Abstract. The voluminous literature on recent transitions to democracy has generally lacked an analysis from the perspective of international law. This article explores four aspects of efforts to promote a normative ‘democratic entitlement’. First, it reviews the ways in which notions of democratic legitimacy have infiltrated virtually every aspect of international legal discourse. Second, it explores how a normative legitimacy standard may alter foundational doctrines of international law, such as non-intervention and the recognition of states and governments. Third, it reviews arguments against the emergence of ‘democratic entitlement’. These arguments both take issue with the sources of law relied upon by the entitlement’s proponents, and ask whether the substantive and procedural aspects of democracy implicit in the democratic entitlement thesis are conceptually coherent. Finally, the article explores the ways in which a legal analysis of democratization confronts questions not addressed by the methodologies of other disciplines.

1. Introduction

Prior to the events of 1989–91, ‘democracy’ was a word rarely found in the writings of international lawyers. Most legal scholars, and certainly most states, accepted the 1987 view of the American Law Institute that ‘international law does not generally address domestic constitutional issues, such as how a national government is formed’. Apart from its use in resolutions repudiating ‘alien, colonial, and racist’ domination, the term ‘democratic’ appeared in collective pronouncements as a mere platitude, so abstract as to encompass opposite interpretations. Although human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR) had long provided for a right to political participation, the diversity (and, in the case of Cold War participants, mutual hostility) of governmental systems in the international ‘community’ had precluded consensus on the specifications of this

* This article is adapted from the Introduction to Democratic Governance and International Law (Cambridge: Cambridge University Press, 2000), edited by the authors.
1 For a discussion of doctrine and scholarship on this question prior to the end of the Cold War, see the essays in Gregory H. Fox and Brad R. Roth (eds.), Democratic Governance and International Law (Cambridge: Cambridge University Press, 2000).
3 Article 25 of the ICCPR provides:

   (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
   (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
   (c) To have access, on general terms of equality, to public service in his country.
Moreover, any assertion of a determinate ‘right to democratic governance’ would have suggested criteria of governmental legitimacy at odds with the ‘effective control’ doctrine that had long prevailed in the recognition practices of most states and intergovernmental organizations.

The United Nations, an organization founded on the principle of the sovereign equality of ideologically-diverse states, seemed an unlikely vehicle to further a specific mode of internal governance. Although the UN had an extensive history of monitoring elections and referenda in states emerging from colonialism, it did not send a monitoring mission to a sovereign state until the 1990 elections in Nicaragua. Even after the UN Security Council began using its long-dormant Chapter VII powers to address humanitarian catastrophes arising from civil conflict, there seemed little prospect that the organization would get into the business of imposing solutions to internal power struggles, let alone that it would invoke liberal-democratic criteria in dictating outcomes. Regional intergovernmental organizations, despite occasional rhetorical commitments to political democracy, appeared scarcely more disposed to enter the fray.

Whatever one is to make of the developments in the 1990s, it is now clear that international law and international organizations are no longer indifferent to the internal character of regimes exercising effective control within sovereign states. In region after region, political change has swept through the former bastions of authoritarian and dictatorial rule, offering the promise, if not always the reality, of democratization, and this development has been reflected in international institutions. The status and determinacy of the right to political participation have been enhanced by pronouncements of the ICCPR Human Rights Committee, the UN Human Rights Commission, the European and Inter-American Commissions on Human Rights, the Organization of American States (OAS), the Organization for

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6 The 1948 Charter of the Organization of American States declares that ‘representative democracy is an indispensable condition for the stability, peace and development of the region’. The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms states in its preamble that ‘an effective political democracy is essential to the protection of fundamental freedoms’.


8 Promotion of the Right to Democracy, Commission on Human Rights Resolution 1999/57 (27 April 1999).


Security and Cooperation in Europe (OSCE), and the UN General Assembly. The UN and other intergovernmental organizations have invested heavily in the crafting and monitoring of electoral processes in many nations across the globe. On two occasions, the international community has responded vigorously to military coups against elected governments, endorsing the use of external armed force to restore the deposed governments of Jean-Bertrand Aristide in Haiti in 1994 and Ahmad Tejan Kabbah in Sierra Leone in 1998. So commonly espoused is the commitment to democratic institutions that the UN Secretary-General could assert in 1997 as ‘an established norm’ the view that ‘military coups against democratically elected Governments by self-appointed juntas are not acceptable.’

There can be little doubt that this unprecedented international attention to the internal governing structures of states has significant implications for the current content and future direction of international law. Legal scholars have only recently begun to assess these developments and to ask whether there can meaningfully be said to be, in Thomas Franck’s pioneering words, a ‘democratic entitlement’ in international law. Franck defines the democratic entitlement in words borrowed from the American Declaration of Independence: governments derive ‘their just powers from the consent of the governed’. To this traditional principle of contractarianism he adds a crucial second component, relating not to the legitimating authority of citizen consent but to the role of international actors in national processes of legitimation. Franck contends that the international community, acting through increasingly standardized legal mechanisms, now plays a crucial role in both the establishment and maintenance of national democratic institutions. Franck concludes, in the words of the Declaration, that each nation achieves ‘separate and equal station’ in the international community by demonstrating ‘a decent respect to the opinions of mankind’. Whether, and to what extent, that ‘separate and equal station’ is contingent on comportment with a determinate ‘democratic’ norm is, nonetheless, an intricate and controversial question.

It is the thesis of this article that the analytical tools of international law are now essential to a full understanding of collective initiatives in support of democratic governance. If these initiatives are to be fully understood, in other words, they must be conceptualized as having definable normative goals and as emerging within the larger body of international legal institutions. In the absence of a legal analysis, we

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12 See, for example, GA Res. 45/150 (1990) (on ‘Enhancing the effectiveness of the principle of periodic and genuine elections’).

13 Biegbeder, *International Monitoring*.


17 Ibid. p. 46.

18 Ibid.
will fail to understand both the systemic consequences and the inherent limitations of collective democratic initiatives.

2. Democratization and the international system

It once seemed incontrovertible that, given the range of ideologies and institutional structures of member states, the international system was, by its very nature, neutral on the subject of the internal character, let alone legitimacy, of domestic regimes. The recent wave of democratization, however, has had ramifications for the conduct of international organizations, and consequently for international law.

The end of the Cold War occasioned a challenging new role for international organizations as architects for the rebuilding of shattered states in the developing world. In countries from Nicaragua to El Salvador to Cambodia to Angola to Bosnia to Sierra Leone, it has become almost a given that international organizations will culminate their efforts at national reconciliation with the holding of democratic elections. Not once has the international community proposed that a new, post-conflict government be chosen in any other way.19

What began as an adjunct to conflict resolution has grown to a broader, institutionalized legitimating function. Many international organizations now maintain permanent electoral assistance divisions. From 1992 to August 1999, the United Nations Electoral Assistance Division provided various forms of electoral assistance to over 70 states, most of them in Africa, and most without the former predicate of a recently ended civil war.20 Between 1990 and 1995 the European Union (EU) provided electoral assistance to forty-four different countries.21 Similar statistics could be quoted for the OAS and the Office for Democratic Institutions and Human Rights of the OSCE. Many of these missions end with the organization determining whether the elections have been conducted according to criteria of fairness that have essentially achieved boilerplate status.22 Necessarily, a determination as to whether an election was conducted properly speaks to the legitimacy of the purported victor's mandate to govern.

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Such judgments sharply contradict the traditional international law maxim that
the selection of national leaders is quintessentially a matter of exclusive domestic
jurisdiction. At the same time, such developments must be seen in context: inter-
national organizations are now involved in virtually every aspect of national
policymaking, from budgeting priorities to labour issues to the eradication of official
corruption. It is not self-evident that a great legal distance exists between weighing
in on these important questions of policy and having a say in the selection of
policymakers themselves.

The legal innovations related to democratic governance may be described as
having both qualitative and quantitative aspects. The qualitative innovations involve
defining various aspects of ‘democracy’. No generally agreed definition has yet
emerged, though most international actors using the term appear, at a minimum, to
refer to the familiar pairing of free and fair elections and certain ‘counter-
majoritarian’ political rights. Elections, as the procedural embodiment of ‘popular
sovereignty’, are particularly emphasized, though the UN Human Rights
Commission recently included elections as only one of a long list of ‘rights of
democratic governance’.

What has been made increasingly clear, at least in the jurisprudence of human
rights bodies, is what democracy does not mean. Whereas the issue was off-limits
during the Cold War years, several international institutions have expressly denied
that the one-party state allows sufficient electoral choice to comport with treaty
standards. Similarly, these bodies have placed a heavy burden of justification on
efforts to ban specific political parties as threats to national security or to the
identity of the state. With a drastic increase in their caseload, human rights bodies
have developed an increasingly rich jurisprudence that has sought to bound the once
open-ended debate over the nature of democratic institutions.

The quantitative changes relate to the infiltration of concerns for democratic
legitimacy into virtually every aspect of international legal discourse. Pertinent
developments include the following:

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23 As Oppenheim stated in the first edition of his influential treatise: ‘The Law of Nations prescribes no
rules as regards the kind of head a State may have. Every State is, naturally, independent regarding
this point, possessing the faculty of adopting any Constitution according to its discretion’. Lassa

24 Kurt Herndl, ‘The Case-Law of the Commission as Regards the Right to Free Elections (Article 3 of
protocol 1)’, in *The Birth of European Human Rights Law*, Michele de Salvia and Marti E. Villiger
(eds.) (Baden-Baden: Nomos Verlagsgesellschaft 1998): (‘the right of an individual to take part in
elections is quintessential for any democratic society and any democratic State’).

25 This non-exclusive list refers to (a) the rights to freedom of opinion and expression, of thought,
conscience and religion, and of peaceful association and assembly; (b) the right to freedom to seek,
receive and impart information and ideas through any media; (c) the rule of law; (d) the right of
universal and equal suffrage, as well as free voting procedures and periodic and free elections; (e) the
right to political participation; (f) transparent and accountable government institutions; (g) the right
of citizens to choose their government system though constitutional or other democratic means; and
(h) equal access to public service. Promotion of the Right to Democracy, Comm. HR Res. 1999/57
(27 April 1999) (approved by a vote of 51–0–2).

26 See the discussion in Gregory H. Fox, ‘The Right to Political Participation in International Law,’ in
Fox and Roth, *Democratic Governance*.

27 Ibid., pp. 55–9.
• States and international lenders have started to withhold development assistance from states unwilling to pursue democratic reforms.28
• Military coups, once marginal events in the eyes of international law, are increasingly condemned as illegitimate exercises of state power.29
• States and international organizations that once professed either not to view recognition of new governments as a legal matter, or took the view that any regime in effective control of territory was entitled to recognition, have increasingly invoked democratic criteria in their recognition decisions.30
• The EU, the OAS and MERCOSUR now condition full membership on the maintenance of political democracy.31
• The EU now predicates its adherence to new treaty obligations on other parties’ observance of democratic norms. All new EU treaties specify observance of democratic principles as an essential element of the accord, a material breach of which would permit the Union to suspend compliance with its treaty obligations.32
• The claim has been made, though it has yet to be generally accepted, that the transition to democratic rule is so profound as to constitute a ‘fundamental

31 The Maastricht Treaty on European Union provides that democracy and respect for human rights, as set forth in the European Convention on Human Rights, shall be pre-conditions for membership in the European Union. Treaty on European Union, Title I(F), International Legal Materials, 31 (1992), p. 256. The Washington Protocol to the OAS Charter provides for the suspension from the General Assembly of any member state whose democratically constituted government has been overthrown by force. OAE/Ser.P. AG/doc.11 (XVI-E/92), rev. 1 (1992). MERCOSUR’s 1996 Protocol of Ushuaia provides that any disruption of democracy in a member state may lead to the suspension of that state’s right to participate in MERCOSUR organs and a suspension of its rights under the preferential trade instruments promulgated by the organization. Protocol de Ushuaia Sobre Compromiso Democrático en el Mercosur, the Republica de Bolivia and la Republica de Chile, arts. 4 and 5 (1996), available at www.idrc.ca/lacro/investigacionmercours2.html. The member states of MERCOSUR are Argentina, Brazil, Paraguay and Uruguay.
change in circumstances’, permitting a newly democratic state to discard treaty obligations assumed by a previous, non-democratic regime.33

As notions of democratic legitimacy diffuse throughout the international legal system, one can identify at least four broad justifications for including democratization as a concern of the international law. A crucial feature of these justifications is that they do not simply repeat arguments about democracy found in political theory. While some overlapping with democratic political theory is certainly evident, these arguments address not only the well-being of citizens within democratic systems but the distinctive interests of the international community as well.

The first justification is a perceived connection between competitive multiparty elections and the range of other internationally protected human rights. For reasons of Cold War politics—relating primarily to the impossibility of agreement that free and fair elections were a human right on par with core norms such as the right against torture—these two categories have been consistently described in discrete terms: democracy and human rights.34 Nonetheless, international organizations increasingly assert that a commitment to the principles of choice, transparency and pluralism that mark political democracy is essential to securing an institutionalized protection of other human rights.35 This is hardly a new insight: the mutually reinforcing nature of broad political participation and individual freedom has been a major theme in Western political thought over the past two centuries.36

Second, democratization is increasingly regarded as a means of preventing internal armed conflict, which in the 1990s was unrivalled as the leading form of

33 Gabcíkovo-Nagymaros Project (Hungary/Slovakia), 1997 ICJ 1, para.104 (International Court of Justice rejects Hungary’s claim that ‘profound changes of a political nature’ in Eastern Europe, in combination with other factors, constituted a ‘fundamental change in circumstances’).


35 Report of the Secretary-General: Supplement to Reports on Democratization, UN Doc. A/51/761 (Annex), para. 3 (1996) (‘the practice of democracy is increasingly regarded as essential to progress on a wide range of human concerns and to the protection of human rights’); Inter-American Commission on Human Rights, Ten Years of Activities 1971–1981 (1982), p. 337 (‘the democratic context is the necessary element for the establishment of a political society where human rights can thrive to their fullest’).

deadly strife. Democratization is said to address the exclusionary politics lying at the heart of civil conflicts. As UN Secretary-General Kofi Annan has stated, 'in the absence of genuinely democratic institutions, contending interests are likely to seek to settle their differences through conflict rather than through accommodation'. In the Secretary-General’s words, 'democratization gives people a stake in society. Its importance cannot be overstated, for unless people feel that they have a true stake in society lasting peace will not be possible.'

Third, and relatedly, democratization has been asserted as a key to peace among states. The widely reported finding that democratic states do not go to war with one another, though not uncontroversial in its particulars, has led many to link the international community’s security interests to the promotion of democratic governance within states.

Finally, a range of emerging international norms, unrelated to democratization, have come to rely upon implementation through democratic processes. Three examples of this phenomenon can be found in the international efforts to protect the environment, to fight official corruption, and to promote the rights of indigenous peoples. In each of these cases, instruments establishing the regimes provide for the maximum degree of popular participation in formulating strategies for implementing a state’s international obligations. The 1992 Rio Declaration on Environment and Development, for example, in setting out a broad range of regulatory challenges, provides that '[e]nvironmental issues are best handled with the participation of all concerned citizens'. The instruments also require the sort of transparent decision-making processes and free flow of information that are typical of democratic systems. Indeed, it has been asserted more broadly that the increasingly complex demands of multilateral treaty regimes cannot easily be fulfilled by unrepresentative, non-transparent national institutions—this quite apart from the

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37 In approving an electoral monitoring mission at the end of a long and brutal civil war in Liberia, for example, the Security Council declared ‘that the holding of free and fair elections as scheduled is an essential phase of the peace process in Liberia.’ SC Res. 1100 (1997). See also SC Res. 1116 (1997) (same).


39 Ibid., para. 78.

40 For a collection of scholarly articles on both sides of the ‘democratic peace’ controversy, see Michael E. Brown, Sean M. Lynn-Jones and Steven E. Miller (eds.), Debating the Democratic Peace (Cambridge, MA: MIT Press, 1996).


43 The United Nations Economic Commission for Europe, for example, has devoted an entire treaty to the participatory aspects of environmental law-making. Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, UN Doc. ECE/CEP/43 (1998). Article 1 provides that in order to protect the right of every person to live in a healthy environment, ‘each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention’.

general question of whether democracies are more likely than other states to adhere to treaty commitments.45

In the *Tinoco* Arbitration, William Howard Taft famously held that non-recogn-


ing of governments on the ground of illegitimacy of origin was not a postulate of

international law and did not secure general acquiescence.46 Intervening events,

however, have cast doubt on this conventional wisdom, and have raised the question

of the emergence of a right to democratic governance in international law. Such an

emergent right, if established, is so thoroughly at odds with traditional conceptions

of state sovereignty as to augur a major transformation of the ground rules of the

international system.

3. The ‘democratic entitlement’ thesis: scope and consequences

Because the assertion of a ‘democratic entitlement’ in international law is grounded in

the right to political participation as established in Article 21 of the Universal

Declaration of Human Rights (UDHR), Article 25 of the ICCPR, and the counter-

part articles of regional human rights instruments, the questions posed by the thesis

may, at first glance, appear confined to the human rights treaty system. As that

system provides for only the most limited of remedies and notoriously lacks

efficacious enforcement mechanisms, one might well imagine that the specification of

its requirements in respect of political participation, as in respect of freedom of

speech or religion or association, would be a development of limited significance to

international law, organization, and relations overall.

Yet the right to political participation, at least as interpreted through the lens of

the democratic entitlement, is unlike other human rights, for its individual enjoy-

ment is inseparable from its collective effect. One participates in politics not solely

(and usually not principally) for the fulfilment derived from the activity, but for the

opportunity to affect the exercise of power in the polity. From the liberal-democratic

perspective, to have the individual right to political participation is to have the

collective right to oust a political leadership that fails to garner the support of at

least a plurality of one’s fellows. Article 21 of the UDHR, in a manner strikingly

dissimilar to that of the document’s other Articles and that of the ICCPR, speaks

not merely of the individual right to take part in government, but also of the

principle that ‘[t]he will of the people shall be the basis of the authority of

government’.

If the very basis of the authority of government can be said to rest, as a matter of

international law, on the fulfilment of liberal-democratic participatory standards, the

consequences will be wide-ranging. Indeed, if the sovereignty affirmed and protected

by the international system is understood to be popular sovereignty, and popular

sovereignty is understood to be predicated upon liberal democracy, the potential

result is a revolutionary transformation of the full array of international norms.

45 Kurt Taylor Gaubatz, ‘Democratic States and Commitment in International Relations’, *International
47 GA Res. 217 (III) (1948).
from norms governing recognition of states and governments to those governing the use of force. Thus, the most pointed interpretation of the democratic entitlement would permit unilateral armed intervention across state boundaries to depose a regime that has usurped an electoral mandate. In the words of W. Michael Reisman, the ‘sovereignty’ protected by contemporary international law ‘is the people’s sovereignty rather than the sovereign’s sovereignty’. 48 From this, Reisman draws the conclusion that when the people’s ‘confirmed wishes are ignored by a local caudillo who either takes power himself or assigns it to a subordinate he controls, a jurist rooted in the late twentieth century can hardly say that the invasion by outside forces to remove the caudillo and install the elected government is a violation of national sovereignty’. 49

It is by no means clear that the argument for a democratic entitlement need be taken to such a conclusion. Nonetheless, the democratic entitlement thesis generates a progression of path-breaking legal conclusions that has no clear stopping point. The progression can be elaborated as follows. The democratic entitlement thesis expressly embodies two assertions:

1. The right to political participation, however deliberately vague its specifications in human rights instruments that were adopted prior to the recent wave of liberal-democratic transitions, has now acquired a determinate content grounded in liberal-democratic institutional practices.

2. The right entails not merely the existence of appropriate participatory mechanisms, but also a determinate relationship between the mandated participatory mechanisms and the actual exercise of political power. As in the UDHR, but not the ICCPR, the individual right to cast a vote reflecting uncoerced choice is organically connected to the proposition that ‘[t]he will of the people shall be the basis of the authority of government’. The regime has a duty not merely to allow individuals ‘to take part in government’ through a consultative process, but also a duty to subject itself to the popular will — that is, to allow itself to be voted out of power.

From these two assertions, one can well infer a third:

3. The sovereignty affirmed by the international legal system belongs to the people, and can be cognizably asserted on the people’s behalf only where the government conforms to the right to political participation; therefore, measures to implement democratic rights, undertaken by foreign states collectively and/or individually, need not respect the sovereign prerogatives of governments that violate those rights. This is especially so where a ‘free and fair election’ has actually taken place, and those elected have been denied, or ousted from, office by force of arms.

The third assertion is, of course, the critical one. The democratic entitlement literature is generally suggestive of this move, although the most often-cited works have

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49 Ibid., p. 871 (arguing for the legality of the US invasion of Panama).
avoided sweeping affirmations of it.\textsuperscript{50} Acceptance of the third assertion is, perhaps, not compelled by acceptance of the first and second, but it is the logical next step.

The third assertion leaves open the practical question of how to further democratic development across borders. It does not necessarily mandate derecognition of regimes that fail to abide by international standards; proponents of the democratic entitlement neither assert as established law nor propose a mechanistic rule by which certificates of recognition, IGO delegation credentials, and diplomatic and trade relations are automatically to be denied to violators. Still less does the democratic entitlement thesis predict that measures will be taken to intervene in any particular state’s internal affairs, whether by intrusive political or economic measures (for example, covert funding of opposition groups in violation of municipal law, or secondary boycotts to disrupt a state’s trade relations) or by forcible measures (such as supply of insurgents or outright invasion).\textsuperscript{51} Given the realities of international relations, none of these measures is likely to be used routinely against non-democratic governments.

What the democratic entitlement thesis does suggest, however, is that whereas intrusive political, economic, and military measures would previously have been excluded as violative of international law, they may now be included on the menu of lawful options for foreign powers seeking—collectively or perhaps even unilaterally—to implement democratization in a recalcitrant state. While limitations on aggressive promotion of democracy would continue to arise from considerations of efficacy and prudence, the bars traditionally posed by international law would be, at a minimum, open to question. In an international system that has repeatedly affirmed the sovereign right of each state to be free from the coercive interferences of others in its choice of political, economic, social, and cultural systems,\textsuperscript{52} this alone is a revolutionary proposition.

Adherents of the democratic entitlement characterize it as an ‘emerging’ right. They understand full well that undemocratic regimes continue to be tolerated in the international community. They do not assert that state practice as yet manifests any legal duties of foreign states and intergovernmental organizations to adopt specific democracy-promoting measures. They are aware that expediency will ever under-


\textsuperscript{51} In his seminal article, Thomas Franck warns that efforts to implement the democratic entitlement need ‘to be uncoupled, in the clearest fashion, from a long history of unilateral enforcement of a tainted, colonialist “civilizing” mission’; he thus urges that ‘all states unambiguously renounce the use of unilateral, or even regional, military force to compel compliance …’ Franck, ‘Emerging Right to Democratic Governance’ (see n. 16 above) (emphasis in original).

\textsuperscript{52} See GA Res 2625 (XXV) (1970) (the ‘Friendly Relations Declaration’).
mine consistency in efforts to promote democracy. They insist, however, that the legal door is now open to determined efforts to spur democratization, and that the failure to do good everywhere should not be seen as a bar to doing good anywhere.

4. Legal methodology and democratic norms

What can a legal analysis add to the already voluminous literature on democratization? This question implicates a much broader scholarly initiative to bring the tools of legal analysis to bear on the subject matter of international relations theory. One important insight of this scholarship is that interactions among international actors ‘cannot be explained solely by the preferences and payoffs of the players; they are dependent in part on the process by which bargainers seek to resolve conflict or seek consensus’. The emergence of a democratic entitlement has been marked precisely by innovations in normative and institutional processes. Since the end of the Cold War, the sources of international support for democratization have become increasingly multilateralized. Election monitoring, recognition decisions and even the use of military force in support of elected regimes have been undertaken pursuant to collective mandates issued by international organizations. If international support for democratization is indeed unfolding in a manner consistent with an emerging normative structure, then scholars must begin to employ analytical tools specifically designed to study these issues of process; that is, the tools of international law. A legal perspective on democratization initiatives promises a number of insights.

First, a legal analysis focuses attention on state consent to democratization initiatives, a consideration often missing from claims that these efforts represent the imposition of Western institutions on an unreceptive developing world. Developing states are long-standing members of the international organizations in which these initiatives originate. Frequently, as in the case of election monitoring, the initiatives begin with requests for assistance by a developing state. In other cases, when actions are taken over the objections of a target state, the organizations frequently act pursuant to specific legal mandates that permit the objections to be disregarded. Most of these initiatives, in other words, are taken pursuant to the consent of the developing state involved. The consent is either specific to the initiative or more general to the legal mandate permitting the organization to engage in certain types of coercive action.

International law endows such consensual acts with a presumptive legitimacy. This process-based legitimacy stands apart from the truism that Western states wield

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54 See *The Lotus Case (Fr. v. Turkey)*, 1927 PCIJ (ser. A) no. 10, p.18 (‘[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law’). This presumption is embodied in the extraordinarily limited circumstances under which a State may opt out of a legal obligation binding under customary or treaty law. See *Vienna Convention on the Law of Treaties*, 23 May 1969, arts. 46–64, 1155 UNTS 331 (limited circumstances in which a treaty is deemed invalid, terminated or state performance is excused); Malcolm N. Shaw, *International Law*, 72 (4th edn., 1997) (newly created states, such as
substantial political power in bodies such as the UN Security Council. Powerful political actors influence legislative or quasi-legislative initiatives of all kinds, especially in domestic politics. In the absence of extraordinary circumstances, however, the political pressures and trade-offs surrounding passage of a legislative initiative are generally not taken as vitiating its legal legitimacy, assuming proper procedures have been followed.

If one nonetheless presses the critique that international legal processes are politicized to a degree rendering consent an empty formalism—masking exercises in Western cultural hegemony—that argument will have engaged issues of legal process generally absent from scholarship on democratization. Such a critique, for example, would need to address the substantial benefits developing states have derived from international law of the UN era: decolonization, the delegitimization of apartheid, the strengthening of norms against intervention, special dispensations in costly environmental regulatory schemes, and others. It is doubtful that any of these norms would have emerged in their present form without the multilateral institutions in which they were crafted. Developing states not only consented to these institutional processes but were active and vocal participants in creating the norms. In light of this confluence between means and ends, the focus on state consent afforded by a legal analysis assumes a central importance.

Second, a legal analysis confronts a paradox surrounding Cold War interventions by the United States (putatively) in support of democratic actors: how can law-based systems of government be installed by actions that are themselves, at best, of questionable legality? The prohibition on the unilateral use of force is generally considered to be the foundational norm of the postwar international legal order. While some legal scholars find a right of unilateral intervention in customary international law, an examination of ‘pro-democratic’ interventions in the UN era reveals that virtually none received substantial international support. Indeed, many were overwhelmingly condemned in the UN General Assembly. When the community of states reacts so negatively to unilateral actions, the acts are usually considered ineligible to serve as precedent for the emergence of a new customary norm. As a result, most legal scholars view unilateral ‘pro-democratic’ intervention with considerable suspicion.

To avoid the paradox, one might argue that the use of extra-legal means to achieve law-based democratic ends entails no necessary contradiction, since any revolution by its nature subverts the pre-existing legal order. International law surely cannot be understood to outlaw revolution, especially pro-democratic revolution.

former colonies, are bound by all customary norms existing at the time of their independence); International Law Commission, Draft Articles on State Responsibility, UN Doc. A/4/L.600 (2000), arts. 20–27 (limited circumstances excusing State acts otherwise deemed violative of legal obligations).

55 Article 2(4) of the United Nations Charter provides: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations’. The International Court of Justice has described the prohibition on unilateral force as a jus cogens norm—that is, one from which no derogation is permitted even by treaty. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 1986, ICJ 14, para. 190.

56 See, for example, D’Amato, ‘The Invasion of Panama Was a Lawful Response to Tyranny’, (see n. 50 above).

57 Michael Byers and Simon Chesterman, ‘“You the People”: Pro-Democratic Intervention in International Law’, in Fox and Roth, *Democratic Governance*. 
But whatever the validity of this argument as a matter of domestic law, it has little relevance to the legality of external intervention. The corpus of international law prohibiting unilateral intervention is unaffected by subversions of any given domestic legal order, and indeed that law exists in large part to prevent domestic turmoil from becoming ‘internationalized’. For many writers, the legally questionable nature of these unilateral interventions provided confirmation for arguments by John Stuart Mill, Michael Walzer and others that outside actors cannot (and should not) attempt to create democratic polities by fiat.58

But a legal analysis addresses the paradox by differentiating between unilateral intervention and pro-democratic intervention undertaken pursuant to multilateral deliberative processes. Acts authorized by the UN Security Council are the pre-eminent example. Since the early 1990s the Council has steadily expanded its understanding of events constituting a ‘threat to the peace’, the UN Charter’s jurisdictional trigger for the Council to authorize forcible action against a member state.59 In the cases of Haiti and Sierra Leone the Council deemed coups against elected regimes ‘threats to the peace’.60 No states voted against either resolution and both were supported by the target states’ elected governments in exile.

A legal analysis would focus on whether such Council actions indeed resolve the paradox by bestowing an imprimatur of legality on pro-democratic intervention. Can an anti-democratic coup, without more, really be said to threaten the peace? What of the timing of Council actions? Interventions by the Economic Community of West African States in Liberia and Sierra Leone, for example, received Security Council approval after they occurred, not before, as is required by the Charter.61 The questions can be broadened beyond the UN and acts of armed intervention. Can the World Bank consider the nature of a regime in making lending decisions? To what extent should organizations such as the OAS—which has adopted a collective commitment to oppose the ouster of democratic regimes—scrutinize the constitutional law and practice of member states to determine whether an ‘anti-democratic’ coup has taken place? An incongruity between extra-legal means and law-based ends may still be present in such cases, but the questions to be asked differ entirely from the case of unilateral action.

Third, the new democratic ‘normativity’ implicates the way in which law and politics are juxtaposed in the standard realist account of international relations. In describing international politics as almost wholly bereft of normative constraint, realists appear to assume that definable norms in fact address the specific aspects of state behaviour they describe. Otherwise their hypothesis could not be tested: without law one simply cannot postulate that law is either effective or ineffective in constraining state action. For most of the modern era, however, one could not make


59 UN Charter, Art. 39.


this assumption about issues of democratic legitimacy. International law simply did not address the origin or nature of national governments. Because such questions were resolved in a legal vacuum, a theory postulating the impotence of law in this area would have been wholly without empirical grounding.

Now that international law pertaining to the internal character of domestic regimes has increased in scope and determinacy, the possibility of normative constraint has entered the picture. The initial denial to Croatia of membership in the Council of Europe, the ouster of General Cedras and his junta from Haiti, and the resolution of the 1997 UN accreditation crisis for Cambodia all implicated legal as well as political considerations and standards.62 This is not to say that the outcomes of these and similar disputes are uniformly in accord with relevant legal standards. Realists may still conclude that law is not an explanatory variable in any of these circumstances. But they now must do so only after assessing a normative regime that did not exist even ten years ago.

Finally, a legal analysis provides a new perspective on the knotty definitional problems that attend promotion of ‘democratic’ governance. For writers starting from first principles, democracy is often seen as an ‘essentially contested concept’.63 Common definitions range from Joseph Schumpeter’s procedural conception of democracy as the ‘institutional arrangement for arriving at political discussions in which individuals acquire the power to decide by means of a competitive struggle for the people’s vote’, to substantive definitions phrased in consequentialist terms.64

But the emergence of legal structures has narrowed the range of democratic models potentially acceptable as multilateral initiatives. First, international legal instruments—for the most part human rights treaties—commonly avoid addressing ‘democracy’ as such. Instead, for better or worse, they treat the various component parts of most democratic models as discrete normative questions: political participation, freedoms of association, conscience and speech, self-determination, matters of economic subsistence, and the like are set out in separate articles, and each has become the subject of a rather detailed jurisprudence. By so disassembling broader conceptions of democracy, the instruments avoid—or evade—ideological disputes about the inter-relationship of these components. Each component involves a binding obligation under international law, and is properly the subject of multilateral protection.

Second, the memorialization of democratic or ‘participatory’ rights in binding legal instruments transforms definitional debates from purely philosophical discussions into, largely, exercises in legal exegesis. How, for example, should the international community assess leaders’ appeals to the ‘popular will’ or ‘popular sovereignty’? With the increased scope and determinacy of international law


pertaining to the internal character of domestic regimes, this question cannot be answered without reference to instruments requiring states to hold periodic and genuine elections—employing a secret ballot and universal suffrage—in which opponents have a meaningful opportunity to participate. An answer must also at least acknowledge decisions of human rights treaty bodies, even where those bodies (as in the case of the Human Rights Committee set up under the International Covenant on Civil and Political Rights) do not have explicit authority to issue binding interpretations of the instruments. Finally, the now-substantial practice of international organizations in monitoring national elections, even though predicated on either host state invitation or exceptional circumstances, can scarcely be ignored, as monitors have developed criteria of electoral fairness that substantially parallel treaty-body interpretations of standards set forth in binding international instruments.

The democratic entitlement thesis, if accepted, would reduce the normative inquiry to the confines of a clearly bounded universe of relevant texts. Although this would not necessarily produce a common understanding of the norms themselves, the debate among international lawyers would be conducted within relatively clear points of doctrinal reference. Methodologically, contemporary debates in and around international institutions about the criteria for democracy and popular sovereignty are a far cry from the open-ended discussions that take place among political theorists.

The third reason for change in the definitional debate is the increasing availability of judicial and quasi-judicial bodies to resolve disputes. During the Cold War few international institutions were equipped to interpret or apply democratic norms. In the absence of such multinational bodies, the few treaty standards that existed were either ignored or interpreted unilaterally by the two contending camps, leading to such dubious categories as ‘people’s democracies’ and ‘authoritarian’ (as opposed to ‘totalitarian’) regimes. Democratic standards without mediating institutions, in other words, were little better than no standards at all.65

Today, such questions are increasingly resolved in multilateral fora. Several human rights tribunals, both global and regional, have developed a jurisprudence elucidating various aspects of electoral fairness and other political rights.66 Some international organizations limit membership to ‘liberal democracies’ and therefore inquire into the democratic bona fides of new state applicants.67 The clearest application of democratic legitimacy criteria occurs in decisions to declare or refuse recognition of new states and governments, to open or break diplomatic relations, and to accord, withhold or suspend states’ memberships in, or deny their governments’ credentials to, intergovernmental organizations. On occasion, these measures may go so far as to express a collective opinio juris holding that the ruling apparatus lacks legal standing to assert rights, incur obligations, and confer immunities on behalf of the sovereign state entity—that is, legal, as distinct from merely political, non-recognition.68 Not to recognize an undemocratic regime that nonetheless

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66 Fox, ‘The Right to Political Participation’, (see n. 26 above).
67 Murphy, ‘Democratic Legitimacy and Recognition’, (see n. 30 above).
68 This phenomenon is the subject of Brad R. Roth, *Governmental Illegitimacy in International Law* (New York: Oxford University Press, 1999).
exercises effective control over the national territory represents (or at least affects) a profound affirmation of democratic principles. It affirms a willingness to forgo any sort of meaningful relationship with the state in the hope that ‘legitimate’ leaders might someday return to office.

Increasingly, intergovernmental bodies are taking decisions of this nature, the most dramatic being the UN measures of legal non-recognition against ruling military juntas in Haiti and Sierra Leone. The political organs of regional organizations, though having far less legal authority, have adopted legal or legalistic criteria and procedures to govern the adoption of political measures against ‘undemocratic’ regimes. For example, the European Union established an arbitral commission to determine whether the states of the former Yugoslavia met EU criteria for recognition. The OSCE, OAS, MERCOSUR and the Commonwealth have adopted elaborate policies to ostracize regimes that depose elected governments. The OAU has taken strong positions on an ad hoc basis in opposition to military takeovers in Sierra Leone and Côte D’Ivoire, using language that suggests broad disapproval of anti-democratic coups. This practice suggests that the international community is not only elaborating clearer standards regarding democratic government, but also creating authoritative bodies to interpret and apply those standards to new and would-be democracies.

5. Misgivings about the democratic entitlement

Although there have been few scholarly efforts to examine the democratic entitlement sceptically at length, many observers have expressed doubts about it. The case against the democratic entitlement rests in part on a more conservative juridical assessment of the instruments, practices, and pronouncements associated with democratization, with more emphasis accorded to the foundational presumption against derogations of the political independence of sovereign states. In equal part, however, the dissenting view is based upon an interpretation of the underlying political concept of popular sovereignty that is more open-textured than the one embraced by the entitlement’s proponents.

To the extent that legal source materials are interpreted teleologically, in accordance with a set of basic ends attributed to the international legal system, interpretation of these underlying ends colours seemingly positivistic assessments. This teleological element is especially relevant where the claim at stake concerns an ‘emerging’, rather than fully established, norm, since the legal analyst is called upon...

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70 OSCE, Moscow Document (see n.11 above), OAS, Representative Government Resolution (see n. 10 above); MERCOSUR Protocol of Ushuaia (see n.1 above); Commonwealth, Cultures of Democracy (see n. 29 above).
71 Agence France Presse, 30 May 1997 (Sierra Leone); Jane’s Foreign Report, 20 January 2000 (Cote D’Ivoire).
72 The most elaborate exception is the work of one of the authors of this article. Roth, Governmental Illegitimacy in International Law (see n. 68 above). For a detailed normative critique of the character of the democracy that the entitlement thesis embodies, see Susan Marks, The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology (Oxford: Clarendon Press, 2000).
not only to assess current developments but to project their future direction. Thus, while the controversy here is not merely a contest of subjectively-held ideas and aspirations, neither is it a matter of sterile application of competing legal ‘methodologies’ to source material.

The case against the democratic entitlement takes a sceptical reading of the source material cited as evidence of the ‘emerging norm’. Given that states are presumptively free and equal, and that international institutions have no implicit licence to govern matters ‘essentially within the domestic jurisdiction’, a heavy burden falls on proponents of the democratic norm to establish both its existence and its determinacy. In the light of this burden, the evidence marshalled by democratic entitlement adherents, while impressive, is far from incontestable.

A sceptical approach highlights what relevant treaties and resolutions still do not say, and what agreements could not be reached. This scepticism need not go so far as to deny that norms pertaining to the internal character of domestic regimes have increased in scope and determinacy. But whereas the democratic entitlement’s adherents see the international system as gradually establishing a set of determinate legal norms by which the whole of a state’s internal politics can be authoritatively judged and—in principle—effectively regulated, the dissenting view sees legally-protected space for diversity and contingency, now and into the future.

Notwithstanding the recent proliferation of liberal-democratic electoral processes, their adoption has been by no means universal, and the depth of commitment to them is frequently uncertain. Moreover, adoption of such processes ordinarily entails neither a renunciation of a state’s sovereign right to alter its constitutional system whenever and however it sees fit, nor any other affirmation relevant to external affairs.

Although the international community has, through UN electoral assistance projects and General Assembly pronouncements, manifested support for liberal-democratic electoral processes around the world, the assistance has been rendered only in cases where host states have requested it or where extraordinary measures have already been taken on independent grounds, and the pronouncements have been consistently two-sided. Even the more ‘pro-democratic’ resolutions, passed over the objections of the most recalcitrant states, include the pointed caveat that international electoral assistance ‘should not call into question each State’s sovereign right freely to choose and develop its political, social, economic, and cultural systems, whether or not they conform to the preferences of other States’. These supportive resolutions are consistently accompanied by counterpart resolutions, passed by majority over the objection of the most strongly liberal-democratic states, that reaffirm ‘respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes’, acknowledging the

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73 UN Charter, Art. 2 (7).
74 To meet such a burden, one must demonstrate a consistent pattern of state practice, combined with manifestations of a generally-held subjective sense of legal obligation (opinio juris) on the part of state actors. Ian Brownlie, *Principles of Public International Law* (Oxford: Clarendon Press, 1990), 4th edn, pp. 4–11. Where treaty provisions are concerned, appeal must be made to the ‘ordinary meaning’ of the provisions in context, supplemented in case of ambiguity by the treaty’s preparatory work and circumstances of conclusion, as well as by any state practice indicating subsequent agreement of the parties on interpretation. Vienna Convention on the Law of Treaties (1969), Arts. 31–32.
75 GA Res. 45/150 (1990) (129–8–9).
plurality of approaches, reserving to the domestic jurisdiction control over implementation, and criticizing unwelcome external influences on local processes.\textsuperscript{76}

It is true that UN electoral assistance, where sought by a host state, has come replete with exacting and non-negotiable standards of electoral fairness. Nonetheless, the General Assembly majority has maintained that there is ‘no universal need’ for such assistance,\textsuperscript{77} and no definitive conclusions can be drawn from collective acquiescence in the Organization’s attachment of these conditions, since even the states most protective of sovereign prerogative have no motivation or basis to question a host state’s sovereign decision to accept those terms.

Regional organizations, especially in Europe and Latin America, have been less tepid in their assertions of a democratic norm, and have imposed liberal-democratic processes as a condition, variously, of declarations of recognition (for both states and governments), of membership in intergovernmental organizations, and of diplomatic courtesies.\textsuperscript{78} It is important to note, however, that each of these political measures is a discretionary aspect of the foreign policies, unilateral and coordinated, of sovereign states. The use of these measures for putatively ‘pro-democratic’ purposes is a new and important political development—perhaps even a political development in support of legal standards—but it is not, without more, an assertion that a state’s non-compliance licenses otherwise-inadmissible interferences in its internal affairs, let alone that a non-complying government generally lacks legal standing to assert the sovereign rights of its state. Only in the cases of Haiti and Sierra Leone, among the several cases of coups against elected governments in the 1990s, have intergovernmental organizations gone to such a length, and in those cases, the illegitimacy of the regimes in question was manifest in ways that went far beyond their disregard of an electoral mandate.

In the area of treaty law, which has addressed human rights obligations without any regard to externally-driven implementation, there is no question that a right to political participation exists both in the global and in regional human rights systems. The vagueness of the relevant provisions, especially in the ICCPR, as well as the Cold War-era inattention of most human rights bodies to this issue, can be attributed to efforts to appease unrepentant one-party states. The absence of such states in Western Europe was favourable to the development of an accepted international jurisprudence of democratic rights in that region, and this phenomenon has, for obvious reasons, now spread to East-Central Europe and Latin America. The global situation, however, is more complex. The ICCPR Human Rights Committee has lately ventured a more determinate interpretation of the political participation provisions—quite arguably, more determinate than can be attributed to

\textsuperscript{76} GA Res. 45/151 (1990) (111–29–11); GA Res. 49/180 (97–57–14); GA Res. 54/168 (91–59–10). See also Boutros Boutros-Ghali, \textit{An Agenda for Democratization} (New York: United Nations, 1996), pp. 1, 3 (the UN Secretary-General notes that ‘individual states decide if and when to begin democratization’ and that the new emphasis on democratization ‘does not imply a change’ in the traditional principle of non-intervention).

\textsuperscript{77} GA Res. 49/180 (1994).

the consent of many of the member states at the time of ratification.\textsuperscript{79} The Committee’s interpretations of the Covenant are not, however, either by treaty provision or by established practice, binding on the states parties, and its ‘activist’ interpretation of some articles have raised questions as to the Committee’s credibility with state actors.\textsuperscript{80} There thus remains an onus to demonstrate acceptance by the community of states of democratic norms that go beyond the boilerplate abstractions of old.

In this regard, it is noteworthy that even in the course of approving without dissent a 1999 UN Human Rights Commission resolution affirming democratic values and related rights, a substantial portion of the international community went on record to question whether there exists anything that can meaningfully be termed an international ‘right to democracy’.\textsuperscript{81} The remarks of several states reflect, on the one hand, an unwillingness to repudiate either discrete participatory rights or democracy in the abstract, yet on the other hand, a deep concern about the implications of characterizing an entire and specific form of government as legally mandated.\textsuperscript{82}

It is true that, in the absence of fixed standards specifying how much evidence is enough to substantiate the existence of a legal norm, a sceptic can always characterize the glass as half empty. The particular scepticism at work here, though, is not an insistence on endless formal criteria; it does not deny the need to read the source material generously in light of certain presumed purposes of a community of states. Nor does the scepticism rendered here deny that the UN Charter system’s foundational norm of sovereign equality is predicated on the principle of the self-determination of peoples, and thus that the sovereignty upheld by international law is popular sovereignty, rather than the sovereignty of power holders \textit{tout court}. Nonetheless, to read the source material teleologically is not necessarily to read it through a liberal-democratic lens, especially given the ideological pluralism that characterizes the international community’s recent past and, to a non-trivial extent, its present and likely future.

One can acknowledge that sovereignty ultimately belongs to peoples and not to governments, and still question whether a liberal-democratic institutional structure

\footnotesize{\textsuperscript{79} See n. 7 above.}

\footnotesize{\textsuperscript{80} See, for example, Toonen v. Australia, CCPR/C/50/D/488/1992 (31 March 1994), para. 8.7 (‘the reference to ‘sex’ in Art. 2, para. 1, and Art. 26 is to be taken as including sexual orientation’); Human Rights Committee, General Comment 14 (1984), para. 6 (the right to life under Art. 6 entails that ‘[t]he production, testing, possession, deployment, and use of nuclear weapons should be prohibited and recognized as crimes against humanity’); Human Rights Committee, General Comment 24 (1994), para. 18 (a reservation determined by the Committee to be impermissible ‘will generally be severable, in the sense that the Covenant will be operative for the reserving party without benefit of the reservation’).

\textsuperscript{81} See n. 8 above. 25 out of 53 member states on the UN Human Rights Commission dissented or abstained on the ‘right to democracy’ language of Resolution 1999/57, though none dissented and only two (China and Cuba) abstained on the resolution as a whole. UN Doc. E/CN.4/1999/SR.57 (April 27, 1999).

\textsuperscript{82} The Indian representative commented that the ‘right to democracy’ language ‘tended needlessly to politicize an essentially promotional concept, and raised questions and legal issues that found little support in international human rights instruments’. India affirmed that there was ‘no prescriptive or single model of democracy, and that all peoples had the right freely to determine their own political and constitutional systems in accordance with their right of self-determination’, adding that democracy, as a form of government that arises from the will of the people, cannot ‘be imposed, especially from the outside’. Ibid., paras. 8–9; see also ibid., paras. 15 (Pakistan), 20 (Mexico), 22–23 (Cuba), 29 (Russian Federation), 40 (Indonesia), 42 (China).}
is the ultimate and indispensable vehicle of popular will. Indeed, in reducing popular will to the outcome of specified processes, adherents of the ‘emerging right to democratic governance’ neither worship empirical popular will nor own up to the consequences of an inherently ideological and controvertible enterprise.

On the one hand, no empirical account of popular satisfaction with an authoritarian system would satisfy the democratic entitlement. It would not be sufficient even for a dictatorship to hold a verifiably honest plebiscite on the continuation of dictatorial rule, since the ‘proper conditions’ for the exercise of popular will require a remaking of authoritarian institutions to allow for knowing, willing, and intelligent collective choice. Putting aside the problem that liberal-democratic structures alone may not establish the requisites of a collective choice that is genuinely knowing (based on good information), willing (not merely a choice among options imposed by the will of elites or by circumstance), and intelligent (taken in circumstances that allow for proper reflection, including widely available education, a robust societal market-place of ideas, and the absence of distortive economic pressures), the posited ‘conditions of choice’ require the very institutional transformation—perhaps an irreversible one—about which the populace was supposed to be empowered to choose. And even then, adherents of the democratic entitlement would not take no for an answer, on the ground that the present majority cannot legitimately vote to deny the democratic right to future instantiations of the polity. Though justifiable from the standpoint of a particular comprehensive world-view, this is a rather presumptuous approach to popular self-determination.

On the other hand, the calculated effort to specify the democratic entitlement without express reference to wider social goals entails a contradiction. In defining democracy in essentially procedural terms, the democratic entitlement school follows the contemporary comparative politics literature in rejecting teleological definitions that render democratic performance inherently unmeasurable by social science techniques. Yet political scientists justify this sterile definition, so much at odds with the term’s role in both classical theory and popular morality, by purporting (perhaps not always ingenuously) to lighten the term’s normative baggage—that is, by identifying democracy as, at most, one of many political virtues. The democratic entitlement school restores to the term ‘democracy’ its former normative weight as the sine qua non of governmental legitimacy, but not its former complexity as a realization of substantive ends and, thus, as an object of ideological contestation.

Not only are there, as everyone concedes, other perceived first-order political virtues besides ‘procedural democracy’, but the many who have yet to adopt the whole of the liberal-democratic world-view (and, yet more troubling, even some of those who have) frequently perceive the former virtues to be achievable, in certain circumstances, only at the expense of the latter. Majorities occasionally choose—if, perhaps, unwisely—to eschew or to void liberal-democratic procedures where these appear to jeopardize other virtues.

On such occasions, one can always posit a ‘higher’ popular will, at odds with empirical manifestations, that embodies the ‘objective’ interests of the populace,

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85 Ibid., p. 10.
perhaps locating the ‘true’ collective decision in customary practice or an heroic revolutionary moment. Yet for the democratic entitlement to have recourse to such devices, it must take its place alongside every other variant of political messianism. It must accept the insight that what ultimately count as democratic are such acts as are calculated to bring about a ‘truly’ democratic social reality, the insight that inspires the bearers of a substantive political faith (liberal democrats included) to eschew procedural niceties as needed. Ultimately, we do not know what democracy is until we know what it is for, and although the proponents of the entitlement may themselves have a clear vision of democratic purposes, it is far more difficult to argue that a genuine international consensus has emerged on these.

For example, notwithstanding their vaunted fidelity to formal participatory mechanisms, many liberal democrats manifested sympathy with the coup in Algeria that pre-empted an Islamic fundamentalist landslide in 1992, the forcible dispersion of the supposedly pro-Communist Russian legislature in 1993, and the Dayton High Commissioner’s removal of the Republika Srpska’s elected ethno-nationalist President in 1999. This is a sign, not of hypocrisy, but of a teleological conception of democracy that permits only contingent loyalty to institutional forms. The attempt to give those forms a status that stands above ideology and politics is therefore problematic.

From the standpoint of those sceptical of the democratic entitlement, then, what remains is a partisan vision dressed up as international law, thereby to supply a rationale for meddling in the internal affairs of foreign political communities. When one affirms that the term ‘democracy’ demarcates the moral high ground in political struggle, one must also acknowledge that the word encompasses the universe of political virtues as variously perceived, at which point democracy’s presence or absence largely ceases to be an empirical question. This acknowledgement should, arguably, lead the international actor to fall back on the principle of respect for the internal processes, however ragged, of countries not one’s own.

To be sure, some consensus has emerged, at least, as to what democracy is not. One need only invoke ‘Democratic Kampuchea’ to point out that the existence of twilight does not refute the distinction between day and night. But the ‘democratic’ merits of real-life political struggles in diverse lands are seldom so reliably judged from abroad, let alone reliably judged on the basis of a mechanistic application of procedural criteria. Or so an opponent of the democratic entitlement may contend.

6. Conclusion

Analysing democratic governance as an international legal entitlement involves substantially more than predicting the future of recent democratic transitions. To be sure, the contours of a democratic entitlement will be shaped by the same political

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86 The constitution of Democratic Kampuchea indeed dutifully provided for an elected legislature (Arts. 5–7), proclaimed ‘complete equality among all Kampuchean people’ (Art. 13) and described various aspects of Cambodian society as ‘democratic’ in three separate articles (Arts. 1, 13 and 21). Reprinted in François Ponchaud, Cambodia Year Zero (New York: Holt, Rhinehart & Winston, 1978), p. 199.
forces affecting every rule of international law. But the democratic entitlement involves indeterminacy of an entirely different order, for the putative right embodies a marriage of law and politics that is in many ways unprecedented in international law. The entitlement is not simply law affected by politics. It is law that penetrates and regulates the very essence of political life, both domestically and internationally.

Domestically, the democratic entitlement sets out a theoretical blueprint for the proper allocation of national political power. In so doing it assumes a critical degree of trust and cooperation on the part of all factions participating in democratic institutions. While some argue that international law permits democracies to defend themselves against anti-democratic actors by restricting their participation in elections, the uncertain record of democratic transitions in Africa, Central Europe, and Central Asia suggests that political actors determined to subvert democratic institutions will usually succeed in doing so. The democratic entitlement thus appears to envision, for its success, a change not only in political institutions but in political cultures as well. It was for this reason that the 1990 UN Observer Mission to Haiti warned the General Assembly that ‘there is no democratic tradition in Haitian politics … [and] violence has always been the means of settling conflicts and choosing leaders’. The governmental paralysis that followed ‘restoration’ of Haitian democracy in 1994 appeared to confirm the monitors’ prescience. Such vagaries of domestic politics are usually relevant to international norms only to the extent that they facilitate or impede state compliance with their terms. In the case of the democratic entitlement, however, domestic politics and the terms of compliance are one and the same.

Internationally, the democratic blueprint translates into a legal standard of regime legitimacy. Where a regime is considered illegitimate according to democratic theory, other states face a stark choice. If they continue business as usual with an undemocratic regime, they implicitly affirm its capacity to act as agent for the state—that is, to serve as the state’s legitimate government. In that case, the democratic entitlement will have failed to make normative inroads into the political dynamic of inter-state relations. The norm will likely suffer as a result, taking on more the hue of a political aspiration than a binding guideline.

Alternatively, states may incorporate democratic legitimacy criteria into their foreign policies and refuse to carry on relations with undemocratic regimes. This was the approach of many states toward the apartheid regime in South Africa: until majoritarian elections were held, any interaction with the regime was seen as an

87 For a fascinating discussion of how customary norms are shaped by asymmetrical power structures, see Michael Byers, Custom, Power and the Power of Rules: International Relations and Customary International Law (Cambridge: Cambridge University Press, 1999).
88 Fox and Nolte, ‘Intolerant Democracies’, (see n. 83 above).
89 The Secretary-General has observed, ‘democratization must begin with an effort to create a culture of democracy — a political culture, which is fundamentally non-violent and in which no one party or group expects to win or lose all the time’. Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies, UN Doc. A/51/761 (Annex), at 7 (1996).
improper validation of its authority to act.\textsuperscript{91} What if this were adopted as a global strategy toward all undemocratic regimes? As James Crawford, Michael Byers and Simon Chesterman have detailed,\textsuperscript{92} the consequences of effectively disenfranchising the world’s non-democratic regimes would be almost unimaginable. International politics as it is now practiced would effectively halt. While proponents of a democratic entitlement would surely respond that no state (or the United Nations) is likely to adopt such a rigid legitimism, it is hard to dispute that a principle of non-recognition flows quite naturally from the internal logic of the democratic entitlement. Once again, political conflict is not exogenous to but inherent in the entitlement itself.

Two other aspects of the entitlement also bring political considerations to the fore. First, the view that democratic regimes are best able to implement a range of other international legal obligations\textsuperscript{93} ties much of the case for the entitlement to realization of these other normative goals. But these other legal regimes may fail for a host of reasons unrelated to the democratic nature of participating states. Environmental norms, for example, while increasingly reliant on implementation strategies that utilize democratic political institutions, may be opposed by industry groups, may be perceived as inimical to appropriate rates of development, or may clash with other normative goals such as free trade. If these arguments succeed and schemes such as international environmental cooperation experience temporary or long-term failures, it will be the political power of those making the countervailing arguments that will contribute to undermining the case for the democratic entitlement.

Second, the democratic entitlement is often described as a necessary precondition to social progress in a wide range of other areas—protection of human rights, economic development, cultural diversity, and so on.\textsuperscript{94} On this view, democratization sits atop a hierarchy of normative goals. But constructing such a hierarchy is as much an empirical statement of causation—a state must be democratic in order to achieve certain other normative objectives—as it is a ranking of values. And as an empirical statement it is susceptible to being proven false: Cuba has achieved remarkably high literacy rates; infant mortality in Singapore is among the world’s lowest; ethnic conflict in Eastern and Central Europe was largely quiescent during the Communist era; and so on. While these counter-examples are clearly debatable, it is the very prospect of debate that contributes to politicizing the democratic entitlement. The value of enforcing the entitlement as a legal rule becomes subject to

\textsuperscript{91} The myriad of international sanctions against the apartheid regime are detailed in I.E. Sagay, The Southern African Situation and the Eventual Triumph of International Law (Lagos, Nigeria: Nigerian Institute of Advanced Legal Studies, 1991), pp. 34–6. In a 1991 resolution the General Assembly set out the conditions for South Africa’s re-entry into international society: ‘only the total eradication of apartheid and the establishment of a non-racial, democratic society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and non-fragmented South Africa, can lead to a just and lasting solution to the situation in South Africa’. GA Res. 46/130 (1991).

\textsuperscript{92} See text accompanying notes 41–45.

\textsuperscript{93} James Crawford, ‘Democracy and the Body of International Law,’ in Fox and Roth, Democratic Governance; Byers and Chesterman, ‘You the People’ (n. 57 above).

\textsuperscript{94} ‘Because democratic Governments are freely chosen by their citizens and held accountable through periodic and genuine elections and other mechanisms, they are more likely to promote and respect the rule of law, respect individual and minority rights, cope effectively with social conflict, absorb migrant populations and respond to the needs of marginalized groups.’ Support by the United Nations System, p. 6 (see n. 89 above).
the outcome of discussions involving highly complex issues of local culture, political economy and resource allocation. If democracy is thereby understood as a contingent value, then a legal rule embodying democratic principles will suffer from perpetual contingency as well.

Future analyses of a normative democratic entitlement will need to ask whether this extraordinary degree of politicization can be overcome. Will the broad community of states accept a Manichean rule that postulates a right way and a wrong way for governments to relate to their citizens and for states to relate to one another? This question cannot be answered simply by predicting a triumph of the democratic ideal—‘liberal millenarianism’ in Susan Marks’ phraseology.\footnote{Susan Marks, ‘The End of History? Reflections on Some International Legal Theses’, \textit{European Journal of International Law}, 8 (1997), pp. 449–77.} Reliance on political trends will not stand in for a rigorous legal analysis that investigates systemic consequences of a democratic norm.

An exercise in hindsight makes this point clear. In April 1917, former US Secretary of State Elihu Root gave an address to the American Society of International Law, of which he was then President, entitled ‘The Effect of Democracy on International Law’.\footnote{\textit{Proceedings of the American Society of International Law}, 11 (1917), p. 2.} Speaking only a few weeks after American entry into the First World War, and brimming with Wilsonian optimism, Root argued that the forward march of democracy then evident would remove the fundamental cause of international conflict—the territorial ambitions of dynastic rulers. To Root, the trajectory of history was clear, as he listed country after country in which democratic reforms were taking hold. These included Russia, which he described as ‘engaged in establishing the new self-control of that vast Empire upon the basis of universal suffrage and republican institutions’.\footnote{Ibid., p. 5. Root also described China as ‘throwing off the domination of the Manchu [and] striving to accustom her long-suffering and submissive millions to the idea of a constitutional right’. Ibid.} Root argued that because ‘democracies are absolutely dependent for their existence upon the preservation of law’, respect for international law would arise as a natural corollary to the spread of democracy. The designs of autocracies, by contrast, could not be constrained by the consensual and self-enforcing tools of international society: ‘The Congresses of Westphalia, of Vienna, of Berlin, and a multitude of others less conspicuous have sought to curb the evil through settings limits upon power by treaty. They have all failed.’\footnote{Ibid., p. 7.} Only change at the national level would bring lasting peace between nations:

The progress of democracy … is dealing with the problem by destroying the type of government which has shown itself incapable of maintaining respect for law and justice and resisting the temptations of ambition, and by substituting a new form of government which in its nature is incapable of proceeding by the same methods, and necessarily responds to different motives and pursues different objects from the old autocratic offenders. Only when that task has been substantially accomplished will the advocates of law among nations be free from the inheritance of the former failure.\footnote{Ibid.}
the implications of its adopting political democracy as a normative goal. He appears to have assumed that the spread of democracy would portend little change in the direction or content of international rules. His focus was rather on the enhanced appeal and respect for existing international law that would come about once autocratic governments have given way to popularly elected regimes. The spread of democracy, in Root’s view, was fundamentally a political question but one with important consequences for international law.

The time has come to address the democratic entitlement directly as a legal question. Politics, we have noted, is ever present. But only by understanding how political democracy can be conceived as a legal obligation, whether existing normative structures can accommodate a right to democratic governance, and, if not, what sort of reforms would be needed, will wholesale reliance on political factors be avoided. Root, speaking in the midst of war and at the dawn of a truly global American foreign policy, may be forgiven for his misplaced optimism. But it is imperative that contemporary international lawyers eschew reliance on pure politics and focus their unique analytical tools on the idea of a legal right to democratic governance. Their essential voice must be added to what has become a vigorous global debate.