but only in order to legitimize themselves.⁸⁶ The factor that distinguishes them from the liberal democracies, is the latter's respect for individual freedoms. According to the liberal democracies, democracy as a form of government can only be legitimized if the right conditions for the execution of the people's will are fulfilled.⁸⁷ These conditions concern citizens' ability

83. Commission on Human Rights, press notice, HR/CN/99/61, 27 April 1999, available on <<http://193.194.138.190/hurricane/hurricane.nsf/0?C4136C5E4B99AA4780256761004B93F5?opendocument>>. See for instance India: 'All peoples had the right to democracy, since it was a form of government rising from the people. It could not be proposed from outside'. Pakistan: 'It was the consistent view of the Pakistani delegation that democratic governments must take into account the traditions and cultures of every country. Pakistan believed that any provision relating to democracy must take into account any foreign nations in occupation of lands not their own; such countries must not be allowed to use the façade of elections to justify their occupation or colonial domination.' This was not included in the text. Indonesia: 'Democracy was not to be put into a straightjacket as a "right"'. China: 'The promotion of democracy should also be based on respect for the differing historical, social and economic background of countries. The draft resolution did not contain this element, and for this reason China would abstain from the vote.'

84. Arts. 1 and 3 of the Universal Declaration on Democracy, adopted without voting by the Interparliamentary Council at its 161st session, Cairo, 16 September 1997, 1 *NQHR* (2000) pp. 127-130. Art. 1 of the Universal Declaration on Democracy is in a sense drafted contradictorily. On the one hand the first sentence indicates that the democratic ideal is based on democratic values that are shared without any distinction by all peoples. On the other hand the second sentence of the article talks about a 'basic right of citizenship', which, however, has to pay respect to a 'plurality of views' and 'the interest of the polity'. Art. 2 defines from that point of view that democracy is 'a constantly perfected and always perfectible state or condition'.

85. 'Warsaw Declaration: Towards a Community of Democracies, 27 June 2000', *ILM* (2000) p. 1306. Around 100 countries agreed to this declaration. See for the text also <<http://www.pdgs.org.ar/featured/prss-demo2.htm>>.

86. The former Iraqi dictator Saddam Hussein was elected on 16 October 2002 with 100 percent of the votes for a new term as president. Also, in the People's Republic of China, all representatives in the National Congress are elected by well-elaborated procedures. China remains a one-party state but the Communist Party is since its 16th National Congress in 2002 open to all sections of society. This should enhance its democratic legitimacy. See <<http://www.16congress.org.cn>>.

87. G.H. Fox and B.R. Roth, 'Introduction: the Spread of Liberal Democracy and its Implications for International Law', in Fox and Roth, eds., op. cit. n. 1, at pp. 14-15.

to make an informed and free choice, which is *a priori* impossible in a totalitarian one-party state. Such a free choice is only possible if citizens have the right to freely express their opinions and to unite in political movements or parties. The 'right to democracy' resolution linked in particular the electoral democracy to fundamental rights and the rule of law.

In order to make democracy truly coincide with governance by the people, a sound institutional breeding ground is necessary. Democratization presupposes more than democratic elections alone; it also requires respect for the rule of law, human rights, minorities, social development and full integration of women in society.⁸⁸ To this end, a fully elaborated right to democracy would hold not one, but a bundle of norms like the right to free and fair elections, the right to freedom of assembly (especially in political parties), the freedom to deploy political activities and to express one's political opinion and the right to influence certain decisions.⁸⁹ However, as of yet, it appears that these rights, considered as a whole, are only protected on a regional basis, such as in the Council of Europe.

In conclusion, one can assume that, if democracy is understood restrictively as a form of governance in which the people elect their administrators, it is definitely a principle of international law. However, if considered as a form of governance that is guided by requirements of good governance, such as the rule of law and accountability,⁹⁰ state practice allowing us to identify a right to democratic governance is, at present, lacking.

4. DEMOCRACY AS A CONDITION FOR STATE RECOGNITION

The recognition of states is traditionally only dependent on the objective characteristics of statehood, like a territory, a permanent population, effective authority by a government and the possibility to engage in international relations. The question of whether authority is legal or democratic, is not considered.⁹¹ By holding on to clear state criteria, consistency would be upheld, while dubious claims would be faced with rejection.⁹² The consequence is that, in principle,

88. Boutros-Ghali, *An agenda for Democratization*, para. 45. See also Universal Declaration on Democracy, *supra* n. 84, Arts. 6 to 23.

89. The European Court on Human Rights has elaborated a large jurisprudence on this matter, which however goes beyond the underlying dissertation. See S. Wheatley, 'Democracy in International Law: A European Perspective', 51 *ICLQ* (2002) pp. 225-247.

90. See on democracy and accountability in international law S.R. Ratner, 'Democracy and Accountability: the Criss-crossing Paths of Two Emerging Norms', in Fox and B.R. Roth, eds., op. cit. n. 1, pp. 449-492.

91. See S.D. Murphy, 'Democratic Legitimacy and the Recognition of states and Governments', in Fox and Roth, eds., op. cit. n. 1, at pp. 125-128.

92. See R. Rich, 'Recognition of States: The Collapse of Yugoslavia and the Soviet Union', 4 *EJIL* (1993) at p. 55.

recognition can be granted to undemocratic states, as the recognition practice during the decolonization wave proves.⁹³ To make these states turn to democratic reforms, the argument goes that the international community ought to use diplomatic or economic sanctions rather than deprive the undemocratic state of its statehood.

Regarding the European and Euro-Asian states that emerged in the 1990s of last century, however, the European Community/Union and its Member States used different standards, along with the classic criteria. The disintegration of the Soviet Union and former Yugoslavia led to the creation of a large number of new Central and Eastern European states. While these states fulfilled all criteria of statehood, the EC Member States did not want to proceed unconditionally to recognition. In particular, the Ministers of Foreign Affairs of the EC Member States adopted on 16 December 1991, in the framework of the European Political Co-operation, guidelines on the recognition of new states in Eastern Europe and the Soviet Union, as well as a joint declaration on former Yugoslavia.⁹⁴ They underlined their determination to 'recognise, subject to the normal standards of international practice and the political realities in each case, those new states which, following the historic changes in the region, *have constituted themselves on a democratic basis*'. [emphasis added] This would mean, according to the common declaration, that the new states agree, *inter alia*, 'to respect the United Nations Charter, the Helsinki Final Act, and the Charter of Paris, especially with regard to the rule of law, *democracy* and human rights' [emphasis added] and 'to guarantee rights for ethnic and national groups and minorities according to the obligations in the framework of the CSCE'.⁹⁵

Based on these principles, the EC Member States recognized the former Soviet republics. Conform the common declaration by the bureau of the Conference on Yugoslavia, the requests for recognition by the Yugoslavian republics Bosnia-Herzegovina, Croatia, Macedonia and Slovenia were referred to the Arbitration Commission. Slovenia and Croatia were recognized by the then 12 EC Member

93. See Ben Achour, loc. cit. n. 25, at p. 910. The right to self-determination overshadowed all other considerations. See Declaration on the Granting of Independence to Colonial Countries and Peoples, *supra* n. 5.

94. Ratified by the ministers of foreign affairs of the Member States of the EC in the framework of the European Political Co-operation in Brussels on 16 December 1991, 12 *Bulletin of the European Communities* (1991) pp. 120-121, paras. 1.4.5-1.4.6.

95. These criteria were included in the guidelines on recognition of new states in Eastern Europe, but also apply, according to common declaration on Yugoslavia, to all Yugoslavian republics that declare before 23 December 1991 'whether they wish to be recognised as independent states', 'whether accept the provisions laid down in the draft Convention – especially those in Chapter II on human rights and rights of national and ethnic groups – under consideration by the Conference on Yugoslavia' and 'whether they continue to support the efforts of the Secretary General and the Security Council of the United Nations and the continuation of the Conference on Yugoslavia'.

States on 15 January 1992,⁹⁶ despite this Commission's negative opinion on Croatia. Macedonia obtained a positive opinion, but was not recognized by the EC due to a veto by Greece. It was nevertheless admitted to the UN on 7 April 1993.⁹⁷ After a reminder by the Arbitration Commission, Bosnia-Herzegovina held a referendum, after which the EC Member States recognized the country on 6 April 1992. Other countries followed the recognition practice of the EC, although they did not explicitly make a reference to democratic requirements.⁹⁸

The recognition of the new states was made dependent upon their engagement to construct a democratic state according to the rule of law. In contrast to the classic amoral practice of recognition, EC Member States introduced moral considerations, an attitude that, previously, would be considered as an unacceptable intervention in domestic affairs. Arguably, the Member States used state recognition as an instrument of foreign policy and, therefore, forced democracy upon the former totalitarian states in order to stabilize the European continent. Indeed, democratic states would, taking into account the thesis of the democratic peace (*supra* section 3.1), tend to peaceful international relations.⁹⁹

It is at least unclear whether this new practice has even achieved the status of regional customary international law. A number of indices seem to point to the fact that the presence of a democratic polity is not the ultimate requirement for recognition.¹⁰⁰ It has been said that the cases of the Soviet Union and former Yugoslavia were *sui generis* cases due to the special historical circumstances on the European continent, and that the conditions for recognition would only apply in case of the disintegration of federal states.¹⁰¹ Furthermore, the EC guidelines provide that the EC and its Member States take into account '*the political reality of each concrete case separately*'. The scope of this sentence has been clarified in the case of Macedonia. After a positive opinion of the Arbitration Commission and the EC Member States' refusal in the framework of European Political Co-operation to recognize Macedonia, the EC declared that the new state was nevertheless established and that Member States could decide themselves on rec-

96. See for a chronology of the recognition of Croatia: <<http://www.croatiaemb.org/in%20the%20spotlight/chronology.htm>>.

97. UNSC Res. 817 (1993).

98. See <www.bosnia.org.uk/bosnia/history.cfm>. On the criteria for recognition in former Yugoslavia, see further: Murphy, loc. cit. n. 91, at pp. 132-139.

99. See on the shifts in opinions on criteria for recognition: Rich, loc. cit. n. 92, at pp. 55-56 and 63-65.

100. Murphy points to the fact that Bosnia-Herzegovina was recognized although the traditional conditions were not fulfilled. Conversely, Nagorno-Karabach was not recognized, although the traditional conditions were apparently fulfilled (Murphy, loc. cit. n. 91, at pp. 132, 136 and 138). Rich insinuates that the new criteria supplanted the former ones (Rich, loc. cit. n. 92, at p. 43).

101. See Rich, loc. cit. n. 91, at pp. 60-62.

ognition.¹⁰² In brief, it seems to be the case that the presence democratic institutions create a presumption of *Anerkennungsfähigkeit*, but that each Member State, when a common European position is lacking, keeps its own political freedom to proceed to the effective recognition of another state after balancing all interests.

5. DEMOCRACY AS A CONDITION FOR MEMBERSHIP OF INTERNATIONAL ORGANIZATIONS

Respect for democratic principles exists directly or indirectly as a condition for membership in the statutes of a number of regional international organizations.

5.1 North-Atlantic Treaty Organisation (NATO)

The preamble of the North-Atlantic Treaty¹⁰³ provides that the Treaty Members are determined ‘to safeguard the freedom, common heritage and civilization of their peoples, *founded on the principles of democracy*, individual liberty and the rule of law’.[emphasis added]¹⁰⁴ Article 2 of the Treaty again refers to the democratic peace by stating that ‘Parties will contribute toward the further development of peaceful and friendly international relations by strengthening their free institutions, by bringing about a better understanding of the principles upon which these institutions are founded, and by promoting conditions of stability and well-being.’ New states would, on the basis of Article 10, be able to accede to the Treaty as far as the Treaty Members ‘by unanimous agreement, invite any other European state in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty’. To be eligible for membership in NATO, a state not only has to be able to contribute to peace in the North Atlantic region, but it also has to embody the principles of democracy.

In its policy declarations, NATO leaders relentlessly tout the virtues of democracy. In the very first paragraph of the 1999 Washington Declaration, NATO’s Heads of State and Government declared ‘for a new century our mutual commitment to defend our people, our territory and our liberty, *founded on democracy, human rights and the rule of law*’.[emphasis added]¹⁰⁵ In the 2002

102. See Murphy, loc. cit. n. 91, at p. 135.

103. North-Atlantic Treaty, signed in Washington DC on 4 April 1949.

104. Emphasis added.

105. Washington Declaration, North Atlantic Council, 23-24 April 1999, available at <<http://www.nato.int/docu/pr/1999/p99-063e.htm>>.

Prague Declaration, the Heads of State and Government assured, after inviting a host of Eastern European countries, which eventually joined on 29 March 2004: ‘NATO’s door will remain open to European *democracies* willing and able to assume the responsibilities and obligations of membership, in accordance with Article 10 of the Washington Treaty.’[emphasis added]¹⁰⁶ In the final analysis, NATO is as much an organization based on the protection and spread of common values such as democracy, as it is a collective security organization.

5.2 The Council of Europe (CoE)

The Statute of the Council of Europe¹⁰⁷ sees in its preamble ‘the basis of all genuine democracy’ in the ‘devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law.’ As in the North-Atlantic Treaty, the operational articles of the Statute of the Council of Europe do not explicitly feature the principle of democracy. Article 3 of the Statute states nevertheless: ‘Every member of the Council of Europe must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms.’ This text holds a clear reference to the preamble, which contains the ‘democracy’ concept. Moreover, pursuant to Article 3 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms the High Contracting Parties undertake to ‘hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature’. This Protocol has been ratified by all Member States of the Council of Europe, except Andorra, Switzerland and Serbia-Montenegro.¹⁰⁸ One can therefore assume that a democratic polity is a membership condition for the Council of Europe.

5.3 The European Union (EU)

In the European Union, respect for democracy is included in the Treaty on European Union (‘TEU’) itself. Interestingly, the EU provides for a sanction mechanism in the event that Member States violate democratic principles.

Article 6(1) of the TEU States, since the Treaty of Amsterdam (1997), that the Union ‘is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are com-

106. Emphasis added.

107. Treaty on the establishment of the Council of Europe, signed in London on 5 May 1949.

108. The latter state has signed the protocol on 3 April 2003: <<http://conventions.coe.int/treaty/EN/cadreprincipal.htm>>.

mon to the Member States.¹⁰⁹ Countries that want to accede to the European Union, have to comply with these principles pursuant to Article 49 TEU, which provides that only European states 'which respect the principles set out in Article 6(1)', can request to become a Member State of the Union. The democratic criterion is, thus, of substantial importance in the accession negotiations.¹¹⁰

The Draft Treaty establishing a Constitution for Europe (hereinafter the Constitution) on which the European Convention agreed in June-July 2003¹¹¹ and on which the Intergovernmental Conference finally reached agreement on 18 June 2004, grants democracy a major role. Title VI of the Part I of the Constitution concerns 'the democratic life of the Union'.¹¹² This democratic life has different dimensions: the principle of democratic equality of the citizens of the Union, of representative democracy,¹¹³ of participative democracy, the social partners and the autonomous social dialogue, the European ombudsman, transparency of the working procedures of the institutions of the Union, protection of personal data and the status of churches and non-confessional organizations.

Once states have acceded to the EU, they remain bound to comply with the democratic principles.¹¹⁴ Article 7 of the TEU, inserted by the Treaty of Amsterdam,¹¹⁵ provides a controlling mechanism in case a Member State violates principles mentioned in Article 6(1) TEU. According to Article 7(2) TEU,

109. The preamble of the original version of the Treaty on European Union contained (Treaty of Maastricht, 1992) a similar provision: see *inter alia*, W. Devroe and J. Wouters, *De Europese Unie. Het Verdrag van Maastricht en zijn uitvoering: analyse en perspectieven* [The European Union. The Treaty of Maastricht and Its Execution: Analysis and Perspectives] (Leuven, Peeters 1996) at pp. 92-93, Nos. 104-106. See for an analysis of Art. 6 TEU, *inter alia*, A. Verhoeven, *The European Union in Search of a Democratic and Constitutional Theory* (The Hague, Kluwer Law International 2002) at pp. 321-325.

110. See European Commission, *The European Union: the Enlargement Proceeds* (Brussels, 2001) 23 p., also available on <http://www.europe.eu.int/comm/publications/booklets/move/30/txt_eng.pdf>.

111. For the final version, see CONV 850/03, available on <http://www.europe.eu.int/futurum/index_eng.htm>.

112. Arts. I-44 to I-51 of the Constitution.

113. See on this matter also B. Crum, 'Vertegenwoordigende democratie in de Europese Unie. Een verkenning van de institutionele mogelijkheden', Paper for the conference 'De Nederlandse stem in de Europese Conventie', Wetenschappelijke Raad voor het Regeringsbeleid, The Hague, 21 May 2003, available via <<http://www.wrr.nl/ne/nieuws.php#22>>.

114. It has for long been well-established case-law of the European Court of Justice that actions by EU Member States must respect fundamental rights as far as they fall within the scope of Community law: see A. Verhoeven, *op. cit.* n. 109, at pp. 354-359. Arts. 6 and 7 TEU also require respect for democracy and the rule of law outside the Community pillar.

115. For a discussion, see *inter alia*, J. Wouters, 'Institutionele aspecten van het Verdrag van Amsterdam' [Institutional Aspects of the Amsterdam Treaty], in R. Blanpain, ed., *Europa na het Verdrag van Amsterdam* [Europe After the Treaty of Amsterdam] (Leuven, Peeters 1998) at pp. 66-68, paras 75-77.

the Council, meeting in the composition of the Heads of State or Government, may, acting by unanimity and after obtaining the assent of the European Parliament, determine the existence of a serious and persistent breach by a Member State. After such a finding, the Council of Ministers can on the basis of Article 7(3) TEU decide by qualified majority to suspend certain membership rights, such as voting rights.¹¹⁶

The Treaty of Nice added an 'early warning mechanism' to Article 7(1) TEU. When in the beginning of 2000, a coalition government involving a far-right party was set to get to power in Austria, the Union proved to be insufficiently armed to act preventively against possible violations of Article 6(1) TEU. The other 14 Member States turned therefore to bilateral sanctions outside the institutional framework of the EU. Pursuant to the new Article 7(1) TEU, the Council of Ministers can, acting by a majority of four-fifths of its members and after obtaining the assent of the European Parliament, determine that there is a 'clear risk of a serious breach' by a Member State of principles mentioned in Article 6(1) and make appropriate recommendations to that Member State. The Member State involved has the right to be heard first. The Court of Justice has jurisdiction over this matter, albeit only with respect to the 'purely procedural stipulations'.¹¹⁷ When the Court checks whether the conditions for imposing sanctions are met, it can, however, also review incidentally the decision which found an infringement.¹¹⁸

5.4 **The Organization for American States (OAS)**

In the OAS, accession conditions and mechanisms similar to those in the European Union apply. According to the preamble of the OAS Statute, the Member States are convinced that 'representative democracy is an indispensable condition for the stability, peace and development of the region'. In this vein, Article 3 of the Statute states that 'the solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy'.

The OAS is therefore only open to democracies. Moreover, the OAS Statute provides for a sanction mechanism similar to Article 7 TEU. An OAS Member whose democratically elected government has been overthrown, can see its rights within the organization suspended, according to Article 9 OAS Statute. The ar-

116. For the Community pillar, Art. 309 EC, similar to Art. 7, is applicable.

117. Art. 46(e) TEU.

118. See on Art. 7 TEU also Verhoeven, *op. cit.* n. 109, at pp. 349-354.

ticle is drafted in such a way that a suspension is a last resort: it only applies when all other attempts have failed.¹¹⁹

The articles concerning democracy were elaborated upon in the Inter-American Democratic Charter,¹²⁰ which was adopted on 11 September 2001. Article 1 of this Charter stipulates that American peoples have a right to democracy and that governments have the obligation to promote and defend democracy. Articles 22 and 27 meticulously set out which steps the OAS can take in case the democratic order in a Member State is overthrown. The steps range from diplomatic initiatives to the suspension of membership rights. Although the OAS has never effectively turned to sanctions, its efforts have helped support democratic structures in its Member States, *inter alia*, recently in Venezuela.¹²¹

5.5 Universal international organizations

For most universal international organizations, respect for democracy is not a membership requirement. As has previously been stated, Article 2(7) of the UN Charter leaves the choice of the domestic constitutional structure up to the Member States. The UN does not require its Member States to be democratic; the only condition for UN membership is to be 'peace-loving' (Art. 4(1) of the UN Charter). All the same, since the 1990s, in the light of its ample nation-building experience, the UN does not hide its preference for a democratic domestic regime. Several UN bodies and specialized agencies have indeed contributed greatly to the processes of democratization in a number of countries. Importantly, in the Millennium Declaration,¹²² adopted by the UN General Assembly on 8 September 2000, the Heads of State and Governments of the UN Member States declared:

119. Art. 9 of the OAS Statute was only included by the Protocol of Washington (14 December 1992). This Protocol has entered into force since more than two thirds of the OAS Members have ratified it (<<http://www1.umn.edu/humanrts/oasinstr/washingtonratifications.html>>). On 5 December 1985 the Protocol of Cartagena had already confirmed that representative democracy is indispensable for stability, peace and development in the region. Since this Protocol, promotion and confirmation of representative democracy are major objectives of the OAS.

120. See for the text of this Charter <http://www.oas.org/charter/docs/resolution1_en_p4.htm>.

121. The Secretary-General of the OAS, Cesar Gaviria, offered his good offices to solve a political stand-off and avoid the danger of a new coup against the democratically elected President Hugo Chavez. On 4 June 2002 the OAS adopted a declaration on democracy in Venezuela (<http://www.oas.org/xxxiiga/english/docs_en/docs_items/AGCgdoc16_02.htm>). On 19 December 2002, it voted a resolution to support the efforts of the Secretary-General and the democratic structures in Venezuela (<<http://www.oas.org/OASpage/eng/Venezuela/CP10628E01.htm>>). It is accepted that the OAS plays an important role in safeguarding of the Venezuelan democracy (see for instance the declaration of the American ambassador Noriega *vis-à-vis* the Permanent Council of the OAS on 28 May 2002, <<http://www.uspolicy.be/Issues/Foreignpolicy/noriega.052902.htm>>; see also <<http://www.csmonitor.com/2002/1008/p09s02-coop.html>>).

122. A/RES/55/2. See <<http://www.un.org/millennium/declaration/ares552e.htm>>.

- ‘Democratic and participatory governance based on the will of the people best assures these rights’¹²³ (i.e., the right of men and women to live their lives and raise their children in dignity, free from hunger and from the fear of violence, oppression or injustice);
- ‘We will spare no effort to promote democracy and strengthen the rule of law [...]’;¹²⁴
- ‘We resolve [...] [t]o strengthen the capacity of all our countries to implement the principles and practices of democracy and respect for human rights, including minority rights’.¹²⁵

Despite the preference of the UN for democracy, a Member State’s political regime does not affect its membership rights. In January 2003 for instance, the Libyan Arab Jamahiriya – which does not serve as model of democracy – was elected president of the UN Human Rights Commission.¹²⁶

Furthermore, one should note that for a number of international financial organizations, respect for democratic principles and processes is a condition for financial support.¹²⁷ Since the beginning of the 1990s, for example, countries can only borrow from the International Monetary Fund (‘IMF’) and the World Bank provided that they ‘govern well’. Originally, good governance referred to sound macro-economic policies. Yet later, it became clear that economic development could not be separated from the rule of law. Accordingly, the IMF and the World Bank introduced political conditions, such as respect for human rights and democratic empowerment, into the lending conditions.¹²⁸ Rejecting good governance

123. Ibid., para. 6.

124. Ibid., para. 24. See referring to the Millennium Declaration quotations, UNDP Thematic Trust Fund, *Democratic Governance*, available at <<http://www.undp.org/trustfunds/devgovttf.pdf>>.

125. Ibid., paras. 25, 27 and 28 also contain commitments with respect to support for the consolidation of democracy in Africa and the political and institutional structures of emerging democracies in Africa.

126. The election was fiercely criticized by the United States. See <<http://www.usinfo.state.gov/topical/pol/terror/03011310.htm>>.

127. This requirement is even inserted into the Statute of the European Bank for Reconstruction and Development (EBRD). See Art. 1 of the Treaty Establishing the EBRD, available at <www.ebrd.org>: ‘In contributing to economic progress and reconstruction, the purpose of the Bank shall be to foster the transition towards open market-oriented economies and to promote private and entrepreneurial initiative in the central and eastern European countries committed to and applying the principles of multiparty democracy, pluralism and market economics.’

128. See World Bank, *Governance and Development, the World Bank* (Washington, 1992); World Bank, *Governance. The World Bank’s Experience, the World Bank*, (Washington, 1994); World Bank, *Helping Countries Combat Corruption. The Role of the World Bank*, (Washington, 1997); World Bank, *Development and Human Rights. The Role of the World Bank*, (Washington, 1998); <<http://www.worldbank.org/wbi/governance/overview.htm>>; M. Camdessus, ‘Good Governance. The IMF’s Role, attached to The Role of the IMF in Governance Issues Guidance Note’, approved by the IMF Board of Governors on 25 July 1997, <www.imf.org/external/pubs/ft/exrp/govern/govindex.htm>. For an overview, see J. Wouters and C. Ryngaert, ‘Good governance: lessons from international organizations’, in D.M. Curtin and R.A. Wessel, eds., *Good Governance in the European Union. Lessons from National and International Law* (Schoten, Intersentia 2004) (forthcoming).

criteria became synonymous with rejecting the advantages membership of international financial organizations offers.¹²⁹ Democratic requirements, are, however, not always *imposed*. NEPAD (*'New Partnership for African Development'*), an initiative from African countries committing themselves to good governance, provides a fine example thereof. NEPAD enabled these countries to obtain considerable support from the G-8.¹³⁰

6. PRO-DEMOCRATIC INTERVENTION IN INTERNATIONAL LAW

Western democratic states and organizations often insert democratic governance in their development assistance agreements or partnerships with developing countries.¹³¹ The implementation of these agreements is then dependent upon the developing country living up to democratic expectations. This 'soft' approach stands in startling contrast to the more forceful approach according to which states expose themselves to foreign intervention if they continue to violate democratic principles despite economic pressure brought to bear on them. This theory of 'pro-democratic intervention' poses significant problems under international law.

6.1 Popular sovereignty supplanting state sovereignty

It is commonly believed that international law prohibits the use of force in international relations, except in the case of self-defence (Art. 51 of the UN Charter) or Security Council authorization (pursuant to resolutions under Chapter VII of the UN Charter). Indeed, Article 2(4) of the UN Charter provides that '[a]ll

129. Some authors, however, take the view that good governance criteria do not serve democracy at all. See for example C. Thomas, 'Does the "Good Governance Policy" of the International Financial Institutions Privilege Markets at the Expense of Democracy?', 14 *Connecticut JIL* (1999) at pp. 551-562.

130. The NEPAD-initiative was received positively during the G-8 Summit in 2002 (www.g8.utoronto.ca/evaluations/2002kananaskis/assessment_africaplan.html). During the G-8 Summit in 2003, an action plan and implementation report with respect to NEPAD were presented (<http://www.g8.fr/evian/english/navigation/news/meeting_of_the_g8_aid_agencies_on_nepad_press_conference_given_by_the_minister_delegate_for_cooperation_and_francophony_pierre-andre_wiltzer.html>).

131. See for the latter for instance the so-called Cotonou Agreement, which entered into force on 1 April 2003 (2000/483/EG, Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of states and the European Community and its Member states, signed in Cotonou, 23 June 2000, *OJ L* 317/3, 2000). Art. 9 of the Agreement stipulates that respect for human rights, democratic principles and the rule of law are essential elements of the Agreement. Art. 96 provides for a consultation procedure in case the requirements of Art. 9 are not met. Appropriate measures could be taken, including ultimately the suspension of the Agreement.

Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations'. In combination with Article 2(7), which stipulates that '[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state', the Charter has been construed to shield state sovereignty from being encroached upon by foreign interventions aimed at imposing or restoring a particular type of government. In spite of the general preference of the UN for democracy, to which its election-monitoring assistance is testimony (*supra* Section 5.5), Member States would enjoy the right to choose an undemocratic political structure, however morally repulsive such a choice might be.

The traditional statist view vests all sovereign authority in the government of the state, be that government representative or repressive. Yet in a seminal article published twenty years ago, Michael Reisman argued that, under modern international law, popular sovereignty has supplanted state sovereignty.¹³² Reisman pierced sovereignty's abstract veil and vested true sovereignty in the citizens of the state. Similarly, a few years later Anthony D'Amato underscored that international law is about people and not about states.¹³³ This implies that the test for sovereignty is the democratic character of a state. Only elected governments are deemed to represent the people and their atomistic sovereignty. If a government is not elected, it can never embody the sovereignty of the state. Then, basing pro-democratic intervention on this premise is the next logical step. As only democratic states are bearers of sovereignty, any state has the right, even more, the obligation to overthrow non-democratic governments so as to restore the full sovereignty of the state. This would fit surprisingly well with the text of Article 2(4) of the Charter: pro-democratic intervention is not specifically directed against the 'territorial integrity' of another state, and even contributes to the realization

132. See W.M. Reisman, 'Coercion and Self-Determination: Construing Charter Article 2(4)', 78 *AJIL* (1984) pp. 642-645. Reisman draws on the speech delivered by Elihu Root at the Annual Meeting of the Society in 1917, to which reference was made above (*supra* Section 3.1): 'So long as military autocracy continues, democracy is not safe from attacks, which are certain to come sometime, and certain to find it unprepared. The conflict is inevitable and universal; and it is a l'outrance. To be safe democracy must kill its enemy when it can and where it can. The world cannot be half democratic and half autocratic.' E. Root, loc. cit. n. 11, at p. 10.

133. See A. D'Amato, 'The Invasion of Panama was a Lawful Response to Tyranny', 84 *AJIL* (1990) at p. 516, refuting Farer's argument that '[i]f sovereignty means anything, it means that one state cannot compromise another state's territorial integrity or dictate the character or the occupants of its governing institutions.' (T.M. Farer, 'Panama: Beyond the Charter Paradigm', 84 *AJIL* (1990) at p. 507). Interestingly, D'Amato does not term the intervention favoured by him 'pro-democratic', but rather 'anti-tyranny', thereby referring to the duty to stop widespread human rights abuses, and, thus, to humanitarian intervention (D'Amato, *ibid.*, at p. 519).

of the 'political independence' of that state. As D'Amato notes, the principle of sovereignty would only prohibit 'territorial aggrandizement or colonialism'.¹³⁴

6.2 Unilateral pro-democratic intervention

Reisman's reasoning provided the legal underpinning for the so-called 'Reagan-doctrine', a US policy of supporting Communist insurgents all over the world.¹³⁵ A well-known application of this doctrine was the American intervention in Grenada (1983), an Eastern Caribbean island, the elected government of which had been ousted by a Marxist *junta*.¹³⁶ Allegedly called upon by the deposed government, US marines and paratroopers overthrew the *junta* within three days and re-instated the democratic government. Under President George H. W. Bush, the United States intervened in a similar manner in the Central American State of Panama (1989) in order to oust the military government, capture its leader, General Manuel Noriega, and bring the democratically elected leader to power.¹³⁷

134. *Ibid.*, at p. 520.

135. See on the Reagan-doctrine and additional reading: <<http://www.state.gov/r/pa/ho/time/dr/17741.htm>>.

136. See *inter alia*, L. Doswald-Beck, 'The Legality of the United States Intervention in Grenada', *Indian JIL* (1984), 200-223; E. Gordon and Committee on Grenada, 'International Law and the United States Action in Grenada', 18 *The International Lawyer* (1984) pp. 331-380; C.C. Joyner, 'The United States Action in Grenada: Reflections on the Lawfulness of Invasion', 78 *AJIL* (1984) pp. 131-144; J.M. Karas and J.M. Goodman, 'The United States Action in Grenada: an Exercise in Realpolitik', 16 *Univ. Miami LR* (1984) pp. 53-108; J.N. Moore, *Law and the Grenada Mission* (Charlottesville VA, University of Virginia School of Law, Center for Law and National Security, 1984); J.N. Moore, 'Grenada and the International Double Standard', 78 *AJIL* (1984) pp. 145-168; D.F. Vagts, 'International Law Under Time Pressure: Grading the Grenada take-home examination', 78 *AJIL* (1984) pp. 169-172; P.M. Dunn, *American Intervention in Grenada: the Implication of Operation "Urgent Fury"* (Boulder CO, Westview 1985); M.J. Levin, 'The Law of Force and the Force of Law: Grenada, the Falklands, and Humanitarian Intervention', 27 *Harvard ILJ* (1986) pp. 621-657; S.R. Maizel, 'Intervention in Grenada', 35 *Naval LR* (1986) pp. 47-86; S. Davidson, *Grenada: a Study in Politics and the Limits of International Law* (Aldershot, Avebury 1987); M. Hilaire, 'International Law and the United States Intervention in Grenada', 30 *Revue de droit militaire et de droit de guerre* (1991) pp. 147-182; R.J. Beck, *The Grenada Invasion: Politics, Law and Foreign Policy Decision Making* (Boulder, West View Press 1993); R.J. Beck, 'International Law and the Decision to Invade Grenada: a Ten-Year Retrospective', 33 *Virginia JIL* (1993) pp. 765-817.

137. See A. Berman, 'In Mitigation of Illegality: The U.S. Invasion of Panama', 79 *Kentucky LJ* (1990-1991) pp. 735-800; D'Amato, *lo, cit.* n. 133; Farer, *loc. cit.* n. 133; P. Nanda, 'Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists?: the Validity of United States Intervention in Panama Under International Law', 84 *AJIL* (1990) pp. 494-503; J. Quigley, *The Invasion of Panama and International Law* (Vienna, IPO 1990); J. Quigley, 'The Legality of the United States Invasion of Panama', 15 *Yale JIL* (1990) pp. 276-315; D.W. Alberts, 'The United States Invasion of Panama; Unilateral Military Intervention to Effectuate a Change in Government: a Continuum of Lawfulness', 1 *Transn. L & Contemp. Prob.* (1991) pp. 261-312; L.D. Henkin, 'The

In their positive assessment of unilateral pro-democratic intervention, Reisman,¹³⁸ D'Amato,¹³⁹ and Teson¹⁴⁰ stand rather alone.¹⁴¹ In Fox and Roth's landmark book *Democratic Governance and International Law*, Byers and Chesterman, discussing previous academic writing and state practice on the subject, meticulously refute all arguments of the proponents of a unilateral right to pro-democratic intervention under customary international law.¹⁴² According to them, these proponents turn their wishes into reality and conflate legal and moral considerations. Byers's and Chesterman's argument boils down to the thesis that the invasions of Grenada and Panama prove exactly the opposite from what their proponents believe. Regarding the Grenada invasion, they refer to a letter by a legal adviser to the State Department, which emphasized the grounds on which the United States did *not* rely, namely an expanded view of self-defence, new interpretations of Article 2(4) of the UN Charter or a broad doctrine of humanitarian intervention. According to the adviser, the United States acted upon invitation of the Governor-General of Grenada, upon a request to intervene from the

Invasion of Panama Under International Law: a Gross Violation', 29 *Columbia JTL* (1991) pp. 293-317; M. McConnell, *Just Cause: the Real Story of America's High-Tech Invasion of Panama* (New York, St Martin's 1991); A.D. Sofaer, The Legality of the United States Action in Panama', 29 *Columbia JTL* (1991) pp. 281-292; R. Wedgwood, 'The Use of Armed Force in International Affairs: Self-Defense and the Panama Invasion', 29 *Columbia JTL* (1991) pp. 609-628; C.T. Bogus, 'The Invasion of Panama and the Rule of Law', 26 *The International Lawyer* (1992) pp. 781-787; S.A. Ramage, 'Panama and the Myth of Humanitarian Intervention in U.S. Foreign Policy: Neither Legal Nor Moral, Neither Just Nor Right', 10 *Arizona JI & CL* (1993) pp. 1-76; A. Gray and M. Manwaring, 'Panama: Operation Just Cause', in R.B. Oakley, M.J. Dziedzic and E.M. Goldberg, eds., *Policing the New World Disorder* (Washington, National Defense University Press 1998) pp. 41-68.

138. See W.M. Reisman, 'Humanitarian Intervention and Fledgling Democracies', *Fordham International Law Journal* (1995), 794-805; W.M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', in Fox and Roth, op. cit. n. 1, pp. 239-258.

139. See D'Amato, loc. cit. n. 133. D'Amato's analysis is as controversial as it is influential. He contends that only physical acts and not statements constitute state practice for the purposes of customary international law. This implies that the physical act of pro-democratic intervention by states contributes to the formation of a rule of customary international law, whereas statements by states condemning such action would be irrelevant.

140. See F.R. Teson, 'Collective Humanitarian Intervention', 17 *Michigan JIL* (1996) pp. 323-371; F.R. Teson, *Humanitarian Intervention: an Inquiry into Law and Morality* (Irvington-on-Hudson NY, Transnational Publishers 1997) 338 pp.; F.R. Teson, 'The Liberal Case for Humanitarian Intervention', in J.L. Holzgrefe and R.O. Keohane, eds., *Humanitarian Intervention* (Cambridge, Cambridge University Press 2003) pp. 93-129.

141. See for an early response to Reisman, O. Schachter, 'The Legality of Pro-Democratic Invasion', 78 *AJIL* (1984) pp. 645-650.

142. See M. Byers and S. Chesterman, "'You, the People": Pro-democratic Intervention in International Law', in Fox and Roth, eds., op. cit. n. 1, pp. 259-292.

Organization of Eastern Caribbean States and to protect nationals.¹⁴³ Attempting to legitimize the Grenada invasion under international law, the United States did not legally identify the *opinio iuris* in favour of a unilateral right to pro-democratic or humanitarian intervention. The legal qualification of the action of a state is, however, of utmost importance in terms of providing evidence of the *opinio iuris* necessary to establish the existence of a rule of customary international law. In this context, the International Court of Justice held in the *Nicaragua* case (1986) that a state, *in casu* the United States, needs to claim that its intervention, which it justified on the political level, is also justified on the legal level, in order to establish a new right of intervention regarded by it as existing in such circumstances.¹⁴⁴ A *post factum* legitimization, as proffered by legal academics, does not suffice to establish a right of pro-democratic intervention.

As far as the Panama invasion – which occurred *after* the *Nicaragua* judgment – is concerned, the United States again relied officially on other legal justifications, such as the protection of American nationals under Article 51 of the UN Charter, the fight against drug trafficking and the protection of the integrity of the Panama Canal Treaty. Yet in the list of justifications also features, although not in the first place, support of democracy.¹⁴⁵ However, the emergence of a rule of customary international law in favour of pro-democratic intervention was immediately opposed by the international community united in the UN General Assembly, which condemned the intervention in Panama as ‘a flagrant violation of international law and of the independence, sovereignty and territorial integrity of states’, thereby explicitly referring to Article 2(4) of the UN Charter.¹⁴⁶

Very recently, in February 2004, the United States stood again accused of unduly interfering in the domestic matters of another state. When the Haitian president Aristide, who was ironically re-instated as the democratic incumbent by the United States in 1994 (*infra* Section 6.4), faced stiff domestic opposition against his corrupted, yet democratically elected, regime, he was allegedly forced by the United States to leave his country.¹⁴⁷ The United States dismissed the allega-

143. *Ibid.*, at pp. 272-273. Upon receiving the ‘invitation’, however, the preparation of the intervention was already in an advanced stage. See *infra* on pro-democratic intervention by invitation.

144. ICJ, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)* 27 June 1986, *ICJ Rep.* (1986) p. 109, para. 208: ‘[T]he United States has, on the legal plane, justified its intervention expressly and solely by reference to the “classic” rules involved, namely, collective self-defence against an armed attack.’; pp. 109-110, para. 209: ‘The Court therefore finds that no such general right of intervention, in support of an opposition within another state, exists in contemporary international law.’

145. See M. Byers and S. Chesterman, *loc. cit.* n. 145, pp. 274-279.

146. UNGA Res. 44/240 (1989). In the same vein, the Grenada intervention was condemned by UNGA Res. 38/7 (1983). In both instances, condemnation of the intervention by the Security Council was vetoed by the United States.

147. *The Economist*, ‘America’s debate on Haiti: Did he go or was he pushed?’ (6 March 2004).

tions. As Aristide had lost considerable support in Haiti anyway and almost all support outside Haiti, condemnation of possible United States intervention was scarce. On the very day that Aristide fled his country, on 29 February 2004, the Security Council adopted Resolution 1529, authorizing the immediate deployment of a multinational interim force to stabilize Haiti. The Resolution did not feature any reference to outside pressure brought to bear on Aristide.

6.3 Pro-democratic intervention by invitation

The current prohibition of pro-democratic intervention in international law is concerned with an intervention to which the elected government of the target state has not consented. However, a state may not only lawfully use force in the territory of another state in the case of self-defence or Security Council authorization, but also when the target state consents.¹⁴⁸ Indeed, Article 20 of the Draft Articles on State Responsibility (2001) provides that '[v]alid consent by a state to the commission of a given act by another state precludes the wrongfulness of that act in relation to the former state to the extent that the act remains within the limits of that consent.'¹⁴⁹ Furthermore, the Security Council reaffirmed in 1976 'the inherent and lawful right of every state, in the exercise of its sovereignty, to request assistance from any other state or group of states'.¹⁵⁰ Hence, consent to forcible intervention by the target state trumps the prohibition of the use of force contained in Article 2(4) of the UN Charter.

Obviously, pro-democratic intervention by invitation could only take place if an incumbent (democratic) government invites another state to intervene in order to protect democracy. Democratic factions that are not part of the government cannot invite other states to overthrow a non-democratic government.¹⁵¹ The problem is, however, that the helping state is often only called upon to intervene once the democratic government is unseated by a military *junta*. Here, Wippman points out that the international community has countenanced this sort of foreign interventions, such as operations led by France and the United Kingdom in their

148. See D. Wippman, 'Pro-democratic Intervention by Invitation', in Fox and Roth, eds., op. cit. n. 1, pp. 294-295. Interestingly, Wippman was counsel for Nicaragua in the *Nicaragua* case (1986).

149. International Law Commission, 'Draft Articles on Responsibility of States for Internationally Wrongful Acts', 2001, available at <<http://www.un.org/law/ilc/archives/statresp.htm>>.

150. UNSC Res. 387 (1976).

151. See ICJ, *Nicaragua*, ICJ Rep. (1986) p. 108, para. 206: '[The Court] has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, [...]'; pp. 109-110, para. 209: 'The Court [...] finds that no such general right of intervention, in support of an opposition within another state, exists in contemporary international law.'

former colonies in Africa, provided that they are swift and small scale.¹⁵² In other words, he suggests that the right to pro-democratic intervention to re-instate an ousted democratic government upon its request, may amount to a rule of customary international law.

The crystallization of such a rule, however, requires strong support of the international community, as it derogates from the prohibition of the use of force, which is a norm of *jus cogens*.¹⁵³ Moreover, as is apparent from the *Nicaragua* judgment¹⁵⁴ and the *Friendly Relations Declaration*¹⁵⁵, outside intervention in a civil war, in favour of *any* party, may distort a state's free choice of its political, economic, social and cultural system. Gray argues therefore that intervention, pro-democratic or not, is permissible only if there has been outside subversion against the government, or in the case of domestic unrest short of a civil war.¹⁵⁶

6.4 Multilateral pro-democratic intervention authorized by the UN Security Council

Unilateral pro-democratic intervention by a state or a group of states is, as mentioned above, not self-evident under international law. It is likely to be restricted to instances of unambiguous consent of the target state. Pro-democratic intervention authorized by the UN Security Council, on the other hand, has proven less contentious. *Prima facie* it does not sit uneasy with Article 2(7) of the UN Charter, as the principle of non-intervention in domestic matters contained in this article 'shall not prejudice the application of enforcement measures under Chapter VII'. Yet, under Chapter VII of the UN Charter, the Security Council can only take measures in case of a threat to *international* peace and security.¹⁵⁷ *A contrario*, the Security Council cannot intervene to enforce democracy in a UN Member State, as the choice of the type of government is essentially a domestic matter and therefore presumably does not pose a threat to international peace and security. However, under a broad interpretation of such a threat, the overthrow of a democratic government may jeopardize international peace and security, in that

152. See Wippman, loc. cit. n. 148, at pp. 295 and 300.

153. See ICJ, *Nicaragua*, ICJ Rep. (1986) pp. 100-101, para. 190; II Yb ILC (1966) at p. 248.

154. See ICJ, *Nicaragua*, ICJ Rep. (1986) p. 101, para. 191.

155. Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among states In Accordance with the Charter of the United Nations, UNGA Res. 2625 (XXV) (1970): 'Every state has an inalienable right to choose its political, economic and cultural systems, without interference in any form by another state.'

156. See C. Gray, *International Law and the Use of Force* (Oxford, Oxford University Press 2000) at p. 57. See also O. Schachter, 'International Law: the Right of States to Use Armed Force', 82 *Michigan LR* (1984) at p. 1641; J.N. Moore, 'Legal Standards for Intervention in Internal Conflicts', 13 *Georgia JICL* (1983) at p. 196.

157. Art. 39 UN Charter.

it may bring about refugee flows or hostile conduct of the unelected government toward neighbouring states.¹⁵⁸

In the 1960s and 1970s, the Security Council imposed economic sanctions on the white minority governments of what was then Southern Rhodesia and South Africa, chiefly on the grounds of the right to self-determination of the majority, although there might have been spill-over effects, or perhaps entirely unconnected actions, threatening international peace and security, such as the former Rhodesia violating the territorial sovereignty of other states, and South Africa developing nuclear weapons.¹⁵⁹ Terming these sanctions 'pro-democratic' is, at any rate, not correct, as they were concerned with the right to self-determination of colonial peoples,¹⁶⁰ a right that, as Russell Miller recently argued, might contribute to the sheer *demise* of democracy.¹⁶¹

In 1993, the Security Council imposed an economic embargo on Haiti, after its democratically elected President Aristide was overthrown by a military junta in 1991.¹⁶² The Council deplored that, 'despite the efforts of the international community, the legitimate Government of President Jean-Bertrand Aristide ha[d] not been reinstated'. Although the Council was also concerned 'that the persistence of this situation contribute[d] to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States', it was clear that these spill-over effects were too minimal to establish a threat to international peace and security as commonly perceived. Therefore, the Security Council determined that measures under Chapter VII of the UN Charter were warranted 'in these unique and exceptional circumstances'. In 1994, after the embargo failed to force the coup leaders to step down, the Security Council authorized the UN Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership and the prompt return of the legitimately elected President. A force, mainly consisting of United States troops, acted upon the UN mandate and re-instated President Aristide.

158. See M. Glennon, 'Sovereignty and Community after Haiti: Rethinking the Collective Use of Force', 89 *AJIL* (1995), at p. 72; Byers and Chesterman, loc. cit. n. 142, at pp. 282-283.

159. See for Southern Rhodesia: UNSC Res. 221 (1966) and 232 (1966), 253 (1968), 277 (1970), 386 (1976), 403 (1977), 411 (1977), 423 (1978), 445 (1979), 418 (1977). See for South Africa: UNSC Res. 386 (1976), 403 (1977), 411 (1977), 423 (1978), 445 (1979).

160. See the 'Declaration on the Granting of Independence to Colonial Territories and Peoples', UNGA Res. 1514 (XV), 1960.

161. See R.A. Miller, 'Self-Determination in International Law and the Demise of Democracy', 41 *Columbia JTL* (2003) pp. 601-648.

162. UNSC Res. 841 (1993).

It could be questioned whether or not the Haiti intervention was a watershed. For one thing, the Security Council may have listed in its resolutions circumstances that point to humanitarian rather than pro-democratic intervention.¹⁶³ For another, the deposed government of Haiti had invited the UN to re-instate it, and had, thus, given its consent to intervention.¹⁶⁴

6.5 Multilateral pro-democratic intervention authorized by regional international organizations

Multilateral intervention is not always authorized by the Security Council. Regional security organizations may as well be tempted to enforce democracy by forcible means. In 1997, the elected government of Sierra Leone was overthrown by the so-called Armed Forces Revolutionary Committee. The *coup d'état* was condemned by the Organization for African Unity (hereinafter OAU), which called for the 'immediate restoration of constitutional order' and appealed to the Economic Community of West African States (hereinafter ECOWAS), of which Sierra Leone is a Member State, 'to assist the people of Sierra Leone to restore constitutional order to the country'.¹⁶⁵ The OAU did not specify what means of assistance ECOWAS could employ. ECOWAS construed the mandate to imply the use of force and, through the West African peacekeeping mission known by the acronym ECOMOG, militarily enforced the embargo imposed on Sierra Leone.¹⁶⁶ Thereupon, the Security Council expressed its strong support for the efforts of ECOWAS and authorized the organization, acting under Chapter VIII of the UN Charter, *post factum* to ensure the implementation of the embargo.¹⁶⁷ In February 1998, Nigerian ECOMOG forces invaded Sierra Leone, an action that was again endorsed *post factum* by the Security Council.¹⁶⁸ On 10 March 1998, the democratically elected leader of Sierra Leone resumed his powers, af-

163. Byers and Chesterman note that humanitarian intervention was considered more important, because it was mentioned earlier in the preamble. See Byers and Chesterman, loc. cit. n. 142, at p. 287. Such a reading is, however, difficult to reconcile with the 'unique and exceptional circumstances' that the Security Council found in the Haiti case. Indeed, in 1992, the Security Council had already espoused the concept of humanitarian intervention so as to intervene in Somalia (UNSC Res. 733 (1992)).

164. See *supra*.

165. Council of Ministers of the OAU, 33th Ordinary Session, Harare (Zimbabwe), 28-31 May 1997, DOC.CM/2004 (LXVI).

166. Communiqué issued at the meeting of the Foreign Ministers of ECOWAS on Sierra Leone, Conakry (Guinea), 26 June 1997 (S/1997/499); Declaration of the ECOWAS Committee of Four Foreign Ministers on Sierra Leone (ECOWAS Committee), 30 July 1997 (S/1997/646); final Communiqué of the Summit of ECOWAS, Abuja (Nigeria), 28-29 August 1997; Decision on sanctions against the military junta in Sierra Leone issued at the summit (S/1997/695, Annexes I and II).

167. UNSC Res. 1132 (1997).

168. UNSC Res. 1162 (1998).

ter which the embargo was lifted¹⁶⁹ and the Security Council established the UN Observer Mission in Sierra Leone (hereinafter UNOMSIL).¹⁷⁰

6.6 Pro-democratic invasion pacts

Interestingly, in the wake of the Sierra Leone experience, in 1999, ECOWAS adopted the Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security,¹⁷¹ so as to streamline its efforts on conflict prevention. The Mediation and Security Council, established by this Protocol, has the power to 'authorize all forms of intervention and decide particularly on the deployment of political and military missions'.¹⁷² Read together with the OAU's Declaration on a Framework for an OAU Response to Unconstitutional Changes in Government (2000),¹⁷³ which provides for the condemnation of unconstitutional changes of government, the suspension of rights of the illegitimate government and the imposition of sanctions, ECOWAS seems to be, more than ever, willing to wield the sword of pro-democratic intervention in case of the overthrow of the constitutional order in its Member States.¹⁷⁴

A similar document as the ECOWAS Protocol is the African Union's Protocol Relating to the Establishment of a Peace and Security Council, which was adopted on 9 July 2002 by 53 African states.¹⁷⁵ This Protocol entered into force in May 2004 and has as one of its objectives the promotion and encouragement of democratic practices as part of efforts for preventing conflicts.¹⁷⁶ However,

169. UNSC Res. 1156 (1998) and 1171 (1998).

170. UNSC Res. 1181 (1998), 1220 (1999), 1231 (1999), 1245 (1999), 1260 (1999). Later, the Security Council established the UN Mission in Sierra Leone (UNAMSIL): UNSC Res. 1270 (1999), 1289 (2000), 1299 (2000), 1306 (2000), 1313 (2000), 1315 (2000), 1321 (2000), 1334 (2000), 1346 (2001), 1370 (2001), 1385 (2001), 1389 (2002), 1400 (2002), 1436 (2002), 1470 (2003), 1492 (2003) and 1508 (2003). See for an extensive account of the military intervention in Sierra Leone: A. Bundu, *Democracy by Force? A Study of International Military Intervention in the Conflict in Sierra Leone from 1991-2000* (Parkland FL, Universal Publishers 2000) pp. 330.

171. ECOWAS, *Protocol Relating to the Mechanism for Conflict Prevention, Management, Resolution, Peace-keeping and Security*, Lomé, 10 December 1999, available at <http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/ConflictMecha.pdf>.

172. *Ibid.*, Art. 10(c).

173. Heads of State and Government of the OAU, 'Declaration on a Framework for an OAU Response to Unconstitutional Changes in Government', 36th Ordinary Session, Lomé (Togo) 10-12 July 2000, AHG/Decl. 5 (XXXVI).

174. A pro-democratic intervention by ECOWAS remains subject to constraints imposed by the UN Security Council pursuant to Article 103 of the UN Charter. See also D. Wippman, 'Pro-democratic Intervention in Africa', *Proceedings of the American Society of International Law*, (Washington DC, ASIL 2002) pp. 143-145.

175. Available at <http://www.africa-union.org/rule_prot/PROTOCOL-%20PEACE%20AND%20SECURITY%20COUNCIL%20OF%20THE%20AFRICAN%20UNION.pdf>.

176. Article 3 (f) of the Protocol Relating to the Establishment of a Peace and Security Council.

the African Union has no right to intervene in a Member State, except in the case of war crimes, genocide and crimes against humanity.¹⁷⁷ Short of direct democratic intervention, the Peace and Security Council may institute sanctions whenever an unconstitutional change of government takes place in a Member State.¹⁷⁸

As regional organizations willing to intervene in support of democracy, ECOWAS is joined by the OAS and the OSCE, although the latter organizations have never actually exercised their power to enforce democracy in their Member States. The OAS's Inter-American Democratic Charter (2001)¹⁷⁹ stipulates that '[i]n the event of an unconstitutional alteration of the constitutional regime that seriously impairs the democratic order in a Member State, any Member State or the Secretary General may request the immediate convocation of the Permanent Council to undertake a collective assessment of the situation and to take such decisions as it deems appropriate.'¹⁸⁰ The Charter does not exclude the use of force.¹⁸¹

Similarly, the Copenhagen Document,¹⁸² adopted in 1990 by the CSCE, stipulates that the participating states 'recognize their responsibility to defend and protect [...] the democratic order freely established through the will of the people against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at the overthrow of that order or of that of another participating state'.¹⁸³ The Copenhagen Document does not exclude the use of force either.¹⁸⁴ This could imply that the OSCE and its 55 Member States have, on the basis of this document, the legal authority to enforce democracy in other Member States, many of which are not renowned for their democratic stability. It should be noted that the Copenhagen Document is merely a political declaration that does not set out any decision-making mechanism.

It is likely that neither the OAS Democratic Charter nor the OSCE Copenhagen Document can be termed pro-democratic invasion pacts since they lack the explicit endorsement of military intervention. In view of the strict inter-

177. Ibid., Art. 4 (j) of the Protocol.

178. Ibid., Art. 7(g) of the Protocol.

179. General Assembly of the OAS, *Inter-American Democratic Charter*, Special Session, Lima (Peru), 11 September 2001, available at <[http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm](http://www.oas.org/main/main.asp?sLang=E&sLink=http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm)>.

180. Ibid., Art. 20. This article is a formalization of the Santiago Commitment to Democracy and the Renewal of the Inter-American System (OEA/Ser.P./XXI.O.2) (1991).

181. See with respect to the Santiago Commitment: Wippman, loc. cit. n. 148, at p. 323.

182. Document on the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE), 29 June 1990, reprinted in *ILM* (1990) at p. 1305.

183. Ibid., para. 7.

184. See M. Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard ILJ* (1993) pp. 163-175.

pretation of the international rules governing the use of force, the former instruments may not imply a right of pro-democratic intervention. Even if they do, the legality of pro-democratic invasion remains doubtful.

Roth for instance asserts that they may run afoul of the right to self-determination, i.e., a norm of *jus cogens*.¹⁸⁵ Under Article 53 of the Vienna Convention on the Law of Treaties (1969), treaties may not violate norms of *jus cogens*.¹⁸⁶ Roth makes the argument that sovereignty is not a continuum: a state is sovereign or it is not.¹⁸⁷ Although the state can waive some sovereign rights, it could not erode beforehand the core of sovereignty, which would include the right to choose freely, at any given moment, its particular type of government.¹⁸⁸ Pro-democratic invasion pacts should therefore not be agreed upon *a priori*, but remain subject to the contemporaneous consent of the government. Roth points out that the presumption of a pro-democratic invasion pact that a *coup d'état* is against the contemporaneous consent, is untenable, as '[i]t would replace the principle of sovereignty of all peoples [...] with a principle of dominance for a single world-view.'¹⁸⁹

It is submitted that this view incorrectly equates the right of a state to choose its particular type of government freely with the right to self-determination as a norm of *jus cogens*. Admittedly, in the *East Timor* case, the International Court of Justice ascribed an *erga omnes* character to the right of self-determination and recognized that it was one of the essential principles of contemporary international law.¹⁹⁰ Yet the right of self-determination – which is a right of peoples¹⁹¹ – does not preclude states from freely entering into international commitments to (help to) uphold the democratic nature of their political systems and of the political system of other states that have freely decided to be part of the organization

185. See B.R. Roth, 'The Illegality of Pro-democratic Invasion Pacts', in Fox and Roth, op. cit. n. 1, at p. 329.

186. Pursuant to Art. 53 of the Vienna Convention on the Law of Treaties, such a peremptory norm 'can be modified [...] by a subsequent norm of general international having the same character.' The right to democracy is not a peremptory norm and can, thus, not impinge on the right to self-determination. Interestingly, Roth admits that, as the prohibition of genocide and crimes against humanity is a peremptory norm, its enforcement may trump the right to self-determination. However debatable construing a substantive peremptory norm to imply its enforcement might be, Roth's analysis seems to legitimize humanitarian intervention.

187. Ibid., at p. 331.

188. Cf., UNGA Res. 2625 (XXV) (1970): 'Every state has an inalienable right to choose its political, economic and cultural systems, without interference in any form by another state.'

189. See Roth, loc. cit. n. 185, at p. 335.

190. ICJ, *Case Concerning East Timor (Portugal v. Australia)*, ICJ Rep. (1995) p. 102, para. 29. It goes beyond the scope of this article to address the relation between norms of *jus cogens* and *erga omnes* obligations.

191. See the formulation of Art. 1(1) of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, *supra* n. 5.

in question. This being said, the precise determination of what constitutes the 'democratic order' of the state in question may be a thorny issue: in that respect, one can only plead for the large view of democracy, as developed above (*supra* Section 3.4), to be taken as the frame of reference by the organizations concerned.

7. THE DEMOCRATIC DEFICIT OF NORMATIVE PROCESSES IN INTERNATIONAL LAW

As has become clear from the above, international law is gradually evolving towards a positive assessment of intra-state democracy. Yet as regards democratic participation of both citizens (vertical democracy) and states (horizontal democracy) in intergovernmental law-making, much remains to be done. Feeble participation of parliamentary assemblies (vertical democracy) in the making of international law, as well as the lack of control over the actions of the executive branch, are testimony to this. Horizontal, inter-state democracy refers to the equal rights of all states participating in international law-making. Since their independence, developing countries have striven for effective participation in international law-making.¹⁹² Industrial countries are, not surprisingly, reluctant to hand over the leading role that they have always played in the treaty-making process and in international organizations.¹⁹³

7.1 Democracy in the treaty-making process

It may be obvious that every state has the right to participate in the treaty-making process. This participative model is, however, a rather recent phenomenon. Traditionally, only the great powers were invited to international conferences. Smaller states had to abide by the results of these gatherings.¹⁹⁴ These days, conference rules provide for the equal treatment of all parties to the treaty, albeit only for the formal consultations.

192. See e.g., the 'Declaration on the New International Economic Order', UNGA Res. 3201 (S-VI), 1974.

193. Western domination over the making of international law would, according to some authors, account for the Western bias of current international law. See E. Kwakwa, 'Regulating the International Economy: What Role for the state?', in M. Byers, ed., *The Role of Law in International Politics* (Oxford, Oxford University Press 2000) pp. 227-246.

194. See M.C.W. Pinto, 'Democratization of International Relations and its Implications for Development and Application of International Law', in N. Al-Nauimi and R. Meese, eds., *International Legal Issues Arising under the United Nations Decade of International Law* (The Hague, Kluwer Law International 1995) at p. 1260.

This being said, equal treatment of sovereign states only addresses horizontal democratic participation. What about the participation of the citizen and his or her representatives in international law-making?

A state is a legal person which, like all legal entities, needs a mandated physical person to enter into legal relations. International treaty practice, therefore, needs a state representative to make agreements binding on the state under international law. International law does not require the state representative to be democratically legitimized. The Vienna Convention on the Law of Treaties does not determine the origin of the mandate; some state representatives are even exempt from submitting any mandate.¹⁹⁵

It is important to note for domestic democracy that the adoption of a treaty does not bind a state *per se*. In international law, a state can use various methods to express its consent to be bound.¹⁹⁶ In democratic states, a treaty is often subject to parliamentary consent prior to its ratification.¹⁹⁷ Yet a direct democratic legitimation is not a prerequisite of the international law of treaties. Besides, the parliamentary assembly can not amend the treaty; it can merely approve or reject it as a whole.¹⁹⁸ Accordingly, unlike with respect to domestic law-making, a parliamentary assembly giving its consent to a treaty does not have full legislative powers.¹⁹⁹ In this context, even democratic states suffer from a considerable democratic deficit.²⁰⁰

195. See Art. 7 Vienna Convention on the Law of Treaties.

196. See Arts. 11-16 Vienna Convention on the Law of Treaties.

197. In Belgium all treaties are, since the fourth reform of the state (1993), submitted to the federal parliament and/or the regional parliamentary assemblies, by virtue of Art. 167, paras. 2 and 3 of the Constitution. In 1831, Belgium was the first country to insert parliamentary approval of treaties into the constitution. See D. Schindler, 'Völkerrecht und Demokratie', in G. Hafner, G. Loibl, A. Rest, L. Sucharipa-Behrmann and K. Zemanek, eds., *Liber Amicorum Professor Seidl-Hohenveldern – in Honour of his 80th Birthday* (The Hague, Kluwer Law International, 1998) pp. 611-630. It may happen that the executive branch circumvents parliamentary interference by entering into executive agreements.

198. With the possible qualification that it can insist on certain reservations to be made, if of course such reservations are allowed under the treaty.

199. Parliamentary intervention enhances the domestic democratic character of international law-making. Yet, paradoxically, it may run counter to the realization of international democracy. Often, a treaty only takes effect after ratification by a substantial amount of treaty parties. Accordingly, if national parliaments refuse to approve a treaty, it may not take effect. Although states have democratically reached a consensus on an international conference, they remain dependent on the uncertain outcome of a domestic parliamentary debate. See Pinto, loc. cit. n. 194, at pp. 1263-1265.

200. International treaty law does not take domestic democratic concerns of the parties to the treaty into account. When a state bypasses its parliamentary assembly in the treaty-making process, the assembly has no recourse under international law. Indeed, a party to a treaty may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27 of the Vienna Convention on the Law of Treaties). Art. 46 of the Vienna Convention on the Law of Treaties qualifies this rule in that a state may not invoke the fact that its consent to be bound by a treaty

International law probably grapples with an *inevitable* democratic deficit. Much more than national law-making, international law-making results from a process of giving and taking. Multilateral treaties are often made during diplomatic conferences in which dozens of states participate. After laborious negotiations, consensus should be reached over a text that satisfies all parties, but that naturally fails to meet all their original demands.²⁰¹ In the domestic legal order, on the other hand, law-making results from a unilateral legislative decision. Under the theory of popular sovereignty, the law is then thought to reflect the will of the people. In the international legal order, this domestic *volonté générale* is replaced by the consensus of the parties. Equating the will of the parties with the will of the people is, however, not straightforward, as the executive branch carries out the treaty-making mandate delegated to it by legislative branch, which only in turn represents the people. In practice, the executive branch may attach weight to considerations other than the interests of the people it is believed to represent.

It could be argued, minimalistically, that international law-making is democratic, because the sovereign people have constitutionally authorized their representatives to limit democratic participation as the emanation of popular sovereignty. Yet such a comprehensive *a priori* mandate probably does not suffice in the current globalized world, in which so many inter-state decisions are taken. Such a mandate would limit active democratic involvement to an ever narrowing base of exclusively intra-state matters.

Neither does the argument that diplomats work under the authority of a democratically elected minister provide international law-making sufficient legitimacy. The activities and preferences of diplomats are often remote from the opinions of the citizens.²⁰² This distance may constitute the essence of the democratic deficit in international decision-making. In order to better involve citizens, their directly elected parliamentary delegates ought to participate in international law-making. These delegates could either be part of the official delegation of the state or region, or be involved in the preparation of conference positions.²⁰³

Spontaneous international law-making, however, excludes such democratic participation. Norms of customary law and *jus cogens* are made in the absence of

has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.

201. See Schindler, loc. cit. n. 197, at p. 616. According to Art. 9(2) of the Vienna Convention on the Law of Treaties, a two third majority now suffices to adopt a treaty text.

202. See Pinto, loc. cit. n. 194, at p. 1288.

203. See for instance the recommendations of the Belgian parliamentary working group on globalization (*Documents parlementaires*, Chamber of Representatives, 2002-2003, DOC 50 2330/003, 1.3).

a formal decision-making procedure. Whereas, to be true, a state may object to the crystallization of a norm of customary international law on the basis of the persistent objector rule,²⁰⁴ possibly after a domestic democratic debate, *jus cogens* is imposed on any state, without the possibility of objecting.²⁰⁵ The lack of participation in the making of these norms would, according to some authors, question their democratic legitimacy.²⁰⁶

7.2 Democracy in international organizations

International organizations often shun basic democratic principles. Although the democratic principle of one-state-one-vote, a transposition of the domestic principle of one-citizen-one-vote, is mostly followed in plenary organs of international organizations, typically only non-plenary executive organs acting on behalf of the whole membership can effectively take decisions. Citizens of states having no seat in these bodies, have almost no control over their decision-making. As there is often no review by the general assembly of the organization either, this might lead to a serious legitimacy and accountability crisis within the organization concerned.²⁰⁷

In an analysis mainly applicable to decision-making in international organizations, Schindler believes that genuine democracy can only thrive in a closed community (*Volksgemeinschaft*), the constituent parts of which are ready to accept majority decisions as decisions reached by the community as a whole.²⁰⁸ The international community is, in Schindler's view, no such closed community, but lumps together atomistic subjects with various interests. Their lack of solidarity would be a stumbling block to the unconditional acceptance of the majority's decision.

Schindler points to the difficulties encountered by the European Union in extending qualified majority voting. Also in other international organizations,

204. Contra, J.J. Paust, 'Customary International Law in the United States: Clean and Dirty Laundry', 40 *GYIL* (1997) 79. The persistent objector theory would be a myth, as US courts have never resorted to it in order to avoid the application of customary international law in the United States.

205. Pursuant to Art. 53 of the Vienna Convention on the Law of Treaties, treaties cannot derogate from norms of *jus cogens*: see *supra* Section 6.6.

206. See for instance C.A. Bradley and J.L. Goldsmith, 'Customary International Law as Federal Common Law: a Critique of the Modern Position', 110 *Harvard LR* (1997) pp. 856-857. However, see the criticism of this view and arguments stressing the relative democratic nature of the customary law-making process in comparison to the treaty-making process, J. Wouters, 'Customary international law before national courts: Some reflections from a continental legal perspective', *Non-state Actors and International Law* (2004) pp. 25-38.

207. See on democratization at the international level: B. Boutros-Ghali, *An Agenda for Democratization*, paras. 61-115.

208. See Schindler, loc. cit. n. 197, at p. 619.

qualified majority voting raises eyebrows. Most international organizations decide by consensus, e.g., the World Trade Organization (hereinafter WTO); (*infra* Section 7.3). A number of organizations, however, apply rules of weighted voting or qualified majority voting, chiefly to protect powerful states from domination by the majority. In the IMF, the five richest economies have, on the basis of their capital subscriptions, almost half of the total votes in the executive body. The IMF's Articles of Agreement even provide for so-called 'supermajorities' for a number of decisions, ranging from 70% to 85%. This enables the United States to block important lending decisions.²⁰⁹ Article 27 of the UN Charter also provides for a system of qualified majority voting in the Security Council: each member has one vote, but decisions on matters of substance are only adopted when nine members, including the permanent members, vote in favour.²¹⁰ It should be noted that consensus-based decision-making or qualified majority-voting is not necessarily at odds with democratic principles, as a host of democratic state constitutions themselves provide for stricter majority requirements in order to protect minorities.²¹¹

At any rate, attempts at re-inforcing international democracy often meet with stiff resistance from a minority of powerful states. These states are willing to cooperate internationally provided that the statute of the international organization concerned offers them procedural safeguards against the actions of a majority of less powerful states.²¹² Abolishing these safeguards could jeopardize the existence of the international organization in the long run, since influential states would not be inclined to give other states an equal say over the resources put at the disposal of the organization by the former states. This might undermine the efficiency of the organization, as evidenced by the inglorious demise of the League of Nations.

209. See for criticism: W. Bello, *Prospects for Good Global Governance: The View From the South*, Report prepared for the Bundestag, Federal Republic of Germany, Focus on the Global South, CUSRI, Chulalongkorn University, Bangkok, 2001, also available at <www.bundestag.de/gremien/welt/gutachten/vg12.pdf>.

210. In spite of the text of Art. 27(3) of the UN Charter, the institutional practice of the Security Council allows for a resolution to be adopted if one or more permanent members abstain.

211. E.g., the Belgian Constitution, which requires a two third majority for taking certain decision, with a simple majority in every linguistic group: Art. 4 (modification or correction of the boundaries of the linguistic regions), Arts. 5, 162 and 166(2) (status of local and provincial governments), and a great number of other articles relating to the communities and the regions (Arts. 117, 118, 121(1), 123, 128, 129(2), 136, 137, 143(3), 167(5), 175, 177 and 178). A constitutional amendment, however, does not require a linguistic majority (Art. 195).

212. See Pinto, *loc. cit.* n. 194, at p. 1263.

7.3 A case-study: the democracy deficit in the World Trade Organization

The WTO, while still a relatively young international organization (it was established in 1995), has nevertheless become one of the most heavily criticized organizations at the international level. The rules for international trade that exist within the framework of the organization have proven to interact intensively with non-trade policies by governments and principles of international law (like, for instance, human rights principles and rules of international environmental law).²¹³ In the light of the considerable impact of WTO rules and rulings on day-to-day policy-making by states and eventually on citizens' lives, there is a growing unease about the (real or imagined (*infra*)) lack of democracy within the WTO. This is shown sufficiently by the bitter protests at the time of meetings of the WTO's Ministerial Conference, such as the ones in Seattle (1999) and Cancún (2003). Criticism of the WTO is aimed at both the political (the way agreements are being reached) and the judicial (the dispute settlement system) branch of the WTO. This short case-study may point to the different aspects of democratic participation (horizontal and vertical) within a powerful international organization.

It is first important to note that being a democratic state is not a condition for WTO membership. Article XII (1) of the Marrakech Agreement only states: 'Any state or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO'.²¹⁴ It has been suggested that requiring a minimal level of democratic practice from WTO Members could possibly help to further democratize the WTO.²¹⁵ This would, however, be problematic if applied to a number of current Members. It also remains a question whether a WTO Member should be sanctioned when it violates democratic standards. The ambivalent reaction of EU Member States to the participation of a far-right party to a coalition government in Austria in the beginning of 2000 (*supra* Section 5.3) shows how difficult this can be.²¹⁶

213. D. Luff, *Le droit de l'Organisation Mondiale du Commerce. Analyse critique* (Brussels, Bruylant 2004) pp. 6-7. See also J.E. Alvarez and D.W. Leebron, 'Symposium: The Boundaries of the WTO: Linkages', 96 *AJIL* (2002) pp. 5-27.

214. Art. XII(1) Marrakech Agreement Establishing the World Trade Organization, Marrakech, 15 April 1994.

215. G. Fox, 'Strengthening the State', 7 *Indiana Journal of Global Legal Studies* (1999) p. 63.

216. J. Atik, 'Democratizing the WTO', 33 *George Washington ILR* (2001) at p. 466.

One criticism aimed at the WTO's political branch, is that it is an institution that only represents wealthy countries' interests, and one in which poorer countries have very little influence. *Horizontal* democratic participation (see *supra* Section 7.1) cannot be achieved since only a few countries dominate the political branch. In principle, decisions are reached within the WTO when every Member agrees to the new agreement. Normally, the decision-making process works by consensus. This supposes that there will never be a vote on an agreement: it will be adopted if no Member opposes. Only when a consensus cannot be reached, will there be a vote. An agreement will, in that case, be accepted when a simple majority has been reached.²¹⁷ Every Member has one single vote, a decision-making rule which, in principle, should guarantee the equality of all Members. Yet, as consensus should be reached, every Member government can potentially veto decisions with which it does not agree²¹⁸ and will have to be persuaded to accept the proposed agreement.

This immediately suggests that the GATT/WTO negotiation rounds are extremely sensitive to power-talk and intimidation. According to Jeffery Atik, the relevant power not only includes economic power (e.g., the size of a country's market), but also power in other spheres. Through *intra*-WTO linkages (i.e., the linkages in the 'package' of negotiations such as e.g., trading market access for textiles in exchange for pharmaceutical patent recognition) and more subtle exertions of influence, bargains are structured.²¹⁹ 'The display of power within the WTO rounds, the chief side for WTO law-making, has little to do with democracy.'²²⁰

Display of power within the WTO can take different shapes. Often an agreement, between the four most important industrialized nations (the 'quad': US, EU, Canada and Japan²²¹) (frequently negotiated in so-called 'green rooms' in the WTO in Geneva) is necessary before the WTO can proceed on certain is-

217. There are, however, a few exceptions (Arts. IX(2); IX(3); X; XII(2) of the Marrakesh Agreement on the Establishment of the WTO). In practice, voting never occurs. See <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org1_e.htm>; <<http://www.twinside.org.sg/title/bgl3-cn.htm>>. Proposals to reduce the consensus rule in the WTO are circulating, because such a rule *de facto* protects the interests of industrialised countries from a possible alliance of developing countries. See for example the recommendations of the Belgian parliamentary working group on globalization (*Document parlementaires*, Chamber of Representatives, 2002-2003, DOC 50 2330/003, paras. 3.1.1.4.-3.1.1.5).

218. WTO, *WTO Policy Issues for Parliamentarians* (Geneva, WTO Publications 2001) p. 14.

219. Atik, loc. cit. n. 216, at p. 469.

220. Ibid.

221. The 'quad' (abbreviation for 'quadrilaterals') were originally trade policy talks between the US, EC, Japan and Canada. The term is now also applied to the four acting together. See W. Goode, *Dictionary of Trade Policy Terms* (Cambridge, Cambridge University Press 2003) at p. 287.

sues.²²² These large, industrialized nations then try to find support for their proposals with smaller nations.

In the run-up to the most recent Ministerial Conference in Cancún, the US and EU, realizing that striking an agreement on agriculture would be one of the main issues, agreed on a common position in order to preserve their interests.²²³ Moreover, the richer the country, the more resources it has to defend and support its proposals and positions. Often, developing countries do not have enough civil servants to attend all WTO meetings, let alone to prepare them sufficiently.²²⁴ Since, in the case of decision-making by consensus, a decision is agreed upon as soon as no Member present in the meeting opposes, this does not guarantee the rights of the Members that are absent.²²⁵ The fact that there are no objections by Members present, does not necessarily mean that a majority of countries agree.

These examples make clear that, even when there seem to be strong formal guarantees for equality among nations, in practice this might turn out differently. Therefore, some proposals have been formulated to reduce the consensus requirement in WTO decision-making and shift to majority voting. Surely, *de facto*, the consensus rule primarily protects the interests of the *developed* countries against a possible alliance of *developing* countries. 'The thinly veiled scare here is that the United States would be regularly outvoted on important matters, much as the United States is routinely disappointed by the resolutions of the United Nations General Assembly.'²²⁶ However, it might seem that this imbalance of powers between richer and poorer countries within the WTO is slowly changing.

222. An example of the importance of the Quad could be seen in the Tokyo Tariff negotiations. Disagreements among the major trading countries on these aspects were one of the reasons why the conclusion of the Tokyo Round was delayed. Industrial tariff negotiations resumed only after the Quad reached an agreement on these issues at Tokyo in July 1993. See A. Hoda, *Tariff Negotiations and Renegotiations under the GATT and the WTO. Procedures and Practices* (Cambridge, Cambridge University Press 2001) at p. 37.

223. Joint initiative by EU and US presented to the trade partners in Geneva (WTO) with a view to advancing the negotiations in the Doha Round towards a successful conclusion in Cancún as requested by our trading partners, 13 August 2003, The proposal is available on <http://europa.eu.int/comm/agriculture/external/wto/document/mod_en.pdf>. The agreement proposed to 'decouple' the amount of subsidy that farmers receive from the amount they produce. Hence these subsidies are moved from the so-called 'blue box' (subsidies that distort trade, but are allowed under certain conditions, like limiting of production) to the 'green box' (subsidies which are not prohibited because they provide no or only minimal trade-distortion).

224. P. Sutherland and J. Sewell, 'Challenges facing the WTO and policies to address global governance', in G.P. Sampson, ed., *The Role of the World Trade Organization in Global Governance* (Tokyo, United Nations University Press 2001) at p. 88.

225. B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System. The WTO and Beyond* (Oxford, Oxford University Press 2001) at p. 57.

226. Atik, loc. cit. n. 216, at p. 469.

Efforts to remedy developing countries' lack of resources have been undertaken. WTO technical co-operation has been set up to help developing countries (and countries in transition from centrally planned economies) operate successfully in the multilateral trading system.²²⁷ In addition, politically, it seems that changes are occurring though they fluctuate and are not necessarily permanent. The most recent and most striking illustration of this is the failed Ministerial Conference in Cancún. A coalition of developing countries, coordinated by Brazil, refused to accept the proposals on the table. It is clear that if developing countries can combine their interests, they can effectively form a counterbalance to the powers of the richer countries. It must be said, however, that this coalition²²⁸ seems to be slowly falling apart.²²⁹

Criticism is also often aimed at the lack of *vertical* democratic participation in the WTO. Citizens in the states that are Members of the WTO have the feeling that by agreeing – through their parliaments – to become Members of the WTO, they have given away some autonomous policy-making. While this is not uncommon in international relations (agreeing to a treaty necessarily means that a country is no longer pursuing certain policy objectives in a unilateral manner, but is taking into account the interests of other parties to the treaty), in the case of the WTO, the transfer of domestic powers is particularly sensitive. The matters that the WTO deals with appear to most people as highly abstract. Nevertheless, decisions made within the WTO have clear and tangible effects on people's lives. Citizens feel that decisions are being made in which the subjects themselves have no more sufficient democratic impact through their representatives in parliament. Therefore, there is an increasingly widespread perception that the WTO

227. The objective is to help build the necessary institutions and to train officials. Two WTO committees deal specifically with trade and development: the Committee on Trade and Development and the Sub-Committee on Least-Developed Countries. On the occasion of the third Ministerial Conference in Seattle on 1 December 1999, the Agreement establishing the Advisory Centre on WTO Law ('ACWL') was signed by a number of WTO Members. It entered into force on 15 July 2001 and has currently thirty-two signatories. The Centre provides legal counselling on WTO law matters to developing-country and economy-in-transition Members of the Centre and all least developed countries free of charge. It also provides legal support throughout dispute settlement proceedings in the WTO at discounted rates for its Members and least developed countries. See Agreement establishing the Advisory Centre on WTO Law, done at Seattle on 30 November 1999, available at <<http://www.acwl.ch>>.

228. This coalition is called the G20+, with reference to its origin: the G20.

229. The coalition would be comprised of Argentina, Bolivia, Brazil, Chile, China, Cuba, Egypt, India, Indonesia, Mexico, Nigeria, Pakistan, Paraguay, the Philippines, South Africa, Thailand and Venezuela. Costa Rica, Colombia, Ecuador, Guatemala and Peru already left the group. Some of the South-American countries decided to pull out in order not to threaten future bilateral deals with the US. See M. Valente, A strategy meeting for G20+, IPS 9 October 2003.

lacks adequate democratic legitimacy. The WTO may have a ‘*democratic deficit*’, much in the same way as is debated in case of the European Union.²³⁰

It has been said that the existence of a democratic deficit within the WTO should not be feared. The agreements that are reached are monitored and approved by Member State national parliaments. It is said that the WTO is ‘owned by Governments. In the end Governments are sustained by the people, by the people [parliamentarians] represent [...]’.²³¹ Diplomats who negotiate the agreements are responsible to a democratically elected minister. However, as it is explained above (*supra* Section 7.1), this formal legitimacy is mostly insufficient to guarantee effective democratic participation by the people in decision-making that directly affects them. The fact that national parliaments have the power to approve or reject an agreement that is the outcome of WTO negotiations is not an appropriate and effective safeguard.²³²

According to Robert Howse, the *ex post* legislature control is defunct. Indeed, this control has limited effectiveness.²³³ As explained above, parliaments do not have the option to amend the agreement resulting from WTO negotiations. Since negotiation is done through ‘packages’,²³⁴ the rejection of the package because of one contentious issue will immediately mean a rejection of all other components that might be very advantageous for the country. This undoubtedly puts pressure on the parliaments to approve. Since the negotiating agents have considerable agenda-setting ability, they are able to combine components in such a way that the parliament has no other choice than to approve the package. The fear of forgoing the advantageous aspects induces parliament to approve. While this certainly helps to achieve agreements with something advantageous for everyone and to reach a compromise on contentious issues, the impression remains that it also allows negotiation agents to manipulate the approval by parliament.

Moreover, the issues included in the packages increasingly affect more areas than negotiators and parliamentarians ever dreamed of when drafting and approving the initial WTO agreements. Hence, there is a ‘fear that when states have

230. See R. Howse, ‘How to Begin to Think About the “Democratic Deficit” at the WTO’, Draft paper (2002) available at <http://faculty.law.umich.edu/rhowse/Drafts_and_Publications/howse7.pdf>.

231. Mike Moore, After Seattle – The WTO and Developing Countries, Formal Evidence to the International Development Committee of the House of Commons and Remarks to the All Party Parliamentary Group on Overseas Development of the House of Commons, 7 March 2000, available at <http://www.wto.org/english/news_e/spmm_e/spmm26_e.htm>.

232. E.-U., Petersmann, ‘European and International Constitutional Law: Time for Promoting “Cosmopolitan Democracy” in the WTO’ in G. de Burca and J. Scott, eds., *The EU and the WTO: Legal and Constitutional Issues* (Oxford, Oxford University Press 2001) at p. 98.

233. See Howse, loc. cit. n. 230, at p. 8.

234. See WTO, *Understanding the WTO*, 3rd edn., (Geneva, WTO Publications 2003) at p. 18, available on <http://www.wto.org/english/thewto_e/whatis_e/tif_e/understanding_e.pdf>.

consented to delegate some of their sovereign power to the WTO to act in the domain of international trade, the consent has, in fact, spilled over to a far wider range of social concerns, such as health and safety issues.²³⁵ Steadily, the WTO has been shifting away from the GATT model of negative regulation (i.e., what governments must not do), to positive regulation (i.e., what governments must do).²³⁶ Since this shift in rule-making and the linkages with new areas outside trade are both complex and contentious, an ongoing policy dialogue with all actors will be essential. The WTO's current institutions seem not well-equipped for this broader task.

Some proposals to enhance parliamentary control of the WTO have been made. In its resolution on the preparation of the Seattle conference, the European Parliament referred to the need for a permanent body to provide for parliamentary scrutiny.²³⁷ The idea of a 'consultative parliamentary assembly at the WTO' was advanced by Pascal Lamy, the EU Commissioner for Trade.²³⁸ Moreover, former Director-General of the WTO Mike Moore admits that parliamentarians have an essential role to play with regard to the ratification of the results of negotiations concluded in the WTO.²³⁹ Such a parliamentary assembly was allegedly created at Seattle but was never composed. Nevertheless, there have been a number of Parliamentary Conferences on the WTO, as a joint undertaking of the Inter-Parliamentary Union and the European Parliament. The first ever global parliamentary meeting on international trade was organized by the Inter-Parliamentary Union and took place in the Geneva International Conference Centre (CICG) on 8 and 9 June 2001.²⁴⁰

There have been organized parliamentary meetings parallel to the Ministerial Conferences in Doha (11 November 2001²⁴¹) and in Cancún (9 and 12 Septem-

235. See P. M. Gerhart, 'The Two Constitutional Visions of the World Trade Organization', 24 *Univ. Pennsylvania JIEL* (2003) at p. 8.

236. See S. Ostry, 'The World Trading System: In Dire Need of Reform', 24 *Temple International and Comparative Law Journal* (2003) at p. 110.

237. European Parliament Resolution on the communication from the Commission to the Council and the European Parliament on the EU approach to the WTO Millennium Round, COM(1999) 331 B C5-0155/1999 B 1999/2149(COS), 18 November 1999, *OJ C* 189, 7 July 2000, p. 213, para. 74; European Parliament Resolution on the Third Ministerial Conference of the World Trade Organization in Seattle, 15 December 1999, *OJ C* 296, 18 October 2000, p. 121.

238. P. Lamy, 'What are the Options After Seattle?', Speech to European Parliament, 25 January 2000, <http://europa.eu.int/comm/commissioners/lamy/speeches_articles/spla09_en.htm>.

239. See 'The WTO: The Role of Parliamentarians', *Public Symposium: The Doha Development Agenda and Beyond, Summary Report*, 6 May 2002, <http://www.revistainternationalforum.com/english/articles/050602artprin_en3.html>.

240. See Final Declaration of the Parliamentary Meeting on International Trade, Geneva, 8-9 June 2001, available at <<http://www.ipu.org/splz-e/trade01dclr.htm>>.

241. See Parliamentary Meeting on the Occasion of the fourth WTO Ministerial Conference in Doha, <<http://www.ipu.org/splz-e/doha.htm>>.

ber 2003²⁴²). While the WTO seems to recognize the importance of these meetings and encourages them, they still happen *outside* its institutional framework.²⁴³ There was no reference to a consultative parliamentary assembly in the Ministerial Declaration at Doha²⁴⁴ or in the Concluding Ministerial Declaration of Cancún.²⁴⁵ In its resolution on the ministerial conference of Cancún the European Parliament called for 'enhanced democratic accountability and openness of the WTO and for the creation of a WTO Parliamentary Assembly'.²⁴⁶ Looking at the difficult experiences the EU has been (and still is) facing when making the parliamentary assembly a real co-legislator²⁴⁷, one can wonder whether a *legislative* WTO Parliamentary Assembly can ever be expected.

Another reason why the present parliamentary control on WTO decisions is not effective, according to Howse, is the information asymmetry between the agents who negotiate and the parliamentarians who have to approve or reject the outcomes of the negotiations. 'Since negotiating agents tend to be invested in the outcomes that they have negotiated, they face strong incentives to exaggerate the benefits, and minimize the costs, or negative consequences of the deal.'²⁴⁸ However, one should not just blame the agents for providing incorrect or insufficient information. At present, a large number of GATT and WTO documents are issued as 'restricted' documents. Such documents are generally issued by the Secretariat only to representatives of WTO Member governments, representatives of those governments, and international organizations with observer status at the WTO. About 30% of all WTO documents circulate as restricted in order not to harm negotiating positions. Obviously, document restriction hampers transparency and public information. Therefore, in May 2002 the General Council of the WTO agreed to far-reaching document de-restriction.²⁴⁹ All official WTO docu-

242. See Cancun Session of the Parliamentary Conference on the WTO, <<http://www.ipu.org/splz-e/cancun.htm#post-doha>>.

243. M. Moore, After Seattle – The WTO and Developing Countries, Formal Evidence to the International Development Committee of the House of Commons and Remarks to the All Party Parliamentary Group on Overseas Development of the House of Commons, 7 March 2000, available at <http://www.wto.org/english/news_e/spmm_e/spmm26_e.htm>.

244. WT/MIN(01)/DEC/1, 14 November 2001, Available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

245. WT/MIN(03)/20, 14 September 2003, Available at <http://www.wto.org/english/thewto_e/minist_e/min03_e/min03_14sept_e.htm#statement>.

246. European Parliament Resolution on the Fifth Ministerial Conference of the WTO in Cancún, 25 September 2003, B5-0399(2003), para. 20, available at <http://europa.eu.int/comm/trade/issues/newround/doha_da/epr250903_en.htm>.

247. See C. Neuhold, 'Into the New Millennium: The Evolution of the European Parliament from Consultative Assembly to Co-Legislator', *Eipascope* (2000-1) at p. 3, also available at <http://www.eipa.nl/Eipascope/00/2000-1/2000_1.pdf>.

248. Howse, loc. cit. n. 230, at p. 9.

249. 'The new de-restriction procedures represent a compromise between developed country Members such as the US, the EC and Canada, on the one hand, and some developing countries, in-

ments that are not restricted shall be made available from now on via the WTO website once they are translated into all three official WTO languages (English, French and Spanish).²⁵⁰

It is not only the lack of parliamentary involvement within the WTO that is being criticized. There is also a widespread call for NGO involvement in the WTO. According to Daniel Esty 'NGOs offer the promise of serving as a 'connective tissue' that will help to bridge the gap between WTO decision-makers and the distant constituencies which they are meant to serve, thereby ensuring that the WTO's actions are perceived as responsive and fair.'²⁵¹ They can indeed make the WTO aware of the concerns of the very subjects of its decisions and help to fine-tune policies. As WTO competence touches increasingly more on issues where the WTO lacks expertise, the input by experts from the field may prove very useful. Moreover, input by civil society may add 'fairness' to WTO decisions. Possibly affected parties will be able to express their views and will ensure that rules and principles are applied even-handedly over time and issues.²⁵²

It is also said that governments often only represent the position of the majority of a certain country. NGOs may collect minority views in separate countries and hence show that these views in fact enjoy a plurality of support at a global level and therefore represent voices that would otherwise not be heard.

Finally NGOs may be an additional source of ideas for policy-making and provide a fruitful intellectual competition to the governments in the WTO.²⁵³ However, it is often warned that these NGOs may be representing narrow interests, backed by money from unveiled sources. Nevertheless, the fact cannot be

cluding India and Malaysia, on the other. Industrialised countries had been pushing for automatic de-restriction of all documents, and one developed country source said that the EC was "less than enthusiastic" with the final decision, as it had been significantly watered down from previous proposals. These Members tend to post their own submitted documents on publicly- accessible government websites. Some developing countries were less comfortable with releasing documents related to negotiating processes, saying they preferred to maintain the right to give their capitals time to review papers before circulation.' See at <<http://www.ictsd.org/we-ekly/02-05-15/story1.htm>>.

250. See WTO document WT/GC/W/464/Rev.1. Where a delegation specifically requests that a document produced by the Secretariat be restricting, the waiting time for de-restriction has been reduced from eight months to 6-8 weeks. Under the new provisions, documents produced by the Secretariat can be restricted by the issuing body and will be de-restricted 60 days after the date of circulation. Members retain the right to restrict their own submitted documents, though they must renew their restriction requests monthly after an initial period of 60 days or until first consideration by the relevant body.

251. See D.C. Esty, 'Non-Governmental Organizations at the World Trade Organization: Cooperation, Competition or Exclusion', 1 *Journal of International Economic Law* (1998) at pp. 125-126, available at <http://www3.oup.co.uk/jielaw/hdb/Volume_01/Issue_01/pdf/010123.pdf>.

252. *Ibid.*, at p. 127.

253. *Ibid.*, at p. 136.

ignored that already, 'international trade policy is more subject to capture by special interest groups than is ordinary lawmaking'.²⁵⁴ Special business interests influence – through governments – the decisions within the WTO. Adding NGO perspectives may offset or counterbalance these interests. Indeed, how accountable and representative NGOs are may be problematic.

But as time goes on, officials will be able to distinguish and classify NGOs and the WTO has realized this. The Marrakech Agreement called upon the General Council to 'make appropriate arrangements for consultation and cooperation with non-governmental organizations concerned with matters related to those of the WTO'.²⁵⁵ In accordance with this mandate, the Secretariat was given the task by the General Council in the '1996 Guidelines For Arrangements on Relations' With Non-Governmental Organizations of playing a more active role in its direct contacts with NGOs. '[...] [T]his interaction [...] should be developed through various means such as inter alia the organization on an ad hoc basis of symposia on specific WTO-related issues, informal arrangements to receive the information NGOs may wish to make available for consultation by interested delegations and the continuation of past practice of responding to requests for general information and briefings about the WTO.'²⁵⁶

In pursuit of the objectives set out in the 1996 Guidelines, the Secretariat has been giving consideration to activities that might be carried out with NGOs. The basic objective of this programme of activities is to facilitate and encourage substantive and responsible discussion with NGOs on issues falling within the WTO's mandate.²⁵⁷ The Secretariat has allowed the NGOs to participate in technical seminars and has organized stand-alone workshops. Large numbers of NGOs also try to attend WTO ministerial conferences.²⁵⁸

Also, the judicial branch of the WTO has come under fierce criticism.²⁵⁹ At present, to a large extent, dispute settlement by Panels and the Appellate Body is

254. See R.E. Hudec, "'Circumventing" Democracy: The Political Morality of Trade Negotiations', 25 *NY Univ. JIL & Pol.* (1993) at p. 312, cited in Atik, loc. cit. n. 216, at p. 459.

255. Art. V(2) of the Marrakech Agreement Establishing the World Trade Organization, Marrakech, 15 April 1994.

256. Guidelines for Arrangements on Relations With Non-Governmental Organizations adopted on 18 July 1996, para. 4 (WT/L/162, 23 July 1996).

257. Seeat <http://www.wto.org/english/thewto_e/minist_e/min01_e/min01_ngo_activ_e.htm>.

258. On the first conference in Singapore in 1996, only a modest 108 NGOs attended the conference. On the contrary in 2003, the request for accreditation for the Cancún conference was so large that the WTO decided to seriously limit access of NGOs. NGOs could send by mail a request for registration indicating how they are concerned with matters related to those in the WTO. Selected NGOs could register three representatives. Of these three, only one was allowed at the convention centre at a given time. Finally, 795 NGOs participated in the conference. See WTO, *Annual Report 2004* (Geneva, WTO Publications 2004) p. 76, available on <http://www.wto.org/english/res_e/booksp_e/anrep_e/anrep04_e.pdf>.

259. For a recent discussion, see D. McRae, 'What is the Future of WTO Dispute Settlement?', 7 *Journal of International Economic Law* (2004) pp. 3-21.

the main source of WTO law-making.²⁶⁰ This is often due to both unclear treaty-drafting and the present impasse in the political branch of the WTO. This raises serious questions: '[A] structure in which courts compensate for the lack of legislative decision-making and actively react to the deficiencies of a political process [is] particularly questionable.'²⁶¹ There is indeed a genuine danger that 'Members overburden, and thus undermine, the dispute settlement system as a result of their inability to agree on (clearer) rules governing politically sensitive issues concerning international trade.'²⁶²

The broad and active role of the Dispute Settlement System is equally causing problems of transparency and accountability. The dispute settlement organs of the WTO had to decide in recent years on politically sensible issues like environmental protection, public health and development policy, where they often lack expertise. The fierce reactions to decisions like *US-Shrimp*²⁶³ and *EC-Hormones*²⁶⁴ show the unease of many people with the current inaccessible dispute settlement system. Therefore, proposals have been made by the United States to open up the dispute settlement process for civil society and members not party to a dispute but with a legitimate interest in the case.²⁶⁵ Moreover, the African Group submitted its own communication in September 2002.²⁶⁶ The Group did not focus on transparency issues, but denounced the structural impediments for dispute settlement access for developing countries. As far as transparency is concerned, it confined itself to demanding technical and financial assistance for *amicus curiae* briefs. It rejected opening up the DSM to the public at this point in time.²⁶⁷ India also filed a communication aimed at explicitly prohibiting panels

260. See P.B. Stephan, 'The New International Law: Legitimacy, Accountability, Authority and Freedom in the New Global Order', 70 *Univ. Colorado LR* (1999) at pp. 1559-1560.

261. See C. Mollers, 'Steps to a Tripartite Theory of Multi-level-Government', *Jean Monnet Working Paper 5/03*, New York University School of Law (2003) p. 45.

262. See P. Van Den Bossche, 'The Doha Development Round Negotiations on the Dispute Settlement Understanding', *Working Paper Nr. 47*, Institute for International Law, Katholieke Universiteit Leuven, November 2003, 21, available at <<http://www.law.kuleuven.ac.be/iir/nl/wp/WP47e.pdf>>.

263. Appellate Body report on United States – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, 12 October 1998.

264. Appellate Body report on European Communities – Measures concerning meat and meat products (Hormones), WT/DS26/AB/R & WT/DS48/AB/R, 13 February 1998.

265. Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, 9 August 2000, TN/DS/W/13, available at <<http://www.ustr.gov/enforcement/2002-08-09-transparency.pdf>>. See also <<http://www.ustr.gov/releases/2002/08/02-82.htm>>.

266. Negotiations on the Dispute Settlement Understanding, Proposal by the African Group, 9 September 2002, TN/DS/W/15, available at <<http://www.law.georgetown.edu/iel/research/projects/dsureview/documents/W15.doc>>.

267. *Ibid.*, para. 12.

and the Appellate Body to accept and consider unsolicited information and advice.²⁶⁸

Moreover, the Appellate Body itself made a move towards more openness and accepted the right of panels and the Appellate Body to accept *amicus curiae* briefs filed by non-parties in its *US-Shrimp*²⁶⁹, *US-Steel*²⁷⁰ and *EC-Asbestos*²⁷¹ decisions. These decisions faced fierce objections by the majority of Members.²⁷² Mostly developing countries feared that well-equipped organizations from industrial countries would unduly interfere in the dispute settlement process, thereby sidelining the parties themselves.

Costa Rica noted that 'such a measure represented a risk for developing countries as it would put them in a situation where they would be sort of possibilities of defence'.²⁷³ Other objections include the possibility of trials by media and the risk of making the proceedings more burdensome. Nevertheless, the Panels and Appellate Body do not seem to be accepting large numbers of briefs because the briefs rarely meet the procedural requirements the Panels or Appellate Body set.

Surely, the Appellate Body in *EC-Asbestos* did *not* rule that there is a *duty to accept and comment on the briefs*.²⁷⁴ The Panels and the Appellate Body can easily reject them and do so often with vague reasons.²⁷⁵ While it is undeniable that *amicus curiae* briefs can help the Dispute Settlement Bodies produce a well-

268. Proposal on DSU by India et. al., 7 October 2002, TN/DS/W/18, 2.

269. Appellate Body report on United States – Import prohibition of certain shrimp and shrimp products, WT/DS58/AB/R, 12 October 1998.

270. Appellate Body Report on United States – Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom, WTO Doc. WT/DS138/AB/R, 10 May 2000.

271. Appellate Body report on European Communities – Measures affecting asbestos and products containing asbestos WT/DS135AB//R, 12 March 2001. Document inviting briefs: WT/DS135/9, 8 November 2000.

272. Some WTO members had serious concerns about the initiative of the Appellate Body and requested an extraordinary meeting of the WTO General Council. This meeting took place on 22 November 2000. However, the United States 'believed that the Appellate Body had acted appropriately' (Minutes of the Meeting of the General Council on 22 November 2000, WT/GC/M/60, 23 January 2001, para. 74), whereas the EC stated that there was a need for rule-making on this issue, and that 'if the legislative fell short in legislating, the judiciary arm had the tendency to fill the gap' (Minutes of the Meeting, para. 96).

273. Minutes of the Meeting, para. 70.

274. For a critical analysis see P. Mavroidis, '*Amicus Curiae* Briefs Before the WTO: Much Ado About Nothing', *Jean Monnet Working Paper 2/01*, New York University School of Law, 2001, available at <<http://www.jeanmonnetprogram.org/papers/01/010201.html>>. See also P. Ala'I, 'Judicial Lobbying at the WTO: the debate over the Use of Amicus Curiae Briefs and the US Experience', 24 *Fordham ILJ* (2000) pp. 62-94 and A. Antoniadis, 'Enhanced Third Party Rights in the WTO Dispute Settlement Understanding', 29 *Legal Issues of Economic Integration* (2002) pp. 285-304.

275. Mavroidis, loc. cit. n. 274, at pp. 10 and 12.

elaborated upon decision, taking into account all interests, it should not be ignored that the NGOs and other interested parties that submit the briefs may represent only a narrow interest.²⁷⁶ This common argument has already been qualified above.²⁷⁷

There is an undeniable need for clearly elaborated criteria for *amicus curiae* brief-filing. These criteria can provide a certain filter for briefs being allowed. On the other hand, one should be aware that these criteria are not being used arbitrarily to restrict access. Indeed the statements by the EC that there is a need for rule-making on this issue and that ‘if the legislative fell short in legislating, the judiciary arm [has] the tendency to fill the gap’²⁷⁸ point to this danger. Unfortunately, none of the proposals regulating the filing of *amicus curiae* briefs²⁷⁹ and none of the proposals to allow panel meetings and Appellate Body hearings to be open to the public²⁸⁰ have been retained in the ‘Chairman’s Text’ on the current Dispute Settlement Understanding Negotiations.²⁸¹ This ‘Chairman’s Text’ is the basis for further amendments to the Dispute Settlement Understanding.

While structures of participation and transparency might be able to enhance formal legitimacy, this does not necessarily mean that citizens will accept the system’s legitimacy. According to Joseph Weiler, “[s]ocial legitimacy” [...] connotes a broad, empirically determined, societal acceptance of the system. [...] An institution, system, or polity, in most, but not all, cases, must enjoy formal legitimacy to enjoy social legitimacy. [...] But a system that enjoys formal legitimacy may not necessarily enjoy social legitimacy.’²⁸² The institutional structure should be ‘such that even critics who disagree with the way the authority is exercised nonetheless accept the right of the institution to exercise its authority.’²⁸³ This is one of the most important challenges for the WTO. It should make it credible

276. According to Mavroidis, ‘many friends of the court are rather friends of themselves. They do not care about systemic issues, they do not care for the truth. They want to sell a message.’ Ibid., p. 12.

277. *Supra*.

278. Minutes of the Meeting of the General Council on 22 November 2000, WTO Doc. WT/GC/M/60, 23 January 2001, para. 96.

279. See Contribution of the European Communities and its Member states to Improvement of the WTO Dispute Settlement, 13 March 2002, TN/DS/W/1, 7. See the remarks on the EC’s proposal by India: Proposals Relative to the Improvement of the Dispute Settlement Understanding – Communication from India, 29 April 2002, TN/DS/W/5.

280. See Contribution of the United States to the Improvement of the Dispute Settlement Understanding of the WTO Related to Transparency, 9 August 2000, TN/DS/W/13.

281. Special Session of the Dispute Settlement Body, Report by the Chairman, 6 June 2003, TN/DS/9; the text itself can be found as Job (03)/91.

282. J. J. Weiler, *The Constitution of Europe* (Cambridge, Cambridge University Press 1999) at pp. 80-81.

283. See Gerhart, loc. cit. n. 235, at p. 6.

that its decisions are not solely advancing the interests of a few countries.²⁸⁴ This becomes apparent when it is clear that the total welfare of all the citizens increases. Therefore it is important for the WTO to proceed on the Doha Development Agenda. In the Doha Ministerial Declaration, the Members vowed to 'seek to place [the] needs and interests [of the developing countries] at the heart of the Work Programme adopted in this Declaration.'²⁸⁵

Citizens will only accept the legitimacy of the WTO if they realize they that they not only have access to and understand what is being decided in the organization, but also if they see evidence that the organization is ultimately promoting the welfare of everyone. A World Trade Organization that fails to deliver on the needs of the largest part of its Members, will never achieve such social legitimacy. The Members united in the WTO should prove that their promises are not hollow. If total welfare of the Members' population is indeed improved as a result of joining the WTO, the WTO will enjoy social legitimacy, even if some decisions do not seem to be in the immediate interest of a certain part of the world's population.²⁸⁶ It also supposes that the institution has democratic structures (and this brings us back to formal legitimacy) that clearly inform people.

There is also a need for capacity-building for poorer countries so as to make them able to represent their citizens adequately within the WTO. NGOs may be a means for the WTO to communicate with people at the grassroots level. If people understand the system, they are less likely to react negatively to it. Citizens should be enabled to accept and understand that decisions made at the global (WTO) level are in the interest of all, even if they seem at first sight an infringement of their national sovereignty.²⁸⁷ Such a process takes time and efforts by all actors; the WTO, governments, parliaments and civil society.

284. Esty talks about the 'WTO's need for "connectedness" to people around the world'. See Esty, loc. cit. n. 251, at p. 131.

285. WT/MIN(01)/DEC/1, 14 November 2001, para. 2, Available at <http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm>.

286. E.g., the abolition of farming subsidies or the complete opening of the service sector.

287. Gerhart recognises a 'democratic paradox of globalization'. According to him there is an undeniable need to move decision-making authority to higher levels. 'In an interconnected world, the democratic deficit that occurs when decision-making is moved further from the people is offset by a democratic deficit that would occur if we fail to move decision-making authority to higher levels. On the first side of the paradox, we have the problem of making democratic participation harder by removing it, for example from Washington to Geneva; the second side of the democratic paradox recognises that when the policy made in one nation adversely affects people in other nations, those adversely affected people need to have some meaningful way to participate in shaping policy.' Gerhart, loc. cit. n. 235, at pp. 9-10.

8. CONCLUSION

Only recently, the international community has realized, in the words of Thomas Franck, that 'the natural right of all people to liberty and democracy is too precious and too vulnerable to be entrusted entirely to those who govern'.²⁸⁸ States and international organizations have boosted their assistance to other states aimed at strengthening the latter's democratic tissue. To that end, they use a variety of sticks and carrots. International organizations such as the UN, the OSCE, the Council of Europe and the OAS, or even private organizations,²⁸⁹ assist states at their request to monitor elections. To help perform this monitoring, election standards have been drafted. States are sometimes required to push through democratic reforms so as to obtain membership of international organizations, NATO and the EU for instance, or to be entitled to financial support by these organizations.

The use of sticks is limited in international practice. At most, new undemocratic states or regimes fail to obtain recognition. For existing undemocratic states, the international community usually reserves a carrot approach. Attempts at upgrading democracy as hard law, which could even be militarily enforced by the Security Council or states *ut singuli*, are not only at loggerheads with principles of international law, chiefly sovereignty and non-intervention, but as well with the difficulty of *imposing* democracy. A flourishing democracy needs a bottom-up approach, an insight that is, once again, confirmed by the American-British occupation of Iraq.²⁹⁰ In view of the Iraq debacle, powerful states will think twice when contemplating interventions exclusively based on pro-democratic arguments. However, there is room for pro-democratic intervention by invitation under international law, although the requirement of consent, even anticipatory, by a government held to be representative will not always be easy to meet.

Although democracy is increasingly preached in international relations, its status under international law remains uncertain. On the basis of the sovereignty principle, states continue to oppose certain interpretations of democracy. These rear guard actions, however, cannot conceal that the basic premise of democracy, the right to elections, is, despite or perhaps thanks to its vagueness, generally accepted and has attained the status of customary international law.²⁹¹ This view

288. See Franck, in Fox and Roth, loc. cit. n. 42, at p. 45.

289. E.g., the Carter Center for Democracy: <http://www.centerfordemocracy.org/elect_monitor.html>.

290. See for some grassroots organizations promoting democracy in Iraq: <<http://www.iraqfoundation.org>>, <<http://www.iraqifd.org>>, <<http://www.defenddemocracy.org>>, <<http://www.iraq-democracy.org>>.

291. Cf., Ben Achour, loc. cit. n. 25, at p. 917; Wheatley, loc. cit. n. 89, at pp. 236-239; Fox, loc. cit. n. 18, at pp. 98-99. See also Fukuyama's definition of democracy: 'A country is democratic

might be reinforced by the recent entry into force (May 2004) of the African Union's Protocol on the Peace and Security Council. It is heartening to see that a continent that was not particularly known for its democratic tenets now embraces the promotion and encouragement of democracy as one of its primary objectives and, importantly, is willing to impose sanctions in case the constitutional order of a Member State is overthrown.

Nevertheless, it would be a mistake to believe that the battle for democracy is over. Electoral democracy is still used improperly to legitimize authoritarian regimes. Referenda are staged in which voters can only vote in favour of or against one person, members of political parties are harassed and elections are systematically rigged. Therefore, the idea that a genuine democracy can only prosper when it is embedded in the rule of law providing sufficient legal protection gains ground. Nation-building projects in areas such as Bosnia, Kosovo, East Timor, Afghanistan and Iraq indeed focus on stabilizing and strengthening state institutions under auspices of the international community. These efforts are to culminate in free and fair elections, paving the way for an effective and lasting democracy.²⁹²

An account of democracy cannot be complete without a focus on international democracy. Aside from the emergence of national democracy, recent history has shown an exponential increase in international organizations. These organizations are, unlike most states, young and represent a wholly new form of governance and co-operation for mankind. From a democratic perspective, criticism of their functioning is evident. Yet the hope persists that, eventually, they too will draw their legitimacy from democratic representation. This transformation will be necessary, because achieving national democracy may turn out to be empty when all essential powers are transferred to the international level. Moreover, national policy-making is being influenced and curbed by commitments on higher levels (such as the WTO), even if, in principle, states maintain their whole sovereignty. Our case study on the World Trade Organization tried to indicate that if decision-making becomes multi-level, democracy also has to climb to all levels.

if it grants its people the right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage.' (Fukuyama, *op. cit.* n. 2, at p. 48) and Franck's definition of democracy: '[O]pen multiparty, secret-ballot elections with a universal franchise.' (Franck, *loc. cit.* n. 3, at p. 47).

292. See also S.H. Barnes, 'The Contribution of Democracy to Rebuilding Post-conflict Societies', 95 *AJIL* (2001) pp. 86-101.

ABSTRACT

Traditionally, international law has barely paid attention to the democratic legitimacy of its most important subjects – States –, having been concerned only with relations between states and not within them. The neutral position of international law vis-à-vis a state's internal form of government changed after the collapse of communism. The question of whether the citizen could claim democratic governance, made headway. The normative value of democracy has also deeply influenced the foreign policy of a large number of states: since the 1990s, respect for democracy has at times been considered a condition for recognizing a new state and it is increasingly a prerequisite for membership of international organizations. A forcible imposition of democracy is however doubtful. Finally, the article examines whether international law itself is made in a sufficiently democratic manner. The formation of international law through treaties or custom, for instance, is inherently suffering from a democracy deficit, even though some remedies seem possible. There are likewise problems of democratic deficits in the decision-making processes in international organizations. Powerful states are able to use decision-making to their advantage by using all kinds of formal and informal mechanisms. The article explores, as a case-study, the situation in the World Trade Organization.