The European Journal of International Law Vol. 22 no. 2 © EJIL 2011; all rights reserved

The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks

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Abstract

Although going down a different path, this article reaches similar conclusions to those formulated by Susan Marks. It starts by showing that the years 1989–2010 can be hailed as an unprecedented epoch of international law during which domestic governance came to be regulated to an unprecedented extent. This materialized through the coming into existence of a requirement of democratic origin of governments which has been dubbed the principle of democratic legitimacy. However, this article argues that the rapid rise of non-democratic super-powers, growing security concerns at the international level, the 2007–2010 economic crisis, the instrumentalization of democratization policies of Western countries as well as the rise of some authoritarian superpowers could be currently cutting short the consolidation of the principle of democratic legitimacy in international law. After sketching out the possible rise (1) and fall (2) of the principle of democratic legitimacy in the practice of international law and the legal scholarship since 1989, the article seeks critically to appraise the lessons learnt from that period, especially regarding the ability of international law to regulate domestic governance (3) and the various dynamics that have permeated the legal scholarship over the last two decades (4). In doing so, it sheds some light on some oscillatory dynamics similarly pinpointed by Susan Marks in her contribution to this journal.

It has now been almost 20 years since international legal scholars took ownership of the question of democracy. Before that, such an inquiry had continuously been dismissed as being at odds with the almost unfettered constitutional autonomy

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EJIL (2011), Vol. 22 No. 2, 549–570 doi: 10.1093/ejil/chr024

recognized by international law to states – mostly in the form of a residual freedom rather than an express entitlement – and, accordingly, demoted to a purely normative exercise left to other disciplines. The international legal scholarship, however, found in the end of the Cold War the historical watershed that would allow it to attempt a revamp of international law and strip its subjects of their illiberal trappings. Like Susan Marks and Steven Wheatley, whose thoughts appear in this issue, I happened to be among that generation of scholars who were deeply provoked by the American literature of the early 1990s on the democratic entitlement – and especially by the 'seminal' 1992 article of the late Tom Franck published in the *American Journal of International Law* – and who accordingly decided to devote a major part of their research agenda to the question of democracy in international law.

Two decades after the inception of this new scholarly enterprise, it comes as no surprise that the – sometimes naïve – frenzy of the early years was superseded by a more cold-eyed, critical, and self-reflective outlook – the earlier work of Susan Marks at the turn of the century having been very conducive to the maturity gained by international legal scholars in this regard.[1] Yet, this change of mindset alone does not suffice to justify filling the pages of this prestigious journal with another round of thoughts on this topic. Indeed, there is more than a rise of cynicism nowadays at the heart of the debate published here. In the eyes of the author of these lines, the 20 years that have passed since the fall of the Berlin Wall now provide some of the necessary hindsight that helps realize the significant oscillations which have pervaded the practice, the political discourse, and, above all, the legal scholarship as regards the place and the status of democracy in international law. In other words, time seems – already – ripe for a short reevaluation.

It will be clear to the reader that the stocktaking which the articles published here have ventured is multifaceted and covers very different questions. Whilst Steven Wheatley's contribution grapples with global democracy, Susan Marks' article zeroes in on the international requirements of democracy at the municipal level. Because these two issues are radically distinct, the present article will not attempt to engage simultaneously with both of them. Rather, it will focus on the latter and, like Susan Marks' endeavour, seeks to unearth some of the fluctuations undergone by the practice and the scholarship pertaining to the idea of regulating municipal democracy by international law.

Susan Marks' article insightfully sheds some lights on three particular movements of the claim of an emerging right of democratic governance, namely the status and prospect of such a norm, its articulation with the democratic peace theory and the consequences thereof in a world nowadays entirely obsessed by its security agenda, and, finally, the shift from electoral democracy to development. The present reaction focuses on only one of these dimensions of contemporary factual and scholarly fluctuations, that is the status of the norm of democratic governance. In this regard, it seeks to unravel what has changed as well as what remains the same 20 years

[1] S. Marks, *The Riddle of All Constitutions* (2003).

after the fall of the Berlin Wall, both empirically and scholarly. Despite its primary concern with the most legalistic part of the debate, this article will at the same time show how the movements observed in this regard both in the international legal scholarship and in practice are closely intertwined with the other dynamics identified by Susan Marks. The conclusions reached here thus concur to a large extent with those of Susan Marks. Nonetheless, such arguments are made using a very different route.

In particular, Susan Marks' article and the present reaction thereto, while reaching some similar verdicts, rest on a fundamentally diverging starting point. This article is premised on the idea that the prescriptions as to *how* power must be exercised at the domestic level (by virtue of major international human rights conventions) and the prohibition of certain political regimes (e.g. apartheid and fascist regimes[2]) already enshrined in international law before the end of the Cold War were subsequently supplemented by a new democratic rule. Indeed, the author of these lines believes, as is explained in the following paragraphs, that the practice since the end of the Cold War – and the accounts thereof in the legal scholarship – witnessed – and gave form to – a consolidation of a principle of democratic legitimacy. This development constituted a remarkable phenomenon, for it came to limit the classical constitutional autonomy of each State. In that sense, the years 1989–2010 can be hailed as an unprecedented epoch of international law during which domestic governance – understood here in a traditional way as the use of public authority at the domestic level through a central governmental authority – has been regulated by international law to an unprecedented extent, the latter going as far as to prescribe a given type of procedure for acceding to power at the domestic level.

Yet, while Susan Marks may not entirely share the idea of the existence of a democratic rule in the post-Cold War period, our respective pieces come to similar findings as to the general orientations of both recent practice and legal scholarship. Indeed, it is submitted here that the rapid rise of non-democratic super-powers, growing security concerns at the international level, the 2007–2010 economic crisis as well as the inevitable instrumentalization of democratization policies of Western countries[3] are currently cutting short the consolidation of such a principle of democratic legitimacy in international law. Contemporary practice shows signs of a return to realist and non-ideological foreign policies, threatening the centrality of democracy promotion in the foreign policies of most democratic states and the nascent consensus over the existence of international obligations about the democratic origin of power at the domestic level.

This article starts by exposing in some details the possible rise (1) and fall (2) of the principle of democratic legitimacy in the practice of international law and the accounts thereof in the legal scholarship from 1989 to 2010. In doing so, it substantiates as well as complements some of the finding made in the other articles published

[2] Cf. *infra* notes 6 and 7.

[3] On the use of the concept of 'Western States' see the remarks of Vidmar, 'Multiple Democracy: International and European Human Rights Law Perspectives', 23 *Leiden J Int'l L* (2010) 207, note 47.

in this symposium. The article then seeks critically to appraise the lessons learnt from that period, especially regarding the ability of international law to regulate domestic governance (3) and the various dynamics that have permeated the legal scholarship over the last two decades (4). On this occasion, it shows that, although presenting their own specificities and perspectives, the dynamics unravelled here bear some interesting resemblance to those identified by Susan Marks, especially as regards the oscillatory moves observed within scholarly studies of the status and place of democracy in international law.

1 1989–2010: From Human Rights to a Requirement of Democratic Origin (the Rise?)

It is commonly accepted that the determination of those entitled to act and speak on behalf of states is not based on a formal certifying operation and is inextricably left to the unconstrained discretion of states, although sometimes acting in the framework of international organizations. This abiding and inevitable absence of formal certification of governments was, before the fall of the Berlin Wall, accompanied by a lack of rules affecting domestic governance. In particular, the form of the political regime of each state was considered to be an 'internal affairs' matter[4] and the choice thereof was considered to be unconstrained by international law.[5] Apart from the prohibition of apartheid[6] and, to a lesser extent, of the fascist political system,[7] the only prescriptions relating to domestic governance were found in human rights law – and especially the obligations pertaining to political and civil rights – which enshrines limitations as to *how* the power can be exercised by governments. Before the end of the Cold War, human rights law thus constituted the backbone of the international regulation of domestic governance.

The end of the Cold War impinged significantly on how domestic governance is regulated. International legal scholars promptly recognized that the post-Cold War international legal order had become more amenable to democracy. In what has been perceived as an intra-disciplinary truce,[8] American scholars in particular – i.e. those who have subsequently been seen as forming the 'democratic entitle-

4 For a classical account see L. Oppenheim, *International Law* (6th edn., 1912), i, at 425.

5 *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [1986] ICJ Rep.14, at para. 261.

6 See International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UNTS (1976) 243; International Convention on the Elimination of All Forms of Racial Discrimination (1965), 660 UNTS (1969) 195, Art 3. See also SC Res 288, UN Doc S/RES/288 (1970); SC Res 277, UN Doc S/RES/277 (1970); SC Res 253, UN Doc S/RES/253 (1968); SC Res 232, UN Doc S/RES/232 (1966); SC Res 216, UN Doc S/RES/216 (1965); SC Res 217, UN Doc S/RES/217 (1965); GA Res 1791, UN Doc A/RES/1791 (1962); GA Res 1598, UN Doc A/RES/1598 (1961); SC Res 221, UN Doc S/RES/221 (1961).

7 In particular, see GA Res 36/162, UN Doc A/RES/36/162 (16 Dec. 1981).

8 MacDonald, 'International Law, Democratic Governance and September the 11th', 3 *German LJ* (2002), available at www.germanlawjournal.com.

ment school'[9] – have – albeit to various degrees[10] – enthusiastically supported the idea that democracy today plays a crucial role in the international legal order and have swiftly provided various optimistic accounts of the extent of the legal changes brought about by democracy.[11] European scholars, although they usually voiced greater scepticism and refrained from embracing the whole array of consequences that the abovementioned American scholars attached to a lack of democracy, growingly came to recognize that democracy – at least in its procedural and electoral dimension – bears upon the rules and the functioning of the international legal order.[12]

Even if one does not agree with all the legal consequences that American scholars have sometimes associated with the emergence of democracy in the international legal order,[13] living up to some democratic standards, in the view of the author of these lines, increasingly turned to correspond with an international customary obligation[14] – a stance from which Susan Marks shies away in the article published here. Indeed, I contend that the post-1989 practice contains strong indications that,

[9] Because many of them were affiliated to NYU, these scholars were subsequently dubbed by David Kennedy members of the 'Manhattan School'. See Kennedy, 'Tom Franck and the Manhattan School', 35 *NYU J Int'l Law & Politics* (2003) 397, at 432.

[10] Simpson, 'Two Liberalisms', 12 *EJIL* (2001) 537.

[11] The most radical liberal view on this question is probably offered by Tesón, 'The Kantian Theory of International Law', 92 *Columbia L Rev* (1992) 53, at 54–55. For milder forms of the democratic entitlement theory see Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46, at 46; Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *NYU J Intl L & Politics* (1994–1995) 289, at 329. For an overview of how participatory rights emerged in international law see generally Fox, 'The Right to Political Participation in International Law', 17 *Yale J Int'l L* (1992) 539. For a basic account of the arguments for and against the democratic entitlement theory see generally Fox and Roth, 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law', in G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000), at 1, 11. Many of these seminal works are reproduced in *ibid.* For a critical appraisal of that literature see Marks, *supra* note 1.

[12] Crawford, 'Democracy and International Law', 64 *BYBIL* (1993) 113–133; J.R. Barbero, *Democracia y Derecho Internacional* (1994); B. Bauer, *Der völkerrechtliche Anspruch auf Demokratie* (1998); Schindler, 'Völkerrecht und Demokratie', in G. Hafner *et al.* (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (1998), at 611 ff; L.-A. Sicilianos, *L'ONU et la démocratisation de l'état; systèmes régionaux et ordre juridique universel* (2000); Sicilianos, 'Les Nations unies et la démocratisation de l'Etat: nouvelles tendances', in R. Mehdi (ed.), *La contribution des Nations unies à la démocratisation de l'Etat* (2002), at 13; J. d'Aspremont, *L'Etat non démocratique en droit international* (2008); Peters, 'Dual Democracy', in J. Klabbers, A. Peters, and G. Ulfstein, *The Constitutionalization of International Law* (2009), at 273; Wheatley, 'Democracy in International Law: A European Perspective', 51 *Int'l & Comp LQ* (2002) 225. See also Pippan, 'International Law, Domestic Political Orders, and the "Democratic Imperative": Has Democracy Finally Emerged as a Global Legal Entitlement?', *Jean Monnet Working Paper 02/10*, available at www.jeanmonnetprogram.org, at 7, who argues that such an entitlement can be said to have emerged only if we equates democracy and elections; Klein, 'Le droit aux élections libres en droit international: Mythes et réalités', in O. Corten *et al.*, *A la recherche du nouvel ordre mondial* (1993), i, at 93, 95–98; Ben Achour, 'Le Droit International de la Démocratie', 4 *Cursos Euromediterráneos Bancaja de Derecho Internacional* (2000) 327. See *contra* N. Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (2009), at 139 and 220. See also Petersen, 'The Principle of Democratic Teleology in International Law', 34 *Brooklyn J Int'l L* (2008–2009) 33. See also the criticisms of Pippan, 'Gibt es ein Recht auf Demokratie im Völkerrecht?', in E. Riefler (ed.), *Sir Karl Popper und die Menschenrechte* (2007), at 119.

[13] For one criticism of the liberal theories of democracy see d'Aspremont, *supra* note 12.

[14] See *ibid.*, at 291.

to a large degree, states consider the adoption of the main characteristics of a democratic regime to amount to an international obligation and act accordingly toward non-democratic states. For instance, entities which have reached statehood in the last few years thanks to the support or the involvement of the international community have been induced to adopt democratic institutions.[15] Likewise, each experience of international administration of territory has led to the creation of democratic states, as illustrated by the cases of East Timor and, irrespective of its final status, Kosovo.[16] Because the determination of subjects of international law and that of those who represent them are not carried out through a formal certification, democracy has never directly impinged on the legal existence of states or that of their governments. Yet, practice has shown that, in the policies of recognition, the democratic character of domestic institutions often offsets the lack of *effectivité* of an entity.[17]

While new and restored states have been endowed with democratic institutions, violent changes of government have been deterred by a large array of sanction devices: coups, especially those that lead to the overthrow of a democratic government, are systematically the object of condemnations and sanctions, their authors usually being denied any external legitimacy.[18] These sanctions are usually eased once the authors of the coups pledge to organize free and fair elections. This systematic condemnation of coups against democratic governments surely buttresses the strong commitment of the international community to democracy – or at least the idea of a requirement of a standstill[19] constraining existing democracies.[20] We have also witnessed the resort to peace-enforcement missions to restore overthrown democratic governments, as illustrated by the intervention in Sierra Leone.[21]

15 See, e.g., 'Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union', 62 BYBIL (1991) 559, at 559–560; 'Declaration on Yugoslavia', 62 BYBIL (1991) 559, at 560–561.

16 On this topic see E. de Brabandere, *Post-Conflict Administrations In International Law: International Territorial Administration, Transitional Authority And Foreign Occupation In Theory* (2009); See also C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (2008); d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments', 9 *Chicago J Int'l L* (2008) 1; d'Aspremont, 'La création international d'Etats démocratiques', 109 *RGDIP* (2005) 889. See generally S. Chesterman, *You the People: The United Nations, Transnational Administration and State-Building* (2004), at 204–235. This tendency to install democracies through the international administration of territories has occurred even with the veiled support of non-democratic states, as if these states acknowledge that democracy is the only admissible political regime: see, e.g., SC Res 1546, UN Doc. S/RES/1546 (8 June 2004) (unanimously adopted resolution addressing the question of the future democratic government of Iraq). But see SC Res 1244, UN Doc. S/RES/1244 (10 June 1999) (China abstaining from voting on the question of Kosovo).

17 D'Aspremont, *supra* note 12, at 57 ff.

18 See generally d'Aspremont, 'Responsibility for Coups in International Law', 18 *Tulane J Int'l & Comparative L* (2010) 451. See also d'Aspremont, 'La licéité des coups d'Etat en droit international', in Travaux de la Société française pour le droit international (SFDI), *L'Etat de droit en droit international*, Colloque de Bruxelles (2009), at 117–136 .

19 D'Aspremont, *supra* note 12, at 338.

20 Petersen, *Demokratie als teleologisches Prinzip*, *supra* note 12, at 89 (this is what he calls the principle of Democratic Teleology). See also Petersen, 'The Principle of Democratic Teleology', *supra* note 12.

21 See generally Nowrot and Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone', 14 *Am U Int'l L Rev* (1998) 388. It is noteworthy

In the same vein, there is little doubt today that democracy has become a prominent yardstick by which to assess the legitimacy of governments.[22] This explains why complex and multi-layered election monitoring mechanisms have been put at the disposal of states, many of them regularly making use of such possibility to buoy up the legitimacy which their governments can earn from democratic elections.[23] This is not to say that a non-democratic government will never be deemed legitimate, especially if that government has been in power for a long time.[24] The non-democratic character of a government is sometimes disregarded because of overriding geopolitical and strategic motives.[25] But, leaving these situations aside, it can reasonably be argued that, since the end of the Cold War, democracy has become 'the touchstone of legitimacy'[26] for any new government.[27] All in all, these few examples – already much discussed in the literature[28] – suffice to demonstrate the far-reaching structural changes international society has undergone after 1989 with respect to the form of governments.[29]

It is of particular relevance that many non-democratic states do not oppose the principle of democracy, and even claim that they are themselves in the midst of

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that some of these missions were led by non-democratic states as if non-democratic states themselves are coming to terms with the ascendancy of democracy over any other kind of political regimes. See, e.g., Nowrojee, 'Joining Forces: United Nations and Regional Peacekeeping – Lessons from Liberia', 8 *Harvard Human Rts J* (1995) 133 for a discussion of the ECOMOG force in Liberia, which was led by Nigeria. See generally Byers and Chesterman, '"You the People": Pro-democratic intervention in international law', in Fox and Roth (eds), *supra* note 11, at 259.

22 Stein, 'International Integration and Democracy: No Love at First Sight', 95 *AJIL* (2001) 489, at 494; Franck, *supra* note 11, at 46.

23 On international election monitoring see Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation', 13 *European Public L* (2007) 133. See also Binder and Pippan, 'Election Monitoring, International', in R. Wolfrum (ed.), *Encyclopedia of Public International Law* (2008), available at: www.mpepil.com/.

24 In the same vein see Fox, 'Election Monitoring: The International Legal Setting', 19 *Wisconsin Int'l LJ* (2001) 295, at 312; Pippan, *supra* note 12, at 34–35. This finding has led some authors to contend that there are 'double standards' in that regard: see Kohen, 'La création d'Etats en droit international contemporain', VI *Cours euro-méditerranéens Bancaja de droit international* (2002) 6, at 619.

25 The most obvious example is the government of the People's Republic of China which is seen as legitimate by almost all countries in the world although it does not rest on any free and fair electoral process. The same cannot be said with respect to Pakistan since the government has relentlessly pledged to organize democratic elections. See *infra* note 107.

26 On legitimacy see the general observation of Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?', 93 *AJIL* (1999) 596, at 599. See also d'Aspremont and de Brabandere, 'The Complementary Faces of Legitimacy in International Law: the Legitimacy of Origin and the Legitimacy of Exercise', 34 *Fordham J Int'l L* (2010) 101.

27 See generally d'Aspremont, 'Legitimacy of Governments in the Age of Democracy', 38 *NYU J Int'l L & Politics* (2006) 877; see also B. Roth, *Governmental Illegitimacy in International Law* (2000), at 212–200, 413, and 415 (Roth speaks of 'an emerging pattern of collective practice and opinio juris with respect to the legal aspects of non-recognition of governments').

28 See generally Fox and Roth (eds.), *supra* note 11. See also d'Aspremont, *supra* note 12.

29 This led some scholars to claim that we had reached the end of 'History'. On this use of such terminology see Marks, 'International Law, Democracy and the End of History', in Fox and Roth, *supra* note 11, at 535.

progress towards the establishment of democracy.[30] In that sense, non-democratic states, with a view to strengthening the legitimacy of their governments, try to portray their political regimes in a democratic fashion rather than choosing to dispute the role that democracy plays in the international order.

The possible obligation[31] to be democratic to the emergence of which the above-mentioned practice has contributed has been conceptualized by scholars in many different ways. Some authors have espoused a *human rights-based conceptualization* by defending the existence of a right to political participation,[32] a right to democratic governance,[33] a right to free and fair elections.[34] Other scholars have captured the emergence of requirements of democratic governance through the lens of *internal self-determination*, thereby arguing that self-determination expands beyond decolonization.[35] Others – including the author of these lines – have, more simply, put forward the existence of an *international customary obligation* to be democratic without such an obligation taking the form of a human right or an expansion of the principle of self-determination.[36] Eventually, there are scholars who simultaneously drew on all of these conceptualizations to buttress the existence of a requirement of democratic origin of governments in international law,[37] a path also arguably followed by the Human Rights Committee.[38]

However it is eventually conceptualized, this legal obligation to adopt a democratic regime must surely not be exaggerated. First, the scope *ratione materiae* of the principle of democracy in international law is limited, as the obligation rests only on an *electoral*

[30] For one example consider the 2007 events in Pakistan. In particular, see the interview of President Musharraf on 11 Nov. 2007, and Gall, Rohde, and Perlez, 'Rebuffing US, Musharraf Calls Crackdown Crucial to a Fair Vote', *NY Times,* 14 Nov. 2007, A1. Musharraf has since stepped down from military leadership: see, e.g., Rohde and Gall, 'In Musharraf's Shadow, a New Hope for Pakistan Rises', *NY Times,* 7 Jan. 2008, A3. Also relevant are the developments in Myanmar. On this issue see, e.g., Mydans, 'Myanmar Claims Step To Democracy, But Junta Still Grips to Power', *Int'l Herald Tribune*, 4 Sept. 2007, N3. See also L. Diamond, *Developing Democracy: Toward Consolidation* (1999), at 8–9.

[31] In the same vein see Pippan, *supra* note 12 at 7. See *contra* Roth, *supra* note 27, at 417.

[32] Fox, *supra* note 11. See also Binder, *supra* note 23, at 134.

[33] Franck's right to democratic governance is itself very much grounded in participatory rights of human rights treaties as well as the right to self-determination. See Franck, *supra* note 11, at 46. In the same vein see also J.I. Ibegbu, *Right to Democracy in International Law* (2003).

[34] Cerna, *supra* note 11, at 329.

[35] Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism', in C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993), at 101, 134–137; Rosas, 'Internal Self-Determination', in *ibid.*, at 241–246; A. Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (1995), at 311; Thürer, 'Self-Determination', in R. Bernhardt (ed.), *Encyclopedia of Public International Law – Volume IV* (2000), at 364, 372. For a criticism of that approach see Petersen, *supra* note 12. See also d'Aspremont, *supra* note 12, at 271 ff.

[36] T. Franck's right to democratic governance is primarily grounded in self-determination. See Franck, *supra* note 11. For a criticism of this understanding of self-determination see Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?', 10 *Human Rts L Rev* (2010) 239.

[37] Peters, *supra* note 12, at 274–275 and 277–278. For a criticism of the link between the right of political participation and self-determination see Vidmar, *supra* note 36.

[38] HRC General Comment 25, Right to participate in public affairs, voting rights and the right of equal access to public service, 12 July 1996, CCPR/C/21/Rev.1/Add.7.

and *procedural* understanding of democracy.[39] Although the free and fair character of the elections inevitably requires respect for some of the elementary political and civil rights,[40] states are only customarily obliged to abide by democracy to the sole extent that their effective leaders (or the parliamentary body that oversees their executive mandate) are chosen through free and fair elections. Indeed, by the account made here, the practice has conveyed only a restrictive and procedural definition of democracy,[41] however defective such a conception may be from a conceptual and theoretical point of view – as has long been advocated by Susan Marks.[42] Likewise, the ambit of that requirement should also not be overblown. While this customary obligation, whatever its conceptualization, probably constitutes an *erga omnes* obligation,[43] it certainly is not of a *jus cogens* character as it is underscored by the existence of numerous persistent objectors to that customary rule.[44]

As was already alluded to above, it would also be a mistake to consider the obligation to be democratic utterly groundbreaking. The development of a customary norm in this area is unsurprising, given that international law has long regulated some aspects of states' political regimes. Through human rights law, the international community has regulated the way in which power is exercised and has prohibited some types of political regimes – for example, apartheid[45] and, to a lesser extent, fascism.[46] Moreover, the obligation to organize free and fair elections is not entirely new in the international legal order, as a similar obligation[47] is already embedded in the

[39] Fox, *supra* note 11, at 49.

[40] D'Aspremont, *supra* note 12, at 15. On the specific criteria which ought to be met for an election to be free and fair see Binder, *supra* note 23.

[41] This finding is also made (and subsequently discussed) by S. Marks: see Marks, *supra* note 1, at 50 ff. See also Pippan, *supra* note 12.

[42] See the famous criticism of this 'minimalistic' understanding of democracy by Marks, *supra* note 1, at 52–53. In the same vein see Gills, Rocamora, and Wilson, 'Low Intensity Democracy', in B. Gills, J. Rocamora, and R. Wilson (eds), *Low Intensity Democracy: Political Power in the New World Order* (1993), at 3, 21; Burchill, 'Book Review, *The Developing International Law of Democracy'*, 64 *MLR* (2001) 123, at 128; Miller, 'Self-Determination in International Law and the Demise of Democracy', 41 *Columbia J Transnat'l L* (2003) 601, at 603–605; Koskenniemi, 'Whose Intolerance, Which Democracy?', in Fox and Roth, *supra* note 11, at 436, 438. See also Roth, 'Evaluating Democratic Progress' in *ibid.*, at 493 ff.; Binder and Pippan, *supra* note 24; Pippan, *supra* note 12.

[43] D'Aspremont, *supra* note 12, at 291.

[44] The People's Republic of China and several states in the Middle East can probably be considered persistent objectors to that rule. See, e.g., Nathan, 'The Tianammen Papers', 80 *Foreign Affairs* (Jan./Feb. 2001) 2, adapted from Zhang Liang, compiler, A.J. Nathan and P. Link (eds), *The Tianammen Papers* (2001). I have defended this idea of persistent objector elsewhere: see d'Aspremont, *supra* note 12, at 290. For a criticism of the idea of persistent objectors to the customary rule pertaining to the democratic origin of governments see Pippan, 'International Law', *supra* note 12, at 27. See also Pippan, 'Review of Jean d'Aspremont. L'Etat Non Démocratique en Droit International', 20 *EJIL* (2009) 1276. For a criticism of the concept of persistent objector in general see P. Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited', 59 *Int'l & Comparative LQ* (2010) 779.

[45] Cf. *supra* note 6.

[46] Cf. *supra* note 7.

[47] See, however, J. Vidmar for whom the ICCPR obligation does not entail an obligation to organize multiparty elections: Vidmar, *supra* note 3, especially at 222.

International Covenant on Civil and Political Rights,[48] which has been ratified by 167 states to date.[49] It must be pointed out, however, that even if the international legal order enshrines a principle of *procedural* democracy applicable to the political regime of states, there is no corresponding requirement of democracy applicable to the structure and the functioning of the international legal system as a whole.[50] This is not totally astonishing, given the inapplicability of the classical domestic blueprints of governance to the international system.[51]

While the requirement of democratic origin of governments, in the view of this author, has gained currency in the post-Cold War practice and legal scholarship, it would be untrue to say that this acceptance of a requirement of democratic origin of governments has been unchallenged. The abovementioned scholarly enthusiasm for the principle of democracy has aroused some severe criticisms with respect to its imperialistic or neo-colonialist overtones[52] and the correlative reminiscence of the nineteenth century distinction between civilized and barbarian states.[53] It has also been said that a principle of democratic legitimacy can help secure systematic inequalities among states and even within states.[54] Because of the impossibility of clearly defining democracy, others have contended that any obligation pertaining to the democratic origin of governments is not normative and cannot yield a meaningful directive

[48] International Covenant on Civil and Political Rights, GA Res 2200A, UN Doc A/6316 (1966) ('ICCPR'). On the ICCPR and democracy see generally Mavrommatis, 'The International Covenant on Civil and Political Rights and Its Role in Promoting Democracy', in K. Koufa (ed.), *Human Rights and Democracy for the 21st Century* (2000), at 255.

[49] Pakistan and Guinea-Bissau are among those states which recently ratified it. See Status of Ratification of the Principal International Human Rights Treaties, available at: http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (visited 30 Nov. 2010). On the possible ratification of the ICCPR by the People's Republic of China see Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges', 6 *Chinese J Int'l L* (2007) 445. See also the signature of the ICCPR by Cuba on 28 Feb. 2008 and the possible ratification in the future: 'Cuba Signs Rights Treaties at UN, with reservations', *Int'l Herald Tribune,* 28 Feb. 2008, available at: www.iht.com/articles/ap/2008/02/28/news/UN-Cuba-Human-Rights.php (visited 5 Apr. 2008).

[50] On this debate see generally Peters, *supra* note 12.

[51] See generally Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy', 64 *Heidelberg J Int'l L* (2004) 547.

[52] Koskenniemi, 'Intolerant Democracies: A Reaction', 37 *Harvard Int'l LJ* (1996) 231. While recognizing that such a criticism is not ill-founded S. Marks puts forward an alternative reading of democracy to overcome such an object: see Marks, *supra* note 1, at 101 ff. For some historical underpinnings to the idea that democracy is primarily a Western idea see D. Held, *Democracy and the Global Order* (1995), at 282 ff. For an attempted reconciliation see Petersen, 'International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism', *Asian J Int'l L* (2010) 1. See more generally on the question of global values d'Aspremont, 'The Foundations of the International Legal Order', 18 *Finnish Yrbk Int'l L* (2007) 219.

[53] See in particular E. Nys, *Droit international, Les principes, les théories, les faits* (1904), i, at 116 ff; A. McNair, *L. Oppenheim's International Law* (4th edn., 1926 and 1928), at 42; J. Westlake, *International Law* (2nd edn, 1910), at 40; J. Kent, *Commentary on International Law* (1878); R. Phillimore, *Commentaries upon International Law* (1879–1889); H. Wheaton, *Elements of International Law* (1880).

[54] Marks, *supra* note 1, at 101.

towards states.[55] Even though it cannot be denied that the principle of democratic legitimacy stirs inevitable controversy as to its imperialist, neocolonialist character or its ability to produce any meaningful command towards international law addressees, it is not the aim of this article to discuss them.[56] Rather, the following section turns to the setbacks encountered by the legal requirement of the democratic origin of government in very recent international practice.

2 Beyond the Post-Cold War Period: The Retreat from a Requirement of Democratic Origin and the Return to Classical Human Rights (the Fall?)

It is argued here that recent practice is jeopardizing the consolidation of the abovementioned practice in favour of a requirement of democratic origin of governments. Indeed, subject to the important exception of regional regimes,[57] contemporary practice weathers an incremental de-emphasizing of the democratic origin of governments and a growing emphasis on the requirements of transparency and the absence of corruption (good governance)[58] and the respect for human rights.[59] After almost two decades of care for the democratic origin of governments, it seems that we are witnessing a return to foreign policies centred on the manner in which governments exercise power. In that sense, the emphasis is increasingly less on governments originating in free and fair elections but rather on their respect for elementary political and civil rights, as well as standards of good governance. This is exemplified by the great attention to what I have called elsewhere the *legitimacy of exercise* in the practice pertaining to recognition, accreditation, or intervention by invitation, that is the idea that the manner in which power is exercised matters more than the origin of that power.[60]

[55] Steiner, 'Political Participation as a Human Right', 1 *Harvard Human Rts Yrbk* (1988) 77, at 89. See also the remarks of Fox, 'Democracy, Right to, International Protection', in Wolfrum (ed.), *supra* note 23, at para. 6. On this understanding of normativity see d'Aspremont, 'Softness in International Law', 19 *EJIL* (2008) 1075; see also d'Aspremont, 'Les dispositions non normatives des actes juridiques conventionnels à la lumière de la jurisprudence de la Cour internationale de Justice', 36 *Belgian Rev Int'l L* (2003) 496.

[56] Many of them have been insightfully examined by Marks, *supra* note 1. See also Ayers, 'Imperial Liberties: Democratisation and Governance in the "New" Imperial Order', 57 *Political Studies* (2009) 1. For an attempt to go beyond this criticism see Tully, 'Modern Constitutional Democracy and Imperialism', 46 *Osgoode Hall LJ* (2008) 461.

[57] For an outline of the mechanisms geared towards the promotion or the enforcement of democracy at the regional level see Fox, *supra* note 55. For an insightful account of the European regional model see Wheatley, *supra* note 12.

[58] Burns and Cowell, 'Brown issues Karzai a stern warning', *Int'l Herald Tribune*, 7–8 Nov. 2009, at 3. See the 2010 US National Security Strategy at 38, available at: www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[59] Sciolino, 'Rocky time for Qaddafi during visit to France', *Int'l Herald Tribune*, 14 Dec. 2007, at 3.

[60] On the oscillations between democracy of origin and democracy of exercise see generally d'Aspremont, *supra* note 2. See more recently d'Aspremont and de Brabandere, *supra* note 28.

Against the backdrop of this growing de-emphasizing of free and fair elections, it is not surprising that the non-democratic origin of a government, while likely to provoke some temporary diplomatic isolation or unease, more often proves insufficient to trigger non-recognition of the new government, particularly if the latter is being re-elected.[61] Likewise, states are nowadays living up to a *principled engagement with non-democratic regimes.*[62] In the same vein, diplomatic relations seem less affected nowadays than during the years following the Cold War by the dubious democratic origin of one of the partners. Indeed, the non-democratic origin does not prevent such relations,[63] although diplomatic relations are occasionally demoted to a lower level to manifest some discontent as to the absence of free and fair elections.[64] But even coups do not always lead to a suspension of diplomatic relations.[65]

The same can be said as far as a various types of inter-state cooperation are concerned. Indeed, international cooperation among states in a wide variety of fields is increasingly unaffected by the lack of democratic virtue of one of the partners,[66] especially when it comes to security[67] or the economy.[68] By the same token, cooperation policies based on mechanisms of democratic conditionality are increasingly challenged by non-Western states. That is not to say that after the Cold War all cooperation policies were systematically made conditional upon compliance with some democratic standards. It simply is that it is nowadays less so than it used to be. As is illustrated by the unprecedented challenge of the European Union's famous

[61] See Simons, 'Sudan Leader can't bypass wall of diplomatic isolation', *Int'l Herald Tribune,* 3 May 2010, at 5; See Berthemet, 'Omar el-Béchir réélu sans péril président du Soudan', *Le Figaro,* 27 Apr. 2010, at 6.

[62] See, for instance, the 2010 US National Security Strategy at 38: 'Practicing Principled Engagement with Non-Democratic Regimes: Even when we are focused on interests such as counterterrorism, nonproliferation, or enhancing economic ties, we will always seek in parallel to expand individual rights and opportunities through our bilateral engagement. The United States is pursuing a dual-track approach in which we seek to improve government-to-government relations and use this dialogue to advance human rights, while engaging civil society and peaceful political opposition, and encouraging U.S. nongovernmental actors to do the same. More substantive government-to-government relations can create permissive conditions for civil society to operate and for more extensive people-to-people exchanges. But when our overtures are rebuffed, we must lead the international community in using public and private diplomacy, and drawing on incentives and disincentives, in an effort to change repressive behavior': available at: www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[63] Slackman, 'Libya seeks greater U.S. Reward for renouncing weapons projects', *Int'l Herald Tribune,* 11 Mar. 2009, at 5; Sciolino, 'Rocky time for Qaddafi during visit to France', *Int'l Herald Tribune,* 14 Dec. 2007, at 3; see also the report that the US President would meet the prime minister of Myanmar on the occasions of a meeting with the 10 leaders of the Association of Southeast Asian Nations, *Int'l Herald Tribune,* 9 Nov. 2009, at 8.

[64] Lander and Mazzeti, 'A valuable peek at North Korea', *Int'l Herald Tribune,* 20 Aug. 2009, at 2; Duhigg and Dougherty, 'Gambling on the global economy', *Int'l Herald Tribune,* 3 Nov. 2008, at 1.

[65] *Int'l Herald Tribune,* 11–12 July 2009, at 4.

[66] See Mydans, '20 Uighurs, $1 billion and a clear signal', *Int'l Herald Tribune,* 23 Dec. 2009, at 5.

[67] Sanger and Schmitt, 'A threat not dwelled on: Pakistan', *Int'l Herald Tribune,* 3 Dec. 2009, at 7; Polgreen, 'France may intervene to back Chad's leader', *Int'l Herald Tribune,* 6 Feb. 2008, at 4; Associated Press, 'France admits it delivered Libyan munitions to Chad', *Int'l Herald Tribune,* 15 Feb. 2008, at 3.

[68] Slackman, *supra* note 63, at 5.

democratic conditionality[69] by African states,[70] practice indicates that democratic conditionality is turning more controversial, which in turn may bring about its abandonment in some areas.[71]

Although it is too early to gauge the extent of these changes, these few examples suffice to show that contemporary practice manifests a return to *RealPolitik* after almost two decades of ideological foreign policies centred on the democratization of foreign regimes through a requirement of democratic origin of governments. This change has been particularly noticeable in the foreign policy of the United States[72] and confirmed by the 2010 National Security Strategy of the United States.[73] As a result of this de-emphasizing of the democratic origin of governments, the fall of the Berlin Wall has been growingly seen in recent scholarship as a culmination rather than a departure.[74] Interestingly, the international legal scholarship – which had until recently most of the time voiced an upbeat tone – has itself turned more sceptical about the existence of a requirement (or the extent thereof) pertaining to the democratic origin of governments.[75]

Should future practice confirms these developments, this would underpin the idea that the emphasis put on the democratic origin of governments during the 1989–2010 period is ebbing away and that, in the foreign policies of many states the democratic origin of foreign partners has been demoted to a secondary issue. Because contemporary practice shows that the democratization of foreign governments has

[69] Verhoeven, 'La Communauté européenne et la sanction international de la démocratie et des droits de l'homme', in E. Yakpo and T. Boumedra (eds), *Liber amicorum judge Mohammed Bedjaoui* (1999), at 771–790; D. Perrot (ed.), *Les relations ACP/UE après le modèle de Lomé : quel partenariat?* (2007); O. Babarinde and G. Faber (eds), *The European Union and the Developing Countries: the Cotonou Agreement* (2005); Bartels, 'The Trade and Development Policy of the European Union', 18 *EJIL* (2007) 715; P. Leino, 'European Universalism? : the EU and Human Rights Conditionality', 24 *Yrbk European L* (2006), 329.

[70] See the reactions on the occasion of the Lisbon Summit. See, e.g., para. 52 of the 2007 Lisbon Africa–EU Strategic Partnership, available at: www.africa-eu-partnership.org/pdf/eas2007_joint_strategy_en.pdf: 'The predictability of development aid should be promoted and the EU will work toward a limitation of conditionalities and further move towards result-oriented aid, with a clear link with MDG indicators and performance'. Interestingly the Final Declaration of the 2007 Lisbon Summit between Europe and Africa, available at: www.africa-eu-partnership.org/pdf/eas2007_lisbon_declaration_en.pdf, mentions only good governance and human rights and fails to refer to the democratic origin of governments.

[71] See generally Carothers, 'The Backlash Against Democracy Promotion', 85 *Foreign Affairs* (2006) 55.

[72] See, e.g., K. Roth, 'Empty Promises? Obama's Hesitant Embrace of Human Rights, Foreign Affairs, Mar.–Apr. 2010; Roth, 'Obama's hesitant embrace of human rights', *Int'l Herald Tribune*, 24 Feb. 2010, at 8. In the same vein see Traub, 'Keeping score on Obama's engagement' policy', *Int'l Herald Tribune*, 21 Dec. 2009, at 4; Knowlton, 'US waiver allows aid to nations with child soldiers', *Int'l Herald Tribune*, 29 Oct. 2010, at 5; Carothers, 'Repairing democracy promotion', *Washington Post*, 14 Sept. 2007. Some early signs were already flagged by Carothers, 'Promoting Democracy and Fighting Terror', 82 *Foreign Affairs* (2003) 84.

[73] See in particular at 10 and 37 ff, available at: www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[74] Weisbrode, 'The false promise of 1989', *Int'l Herald Tribune*, 7–8 Nov. 2009, at 8.

[75] See Petersen, *Demokratie als teleologisches Prinzip, supra* note 12, at 139 and 220. See also Petersen, 'The Principle of Democratic Teleology', *supra* note 12; Fox, *supra* note 55; Vidmar, *supra* note 3; Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?', 10 *Human Rts L Rev* (2010) 239; see also the criticisms of Pippan, 'Gibt es ein Recht', *supra* note 12, at 119. See, however, Pippan, 'International Law', *supra* note 12.

taken a back seat and has given way to foreign policies prioritizing other objectives, the classical motives for supporting policies in favour of democratic legitimacy must be briefly recalled.

The requirements pertaining to the democratic origins of governments had classically been promoted and enforced by states and international organizations because of their common – but very disputable – belief that democracy bolsters peace[76] and prosperity,[77] strengthens the respect for human rights,[78]and even quells terrorism.[79] Recent practice seems to indicate that these avowed driving-forces of democratization policies of the post-Cold War period have been outweighed by other political objectives which seem to indicate that, for many states, the 21st century imperatives can no longer accommodate democratization policies and the requirements of democratic origin of governments that go with them. This is probably not the place to appraise the reasons underlying this retreat of democracy in recent practice. This is a task left to international relations and political sciences specialists whose expertise is much more apt to take on such an examination.[80] It suffices here to pinpoint four reasons underpinning the abovementioned return to less ideological and more pragmatic and realist foreign policies. First, it will not come as a surprise that the current economic crisis has made democratization policies more of a luxury. Fewer and fewer countries have been able to afford trade policies conditioned on the respect for some requirements as to the democratic origin of the partner. The same is true with the security agenda, a finding similarly made by Susan Marks in her article in this issue. The multilateralization of the security agenda of the 21st century has elevated security in the

[76] UN Secretary General, *Supplement to Reports on Democratization* (1996), UN Doc A/51/761, at para. 3. In the scholarship, this has proved a widely discussed and controversial idea. See, e.g., the neo-Kantian liberal and democratic peace theories contained in Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', *Philosophy & Public Affairs* (1983) 205, at 206–232; Moore, 'Beyond the Democratic Peace: Solving the War Puzzle', 44 *Virginia J Int'l L* (2004) 341; J.M. Owen IV, *Liberal Peace, Liberal War: American Politics and International Security* (1997); Reisman, 'Humanitarian Intervention and Fledging Democracies', 18 *Fordham Int'l LJ* (1995) 794, at 796; B. Russett, *Grasping the Democratic Peace: Principles for a Post-Cold War World* (1993); Schultz, 'Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War', 53 *Int'l Org* (1999) 233; Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503. This thesis has been severely criticized: see, e.g., B. Roth, *Governmental Illegitimacy in International Law* (1999), at 424 ff.; Vasquez, 'Ethics, Foreign Policy and Liberal Wars', 6 *Int'l Studies Perspectives* (2005) 307; Jahn, 'Kant, Mill and Illiberal Legacies in International Affairs', 59 *Int'l Org* (2005) 177; Marks, *supra* note 1, at 42 ff. For a recent discussion see Peters, *supra* note 12, at 281–282. See also Roth, *Governmental Illegitimacy*, at 426 ff.

[77] GA Res 46/151, Annex II, at para. 13, UN Doc A/RES/46/151 (18 Dec. 1991). But see World Conference on Human Rights, Preparatory Comm., Fourth Session, *Statement to the World Conference on Human Rights on Behalf of the Committee on Economic Social, and Cultural Rights,* Annex I, at para. 9, UN Doc A/CONF. 157/PC/62/Add. 5 (26 Mar. 1993).

[78] UN Secretary General, *supra* note 36, at para. 3.

[79] See The Secretary General, *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on threats, Challenges, and Change, follow-up to the outcome of the Millennium Summit*, UN Doc A/59/565 (2 Dec. 2004), available at: www.un.org/secureworld/report.pdf, at para. 148. See also President George W. Bush, 'President Addresses the Nation' (7 Sept. 2003), available at: hwww.whitehouse.gov. For some criticisms of this aspect of the global war on terror see Carothers, 'Promoting Democracy', *supra* note 72.

[80] For a more detailed analysis of the reasons for this change see Laïdi, 'La Fin du moment démocratique', *Le Débat* (Apr.–May 2008) 52.

overarching objective of states' national and international policies,[81] thereby making it more clearly and more systematically trump democratization policies. Thirdly, the overt instrumentalization to which democracy has been subjected in the past 20 years and the imperialistic policies which have been carried out under its banner have further curtailed the credibility and authority of such policies, democracy promotion being growingly demoted to a mere code word for 'regime change'.[82] This is also an aspect which Susan Marks has long tried to unravel[83] and on which she further sheds some light in the article which is published above. Eventually, the rise of the People's Republic of China as the first superpower – and its avowed rejection of any democratic standards regarding the origin of power[84] – has enticed many emerging democracies to prefer the ideologically free cooperation offered by this new global power to the cooperation of Western countries and regional organizations, which is classically made conditional upon the respect for democratic standards.[85]

3 The Possible Limits of International Law in Regulating of Domestic Governance

It is necessary to emphasize that some of the changes brought about by the end of the Cold War in terms of the regulation of domestic governance are probably too well ingrained in positive international law to be subject to such rapid fluctuations. In that sense, the possible retreat of the requirement of democratic origin of governments mentioned here certainly is not comprehensive. If the practice reported above were to be confirmed, there is no doubt that some of the changes experienced in the international legal system in the aftermath of the Cold War would outlive this return to – more realist – policies centred on classical human rights and good governance rather than the democratic origin of governments. In particular, democracy would most probably remain a standard by which to assess the legitimacy of governments,[86]

[81] *Ibid.*; Carothers, 'Repairing', *supra* note 72. See also MacDonald, *supra* note 8.

[82] On this point see Carothers, *supra* note 71, especially at 64. See also Carothers, 'Repairing', *supra* note 72. See also MacDonald, *supra* note 8.

[83] See generally Marks, *supra* note 1.

[84] If the requirement of democratic origin of governments is considered as a customary obligation, China could be considered a persistent objector: see d'Aspremont, *supra* note 12. For criticism of this idea see *supra* note 44.

[85] This is a change to which I had already alluded to in my previous work: *ibid.*, at 316.

[86] See the reactions following the 2010 coup in Kyrgyzstan: see Kramer, 'U.S. signals backing of new Kyrgyz leadership', *Int'l Herald Tribune*, 15 Apr. 2010, at 4; see also Kramer, 'Deposed leader leaves Kyrgyzstan', *Int'l Herald Tribune*, 16 Apr. 2010, at 3. On the recent crisis in Ivory Coast see the account of the facts by d'Aspremont, 'Duality of government in Côte d'Ivoire', *EJIL:Talk!*, available at: www.ejiltalk.org/duality-of-government-in-cote-divoire/. On the recent regime crisis in Egypt see Castle, 'Europeans Struggle for Consistency on Egypt', *New York Times*, 4 Feb. 2011; Landler and Mazzetti, 'Obama Faces a Stark Choice on Mubarak', *New York Times*, 10 Feb. 2011; Cooper and Sanger, 'In Egypt, U.S. Weighs Push for Change With Stability', *New York Times*, 7 Feb. 2011; Hunt, 'Freedom vs. Security in Egypt', *New York Times*, 30 Jan. 2011. Regarding the events in Tunisia see Abrams, 'Less "Engagement", More Democracy', *New York Times*, 22 Jan. 2011; Erlanger, 'France Seen Wary of Interfering in Tunisia Crisis', *New York Times*, 16 Jan. 2011; News Reports, 'World leaders share Egyptians' joy, but also look ahead to the challenges', *Int'l Herald Tribune*, 12–13 Feb. 2011, at 7.

and governments in quest of greater legitimacy would continue to seek improvement of their democratic standards.[87] In the same vein, coups, especially those that lead to the overthrow of a democratic government, would certainly remain systematically condemned, and sanctions usually eased once the authors of the coups pledge to organize free and fair elections.[88]

Despite the inevitable persistence of some requirements pertaining to the democratic origin of governments, it cannot be ruled out that, in the light of the practice reported above, the years 1989–2010 could someday constitute more an *interlude* than a sustainable change in the regulation of governance in international law. Indeed, 20th century international law, especially that of its second half, had come to regulate domestic governance through political and civil rights. As was indicated above, the end of the Cold War spawned the hope that international law could expand its grip on domestic governance beyond classical political and civil rights and could enshrine some requirements as to the origin of governments. Although not embracing the all-out – and somewhat naïve – enthusiasm of some American counterparts, I have myself defended a prudent and circumspect understanding of the obligation on states to ensure that their governments be of democratic origin.[89] Whilst I still believe that international law regulates the way in which power is gained at the domestic level, I argue that the last years of that period have shown that even this minimalist customary obligation may be fading away. In that sense, these years could one day be perceived as being nothing more than an *experiment,* for regulation of governance through international law has returned to a more classical set of requirements centred on the exercise of power in the form of civil and political human rights. Yet, a rebound cannot be entirely ruled out. Indeed, it may be that we are witnessing only a temporary lull in the consolidation of legal requirements pertaining to the democratic origin of governments. However, the current economic and socio-political configuration of the global order seems to point to a move away from democratic legitimacy centred on the origin of power. Should such an enfeeblement of the democratic principle of democratic legitimacy be confirmed in future practice, this could indicate that international law is perhaps not the appropriate normative instrument to achieve that end.

[87] See Mydans, 'Rulers of Myanmar shed uniforms for civilian skins', *Int'l Herald Tribune,* 3 May 2010, at 2. See Fuller, 'Junta in Myanmar raises promise of 2010 election', *Int'l Herald Tribune,* 11 Feb. 2008, at 2.

[88] See the reactions following the coup in Niger in Feb. 2010: see Nossiter, 'Niger junta names chief after coup oust leader', *Int'l Herald Tribune,* 20–21 Feb. 2010, at 4. On the practice pertaining to the 2009 coup in Honduras see News Reports, 'Ousted Honduran leader vows to return', *Int'l Herald Tribune,* 1 July 2009, at 5. On the ambiguities of practice pertaining to Honduras, see Roth, 'Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine', 11 *Melbourne JIL* (2010) 393.

[89] D'Aspremont, *supra* note 12. Some aspects of this work have been further developed in subsequent publications. See 'Legitimacy of Governments in the Age of Democracy', 38 *NYU J Int'l L & Politics* (2006) 877; d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments', 9 *Chicago J Int'l L* (2008) 1; d'Aspremont, 'Responsibility for Coups in International Law', 18 *Tulane J Int'l & Comparative L* (2010) 451; d'Aspremont, 'La licéité des coups d'Etat en droit international', in Travaux de la Société française pour le droit international (SFDI), *L'Etat de droit en droit international* (2009), at 117–136.

It is probably too early to infer any definite lessons from the abovementioned recent practice. Many of the observations made here are speculative in nature. Additional research must still be conducted, and it is accordingly of great import that the principle of democratic legitimacy, even though the odds are rather ominous as to its consolidations, remains on the research agenda of international legal scholarship.[90] If future research were to demonstrate that the years 1989–2010 constituted a unique experience in the history of international law from the standpoint of regulating governance, legal scholars would then have to come to terms with the possibility that international law probably is not an adequate normative instrument to regulate such an aspect of domestic governance. Rather than vainly trying to re-animate the rules pertaining to the democratic origin of governments once witnessed between 1989 and 2010 or creating soft conceptualizations of democracy in the international legal order, they should then make clear to those actually involved in international norm-making that other avenues need to be pursued if one wants to require governments to be of a democratic origin. This would surely not be idiosyncratic. Indeed, it seems to the present author that domestic governance may simultaneously be regulated through other normative systems. In particular, it cannot be ruled out that non-legal norms, political or moral directives may also enshrine some instructions as to the origin of domestic governance.[91] From the vantage point of compliance, these instructions may sometimes carry more weight than legal rules. The question whether political or moral directives about the democratic origin of government may be more abided by than a corresponding legal requirement is not one that I ought to take on here, however.[92] It suffices here to say that contemporary practice shows that international law could be falling short of extending its grip on domestic governance well beyond the imposition of legal requirements as to *how* the power is exercised at the domestic level. This must entice international lawyers to re-think the efficacy of international law as a tool for regulating accession to power at the domestic level.

[90] According to Pippan, democratic governance remains a topic that has not lost its attraction and continues to inspire scholars of international law: see Pippan, 'International Law', *supra* note 12, at 5. A few years ago, Wheatley argued the contrary: see Wheatley, *supra* note 12, at 225.

[91] These norms are often referred to by legal scholars as constituting soft legal norms. For a criticism of the concept of soft law see d'Aspremont, *supra* note 55.

[92] For a survey of the recent developments in the study of compliance in both international relations and international law scholarship see Raustiala and Slaughter, 'International Law, International Relations and Compliance', in W. Carlnaes, T. Risse, and B. Simmons (eds), *The Handbook of International Relations* (2002), at 538. For an insightful account of various compliance theories see Guzman, 'A Compliance-Based Theory of International Law', 90 *California L Rev* (2002) 1823. From the same author see A.T. Guzman, *How International Law Works: A Rationale Choice Theory* (2008) and the comments by Petersen, 'How Rational is International Law', 20 *EJIL* (2010) 1247. See also the recent empirical contribution by Scharf on the contemporary theories of compliance, 'International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate', 31 *Cardozo L Rev* (2009) 45.

4 Democracy in International Law and Scholarly Dynamics

The fluctuations observed in the contemporary practice – described in section 1 and 2 – make it necessary – as was demonstrated in section 3 – to keep the principle of democratic legitimacy on the research agenda of international legal scholarship. Yet, it is argued in this final section that any future research on the existence of a principle of democratic legitimacy necessitates a greater awareness of some of the abiding leanings of scholars engaging in the study of the principle of democratic legitimacy.

While Susan Marks' earlier work[93] as well as the additional thoughts which she publishes above in this journal are very instrumental in unearthing some of these dynamics, the following paragraphs aim to complement them by a few additional insights. In particular, the rest of this article focuses on three specific attitudes which have pervaded the literature on that question. Before mentioning these three inclinations of scholars, it is of the utmost importance, however, to make clear that unravelling some of these tendencies does not amount to an endorsement of the early sceptical rejection of the emergence of a principle of democratic legitimacy in international law. It is true, as some critics have argued, that the post-Cold War international legal scholarship, which has been outlined above, has occasionally conveyed the impression that international legal scholars woke up one day with the idea that democracy had suddenly crystallized in the international legal order in the form of a multifaceted obligation towards the democratic origin of governments.[94] Such a criticism must nonetheless be limited to the very early studies, for later studies were grounded in thorough analysis of the practice and benefited from better hindsight. This is why critical appraisal of some of the scholarly attitudes which infuse the legal scholarship should not be seen as leading to any scepticism towards the studies – mentioned in section 1 – which have demonstrated that international law – and especially the classical constitutional autonomy of states – had not remained unaffected by the end of the Cold War.

A first attitude that pervades the scholarly literature on democratic governance in international law is the traditional inclination of legal scholars to construe international law as the receptacle of their own views on the ideal state of law. Most often, such a normative bent is unconscious. This attitude is as old as international law and has usually constituted the dividing line between natural law and positivism. While this classical antagonism no longer suffices to describe the state of contemporary scholarship,[95] it is interesting to note that, even today, many commentators working on the

[93] Marks, *supra* note 1.

[94] Burchill, 'The Developing International Law of Democracy', 64 *MLR* (2001) 123.

[95] Among many reasons, it is noteworthy that the natural law school can no longer be assimilated to that attitude: see Finnis, 'On the Incoherence of Legal Positivism', in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (1999), at 140: '[n]o natural law theory of law has ever claimed that in order to be law a norm must be required by morality, or that all legal requirements are also – independently of being validly posited as law – moral requirements'. It has even been argued that formalism is a common denominator of natural law and positivism: see Weinrib, 'Legal Formalism: On the Immanent Rationality of Law', 97 *Yale LJ* (1987–1988) 949, at 361. See also the remarks of Fletcher, 'Comparative Law as a Subversive Discipline', 46 *Am J Comparative L* (1998) 683, at 685.

question of democracy in international law tend to *channel their aspirations* through legal scholarship. Indeed, although most areas of scholarly research have weathered such an inclination,[96] the scholarly thinking about democratic governance in international law is an area where this leaning has been most prominent. One of the most common manifestations of such attitude is, for instance, found in the contemporary constitutionalist accounts of international law,[97] according to which democracy is elevated into a constitutional principle of the international legal order.[98] It is partly in reaction to this inclination of legal scholars to broadcast their ideals or values through their conception of international law that Susan Marks famously defended a principle of democratic inclusion whereby democracy should be construed as a transformative instrument continuously allowing the empowerment of citizens and popular participation.[99] This is surely not the place to discuss the merits of such general scholarly attitude and the extent to which the criticisms thereof are cogent.[100] It only matters for the sake of this article to highlight that the scholarship about democracy in international law has proven the embodiment of the (old) inclination of international legal scholars to mould their interpretation of international law along their own ideals.

Besides those 'idealist'[101] scholars who project their own ideals about domestic governance in their accounts of the rules of international law, others, mindful of the actual underdevelopment of international law in this regard, have purposely engaged with the actual state of the law *with a view to changing it*. This 'reformist'[102] attitude departs from the previous one in that its normative bent is much more conscious. It is equally being witnessed in the international legal scholarship pertaining to

[96] See, for instance, the evaluation of the customary status of some of the rules of International Humanitarian Law in ICTY, Case No. IT-95-16-T, *Kupreskic,* 14 Jan. 2000, at para. 527.

[97] Peters, *supra* note 12, at 263–341.

[98] For a few illustrations of constitutionalist accounts of international law see Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law', 281 *Collected Courses* (1999) 10, especially at 237, 306; Peters, 'Compensatory Constitutionalism: The Function of Potential of Fundamental International Norms and Structure', 19 *Leiden J Int'l L* (2006) 579; de Wet, 'The International Constitutional Order', 55 *Int'l & Comp LQ* (2006) 51; de Wet, 'The Emergence of International and Regional Value Systems as a Manifestation of the Emerging International Constitutional Order', 19 *Leiden J Int'l L* (2006) 611; H. Mosler, *The International Society As a Legal Community* (1980), at 17–18. See also J. Delbrück (ed.), *New Trends in International Lawmaking – International 'Legislation' in the Public Interest* (1996), especially at 18–19; Simma, 'From Bilateralism to Community Interest', 250 *Collected Courses* (1994-VI) 217, especially at 233; Walter, 'International Law in a Process of Constitutionalization', in J. Nijman and A. Nollkaemper (eds), *New Perspectives on the Divide Between National and International Law* (2007), at 191–215. It is interesting to note in this respect that in its conclusions the ILC Study Group on the Fragmentation of International Law alluded to the 'constitutional character of the UN Charter', *Yrbk Int'l L Commission* (2006), ii, pt 2, at para. 35. On constitutionalism in general see von Bogdandy, 'Constitutionalism in International Law: Comment on a Proposal from Germany', 47 *Harvard Int'l LJ* (2006) 223.

[99] Marks, *supra* note 1, at 109 ff.

[100] Legal realists have very early taken issue with such a scholarly attitude. Their critique was later refined and expended by critical legal scholars. See, among others, M. Koskenniemi. *From Apology to Utopia* (2005).

[101] Such a strand of the legal scholarship has been considered 'idealistic': see Megret, 'International Law as Law', in J. Crawford and M. Koskenniemi (eds), *Cambridge Companion to International Law* (forthcoming), available at: http://ssrn.com/abstract=1672824, at 10–11.

[102] *Ibid.*, at 14–15.

democratic governance in international law. Indeed, among the many abovementioned scholars who have embraced the idea that international law enshrines a requirement as to the democratic origin of governments, many have been convinced that change of international law with respect to domestic governance could be achieved through progressive scholarly interpretations.[103] Like the inclination to construe international law as a receptacle of one's own ideals, this conscious use of progressive interpretation to change the law is far from being unprecedented. It comes down to the old belief of international legal scholars that they not only are commentators but that they also take part in the law-making in their capacity as scholars – a belief actually nurtured by Article 38(1)(d) of the Statute of the International Court of Justice which scholars relish referring to.[104] Such an inclination is nowadays observed in other scholarly constructions, like the whole concept of soft law which is also informed by the conscious attempt of scholars to promote an expansion of international law in areas thus far unregulated.[105] As far as the rules of international law pertaining to domestic governance are concerned, such an attitude – which in the more general area of human rights has often been lambasted for being '*droits de l'hommiste*'[106] – has commonly manifested itself in the adoption of a very deductive approach towards customary international law. This is especially true as regards those scholars who have tried to re-interpret the concept of self-determination beyond its decolonization-restricted scope with a view to deducing a principle of democracy.[107] But the promotion of a change of international law as regards domestic governance has not only taken the form of a deductive approach towards customary international law. Others have tried to live up to the classical inductive methodology to establish customary international law,[108] although they have then lowered the standard of general and consistent practice and that of *opinio juris*.

A third attitude could equally explain the amenability of legal scholars to the principle of democratic legitimacy. The legal scholarship having been interested in the study of the principle of democratic legitimacy also bespeaks an inclination to see the world in black and white and the correlative tendency to draw categories and statuses.[109] I must acknowledge that my own take on the question of democratic

[103] Roth, *supra* note 76, at 419.

[104] For a criticism of that view see Kammerhofer, 'Law-Making by Scholarship? The Dark Side of 21st Century International Legal "Methodology"', available at: http://ssrn.com/abstract=1631510, forthcoming in J. Crawford (ed.), *Selected Proceedings of the European Society of International Law* (2011), iii.

[105] On this aspect of the soft law agenda see d'Aspremont, *supra* note 55. I have further elaborated on the agenda of deformalization elsewhere: J. d'Aspremont, *Formalism and the Sources of International Law – A Theory of Ascertainment* (2011).

[106] See generally Pellet, 'Droits-de-l'hommisme et droit international',Conférences Gilberto Amado, 18 July 2000, available at : www.droits-fondamentaux.org/spip.php?article27. See also Pellet, 'Du bon usage du "droits-de-l'hommisme"', *Le Monde*, 26 Oct. 2002, at 17, available at : http://alainpellet.fr/Documents/PELLET%20-%2002-10-26%20-%20Le%20Monde.pdf.

[107] See the authors mentioned in *supra* note 35.

[108] For the classical inductive process see *Delimitation of the Maritime Boundary of the Gulf of Maine (Canada v. United States of America)* [1984] ICJ Rep 246 (Judgment of 12 Oct.).

[109] See, e.g., Slaughter, 'Toward an Age of Liberal Nations', 33 *Harvard Int'l LJ* (1992) 393 or Slaughter, *supra* note 76.

governance in international law is not completely alien to this inclination.[110] It must nonetheless be acknowledged that such a dynamic is almost congenital to international legal scholarship the task of which is often seen as the rationalization of an otherwise heterogeneous and highly contingent practice.[111] I am convinced that the need felt by legal scholars to rationalize even the most intricate factual phenomenon played a role in the prompt affirmation that the principle of democratic legitimacy has crystallized in international law. Indeed, a principle of democratic legitimacy allows a taxonomy between different categories of sovereign states and, possibly, between different sorts of rights and privileges. In that sense, the principle of democratic legitimacy has helped legal scholars to conceptualize and rationalize the volatile and highly fact-dependent question of statehood. While the theories of the fundamental rights of the state have yet to be revived,[112] the introduction of a principle of democratic legitimacy makes possible such differentiations in the legal status of states and their respective rights.

These three leanings observed in the international legal scholarship are only a few of the many inclinations which pervade contemporary studies on democratic governance in international law. This is not the place to evaluate them.[113] Yet, those that have been mentioned here are probably the most common. It is ultimately argued here that only the awareness thereof, if superimposed on the realization of the circular movements of the practice and legal scholarship depicted here, can preserve the authority of scholarly research on questions of democratic governance in international law, especially at a time when empirical studies point to a de-emphasizing of the democratic origin of governments in practice.

Concluding Remarks: Lessons from a Possible Interlude

Although many of the observations made here have remained speculative in nature, this article, despite going down a different route from that followed by Susan Marks, has similarly tried to demonstrate that, when it comes to regulating domestic governance through international law, both the practice and legal scholarship have moved in a circle over the last 20 years. It has more specifically demonstrated that practice and international legal scholarship originally started with a regulation of domestic governance centred on classical political and civil rights, subsequently approaching it from the standpoint of a principle of democratic legitimacy based on the democratic

[110] See d'Aspremont, *supra* note 12, at 84–142.

[111] See the enlightening and famous interpretation of the role of scholars by Reuter, 'Principes de droit international public', 103 *Collected Courses* (1961-II), at 459. This inclination may partly explain the success of Carl Schmitt's distinction between friends and enemies among international legal scholars. See, e.g., Friedrichs, 'Defining the International Public Enemy', 19 *Leiden JIL* (2006) 69. See also Nouwen and Werner, 'Doing Justice to the Political', 21 *EJIL* (2011) 941.

[112] Mouton, 'La notion d'Etat et le droit international public', 16 *Droits — Revue Française de Théorie Juridique* (1992) 45.

[113] I have criticially evaluated some of them elsewhere: see J. d'Aspremont, *Formalism and the Sources of International Law – A Theory of Ascertainment* (forthcoming, 2011).

origin of governments, before finally returning to a traditional – and probably more comfortable – human rights-based conception of domestic governance. Shedding some light on these empirical and scholarly dynamics does certainly not call for a disregard of early scholarly studies of the principle of democratic legitimacy in the international legal order. First, as was explained above, some of the changes in the international legal system in the aftermath of the Cold War will certainly outlive the current return to policies centred on classical human rights and good governance. Indeed, although the democratic origin of government may possibly take a back seat in the foreign policies of states and in the agenda of international legal scholarship, this parameter will continue to bear upon the evaluation of the legitimacy of governments in the years to come. Secondly, these early studies about the principle of democratic legitimacy will long remain of great importance as the practice of the years 2007–2010 is still too uncertain and fluctuating for any definite lesson to be drawn. Above all, if any lesson can be learned from the years 1989–2010, it is thanks to the scholarly efforts devoted to the study of the changes brought about by the end of the Cold War in terms of domestic governance. Many of these studies have usefully demonstrated that international law reached an unprecedented degree of regulation of domestic governance which possibly took the form of an obligation pertaining to the democratic origin of government. While the relevance of studies on democracy of the first decade that followed the end of the Cold War is not by any means put into question by the argument put forward here, the possible fall of democratic governance currently observed in practice nonetheless shows that these early studies must now be complemented by new scholarly inquiries if one wants correctly to capture the fluctuating state of the practice and legal scholarship on the question. In that sense, the argument put forward here leads to a paradoxical conclusion. Indeed, the possible fall of the principle of democratic legitimacy observed in contemporary practice entails renewed scholarly attention being paid to the principle of democratic legitimacy. In other words, the de-emphasizing of the democratic origin of governments in practice and legal scholarship necessitates that democracy return to the top tier of international legal scholars' agenda with a view to their more correctly appraising the continuous changes in the international legal system. If that were to be the case, it is hoped that subsequent research will be carried out with a greater awareness of the empirical and scholarly dynamics which this modest article has sought to unearth.