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LLM – International Law - Dissertation

A Democratic Criterion for Definitional Statehood in International Law

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Part I - Introduction

...adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.¹

International Court of Justice – Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) (1986)

'...a paradigm-shifting development in which new rules and doctrines of customary international law emerge with unusual rapidity and acceptance.'²

Michael Scharf – Description of a 'Groatian Moment' (2010)

...the years 1989–2010 can be hailed as an unprecedented epoch of international law during which domestic governance – understood here in a traditional way as the use of public authority at the domestic level through a central governmental authority – has been regulated by international law to an unprecedented extent.³

Jean d'Aspremont (2011)

The end of the Cold War was regarded as an event of such historic significance that its potential impact was already being described in 1989 as 'the end of history':

What we may be witnessing is not just the end of the Cold War, or the passing of a particular period of postwar history, but the end of history as such: that is, the end point of mankind's ideological evolution and the universalization of Western liberal democracy as the final form of human government.⁴

With the end of the Cold War, international lawyers began to question international law's 'traditional neutrality on the ideological underpinnings of national

¹ *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. US) (Merits)* [1986] ICJ Rep 14 at para 263. [Nicaragua]

² Michael P Scharf 'Seizing the "Groatian Moment": accelerated formation of customary international law in times of fundamental change' (2010) 43 *Cornell international law journal* 439 at 439. [Scharf]

³ Jean d'Aspremont 'The rise and fall of democratic governance in international law: a reply to Susan Marks' (2011) 22 *European journal of international law* 549 at 551. [d'Aspremont]

⁴ Francis Fukuyama 'The end of history?' (Summer 1989) *The national interest*. Available at <http://www.wesjones.com/eoh.htm> [accessed 23 August 2011].

regimes.⁵ Established articulations of state sovereignty regarded the political system in each state as an internal affairs matter 'unconstrained by international law.'⁶ This principle was reaffirmed throughout the Cold War era,⁷ and applied not only to the creation of governments, but also to the creation of states.⁸

Legal criteria for state creation in international law have always been controversial.⁹ In addition to suggestions the topic is simply too political for legal regulation,¹⁰ there is no consensus concerning what *type* of criteria are appropriate,¹¹ what the specific criteria should be,¹² how potential criteria should be interpreted,¹³ and what role recognition plays in state creation.¹⁴

The most generally accepted criteria during the Cold War era were set out in the 1933 *Montevideo Convention on the Rights and Duties of States* which stipulates the following conditions for statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) the capacity to enter into relations with other states.¹⁵

These factors were premised on confirming the effectiveness of the territorial unit claiming statehood.¹⁶ The government criterion therefore required only effective control over people and property in the territorial entities.¹⁷ Issues concerning how a

⁵ Gregory H Fox 'Internationalizing national politics: lessons for international organizations' (2007) 13 *Widener law review* 265 at 270. [Fox 2007]

⁶ d'Aspremont (note 3) at 552.

⁷ *Draft Declaration on Rights and Duties of States* (1949) article 1; American Law Institute *Restatement (Third) of the Foreign Relations Law of the United States* §203 (1987) comment e.

⁸ James Crawford *The creation of states in international law* 2ed (2006) at 55. [Crawford 2006]

⁹ *Ibid* at 3-173.

¹⁰ *Ibid* at 40, 757-759 (Annex 4). The ILC has progressed little on codification of principles respecting recognition of states and governments since 1949, partly because of the politically contentious nature of the topic.

¹¹ *Ibid* at 37-173. There are two broad categories of potential criteria: criteria based on the effectiveness of the territorial unit, and criteria related to the legitimacy of the proposed state.

¹² *Ibid* at 37-173.

¹³ Even a presumably non-controversial criterion like 'permanent population' has resulted in significant disagreement between states. William Thomas Worster 'Law, politics and the conception of the state in state recognition theory' (2009) 27 *Boston University international law journal* 115 at 161. [Worster]

¹⁴ Recognition theory will be discussed in Part II.

¹⁵ *Montevideo Convention on the Rights and Duties of States* (26 December 1933) 165 LNTS 19 article 1. [*Montevideo*]

¹⁶ Crawford 2006 (note 8) at 45-46.

¹⁷ Sean D Murphy 'Democratic legitimacy and recognition' in Gregory H Fox and Brad R Roth (eds) *Democratic governance and international law* (2000) 123 at 125.

government was selected, or a territory's political system, were considered irrelevant.¹⁸ During the Cold War, both democratic and autocratic territories routinely achieved statehood.

For some scholars in the political science, economics and legal disciplines, the end of the Cold War was greeted with almost instantaneous predictions about a profound and permanent change to the international order. Echoes of Fukuyama's 'end of history' theory appear in the legal scholarship arising in the early 1990's, which argued that changes in the international system brought about by the collapse of the Eastern Bloc created fertile ground in which a right to democratic governance was emerging.¹⁹

The seminal work during this period was Thomas Franck's 'The emerging right to democratic governance' published in the *American Journal of International Law* in 1992.²⁰ In that article, Franck argued a right to democratic governance 'while not yet fully word made law, is rapidly becoming, in our time, a normative rule of the international system.'²¹ While Franck's view found support among like-minded academics, including those who argued in favour of the emergence of a specific democratic criterion for definitional statehood (DCDS),²² it met with criticism from those who considered democracy inherently inappropriate for legal regulation, those who expressed concern about the imposition of Western liberal democracy on other parts of the world, and those who considered Franck's specific pronouncements premature.²³

¹⁸ *Ibid* at 125.

¹⁹ Thomas Franck 'The emerging right to democratic governance' (1992) 86 *American journal of international law* 46 [Franck 1992]; Gregory H Fox 'The right to political participation in international law' (1992) 17 *Yale journal of international law* 539. [Fox 1992]

²⁰ *Ibid*.

²¹ *Ibid* at 46.

²² Reginald Ezetah 'The right to democracy: a qualitative inquiry' (1997) 22 *Brooklyn journal of international law* 495. [Ezetah]; A Kelly Malone 'The right of newly emerging democratic states prior to international recognition and the Serbo-Croatian conflict' (1992) 6 *Temple international and comparative law journal* 81 at 86-88 [Malone]; Ingrid Detter *The international legal order* (1994).

²³ Thomas D Grant 'Defining statehood: the *Montevideo Convention* and its discontents' (1999) 37 *Columbia journal of transnational law* 403 [Grant]; Makau wa Mutua 'The *Banjul Charter* and the African cultural fingerprint: an evaluation of language of duties' (1995) 35 *Virginia journal of international law* 339 [Mutua]; James Crawford 'Democracy and the body of international law' (1994) – reproduced in Gregory H Fox and Brad R Roth (eds) *Democratic governance and international law* (2000) at 91–113 [Crawford 1994]; Thomas Carothers 'Empirical perspectives on the emerging norm of democracy in international law' (1992) 86 *American society of international law proceedings* 261-267. [Carothers]

Speaking at the American Society for International Law Proceedings in 1992, Thomas Carothers offered empirical insights based on professional experience in post-Cold War democracy promotion.²⁴ Carothers acknowledged the post-Cold War democratic trend in some regions, but cautioned against the tendency to ‘universalize at the drop of a hat.’²⁵ He castigated the general approach of democratic norm advocates as one ‘based on a superficial empirical account of world events,’²⁶ and criticized Franck’s specific assessment of global adherence to democracy as ‘facile universalism, which is at best an oversimplification but is more probably an incorrect way of viewing the trend toward democracy.’²⁷

In the almost twenty year period since Franck’s article, the *idea* of a right to democracy, and the discrete issue of whether there is a DCDS, have become broadly normalized issues for international legal consideration: ‘the idea of such a right has become accepted, even if still as a proposition about emerging international law, rather than as a settled norm.’²⁸ The proliferation of pro-democratic hard and soft legal instruments, and arguably pro-democratic state practice, has been mirrored by an increasing body of legal scholarship.²⁹

Despite an overall positive democratic trend during this period,³⁰ the diverging views epitomized by Franck and Carothers in 1992 continue to inform contemporary legal scholarship. While some authors argue the right to democratic governance has emerged either internationally³¹ or regionally,³² others contend it is still emerging,³³

²⁴ Carothers (note 23) at 261-267.

²⁵ *Ibid* at 263-264.

²⁶ *Ibid* at 266.

²⁷ *Ibid* at 262.

²⁸ Susan Marks ‘What has become of the emerging right to democratic governance?’ (2011) 22 *European journal of international law* 507 at 511. [Marks]

²⁹ As of 2011, Franck’s 1992 article has been cited 313 times in US law reviews alone. *Ibid* at 507.

³⁰ d’Aspremont (note 3) at 551.

³¹ Eric Ting-Lun Huang ‘The modern concept of sovereignty, statehood and recognition: a case study of Taiwan’ (2003) 16 *New York international law review* 99 [Huang]; Niels Petersen ‘The principle of democratic teleology in international law’ (2008) 34 *Brooklyn journal of international law* 33. [Petersen]

³² Christopher Harding ‘Democratic rights in European law: taking stock at the close of the 20th century’ (2002) 2 *Oregon review of international law* 64.

³³ Samantha Besson ‘Sovereignty, international law and democracy’ (2011) 22 *European journal of international law* 373 [Besson]; Katherine A Wagner ‘Identifying and enforcing “back-end” electoral rights in international human rights law’ (2010) 32 *Michigan journal of international law* 165 [Wagner]; Andrew Coleman and Jackson Maogoto ‘Democracy’s global quest: a noble crusade wrapped in a dirty reality?’ (2005) 28 *Suffolk transnational law review* 175. [Coleman]

there is insufficient consistent evidence to draw any conclusions,³⁴ or that a specific DCDS has not emerged.³⁵ Even among democracy advocates, there are differing opinions concerning the content of the right.³⁶

Moreover, the overall democratic trend since 1989 fails to tell the whole story. Democracy's progress has not been consistent or universal, and recent evidence of democratic regression suggests the continuation of the trend may not be inevitable.³⁷ The increasing international influence of state actors not dedicated to democratic principles has challenged some of the basic assumptions made about the post-Cold War international order.³⁸ While it is too soon to draw definitive conclusions about these events, they do suggest pronouncements of 'the end of history' may have been premature.

This paper will assess whether adherence to democratic principles has become a pre-condition to legal statehood in contemporary international law. Part II will discuss the history of legal statehood criteria and competing recognition theories. Part III will look at the principle of democracy. Part IV will set out the customary international law test, canvass the contentious issues concerning its general application, and identify some challenges in applying the test to the issue of DCDS. Part V will review the evidence of state practice and *opinio juris* to determine whether DCDS finds *direct* support as a customary international law (CIL) rule. Finally, Part VI will consider whether DCDS can be deduced from the legal principle of self-determination.³⁹

³⁴ Jure Vidmar 'The right to self-determination and multi-party democracy: two sides of the same coin?' (2010) 10 *Human rights law review* 239 [Vidmar]; Matthew Griffin 'Accrediting democracies: does the credentials committee of the United Nations promote democracy through its accreditation process and should it?' (2000) 32 *New York University journal of international law and politics* 725 [Griffin]; Same Varayudej 'The right to democracy in international law: its implications for Asia' (2006) 12 *Annual survey of international and comparative law* 1. [Varayudej]

³⁵ Grant (note 23); Worster (note 13).

³⁶ Various potential approaches to the democratic right will be discussed in Part III.

³⁷ d'Aspremont (note 3).

³⁸ Stefan Halper *The Beijing consensus: how China's authoritarian model will dominate the twenty-first century* (2010). [Halper]

³⁹ Petersen (note 31) at 49.

Part II - Legal Statehood Criteria

*'The definition of a state is alone almost an impossible task.'*⁴⁰

William Thomas Worster (2009)

A. *Montevideo* Criteria

While article 1 of the *Montevideo Convention* provides the 'best known formulation of the basic criteria for statehood,'⁴¹ its status under international law has always been controversial.⁴² *Montevideo* was only ratified by five states,⁴³ and adherence in subsequent practice has been inconsistent: 'numerous entities are or have been regarded as states by the international community without meeting the *Montevideo* requirements,'⁴⁴ while satisfaction of the criteria in other instances has not resulted in statehood.⁴⁵ *Montevideo* has been criticized as 'over-inclusive, under-inclusive and outdated.'⁴⁶

Montevideo's resilience has arguably been due to the inability of the international community to agree on a more satisfactory and current articulation of statehood criteria.⁴⁷ While not legally irrelevant, the criteria should be considered 'no more than a basis for further investigation.'⁴⁸

Notwithstanding widespread agreement about *Montevideo's* deficiencies, there have been few subsequent efforts to codify statehood.⁴⁹ The most common explanation is political reluctance by states to commit to a universally binding definition: 'moments

⁴⁰ Worster (note 13) at 143.

⁴¹ Crawford 2006 (note 8) at 45.

⁴² Alexander H Berlin 'Recognition as sanction: using international recognition of new states to deter, punish, and contain bad actors' (2009) 31 *University of Pennsylvania journal of international law* 531 at 549-550. [Berlin]

⁴³ Grant (note 23) at 453-456.

⁴⁴ Berlin (note 42) at 549.

⁴⁵ *Ibid* at 551; Zohar Nevo and Tamar Megiddo 'Lessons from Kosovo, the law of statehood and Palestinian unilateral independence' (2009) 5 *Journal of law & international relations* 89 at 91.

⁴⁶ Grant (note 23) at 434.

⁴⁷ Crawford 2006 (note 8) at 37-45.

⁴⁸ Ian Brownlie *Principles of public international law* 7ed (2008) at 70. [Brownlie]

⁴⁹ Grant (note 23) at 447.

are rare in international politics where a statement can be codified on a matter as sensitive as the definition of a state.⁵⁰

B. Proposed Additional Criteria

Proposed alternative or additional criteria include further effectiveness standards,⁵¹ but also criteria based on the legitimacy of the territorial unit seeking statehood.⁵² Potential legitimacy criteria include a prohibition on state creation arising from a breach of international law,⁵³ a requirement to generally respect fundamental human and minority rights,⁵⁴ and a specific criterion that new states adhere to principles of democratic governance.⁵⁵

i. Criticisms of Additional Criteria

Proposals to alter or supplement *Montevideo* criteria have been challenged on a number of grounds. Resistance to legitimacy criteria has largely been premised on concerns regarding state sovereignty and non-intervention.⁵⁶ During the Cold War, robust interpretations of these principles constituted 'significant obstacles to the development of the principle of democracy into the corpus of international law.'⁵⁷

Since the start of the UN era, 'domestic sovereignty has gradually become more and more limited.'⁵⁸ International law increasingly seeks to regulate matters within states traditionally considered domestic concerns: 'States are no longer "sovereign" in the sense of entitled to act at liberty on their own territory and with respect to their own nationals.'⁵⁹

⁵⁰ *Ibid* at 455.

⁵¹ Crawford 2006 (note 8) at 62-95. Potential additional effectiveness criteria include independence, sovereignty, permanence, willingness and ability to observe international law, a certain degree of civilization, legal order, and recognition.

⁵² *Ibid* 96-173; David Raic *Statehood and the law of self-determination* (2002) at 24-25.

⁵³ Crawford 2006 (note 8) at 107-148. This would include statehood achieved through violation of the international prohibition on territorial acquisition using force, or in contravention of the right of peoples to self-determination.

⁵⁴ *Ibid* at 148-155.

⁵⁵ *Ibid* at 150.

⁵⁶ Jeremy Waldron 'Are sovereigns entitled to the benefit of the international rule of law?' (2011) 22 *European journal of international law* 315 at 318.

⁵⁷ Varayudej (note 34) at 3.

⁵⁸ Besson (note 33) at 382.

⁵⁹ Crawford 2006 (note 8) at 149.

The extent of sovereignty's erosion is arguable. While many states continue to defend sovereignty's more traditional articulation,⁶⁰ scholars have argued contemporary sovereignty has 'become contractual or conditional rather than absolute,'⁶¹ with some even suggesting conflicts between sovereignty and human rights be resolved based on a presumption in favour of humanity.⁶² Others defend the contemporary significance of the principle, but contend sovereignty has evolved from a right belonging to states to a right belonging to citizens within a state.⁶³

It can also be argued legitimacy criteria have no implications for state sovereignty because statehood *precedes* sovereignty:

Sovereignty applies as a legal right (more properly, a legal presumption) only to territories constituted and accepted as states...the notion of a right presupposes identification of its subject, and such an identification must be made independently of the principle of sovereignty.⁶⁴

In addition to potential sovereignty ramifications, the inherent capacity of legitimacy criteria to serve as legal benchmarks has been questioned. Unlike effectiveness criteria, which are 'fact-based', legitimacy criteria are deemed too subjective, political, and/or ideologically-based to be legal rules.⁶⁵ Some have alleged legitimacy criteria would result in the 'blurring of distinctions between what it takes to be a state and what it takes to get other states to recognize a state as such.'⁶⁶

From an evidentiary perspective, statehood criteria such as democracy would be difficult to objectively assess and measure.⁶⁷ Determinations whether a proposed state

⁶⁰ In Part V, this will be evidenced by a detailed analysis of UNGA resolutions on democracy.

⁶¹ Thomas G Weiss and Sam Daws 'World Politics: continuity and change since 1945' in Thomas G Weiss and Sam Daws (eds) *The Oxford handbook on the United Nations* (2007) 3 at 8.

⁶² Anne Peters 'Humanity as the A and Ω of sovereignty' (2009) 20 *European journal of international law* 513-544.

⁶³ This has been commonly referred to as 'popular sovereignty'. W Michael Reisman 'Coercion and self-determination: construing Charter article 2(4)' (1984) 78 *American journal of international law* 642 at 645; Besson (note 33) at 382-383.

⁶⁴ Crawford 2006 (note 8) at 115. Because the application of these same criteria *would* have implications for the sovereignty of existing states, even pro-DCDS advocates concede a democratic criterion would not apply to delegitimize existing states – see Malone (note 22) at 90.

⁶⁵ Grant (not 23) at 450-452.

⁶⁶ *Ibid* at 445. Grant notes at 452 that 'criteria such as minority rights and the holding of democratic referenda appear to raise particular problems in this regard.'

⁶⁷ These issues will be discussed in detail in Part III.

is 'democratic' at one specific moment in time would likely need to be based on a simple undertaking to adhere to democratic principles.⁶⁸ This would not only present a radical shift from the traditional approach to statehood criteria,⁶⁹ but the gap between professions of democratic adherence and subsequent actual adherence suggests such undertakings alone are not a reliable barometer of future democratization.⁷⁰

Finally, some have argued that a DCDS may not even be desirable. If non-democratic territories were unable to achieve statehood, the resultant rogue entities would be less constrained by the 'manifestations of responsibility' statehood produces, ultimately inhibiting the ability of the international legal system to regulate the internal and external conduct of these democratic outliers.⁷¹

ii. Recognition as a Criterion of Statehood

A particularly controversial aspect of legal statehood is the role of recognition by existing states. Recognition theories can be broadly categorized into declaratory and constitutive approaches.⁷²

The declaratory theory considers recognition of a new state as a political act that acknowledges the existing legal fact of statehood and is thus 'independent of the existence of the new state as a subject of international law.'⁷³

The constitutive theory considers recognition a precondition for legal statehood: 'the political act of recognition is a pre-condition of the existence of legal rights: in its extreme form this is to say that the very personality of a state depends on the political decisions of other states.'⁷⁴

⁶⁸ For example, it has been suggested that pro-democratic provisions in a proposed new state's constitution satisfy the criterion – see Malone at 90.

⁶⁹ A state does not satisfy the 'permanent population' or 'government' criteria by promising to put them in place upon achieving statehood – it is the *prior existence* of these criteria that establishes statehood.

⁷⁰ In Part V, a detailed comparison between state professions of democratic adherence and actual adherence will demonstrate a significant lack of concordance between the two (including many states created since 1989).

⁷¹ James Crawford 'Democracy and the body of international law – a reprise' in Gregory H Fox and Brad R Roth (eds) *Democratic governance and international law* (2000) 114 at 115. For example, a government that is unable to sue for lack of statehood will likely be unwilling to be sued.

⁷² It would be an oversimplification to suggest all recognition theories fall neatly within one of these categories. Worster (note 13) at 116-171.

⁷³ Crawford 2006 (note 8) at 22.

⁷⁴ Brownlie (note 48) at 87-88.

The relationship between recognition and legal statehood is of particular relevance to what *type* of additional statehood criteria may be appropriate. Writing from a declaratory perspective, it has been suggested certain types of issues are inherently best addressed as part of individual states' deliberations about recognition:

...the proposals made by some critics that entities must go through popular referenda on independence to be states, that entities must have democratic governments to be states, and that entities must respect the rights of minorities to be states seem clearly to belong to the realm of recognition decisions and not definitional statehood.⁷⁵

While there is no consensus among legal scholars, most 'assume that recognition itself does not create statehood.'⁷⁶ Attempts to legally codify recognition principles have generally been unsuccessful. While *Montevideo* does adopt a declaratory approach,⁷⁷ a proposal to incorporate similar declaratory language in the *Declaration on the Right and Duties of States* was rejected by a split vote of six-to-six.⁷⁸

A review of actual state practice over time concluded that recognition decisions are often dependent 'on political policy rather than the ability to meet the objective test as set under international law.'⁷⁹ This conclusion is consistent with that of an ILC Working Group studying the potential codification of rules on state recognition:

On one hand, there is the question of whether a new State has come into existence so as to qualify to be treated as a full member of the international community, e.g. in the context of admission to the United Nations. On the other hand there is the question of the decision by other states to extend formal recognition...The latter decision...is intensely political and apparently discretionary in character, and the range of factors that may be taken into account does not appear to be limited to considerations directly related to the statehood of the entity concerned...By contrast, the question of whether an entity

⁷⁵ Berlin (note 42) at 552.

⁷⁶ Grant (note 23) at 446; Brownlie (note 48) at 87-88; Crawford 2006 (note 8) at 21-22.

⁷⁷ 'The political existence of the state is independent of the recognition by other states.' *Montevideo* (note 15) article 3.

⁷⁸ *ILC Yearbook* (1949) at 87-88. Available at <http://untreaty.un.org/ilc/publications/> [accessed 3 July 2011].

⁷⁹ Huang (note 31) at 125.

qualifies for recognition as a State is a question of general character, separate from the particular policies of particular States⁸⁰ [emphasis added].

This distinction is reflected in arguments that 'theoretical statehood', which flows from meeting legal criteria, should be distinguished from 'effective statehood', which results from recognition.⁸¹ Historically, this distinction was significant because, prior to recognition, an entity that satisfied the definitional criteria was 'entitled to many of the most important attributes of statehood.'⁸²

While a territory could previously realize many benefits of statehood independently, the interconnected nature of the modern international system makes international relations and cooperation so essential to statehood it is arguably 'impossible to see how any state can live without relations with another.'⁸³ Non-recognition can be devastating for territories which otherwise satisfy traditional statehood criteria: 'Its [recognition] denial places real constraints on the capacity to function as a modern state, both domestically and internationally.'⁸⁴

As the practical consequences flowing from theoretical statehood and effective statehood contract, arguments have been advanced the declaratory-constitutive distinction is becoming irrelevant.⁸⁵ Part IV will discuss whether state recognition practices should be considered relevant precedents in support of universally applicable customary statehood criteria.

⁸⁰ 'Outline of issues on the topic of statehood' (1996) at paras 3-4 - reproduced in Crawford 2006 at 758. [ILC recognition paper]

⁸¹ Worster (note 13) at 131-132.

⁸² Hersch Lauterpacht *Recognition in international law* (1947) at 2.

⁸³ Huang (note 31) at 113-114.

⁸⁴ International Crisis Group 'Somaliland: time for African Union leadership' (2006) *ICG African report* No 110 at 10.

⁸⁵ 'Whether a state is "created" or merely acknowledged may not really be a distinction that matters if recognition opens the gate to full access to the international plane.' Worster (note 13) at 137.

Part III - Democracy

*'...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.'*⁸⁶

Gregory H Fox and Brad Roth (2000)

A. Definitional Democracy

Any analysis into a DCDS must consider what the word 'democracy' means to permit assessment of a potential democratic norm's 'content, justification and consequences.'⁸⁷

The definition will determine what state practice is relevant to the proposed customary rule, and whether there is a nexus between pro-democracy positions (alleged to evidence an *opinio juris*) and a defined concept.⁸⁸

The word democracy is derived from the Greek word *demokratía* which means 'rule of the people.'⁸⁹ In the modern context, the basic democratic principle has been described as follows: 'Democratic legitimacy for the exercise of political authority requires that the members of a political community regard themselves as both the authors and subjects of the law.'⁹⁰ Aside from such general articulations of principle, states have generally been unable to reach agreement on a definition:

A major problem with the notion of democratic governance is that no legal definition of 'democracy' has been generally agreed upon in State practice or in any international document. This leaves it subject to a variety of interpretations, depending upon the persons providing the definition and the context in which they are speaking. This makes democracy an essentially contested concept.⁹¹

⁸⁶ Gregory H Fox and Brad R Roth 'Introduction: the spread of liberal democracy and its implication for international law' in Gregory H Fox and Brad Roth (eds) *Democratic governance and international law* (2000) 1 at 18. [Fox Intro]

⁸⁷ *Ibid* at 4.

⁸⁸ Part IV will discuss the state practice and *opinio juris* elements of the CIL test.

⁸⁹ Ezetah (note 22) at 498.

⁹⁰ Steven Wheatley 'A democratic rule of international law' (2011) 22 *European journal of international law* 525 at 541. (Wheatley)

⁹¹ Varayudej (note 34) at 14-15.

B. Procedural and Substantive Definitions

Suggested democracy definitions can be distinguished between procedural and substantive approaches.⁹²

i. Procedural Democracy

A procedural definition focuses on how governments come into power, emphasizing free and fair elections 'as a sufficient criterion for democracy.'⁹³ It can be considered a minimalist approach,⁹⁴ with other protections of individual liberty associated with democratic governance considered separate human rights matters.⁹⁵

The emerging right to democratic governance described by Franck in 1992 was a procedural one based on legal commitments to permit 'open, multi-party, secret ballot elections with a universal franchise.'⁹⁶

While a procedural definition is potentially less controversial than a substantive one, many unsettled issues remain, including the necessity of multiple parties, who can run for office, inclusion of independent monitoring of the voting process, universal suffrage, and 'back-end' issues including the fairness of vote tabulation and the announcement of results.⁹⁷ Without these other elements, periodic elections alone may not necessarily reflect the will of the people.⁹⁸

Moreover, periodic elections do not necessarily ensure adherence to democratic principles and institutions.⁹⁹ A 2002 UN study looking at states holding democratic elections since 1980 found discrepancies between constitutionally enshrined democratic

⁹² Vidmar (note 34) at 241.

⁹³ *Ibid* at 241.

⁹⁴ Adam Przeworski 'Minimalist conception of democracy: a defence' in Ian Shapiro and Casiano Hacker-Cordon *Democracy's value* (1999) 23 at 23. [Przeworski]

⁹⁵ Gregory H Fox and Georg Nolte 'Intolerant democracies' in Gregory H Fox and Brad R Roth (eds) *Democratic governance and international law* (2000) 389 at 397. [Fox and Nolte]

⁹⁶ Franck 1992 (note 19) at 47-48.

⁹⁷ Wagner at (note 33) 167-170.

⁹⁸ *Ibid* at 166.

⁹⁹ For example, Nigeria's electoral experience has been described as en masse participation 'in the electoral ritual of voting for contestants for state power without actually choosing or determining who the winners will be.' W Alade Fawole 'Voting without choosing: interrogating the crisis of "electoral democracy" in Nigeria' in Tukumbi Lumumba-Kasongo (ed) *Liberal democracy and its critics in Africa* (2005) 149 at 149.

principles and actual practice.¹⁰⁰ Further, of 140 countries holding elections, only 82 possessed a free press and independent judiciary.¹⁰¹

Further, elections alone do not guarantee a government responsive to the will of the people.¹⁰² The ability of an elected government to institute change responsive to the will of the people may be constrained by entrenched militaries, influential business elites, inequalities in resource distribution, historical patterns of human rights abuses, or a decision to abandon democratic principles once in office.¹⁰³ In extreme cases, procedural democracy might produce only a 'sham democracy' in which 'mass preferences are something that political elites can largely ignore and in which they do not decisively influence government decisions.'¹⁰⁴

ii. Substantive Democracy

A substantive view of democracy is premised on the principle that majority rule must be 'meaningful'.¹⁰⁵ Elections alone as thus considered insufficient to achieve an actual state of democracy.¹⁰⁶ Beyond a core electoral component, there is debate concerning elements such as the opportunity to organize political parties, rule of law, preservation of civil and political rights, freedom of speech, minority protection, a free press, an independent judiciary, and the existence of social rights.¹⁰⁷

Substantive definitions of democracy are more contentious; possessing additional elements on which consensus must be achieved, potentially including controversial value judgments, and imposing concrete obligations on states potentially resistant to actual democratization.¹⁰⁸ As a result, 'no international consensus exists on

¹⁰⁰ *Human development report: deepening democracy in a developing World* (2002). Available at http://hdr.undp.org/en/media/HDR_2002_EN_Complete.pdf [accessed 5 June 2011].

¹⁰¹ *Ibid.*

¹⁰² David Wippman 'Defending democracy through foreign intervention' (1997) 19 *Houston journal of international law* 659 at 667. [Wippman]

¹⁰³ *Ibid* at 667-668.

¹⁰⁴ Ronald Inglehart and Christian Welzel 'How development leads to democracy' (2008) 88 *Foreign affairs* 33 at 44. [Inglehart]

¹⁰⁵ Fox and Nolte (note 95) at 401.

¹⁰⁶ Vidmar (note 34) at 241.

¹⁰⁷ Armin von Bogdandy 'Globalization and Europe: how to square democracy, globalization, and international law' (2004) 15 *European journal of international law* 885 at 889-90; James Crawford 'Democracy and international law' (1994) 64 *British yearbook of international law* 113 at 116 [Crawford BYIL]; Przeworski at (note 94) at 23; Wheatley (note 90) at 247.

¹⁰⁸ Coleman (note 33) at 239-242.

specific criteria that should be used to judge whether a particular government is substantively "democratic".¹⁰⁹

iii. Minimal Core Approach

Some have suggested definitional consensus might be reached based on a minimum core of agreeable democratic principles.¹¹⁰ Using such an approach *deductively* in a CIL analysis may be inappropriate.¹¹¹ Simply because common elements exist within broader articulations of democracy does not necessarily mean a state supporting the broader concept would support each individual component in isolation.

For example, there may be a common minimal core in favour of periodic elections. However, some articulations will require multiple parties, secret ballots and other measures to ensure votes are free and fair. It would be inappropriate to infer that states which consider elections alone insufficient to ensure a democratic government, would support a customary rule based on a definition of democracy that would be satisfied by strictly controlled single party plebiscites.

iv. Democracy and Cultural Relativism

Some argue that most proposed definitions of democracy fail to reflect potential diverse manifestations of democracy in different cultural contexts.¹¹² There have also been assertions that democracy itself is incompatible with certain cultures,¹¹³ but this position has been challenged as failing to acknowledge diversity within cultures.¹¹⁴ For example, while arguments that Asian culture is hostile to democracy are often premised on Confucianism,¹¹⁵ this interpretation of Confucianism has been challenged, as has the

¹⁰⁹ *Ibid* at 239.

¹¹⁰ Crawford BYIL (note 107) at 113.

¹¹¹ If a sufficient number of states *explicitly* accepted the core democratic elements, independent of broader articulations of democracy, the concerns raised herein would not apply.

¹¹² Martti Koskenniemi 'Whose intolerance, which democracy?' in Gregory H Fox and Brad R Roth (eds) *Democratic governance and international law* (2000) 436 at 438 [Koskenniemi]; Mutua (note 33) at 341.

¹¹³ Such arguments are usually raised in connection with Asian and Islamic cultures – see Amartya Sen 'Democracy as a universal value' in Larry Diamond and Marc F Plattner (eds) *The global divergence of democracies* (2001) 3 at 13-16. [Sen]

¹¹⁴ *Ibid* at 13-15.

¹¹⁵ Francis Fukuyama 'Confucianism and democracy' in Larry Diamond and Marc F Plattner (eds) *The global divergence of democracies* (2001) 23 at 23-36.

applicability of these values apply to all Asian cultures.¹¹⁶ Similar assertions about Islam are arguably based on a narrow review of contemporary Islamic states, without consideration of the diversity historically present within Islam.¹¹⁷

Conversely, Western notions of democracy may not be universally appropriate. The unique needs of societies that place greater emphasis on collective rights may not correspond to Western democratic emphasis on 'the sacralization of the individual and the supremacy of jurisprudence of individual rights.'¹¹⁸ Moreover, abrogation of individual rights and free and fair elections to raise a population's overall well-being arguably 'exhibits a higher form of democratic rule as it gives effect to values hierarchically superior to electoral fairness and individualism.'¹¹⁹

One possible response to this concern is to define democracy broadly enough to apply in myriad diverse contexts.¹²⁰ Another approach is to resist *any* universal definition:

...the proposition that there is an international or universal norm of "democracy", "tolerance" or something of the sort...may in fact be unacceptable because over- and under-inclusive at the same time, too general to provide political guidance, and always suspect as a neo-colonial strategy.¹²¹

v. Binary, Graduated and Procedural Approaches

Distinctions can also be made between binary and graduated approaches to democracy.¹²² A binary approach treats an entity as either democratic or not, while a graduated approach distinguishes between degrees of democracy because democratization does not involve 'a simple shift from one status to another.'¹²³ From an international law perspective, a binary approach may be attractive because of its utility

¹¹⁶ Sen (note 113) at 15.

¹¹⁷ Abdou Filali-Ansary 'Muslims and democracy' in Larry Diamond and Marc F Plattner (eds) *The global divergence of democracies* (2001) 37 at 37-51.

¹¹⁸ Mutua (note 23) at 341.

¹¹⁹ Koskenniemi (note 112) at 438.

¹²⁰ One must be careful not to define democracy so broadly that the very reason for seeking a universal definition (the presumed inherent value of the principle) is sacrificed on the altar of reaching a consensus.

¹²¹ Koskenniemi (note 112) at 439-440. Koskenniemi rejects universality in favour of individualized responses to specific situations.

¹²² Petersen (note 31) at 37.

¹²³ *Ibid* at 37, 60. Carothers describes this as democracy not being 'susceptible to an on/off switch.' Carothers (note 23) at 264-265.

in classifying subjects into legal and illegal categories. It may, however, be inaccurate when applied to a concept like democracy: '[I]nternational law, like most law, tends to look for bright lines, but it is very hard to find one when dealing with democracy.'¹²⁴ The most credible data sets on global democratization use a graduated approach,¹²⁵ which also recognizes the procedural aspects of democratization.¹²⁶ Some democratic rights theorists have actually defined the right procedurally, limiting the obligation to one in which 'States and societies are obliged to develop towards democracy.'¹²⁷

vi. DCDS Approach

There are various possible ways in which the definition of democracy can be approached for CIL purposes. One can look to relevant international sources for a definition.¹²⁸ Alternatively, a specific definition can be proposed and the CIL evidence assessed to determine whether it finds support as a customary rule.¹²⁹ Finally, the CIL evidence can be assessed to determine whether there is sufficient state practice and *opinio juris* to support a binding rule of DCDS, and if so, allow the CIL evidence itself to suggest the parameters of the definition. This paper will adopt the third option:

¹²⁴ Carothers (note 23) at 265.

¹²⁵ The Freedom House and Polity IV data sets will be discussed in Part V.

¹²⁶ Petersen (note 31) at 40-48.

¹²⁷ *Ibid* at 81-82. Petersen describes this as the principle of 'democratic teleology'.

¹²⁸ *Ibid* at 37-38. Because of the lack of specificity in most international and regional instruments, this approach has limited practical utility.

¹²⁹ *Ibid* at 37.

Part IV - Customary International Law

*What is customary international law? This question has intrigued jurists and scholars for centuries – and frustrated government officials charged with determining whether a contemplated course of conduct is consistent with a state's international legal obligations.*¹³⁰

Brian Lepard (2010)

This section will set out the basic criteria necessary to establish a CIL rule, identify various challenges and controversies associated with the application of the CIL criteria both generally and to the specific issue of a DCDS.

A. CIL Criteria

Customary international law is created when state behaviour coalesces around a particular international rule such that it achieves the status of international law. CIL is composed of two elements: actual state practice (the objective element) and *opinio juris* (the subjective element).¹³¹

i. State Practice

State practice must be both consistent and general.¹³² While there need not be absolute uniformity, CIL requires 'substantial uniformity',¹³³ and the issue should be considered as generally 'settled'.¹³⁴ Where there are 'major' discrepancies, uncertainty, contradictions or fluctuations in state practice, it is unlikely a customary rule exists.¹³⁵

There is debate concerning what *type* of conduct constitutes state practice.¹³⁶ At issue is whether state practice is limited to actions, or whether statements can also be

¹³⁰ Brian D Lepard *Customary international law: a new theory with practical applications* (2010) at 3. [Lepard]

¹³¹ *Statute of the International Court of Justice* article 38(b); *Case Concerning the Continental Shelf (Libyan Arab Jarnahiriyyu/Malta)* [1984] ICJ Rep 3 at para 27; *Nicaragua* (note 1) at para 183.

¹³² Brownlie (note 48) at 7-8. Consistency requires that individual states' practice not fluctuate between situations or over time. Generality refers to how broad the state practice is among states.

¹³³ *Ibid* at 7.

¹³⁴ *North Sea Continental Shelf Case (Federal Republic of Germany v. Denmark/Netherlands)* [1969] ICJ Rep 3 at para 77. [North Sea]

¹³⁵ *Asylum Case (Colombia v. Peru)* [1950] ICJ Rep 266 at 277 [Asylum Case]. Peter Malanczuk *Akehurst's modern introduction to international law* 7ed (1997) at 41-42.

¹³⁶ Jörg Kammerhofer 'Uncertainty in the formal sources of international law: customary international law and some of its problems' (2004) 15(3) *European journal of international law* 523 at 525. [Kammerhofer]

considered state practice.¹³⁷ While each view has its proponents,¹³⁸ treating statements as state practice arguably conflates state practice and *opinio juris*.¹³⁹

To be good CIL evidence, state practice must be considered reliable precedents for the proposed rule.¹⁴⁰ Grounds for depriving instances of state practice of their precedential value include: where the practice can be attributed to a non-customary legal obligation;¹⁴¹ where the basis for the action is speculative;¹⁴² or where the state practice is not sufficiently similar to the proposed rule.¹⁴³ In other words, state practice not truly analogous to a proposed CIL rule provides an 'inconclusive' and 'insufficient' evidentiary basis of settled practice.¹⁴⁴ There is clearly some overlap between these grounds and *opinio juris* considerations.

ii. *Opinio Juris*

Where state practice is sufficiently consistent and general, an analysis of the *opinio juris* must disclose 'evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it.'¹⁴⁵ The classic articulation of *opinio juris* is from the *North Sea Continental Shelf* case:

The States concerned must therefore feel that they are conforming to what amounts to a legal obligation. The frequency or even habitual character of the acts is not in itself enough. There are many international acts...motivated only by considerations of courtesy, convenience or tradition, and not by any sense of legal duty.¹⁴⁶

¹³⁷ Anthea Elizabeth Roberts 'Traditional and modern approaches to customary international law: a reconciliation' (2001) 95 *American journal of international law* 757 at 757 [Roberts].

¹³⁸ Michael Akehurst 'Custom as a source of international law' (1977) 47 *British yearbook of international law* 1 at 53. In Akehurst's view, 'state practice means any act or statement by a State from which views about customary law can be inferred.' Anthony D'Amato *The concept of custom in international law* (1971) at 88 [D'Amato 1971]. D'Amato argues only actions should be considered state practice.

¹³⁹ Kammerhofer (note 136) at 525.

¹⁴⁰ *North Sea* (note 135) at para 75.

¹⁴¹ *Ibid* at para 76. For example, if state practice can be explained by a state's existing treaty obligations, that conduct is not a good precedent in respect to a customary version of the treaty provision.

¹⁴² *Ibid* at para 76.

¹⁴³ *Ibid* at para 79. In *North Sea*, the proffered state practice (median-line maritime delimitations between opposite states) was 'sufficiently distinct' from the circumstances to which the purported rule would apply (lateral delimitations) such that the practice did not constitute a precedent for the rule.

¹⁴⁴ *Ibid* at paras 79-80.

¹⁴⁵ *Ibid* at para 77.

¹⁴⁶ *Ibid* at para 77.

The *opinio juris* analysis essentially examines whether a legal motivation forms the basis for a state's actions. Actions must be based on the recognition by states of a 'right appertaining to them' and/or 'duty incumbent on them' and not premised on discretionary considerations such as political expediency.¹⁴⁷

There is some disagreement in the academic literature about whether the *opinio juris* analysis should focus only on the attitude of states reacting to the practice of other states,¹⁴⁸ or if the attitudes of the state engaging in the practice at issue can also be considered.¹⁴⁹ The ICJ has adopted the latter approach, looking to evidence from both practicing and reacting states.¹⁵⁰ There is also debate whether *opinio juris* requires only a statement of belief by states respecting the proposed customary rule, or whether actual belief must be established.¹⁵¹

Where there is sufficient evidence of state practice and *opinio juris* for the establishment of a customary rule, the resultant obligation applies to all states, unless they can be regarded as persistent objectors. During the time period when state practice is developing into a customary rule, a state that persistently and openly dissents from the rule will not be bound by it.¹⁵²

B. Application of CIL Criteria

While the basic definition of CIL would suggest two distinct and equally important components, the practice of tribunals and the writings of legal scholars suggest many contentious issues respecting the application of the CIL criteria.¹⁵³ A broad distinction can be made between strict-inductive approaches and relaxed-deductive approaches.¹⁵⁴

¹⁴⁷ *Asylum Case* (note 135) at 277.

¹⁴⁸ Karol Wolke *Custom in present international law* 2ed (1993) at 47.

¹⁴⁹ Lepard (note 130) at 107.

¹⁵⁰ *Nicaragua* (note 1) at para 207.

¹⁵¹ Roberts (note 137) at 757-758; D'Amato 1971 (note 138) at 36-39.

¹⁵² *Asylum Case* (note 135) at 277-278.

¹⁵³ Lepard (note 130) at 14-46; Alberto Alvarez-Jiménez 'Methods for the identification of customary international law in the International Court of Justice's jurisprudence: 2000-2009' (2011) 60 *International & comparative law quarterly* at 681-712. [Alvarez-Jiménez]; Brownlie (note 48) at 8-9; Roberts (note 137) at 757-791.

¹⁵⁴ Alvarez-Jiménez (note 153) at 686-689.

i. Strict Approach

The strict-inductive approach, exemplified by the *North Sea* case, requires both state practice and *opinio juris* to be demonstrated and treats each component as equally important.¹⁵⁵ It is a 'practice-based methodological orientation.'¹⁵⁶

ii. Relaxed Approach

The deductive approach relaxes the requirement to strictly prove either state practice or *opinio juris*.¹⁵⁷ ICJ practice respecting the necessity to provide distinct positive *opinio juris* evidence has been inconsistent.¹⁵⁸ In most cases, the Court 'is willing to assume the existence of an *opinio juris* on the basis of evidence of a general practice, or consensus in the literature, or the previous determinations of the Court or other international tribunals.'¹⁵⁹ In a significant minority of cases, however, the ICJ has engaged in a more 'rigorous' approach by requiring positive evidence of *opinio juris*.¹⁶⁰

Inferring *opinio juris* has been criticized as failing to account for differing legal implications of state practice: it can alternatively generate custom, violate custom, or be legally neutral.¹⁶¹ Repetition of an action alone is 'merely a regularity of fact, not a norm.'¹⁶² Repeated actions must therefore 'be connected by lines of enunciated principle.'¹⁶³

This distinction is illustrated by the *Nuclear Weapons Advisory*.¹⁶⁴ While non-use of nuclear weapons had been consistent since 1945, it was necessary to determine whether the rationale for that consistent practice was recognition of a legal rule prohibiting their use. Because there were other explanations (i.e. a practice of

¹⁵⁵ *Ibid* at 686.

¹⁵⁶ Roozbeh B Baker 'Customary international law in the 21st century: old challenges and new debates' (2010) 21 *European journal of international law* 173 at 183. [Baker]

¹⁵⁷ *Ibid* at 183. It can generally be considered as a more normative approach.

¹⁵⁸ Brownlie (note 48) at 8-9.

¹⁵⁹ *Ibid* at 8-9.

¹⁶⁰ *Ibid* at 9-10.

¹⁶¹ Anthony D'Amato 'Softness in international law: a self-serving quest for new legal materials: a reply to Jean d'Aspremont' (2009) 20 *European journal of international law* 898 at 906. [D'Amato 2009]

¹⁶² Kammerhofer (note 136) at 528.

¹⁶³ Franck 1992 (note 19) at 56.

¹⁶⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226. [*Nuclear Weapons*]

deterrence), the consistency of the state conduct itself was insufficient to conclude a customary rule had emerged.¹⁶⁵

The *Nicaragua* decision, on the other hand, is often cited as indicative of the ICJ emphasizing *opinio juris* over state practice.¹⁶⁶ The finding of a CIL prohibition on international use of force allegedly focused on official state positions,¹⁶⁷ and discounted substantial contrary state practice.¹⁶⁸ In response to the ruling, Franck notes: '*opinio juris* is not evidence of practice, unless the verbal behavior of states in the Assembly is to be presumed to attest to their actual behavior in the "real world".'¹⁶⁹

A similar approach has arguably been used in torture cases. In *Filartiga v. Pena-Irala*, the US Second Circuit Court of Appeals held the prohibition on torture was CIL because states recognized it as a legal obligation despite the rule being 'often violated'.¹⁷⁰ Other domestic and international tribunals have also found torture prohibited by CIL, *jus cogens*, or both,¹⁷¹ despite the fact that 'torture has been widely employed across the globe by states with all forms of governments.'¹⁷²

iii. Recent ICJ Jurisprudence

Recent ICJ practice indicates continued use of both inductive and deductive approaches, but evidences a 'reemergence' of the strict-inductive approach.¹⁷³ The deductive approach has generally been limited to uncontroversial cases where rules are already widely considered customary.¹⁷⁴

¹⁶⁵ *Ibid* at paras 60-73.

¹⁶⁶ Thomas Franck 'Some observations on the ICJ's procedural and substantive innovations' (1987) 81 *American journal of international law* 116-121. [Franck 1987]

¹⁶⁷ For example, signing treaties, agreeing to UN resolutions and making official statements.

¹⁶⁸ Frederic L Kirgis 'Custom on a sliding scale' (1987) 81 *American journal of international law* 146 at 148; Anthony D'Amato 'Trashing customary international law' (1987) 81 *American journal of international law* 101 at 101-105.

¹⁶⁹ Franck 1987 (note 166) at 119.

¹⁷⁰ *Filartiga v. Pena-Irala*, 630 F.2d 876 at 884 (2d Circuit 1980).

¹⁷¹ *Suresh v. Canada (Minister of Immigration)* [2002] 1 SCR 3 (Supreme Court of Canada); *Jones v. Ministry of Interior Al-Mamlaka As Saudiya (the Kingdom of Saudi Arabia)* [2007] 1 AC 2 (House of Lords); *Prosecutor v. Furundzija* IT-95-17/1-T (ICTY-Trial Judgment).

¹⁷² Jutta Brunnée and Stephen J Toope *Legitimacy and legality in international law* (2010) at 231. At 232, the authors conclude while the norm against torture 'was strong as an aspiration...its rhetorical condemnation was matched by use around the globe.' [Brunnée]

¹⁷³ Alvarez-Jiménez (note 153) at 711-712.

¹⁷⁴ *Ibid* at 689-693.

iv. Ideological Basis for the Relaxed Approach

There are several potential explanations for the conscious or unconscious use of the relaxed approach.¹⁷⁵ Some may approach CIL from an idealist perspective, which results in a tendency (often unconscious) to 'construe international law as the receptacle of their own views in the ideal state of the law.'¹⁷⁶

A reformist approach seeks to change the actual state of the law, often through the use of 'progressive interpretation,'¹⁷⁷ while a rationalizing approach is premised on a need to rationalize what is 'an otherwise heterogeneous and highly contingent practice.'¹⁷⁸

These approaches have arguably influenced the democracy literature: '[T]he scholarship about democracy in international law has proven the embodiment of the (old) inclination of international legal scholars to mould their interpretation of international law along their own ideals.'¹⁷⁹ The speed of many scholars to affirm democratic legitimacy as a requirement of international law 'has helped legal scholars to conceptualize and rationalize the volatile and highly fact-dependent question of statehood.'¹⁸⁰

v. Arguments in Favour of the Relaxed Approach

The relaxation of state practice has been justified based on differing conceptions of the source of 'obligation' in international law. If legal 'obligation' is based more on state commitment to a legal system and its rules than actual compliance with those rules,¹⁸¹ formal statements committing to a rule may be sufficient to create a legal obligation, even if evidence of compliance is less than consistent.¹⁸²

¹⁷⁵ d'Aspremont (note 3) at 566-569.

¹⁷⁶ *Ibid* at 566.

¹⁷⁷ *Ibid* at 567-568.

¹⁷⁸ *Ibid* at 569.

¹⁷⁹ *Ibid* at 566-567.

¹⁸⁰ *Ibid* at 569.

¹⁸¹ Brunnée (note 172) at 92. Lepard adopts a similar view, arguing belief in the promise of certain behaviour (as opposed to actual state practice) is what makes a CIL rule obligatory. Lepard (note 130) at 124.

¹⁸² Brunnée (note 172) at 232.

Relaxation has also been justified as necessary to account for soft law norms that fall outside the traditional binary approach between strict obligatory rules and completely discretionary matters.¹⁸³

Fundamental changes in the international system have been argued to justify using a less rigorous approach to CIL. These events, described as either 'Groatian Moments',¹⁸⁴ or 'Constitutional Moments',¹⁸⁵ require the rapid promulgation of new rules which might be hampered by insistence on consistent state practice.¹⁸⁶ Globalization is alleged to constitute such a Groatian Moment which 'has produced new rules regarding the legal theory of statehood.'¹⁸⁷

Other writers take a contextual approach to the relaxation of CIL criteria, arguing rules possessing inherent normative value should not be subject to the same standards as other rules.¹⁸⁸ For example, it has been argued that issues involving fundamental ethical principles should permit the relaxation of the state practice requirement, or allow an inference of *opinio juris* to be made from official statements.¹⁸⁹

vi. Criticisms of the Relaxed Approach

The relaxation of CIL criteria has been criticized as transforming the CIL inquiry from an objective analysis of what the law is, to a subjective approach based on perceptions of what legal rules are needed.¹⁹⁰ Justice Schwebel cautioned against conflating these

¹⁸³ Kenneth W Abbott et al 'The concept of legalization' in Beth A Simmons and Richard H Steinberg (eds.) *International law and international relations* (2006) 115 at 117; Jean d'Aspremont 'Softness in international law: a self-serving quest for new legal materials' (2008) 19 *European journal of international law* 1075 at 1076.

¹⁸⁴ Scharf (note 2) at 439.

¹⁸⁵ Anne-Marie Slaughter and William Burke White 'An international constitutional moment' (2002) 43 *Harvard international law journal* 1-21. Slaughter and White describe the 9/11 attacks as a constitutional moment that justified rapid development of new customary rules.

¹⁸⁶ Scharf (note 2) at 450.

¹⁸⁷ Milena Sterio 'A Groatian Moment: changes in the legal theory of statehood' (2011) 39 *Denver journal of international law & policy* 209 at 209-210. In Sterio's view, these new rules include respect for human and minority rights.

¹⁸⁸ Lepard (note 130) at 140-150.

¹⁸⁹ *Ibid.*

¹⁹⁰ It can thus be considered 'descriptively inaccurate because it reflects ideal, rather than actual, standards of conduct.' Roberts (note 137) at 769.

issues in the *Nuclear Weapons Advisory*: 'It is accordingly the more important not to confuse the international law we have with the international law we need.'¹⁹¹

Ultimately, a relaxed approach may undermine the very regulatory function of CIL by treating it as more of an aspirational goal or soft law norm than an enforceable obligation.¹⁹² This in turn compromises the legitimacy of international law generally:

...the combined objective and subjective inquiries for CIL formation (state practice and *opinio juris*) remain the crucial algorithm for establishing whether a norm really rises to the level of international custom, and is thus deserving of recognition and enforcement. To dispense with, or relax, either of these requirements, in a misguided attempt to increase CIL's dynamism and relevance (especially to pursue favoured objectives, such as the promotion of human rights), would fatally undermine its legitimacy.¹⁹³

The weakness in the Groatian Moment theory is it fails to account for successive events of comparable importance that may give rise to different and conflicting needs. As will be discussed in Part V, pro-democracy efforts that arose following the end of the Cold War were drastically affected by security concerns following 9/11, and economic concerns resulting from the global economic crisis of 2008 and increasing Chinese influence.

The proliferation of soft law norms does suggest a binary approach to contemporary international law would be inaccurate. However, the mutation of CIL to accommodate these norms arguably maintains the binary system when a distinct new category is required. Efforts to 'force' soft law norms into CIL status not only inaccurately categorizes their degree of compulsoriness, but potentially undermines binding legal rules:

If a rule is not enforced it begins to unravel and, like a breach in a fabric, the unravelling tears apart nearby rules. The danger to the system could not be greater, for, as the unravelling spreads to all the rules, anarchy results. Anarchy is the equivalent of the death of the legal system.¹⁹⁴

¹⁹¹ *Nuclear Weapons* (note 164) at 311 (dissenting opinion).

¹⁹² Roberts (note 137) at 769-770; see also Prosper Weil 'Towards relative normativity in international law?' (1983) 77 *AJIL* 413 at 415. [Weil]

¹⁹³ David J Bederman 'Acquiescence, objection and the death of customary international law' (2010) 21 *Duke journal of comparative & international law* 31 at 44.

¹⁹⁴ D'Amato 2009 (note 161) at 903.

Ultimately, the 'appropriate' approach to CIL will be partly based on whether one regards the role of international law as a force to improve humanity's condition, or a mechanism to ensure a set of universally accepted rules allowing states to live in relative peace and order.¹⁹⁵

If CIL is considered a process to objectively determine what international law is, a strict approach is warranted. While a relaxed approach may facilitate the 'advancement' of international law in a direction favourable to a set of pre-determined values, one might question the utility of an international system replete with value-laden customary rules that does not actually regulate the conduct of international actors.

C. CIL and Democracy

DCDS presents unique CIL challenges. There is a dearth of CIL evidence directly relevant to DCDS, but a significant amount of potentially analogous evidence. The following section will discuss the various types of evidence and whether they are sufficiently analogous to be considered relevant precedents for a CIL rule.

i. Recognition

A fundamental issue respecting DCDS is what weight (if any) should be accorded to recognition practices of existing states. Recognition (at least under the declaratory theory) is distinct from legal statehood, but is the primary mechanism by which states confirm or reject their acceptance of a proposed new country.

For such decisions to be relevant precedents for definitional statehood, there must be a sufficient nexus between specific recognition decisions and legal statehood criteria. While decisions in some cases might be 'conditioned' by legal factors, the decision 'is ultimately a political one.'¹⁹⁶ Recognition is not necessarily based on the recognizing state's determination whether the territory at issue has satisfied legal

¹⁹⁵ Weil (note 192) at 418.

¹⁹⁶ Eileen Denza 'European practice on the recognition of states' (2011) 36(3) *European law review* 321 at 321. [Denza]

criteria for statehood (whatever those criteria may be),¹⁹⁷ but on policy preferences and other considerations that may change over time in response to new political realities.¹⁹⁸

Therefore, using recognition decisions as CIL evidence is to ascribe legal character to an act which is inherently discretionary in nature.¹⁹⁹ A potential exception would involve circumstances where an international legal obligation of non-recognition was applicable. While it is possible such duties do exist in contemporary international law, the obligation would only apply to violations of *jus cogens* norms and therefore not impose a duty of non-recognition for states that are not democratic.²⁰⁰

For these reasons, this paper will not rely on specific recognition decisions as evidence of DCDS's customary status. However, recognition policies of regional and international organizations, in which states agree to base recognition decisions on certain principles, *may be* relevant CIL practice.²⁰¹

ii. New vs. Existing States

The weight accorded to CIL evidence involving democratic deficits in existing states is questionable because existing countries are generally subject to lesser standards than new states.²⁰² A lack of democracy in an existing state is not considered relevant to its statehood:

...any developments in the direction of conditioning the standing or legitimacy of governments by reference to democratic standards has not affected the *underlying condition of the State as an entity under international law* [emphasis added].²⁰³

¹⁹⁷ Worster (note 13) at 141-142.

¹⁹⁸ *Ibid* at 142. For example, American recognition policy has varied from supporting antimonarchical governments, advancing economic imperialism, promoting constitutional government, to stopping communism.

¹⁹⁹ *Ibid* at 171.

²⁰⁰ Jean d'Aspremont and Eric De Brabandere 'The complementary faces of legitimacy in international law: the legitimacy of origin and the legitimacy of the exercise' (2011) 34 *Fordham international law journal* 190 at 202. [De Brabandere]

²⁰¹ The European Community's Recognition Guidelines on the former USSR and Yugoslavia will be discussed in Part V.

²⁰² d'Aspremont (note 3) at 555.

²⁰³ Crawford 2006 (note 8) at 152.

Even DCDS proponents acknowledge the criterion would only apply to newly emerging states and 'does not operate retroactively to delegitimize totalitarian States like China, Iraq, and North Korea.'²⁰⁴

While a lack of democracy does not undermine the legitimacy of an existing country's statehood, it can undermine the legitimacy of the non-democratic government.²⁰⁵ It is therefore submitted that CIL evidence suggesting democracy is a condition for governmental legitimacy may be regarded as analogous evidence for a DCDS. Because 'government' has traditionally been considered a criterion for statehood, any evolution in the approach to governmental legitimacy within existing states would by implication apply to the government statehood criterion. Unless and until the government in a proposed state complied with democratic norms, it would be unable to satisfy this criterion.

iii. Determinacy

In Franck's view, for a proposed rule to have legitimacy, 'the underlying principles must be enunciated in a way that makes their content determinate.'²⁰⁶ It is preferable that *any* statehood criteria are 'comparatively concrete' and 'objectively ascertainable'.²⁰⁷ If CIL evidence fails to disclose a consistent understanding among states concerning the meaning of democracy, it is doubtful a DCDS has been established through customary means.

²⁰⁴ Malone (note 22) at 90.

²⁰⁵ d'Aspremont (note 3) at 555. d'Aspremont suggests non-democratic governments are not always considered illegitimate in contemporary practice, with legitimacy less likely to be undermined for those that have been in power for a long time.

²⁰⁶ Franck 1992 (note 19) at 56.

²⁰⁷ Grant (note 23) at 451. Vague rules leave so much discretion respecting compliance that actors are essentially freed from obligation.

PART V – CIL Evidence

This section will examine the evidence potentially supporting the customary status of a DCDS. It will analyze the evidence of state practice and *opinio juris* at the UN and regional levels.

A. Global Democracy in 2011

State adherence to democratic principles can be assessed by reviewing democracy data in the post-Cold War era. The Freedom House and Polity IV collections are two of the 'most widely used and respected data sets on democracy.'²⁰⁸

i. Freedom House Data

Freedom House has produced a comprehensive annual study on global freedom since 1972, categorizing states into three broad categories of free, partly free, and not free.²⁰⁹ Because the freedom categories are not co-extensive with democracy, Freedom House also analyses the discrete issue of whether states can be classified as electoral democracies.²¹⁰

To be considered an electoral democracy, a state must possess a competitive multi-party political system, universal adult suffrage for citizens, regularly contested secret ballot elections,²¹¹ and significant public access by major political parties to the electorate.²¹² An electoral democracy need not possess the array of civil liberties associated with a liberal democracy.²¹³

²⁰⁸ Albert Somit and Steven A Peterson *The failure of democratic nation-building* (2005) at 29. [Somit]

²⁰⁹ 'Freedom of the World 2010 Methodology.' Available at http://www.freedomhouse.org/template.cfm?page=351&ana_page=363&year=2010 [accessed 13 August 2011]. [Methodology]

²¹⁰ *Ibid.*

²¹¹ *Ibid.* Elections must include reasonable ballot security, absence of massive voter fraud, and yield results representative of the public will.

²¹² *Ibid.*

²¹³ *Ibid.* States that are both liberal and electoral democracies are rated free, while states considered electoral democracies, but not liberal democracies, are rated party free.

In Freedom House's 2011 report, 115 states are considered electoral democracies and 79 states are considered not electoral democracies.²¹⁴ Among the non-electoral democracies in the not free category, states with the lowest ratings are classified as the 'worst of the worst.'²¹⁵

Freedom House also analyzes freedom and democracy trends. Since its inaugural report in 1972, there have been 'broad advances' in freedom in all parts of the world except the Middle East and North Africa,²¹⁶ but freedom's progress has not been consistent and recent trends suggest a regression.²¹⁷

Freedom and electoral democracy increased significantly between 1980 and 2000,²¹⁸ with the progressive trend peaking in 2000.²¹⁹ Since then, there has been a cyclical pattern of improvement and decline.²²⁰ The 2011 report confirms a worsening of conditions for the fifth consecutive year, the longest sustained backslide in report history.²²¹ Electoral democracy data is equally troubling. The 115 electoral democracies in the 2011 report represent a significant decline from the high watermark of 123 in 2005, and the lowest recorded number since 1995.²²²

ii. Polity IV Data

Polity IV data assesses a state's democratic and autocratic features on a scale of zero to ten,²²³ and scores states as democracies, autocracies, or anocracies.²²⁴ Polity

²¹⁴ Arch Puddington 'Freedom of the world in 2011: the authoritarian challenge to democracy.' Available at <http://www.freedomhouse.org/template.cfm?page=130&year=2011> [accessed 13 August 2011].

[Puddington]

²¹⁵ *Ibid.* Of the 47 states rated not free in the 2011 report, 17 fell within this category: North Korea, Turkmenistan, Uzbekistan, Libya, Sudan, Burma, Equatorial Guinea, Eritrea, Somalia, Belarus, Chad, China, Côte d'Ivoire, Cuba, Laos, Saudi Arabia and Syria.

²¹⁶ *Ibid.* As the 2011 report was produced prior to the uprisings in these regions, this overall conclusion must be approached with caution.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.* For example, free states increased from 31 per cent to 45 per cent and not free states declined from 37 per cent to 25 per cent.

²¹⁹ *Ibid.* The percentage of states within the free and not free categories is essentially the same in 2010 as it was in 2000.

²²⁰ *Ibid.*

²²¹ *Ibid.* In some regions (Africa, Latin America, Asia and some former Soviet Republics), this recent trend actually 'threatens gains dating to the post-Cold War era.'

²²² *Ibid.*

²²³ Monty G Marshall and Benjamin R Cole 'Global report 2009: conflict, governance and state fragility' at 8-9. Available at <http://www.systemicpeace.org/Global%20Report%202009.pdf> [accessed 20 August 2011]. [Marshall]

IV data confirms an overall democratic trend since 1989, but most progress occurred between 1989 and 1994.²²⁵ Since 2005, there has been a general lack of progress and some evidence of regression.²²⁶

iii. Post-1989 States

Newly emerging states since 1989 have universally professed commitments to democratic norms in declarations of independence, constitutional documents, or in public pronouncements in UN forums.²²⁷ The relationship between such democratic commitments and actual democratic practice in these states is inconsistent, but the overall rate of democratization in new states does not appear to be significantly greater than among existing states.

Using all new members of the UN as a sample group,²²⁸ the period between 1989 and July 2011 saw 35 new member states admitted.²²⁹ This figure includes newly created states resulting from the dissolution of the Soviet Union,²³⁰ Czechoslovakia,²³¹ and Yugoslavia,²³² existing states that had not sought or been granted membership previously,²³³ and newly independent territories.²³⁴ Disregarding the 11 previously existing states, there were 24 new states admitted to the UN during this period.²³⁵

²²⁴ *Ibid* at 9. An anocratic state often combines an 'incoherent mix of democratic and autocratic traits and practices.'

²²⁵ *Ibid* at 11. Between 1989 and 1994, the number of democracies increased from 48 to 77. Between 1994 and 2009, the number increased from 77 to 92.

²²⁶ *Ibid* (see figure 6).

²²⁷ 'Universal Periodic Review Country Documentation.' Available at <http://www.ohchr.org/EN/HRBodies/UPR/Pages/Documentation.aspx> [accessed 2 September 2011].

²²⁸ UN membership is not a requirement of statehood, but is 'conclusive as to the statehood of the entity admitted.' Thomas D Grant 'Regulating the creation of states from decolonization to secession' (2009) 5 *Journal of law and international relations* 11 at 49.

²²⁹ <http://www.un.org/en/members/> [accessed 18 July 2011].

²³⁰ Armenia (1992), Azerbaijan (1993), Estonia (1991), Georgia (1992), Kazakhstan (1992), Kyrgyzstan (1992), Latvia (1991), Lithuania (1991), the Republic of Moldova (1992), Tajikistan (1992), Turkmenistan (1992) and Uzbekistan (1992).

²³¹ Czech Republic (1993) and Slovakia (1993).

²³² Bosnia and Herzegovina (1992), Croatia (1992), Macedonia (1993), Montenegro (2006), Serbia (2000) and Slovenia (1992).

²³³ Andorra (2003), Kiribati (1999), Lichtenstein (1990), Marshall Islands (1991), Micronesia (1991), Monaco (1993), Nauru (1999), Palau (1994), Republic of Korea (1991), Switzerland (2002) and Tuvalu (2000).

²³⁴ Eritrea (1993), Namibia (1990), Timor-Leste (2002) and South Sudan (2011).

²³⁵ While this only accounts for new states who successfully sought UN membership during this period, it arguably represents a majority of new states subsequent to 1989.

Among these new states, Uzbekistan is habitually ranked as one of the world's least democratic countries, and has been explicitly condemned by the UN General Assembly (UNGA) for refusing to allow registration and participation of opposing political parties.²³⁶ However, the Uzbekistan Constitution is replete with references to the state being a sovereign democratic republic.²³⁷ It contains eight specific articles in Chapter II under the heading 'democracy', including the stipulation that 'the people are the sole source of state power.'²³⁸ Other chapters confirm the supremacy of the Constitution, and set out various human rights enjoyed by Uzbek citizens.²³⁹

Turkmenistan has also received Freedom House's lowest score, but publicly professes its strong commitment to democracy:

Turkmenistan recognizes and respects the core democratic rights and freedoms of individuals and citizens accepted by the international community and enshrined in the norms of international law and is creating political, economic, legal and other guarantees of their enjoyment in practice.²⁴⁰

The *Constitution of Tajikistan* describes the state as democratic,²⁴¹ and confirms its people 'are the single source of the state authority' which is exercised directly through their representatives in government.²⁴² In reality, despite these provisions, and professions of democratic adherence in Tajikistan's *Declaration of Independence*, the state is not an electoral democracy, and the system of governance actually implemented resulted in the transfer of power from the old communist party to the same regime renamed as the People's Party.²⁴³

In addition to these examples, Eritrea has received Freedom House's lowest rating,²⁴⁴ and five additional post-Cold War states are not electoral democracies.²⁴⁵

²³⁶ Puddington (note 214); Marshall (note 223); Compilation Prepared by the High Commissioner for Human Rights (Uzbekistan) - A/HRC/WG.6/3/UZB/2 (2008) at para 40.

²³⁷ *Constitution of the Republic of Uzbekistan* Article 1. Available at <http://www.gov.uz/en/constitution/#a1830> [accessed 1 May 2011].

²³⁸ *Ibid* at articles 8-14.

²³⁹ *Ibid* at chapters 3-10.

²⁴⁰ National Report of Turkmenistan A/HRC/WG.6/3/TKM/1 (2008) at para 8.

²⁴¹ *Constitution of the Republic of Tajikistan* article 1. Available at (<http://www.tajik-gateway.org/index.phtml?lang=en&id=874>) [accessed 15 July 2011].

²⁴² *Ibid* at article 4.

²⁴³ Jill E Hickson 'Using law to create identity: the course of democracy in Tajikistan' (2003) 38 *Texas international law journal* 347 at 356.

²⁴⁴ Puddington (note 214).

Accordingly, the percentage of new states which are electoral democracies is only slightly higher than the percentage of electoral democracies among all states.²⁴⁶

B. State Self-Assessments

Perhaps the most comprehensive data on official state positions regarding their own level of democratization is contained within the new Universal Periodic Review (UPR) process of the UN Human Rights Council.²⁴⁷ The UPR assesses the compliance of each UN member state with that state's human rights treaty obligations,²⁴⁸ and all states are reviewed on the *Universal Declaration of Human Rights (UDHR)*.²⁴⁹

Paragraph 21 of the *UDHR* articulates a procedural democratic right based on free and fair elections:

21(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) Everyone has the right of equal access to public service in his country.

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.²⁵⁰

Accordingly, regardless of conventional human rights commitments, each state's adherence to the democratic principles set out in article 21 of the *UDHR* are reviewable.²⁵¹

Each reviewed state must submit a national report articulating its own human rights record, providing insight into its conceptions of democracy.²⁵² China's national report, for example, asserts state adherence to electoral rights and representativeness,

²⁴⁵ Freedom House 2011 Country Reports. Available at <http://www.freedomhouse.org/template.cfm?page=21&year=2011> [accessed 2 September 2011]. The other non-electoral democracies are Armenia, Azerbaijan, Georgia, Kazakhstan and Kyrgyzstan.

²⁴⁶ *Ibid*; Puddington (note 214). Based on the most recent Freedom House data, 59 per cent of all states are electoral democracies, while 62.5 per cent of all new states are electoral democracies.

²⁴⁷ A/HRC/5/1 (2007) Annex at para 4.

²⁴⁸ *Ibid* at para 1(c).

²⁴⁹ *Ibid* at para 1(b).

²⁵⁰ *Universal Declaration on Human Rights* (1948) GA Res 217A (III) at para 21. [*UDHR*]

²⁵¹ States are also reviewable respecting *UDHR* paragraphs 2 and 7 which mandate non-discrimination in the application of *UDHR* rights.

²⁵² A/HRC/5/1 (2007) at para 15.

refers to the state as a democracy,²⁵³ and lists future objectives to include 'strengthening democratic institutions.'²⁵⁴

The People's Democratic Republic of Korea professes to be governed in a democratic manner, refers to itself as a 'socialist democratic republic' and claims people exercise power through their representative organs.²⁵⁵

In addition to these states, there has been an almost universal profession of adherence to democratic norms by reviewed states, including Equatorial Guinea, Libya and Uzbekistan which claim to be democratic,²⁵⁶ Myanmar, Sudan, Turkmenistan and Eritrea which claim to be in the process of democratization,²⁵⁷ and Somalia which claims to recognize the need to democratize.²⁵⁸

The national reports indicate a wide gap between statements about democracy and democratic practice: each of the states referenced above (with the exception of China) received Freedom House's worst possible rating in 2011,²⁵⁹ and all received zero democracy scores in the latest Polity IV rankings.²⁶⁰

These democratic assertions are also inconsistent with evidence compiled by the UN. For example, the Special Rapporteur on the Situation of Human Rights in the Democratic Republic of Korea concluded that no genuine people's participation existed

²⁵³ National Report of China - A/HRC/WG.6/4/CHN/1 (2008) at paras 7, 9.

²⁵⁴ *Ibid* at para 101.

²⁵⁵ National Report of the People's Republic of Korea - A/HRC/WG.6/6/PRK/1 (2009) at para 18.

²⁵⁶ National Report of Equatorial Guinea A/HRC/WG.6/6/GNQ/1 (2009) at paras 4, 17; National Report of the People's Great Socialist Libyan Jamahiriya - A/HRC/WG.6/9/LBY/1 (2010) at paras 1, 12, 94; National Report of Uzbekistan - A/HRC/WG.6/3/UZB/1 (2008) at paras 8-9.

²⁵⁷ National Report of Myanmar - A/HRC/WG.6/10/MMR/1 (2010) at paras 27-30; National Report of Eritrea - A/HRC/WG.6/6/ERI/1 (2009) at paras 5, 91; National Report of Sudan - A/HRC/WG.6/11/SDN/1 (2011) at paras 43-44; National Report of Turkmenistan - A/HRC/WG.6/3/TKM/1 (2008) at para 137.

²⁵⁸ Somalia's national report was prepared by the Transitional Federal Government (TFG). While acknowledging the need for democratization, the TFG has been unable to undertake this task because it lacks control outside Mogadishu - National Report of Somalia - A/HRC/WG.6/11/SOM/1 (2011) at para 36.

²⁵⁹ Puddington (note 214). China was still rated as 'worst of the worst,' but was one point higher than the worst states.

²⁶⁰ Monty G Marshall and Keith Jagers 'Polity IV country reports 2009.' Available at <http://www.systemicpeace.org/polity/polity06.htm> [accessed 2 August 2011]. Somalia received a negative score due to high levels of instability.

in the state,²⁶¹ and the UNGA has explicitly condemned Uzbekistan for refusing to allow the registration and participation of opposing political parties.²⁶²

This evidence demonstrates a consistent state 'practice' of making statements which profess adherence to democratic norms.²⁶³ The UPR also suggests that non-democracies try to portray themselves as democratic to bolster legitimacy, rather than choosing to dispute the role of democracy in the international system.²⁶⁴ This practice is arguably similar to that discussed in Part IV in the context of the international use of force and torture.

C. Pro-Democratization UN Practice

There is increasing pro-democracy conduct at the international and regional level. This includes election monitoring efforts to ensure elections are actually free and fair, external intervention, sanctions, and membership suspension to address anti-democratic behaviour, and using the UN credentials process to sanction unconstitutional changes of power in member states.²⁶⁵

i. Election Monitoring

The United Nations Observer Mission to Verify the Electoral Process in Nicaragua in 1989 was the first instance of a public international organization monitoring an election in an independent state.²⁶⁶ Since 1989, there has been a dramatic evolution in the volume and nature of UN election monitoring.²⁶⁷

Initially, election monitors acted as no more than watchdogs, assigned to deter fraud and promote participation.²⁶⁸ As of the Namibian election in 1990, the UN has

²⁶¹ Compilation Prepared by the High Commissioner for Human Rights (People's Democratic Republic of Korea) - A/HRC/WG.6/6/PRK/2 (2009) at para 41.

²⁶² Compilation Prepared by the High Commissioner for Human Rights (Uzbekistan) - A/HRC/WG.6/3/UZB/2 (2008) at para 40.

²⁶³ As discussed in Part IV, there are differing views on whether such statements can be considered state practice as opposed to *opinio juris*.

²⁶⁴ De Brabandere (note 200) at 199.

²⁶⁵ The practice of regional organizations will be discussed separately in the following section of the paper.

²⁶⁶ Crawford BYIL (note 107) at 124.

²⁶⁷ W Andy Knight 'Democracy and good governance' in Thomas G Weiss and Sam Daws (eds) *The Oxford companion on the United Nations* (2007) 620 at 625. [Knight]

²⁶⁸ Kimberley Coles 'International presence: the passive work in democracy promotion' in Julia Paley (ed) *Democracy: anthropological approaches* (2008) 123 at 127.

combined traditional observer tasks with 'actual institutional development.'²⁶⁹ The UN has developed two types of election monitoring: (1) standard electoral assistance; and (2) major electoral missions which are usually conducted together with peacekeeping/peacebuilding engagements.²⁷⁰ These latter operations also provide assistance to create the conditions in which free elections can be conducted.²⁷¹

The UN has increasingly worked with partner organizations at the regional level, including the African Union (AU), the Organizations of American States (OAS) and the Office for Security and Cooperation in Europe (OSCE).²⁷² Many of these organizations conduct independent election monitoring as well, with most contemporary election monitoring efforts being conducted by regional organizations.²⁷³

UN election monitoring and support for democratic promotion require consent of the member state.²⁷⁴ However, its significance is evidenced by the increasing number of monitoring requests: 'the international monitoring of elections has become so common that refusing to invite foreign observers is seen as a signal that a regime has something to hide.'²⁷⁵ Many states have come to consider election monitoring as a valuable tool to 'buoy up the legitimacy which their governments can earn from democratic elections.'²⁷⁶

Election monitoring can also influence other UN pro-democratic practices. For example, the Security Council authorization to use force in response to the 1991 overthrow of President Aristide in Haiti was likely influenced by his election being deemed free and fair by UN and OAS monitors.²⁷⁷

The 2011 Security Council resolution authorizing use of force in response to the conflict in Côte d'Ivoire, following the contested 2010 election, made explicit reference

²⁶⁹ Knight Note 267) at 625.

²⁷⁰ *Ibid* at 627.

²⁷¹ Crawford BYIL (note 107) at 124.

²⁷² 'UN Election Monitoring Fact Sheet.' Available at <http://www.un.org/wcm/content/site/undpa/partnerships> [accessed 1 August 2011].

²⁷³ Susan D Hyde and Judith G Kelley 'The limits of election monitoring' (2011) *Foreign affairs*. Available at <http://www.foreignaffairs.com/articles/67968/susan-d-hyde-and-judith-g-kelley/the-limits-of-election-monitoring> [accessed 30 August 2011]. [Hyde]

²⁷⁴ A/RES/60/162 (2005) preamble.

²⁷⁵ Hyde (note 273).

²⁷⁶ d'Aspremont (note 3) at 555.

²⁷⁷ Petersen (note 31) at 75-76.

to the international recognition of the election results.²⁷⁸ The election, which President Gbagbo lost, was monitored by the UN and EU which judged the process to be fair and transparent.²⁷⁹ Arguably, the legitimacy of the election result was a significant factor in the relatively consistent international opposition to Gbagbo's attempt to remain in power.²⁸⁰

The increasing importance of election monitoring does evidence a growing recognition that the formal act of holding elections does not render the resultant regime legitimate in the eyes of the international community or by the domestic populations. Rather, legitimacy is increasingly being premised on an electoral process that is considered to be free and fair.

ii. UN Authorized Interventions

In the post-Cold War era, there have been a number of UN authorized interventions, arguably undertaken in support of the right to democracy. In 1991, the UN Security Council authorized intervention in Kuwait and Iraq to restore 'the sovereignty, independence and territorial integrity of Kuwait,' and the authority of 'the legitimate government of Kuwait.'²⁸¹

In 1994, after peaceful attempts to resolve the 1991 overthrow of the Aristide government failed, the UN Security Council authorized use of force to restore Haitian democracy and reinstate Aristide to power.²⁸²

Following the overthrow of the democratically elected government of Sierra Leone in 1997, ECOWAS intervened militarily to restore President Kabbah to power.²⁸³ While the Security Council did not pre-authorize the use of force, it did pass a subsequent resolution approving the intervention.²⁸⁴

²⁷⁸ S/RES/1975 (2011) preamble, article 1; Thomas J Bassett and Scott Strauss 'Defending democracy in Côte d'Ivoire' (2011) 90 *Foreign affairs* 130 at 130-140. [Bassett]

²⁷⁹ *Ibid* at 132-133.

²⁸⁰ *Ibid* at 130-136.

²⁸¹ S/RES/662 (1990).

²⁸² S/RES/940 (1994); Wippman (note 101) at 672; Petersen (note 31) at 75-76.

²⁸³ Petersen (note 31) at 79-80.

²⁸⁴ S/RES/1132 (1997).

These examples evidence some UN willingness to intervene to restore democracy where there has been an unconstitutional regime change as a result of an internal coup or external invasion. The UN has not intervened against an incumbent regime based solely on anti-democratic behaviour.

The 2011 interventions in Libya and Côte d'Ivoire were based on explicit Security Council authorization.²⁸⁵ While the Gaddafi and Gbagbo regimes were condemned generally in the respective resolutions,²⁸⁶ and resolution 1975 explicitly called for Gbagbo to relinquish power following his election loss,²⁸⁷ the use of force authorization was expressly restricted to the protection of civilians and not to be used to achieve other pro-democratic goals.²⁸⁸

Interventions to protect civilians fall within the Responsibility to Protect (R2P) doctrine which permits external intervention where a state fails to protect its civilian population.²⁸⁹ The R2P doctrine does not permit intervention based on the general presence or absence of democracy.²⁹⁰

The value of these interventions as precedents for a broader democratic rule is undermined by the arguably inconsistent motivations for intervening, the small overall number of instances in which intervention was authorized, and the selectivity of intervention decisions.²⁹¹ For example, in response to the 2011 violence against civilians by the Syrian government, an arguably comparable situation with Libya, the UN has not authorized intervention.²⁹²

²⁸⁵ S/RES/1973 (2011); S/RES/1975(2011).

²⁸⁶ *Ibid.*

²⁸⁷ S/RES/1975/ (2011) at paras 1-4.

²⁸⁸ Christian Henderson 'International measures for the protection of civilians in Libya and Côte d'Ivoire' (2011) 60 *International & comparative law quarterly* 767 at 770-773. [Henderson]

²⁸⁹ *Ibid* at 768. This doctrine was explicitly invoked in the Libya and Côte d'Ivoire interventions.

²⁹⁰ Mehrdad Payandeh 'With great power comes great responsibility? The concept of the Responsibility to Protect within the process of international lawmaking' (2010) 35 *Yale journal of international law* 469 at 472-474.

²⁹¹ Arbitrariness in state practice will inhibit the formation of a customary rule – see Crawford 1994 (note 23) at 106.

²⁹² Security Council involvement has been limited to issuing a non-binding Presidential Statement. 'UN Security Council Presidential Statement' (3 August 2011). Available at <http://www.un.org/apps/news/story> [accessed 13 August 2011].

iii. Other UN Practice

In addition to intervention practices, unconstitutional changes in government in the post-Cold War era have generally resulted in UN condemnation and the potential imposition of sanctions.²⁹³

Post-Cold War UN accreditation practice also offers some support in favour of an emerging democratic norm. Generally, UN membership status has been unaffected by unconstitutional changes in government, including cases where new governments have been imposed by force, as long as the new government was in effective control of the country.²⁹⁴ Prior to 1991, the acceptance of UN credentials was essentially treated in the same manner.²⁹⁵ Since then, there have been five instances in which the UN has refused to recognize the credentials of a new government following a non-democratic regime change.²⁹⁶

In 1992, the credentials of the military regime that overthrew democratically elected Haitian President Aristide were refused.²⁹⁷

In the case of Liberia, despite a 1990 coup that deposed President Doe, the UN continued to recognize the credentials of the Doe regime until the Charles Taylor regime was legitimated by democratic elections in 1997.²⁹⁸

The Credentials Committee effectively continued to recognize the credentials of the Rabbani regime in Afghanistan for several years after the Taliban acquired effective control over most of the state.²⁹⁹ By repeatedly deferring the decision whether to recognize Taliban credentials, the Rabbani regime's previously conferred credentials remained in effect.³⁰⁰

²⁹³ d'Aspremont (note 3) at 554.

²⁹⁴ Benedetto Conforti *The law and practice of the United Nations* 3ed (2005) at 49.

²⁹⁵ Griffin (note 34) at 737.

²⁹⁶ Governments whose credentials were refused include Haiti, Sierra Leone, Cambodia, Liberia and Afghanistan – see Simon Chesterman, Thomas M Franck and David M Malone *Law and practice of the United Nations* (2008) at 196-197.

²⁹⁷ Griffin (note 34) at 746.

²⁹⁸ *Ibid.*

²⁹⁹ *Ibid* at 746-747.

³⁰⁰ *Ibid.*

In 1997, the Credentials Committee accredited the delegation of Sierra Leone's President Kabbah after the democratically elected regime was overthrown, but before it was restored to power.³⁰¹

Following Hun Sen's coup in Cambodia in the late 1990's, the Credentials Committee deferred its decision in 1997 and 1998, resulting in Cambodia having no accredited representation at the UN during this period.³⁰²

These situations do evidence an emerging practice in which accreditation decisions consider the democratic legitimacy of the regime seeking accreditation.³⁰³ However, while all five examples did involve issues relating to democracy, 'no one issue entirely explains all five cases.'³⁰⁴ Accordingly, one should exercise caution in drawing inferences based on this limited amount of practice.

Because accreditation determinations only take place in respect to new regimes, this practice has no application to the issue of the democratic nature of existing governments. Rules that are limited in application to new governments, however, *may* be sufficiently analogous to criteria applicable to new states to offer relevant precedents in favour of a customary DCDS rule.

While it is premature to draw definitive conclusions about the overall evidence of UN practice in the areas of election monitoring, interventions, and accreditation, it is consistent with an emerging democratic obligation respecting the process in which new regimes come into power.

D. UN Pro-Democracy Instruments

i. Conventional Instruments

The word democracy does not appear in the *UN Charter* as a condition for membership or goal of the organization.³⁰⁵ The primary conventional instrument at the UN level articulating rights relevant to democracy is the *International Covenant on Civil and Political Rights (ICCPR)*. Article 25 provides:

³⁰¹ *Ibid* at 747.

³⁰² *Ibid*.

³⁰³ *Ibid* at 748.

³⁰⁴ *Ibid*.

³⁰⁵ Knight (note 267) at 625-626.

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine 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.³⁰⁶

Because of the varying ideologies and political systems of states drafting the *ICCPR*, these rights are broadly stated, providing 'more principle than prescription.'³⁰⁷ While article 25 does articulate a right to participate in public affairs, including electoral rights, 'it does not purport to condition governmental authority on respect for the will of the people.'³⁰⁸ There is thus no suggestion a state or government which violates article 25 cedes its legitimacy under international law.

The customary status of article 25 is arguable. The UN Human Rights Committee (HRC) excluded the provision from its list of *ICCPR* provisions reflecting CIL,³⁰⁹ and omitted it from its list of provisions for which reservations are not permitted.³¹⁰ The ICJ has confirmed that a treaty obligation that can be abrogated by reservation should generally not be considered a codification of CIL, and is less likely to be the type of norm-creating provision capable of subsequent transformation into CIL.³¹¹ Moreover, article 25 is not one of the *ICCPR*'s non-derogable rights, which further undermines its norm-creating character.³¹²

Assuming the provision is sufficiently norm-generating to serve as evidence of an *opinio juris*, there must also be proof of consistent and general state practice for article 25 to have developed into CIL.³¹³ While the *ICCPR* has been widely ratified,³¹⁴ many of

³⁰⁶ *International Covenant on Civil and Political Rights* (19 December 1966) 999 UNTS 171 article 25. [ICCPR]

³⁰⁷ Wagner (note 33) at 174, 179.

³⁰⁸ Coleman (note 33) at 187-188.

³⁰⁹ Human Rights Committee General Comment No 24 CCPR/C/21/Rev.1/Add.6 (1994) at para 8.

³¹⁰ *Ibid* at paras 9-11.

³¹¹ *North Sea* (note 134) at paras 63-64, 72.

³¹² *ICCPR* (note 306) article 4(2); *Ibid* at para 72.

³¹³ *North Sea* (note 134) at paras 73-75.

³¹⁴ There are currently 167 parties. 'Status of Ratifications - *International Covenant on Civil and Political Rights*.' Available at <http://treaties.un.org> [accessed 15 April 2011]. [ICCPR Ratifications]

the state parties do not actually practice electoral democracy,³¹⁵ including a majority of the 47 states rated not-free in 2011 by Freedom House and 13 of 17 in the 'worst of the worst' category.³¹⁶ Of the 25 states who are not parties to the *ICCPR*, 13 are not electoral democracies.³¹⁷

ii. Soft Law Instruments

While the UN has increasingly emphasized democracy issues,³¹⁸ its efforts have not manifested into binding conventional instruments.³¹⁹ As a result, advocates of a 'global democratization norm' emphasize the proliferation of UNGA democracy resolutions since 1989.³²⁰

While there has been an increasing ICJ tendency to use UNGA resolutions as evidence of *opinio juris*,³²¹ this practice must be undertaken with 'all due caution.'³²² Not all resolutions provide evidence of *opinio juris*; each must be analyzed in light of its content, the conditions of its adoption, and its normative character.³²³ Courts have generally examined the actual wording of resolutions to determine whether they use 'language of firm obligation versus aspiration.'³²⁴ Resolutions which 'articulate universalizable legal rules' can be contrasted with those expressing 'long-term moral ideals' or endorsing a 'purely political view.'³²⁵

(1) UDHR

As discussed above, paragraph 21 of the *UDHR* articulates a procedural electoral right.³²⁶ Opinions regarding the customary status of the *UDHR* range from arguments

³¹⁵ Based on 2011 Freedom House data, 39.5 per cent of *ICCPR* parties are not electoral democracies – see Puddington (note 214); *ICCPR* Ratifications (note 314); Petersen (note 31) at 56.

³¹⁶ Puddington (note 214).

³¹⁷ *Ibid*; *ICCPR* Ratifications (note 314).

³¹⁸ Knight (note 267) at 620-631.

³¹⁹ While there have been binding instruments adopted at the regional level, the *ICCPR* remains the primary UN convention articulating democratic rights. Varayudej (note 34) at 8-9.

³²⁰ Knight (note 267) at 631.

³²¹ Lepard (note 130) at 33.

³²² *Nicaragua* (note 1) at para 188.

³²³ *Nuclear Weapons* (note 164) at para 70. A series of resolutions on the same subject matter 'may show the gradual evolution of an *opinio juris*.'

³²⁴ Scharf (note 2) at 459.

³²⁵ Lepard (note 130) at 181, 212.

³²⁶ *UDHR* (note 250) at para 21.

the entire declaration reflects CIL, to assertions it has no legal force at all.³²⁷ An intermediate position proposes a right-by-right approach, examining state practice respecting each provision.³²⁸ The inclusion of the *UDHR* as a universally reviewable obligation in the UPR does suggest it has taken on a binding 'quality'.

(2) Post-Cold War UNGA Resolutions

Commencing in 1988, the UNGA passed a series of resolutions with broad support designed to promote the principle of periodic and genuine elections.³²⁹ These resolutions articulate general statements of principle such as underscoring the 'significance' of the *UDHR* and *ICCPR* provisions discussed above, and stress the 'conviction' periodic elections are necessary for the will of the people to be expressed.³³⁰ Subsequent resolutions move these statements to the preamble.³³¹

Provisions setting out specific state duties are restricted to the reaffirmation of the obligation to respect other states' electoral systems.³³² More recent versions of these resolutions have focused on UN electoral monitoring efforts and have removed any language concerning obligations of member states.³³³

Between 1994 and 2007, the UNGA adopted a second series of resolutions entitled 'Support by the United Nations System for the *Efforts* of Governments to *Promote and Consolidate New or Restored Democracies*'³³⁴ [emphasis added]. Each resolution was adopted without a vote.³³⁵

³²⁷ Lepard (note 130) at 318.

³²⁸ *Ibid.*

³²⁹ A/RES/43/157 (1988); A/RES/44/146 (1989); A/RES/45/150 (1990); A/RES/46/137 (1991); A/RES/47/138 (1992); A/RES/48/131 (1993); A/RES/49/190 (1994); A/RES/50/185 (1995); A/RES/52/129 (1997); A/RES/54/173 (1999); A/RES/56/159 (2001); A/RES/58/180 (2003); A/RES/60/162 (2005); A/RES/62/150 (2007); A/RES/64/155 (2009). These resolutions have been widely supported. Voting records available at <http://unbisnet.un.org> [accessed 18 July 2011].

³³⁰ A/RES/45/150 (1990) at paras 1-3; A/RES/46/137 (1991) at paras 2-4.

³³¹ For example - see A/RES/56/159 (2001) preamble.

³³² A/RES/45/150 (1990) at para 5; A/RES/46/137 (1991) at para 5.

³³³ For example - see A/RES/64/155 (2009).

³³⁴ A/RES/49/30 (1994); A/RES/50/133 (1995); A/RES/51/31 (1996); A/RES/52/18 (1997); A/RES/53/31 (1998); A/RES/54/36 (1999); A/RES/55/43 (2000); A/RES/56/96 (2001); A/RES/58/13 (2003); A/RES/60/253 (2005); A/RES/61/226 (2006); and A/RES/62/7 (2007).

³³⁵ Available at <http://unbisnet.un.org> [accessed 18 July 2011].

Second series resolutions were initially limited to confirming the need for democracy promotion and consolidation in the UN's agenda.³³⁶ Subsequent resolutions included a preamble provision describing democracy as 'based on the free will of the people' and 'interdependent and mutually reinforcing' with development and respect for human rights and fundamental freedoms.³³⁷ The operative part of later resolutions 'encourages' member states to 'promote' democratization.³³⁸

Between 2005 and 2009, two provisions were added to the preamble. There is a reaffirmation that 'democracy is a universal *value* based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives'³³⁹ [emphasis added]. There is also a reaffirmation that no single model for democracy exists and that it is necessary to give due respect to the principles of sovereignty, self-determination and territorial integrity.³⁴⁰ The operative part of the most recent second series resolutions 'encourages' member states to 'strengthen programmes devoted to the promotion and consolidation of democracy.'³⁴¹

A third series of democracy resolutions entitled 'Promotion of a Democratic and Equitable International Order' were passed by the UNGA five times between 2000 and 2006, becoming annual in 2008.³⁴²

The operative part of these resolutions affirms 'everyone is entitled to a democratic and equitable international order,'³⁴³ and sets out a detailed description of what this entails. While most provisions involve measures undertaken at the international level, there is an affirmation of 'the right of all peoples to self-determination,

³³⁶ A/RES/49/30 (1994) contains three operative paragraphs: two request the Secretary General to study and produce a report, and one decides to include the topic on the following year's provisional agenda.

³³⁷ A/RES/50/133 (1995) preamble.

³³⁸ *Ibid* at para 6. This language is generally repeated in subsequent resolutions up to resolution 58/12 in 2003.

³³⁹ A/RES/60/162 (2005) preamble; A/RES/61/226 (2006) preamble; A/RES/62/150 (2007) preamble.

³⁴⁰ *Ibid*.

³⁴¹ A/RES/61/226 (2006) at para 7; A/RES/62/7 (2007) at para 3; A/RES/64/12 (2009) at para 4.

³⁴² A/RES/55/107 (2000); A/RES/56/151 (2001); A/RES/57/213 (2002); A/RES/59/193 (2004); A/RES/61/160 (2006); A/RES/63/189 (2008); A/RES/64/157 (2009); and A/RES/65/223 (2010).

³⁴³ For example, A/RES/65/223 (2010) at para 1.

by virtue of which they can freely determine their political status and freely pursue their economic, social and cultural development.³⁴⁴

State obligations are phrased using aspirational and equivocal language: paragraph 11 of each resolution '[u]rges States to continue their *efforts*, through enhanced international cooperation, towards the *promotion* of a democratic and equitable international order'³⁴⁵ [emphasis added].

Fourth series resolutions, entitled 'Respect for the Principles of National Sovereignty and Diversity of Democratic Systems in Electoral Processes as an Important Element for the Promotion and Protection of Human Rights,' were passed in 2003 and 2005.³⁴⁶ The preamble of these resolutions recognizes the 'richness' and 'diversity' of democratic political systems and models of free and fair electoral processes.³⁴⁷ The operative part reaffirms all people's right to self-determination, acknowledges that the promotion and protection of human rights requires free and fair elections, and affirms there is no single model of democracy or democratic institutions.³⁴⁸ Fourth series resolutions also affirm:

The will of the people shall be the basis of the authority of government and that this will shall be expressed in periodic and genuine elections, which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.³⁴⁹

Individual democracy resolutions have also been passed. In its *Millennium Declaration*, the UNGA sets out six fundamental values 'essential to international relations in the twenty-first century.'³⁵⁰ Under the heading freedom, the *Declaration* notes: 'Democratic and participatory governance based on the will of the people best assures these rights.'³⁵¹ The *Declaration* also identifies 'key objectives' which include efforts to promote democracy, strengthen the capacity of all states to implement the

³⁴⁴ This provision is set out in paragraph 4(a) of each third series resolution.

³⁴⁵ For example, A/RES/65/223 (2010) at para 11.

³⁴⁶ A/RES/58/189 (2003); A/RES/60/164 (2005).

³⁴⁷ A/RES/60/164 (2005) preamble. The preamble also reaffirms the interconnectedness between democracy and respect for human rights.

³⁴⁸ *Ibid* at paras 1-3.

³⁴⁹ *Ibid* at para 7.

³⁵⁰ A/RES/55/L.2 (2000) at para 6.

³⁵¹ *Ibid* at para 6.

principles and practices of democracy, and to 'work collectively for more inclusive political processes, allowing genuine participation by all citizens in all our countries.'³⁵²

The 2000 resolution, 'Promoting and Consolidating Democracy,' offers the most detailed articulation of democracy in any of the UNGA resolutions.³⁵³ Democracy is defined as incorporating the promotion of pluralism, protection of human rights, separation of powers, rule of law, elections, development of civil society, good governance, sustainable development, solidarity, and social cohesion.³⁵⁴ While this resolution describes democracy in an atypically detailed manner, actual obligations are expressed as requiring only democratic promotion and consolidation,³⁵⁵ making the resolution arguably 'more of a wish list than an attempt to propose a coherent definition of democracy.'³⁵⁶ In any event, this expansive articulation of democracy has not been repeated in subsequent resolutions.

Resolutions respecting democracy have also been passed by other UN bodies. The debate surrounding the 1999 resolution of the UN Commission on Human Rights, titled *A Right to Democracy*, illustrates varying state views on whether democracy is a right.³⁵⁷ While the resolution was ultimately adopted, a Cuban proposal to remove the reference to democracy as a right in the title was only narrowly defeated.³⁵⁸ Further, the phrase 'right to democracy' is not actually contained in the text of the resolution,³⁵⁹ and several states expressed 'doubt' as to democracy's legal status as a right.³⁶⁰

(3) Conclusions Respecting Soft Law Instruments

Assessed as a whole, several factors undermine the value of these resolutions as evidence of *opinio juris*. The *form* of the expressed obligation to democratize is usually

³⁵² *Ibid* at paras 24-25.

³⁵³ A/RES/55/96 (2000).

³⁵⁴ *Ibid* at para 1.

³⁵⁵ *Ibid*.

³⁵⁶ Petersen (note 31) at 38.

³⁵⁷ E/CN4/1999/L55/Rev2 (1999).

³⁵⁸ Varayudej (note 34) at 9-10. There were 28 yes votes, 12 no votes, and 13 abstentions.

³⁵⁹ E/CN4/1999/L55/Rev2 (1999).

³⁶⁰ Fox Intro (note 86) at 3 (footnote 14). Even states such as India, Pakistan, Indonesia, the Russian Federation and Mexico, who voted in favour of the resolution, expressed doubt whether democracy was a legal right.

couched in intangible terminology such as democratic 'consolidation' or 'promotion',³⁶¹ rendering assessment of compliance difficult. Further, the process-oriented nature of these terms does not indicate imposition of a 'strict obligation to establish and honor' democratic institutions,³⁶² and frequent caveats reaffirming state sovereignty, diversity of democratic systems, and the principle of non-intervention suggest the resolutions are not intended to articulate a binding obligation based on a universally applicable standard.³⁶³

Additionally, second series resolutions are explicitly directed at new or restored democracies and are thus presumably not designed to transform non-democratic entities.³⁶⁴ The voting record on third and fourth series resolutions further undermines their specific value as evidence of *opinio juris*. In the *Nuclear Weapons Advisory*, despite proffered UNGA resolutions articulating duties of member states using extremely obligatory language, a 'substantial'³⁶⁵ number of negative votes and abstentions rendered them insufficient as evidence of *opinio juris*.³⁶⁶ The number of no votes and abstentions respecting third and fourth series resolutions is equivalent or greater than the figures in the nuclear weapons resolutions.³⁶⁷

Furthermore, the manner in which the obligation is expressed in these resolutions indicates a lack of compulsoriness. States are merely 'encouraged' to promote or consolidate the principle of democracy. This terminology is markedly less

³⁶¹ 'Democratic consolidation' is regarded as a 'nebulous' concept with no generally understood meaning. Andreas Schoedler 'What is democratic consolidation?' in Larry Diamond and Marc F Plattner (eds) *The global divergence of democracy* (2001) 149 at 149-150.

³⁶² Petersen (note 31) at 60.

³⁶³ Griffin at (note 34) 766-767.

³⁶⁴ Democratic consolidation assumes a democratic transition has been completed. Juan J Linz and Alfred Stepan 'Toward consolidated democracies' in Larry Diamond and Marc F Plattner (eds) *The global divergence of democracy* (2001) 93 at 93.

³⁶⁵ *Nuclear Weapons* (note 164) at paras 68-73. For the resolutions referenced by the ICJ (A/RES/1653 (1961) and subsequent resolutions based upon it), the number of no votes and abstentions ranged from 25 to 46 - <http://unbisnet.un.org> [accessed 2 August 2011].

³⁶⁶ *Ibid* at para 71.

³⁶⁷ For third series resolutions, each received between 52 and 56 'no' votes and between four and seven abstentions. For fourth series resolutions, each received between six and ten 'no' votes and between 55 and 60 abstentions - <http://unbisnet.un.org> [accessed 18 July 2011].

obligatory than the language used in resolutions held by the ICJ to constitute evidence of *opinio juris* in its leading CIL decisions.³⁶⁸

In *Nicaragua*, the ICJ made *explicit* reference to three resolutions,³⁶⁹ considering *The Declaration on Friendly Relations* 'particularly' significant.³⁷⁰ That *Declaration* explicitly affirms that the duties described therein are based on 'principles of international law.'³⁷¹ In language directly relevant to the customary rule at issue, the *Declaration* twice proclaims 'every state has a duty to refrain from the threat or use of force.'³⁷² The universally binding legal nature of these provisions is affirmed by their description as 'basic principles of international law,'³⁷³ and the directive that relations between all states should be based on 'strict observance of these principles.'³⁷⁴

The additional resolutions referenced in *Nicaragua* use similarly obligatory language.³⁷⁵ *The Declaration on Principles Guiding Relations Between Participating States* adopted by the Council for Security and Cooperation in Europe (CSCE) provides:

The participating States will refrain...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 and with the present Declaration. *No consideration may be invoked to serve to warrant resort to the threat or use of force in contravention of this principle*³⁷⁶ [emphasis added].

The *Resolution Condemning Aggression*, adopted at the Sixth International Conference of American States in 1928, described force used in a particular context (a war of aggression) as not only a binding rule, but a criminal prohibition: 'a war of aggression constitutes an international crime against the human species.'³⁷⁷

³⁶⁸ Alvarez-Jiménez (note 153) at 681.

³⁶⁹ These resolutions offered evidence of an *opinio juris* concerning whether the prohibition on the use of force in article 2(4) of the *UN Charter* was also a customary rule.

³⁷⁰ *Nicaragua* (note 1) at paras 188, 191.

³⁷¹ A/RES/2625 (1970) Annex - *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations* preamble.

³⁷² *Ibid* at para 1.

³⁷³ *Ibid* at para 3.

³⁷⁴ *Ibid*.

³⁷⁵ *Nicaragua* (note 1) at para 189.

³⁷⁶ *Declaration on Principles Guiding Relations Between Participating States* (1975). Available at www.osce.org/mc/39501 [accessed 25 July 2011].

³⁷⁷ *Resolution Condemning Aggression* International Conference of American States (1928) - cited in *Yearbook of the International Law Commission* (1950) at 376.

In the *Nuclear Weapons Advisory*, UNGA resolutions establishing a 'nascent *opinio juris*' also used very obligatory language.³⁷⁸ The ICJ emphasized a series of resolutions based on the 1961 *Declaration on the Prohibition on the Use of Nuclear Weapons*.³⁷⁹ The operative part of the resolution makes several declarations respecting the legality of nuclear weapons including:

Any state using nuclear and thermo-nuclear weapons is to be considered as violating the Charter of the United Nations, as acting contrary to the laws of humanity and as committing a crime against mankind and civilization.³⁸⁰

The language used in the democracy resolutions discussed herein is clearly less compulsory than the terminology used in the instruments relied upon by the ICJ.

Even *if* the democracy resolutions used sufficiently compulsory language, and were all universally adopted, their utility as *opinio juris* evidence would also require the discernment of 'the exact content of the principle so accepted.'³⁸¹ In these resolutions,³⁸² democracy has arguably been too ill-defined to enable assessment of state compliance with any democratic right.³⁸³

The common feature of the resolutions is the articulation of a very general principle that democracy requires the expression of the free will of the people. While several resolutions confirm the significance of free and fair elections, little or no specification is provided as to what this entails. Additionally, repeated emphasis on democracy's diversity suggests no intent to ascribe a specific meaning to either of these principles.³⁸⁴

The commitment in these resolutions appears to be more to the idea of democracy as a principle worthy of promotion, than a defined enforceable obligation:

³⁷⁸ *Nuclear Weapons* (note 164) at paras 68-73.

³⁷⁹ A/RES/1653 (1961). Similar resolutions were passed in 1978 (A/RES/33/71B), 1979 (A/RES/34/83G), 1980 (resolution 35/152D), 1981 (A/RES/36/92I), 1990 (A/RES/45/59B) and 1991 (A/RES/46/3D).

³⁸⁰ *Ibid* at para 1(d).

³⁸¹ *Nicaragua* (note 1) at para 205. It is crucial to discern the meaning of a principle in order to assess whether state practice is in 'sufficient conformity' with it.

³⁸² The two individual resolutions do provide more detailed articulations of the democratic principle, but such resolutions were restricted to the year 2000.

³⁸³ Varayudej (note 34) at 14-15.

³⁸⁴ Griffin (note 34) at 766-767.

'While international law appears to have embraced the *idea* of democracy, it has not yet articulated a detailed normative framework or an extensive body of practical rules defining the meaning of democracy.'³⁸⁵ [emphasis added]

The broad support received by these resolutions is arguably more a function of how discretionary the commitments are, than evidence of a communal commitment to a right of democratic governance:

...large numbers of states have been able to sign on to international instruments proclaiming support for democracy and associated values, without any real agreement on the meaning of democracy or the means by which it should be given effect.³⁸⁶

Further and in any event, while democracy resolutions have received either broad or universal support, the democratization data discussed above demonstrates that this level of support is not translated into a comparable degree of adherence to democratic norms in actual state practice.³⁸⁷

This discrepancy has been justified, from a CIL perspective, as the existence of 'numerous' persistent objectors to the democratic right.³⁸⁸ However, one must distinguish between persistent objectors and contrary state practice. There can be multiple persistent objectors to the same customary rule, but not so many as to contravene the need for a consistency of state practice.³⁸⁹ In this case, the 'numerous' states exhibiting contrary practice are too great in number to be considered persistent objectors.

There is accordingly a significant schism between official state positions on democratic adherence and actual state practice,³⁹⁰ suggesting no common understanding of democracy or international democratic obligation.³⁹¹ This gap might be

³⁸⁵ Varajudej (note 34) at 14.

³⁸⁶ Wippman (note 102) at 664.

³⁸⁷ The UN evidence suggests 'recognition and enforceability of the right to free and fair elections is premature.' Wagner at 169.

³⁸⁸ De Brabandere (note 200) at 199-200.

³⁸⁹ Bing Bing Jia 'The relations between treaty and custom' (2010) 9 *Chinese journal of international law* 81 at 88.

³⁹⁰ This type of schism has been described as the 'credibility gap.' Niall MacDermot 'The credibility gap in human rights' (1976-1977) 3 *Dalhousie law journal* 262 at 262. [MacDermot]

³⁹¹ 'Democratic governance' appears to be whatever form of governance a state happens to be practicing.

explained as merely indicative of different conceptions of democracy and/or capacities to democratize.³⁹² However, if this explanation applied to even the most autocratic states who profess to be democratic, the conception of democracy among states would be so inconsistent, or the common, agreed upon core so minimal, the principle would be devoid of any functional universal meaning.

The overall approach of states at the UN level suggests 'a teleological view of elections and democracy, upholding the desirability of electoral institutions without imposing a strict obligation to establish and honor them.'³⁹³

E. Regional Evidence

i. Europe

Europe possesses one of the most comprehensive and fully developed systems of democratic rights.³⁹⁴

(1) European Community (EC)

While the *Statute of the Council of Europe* only makes a general reference to democracy in its preamble,³⁹⁵ a right to participate in democratic elections was subsequently included in the first *Additional Protocol to the European Convention on Human Rights*.³⁹⁶

In practice, 'a state's level of democratization has had an influence on its membership in the Council of Europe.'³⁹⁷ Greek membership was suspended following a military coup, and Spanish, Portuguese, and Russian membership was delayed pending EC satisfaction democratic requirements were satisfied.³⁹⁸

Arguably the most directly relevant international documents respecting DCDS are the *European Community Declaration on the Guidelines on the Recognition of New*

³⁹² MacDermot (note 390) at 265-267.

³⁹³ Petersen (note 31) at 60.

³⁹⁴ *Ibid* at 71-72. The other system at a comparable level of development is the Inter-American system.

³⁹⁵ *Statute of the Council of Europe* (1949) Europ TS No 1 preamble.

³⁹⁶ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* (1952) Europ TS No 9 at article 3.

³⁹⁷ Petersen (note 31) at 65.

³⁹⁸ *Ibid* at 65-66.

States in Eastern Europe and in the Soviet Union (USSR Guidelines),³⁹⁹ and the *European Community Declaration on Yugoslavia* which adopted similar guidelines (*Yugoslavia Guidelines*).⁴⁰⁰ For this reason, they will be examined in detail as a potential source of CIL evidence.

The *Guidelines* stipulate that EC recognition of new states is premised on an assessment of whether the proposed state is constituted on a democratic basis, respects rule of law, democracy, human rights, and guarantees ethnic and minority rights.⁴⁰¹ This approach was a radical departure from *Montevideo*-like effectiveness criteria:

The cumulative effect of these Guidelines—as far as Europe was concerned—was to transform recognition of new states from the Soviet Union and Yugoslavia from a primarily legal and factual estimate of viability as sovereign entities to a primarily political estimate of future good behaviour.⁴⁰²

While frequent reference to the *Yugoslavia Guidelines* during the dissolution of that state suggests 'they might well have informed international practice',⁴⁰³ there are a number of reasons to question the *Guidelines*' value as *opinio juris* evidence in support of a DCDS.

The word 'Guidelines' itself suggests a discretionary quality.⁴⁰⁴ Further, the *Guidelines*' intent to create universally binding rules is not consistent with the caveat that recognition decisions are still 'subject to the normal standards of international practice and *the political realities of each case*'⁴⁰⁵ [emphasis added]. This interpretation is supported by the reference to EC member states adopting a 'common position on the

³⁹⁹ *European Community Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (1992) ILM Volume 31 at 1486-1487. [*USSR Guidelines*]

⁴⁰⁰ *European Community Declaration on Yugoslavia and on the Guidelines on the Recognition of New States* (1992) ILM Volume 31 at 1485-1486. [*Yugoslavia Guidelines*]

⁴⁰¹ *Ibid*; *USSR Guidelines* (note 399).

⁴⁰² Denza (note 196) at 324.

⁴⁰³ Grant (note 23) at 443.

⁴⁰⁴ Berlin (note 42) at 560.

⁴⁰⁵ *USSR Guidelines* (note 399).

recognition of these new States,⁴⁰⁶ which suggests that 'statehood in its orthodox sense is a precondition for recognition.'⁴⁰⁷

Further, the *Guidelines* were adopted in two specific contexts and the EC has not adopted similar guidelines of general application.⁴⁰⁸ They can thus be considered responsive to a 'political need to influence' events surrounding the break-up of the two states, and not an attempt to articulate universally applicable statehood criteria.⁴⁰⁹

Additionally, some specific criteria in the *Yugoslavia Guidelines* are clearly unrelated to definitional statehood, including a prohibition on the 'use of language which implies territorial claims' in a prospective state's name.⁴¹⁰

The procedures established under the *Yugoslavia Guidelines* also suggest that they were not obligatory. While the Badminter Commission was established to assess *Guideline* compliance, its determination that recognition criteria were not satisfied was not determinative: member states could then decide for themselves whether to recognize the prospective state.⁴¹¹

In practice, recognition decisions did not consistently follow the criteria: it was sometimes granted when criteria were not satisfied,⁴¹² and withheld when they were.⁴¹³ Democracy was a relevant consideration to most recognition decisions, 'but was clearly not a prerequisite to statehood itself.'⁴¹⁴

Procedurally, satisfaction of the *Guidelines* only required a professed commitment to observe the criteria, without a substantive consideration of a territory's

⁴⁰⁶ Berlin (note 42) at 560.

⁴⁰⁷ AV Lowe and Colin Warbrick 'Recognition of states' (1992) 41 *International & comparative law quarterly* 473 at 478. [Lowe]

⁴⁰⁸ Berlin (note 42) at 562. While there has been a proliferation of EC and EU pro-democratic initiatives, they are not as proximate to the issue of legal statehood.

⁴⁰⁹ Lowe (note 407) at 481.

⁴¹⁰ Berlin (note 42) at 563.

⁴¹¹ Lowe (note 407) at 478.

⁴¹² Berlin (note 42) at 562-563. Croatia was recognized despite an adverse Badminter Commission finding concerning insufficient constitutional protection of minorities.

⁴¹³ *Ibid* at 562-564. Macedonian recognition was supported, but the EC initially refused due to political considerations raised by Greece.

⁴¹⁴ Grant (note 23) at 444.

actual readiness or willingness to comply.⁴¹⁵ Recognition was therefore conferred without any 'opportunity or real attempt to assess the viability of the new states, far less their capability of enforcing human rights standards.'⁴¹⁶

For these reasons, while the *Guidelines* have a 'semi-legal' appearance, their content and application suggest an intent to provide guidance for EC member state recognition decisions, and not to articulate a set of binding statehood criteria.⁴¹⁷

(2) EU

In the *Treaty of the European Union*, democracy is specified as a fundamental principle of the EU and a prerequisite for membership,⁴¹⁸ with violations possibly resulting in EU suspension.⁴¹⁹ The EU also inserts a clause in agreements with non-member states requiring adherence to democratic norms.⁴²⁰ However, following pressure from developing countries, there may be some weakening of this commitment.⁴²¹

(3) CSCE

In 1990, member states of the CSCE adopted the *Copenhagen Document*, which sets out characteristics of democratic systems including free elections, representative government, a duty of government and public authorities to comply with the constitution and act consistently with national law, an executive accountable to an elected legislature or electorate as a whole, clear separation between the state and political parties, an independent judiciary, military and police forces under civilian control, and a range of related human rights.⁴²²

⁴¹⁵ Denza (note 196) at 325. Uzbekistan and Turkmenistan satisfied USSR Guideline criteria, but habitually rank at the bottom of Freedom House and Polity IV ratings. Puddington; Marshall.

⁴¹⁶ *Ibid* at 334.

⁴¹⁷ Berlin (note 42) at 560-564.

⁴¹⁸ *Consolidated Version of the Treaty on European Union* (2002) OJ (C325) article 6.

⁴¹⁹ *Ibid* at article 7.

⁴²⁰ Fox 2007 (note 5) at 273.

⁴²¹ In a document issued during the 2007 Lisbon Summit by the African-EU Strategic Partnership, the EU agreed to 'work toward a limitation of conditionalities' on aid. 'The Africa-EU Strategic Partnership Press Release' at para 52. Available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/er/97496.pdf [accessed 21 July 2011].

⁴²² 'Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE' at paras 5-8. Available at www.osce.org/odihr/elections/14304 [accessed 23 July 2011].

The *Charter of Paris*, adopted by the CSCE in 1990, declares democracy is the only admissible form of government.⁴²³

The Organization for Security and Cooperation in Europe (CSCE's successor) has established an Office for Democratic Institutions and Human Rights. Among its responsibilities is to establish guidelines and procedures for creating democratic electoral systems.⁴²⁴

i. The Americas

(1) Organization of American States (OAS)

The binding legal instruments of the OAS set out explicit and enforceable democratic rights. The promotion of democracy is enunciated as one of the OAS's principal objectives.⁴²⁵ Membership rights may be suspended where an elected government is overthrown by force,⁴²⁶ and a detailed enforcement regime is set out in the *Inter-American Democratic Charter*.⁴²⁷ The *American Convention on Human Rights* provides an explicit right to participate in democratic elections.⁴²⁸

The 2002 *Quebec Declaration* is one of the most strongly worded pro-democratic soft-law instruments: 'Any unconstitutional alteration or interruption of the democratic order in a state of the hemisphere constitutes an insurmountable obstacle to the participation of that state's government in the Summit of the America's process.'⁴²⁹

In practice, the OAS has used the suspension mechanism and other sanctions on several occasions,⁴³⁰ responding to unconstitutional changes of government in Haiti, Peru and Guatemala.⁴³¹ Moreover, OAS interventions have included scenarios where

⁴²³ *Charter of Paris for a New Europe* (1991) 30 ILM 193.

⁴²⁴ Janie Leatherman *From Cold War to democratic peace* (2003) at 231-232.

⁴²⁵ *Charter of the Organization of American States* 119 U.N.T.S. 3 at article 2(b).

⁴²⁶ *Protocol of Amendments to the Charter of the Organization of American States* (1994) 33 ILM 1005.

⁴²⁷ *Inter-American Democratic Charter* OAS Doc OEA/SerP/AG/Res1 (2001) at articles 17-22.

Suspensions continue pending the success of OAS initiatives to 'restore democracy to that state' (para 21).

⁴²⁸ *American Convention on Human Rights* (1969) 1144 UNTS 144 at article 23.

⁴²⁹ *Declaration of Quebec City*. Available at http://www.oas.org/dil/Declaration_of_Quebec_City.pdf [accessed 13 June 2011].

⁴³⁰ Petersen (note 31) at 62-63. Sanctions include condemnation, refusal to recognize election results, and suspension of loans.

⁴³¹ *Ibid* at 61-63.

the unconstitutional actions were initiated by an incumbent regime.⁴³² There is also evidence suggesting that OAS willingness to intervene in response to an unconstitutional change in government may be dependent on the democratic legitimacy of the ousted regime.⁴³³

(2) The Andean Community (CAN)

CAN has promulgated binding documents with substantial democratic protections. The *Andean Community Commitment to Democracy* expresses a general commitment to democracy,⁴³⁴ authorizes sanctions 'if the democratic order is disrupted in any of the Member Countries,'⁴³⁵ and sets out measures that can be taken to reestablish democratic order in member states.⁴³⁶ CAN also seeks to include a 'democratic clause' in its agreements with third parties.⁴³⁷ The organization's *Human Rights Charter* articulates a detailed definition of democracy,⁴³⁸ and proclaims the rights and duties associated with it: 'The Andean peoples have a right to democracy and their governments have the obligation to promote and defend it.'⁴³⁹

⁴³² *Ibid* at 62. For example, sanctions were imposed against Guatemalan President Elias after he dissolved Parliament, suspended constitutional rights and dismissed the Constitutional Court.

⁴³³ *Ibid* at 61-63. This may explain the drastically different reaction of the OAS to Haitian President Aristide's first ouster in 1991 (sanctions, support of an American invasion) and second overthrow in 2004. In the latter case, Aristide's legitimacy was questionable and the OAS response was limited to a general call for the state to return to democracy.

⁴³⁴ 'Andean Community Commitment to Democracy' at article 1. Available at <http://www.comunidadandina.org/ingles/normativa/democracy.htm> [accessed 1 September 2011].

⁴³⁵ *Ibid* at articles 2, 4. Sanctions range from suspension of membership rights to ineligibility for CAN loans.

⁴³⁶ *Ibid* at articles 6-7.

⁴³⁷ *Ibid* at article 8.

⁴³⁸ *Andean Charter for the Promotion and Protection of Human Rights* at article 14. Available at http://www.comunidadandina.org/INGLES/documentos/documents/andean_charter.htm [accessed 1 September 2011]. Democracy includes respect for human rights and fundamental freedoms, freedom of association, freedom of expression, rule of law, holding of periodic free, fair and impartial elections, universal suffrage, secret balloting, a pluralistic system of political organizations and parties, the separation and independence of powers, the transparency and accountability of public administration, and a free, independent and pluralistic press.

⁴³⁹ *Ibid* at article 13.

(3) Other Organizations

Substantive democratic commitments have been made by two other regional organisations in the Americas: Mercado Común del Sur (Mercosur)⁴⁴⁰ and the System of Central American Integration (SICA).⁴⁴¹

ii. Africa

(1) African Union (AU)

The *African Charter on Human and Peoples Rights* provides a right to participate in public affairs,⁴⁴² and cites promotion and respect for democratic principles as AU goals.⁴⁴³ The *AU Charter* condemns unconstitutional changes in government,⁴⁴⁴ providing for the possible suspension of members in those circumstances.⁴⁴⁵ A comprehensive sanctions process to respond to unconstitutional changes of government was set out in the *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*.⁴⁴⁶

The most recent AU instrument is the *African Charter on Democracy, Elections and Governance*,⁴⁴⁷ which affirms democracy as a core defining principle, but does not define the concept and uses vague language respecting obligations of member

⁴⁴⁰ *Ushuaia Protocol On Democratic Commitment in the Southern Common Market, the Republic of Bolivia and the Republic of Chile*. Available at http://untreaty.un.org/unts/144078_158780/2013/9923.pdf [accessed 15 August 2011]. The *Protocol* conditions cooperation with MERCOSUR on democratic adherence, and permits sanctions and suspensions where there is a disruption in democratic governance.

⁴⁴¹ *Framework Treaty of Democratic Security in Central America* at article 1. Available at http://www.sica.int/busqueda/busqueda_archivo.aspx?Archivo=trat_33842_2_19032009.htm [accessed 15 August 2011]. Article 1 affirms that SICA is based on democratic principles and requires member states to have free and fair elections.

⁴⁴² *Banjul Charter of Human and Peoples Rights* (1981) 21 ILM 158 at article 13. This has been interpreted by the African Commission to require elections. Petersen at 67.

⁴⁴³ *Ibid* at articles 3(g) and 4(m).

⁴⁴⁴ *Constitutive Act of the African Union*, OAU Doc CAB/LEG/2315 (2000) at article 4.

⁴⁴⁵ *Ibid* at article 30; also see Fox 2007 at 272.

⁴⁴⁶ *Declaration on the Framework for an OAU Response to Unconstitutional Changes of Government*, OAU Doc AHG/Dec1.5 (2000).

⁴⁴⁷ *The African Charter on Democracy, Elections and Governance*. Available at <http://www.un.org/democracyfund/Docs/AfricanCharterDemocracy.pdf> [accessed 21 July 2011].

states.⁴⁴⁸ Moreover, as of February 2011, the *Charter* was not yet in force, having been ratified by only eight of a required fifteen states.⁴⁴⁹

(2) ECOWAS

The *Treaty of ECOWAS* cites the right to participate in government and the promotion of democracy as fundamental principles,⁴⁵⁰ and permits the organization to provide electoral assistance to member states upon request.⁴⁵¹ The *ECOWAS Protocol on Democracy and Good Governance* articulates an explicit obligation to hold free, fair and transparent elections.⁴⁵² The organization's *Conflict Protocol* recognizes democracy and good governance as integral to development in West Africa,⁴⁵³ and seeks to prevent and respond to unconstitutional changes in government.⁴⁵⁴

(3) SADC

Democratic promotion is one of the founding principles articulated in the *Charter of the South African Development Community*.⁴⁵⁵ These general democratic principles are affirmed in the *SADC Principles and Guidelines Governing Democratic Elections*.⁴⁵⁶

African regional practice demonstrates an increasing willingness to condemn unconstitutional changes in government, impose sanctions, suspend membership, and occasionally intervene militarily under the auspices of the AU, ECOWAS and SADC.⁴⁵⁷

ECOWAS has intervened on a number of occasions, usually with consent of the ruling regime, or based on pre-authorization provided in ECOWAS legal instruments.⁴⁵⁸

⁴⁴⁸ *Ibid.*

⁴⁴⁹ 'Ratification status of the African Charter on Democracy, Elections and Governance.' Available at <http://www.eisa.org.za/EISA/aucharter.htm> [accessed 21 July 2011].

⁴⁵⁰ *ECOWAS Revised Treaty* (1993) 35 ILM 660 at articles 4(h) and 4(j).

⁴⁵¹ *Ibid* at article 58(2)(g).

⁴⁵² *ECOWAS Protocol on Democracy and Good Governance* Doc A/SPI/12/01 (2001) at article 1.

⁴⁵³ *Protocol Relating to the Mechanism for Conflict Prevention, Management, Peace-keeping and Security* (1999) ECOWAS Doc A/p10/12/99, preamble.

⁴⁵⁴ *Ibid* at articles 2, 45.

⁴⁵⁵ *Charter of the South African Development Community* at article 4(c). Available at <http://www.sadc.int> [accessed 12 July 2011].

⁴⁵⁶ *SADC Principles and Guidelines Governing Democratic Elections*. Available at <http://www.sadc.int> [accessed 12 July 2011].

⁴⁵⁷ Petersen (note 31) at 66-72.

⁴⁵⁸ Jeremy I Levitt 'Pro-democratic intervention in Africa' in Jeremy I Levitt (ed) *Africa: mapping new boundaries in international law* (2008) 103 at 112-133. [Levitt]

The 1988 ECOWAS intervention in Liberia following an appeal from President Doe was arguably 'aimed at creating an enabling environment for democracy.'⁴⁵⁹

ECOWAS has also intervened following the 1998 military coup against the Kabbah government in Sierra Leone,⁴⁶⁰ and in Guinea-Bissau to effectively protect President Vieira's 'controversial yet democratically elected government following threats of mutiny by members of the military.'⁴⁶¹ The organization also intervened in Côte d'Ivoire to maintain peace and monitor a ceasefire agreement following the 2002 overthrow of the Gbagbo government by members of the military.⁴⁶²

The AU joined ECOWAS in condemning the 2005 unconstitutional seizure of power in Togo by the son of deceased President Eyadema, and sanctions imposed by both organizations helped produce a constitutional transition of power.⁴⁶³

In 2005 and 2008, coups took place in Mauritania against arguably illegitimate regimes.⁴⁶⁴ In each case, the AU imposed sanctions and suspended Mauritanian membership.⁴⁶⁵

In 2008, a military coup in Guinea followed the death of the latest in a series of autocratic leaders.⁴⁶⁶ Despite popular support for the coup, and the promise to hold elections within two years, the AU imposed sanctions and suspended Guinea's membership.⁴⁶⁷

In 2009, following pressure from the military and civilian opposition, Madagascar President Ravalomanana stepped down and transferred power to the military who

⁴⁵⁹ *Ibid* at 115.

⁴⁶⁰ Karsten Nowrot and Emily W Schabacker 'The use of force to restore democracy: international legal implications of the ECOWAS intervention in Sierra Leone' (1998) 14 *American University international law review* 321-412; Fox 2007 (note 5) at 268.

⁴⁶¹ Levitt (note 458) at 122-123.

⁴⁶² *Ibid* at 124-126.

⁴⁶³ *Ibid* at 127-129.

⁴⁶⁴ Eki Yemisi Omorogbe 'A club of incumbents? The African Union and coups d'état (2011) 44 *Vanderbilt journal of transnational law* 123 at 142-146. [Omorogbe] In both instances, the coups were non-violent, had support of the populace and/or a majority of members of Parliament, and were followed by undertakings to hold elections.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ *Ibid* at 146-148.

⁴⁶⁷ *Ibid*.

appointed an interim president.⁴⁶⁸ The failure to follow constitutional procedures resulted in membership suspensions by the AU and SADC,⁴⁶⁹ with the AU subsequently imposing sanctions to ensure compliance with the constitutionally mandated electoral process.⁴⁷⁰

In 2009, following Niger President Tandja's refusal to abide by term-limits and the dissolution of Parliament and the Constitutional Court, ECOWAS imposed sanctions and threatened to suspend Niger's membership, but the AU did not take specific action.⁴⁷¹ Following a popularly supported coup that removed Tandja from power in 2010, the AU immediately suspended Niger pending a return to constitutional order.⁴⁷²

One positive development in recent AU practice is an insistence that individuals involved in the overthrow of a democratically elected government are prevented from running for office in elections that result from AU intervention. The AU took this position in Guinea, Madagascar and Niger.⁴⁷³

The 2010-2011 Côte d'Ivoire electoral crisis may prove to be a watershed moment in the AU's approach to democracy. Côte d'Ivoire's Independent Electoral Commission (IEC) determined incumbent President Gbagbo lost 2010 elections that were confirmed as fair and transparent by independent observers.⁴⁷⁴ The Constitutional Court subsequently nullified the IEC results and declared Gbagbo the winner.⁴⁷⁵ In an uncharacteristic response to the actions of an incumbent regime, the AU immediately declared Gbagbo's opponent as the rightful winner, and insisted power be transferred to President-elect Ouattara.⁴⁷⁶

⁴⁶⁸ *Ibid* at 149-150.

⁴⁶⁹ *Ibid*.

⁴⁷⁰ *Ibid* at 150-151.

⁴⁷¹ *Ibid* at 151-152.

⁴⁷² *Ibid* at 152-153.

⁴⁷³ *Ibid* at 153-154.

⁴⁷⁴ Bassett (note 278) at 132-133.

⁴⁷⁵ *Ibid* at 133.

⁴⁷⁶ *Ibid* at 131. ECOWAS took a consistent position, even threatening use of military force to remove Gbagbo if necessary.

iii. Middle East and Asia

There is no regional framework for promotion of democracy in either the Middle East or Asia.⁴⁷⁷

iv. Regional Practice Conclusions

The evidence supporting a customary rule of democratic governance is generally stronger in *some* regional contexts than at the international level.⁴⁷⁸ Agreement to a more detailed articulation and obligation of democracy at a regional level, where there may be greater homogeneity of political systems and cultures, is hardly surprising. There is compelling evidence of at least a procedural democratic obligation in Europe and the Americas, but little to no evidence is the Middle East and Asia.⁴⁷⁹

With respect to Africa, legal instruments are not as explicitly or compulsorily worded as its European or Inter-American counterparts, and it is often unclear whether African states are motivated by democracy, human rights, broader humanitarian concerns or strategic national interests.⁴⁸⁰

Interventions have generally only been used in response to the manner in which regimes came into power: 'it [pro-democracy intervention] does not seek to establish democracy where it does not exist but to preserve democracy where it does exist.'⁴⁸¹ There has been a reluctance to sanction conduct of existing regimes such as falsifying elections, amending constitutions to consolidate power, or abolishing electoral term-limits,⁴⁸² suggesting African regional practice is more a 'reinforcer of the *status quo* rather than a catalyst for democratization.'⁴⁸³

An alternative view of African regional practice suggests intervention may be based on concerns about threats to public order and economic development rather than

⁴⁷⁷ Marks (note 28) at 511.

⁴⁷⁸ Petersen (note 31) at 71-72.

⁴⁷⁹ *Ibid* at 72. While the uprisings of 2011 are regarded as a hopeful sign in these regions, it would be premature to draw any conclusions about their long-term democratic significance.

⁴⁸⁰ Levitt (note 458) at 109.

⁴⁸¹ *Ibid* at 108.

⁴⁸² Petersen (note 31) at 70. The differing AU reaction to the recent unconstitutional actions in Niger by the incumbent regime, as compared to coup participants, provides recent affirmation of this reluctance.

⁴⁸³ *Ibid* at 69.

violations of a right to democracy.⁴⁸⁴ Emphasis on restoration of constitutional order may be accomplished, but at the expense of the installation of democracy.⁴⁸⁵

While it is therefore doubtful that African regional practice is sufficient to establish a customary rule of adherence to democratic governance generally, the increasing consistency in the African response to unconstitutional regime change may support an emerging norm limited to the process through which new regimes come to power. The response to the 2011 Côte d'Ivoire elections suggests a potential willingness to extend this obligation to incumbent regimes, but it is unclear whether this case was an exception, or the beginning of a stricter approach.

F. Democracy as an Instrumental Value

While the evidence as a whole clearly demonstrates a dramatic increase in pro-democracy 'activity' since 1989, its legal nature is questionable, the motivations of the actors engaging in this activity appear varied, and the recent evidence of regression is troubling. One explanation for the inconsistencies within the post-Cold War democratic trend is that democracy is often approached from an instrumental perspective.⁴⁸⁶

Conduct purported to be 'pro-democratic' is therefore not necessarily based on the perceived intrinsic value of democracy, but rather its instrumental value in achieving other goals such as economic and security interests: 'Western democracies do not impose democracy simply out of altruism, because they believe it is a legal norm or the best way to protect human rights, but simply because it was and continues to be in pursuit of their national self interests.'⁴⁸⁷

⁴⁸⁴ Omorogbe (note 464) at 124, 153-154. This would explain AU condemnation of coups undertaken against autocratic regimes and supported by the population of the state (such as the Mauritania and Niger examples discussed above).

⁴⁸⁵ Petersen (note 31) at 70.

⁴⁸⁶ d'Aspremont at (note 3) 551. d'Aspremont notes the inevitability of developed states perceiving democracy in instrumental terms.

⁴⁸⁷ Coleman (note 33) at 211-212.

i. Economic Instrumentalism

Credible arguments suggest many Western interventions were actually seeking to promote liberal economics (freedom from interference by the state or government), as opposed to liberal democracy.⁴⁸⁸ After the Cold War, facing no competition for influence, Western states, the International Monetary Fund (IMF), and the World Bank began to make lending contingent on recipient states implementing liberal economic and democratic reforms.⁴⁸⁹

While many developing states complied,⁴⁹⁰ this is arguably attributable to their own instrumental view of democracy:

...the aspiration of most people is a prosperous and peaceful life. If they think democracy will get them that, they will support democracy. If they lose faith in democracy to achieve those ends, they will support something else. The current democratic trend is really a trend in which many people are embracing the idea that democracy can make their lives better. If democracy does not do so – and it probably will not in many places – they will pass on to something else, something we will usually find unpleasant.⁴⁹¹

This view is consistent with political science democratic 'transition literature' which associates regime breakdown with poor economic performance.⁴⁹²

The policy of conditioning aid on liberal reforms was premised on two assumptions: reforms would create economic improvement in targeted countries, and economic progress and democratization were inherently connected.⁴⁹³ These assumptions also appear within some pro-democratic legal literature.⁴⁹⁴

⁴⁸⁸ *Ibid* at 209-210.

⁴⁸⁹ Halper (note 38) at 57. These reforms included market deregulation, reduction of the public sector, and the elimination of subsidies.

⁴⁹⁰ Claude Ake *The feasibility of democracy in Africa* (2000) at 129.

⁴⁹¹ Carothers (note 23) at 262.

⁴⁹² Graeme Gill *The dynamics of democratization* (2000) at 9. Many political scientists analyzing the 2011 uprisings in North Africa and the Middle East suggest that a significant source of the unrest was poor economic performance, often associated with the imposition of liberal economic reforms, rather than a lack of democracy. Lisa Anderson 'Demystifying the Arab Spring: parsing the differences between Tunisia, Egypt and Libya' (2011) 90 *Foreign affairs* 2 at 2-7; F Gregory Gause III 'Why Middle East studies missed the Arab Spring: the myth of authoritarian stability' (2011) 90 *Foreign affairs* 81 at 85-87; Dina Shehata 'The fall of the pharaoh' (2011) 90 *Foreign affairs* 27 at 27-31.

⁴⁹³ Inglehart (note 104) at 42. The relationship between pro-democratization efforts and economic interests of Western states is also supported by a willingness to ignore a lack of democracy in resource-

The reforms often failed to comport with these assumptions: in many states, market reforms produced inflation, fraud, corruption and failure to uphold the rule of law.⁴⁹⁵ These developments resulted in increasingly negative attitudes toward liberal economics and democracy.⁴⁹⁶ For example, a 2008 poll taken in non-western regions suggested an increasing preference for guarantees of social order and economic growth rather than liberal democratization.⁴⁹⁷

While liberal economic and democratic reforms have failed to produce economic growth in many states, the past 20 years has seen the rise of emerging market states, such as China, that successfully combine market economics with autocratic or semi-autocratic politics.⁴⁹⁸ China's example is regarded by some states as a precedent for the achievement of economic growth without the 'side-effects of democracy.'⁴⁹⁹

Increasingly, states are opting to work with China rather than Western democracies which make cooperation contingent on democratic reforms.⁵⁰⁰ For example, Angolan negotiations with the IMF in 2002 for a reform-contingent loan were broken off after the state received a non-conditional loan offer from the Export-Import Bank of China.⁵⁰¹ The rise of Chinese influence since the late 1990's has a remarkable correlation with the reversal of democratic trends identified in the Freedom House and Polity IV data.

As Western democracies begin to experience competition and the effects of the global economic downturn, democratization policies have often become something of a

rich states where cooperation with existing regimes is considered economically advantageous – see Halper (note 38) at 66-76.

⁴⁹⁴ Writing in 1997, Reginald Ezetah concluded China was 'softening' on democratic reform because underneath the market liberalization 'lies a democratic ethic (at least of free enterprise) that should soon impact the political structure' – see (note 22) Ezetah at 512 (footnote 85).

⁴⁹⁵ Inglehart (note 104) at 44; Halper (note 38) at 58.

⁴⁹⁶ Halper (note 38) at 60-62; 213.

⁴⁹⁷ *Ibid* at 130.

⁴⁹⁸ *Ibid* at 47; 68-73. The Chinese approach accepts market reforms, but rejects the introduction of a multi-party electoral system.

⁴⁹⁹ *Ibid* at 129.

⁵⁰⁰ d'Aspremont (note 3) at 563.

⁵⁰¹ Halper (note 38) at 78-93. Similar examples of Chinese assistance include Uzbekistan, the Central African Republic, Cambodia, Sudan, Myanmar and Zimbabwe.

'luxury', with a decreasing number of states 'able to afford trade policies conditioned on the respect for some requirements as to the democratic origin of the partner.'⁵⁰²

ii. Security Instrumentalism

An assumption was made following 9/11 that democratic states would work to end global terrorism.⁵⁰³ However, when democracy was unnecessary to achieve security objectives, or where a lack of democracy was advantageous from a security perspective, Western states strengthened ties with highly autocratic regimes such as Egypt, Tunisia, Algeria and Libya.⁵⁰⁴ It has thus been argued that 'the democratic entitlement has collapsed under the weight of the post 9/11 security agenda.'⁵⁰⁵

This instrumental view may also explain the difference in international practice between unconstitutional regime change and unconstitutional regime continuance. The tendency to treat anti-democratic actions by an incumbent regime as less serious may be explained by the different implications it has for stability in that state and region. Economic and security interests are both served by a stable and predictable system of governance. While these principles can be achieved through periodic free and fair elections, they do not require democracy. An autocratic regime could be considered more stable and predictable than a democratic one, with its periodic possibility of regime change. The one scenario that would undermine these principles is an unconstitutional change in government. An incumbent's unconstitutional actions, such as rigging elections or abolishing term limits, does not usually have the same deleterious impact on stability as would an unexpected regime change taking place outside of the predictable pattern of periodic elections, and often involving destabilizing actions such as use of military force.

⁵⁰² Aspremont (note 3) at 562.

⁵⁰³ Jason B Conn 'When democracy gives the purple finger: an examination of the proper international legal response when a citizenry elects a terrorist organization to lead its government and seeks international aid' (2007) 23 *Journal of international law & policy* 89 at 89-90.

⁵⁰⁴ Astineh Arakelian 'Extraordinary rendition in the wake of 9/11' (2010) 40 *Southwestern law review* 323 at 326-328; Alan W Clarke 'Rendition to torture: a critical legal history' (2009) 62 *Rutgers law review* 1-74; Daniel Byman 'Terror after the revolutions' (2011) 90 *Foreign affairs* 48 at 48-54. In many cases, the very lack of democratic institutions was regarded by Western democracies as advantageous because terror suspects could be interrogated outside the protections offered in liberal democracies possessing due process rights.

⁵⁰⁵ Marks (note 28) at 513.

Democracy perceived instrumentally is arguably too contingent and context-specific to constitute a relevant precedent in favour of a universal rule. Democratic adherence will be temporarily disregarded, or completely abandoned, if the assumptions underlying its instrumental value prove false.

Part VI – Self Determination

A. The Right to Self-Determination

A generally accepted definition of self-determination is set out in article 1(1) of the *ICCPR*: 'All peoples have the right to self-determination. By virtue of that right, they freely determine their political status and freely pursue their economic, social and cultural development.'⁵⁰⁶

The principle of self-determination has been held by the ICJ to constitute a customary legal right,⁵⁰⁷ and is widely regarded as a peremptory norm of international law.⁵⁰⁸ Self-determination does not apply to all groups of individuals desiring political independence or self-government, but is restricted to circumstances where a defined group of 'people' constitute a self-determination unit.⁵⁰⁹

B. International and External Self-determination

Internal self-determination addresses the relationship between a people and the state in which they reside.⁵¹⁰ At a minimum, a people must have a choice respecting their system of governance.⁵¹¹ The issue of whether international law places any limitations on the nature of the chosen system of governance is contentious.⁵¹²

External self-determination occurs where the self-determination unit exercises its right through unilateral secession, thus creating a new state.⁵¹³ Due to the primacy of the principle of territorial integrity, external self-determination has been limited to the colonial and racist regime context, but may apply in other situations where violations of

⁵⁰⁶ *ICCPR* (note 306) at article 1(1).

⁵⁰⁷ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12. At para 59, the Court notes self-determination entails 'the need to pay regard to the freely expressed will of the people.'

⁵⁰⁸ Brownlie (note 48) at 553; Anthony Cassese *International law* 2ed (2005) at 65. [Cassese]

⁵⁰⁹ Crawford 2006 (note 8) at 127.

⁵¹⁰ Cassese (note 508) at 101.

⁵¹¹ Cécile Vandewoude 'The rise of self-determination versus the rise of democracy' (2010) 3 *Goettingen journal of international law* 982 at 983. [Vandewoude]

⁵¹² *Ibid* at 984.

⁵¹³ Lee Seshagiri 'Democratic disobedience: reconceiving self-determination and secession at international law' (2010) 51 *Harvard international law journal* 533 at 566-567. [Seshagiri]

fundamental human rights prevent a people from exercising their self-determination right internally.⁵¹⁴

C. Self-Determination and Democracy

Arguments that equate democracy and self-determination are usually associated with internal self-determination. It is asserted that the right of peoples to choose their own form of governance can only be exercised in a democratic system.⁵¹⁵

This position has been challenged on the basis it fails to distinguish between the 'act of creating a political system' and the 'actual content and structure of government.'⁵¹⁶ The right to choose a political system does not place any limitation on the nature of that system.⁵¹⁷ Insistence that only some types of political systems are legitimate would limit a people's freedom of choice, arguably violating the self-determination right.⁵¹⁸ There have accordingly been several historical instances in which 'citizens opted through electoral means to delegate power to political elites who then established authoritarian rule.'⁵¹⁹

This minimalist approach has been criticized because 'it is difficult to justify why the citizenry of one historical moment should have the power to bind future generations.'⁵²⁰ Accordingly, a more robust approach to self-determination posits that governance must reflect the will of the people on a continuous basis.⁵²¹

A second criticism of the minimalist approach suggests that, in addition to the continuous aspect of the right, international law may impose limitations on the actual manner in which self-determination rights are exercised.⁵²² In other words, not all systems of governance are consistent with the exercise of the right.

⁵¹⁴ *Ibid* at 566-568; *Reference re Secession of Quebec* [1998] 2 SCR 217 at para 138. [*Quebec Secession*]

⁵¹⁵ Ezetah (note 22) at 504.

⁵¹⁶ Petersen (note 31) at 51.

⁵¹⁷ *Ibid.*

⁵¹⁸ *Ibid.*

⁵¹⁹ *Ibid.* Based upon a minimalist approach, the right is exercised on the occasion where a people first choose a system of governance, and is thereafter exhausted.

⁵²⁰ *Ibid* at 51-52.

⁵²¹ Malone (note 22) at 86.

⁵²² Vandewoude (note 511) at 984.

There are differing perspectives regarding the limits international law may place on permissible systems of governance. One view is that a political system must be 'based on the consent of the governed...and substantially representative of all distinct groups in the country,'⁵²³ and this can only be achieved in a democratic system.⁵²⁴ This conclusion has been criticized as using a progressive interpretation that is outside the currently accepted parameters of the self-determination principle.⁵²⁵

It has accordingly been suggested that a democratic requirement imposes an overly strict limitation on self-determination: 'the principle [self determination] in its positive form requires not a democratically organized government but rather a system of government instituted with the approval of the majority of the people concerned.'⁵²⁶ In this view, while self-determination does entail a limitation on permissible forms of governance, the limitation only requires a government be representative of its people.⁵²⁷

Representativeness and democracy are not synonymous. For example, while racist regimes have been considered unrepresentative and acting in contravention of self-determination rights,⁵²⁸ '[i]nternational law will not automatically regard a non-democratic government as non-representative of its peoples.'⁵²⁹ A government that acts in the public interest may be considered representative, regardless of whether that state adopts procedural democratic institutions such as elections.⁵³⁰

This interpretation is consistent with the view of the UN Human Rights Committee. In its General Comment concerning article 25 of the *ICCPR*, the Committee affirmed electoral rights are related to the right of self-determination, but that the two rights are not identical.⁵³¹ The Human Rights Committee affirmed the description of self-

⁵²³ *Ibid* at 993.

⁵²⁴ *Ibid* at 992. Vandewoude's argument is premised on the assumption that a right to democratic governance has emerged in international law independent of the right to self-determination.

⁵²⁵ d'Aspremont (note 3) at 568.

⁵²⁶ Crawford 2006 (note 8) at 150.

⁵²⁷ Vidmar (note 34) at 268.

⁵²⁸ *Ibid* at 251-253. The commonly cited examples of this practice are South Rhodesia and the Bantustans created by South Africa.

⁵²⁹ *Ibid* at 255. The only exception to this principle may be with respect to the unconstitutional overthrow of democratically elected regimes.

⁵³⁰ Petersen (note 31) at 53.

⁵³¹ General Comment No 25 at para 2.

determination in *ICCPR* article (1) which does not articulate the right as requiring democracy.⁵³²

D. Self-Determination and Statehood

i. States Created in Violation of *Jus Cogens* Norms

The *jus cogens* status of self-determination may impose a negative legal criterion for entities seeking statehood.⁵³³ This is premised on a legitimacy criterion that prohibits statehood in circumstances where the creation of the state would violate a peremptory norm of international law.⁵³⁴ On the basis of this general principle, Crawford notes: 'It may be concluded that an entity may not claim statehood if its creation is in violation of an applicable right to self-determination.'⁵³⁵

While this does impose a type of negative statehood criterion,⁵³⁶ the extent to which a DCDS is entailed by this prohibition is dependent on whether democracy is a necessary requirement of self-determination. If a non-democratic, but representative, government is consistent with the exercise of self-determination rights, some non-democratic regimes will be able to achieve statehood without contravening this negative statehood criterion. For this reason, it would be more accurate to describe the statehood criterion as one based on self-determination and not democracy.⁵³⁷ In any event, because self-determination only applies to peoples, the operation of this negative statehood criterion would not apply in the same universal manner as traditional statehood requirements.

There may be an exception to this general conclusion. In circumstances where a coup has overthrown a democratically elected government, international practice has increasingly regarded the resultant regime as unrepresentative.⁵³⁸ If a coup takes place

⁵³² Vidmar (note 34) at 260.

⁵³³ Crawford 2006 (note 8) at 131.

⁵³⁴ *Ibid* at 99-107.

⁵³⁵ *Ibid* at 131.

⁵³⁶ A territory is not required to satisfy a positive requirement, such as possessing a government, but must refrain from violating a principle of international law.

⁵³⁷ In the event self-determination is determined to require democracy in all circumstances, it would be appropriate to refer to the negative statehood criterion as effectively requiring democracy.

⁵³⁸ Vidmar (note 34) at 266.

in a non-state territory, and the regime involved subsequently seeks statehood, self-determination may operate to prevent that territory from becoming a state.

ii. Remedial Secession

An additional possible connection between democracy, self-determination, and state creation is the concept of remedial secession. Under this theory, if a regime acts in such an authoritarian manner that peoples are deprived of 'meaningful access to government to pursue their political, economic, social and cultural development,' there may be a resultant right of secession.⁵³⁹ It could thus be argued the statehood of a territory, in which a self-determination unit exists, is contingent on the existence of a minimal degree of democratic governance.

There are two challenges to inferring a type of DCDS from remedial secession. First, it is not self-evident that 'meaningful access to government' requires democracy. For the reasons discussed herein, a representative regime that is not democratic may satisfy this obligation.⁵⁴⁰ Second, the principle of remedial secession is itself 'highly controversial' as an entitlement under international law.⁵⁴¹

E. Conclusion

While an entity that is not democratic may be denied statehood status where statehood would contravene self-determination rights, a general right to DCDS cannot be deduced from the right of self-determination, unless democracy is a necessary requirement for the exercise of the right. While democracy is clearly related to self-determination, the better view of the *lex lata* is that self-determination only requires a representative government.

⁵³⁹ *Quebec Secession* (note 514) at para 138.

⁵⁴⁰ Petersen (note 31) at 53.

⁵⁴¹ Vidmar (note 34) at 247.

Part VII – Conclusion

A. General Right of Democratic Governance

In the twenty-five year period since the ICJ held in *Nicaragua* that no customary international law rule regulated the adherence of a state to any particular political system, there has been an substantial amount of pro-democratic 'activity' in the international community.

Assessed solely on the basis of volume, the pro-democratic instruments, practice and official statements in the post-Cold War era are both impressive and a radical departure from the neutrality that was associated with this issue prior to 1989. The one aspect of this activity that is unambiguous is the nearly universal practice of states professing adherence and commitment to democratic norms.

However, this voluminous amount of democratic activity is simply not imbued with sufficient legal character to establish a right under customary international law, or transform the principle of self-determination's requirement of representativeness into a democratic mandate.

The gap between professions of democratic adherence and actual state practice are striking. The lack of democracy among states in the international community is substantial and arguably increasing. While there have been efforts at the UN and regional level to delegitimize non-democratic regimes, this practice has been generally focused on the process through which regimes come to power, can arguably be attributed to concerns about stability as opposed to democracy, has occurred in a relatively limited number of cases, has been selectively undertaken, and has too much regional variation for a general rule to be established. Based on the traditional articulation of the CIL test, the amount of contrary state practice is therefore too substantial for the state practice criteria to be satisfied.

Even relaxing the state practice criteria would likely not be sufficient to transform democracy into a legal right. Democracy in the post-Cold War era does initially appear to be the sort of principle envisioned by proponents of a relaxed approach to CIL. If international obligation is based primarily on state commitment, as opposed to

compliance, the nearly universal commitment of states to democratic norms in UNGA resolutions and in the UPR process would suggest that democracy possesses significant obligatory force.

The circumstances in which the alleged norm arose arguably constitute a Groatian Moment, and democracy is a fundamental ethical issue. Analogies can be drawn with the prohibitions on the use of force and torture. Like democracy, most states profess commitment to the prohibitions, but often do not act in a manner consistent with those commitments. However, there are key differences that distinguish a proposed democratic right from use of force or torture.

The evidence of *opinio juris* respecting those prohibitions is much more profound than the pro-democracy rhetoric relied upon to support a democratic right. The torture and use of force prohibitions have been affirmed in binding and non-binding instruments that explicitly confirm the compulsory nature of the prohibitions, while democracy commitments at the UN level have been expressed in non-binding instruments that contain ambiguous commitments expressed in aspirational language.

Moreover, most instruments not only fail to provide a detailed definition of democracy, but affirm that no single definition exists. This position is confirmed by UPR practice in which states possessing radically different political systems nonetheless profess democratic adherence. Without a clear articulation of democracy, '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.'⁵⁴²

For these reasons, the establishment of a CIL rule would require both the state practice and *opinio juris* criteria to be 'relaxed' to such an extent they would essentially be comatose.

B. Teleological Right

One potential way to address these evidentiary shortcomings is to articulate the CIL right itself in non-concrete terms. One such approach is Petersen's 'teleological' right, in

⁵⁴² Fox Intro (note 86) at 15.

which state obligations are restricted to 'developing towards democracy'.⁵⁴³ A teleological right does not require any specific democratic definition, or the achievement of any specific goal for compliance.⁵⁴⁴ States are given a margin of flexibility about how to honour the obligation, and only 'clearly defective strategies' will be regarded as a contravention.⁵⁴⁵

While this right may initially appear to amount to little more than a commitment to try one's best, it would be subject to the customary obligation of good faith.⁵⁴⁶ However, even for this very ephemeral sort of process-oriented obligation to exist, there must be some commonly agreed upon democratic criteria. Otherwise, it is not possible to measure whether states are undertaking their obligations in good faith, actually developing towards democracy, or regressing away from it. Some of the most autocratic states take the position they are already democracies. If a teleological right allows each duty-bearer to determine what the right entails, the democratic right would be so contingent and discretionary as to be functionally meaningless.

C. Regional Rule of DCDS

The evidence in the Americas and Europe strongly suggests that democracy is considered a condition of state legitimacy in those regions. However, the appropriateness of a regional DCDS is questionable. The constitutive theory has been criticized because legal statehood is an objective fact that does not apply on a differential basis depending on what states have conferred recognition. The same criticism would apply to a regional DCDS. If statehood is an objective legal status, it would seem unacceptable for a territory to be a state for some regions, but not others.

A more appropriate approach would be to consider the emerging customary rule as one that imposes a duty of non-recognition. States would still have discretion to recognize newly emerging territories that complied with basic democratic norms, but would be obligated to refuse recognition to non-democratic entities.

⁵⁴³ Petersen (note 31) at 81.

⁵⁴⁴ *Ibid* at 81-82.

⁵⁴⁵ *Ibid*.

⁵⁴⁶ *Nuclear Tests (Australia/France) Judgment* [1974] ICJ Rep 253 at para 46.

There are several benefits to this approach. It would resolve the problem associated with different statehood criteria applying in different regions. It would also permit each region to establish its own definition of democracy, which may permit a more robust articulation of the principle than would be possible if requiring international consensus.

For the reasons set out in Part II, recognition has become so essential to functional statehood that the practical effect of treating an obligation of democratic governance as a recognition issue, as opposed to a statehood issue, is becoming increasingly insignificant.

D. Future Prospects

While the contemporary evidence does not seem to justify the democratic optimism that was expressed at the end of the Cold War, there are positive signs. Strong democratic rights have emerged on a regional basis, and the recent events in North Africa and the Middle East may lead to some democratization in these bastions of autocracy. Alternatively, the emergence of free-market autocracies as a viable alternative to democracy has the potential to significantly undermine democratic promotion.

An over-emphasis on finding the existence of some DCDS principle that can be described as a CIL rule should give way to the consideration of whether the rule so discovered will have any practical implications for the regulation of state conduct. While a universally binding DCDS may not have emerged under international law, the increasing importance of international acceptance and cooperation provides states with powerful tools to encourage democratization in emerging states.

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