

Jean d'Aspremont. *L'État Non Démocratique en Droit International. Étude Critique du Droit International Positif et de la Pratique Contemporaine*. Paris: Pedone, 2008. Pp. 375. €48. ISBN: 9782233005311.

Niels Petersen. *Demokratie als teleologisches Prinzip. Zur Legitimität von Staatsgewalt im Völkerrecht*. €79.95. Berlin, Heidelberg, New York: Springer, 2009. Pp. 280. ISBN: 9783540921738.

In 1992, shortly after the dissolution of the Warsaw Pact and the Soviet Union marked the formal end point of the Cold War, Thomas Franck, who sadly passed away this year, famously proclaimed the emergence of a global 'right to democratic governance'. Against the backdrop of the dramatic political changes in Central and Eastern Europe, the progressive consolidation of democratic government in Latin America, burgeoning democratic reforms in various parts of Africa, and a rapidly increasing pro-democratic activism by the United Nations and other international organizations, he asserted that 'both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance'.¹ As is well known, Franck's thesis – which is largely grounded in the peoples' right to (internal) self-determination and a new reading of participatory norms contained in international human rights treaties – had a significant resonance in international legal scholarship and ushered in what came to be known as the 'democratic entitlement school'. Though the debate over the sweeping claim that, in the post-Cold War era, democracy is becoming – or has already become – a universal norm

probably saw its heyday in the 1990s, it has, to this day, lost neither attraction nor relevance. Indeed, the claim's provocative nature (in light of international law's traditional indifference towards domestic constitutional orders), its assumptions about the kind of democracy advanced by the international system, as well as its potentially far-reaching consequences for states deemed to be in violation of the emerging norm continue to inspire scholars of international law and fuel an ongoing controversial discussion.²

Interestingly, for most of the 1990s the significant attention that the democratic norm thesis has attracted among Anglo-American scholars has had no parallel in (continental) European legal scholarship.³

² A number of seminal contributions to the debate (mostly adapted by their authors from previous work) can be found in G.H. Fox and B.R. Roth (eds), *Democratic Governance and International Law* (2000). Among the more recent literature see Wheatley, 'Democracy and International Law: A European Perspective', 51 *Int'l & Comp LQ* (2002) 225; Maogoto, 'Democratic Governance: An Emerging Customary Norm?', 5 *U Notre Dame Australia L Rev* (2003) 55; Wouters, de Meester, and Ryngaert, 'Democracy and International Law', 34 *Netherlands Yrbk Int'l L* (2003) 139; Farer, 'The Promotion of Democracy: International Law and Norms', in E. Newman and R. Rich (eds), *The UN Role in Promoting Democracy: Between Ideals and Reality* (2004), at 32; Kokott, 'Souveräne Gleichheit und Demokratie im Völkerrecht', 64 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (2004) 517; Tanzi, 'Remarks on Democracy in Contemporary International Law', 61 *La Comunità Internazionale* (2006) 289; Pippan, 'Gibt es ein Recht auf Demokratie im Völkerrecht?', in E. Riefler (ed.), *Sir Karl Popper und die Menschenrechte* (2007), at 119; Doehring, 'Democracy and International Law', in S. Yee and J.-Y. Morin (eds), *Multiculturalism and International Law* (2009), at 199.

³ Notable exceptions include J. Roldán Barbero, *Democracia y Derecho Internacional* (1994); Schindler, 'Völkerrecht und Demokratie', in G. Hafner et al. (eds), *Liber Amicorum Professor Seidl-Hohenveldern* (1998), at 611; B. Bauer, *Der völkerrechtliche Anspruch auf Demokratie* (1998); L.-A. Sicilianos, *Les Nations Unies et la Démocratisation de l'Etat* (2000).

¹ Franck, 'The Emerging Right to Democratic Governance', 86 *AJIL* (1992) 46, at 91.

This situation has clearly changed in recent years – a fact which is once more confirmed by the books under review here. Tying in with the previous debate, they both aim to provide a fresh look at democracy's ascendance to a core principle of the contemporary global order and its implications for international law. Tellingly, however, at what appears to be the most critical aspect of both studies (the question whether the institution of a democratic form of government amounts to a customary international law obligation), their authors arrive at considerably different conclusions.

The focus of Jean d'Aspremont's *L'Etat Non Démocratique en Droit International* is, as the title suggests, on the position of non-democratic states in the international legal system. The author starts off by discussing the factual prerequisites under which the international community has come to view a state as non-democratic. While acknowledging that there is no standard definition of non-democratic states in international law, he concludes from a review of relevant international documents and the recent practice of global and regional organizations that states are generally labelled 'non-democratic' if their leaders are not selected in free and fair elections *and* if they systematically disrespect their citizens' civil and political rights. As subsequent chapters of the book reveal, this interpretation of international practice regarding the identification of non-democratic states directly informs the author's approach to the concept of governmental legitimacy; it does not, however, seem to be taken by him as also determining the (more limited) content of a purported international obligation to establish a democratic political regime.

Drawing on Wolfgang Friedman's classical distinction between the law of coexistence and the law of cooperation, the first main part of d'Aspremont's book is dedicated to the coexistence of democratic and non-democratic states within the international legal order. Here, the author first looks into basic legal issues usually associated with the existence of states to see whether contemporary international law makes any room for a 'special

treatment' of non-democratic states in areas such as the creation, recognition, restoration, and dissolution of states; their *domaine réservé*, territorial integrity, and immunity; and their participation in international organizations. D'Aspremont does not claim that international law generally allows denying non-democratic states the rights and attributes traditionally accorded to states – nor that it should.⁴ He convincingly argues, however, that questions related to the domestic constitutional order of states are no longer off limits for international law and that, short of the use of force, measures by external actors in support of democracy (that is: the limited kind of democracy which the author views as being currently embraced by international law) have largely ceased to be regarded by the international community as unlawful interventions in the internal affairs of states.

As a general matter, one can hardly dispute the author's observation that, whenever the international community is involved today in the formation or reconstruction of states, its actions will be aimed at (re)establishing democratic structures of government. A further conclusion drawn by d'Aspremont in this regard, however, is more controversial. Pointing to the emergence of East Timor as a sovereign state, as well as to international reactions to the claim to statehood by the people of Palestine, he holds that the exercise of the right to self-determination in colonial and quasi-colonial situations 'must result in the creation of a democratic state' (at 67–68). It is not exactly clear how far the author intends to take this proposition. To the extent that international actors are involved in self-determination processes, they are today indeed expected – perhaps even required – to base their engagement on

⁴ The author consequently rejects the normative claim made by 'liberal international law' theorists, who argue that the international legal order should principally be reconstructed around a distinction among states based on domestic regime-type. For a critical overview of liberal international law scholarship see D. Armstrong, T. Farrell, and H. Lambert, *International Law and International Relations* (2007), at 88.

a vision of statehood which includes, at a minimum, the basic elements of electoral democracy. There is, however, little evidence that international law would now explicitly prohibit the realization of a legitimate claim to self-determination through the creation of a non-democratic state (e.g. one which possesses a hereditary-monarchical or a one-party system), even when this evidently reflects the will of the people concerned. That the decision whether to recognize the new entity as an independent state is within the discretion of existing states is, of course, not in doubt, but – as d’Aspremont himself seems to agree – an entirely different issue.

While non-democratic states are generally entitled to the rights and privileges linked to the concept of statehood on the same terms as democratic states, the latter can nonetheless reduce or otherwise adjust their dealings with the former, particularly within the various forms of organized international cooperation and integration. Occasionally, the international community may even take the drastic step to refuse to consider non-democratic governments as legitimate representatives of their states. D’Aspremont discusses a number of cases in which the international legal standing of an illegitimate *de facto* regime, despite its effective control over the territory of the state it purported to represent, was thwarted due to its (collective) non-recognition and/or the non-accreditation of its delegates with international organizations. As seen by the author, democracy was the touchstone of legitimacy in almost all of these instances. Conversely, in cases of coups against freely elected leaders, states and international organizations have repeatedly continued to recognize the ousted government irrespective of its apparent loss of *effectivité*.

D’Aspremont welcomes these developments but is critical that the international community, when afforded with an occasion to take a position on the legitimacy of a regime, tends to be exclusively concerned with what he calls the ‘*légitimité d’origine*’; i.e. a notion of legitimacy which focuses on free and fair elections as the only valid source of governmental authority.

Pointing to the widespread phenomenon of ‘illiberal democracies’, he argues that, when assessing a government’s legitimacy, international actors should increasingly (also) be guided by the ‘*légitimité d’exercice*’ – which, in his understanding, hinges primarily on a regime’s ability and willingness to respect fundamental human rights (at 45, 154). Indeed, the author believes that a relevant move in this direction is already discernable in the practice of states, and cites as examples the non-accreditation of the delegation of South Africa’s former apartheid regime with the UN General Assembly, as well as recent cases in which the French government has refused to provide military assistance to illiberal, yet democratically elected governments of certain African states (at 181). As notable as these cases may be, however, one wonders whether they are truly indicative of a general trend within the wider international community towards a more substantive understanding of (democratic) governmental legitimacy, let alone of the emergence of a corresponding legal principle. Coherent state practice in this regard is still lacking and even the examples mentioned by d’Aspremont may well be explained either as a variant of the ‘legitimacy of origin’ approach (South Africa) or by the existence of specific political and strategic factors which lie beyond a mere concern about the deplorable human rights record of the regimes in question (the France–Western Africa cases).

The entire second part of d’Aspremont’s study is devoted to the issue of international cooperation with non-democratic states. While democratic states do, of course, maintain all sorts of relations with states deemed to be non-democratic, the author shows how the gradual embrace of democracy as a universal value by the international system has left its marks basically across the full spectrum of both contractual and non-contractual relations among states, ranging from diplomatic relations to economic and development cooperation, as well as (albeit rarely) military cooperation and arms trade. The most interesting, yet also most debatable, aspect of the book comes with d’Aspremont’s

examination of legal problems related to sanctions taken by states in response to a breach of '*l'obligation internationale d'être démocratique*' (at 263). For d'Aspremont, the establishment and preservation of a democratic form of government does not just form a contractual obligation for states parties to, *inter alia*, the International Covenant on Civil and Political Rights (which indeed contains a number of essential democratic rights, including – in Article 25 – the right of citizens to take part in genuine elections). Recent practice and *opinio iuris* of both democratic and most non-democratic states would moreover allow one to regard the adoption of a democratic regime as also constituting a general obligation of customary international law. According to the author, this can be drawn particularly from the fact that even most non-democratic states no longer oppose international efforts to promote the principle of democracy; rather they attempt to portray their own regimes as democratic, or at least as being in transition towards democracy (at 282).

While these stipulations seem far-reaching, the author quickly moves to qualify them; first, *ratione materiae*, by explaining that the scope of the asserted customary norm is limited to the organization of free and fair elections at regular intervals and, secondly, *ratione personae*, by altogether exempting from it 'persistent objectors' such as the People's Republic of China and 'certain states in the Middle East and in South-East Asia' (at 290). In the end, therefore, d'Aspremont appears to advocate a sort of hybrid theory of democracy as an international norm. On the one hand, he shares the 'Franckian' notion that procedural democracy, with its focus on elections and participatory rights, is the maximum of what the international system can realistically be expected to embrace as a universal norm. On the other hand, he makes room for an unspecified number of persistent objectors to whom even this limited interpretation of the purported norm simply does not apply, hereby siding with Brad Roth and other critics of the democratic norm theory who have previously questioned the 'triumphalist' assertion that electoral democracy

can be deemed a global legal entitlement.⁵ To be sure, this Solomonic solution of the democracy and international law puzzle is as such neither unsustainable nor unfounded. It nevertheless seems somewhat misleading to declare the institution of a democratic regime an '*obligation coutumière universelle*', which – because of its presumed *erga omnes* character – is said to be owed to the international community as a whole (at 291, 298), when at the same time the (in and by itself highly controversial) persistent objector thesis is employed to exempt a considerable section of the world community from any duty to comply with it.⁶

Moreover, the approach taken here, while thoroughly elaborated and generally well argued, once again raises a fundamental question: if we are to accept that, when it comes to internal political structures, international law does, if anything, not demand more from states than the holding of genuine elections – is it appropriate to uphold the image of a fully-fledged 'right to democracy' or 'obligation to adopt a democratic regime'? To the reviewer, this would only make sense if one could prove that states and international organizations are still holding on to an oversimplified equation of democracy with free and fair elections. As d'Aspremont himself indicates in the first part of his treatise, however, this is no longer the case. Indeed, one only needs to look at recent UN activities in the area of post-conflict reconstruction and state-building to conclude that democracy has come to be seen today as a form of government which entails more than periodic elections (important as they are, no

⁵ B.R. Roth, *Governmental Illegitimacy in International Law* (1999); see also S. Marks, *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology* (2000).

⁶ An inevitable consequence of this view is that counter-measures – which d'Aspremont generally recognizes as a lawful response by democratic states to violations of the obligation identified by him (at 294) – are obviously not on the table if the violator happens to be one of the persistent objectors who are not bound to respect the relevant obligation in the first place.

doubt, for any democratic system).⁷ Certainly, the definitional debate remains unsettled and states have repeatedly insisted that ‘there is no single model of democracy’.⁸ It nevertheless seems clear that the international community is no longer willing to accept a state’s claim to be democratic if all that it has to show to buttress the claim is an elected government, while other ‘essential elements of democracy’ are persistently ignored.⁹ Again, this is not to say that any particular (substantive) understanding of democracy has already emerged as a global norm. Rather to the contrary, it is to say that grand assertions regarding a customary obligation to establish a democratic political order are seemingly beside the point, when all that is in fact meant is one – albeit highly important – element of a much broader (yet so far mostly programmatic) international vision of democracy.

At least some of these concerns also seem to be shared by Niels Petersen. In *Demokratie als teleologisches Prinzip*, the author focuses specifically on the legal grounding and potential scope of an international principle of democracy and its relevance for the emergence of a general standard of regime legitimacy in international law.¹⁰ Before setting out his legal argument, however, he situates the notion of democracy

within his own theoretical framework of legitimacy and the justification of governmental power. Based on a survey of some particularly influential theories of democratization developed within the social and political sciences, the author rightly maintains that democracy is rather a matter of degree than of kind, usually involving complex, context-related, and long-term social and political processes. Likewise, political legitimacy may be described in a variety of ways; i.e. as sociological vs. normative, procedural vs. substantive, or input vs. output legitimacy. This being said, both legitimacy and democracy also entail a binary dimension, which allows one to distinguish democratic from non-democratic and legitimate from illegitimate regimes. For Petersen, periodic and competitive elections are the default line when it comes to democracy, as democratic government without elections was inconceivable. With regard to legitimacy, however, he holds that no particular institution can be identified as forming the material core of the concept. The only point of reference in this case was the justification of political power, which would not necessarily require the existence of formal electoral procedures. Though not explained in any detail by Petersen, he argues that a regime may nevertheless degenerate into a status of illegitimacy if its policies are clearly detrimental to the country’s overall economic and social development or if it systematically violates fundamental human rights (at 57–58).

Petersen’s subsequent assessment of the place of democracy in international law is rooted in a general theory of (non-codified) law which distinguishes between principles and rules and which, following Dworkin’s seminal work in this area, has gained prominence in German legal scholarship particularly through the writings of Robert Alexy.¹¹ While rules are conceptualized as more or less precisely defined codes of conduct, principles are perceived as guidelines for optimization, leaving those to which they are addressed a much higher degree of discretion than rules. In case of a conflict of rules, specific secondary

⁷ See G.H. Fox, *Humanitarian Occupation* (2008), at 52.

⁸ See, e.g., ‘2005 World Summit Outcome’, UN Doc A/RES/60/1 (18 Sept. 2005), at para. 135.

⁹ According to the General Assembly, ‘the essential elements of democracy include respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections . . . , as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent and pluralistic media’: UN Doc A/RES/59/201 (20 Dec. 2004), at para. 1.

¹⁰ An abridged version of Petersen’s thesis is now also available in English: Petersen, ‘The Principle of Democratic Teleology in International Law’, 34 *Brooklyn J Int’l L* (2008) 33.

¹¹ See, in particular, R. Alexy, *Theorie der Grundrechte [Theory of Fundamental Rights]* (1994).

rules on norm collision (e.g. *lex specialis*, *lex posterior*) apply, whereas a conflict of principles rather demands a balancing of interests in light of the specific circumstances of the matter in question. Taking this theoretical concept as his baseline for an analysis of the right of peoples to self-determination, the individual right to political participation, as well as the practice of the UN and other organizations regarding support for and protection of domestic processes of democratization; Petersen concludes that, in international law, democracy is neither an entitlement nor an obligation. In his view, the international legal system has incorporated only a very modest concept of legitimacy, which ultimately boils down to a 'principle of democratic teleology'. On its basis, states were bound (a) to 'enter into a progressive development towards democracy' and (b) to prevent 'regressions in the process of democratization' (caused, for example, by a coup d'état or a dismantling of the rule of law). However, since 'we are unable to identify ideal ways of democratization', the principle's first aspect does not, according to Petersen, involve any particular duty of action (at 139, 220). As a result, he views a state to be in violation of the principle of democratic teleology only if its government is responsible for severe setbacks in the country's transition towards democracy, if it pursues purely self-enriching policies, or if it gravely violates basic human rights (at 215).¹²

As already indicted earlier, one can certainly agree with the view that international law embraces democracy more as a programmatic – or 'teleological' – principle than a strict legal rule. As construed by Petersen, however, the principle suffers from conceptual ambiguity. First, it is difficult to see the added legal value of an international obligation of states to develop towards democracy when, at the same time, the view is taken that it does not require any specific performance. Indeed, the

author (in contrast to d'Aspremont's view on this point) firmly rejects the idea that, beyond the regional level in Europe and the Americas, states were under a customary obligation to provide for free and fair electoral processes (at 93, 124). Of course, there may be good reasons to question the existence of a universal right to vote and to be elected at genuine elections (as we have seen, even d'Aspremont eventually attenuates the universality argument by making use of the notorious persistent objector doctrine). And yet, one feels a certain uneasiness about the stipulation that even a state which persistently refuses to allow the holding of free and fair elections would have to be deemed in compliance with a duty to develop towards democracy (especially when, as in the present case, elections are generally seen as a *sine qua non* for democratic governance).

Secondly, while it is true that recent state practice has increasingly confirmed the existence of an international obligation to avoid regressions in the process of democratization (at least if they are caused by military coups and similar forms of unconstitutional changes of government), it is up for debate whether this obligation is rooted in a distinctive international principle of democracy. As Petersen agrees, the core of the peoples' right to (internal) self-determination is not a principle of democracy but rather a principle of governmental 'representativeness' (at 89). International law thereby proceeds from the presumption that a government in effective control of a state's territory constitutes a legitimate expression of self-determination by the people belonging to the territory. This presumption is rebutted, however, if there is irrefutable evidence that a regime is not, or is no longer, 'representative' of the people as a whole.¹³ While, in general, clear-cut cases will be extremely rare, the relevant practice of the UN and a number of regional organizations seems to confirm that the unconstitutional repudiation of the will of the people expressed in free and fair elections

¹² Again, no detailed explanation is offered of the latter two categories of 'illegitimate' state conduct (self-enriching policies; systematic violations of fundamental rights), nor of their precise relation to the asserted teleological principle of democracy within the contemporary framework of international law.

¹³ S. Wheatley, *Democracy, Minorities and International Law* (2005), at 134.

is now seen as constituting such evidence.¹⁴ If this argument is accepted, the illegality – in terms of international law – of coups and other unconstitutional attacks against democratically elected governments ultimately results from a violation of the right of peoples to self-determination, rather than from a (de facto) regime's non-compliance with an overall highly opaque principle of 'democratic teleology'.

All this said, a clarification: while I disagree with (or, rather, challenge) some of the conceptual approaches taken and conclusions drawn by the authors of the books under review here, I nevertheless do not hesitate to recommend both studies to everyone interested in the vexing problems associated with the 'developing international law of democracy'.¹⁵ Regrettably, the fact that these new contributions – to what in my view is still one of the most exciting debates in international legal scholarship – are presently not available in the international lawyer's modern *lingua franca* will presumably impair their dissemination among a broader international audience. However, those who are able and willing to engage with the present books by Jean d'Aspremont and Niels Petersen will, in both cases, be rewarded with original and well-written studies entailing a wealth of information, extensive references to relevant literature, and a number of thought-provoking ideas. Indeed, while one may not share all arguments presented by the authors, their books make for a rich reading experience and

clearly help one better to understand international law's (still fairly modest) approach to the 'riddle of all constitutions'.

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¹⁴ The recent international condemnation of the June 2009 coup against the elected President of Honduras, Manuel Zelaya, provides a particularly illustrative example. Within days, the UN General Assembly condemned the coup, called upon states not to recognize the coup-based regime, and demanded 'the immediate and unconditional restoration of the legitimate and constitutional Government of the President of the Republic of Honduras . . . so that he may fulfil the mandate for which he was democratically elected by the people of Honduras': UN Doc A/RES/63/301 (1 July 2009), at para. 2.

¹⁵ Burchill, 'The Developing International Law of Democracy', 64 *MLR* (2001) 123.