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1989-2010: The Rise and Fall of Democratic Governance in International Law

Jean d'Aspremont*

Promptly celebrated in the aftermath of the end of the Cold War by a group of American scholars[1], the rise of the so-called principle of democratic legitimacy came to be seen as one of the major changes brought about by the fall of the Berlin Wall. While non-American international legal scholars proved more cautious as to the existence of an international legal obligation regarding the form of political regime of states, they incrementally accepted – although to a much more modest extent than their American counterparts – that the international legal order had grown more amenable to the principle of democracy[2]. Even though the scope of these rules as well as their conceptualisation have continued to be the object of much scholarly disagreement, the idea that contemporary international law enshrines some requirements as to the *democratic origin* of power at the domestic level gained currency.

This chapter concurs with the contention 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[3]) 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 to accede to power at the domestic level.

This chapter submits, however, 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 instrumentalisation of democratisation policies of Western countries[4] 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

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[1] See n 12 below.

[2] See n 13 below.

[3] See n 7 and n 8 below.

[4] On the use of the concept of 'Western States', see the remarks of J Vidmar, 'Multiple Democracy: International and European Human Rights Law Perspectives (2010) 23 *Leiden Journal of International Law* 207,

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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.

The following paragraphs start by exposing 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 before seeking to critically appraise the lessons learnt from that period, especially regarding the ability of international law to regulate domestic governance (3).

I. 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 organisations. This abiding and inevitable absence of formal certification of governments has, before the fall of the Berlin Wall, been 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 affair'[5] and the choice thereof was considered to be unconstrained by international law.[6] Apart from the prohibition of apartheid[7] and, to a lesser extent, of fascist political system[8], the only prescriptions related 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 recognised that the post-Cold War international legal order had become more amenable to the prominent role of democracy. In what has been perceived as an intra-disciplinary truce[9], American scholars in particular – i.e. those that have subsequently been seen as forming the 'democratic entitlement school'[10] – have – albeit to various degrees[11] – enthusiastically supported the idea that democracy today plays a crucial role in the international legal order and have swiftly provided various

[5] For a classical account, see L. Oppenheim, *International Law*, vol. I, 6th ed (Longmans, New York, 1912), at 425.

[6] ICJ, Case Concerning Military and Paramilitary Activities in and against Nicaragua, ICJ Rep., 1986, para. 261.

[7] See International Convention on the Suppression and Punishment of the Crime of Apartheid (1973), 1015 UN Treaty Ser 243 (1976); International Convention on the Elimination of All Forms of Racial Discrimination (1965), art 3, 660 UN Treaty Ser 195 (1969). See also Security Council Res No 288, UN Doc S/RES/288 (1970); Security Council Res No 277, UN Doc S/RES/277 (1970); Security Council Res No 253, UN Doc S/RES/253 (1968); Security Council Res No 232, UN Doc S/RES/232 (1966); Security Council Res No 216, UN Doc S/RES/216 (1965); Security Council Res No 217, UN Doc S/RES/217 (1965); General Assembly Res No 1791, UN Doc A/RES/1791 (1962); General Assembly Res No 1598, UN Doc A/RES/1598 (1961); Security Council Res No 221, UN Doc S/RES/221 (1961).

[8] In particular, see General Assembly Res No 36/162, UN Doc A/RES/36/162 (Dec 16, 1981).

[9] E MacDonald, 'International Law, Democratic Governance and September the 11th,' (2002) 3 *German Law Journal*, available at http://www.germanlawjournal.com.

[10] Because many of them were affiliated to NYU, these scholars were subsequently dubbed by David Kennedy as members of the 'Manhattan School'. See D Kennedy, 'Tom Franck and the Manhattan School' (2003) 35 *NYU Journal of International Law and Politics* 397, 432.

[11] G Simpson, 'Two Liberalisms' 12 (2001) *European Journal of International Law* 537.

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optimistic accounts of the extent of the legal changes brought about by democracy.[12] European scholars, although they had usually voiced greater skepticism and refrained from embracing the whole array of consequences that the abovementioned American scholars attached to a lack of democracy, growingly came to recognise that democracy – at least in its procedural and electoral dimension – bears upon the rules and the functioning of the international legal order[13].

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,[14] living up to some democratic standards, in the view of the author of these lines, increasingly turned to correspond with an international customary obligation.[15] Indeed, I contend that the post-1989 practice contains strong indications that, 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.[16] Likewise, each experience of international administration of territory has led to

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[12] The most radical liberal view on this question is probably offered by F R Tesón, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53, 54–55. For milder forms of the democratic entitlement theory, see T M Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law* 46, 46; C M Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?' (1994–1995) 27 *NYU Journal of International Law and Politics* 289, 329. For an overview of how participatory rights emerged in international law, see generally G H Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539. For a basic account of the arguments for and against the democratic entitlement theory, see generally G H Fox and B R 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* (Cambridge University Press, Cambridge 2000) 1, 11. Many of the abovementioned works are reproduced in G H Fox and B R Roth (eds), *Democratic Governance and International Law* (Cambridge University Press, Cambridge 2000). For a critical appraisal of that literature, see S. Marks, *The Riddle of All Constitutions* (Oxford University Press, Oxford, 2003).

[13] J Crawford, 'Democracy and International Law' (1993) 64 *British Yearbook of International Law* 113-33; J Roldán Barbero, *Democracia y Derecho Internacional* (Civitas, Madrid, 1994); B. Bauer, *Der volkerrechtliche Anspruch auf Demokratie* (Lang, Frankfurt am Main 1998); D Schindler, 'Völkerrecht und Demokratie' in G Hafner et al. (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (Kluwer Law International, The Hague, 1998), 611-630; L A Sicilianos, *L'ONU et la démocratisation de l'état; systèmes régionaux et ordre juridique universel* (Pedone, Paris, 2000); L A 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* (Pedone, Paris, 2002) 13; J d'Aspremont, *L'Etat non démocratique en droit international. Etude critique du droit internationa positif et de la pratique contemporaine* (Paris, Pedone 2008); A Peters, 'Dual Democracy' in J Klabbers, A Peters, G Ulfstein (eds), *The Constitutionalization of International Law* (Oxford University Press, Oxford, 2009), 273; S Wheatley, 'Democracy in International Law: A European Perspective' (2002) 51 International and Comparative Law Quarterly 225; C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': Has Democracy Finally Emerged as a Global Legal Entitlement?' (2010) *Jean Monnet Working Paper 02/10*, available at http://www.jeanmonnetprogram.org, 7 (who argues that such an entitlement can be said to have emerged only if we equates democracy and elections); P Klein, 'Le droit aux élections libres en droit international: Mythes et réalités' in Olivier Corten et al (eds), *A la recherche du nouvel ordre mondial* 93, 95–98 (Eds Complexe, Brussels, 1993); R Ben Achour, 'Le Droit International de la Démocratie' (2000) 4 *Cursos Euromediterráneos Bancaja de Derecho Internacional* 327. See contra N Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht* (Springer Berlin, Heidelberg, New York, 2009) p. 139 and 220. See also N Petersen, 'The Principle of Democratic Teleology in International Law' (2008-2009) 34 *Brooklyn Journal of International Law* 33.

[14] For one criticism of the liberal theories of democracy, see J d'Aspremont, *L'Etat non democratique en droit international*.

[15] Ibid, 291.

[16] See eg *Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (1991) 62 *British Yearbook of International Law* 559, 559-60; *Declaration on Yugoslavia* (1991) 62 British Yearbook of

the creation of democratic states, as illustrated by the cases of East Timor and, irrespective of its final status, Kosovo.[17] 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 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.[18]

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 being usually denied any external legitimacy.[19] These sanctions usually are eased once the authors of the coups pledge to organise 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 standstill[20] constraining existing democracies.[21] We have also witnessed the resort to peace-enforcement missions to restore overthrown democratic governments, as illustrated by the intervention in Sierra Leone.[22]

In the same vein, there is little doubt today that democracy has become a prominent yardstick with which to assess the legitimacy of governments.[23] 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 the legitimacy which their

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International Law 559, 560-61.

[17]On this topic, see E de Brabandere, *Post-Conflict Administrations In International Law: International Territorial Administration, Transitional Authority And Foreign Occupation In Theory* (Martinus Nijhoff, The Hague, 2009); C Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond* (Cambridge University Press, Cambridge, 2008) ; J d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments' (2008) 9 *Chicago Journal of International Law* 1; J d'Aspremont, 'La création international d'Etats démocratiques' (2005) 109 *Revue générale de droit international public* 889-908. 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 eg S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (unanimously adopted resolution addressing the question of the future democratic government of Iraq). But see S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (China abstaining from voting on the question of Kosovo).

[18] J d'Aspremont, *L'Etat non démocratique*, 57.

[19] See generally J d'Aspremont, 'Responsibility for Coups in International Law' (2010) 18 *Tulane Journal of International and Comparative Law* 451 (2010). See also J d'Aspremont, 'La licéité des coups d'Etat en droit international' in *Travaux de la Société française pour le droit international*. *L'Etat de droit en droit international* (Pedone, Paris, 2009) 117.

[20] J d'Aspremont, *L'Etat non démocratique*, 338.

[21] N Petersen, Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht, 89 (this is what he calls the principle of Democratic Teleology). See also N Petersen, 'The Principle of Democratic Teleology in International Law', 33.

[22] See generally K Nowrot and E W Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *American University International Law Review* 388. It is noteworthy 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 eg B Nowrojee, 'Joining Forces: United Nations and Regional Peacekeeping—Lessons from Liberia' (1995) 8 *Harvard. Human Rights Journal* 133. See generally M Byers and S Chesterman, 'You the People": Pro-democratic intervention in international law' in G H Fox and B Roth (eds), *Democratic Governance and International Law* at 259.

[23] E Stein, 'International Integration and Democracy: No Love at First Sight' (2001) 95 *American Journal of International Law* 489, 494; Franck, 'The Emerging Right', 46.

government can earned from democratic elections.[24] 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.[25] The non-democratic character of a government is sometimes disregarded because of overriding geopolitical and strategic motives.[26] 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"[27] for any new government.[28] All-in-all, these few examples—already much discussed in the literature[29]—suffice to demonstrate the far-reaching structural changes that international society has undergone after 1989 with respect to the form of governments.[30]

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 progress towards the establishment of democracy.[31] In that sense, non-democratic states, with a view of strengthening the legitimacy of their government, try to portray their political regime in a democratic fashion rather than choosing to dispute the role that democracy plays in the international order.

The possible obligation[32] to be democratic to the emergence of which the abovementioned practice has contributed has been conceptualised by scholars in many different ways. Some authors have espoused a *human right-based conceptualisation* by defending the existence of a right to political participation[33], the right to democratic

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[24] On international election monitoring, see C Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation'. See also C Binder and C Pippan, 'Election Monitoring, International' in R Wolfrum (ed), *Encyclopedia of Public International Law* (Oxford University Press, Oxford, 2008), available at http://www.mpepil.com/.

[25] In the same vein, G H Fox, 'Election Monitoring: The International Legal Setting' (2001) 19 *Wisconsin International Law Journal* 295, 312. C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative'', 34-35. This finding has led some authors to contend that there exist "double standards" in that regard. See M G Kohen, 'La création d'Etats en droit international contemporain' (2002) 6 *Cours euro-méditerranéens Bancaja de droit international*, 619.

[26] 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.

[27] On legitimacy, see the general observation of D Bodansky, 'The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?' (1999) 93 *American Journal of International Law* 596, 599. See also J d'Aspremont and E de Brabandere, 'The Complementary Faces of Legitimacy in International Law: the Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 *Fordham Journal of International Law*,101.

[28] See generally J d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2006) 38 *N.Y.U. Journal of International Law and Politics* 877; see also B Roth, *Governmental Illegitimacy*, 212-200, 413 and 415.

[29] See generally G Fox and B Roth (eds.), *Democratic Governance and International Law*. See also J d'Aspremont, *L'Etat non démocratique*.

[30] This led some scholars to claim that we had reached the end of "History". On this use of such a terminology, see S Marks, 'International Law, Democracy and the End of History' in G H Fox and B Roth, *Democratic Governance and International Law*, 535.

[31] For one example, consider the 2007 events in Pakistan. In particular, see the interview of President Musharraf on November 11, 2007, C Gall, D Rohde, and J Perlez, 'Rebuffing US, Musharraf Calls Crackdown Crucial to a Fair Vote', *New York Times*, 14 November 2007, at A1. Musharraf has since stepped down from military leadership, see, for example, D Rohde and C Gall, 'In Musharraf's Shadow, a New Hope for Pakistan Rises', *New York Times*, 7 January 2008, at A3. Also relevant are the developments in Myanmar. On this issue, see, for example, S Mydans, 'Myanmar Claims Step To Democracy, But Junta Still Grips to Power', *International Herald Tribune*, 4 September 2007, 3.

[32] In the same vein, see C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative'', 7. See contra B Roth, *Governmental Illegitimacy,* 417.

[33] G H Fox, 'The Right to Political Participation in International Law' (1992) 17 *Yale Journal of International Law* 539. See also C Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation', 134.

governance[34], the right to free and fair elections[35]. 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 decolonisation[36]. 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 beyond self-determination.[37] Eventually, there are scholars who simultaneously drew on all of these conceptualisations to buttress the existence of a requirement of democratic origin of governments in international law[38], a path also arguably followed by the Human Rights Committee.[39]

However it is eventually conceptualised, 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 only rests on an *electoral* and *procedural* understanding of democracy.[40] Although the free and fair character of the elections inevitably requires respect for some of the elementary political and civil rights[41], 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 only conveyed a restrictive and procedural definition of democracy[42], however defective such a conception may be from a conceptual and theoretical point of view.[43] Likewise, the ambit of

[34] Franck's right to democratic governance is itself very much ground in participatory rights of human rights treaties as well as the right to self-determination. See Franck, 'The Emerging Right'. In the same vein, see also J I Ibegbu, The *Right to Democracy in International Law* (Edwin Mellen Press, Lewiston 2003).

[35] C M Cerna 'Universal Democracy',329.

[36] P Thornberry, 'The Democratic or Internal Aspect of Self-Determination with some Remarks on Federalism' in C Tomuschat (ed) *Modern Law of Self-Determination* (Brill, Dordrecht, 1993) 101, 134-37; A Rosas, 'Internal Self-Determination' in C Tomuschat (ed) *Modern Law of Self-Determination* (Brill, Dordrecht, 1993) 225,,241-46; A Cassese, *Self-Determination of Peoples. A Legal Reappraisal* (Oxford University Press, Oxford, 1995), 311. For a criticism of that approach, see Petersen, Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht, 89. See also J d'Aspremont, *L'Etat non démocratique*,271.

[37] Franck's right to democratic governance is primarily grounded in self-determination. See. Franck, 'The Emerging Right'. For a criticism of this understanding of self-determination, see J Vidmar, 'The Right of Self-Determination and Multiparty Democracy: Two Sides of the Same Coin?' (2010) 10 *Human Rights Law Review* 239.

[38] A Peters, 'Dual Democracy',274-275 and 277-278. For a criticism of the link between the right of political participation and self-determination, see J Vidmar, 'The Right of Self-Determination and Multiparty Democracy'.

[39] 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.

[40] G H Fox, 'The Right to Political Participation in International Law' in Fox and Roth (eds), *Democratic Governance and International Law*,49.

[41] J d'Aspremont, *L'Etat non démocratique*,15. On the specific criteria that ought to be met for an election to be free an fair, see C Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation'.

[42] This finding is also made (and subsequently discussed) by Susan Marks. See S Marks, *The Riddle of All Constitutions*, 50 et seq. See also C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative''.

[43] See the famous criticism of this "minimalistic" understanding of democracy by S Marks, *The Riddle of All Constitutions*, 52-53. In the same vein see B Gills, J Rocamora, and R Wilson, 'Low Intensity Democracy' in B Gills, J Rocamora and R Wilson (eds), *Low Intensity Democracy: Political Power in the New World Order* (Pluto, London, 1993) 3, 21; R Burchill, 'Book Review of The Developing International Law of Democracy' (2001) 64 *Modern Law Review 123*, 128; R A Miller, 'Self-Determination in International Law and the Demise of Democracy' (2003) 41 Columbia Journal of Transnational Law 601, 603–05. M Koskenniemi, 'Whose Intolerance, Which Democracy?' in G Fox and B Roth, *Democratic Governance and International Law*, 438.

that requirement should also not be overblown. While this customary obligation, whatever its conceptualisation, probably constitutes an *erga omnes* obligation[44], it certainly is not of a *jus cogens* character, as it is underscored by the existence of numerous persistent objectors to that customary rule.[45]

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[46] and, to a lesser extent, fascism.[47] Moreover, the obligation to organise free and fair elections is not entirely new in the international legal order, as a similar obligation[48] is already embedded in the International Covenant on Civil and Political Rights,[49] which has been ratified by 167 states.[50] 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.[51] This is not totally astonishing, given the inapplicability of the classical domestic blueprints of governance to the international system.[52] Yet, the abovementioned practice has been interpreted by a very important part of scholarship as the manifestation of an existing international obligation to ensure the democratic origin of governments.

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 above-mentioned scholarly enthusiasm for the principle of democracy has aroused some severe criticisms with respect to its imperialistic or neo-colonialist overtones[53]

See also B Roth, 'Evaluating democratic progress' in G H Fox and B Roth (eds), *Democratic Governance and International Law*, 493 et seq.; C Binder and C Pippan, 'Election Monitoring, International'; C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative''.

[44] J d'Aspremont, *L'Etat non démocratique*, 291.

[45] The People's Republic of China and several states in the Middle East can probably be considered persistent objectors to that rule. See, for example, A J Nathan, 'The Tianammen Papers' (2001) 80 *Foreign Affairs* 2. I have defended this idea of persistent objector elsewhere. See J d'Aspremont, *L'Etat non démocratique* at 290. For a criticism of that idea, see C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative'',27. See also C Pippan, 'Review of Jean d'Aspremont L'Etat Non Démocratique en Droit International' (2009) 20 *European Journal of International* Law 1276.

[46] See n 7 above.

[47] See n 8 above.

[48] See however J. Vidmar for whom the ICCPR obligation does not entail an obligation to organise multi-party elections. See J Vidmar, 'Multiparty Democracy', 209–240, esp. at 222.

[49] International Covenant on Civil and Political Rights, General Assembly Res 2200A, UN Doc A/6316 (1966) ("ICCPR"). On the ICCPR and democracy, see generally A 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* (Sakkoulas, Athens, 2000) 255.

[50] See Status of Ratification of the Principal International Human Rights Treaties, available online at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (visited November, 30, 2010). On the possible ratification of the ICCPR by the People's Republic of China, see K Lee, 'China and the International Covenant on Civil and Political Rights: Prospects and Challenges' (2007) 6 *Chinese Journal of International Law* 445.

[51] On this debate, see generally A Peters, 'Dual Democracy', 263-341.

[52] See generally J H H Weiler, 'The Geology of International Law: Governance, Democracy and Legitimacy' (2004) 64 Heidelberg Journal of International Law 547.

[53] M Koskenniemi, 'Intolerant Democracies: A Reaction' (1996) 37 *Harvard International Law Journal* 231. While recognising that such a criticism is not ill-founded Susan Marks puts forward an alternative reading of

and the correlative reminiscence of the 19th century distinction between civilised and barbarian states.[54] It has also been said that a principle of democratic legitimacy can help secure systematic inequalities among states and even within states.[55] Because of the impossibility to clearly define democracy, others have contended that any obligation pertaining to the democratic origin of governments is not normative and cannot yield a normative directive towards states.[56] 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 paper to discuss them.[57] Rather, the following section turns to the setbacks encountered by the legal requirement of the democratic origin of government in recent international practice.

II. 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 contemporary practice is jeopardising the consolidation of the abovementioned practice in favor of a requirement of democratic origin of governments. Indeed, subject to the important exception of regional regimes[58], contemporary practice weathers an incremental de-emphasising of the democratic origin of governments and a growing emphasis on the requirements of transparency and the absence of corruption (good governance)[59] and the respect for human rights. [60] After almost two decades of care for the democratic origin of governments, it seems that we are witnessing a return to foreign policies centered 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 which have become the central features of foreign policies of states. This is exemplified by

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democracy to overcome such an object. See S Marks, *The Riddle of All Constitutions*, 101 et seq. For some historical underpinnings to the idea that democracy is primarily a Western idea, see D Held, *Democracy and the Global Order* (Polity Press, Cambridge, 1995), 282 et seq. For an attempted reconciliation see N Petersen, 'International Law, Cultural Diversity, and Democratic Rule: Beyond the Divide Between Universalism and Relativism' (2010) 1 *Asian Journal of International Law* (forthcoming). See more generally on the question of global values, J d'Aspremont. 'The Foundations of the International Legal Order' (2007) 18 *Finnish Yearbook of International Law* 219.

[54] See eg E Nys, *Droit international, Les principes, les théories, les faits*, Tome I (Alfred Castaigne Brussels, 1904) 116 et seq; J Westlake, *International Law*, 2d ed (Cambridge University Press, Cambridge, 1910), at 40; J Kent, *Commentary on International Law* (Deighton, Bell, and Co, Cambridge, 1878); R Phillimore, *Commentaries upon International Law* (Butterworths, London, 1879-89); H Wheaton, *Elements of International Law* (Stevens & Sons, London, 1880).

[55] S Marks, *The Riddle of All Constitutions*, 101.

[56] H Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77, 89. See also the remarks of G H Fox, 'Democracy, Right to, International Protection' in R Wolfrum (ed), *Encyclopedia of Public International Law*, at para.6. On this understanding of normativity, see J d'Aspremont, 'Softness in International Law' (2008) 19 *European Journal of International Law* 1075.

[57] Many of them have been insightfully examined by S Marks, *The Riddle of All Constitutions.*

[58] For an outline of the mechanisms geared towards the promotion or the enforcement of democracy at the regional level, see G H Fox, 'Democracy, Right to, International Protection'. For an account of the European regional model, see S Wheatley, 'Democracy in International Law: A European Perspective', 225.

[59] J F Burns and A Cowell, 'Brown issues Karzai a stern warning', *International Herald Tribune*, 7-8 November 2009, 3. See the 2010 *US National Security Strategy*, 38, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[60] E Sciolino, 'Rocky time for Qaddafi during visit to France', *International Herald Tribune*, 14 December 2007, 3.

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.[61]

Against the backdrop of this growing de-emphasising 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, prove more often insufficient to trigger non-recognition of the new government, particularly if the latter is being reelected.[62] Likewise, states are nowadays living up to a *principled engagement with non-democratic regimes.* [63] 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[64], although diplomatic relations are occasionally downgraded at a lower level of diplomatic to manifest some discontent as to the absence of free and fair elections.[65] But even coups do not always lead to a suspension of diplomatic relations.[66]

The same can be said as far as a various types of inter-states 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[67], especially when it comes to security[68] or economy.[69] By the same token, cooperation policies based on mechanisms of democratic conditionality are increasingly challenged by non-western states. It 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 famous democratic conditionality[70] by African states[71], practice indicates that

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[61] On the oscillations between democracy of origin and democracy of exercise, see generally J d'Aspremont, 'Legitimacy of Governments'. See more recently, J d'Aspremont and E de Brabandere, 'The Complementary Faces of Legitimacy in International Law'.

[62] See M Simons, 'Sudan Leader can't bypass wall of diplomatic isolation', *International Herald Tribune*, 3 May 2010, 5; See T Berthemet, 'Omar el-Béchir réélu sans péril président du Soudan', *Le Figaro*, 27 April 2010, 6.

[63] See for instance the *2010 US National Security Strategy*, 38, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf.

[64] M Slackman, 'Libya seeks greater U.S. Reward for renouncing weapons projects', *International Herald Tribune*, 11 March 2009, 5; E Sciolino, 'Rocky time for Qaddafi during visit to France', *International Herald Tribune*, 14 December 2007, 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, *International Herald Tribune*, 9 November 2009, 8.

[65] M Lander and M Mazzeti, 'A valuable peek at North Korea', *International Herald Tribune*, 20 August 2009, 2; C Duhigg and C Dougherty, 'Gambling on the global economy', *International Herald Tribune*, 3 November 2008, 1.

[66] *International Herald Tribune*, 11-12 July 2009, 4.

[67] See S Mydans, '20 Uighurs, $1 billion and a clear signal', *International Herald Tribune*, 23 December 2009, 5.

[68] D E. Sanger and E Schmitt, 'A threat not dwelled on: Pakistan', *International Herald Tribune*, 3 December 2009, 7; L Polgreen, France may intervene to back Chad's leader, *International Herald Tribune*, 6 February 2008, 4; Associated Press, 'France admits it delivered Libyan munitions to Chad', *International Herald Tribune*, 15 February 2008, 3.

[69] M Slackman, 'Libya seeks greater U.S. Reward for renouncing weapons projects', *International Herald Tribune*, 11 March 2009, 5

[70] J 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* (Kluwer, The Hague, 1999) 771-790; D Perrot (ed) *Les relations ACP/UE après le modèle de Lomé : quel partenariat?* (Bruylant, Brussels 2007); see generally O Babarinde and G Faber (eds), *The European Union and the developing countries : the Cotonou Agreement*, *The Trade and Development Policy of the European Union* (Martinus Nijhoff, Leiden, 2005); L Bartels, 'The Trade and Development Policy of the European Union'

democratic conditionality is turning more controversial, which in turn may bring about its abandonment in some areas.[72]

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 centered on the democratisation 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[73] and confirmed by the 2010 *National Security Strategy of the United States*.[74] As a result of this de-emphasising of the democratic origin of governments, the fall of the Berlin Wall has been growingly seen in the recent scholarship as a culmination rather than a departure[75]. Interestingly, the international legal scholarship – which had until recently most of the time voiced an upbeat tone – has itself turned more skeptical as to the existence of a requirement (or the extent thereof) pertaining to the democratic origin of governments.[76]

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 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 democratisation of foreign governments has taken the back seat and has given way to foreign policies prioritising other objectives, the classical motives for supporting policies in favor 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 Organisations because of their common – but very disputable – belief that democracy bolsters peace[77] and prosperity,[78]

(2007) 18 *European Journal of International Law* 715-756; P Leino, 'European Universalism? : the EU and Human Rights Conditionality' (2006) 24 *Yearbook of European Law* 329.

[71] See the reactions on the occasion of the Lisbon Summit. See eg para. 52 of the 2007 Lisbon Africa-EU Strategic Partnership, available at http://www.africa-eu-partnership.org/pdf/eas2007_joint_strategy_en.pdf. Interestingly the Final Declaration of the 2007 Lisbon Summit between Europe and Africa only mentions good governance and human rights and fail to refer to the democratic origin of governments (available at http://www.africa-eu-partnership.org/pdf/eas2007_lisbon_declaration_en.pdf).

[72] See generally T Carothers, 'The Backlash Against Democracy Promotion' (2006) 85 *Foreign Affairs* 55.

[73] See eg K Roth, 'Empty Promises? Obama's Hesitant Embrace of Human Rights, Foreign Affairs, March-April 2010; K Roth, 'Obama's hesitant embrace of human rights', *International Herald Tribune*, 24 February 2010, 8. In the same vein, J Traub, 'Keeping score on Obama's engagement' policy', *International Herald Tribune*, 21 December 2009,, 4; B Knowlton, 'US Waiver Allows Aid to Nations With Child Soldiers', *International Herald Tribune*, 29 October 2010, 5; T Carothers, 'Repairing Democracy Promotion', *The Washington Post*, 14 September 2007 Some early signs were already flagged by T Carothers, 'Promoting Democracy and Fighting Terror' (2003) 82 *Foreign Affairs* 84.

[74] 2010 National Security Strategy of the United States, available at http://www.whitehouse.gov/sites/default/files/rss_viewer/national_security_strategy.pdf, p. 10 and p. 37.

[75] K Weisbrode, 'The false promise of 1989', *International Herald Tribune*, 7-8 November 2009, 8.

[76] See N Petersen, *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht*, 139 and 220. See also N Petersen, 'The Principle of Democratic Teleology in International Law', 33; G H Fox, 'Democracy, Right to, International Protection'; J Vidmar, 'Multiple Democracy', 209; J Vidmar 'The Right of Self-Determination and Multiparty Democracy'; See however C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': Has Democracy Finally Emerged as a Global Legal Entitlement?'.

[77] UN Secretary General, *Supplement to Reports on Democratization*, 1996, UN Doc A/51/761, para. 3. In the scholarship, this has proved a widely discussed and controversial idea. See eg the neo-Kantian Liberal and democratic peace theories contained in M W Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 *Philosophy and Public Affairs* 205, 206-32; J Norton Moore, 'Beyond the Democratic Peace: Solving the War Puzzle' (2004) 44 *Virginia Journal of International Law* 341; J M Owen IV, *Liberal Peace, Liberal War: American Politics and International Security* (Cornell University Press, New York, 1997); W M Reisman,

strengthens the respect for human rights[79]and even quells terrorism.[80] Recent practice seems to indicate that these avowed driving-forces of democratisation 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 democratisations policies and the requirements of democratic origin of governments that go with them. It probably is not the place to appraise the reasons underlying this retreat of the democracy in recent practice. This is a task left to international relations and political sciences specialists whose expertise is much more adequate to take on such an examination. It suffices here to pinpoint three 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 economical crisis has made democratisation policies more of a luxury. Less and less 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. The multilateralisation of the security agenda of the 21st century has elevated security in the overarching objective of states national and international policies[81] thereby making it more clearly and more systematically trump democratisation policies. Third, the avert instrumentalisation 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 also is an aspect which Susan Marks has long tried to unravel.[83] Eventually, the rise of the People's Republic of China as the first superpower – and its avowed rejection of the 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

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'Humanitarian Intervention and Fledging Democracies' (1995) 18 *Fordham International Law Journal* 794, 796; K A Schultz, 'Do Democratic Institutions Constrain or Inform? Contrasting Two Institutional Perspectives on Democracy and War' (1999) 53 *International Organizations* 233; A M Slaughter, International Law in a World of Liberal States (1995) 6 *European Journal of International Law* 503. This thesis has been severely criticized. See eg B Roth, *Governmental Illegitimacy*, 424 et seq.; J Vasquez, 'Ethics, Foreign Policy and Liberal Wars (2005) 6 *International Studies Perspectives* 307; B Jahn, 'Kant, Mill and Illiberal Legacies in International Affairs' (2005) 59 *International Organization,* 177; S Marks, *The Riddle of All Constitutions* at 42 et seq. For a recent discussion, see A Peters, 'Dual Democracy', 281-282.

[78] G.A. Res. 46/151, Annex II, para. 13, U.N. Doc. A/RES/46/151 (Dec. 18, 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, para. 9, U.N. doc. A/CONF. 157/PC/62/Add. 5 (Mar. 26, 1993).

[79] UN Secretary General, *Supplement to Reports on Democratization*, 1996, UN Doc A/51/761, para. 3.

[80] See UN Secretary General, *A More Secure World: Our Shared Responsibility, Report of the High Level Panel on threats, Challenges, and Change*, para. 148, *follow-up to the outcome of the Millennium Summit*, U.N. Doc. A/59/565 (Dec. 2, 2004), *available at* http://www.un.org/secureworld/report.pdf. See also President George W. Bush, President Addresses the Nation (Sept. 7, 2003), available at http://www.whitehouse.gov. For some criticisms of this aspect of the global war on terror, see T Carothers, 'Promoting Democracy and Fighting Terror'.

[81] T Carothers, 'Promoting Democracy and Fighting Terror'; T Carothers, 'Repairing Democracy Promotion. See also E MacDonald, 'International Law, Democratic Governance and September the 11th'.

[82] On this point, see T Carothers, 'The Backlash Against Democracy Promotion', 64. See also T Carothers, 'Repairing Democracy Promotion'. See also E MacDonald, 'International Law, Democratic Governance and September the 11th'.

[83] See generally S. Marks, *The Riddle of All Constitutions*.

[84] If the requirement of democratic origin of governments is considered as a customary obligation, China could be considered a persistent objector. See J d'Aspremont, *L'Etat non démocratique* at 290. For a criticism of that idea, see n 45 above.

countries and international organisations which is classically made conditional upon the respect for democratic standards.[85]

III. Lessons from an Interlude: The Possible Limits of International Law in Regulating of Domestic Governance

Some of the changes brought about by the end of the Cold War in terms of the regulation of domestic governance – which have been described in section 1 – are probably too well ingrained in positive international law to be subject to the fluctuations – described in section 2. 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 centered on classical human rights and good governance rather than the democratic origin of governments. In particular, democracy would most probably remain a standard to assess the legitimacy of governments[86] and governments in quest for greater legitimacy would continue to seek an 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 they the authors of the coups pledge to organise free and fair elections.[88]

Despite the inevitable persistence of some requirements pertaining to the democratic origin of governments, it cannot be excluded 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 in 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 enshrined 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 for 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 *experiment* for regulation of governance through international law has returning to a more classical set of requirements centered on the

[85] This is a change to which I had already alluded to in my previous work. See J d'Aspremont, *L'Etat non démocratique*, 316.

[86] See the reactions following the 2010 coup in Kyrgyzstan, see A E Kramer, 'U.S. signals backing of new Kyrgyz leadership', *International Herald Tribune*, 15 April 2010, 4; see also A E Kramer, 'Deposed leader leaves Kyrgyzstan', *International Herald Tribune*, 16 April 2010, 3.

[87] See S Mydans, 'Rulers of Myanmar shed uniforms for civilian skins', *International Herald Tribune*, 3 May 2010, 2. See T Fuller, 'Junta in Myanmar raises promise of 2010 election', *International Herald Tribune*, 11 February 2008, 2.

[88] See the reactions following the coup in Niger in February 2010. See A Nossiter, 'Niger junta names chief after coup oust leader', *International Herald Tribune*, 20-21 February 2010, 4. On the practice pertaining to the 2009 coup in Honduras, see News Reports, 'Ousted Honduran leader vows to return', *International Herald Tribune*, 1 July 2009, 5.

[89] See n 15 above.

exercise of power in the form of civil and political human rights. Yet, a rebound cannot be entirely excluded. Indeed, it may be that we are only witnessing a temporarily lull in the consolidation of legal requirements pertaining to the democratic origin of governments. However, the current economical and socio-political configuration of the global order seems to point to a move away from democratic legitimacy centered 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 the experience of the year 1989-2010 which brought about the emergence of legal constrains on the origin of governments has showed that international law as not the appropriate normative instrument to achieve that end.

It is probably too early to infer any definite lessons from the abovementioned practice. Many of the observations made here are speculative in nature. Additional research must still be conducted and it, accordingly, is 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 the international legal scholarship.[90] If future research were to demonstrate that the years 1989-2010 has 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 the 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 conceptualisation 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 excluded 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 sometime 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 a question 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 to regulate accession to power at the domestic level.

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[90] According to C. Pippan, democratic governance remains a topic that has not lost its attraction and continues to inspire scholars of international law. See C Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative'' 5.

[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 J d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials'.

[92] For a survey of the recent developments in the study of compliance in both international relations and international law scholarship, see K Raustiala and A M Slaughter, 'International Law, International Relations and Compliance' in W Carlnaes, T Risse and B Simmons (eds), *The Handbook of International Relations* (Sage Publications, London, 2002) 538. For an insightful account of various compliance theories, see A T Guzman, 'A Compliance-Based Theory of International Law' (2002) 90 *California Law Review* 1823.