

## INTERNATIONALIZING NATIONAL POLITICS: LESSONS FOR INTERNATIONAL ORGANIZATIONS

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The 1990s saw a wide-ranging debate on the role of international actors and international law in the reform of national political institutions. The wave of democratic transitions following the end of the Cold War had, for the first time, framed democratization as an international legal question. Abandoning the ideological gridlock over questions of governmental legitimacy, which had been an inevitable result of the East-West conflict, international actors began to embrace liberal democratic institutions in a variety of settings. From monitoring national elections to condemning military coups to inserting democratic principles in criteria for recognizing new states and governments, the international community appeared to view democracy as increasingly central to a variety of traditional legal concerns. These actions, of course, were not uncontroversial. While human rights regimes had long discredited the idea that the international community should never be involved in matters of national politics, the move toward democratic legitimacy took intervention a giant step further. The selection of national leaders is an act at the heart of most conceptions of state autonomy and sovereignty, but norms of democratic legitimacy effectively asserted this was no longer a process for a state to manage alone. To some, particularly in the developing world, this smacked of a new neo-colonialism. Fuzziness over the definition of “democracy” raised suspicions that this was simply a Western-led effort to install their preferred leaders. To others, a decidedly Western understanding of “democracy” ran through these efforts. In a highly pluralistic world, could international law define, let alone implement, a uniform model of national governance?

In my view, the issue explored in this Symposium would not have been taken up by international lawyers had this debate over national democratization not taken place. International organizations, in contrast to states, have no tradition of popular representation. They [always](#) have been the quintessential manifestations of a state-centric legal order that excluded individuals. International organizations were a highly unlikely place for a discussion to begin about global democratic norms. States, by contrast, have been the laboratories for all theories of political accountability, including democratic theory. If efforts to create democratic norms for states had failed,

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there would be little hope they would nonetheless succeed for international institutions.

This article starts from the premise that international law has accepted, or is in the process of accepting, principles of democratic governance for states. It will ask what lessons this first generation of democratic norms might hold for future efforts to democratize international organizations. The two settings arguably have more differences than similarities, and direct parallels between the two scenarios will be few. Indeed, much of the discussion that follows will involve pointing out the perhaps insurmountable challenges highlighted by those differences. But the two undoubtedly share a common understanding of the sources of political power and the theoretical arguments for its legitimate exercise. They also seem to share a pragmatic belief that democratic institutions produce better political decisions. Finally, they may share a belief in what might be termed “political participation as the sublimation of violence”: the idea that popular engagement in the political process can redirect hostilities that might otherwise produce political gridlock or even armed conflict. If one accepts these commonalities, one can be more hopeful that a “second generation” of democratic rights may emerge for international organizations.

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## I. DEBATE OVER INTERNATIONALIZING THE NATIONAL

### A. *Democratization as an International Legal Issue*

With the end of the Cold War, the international community began turning its attention to matters of national governance. Political theorists had long drawn links between states’ domestic politics and their international relations, the most notable being the Kantian theory of the “democratic peace.”<sup>1</sup> The “liberal” school of international relations theory moved beyond examining democracy’s relation to armed conflict and asked whether a host of other state actions could be correlated with regime type.<sup>2</sup> A variety of arguments thus emerged for viewing democracy as central to states’ external behavior. International law could, therefore, find an interest in democracy promotion, not only because it would benefit citizens of target states, but because it could enhance its own regulation of inter-state behavior.

But until the 1990s, international law lacked both the doctrinal tools and necessary consensus to act on this hypothesis. Until 1945, few norms

1. The EU has adopted this view as justification for its own democracy promotion activities. See *Communication From the Commission on EU Election Assistance and Observation*, at 3, COM (2000) 191 final (Nov. 4 2000) (“Actions in support of democratisation and respect for human rights, including the right to participate in the establishment of governments through free and fair elections, can make a major contribution to peace, security and the prevention of conflicts.”).

2. See, e.g., Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT’L ORG. 513, 513 (1997).

addressed how governments treated their own citizens, and even after the United Nations ushered in a steadily growing concern for human rights, slowly eroding the rigidly territoriality of earlier eras, East-West tensions kept most issues of national governance off the agenda of international organizations. This was true despite the presence of a right to political participation in most comprehensive human rights treaties.<sup>3</sup> Everything changed with the end of the Cold War. 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.<sup>4</sup> 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,<sup>5</sup> the UN Human Rights Commission,<sup>6</sup> the European [Court of Human Rights,<sup>7</sup> the] Inter-American Commissions on Human Rights,<sup>8</sup> . . . the Organization for Security and Cooperation in Europe (OSCE),<sup>9</sup> and the UN General Assembly.”<sup>10</sup>

3. See Protocol No. 3 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 21, 1970, 213 U.N.T.S. 221, Europ. T.S. No. 45 replaced by Europ. T.S. No. 155 (Nov. 1, 1998) (Protocol No. 11); Organization of American States, American Convention on Human Rights art. 23, Nov. 22, 1969, O.A.S. T.S. No. 36, 1144 U.N.T.S. 123; International Covenant on Civil and Political Rights art. 25, Dec. 19, 1966, 999 U.N.T.S. 171.

4. Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUD. 327, 327-29 (2001).

5. Human Rights Committee, *General Comment 25 (57): General Comments under Article 45, Paragraph 4 of the International Covenant on Civil and Political Rights*, ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996) (elaborating nature of right to political participation in ICCPR, article 25); Human Rights Committee, *Chiiko Bwalya v. Zambia*, Communication No. 314/1988, UN Doc. CCPR/C/48/D/314/1988 (1993), reprinted in 14 HUM. RTS. L.J. 408 (1993) (opining against barring of electoral candidates who are not members of the ruling party).

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

7. See, e.g., *Refah v. Turkey*, 35 E.H.R.R. 3 (2001); *United Communist Party of Turkey v. Turkey*, 62 Eur. Ct. H.R. 1 (1998).

8. See Organization of American States, Inter-American Democratic Charter, Sept. 11, 2001, OAS Doc. OEA/Ser.P/AG/RES.1838 (XXXI-O/01), available at [http://www.oas.org/OASpage/eng/Documents/Democratic\\_Charter.htm](http://www.oas.org/OASpage/eng/Documents/Democratic_Charter.htm); Enrique Lagos & Timothy D. Rudy, *The Third Summit of the Americas and the Thirty-First Session of the OAS General Assembly*, 96 AM. J. INT'L L. 173 (2002).

9. See Conference on Security and Cooperation in Europe, *Document of the Moscow Meeting of the Conference on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Factfinding* paras. 17.1-17.2, Oct. 3, 1991, 30 I.L.M. 1670, 1677 (condemning forces seeking to overthrow a freely and fairly elected government and pledging to “support vigorously, in accordance with the Charter of the United Nations,” the “legitimate organs” of that State).

10. Fox & Roth, *supra* note 4, at 328-29 & nn.7-11 (footnotes 6, 7 & 10 and explanatory parentheticals therein in original). See, e.g., G.A. Res. 60/162, U.N. Doc. A/RES/60/162 (Feb. 28 2006) (on “[s]trengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”).

The UN and other intergovernmental organizations have invested heavily in the crafting and monitoring of electoral processes in many nations across the globe.<sup>11</sup> 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.<sup>12</sup> 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. The United Nations received 363 requests for electoral assistance between 1989 and 2005, and provided assistance in 96 countries.<sup>13</sup> Between 1990 and 1995 the European Union (EU) provided electoral assistance to forty-four different countries.<sup>14</sup> 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.<sup>15</sup> Necessarily, a determination as to whether an election was conducted properly speaks to the legitimacy of the purported victor's mandate to govern. The Universal Declaration of Human Rights articulates this basic precept of democratic theory when it states, "[t]he will of the people shall be the basis of the authority of government."<sup>16</sup>

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11. See ERIC C. BJORN LUND, *BEYOND FREE AND FAIR: MONITORING ELECTIONS AND BUILDING DEMOCRACY* 53-66 (2004).

12. See S.C. Res. 1162, para. 2, UN Doc. S/RES/1162 (Apr. 17, 1998) (commending ECOWAS after the fact for its role in the Sierra Leonean transition); S.C. Res. 940, para. 4, U.N. Doc. S/RES/940 (July 31, 1994) (authorizing armed intervention in Haiti); President of the Security Council, *Statement by the President of the Security Council on the Situation in Sierra Leone, delivered to the Security Council*, UN Doc. S/PRST/1998/5 (Feb. 26, 1998) (Security Council Presidential Statement welcoming the removal of the Sierra Leonean junta); see also Fox & Roth, *supra* note 4, at 329 & n.14.

13. Electoral Assistance Division of the United Nations, Department of Political Affairs, Overview Information, <http://www.un.org/depts/dpa/ead/overview.html>.

14. *Commission Report on the Implementation of Measures Intended to Promote Observance of Human Rights and Democratic Principles (for 1995)*, at 6, COM (1996) 673 final (Jan. 17, 1997), available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/doc/com96\\_673\\_en.pdf](http://ec.europa.eu/comm/external_relations/human_rights/doc/com96_673_en.pdf).

15. These standards have been codified. National Democratic Institute for International Affairs: Access Democracy, *Declaration of Principles for International Election Observation and the Code of Conduct for International Election Observers*, Oct. 27, 2005, available at [http://www.accessdemocracy.org/library/1923\\_declaration\\_102705.pdf](http://www.accessdemocracy.org/library/1923_declaration_102705.pdf). This document codifies almost two decades of practice and has been endorsed by all major international organizations engaged in electoral observation. See Press Release, Department of Public Information, U.N. Doc. HQ/645, United Nations Joins Regional, Non-Governmental Organizations to Support Code of Common Standards for Election Monitoring, (Oct. 28, 2005), available at <http://www.un.org/Depts/dpa/press-release-election.html>.

16. Universal Declaration of Human Rights, GA Res. 217A, U.N. Doc. Res/217A, at 75, Art. 21(3) (Dec. 8, 1948).

For purposes of this discussion, the ascendancy of democratization to the international legal agenda has two useful aspects. The first is that even having a discussion in legal terms about democratizing international organizations should not itself be a controversial question. International law now undoubtedly addresses the democratic origins of political authority. Notwithstanding the obvious and important differences between the authority exercised by national governments and that wielded by international organizations, one cannot now say that seeking a legal analysis of the latter is a “category mistake”—a manifest transgression of methodological boundaries that invalidates the substantive conclusions to follow. If individuals are affected by exercises of political authority, there exists a legal argument for the democratic legitimization of that authority. Thus, in a case concerning Gibraltar, the European Court of Human Rights held that the provisions of the European Convention on Human Rights on elections apply to the European Parliament, since “legislation emanating from the legislative process of the European Community affects the population of Gibraltar in the same way as legislation which enters the domestic legal order . . . .”<sup>17</sup>

The second is a methodological point, though no less important: there now exists a large body of state practice that may provide parallel, if not direct lessons for democratization of international organizations. Enhancing the diffusion of norms implicit in this practice are detailed reports and data about transnational democratization initiatives now available from bodies such as the Electoral Assistance Division of the United Nations Department of Political Affairs,<sup>18</sup> the European Commission,<sup>19</sup> the Department for the Promotion of Democracy of the Organization of American States’ Secretariat for Political Affairs,<sup>20</sup> the Office for Democratic Institutions and Human Rights<sup>21</sup> of the Organization for Security and Cooperation in Europe,<sup>22</sup> the International Institute for Democracy and Electoral Assistance,<sup>23</sup> and the oddly parallel but separate National Democratic Institute for International Affairs<sup>24</sup> and International Republican Institute.<sup>25</sup> What were once hypotheses about

17. *Matthews v. United Kingdom*, 28 Eur. Ct. H.R. 361, 375 (1999).

18. See Electoral Assistance Division of the United Nations, *supra* note 13.

19. See *Commission Staff Working Paper, Implementation of the Communication on Election Assistance and Observation*, at 9, SEC (2003) 1472 (Dec. 19, 2003), available at [http://ec.europa.eu/comm/external\\_relations/human\\_rights/doc/sec\\_2003\\_1472\\_en.pdf](http://ec.europa.eu/comm/external_relations/human_rights/doc/sec_2003_1472_en.pdf).

20. Organization of American States, *The Democratic Commitment*, [http://www.oas.org/key\\_issues/eng/Keyissue\\_Detail.asp?Kis\\_sec=1](http://www.oas.org/key_issues/eng/Keyissue_Detail.asp?Kis_sec=1) (last visited Jan. 31, 2007).

21. Office for Democratic Institutions and Human Rights, *About*, <http://www.osce.org/odihr/> (last visited Jan. 31, 2007).

22. Organization for Security and Cooperation in Europe, <http://www.osce.org/> (last visited Jan. 31, 2007).

23. IDEA: International Institute for Democracy & Electoral Assistance, <http://www.idea.int/> (last visited Jan. 31, 2007).

24. NDI: National Democratic Institute, <http://www.ndi.org> (last visited Jan. 31, 2007).

25. IRI: International Republican Institute, <http://www.iri.org/> (last visited Jan. 31, 2007).

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whether international actors can affect the quality of national democratic institutions can now be tested by reference to this practice. Beyond legal analyses, political scientists have developed a sophisticated understanding of the factors likely to produce a democratic transition as well as those likely to bolster or undermine a transition once it occurs.<sup>26</sup> Presumably, any claimed lessons for the democratization of international organizations would share this empirical grounding.

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### B. *The Scope of the National Democratization Debate*

The wealth of data now available to international lawyers studying democratization norms might suggest that analysis of the issue has proceeded in a rather traditional manner. Some of the literature has indeed consisted of familiar explications of doctrine. But elevating notions of democratic legitimacy into law implicates more than the standard questions of uniformity in practice or clarity of *opinio juris*. Systemic consequences may follow from the new norms subverting international law's traditional neutrality on the ideological underpinnings of national regimes. Because states, as fictional entities, operate only through their governments, legal criteria of regime legitimacy necessarily implicate the legal standing of the state itself. There is no meaningful way to separate a legally illegitimate regime from a legally illegitimate state. On this view, the traditional willingness to accord full rights to any regime in effective control of a state was a necessary corollary to the principle of state equality. Democracy norms reject the former and may effectively undermine the latter. This perhaps unexpected aspect of democratic norms has led both critics and proponents of the emerging regime to raise a series of questions about its impact on cognate areas of international law. Not all the following questions have consequences for democratizing international organizations, but many do.

- Does international democracy promotion implicate some core aspect of statehood that is or should be immune from international regulation? If the essence of statehood is autonomous decision-making and the selection of leaders lies at the heart of how national decisions are made, what do democratic norms leave of the "sovereign" state? To be sure, democracy norms do not dictate the outcome of any given question of national politics. They cannot be said to "control" national politics in this sense. But who makes national decisions may be as important to an

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26. See generally THOMAS CAROTHERS, CRITICAL MISSION: ESSAYS ON DEMOCRACY PROMOTION (2004); RENSKA DOORENSPLEET, DEMOCRATIC TRANSITIONS: EXPLORING THE STRUCTURAL SOURCES OF THE FOURTH WAVE (2005); Adam Przeworski, et al., *What Makes Democracies Endure?*, J. DEMOCRACY, Jan. 1996, at 39 (1996); Kristian Skrede Gleditsch & Michael D. Ward, *Diffusion and the International Context of Democratization*, 60 INT'L ORG. 911 (2006).

autonomous community as how those decisions are made. Few collective national identities, after all, revolve around particular policy outcomes. They are based instead on shared histories, identities, ethnicities and beliefs. These traditions, in turn, inform the selection of national leaders and the criteria of legitimacy shared among citizens. What remains of these community attributes when external standards dictate the locus of authority within a state?

- Democracy is necessarily a theory of community governance. “One participates in politics not solely (and usually not principally) for the fulfillment derived from the activity, but for the opportunity to affect the exercise of power in the polity.”<sup>27</sup> But when we talk about a “right” to democratic government, which community does international law bestow the right upon? States? Provinces? Regions? Ethnic, religious or other sub-state affinity groups? Apart from questions of territorial integrity, does a “democratic” norm hold the potential to bypass a state’s internal structures when it interferes with the “democratic” decisions of sub-state units? If a province votes by overwhelming majority to ignore a national government’s dictates on language, religion, division of natural resources or other questions, does a principle of democratic legitimacy require that such a vote be respected? What if that local vote runs counter to a national vote supporting the government’s policy? Traditional international law had no interest in these questions of national constitutional architecture. But once notions of popular sovereignty are internationalized, can international law take a principled position on which of these decisions is democratically legitimate and which is not?
- Is democracy a universal value? The debate over cultural relativism is by now a well-rehearsed theme in international law. Concerning human rights generally, most scholars and certainly most international organizations reject the idea that core rights are culturally determined or historically contingent, at least when those claims are invoked to justify violations. But should the claim be taken more seriously when it involves an entire system of government? As we have noted, the absence of democracy or its interruption “victimizes” not simply individuals but groups and entire societies. Should international law then take seriously the social science evidence that has identified a series of economic and social indicators for when democracy is likely to take root?
- Where does democracy fit into the list of attributes the international community now demands of states? How does it rank, for example, against social stability? The maintenance of existing boundaries?

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27. Gregory H. Fox & Brad R. Roth, *Introduction: The Spread of Liberal Democracy and its Implications for International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 1, 10 (Gregory H. Fox & Brad R. Roth eds., 2000).

Accountability for criminal acts? There is now a growing literature describing how democratic transitions may trade off against these and other desirable state qualities.<sup>28</sup> Early elections in post-conflict states, for example, may exacerbate rather than lessen group tensions.<sup>29</sup>

- What effects do violations of democratic norms have on a state's standing in the international community? Codifying a principle of popular sovereignty suggests that international law views only democratic governments as the legitimate representatives of states. If this is the case, does international law now require nonrecognition of nondemocratic states? Put differently, do nondemocratic governments lose their capacity to assert the legal entitlements of the states they purport to govern? In a discussion of the 1990s US intervention in Panama, Michael Reisman argued that because the Noriega government was in the process of losing an election when the invasion occurred, it had no standing to object to the intervention, which quickly resulted in the acknowledged winner of the vote, Guillermo Endara, being sworn in as President. This was because "[i]nternational law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty."<sup>30</sup> Following on this view, several regional organizations, notably the African Union, the Organization of American States, MERCOSUR and the Commonwealth, now deny recognition to member state governments that attain power by extra-constitutional means.<sup>31</sup> This is a break with the traditional view that any

28. See, e.g., Steven R. Ratner, *New Democracies, Old Atrocities: An Inquiry in International Law*, 87 GEO. L.J. 707 (1999).

29. See JACK SNYDER, FROM VOTING TO VIOLENCE: DEMOCRATIZATION AND NATIONALIST CONFLICT (2000).

30. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 239, 243 (Gregory H. Fox & Brad R. Roth eds., 2000).

31. See CONSTITUTIVE ACT OF THE AFRICAN UNION art. 30 (Organization of African Unity), July 11, 2000 available at [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) ("Governments which shall come to power through unconstitutional means shall not be allowed to participate in the activities of the Union."); Charter of the Organization of American States art. 9, 1997, available at <http://www.oas.org/juridico/english/charter.html> ("A Member of the Organization whose democratically constituted government has been overthrown by force may be suspended from the exercise of the right to participate in the sessions of the General Assembly, the Meeting of Consultation, the Councils of the Organization and the Specialized Conferences as well as in the commissions, working groups and any other bodies established."); Protocolo de Ushuaia Sobre Compromiso Democrático en El Mercosur, Bol.-Chile, arts. 4 & 5, June 27, 1992, available at [http://www.mercosur.int/msweb/Normas/Tratado%20e%20protocolos/1998\\_ProtocoloUshuaia-compromisodemocr%20c3%A1tico\\_es.pdf](http://www.mercosur.int/msweb/Normas/Tratado%20e%20protocolos/1998_ProtocoloUshuaia-compromisodemocr%20c3%A1tico_es.pdf) (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); Commonwealth of Nations, Principle Commonwealth Human Rights Treaties, *Milbrook Commonwealth Action Programme on the Harare Declaration*, at 13,



government exercising effective control over a state was entitled to recognition. And the European Union now inserts a clause in all its agreements with nonmember states providing that adherence to democratic norms is an essential element of the agreement. Any disruption of democratic government thus constitutes a material breach of the agreement.<sup>32</sup> Each of these developments uses a state's failure to adhere to a particular model of government to take actions that arguably diminish its legal standing and relative equality. On the one hand this may be seen as simply the latest iteration of the international community's longstanding practice of subjecting what Gerry Simpson has called "outlaw states" to a diminished set of legal entitlements.<sup>33</sup> On the other, it appears profoundly subversive of a general principle of state equality that has been assumed to sit at the heart of the UN-era legal order.

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## II. LESSONS FROM INTERNATIONALIZING THE NATIONAL

### A. Cautionary Tales

What lessons can be drawn from this practice and the difficult questions it raises? Before suggesting similarities between norms promoting democracy at the national level and efforts to democratize international organizations, it is crucial to recognize some fundamental differences. These caveats are central to understanding the comparisons. Any proponent of democratizing international institutions who claims a pedigree in the earlier practice must take account of these disjunctions.

First, national democracy promotion has been directed overwhelmingly toward developing countries of the global south. This is not a controversial political fact: most states in the developed world were already democratic or had experienced initial democratic transitions by the time post-Cold War

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part 1.B.vi, Nov. 12, 1995, available at [http://www.thecommonwealth.org/Shared\\_ASP\\_Files/UploadedFiles/%7B1B46C2E0-B8F8-4484-AA9E103ADD42B166%7D\\_HumanRightsPrinciples.pdf](http://www.thecommonwealth.org/Shared_ASP_Files/UploadedFiles/%7B1B46C2E0-B8F8-4484-AA9E103ADD42B166%7D_HumanRightsPrinciples.pdf) ("[I]n the event of an unconstitutional overthrow of a democratically elected government," Commonwealth member states should take several steps, including: pending restoration of democracy, exclusion of the government concerned from participation at ministerial-level meetings of the Commonwealth, including [Commonwealth Heads of Government Meetings].").

32. *Commission Communication on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements between the Community and Third Countries*, at 6-7, COM (1995) 216 (May 23, 1995). Democratic principles are defined by reference to the Conference on Security and Co-Operation in Europe: Final Act, Aug. 1, 1975, 14 I.L.M. 1293, 1293-96 (1975) and the Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 193, 193-95 (1991). See FRANK HOFFMEISTER, *MENSCHENRECHTS- UND DEMOKRATIEKLAUSELN IN DEN VERTRAGLICHEN AUBENBEZIEHUNGEN DER EUROPÄISCHEN GEMEINSCHAFT* 605-11 (1998); Barbara Brandtner & Allan Rosas, *Human Rights and the External Relations of the European Community: An Analysis of Doctrine and Practice*, 9 EUR. J. INT'L L. 468, 473-77 (1998).

33. GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* (2004).

democratization initiatives began. The democratic transitions yet to happen and with which the international community would become preoccupied in the 1990s lay overwhelmingly outside the developed world. Of the official requests for electoral assistance received by the United Nations between 1989 and 2005, for example, 46% came from Africa, 19% from Latin America and the Caribbean, 18% from Asia and 13% from Eastern Europe. Only 2% came from Western Europe and elsewhere.<sup>34</sup> From the democracy promoters' point of view—those wealthy, mostly western states who were relatively secure in their democratic politics—this was an exceptionally useful dynamic. Not only would democratic norms never be applied to their own political systems, but the wide range of economic, political and military leverage points they hold over the developing world meant that resistance to the norm could be countered with a variety of effective countermeasures. Implementation is, of course, another question. But there is no doubt that coercive measures were easily available when democratization initiatives were resisted. In some cases, such as Bosnia and Kosovo, this included the use of military force.

Such leverage is not available for efforts to democratize international organizations. If the focus is to be on the most effective international organizations such as the WTO or the UN, these are dominated by developed states. Decades of failed efforts by the developed world to push its agenda forward in these organizations demonstrate what may happen when power rests not with the proponents of a new democratization norm but its intended targets.<sup>35</sup> If the focus is instead on new international organizations, such as a peoples' assembly, resistance by developed countries would mean proceeding largely without their participation and funding. The experience of regional organizations in the developed world, comprised of roughly similar memberships, is not encouraging. The unfortunate reality is that strong international organizations have usually been built on the support of politically stable and financially prosperous member states. Where state membership is largely impoverished or politically unstable or both—as in the case of the African Union and the Arab League—the organizations exert only marginal influence on international politics. Developed countries may, of course, become convinced of the benefit or indeed necessity of IO democratization and come to support either of these variants. But such a development would be a significant departure from prior practice and thus cannot be predicted with any confidence.

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34. See Electoral Assistance Division of the United Nations, *supra* note 13.

35. Examples include the New International Economic Order, using economic and political coercion as grounds for invalidating treaties and economic sanctions as a form of prohibited aggression. See Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 42-43 (2005) (New International Economic Order); ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 256-57 (2000) (treaty coercion); Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 125-126 (June 27) (economic sanctions), available at [http://www.icj-cij.org/icjwww/icasess/inus/inus\\_ijudgment/inus\\_ijudgment\\_19860627.pdf](http://www.icj-cij.org/icjwww/icasess/inus/inus_ijudgment/inus_ijudgment_19860627.pdf) (last visited March 27, 2007).

Second, the normative commitment to democracy that underlies most of the efforts at state-level reform is simply not present for international organizations. As we have noted, both global and regional human rights treaties protect a right to political participation, and by the turn of the 21<sup>st</sup> Century international tribunals and other treaty bodies had built on these provisions to fashion an impressive body of jurisprudence. There is no comparable normative support for the claim that international organizations ought to be democratized. To be sure, some argue that decisions of international organizations are democratically deficient because they originate at least two levels above any actual consent by affected individual citizens.<sup>36</sup> But this is far removed from an argument for a legal entitlement to individual participation in those decisions. The human rights movement has largely remained moored to its origins as a set of constraints on the abuse of state power.<sup>37</sup> This is no less true of the participatory rights articulated in human rights treaties, which share this state-centrism, and do not even purport to require popular checks on other entities whose policies affect national populations. Transnational corporations, organized religions and economically dominant foreign states all make decisions with profound consequences for national publics, yet international law creates no entitlement for citizens to participate in or influence those decisions. The same is true for international organizations.

Third, the nature of the “community” to be democratized is much less clear than in the case of national politics. While a variety of international actors emerged in the late 20<sup>th</sup> Century, and Westphalian absolutism, if it ever existed, is now much diminished, we have little sense of who “counts” when we speak of the “international community.” Is the reference primarily to the organized entities that appear in the organized, formal settings in which policies are debated and made? This usage would probably include states and nongovernmental organizations, but exclude individuals. Or is the concept one more grounded in a natural law—“some form of moral collectivity of humankind which exists as an ethical referent even if not organized in any way”<sup>38</sup>—in which individuals are certainly included. Absent any clear definition of the relevant community, we have little sense of who is entitled to claim a right of participation in the decisions of international institutions. Human rights have certainly transformed individuals from objects to subjects and one could make a case that they are now participants in global politics. But what of the other oft-mentioned players we have just noted—NGOs, corporations, religions, ethnicities, etc.? If they are members of the community, surely they are no less entitled to rights of participation. Even those who might argue for their inclusion would not assert that these new

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36. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971 (2004).

37. Even human rights norms applicable to conduct in the private sphere do not purport to constrain private acts directly, but simply require states to take appropriate regulatory steps to do so. See ANDREW CLAPHAM, *HUMAN RIGHTS IN THE PRIVATE SPHERE* 134-39 (1993).

38. Barry Buzan & Ana Gonzalez-Pelaez, ‘*International Community*’ *After Iraq*, 81 INT’L AFF. 31, 32 (2005).

members have the same legal entitlements as states. Do we then envision a multi-tiered set of participatory rights that sort the entitlements of various actors through mechanisms such as weighted voting, gradations of membership (“observers,” for example, who may speak but not vote) or outright exclusion from certain IO decisions? These arrangements could certainly be defended as creating parity between an actor’s general legal entitlements in the international community and its rights of participation in international organizations. But would they satisfy calls for “accountability”? If not, on what basis could one argue that rights of participation for a member of the international community ought to exceed—in some cases, substantially exceed—its rights in virtually every other legal context?

These questions point out a fundamental problem in comparing public participation in the two settings. The constituent public of a state government is the people, and democratic theory provides principles of legitimacy, now arguably embedded in international law, that link policy-making to popular consent. The constituent public of an international organization, on the other hand, is its member states. The law of international institutions, both generally and the specific constitutional law of each individual organization, provides a series of mechanisms by which member states may hold the organization accountable. To argue that international organizations ought to be “accountable,” therefore, begs the question, “accountable to whom?” As Grant and Keohane point out, arguments of democratic theory for holding international organizations accountable unhelpfully mixes these two sets of accountability norms.<sup>39</sup> In order to bridge this gap, one would need to identify a coherent “global public” that would fill the legitimating role envisioned by national democratic politics. But,

[t]oday, there is no large and representative global public, even in the relatively weak sense of a global “imagined community”—a transnational community of people who share a sense of common destiny and are in the habit of communicating with one another about issues of public policy. Particular global publics are indeed emerging—for instance, in issue-areas such as human rights and environmental protection—but they surely are not representative of the world’s people, and they are by no means coterminous with the sets of people affected by the policies of states, multinational firms, or multilateral organizations.<sup>40</sup>

Grant and Keohane conclude that until a coherent global public emerges – either empirically as an actual cohesive force or juridically as recognized by global institutions—“[t]here is no simple analogy that can be made between domestic democratic politics and global politics.”<sup>41</sup>

39. Ruth W. Grant & Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 *AM. POL. SCI. REV.* 29, 29 (2005).

40. *Id.* at 33-34 (citations omitted).

41. *Id.* at 34.

### B. Useful Lessons

With these caveats in mind, what lessons does our experience with national democracy promotion hold for the democratization of international institutions? Given the vast differences between the two, few easy parallels exist. And given that opening international organizations to popular participation is not, to say the least, likely to happen in the near future, perhaps the most useful lessons would be for a research agenda. Proponents of international democratization may at least learn from the questions posed by the earlier generation which, like the current project, was faced with an entity (the state) whose popular legitimacy had never been addressed by international law. The following lessons, in other words, raise issues rather than resolve them.

First, the legitimacy of individual participation in international organizations must be established before institutional or logistical questions are addressed. Prior practice illustrates this rather obvious point. International organizations had no constitutional mandate to address national democratization while debate continued on whether international law even addressed the subject. Only the end of the Cold War, the success of democratic reform movements across the globe, and the lack of any coherent alternative theory of political legitimacy made collective action possible. At the United Nations in the early 1990s, democratization moved from an issue essentially within the domestic jurisdiction of states (and as such immune from scrutiny under Article 2(7) of the Charter) to a central concern of the organization.<sup>42</sup> Reports by election monitoring organizations now routinely begin with discussions of international democratic norms that have become all but boiler-plate. The legitimacy of the enterprise is not even debated; discussion revolves around how these accepted legal principles have fared on the facts of each case.<sup>43</sup>

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This is no less true in light of the recent skepticism about democracy promotion in the wake of the Iraq debacle. Criticism has been grounded not in a widespread rejection of democratization norms but in the view that the intervention in fact exceeded accepted norms.<sup>44</sup> Multilateral democracy promotion has always been predicated on consent by the target state or, at the very least, a mandate from the UN Security Council that reforms could proceed absent consent. Fallout from the Iraq invasion can thus be understood, first and foremost, as a rejection of the idea of unilateral pro-democratic intervention. To be sure, some commentators go farther, questioning whether failure in Iraq is symptomatic of inherent limitations in the external implantation of democratic institutions, particularly in regions with no democratic tradition.<sup>45</sup> But this is arguably an overreaction to extreme

42. See Christopher Joyner, *The United Nations and Democracy*, 5 GLOBAL GOV. 333, 340 (1999).

43. See Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 27, at 48, 83-84.

44. See generally *Agora: Future Implication of the Iraq Conflict*, 97 AM. J. INT'L L. 553 (2003).

45. See Anatol Lieven, *Wolfish Wilsonians: Existential Dilemmas of the Liberal Internationalists*, 50 ORBIS 243, 243-49 (2006).

circumstances. Such claims were notably absent in the wake of the Kosovo, Bosnia and Cambodia missions, which brought elections and other democratic institutions to deeply resistant societies and leaders. There seems little evidence that the UN has lessened its institutional commitment to democracy promotion post-Iraq, and indeed launched an important new initiative, the United Nations Democracy Fund, nearly two years after the intervention.<sup>46</sup> If this normative foundation has emerged relatively unscathed then debate will continue to focus on logistics.

But as long as the legitimacy of democratizing international organizations remains an open question, any practical efforts to structure popular input are likely to be lost in a swirl of more fundamental objections. Indeed, the nature of any legitimizing principle is itself unclear, further complicating the debate. Is individual participation in international organizations a principle of human rights, to be addressed by the same human rights treaties guaranteeing participation in national politics? Or is it a question of each organization's constitutional structure? Or is it primarily a domestic law obligation of each state to grant citizens a voice in the international organizations whose decisions affect their national legal systems? These "category" questions are not mere semantics, since the different bodies of law diverge widely in their roles, standards, and institutional structures.

Second, if individuals acquire new rights in international organizations do they also bear certain responsibilities for the organizations' collective actions? At a minimum these might involve ideological obligations similar to the requirements of membership in certain international organizations: members of the United Nations, for example, must be "peace-loving"<sup>47</sup> and new members of the European Union must accept democracy and human rights as fundamental principles.<sup>48</sup> They might also involve financial obligations or a willingness to support decisions by executive bodies of the organization. UN members, for example, must accept Chapter VII decisions of the Security Council, which might include severing diplomatic and commercial relations with other states or acting in a certain way toward their own citizens.<sup>49</sup> Would individuals incur similar obligations? The argument for obligations being a necessary concomitant of rights is a common one that needs little elaboration.

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46. See UN.org, What is The United Nations Democracy Fund (UNDEF)? <http://www.un.org/democracyfund/XWWhatisUNDEF.htm> (last visited Feb. 1, 2007).

47. UN Charter art. 4, para. 1.

48. Consolidated Version of the Treaty on European Union arts. 6, 49, Dec. 24, 2002, 2002 O.J. (C 325) 9, 11, 31, available at [http://www.ellispub.com/downloads/eu\\_cons\\_treaty.pdf](http://www.ellispub.com/downloads/eu_cons_treaty.pdf).

49. In Resolution 748 (1992), the Security Council invoked Chapter VII to order Libya to surrender two of its citizens wanted in the bombing of Pan Am Flight 103 over Lockerbie, Scotland. S.C. Res. 748, paras. 1-2, U.N. Doc. S/RES/748 (Mar. 31, 1992), available at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NRO/011/07/IMG/NR001107.pdf?OpenElement>.

Some human rights instruments make the connection explicitly,<sup>50</sup> but citizenship in every state involves a social contract that both grants benefits and imposes obligations, most importantly that of loyalty. Every state punishes the crime of treason and there are few good arguments that a citizen should enjoy the protection and support of her state but retain the freedom to undermine its security.

If pairing obligations with the benefits of political participation is not controversial at the national level, there seems little reason it should be controversial internationally. But to state the principle is to raise a host of questions that demonstrate, quite starkly, the theoretical poverty of a right to participate in international organizations. Which individuals would incur these obligations? Those elected as representatives to an international organization, those voting for such representatives, or all persons everywhere on the theory they are now the constituent public of the organizations? What if those obligations conflicted with the individuals' obligations under national law? Would international organizations assume the superiority of their dictates as is the case vis-a-vis member states? What if obligations to one organization conflicted with obligations to another? Would standard rules on treaty conflict<sup>51</sup> accord priority among the obligations or would a *lex specialis* apply?

National democratization provides little assistance other than the fact that international law has simply not addressed citizen obligations to their states. A roughly parallel approach would let each organization set its own policy on obligations and provide no overarching principles. But this is unsatisfactory. The relation between citizen and state evolved through centuries of national practice before international law came to address the broadest principles of electoral structure and fairness. The relation between individuals and international organizations, by contrast, has virtually no history and would come into existence by the legal fiat of those organizations. The national approach of leaving obligations to an existing "default" arrangement cannot be replicated internationally. An international law of obligations would need to be elaborated as part and parcel of the larger accountability project, thus presenting to its architects all of the questions raised above.

Third and finally, the scope of the entitlement to participation must be addressed. Rights to participate in state politics are guaranteed to "citizens" and are conceived as entitlements of opportunity and not of result.<sup>52</sup> How would these limitations translate? As to the first, would participation be limited to citizens of an organization's member states? Or would all citizens be eligible? If the former, would all member states be allocated the same

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50. See Organization of African Unity, African (Banjul) Charter on Human and Peoples' Rights art. 45, June 27, 1981, OAU DOC. CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), available at <http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf> (detailing individual "duties").

51. See Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 *passim* (2005).

52. No other right in the International Covenant on Civil and Political Rights is limited to citizens. See International Covenant on Civil and Political Rights, *supra* note 3, at art. 25 (participatory rights guaranteed to "every citizen").

number of citizen representatives or would some sort of weighting process be necessary, perhaps by population or state contribution? The argument for weighting would seem particularly strong for organizations like the World Bank where member states' voting is weighted. What about states that join treaty bodies with reservations? Would their citizens be prevented from advocating on the issues subject to the reservations?

As to the second characteristic, what role will individuals play within the organizations? Few states employ systems of pure participatory democracy, and international law's role has therefore been largely to ensure the process of electing representatives is free and fair. If international participation is similarly conceived along republican lines, one way to translate the national entitlement would be for citizens to vote for their state's representatives to international organizations. This seems unlikely, however, and, as noted earlier, is not the sort of accountability envisioned by proponents. More likely would be separate "citizen representatives" who work in some capacity alongside state representatives. But as the endless debate over reform of the UN Security Council demonstrates, finding an acceptable role for new players in international organizations is an extraordinarily difficult task. For one, the constitutive treaties of each organization would require amendment. At the UN all amendments are subject to Security Council veto. Another, more fundamental question is the role envisioned for citizen representatives. Would they vote on pending issues or simply voice their opinions in the manner of "observers" at the United Nations?<sup>53</sup> If the latter, they would seem largely to duplicate the role of the UN General Assembly, which passes advisory resolutions that are often at odds with the interests of larger powers. This raises a final challenge: to find a parallel to the efficiency argument for state-level popular sovereignty. Mill and others claim that democratic governments produce better policies because they are more transparent and must respond seriously to criticisms leveled by opposition parties. But this claim obviously assumes that those elected actually make policy. This would almost certainly not be the case for citizen representatives. Can they nonetheless argue that their mere presence within the institution will improve policy outcomes? Could adding an additional institutional layer, even if advisory, lead to the opposite result?

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### III. CONCLUSIONS

The comparison explored in this article is in one sense unfair. Popular participation in national government is one of the most thoroughly analyzed questions of history, philosophy, law and empirical political science. One might view international law on the subject as simply codifying the most widely accepted conclusions of these cognate disciplines. An entitlement to

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53. See R.G. SYBESMA-KNOL, *THE STATUS OF OBSERVERS IN THE UNITED NATIONS* (1981).



participate in international organizations has no similar pedigree. International organizations of any consequence emerged only in the second half of the 20<sup>th</sup> Century, only becoming truly effective in its last decade. The United Nations, World Trade Organization/GATT and European Union of the 1990s hardly resemble those organizations a generation earlier. It is no coincidence that critiques of the organizations' legitimacy and accountability only attracted a following when the paralysis of the Cold War had receded. Given this radical imbalance in experience between the two settings, it is hardly surprising that the international claims find few direct parallels in the national claim. The relation between individuals and international organizations is simply too under-theorized and too new to offer coherent answers to the questions national democratic theory has long explored.

Any conclusions are therefore preliminary and highly contingent. But if they are needed, my view is that the national experience does not hold a promising future for an international entitlement. First, although international law has long settled on the sovereign state as the center of its legal order, in many regions the state is still a work in progress. Many citizens hold primary loyalties to nonstate groupings (ethnicity, religion). In many regions the state does not meet Weber's minimal definition of sovereignty: of holding a monopoly on the legitimate use of force. In many of the same areas basic state services are not provided. International law has moved on many fronts to help the reality of the state in these circumstances live up to its legal ideal.<sup>54</sup> But until progress is made on this front, the prospect of international law effectively diluting these efforts by adding another entity to the tangled mix of identities in these settings seems unlikely and counter-productive. Strong international organizations have traditionally been built on strong states (in the sense of being minimally functional and perceived, for the most part, as legitimate by their citizens). Until efforts to strengthen states bear more fruit, efforts to substitute for state failures by opening international avenues of participation offer little hope of progress. Indeed, success in fostering stronger states might obviate the need for many of the coercive acts by international organizations—aid conditionality, international territorial administration, asymmetrical trade agreements—that prompted calls for individual participation in the first place.

Second, the legal relationships between the many actors involved in a right of individual participation are simply too complex to resolve by fiat. Nationally, only two sets of actors are involved: individuals and the state. Hundreds of years of practice and debate have been needed to reach the rather basic principles of popular sovereignty that now describe that relationship. But internationally, the number of actors multiplies exponentially: almost two hundred states, citizens from each of those states and hundreds of international organizations. As discussed above, it is hardly self-evident how rights and duties among and between these different actors ought to be

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54. See Gregory H. Fox, *Strengthening the State*, 7 *IND. J. GLOBAL LEGAL STUD.* 35 (1999).

structured. The answer can only come from experience that slowly builds consensus. This will arrive, if at all, many, many years in the future.

There is, finally, a strategic question. International organizations have only a tenuous call on state loyalty. For many states, their benefits only marginally outweigh costs in the delegation of decision-making, greater susceptibility to coercive pressures by other states and changes in policy dictated by the organizations' objectives. If added to these costs there was the possibility that a state's citizens might take positions in an organization opposed to those taken by the state itself, the equation might well tip toward a negative assessment. Some scholars argued that it is possible to "overlegalize" international relations; to codify too much too quickly and make "substantive rules or review mechanisms too constraining of sovereignty and precipitat[e] a backlash by governments[.]"<sup>55</sup> This could well be the case if the fragile legitimacy of international organizations is pressed beyond its limits.

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55. Laurence R. Helfer, *Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes*, 102 COLUM. L. REV. 1832, 1834 (2002).