Post-Conflict Administrations as Democracy-Building Instruments

Jean d'Aspremont
Post-Conflict Administrations as Democracy-Building Instruments
Jean d’Aspremont*

The period that stretches from the end of the Cold War until today has weathered the emergence of a large number of new states. With each addition, the international community has striven to regulate statehood and rein in its most erratic and unpredictable manifestations.¹ In particular, the international community has tried to affect what kind of political regimes are set up in these new states. The multi-dimensional administration established by States or International Organizations to (re)build governmental institutions in territories where the governments have floundered completely have constituted an useful instrument to reach that goal. This strategy, while costly, has not been unsuccessful. Through international administrations of territories, several states have been rebuilt or restored, all of them endowed with democratic institutions. It is the aim of this Article to analyze the use of international administrations of territories to create or to reconstruct democratic states. After briefly recalling the status of democracy in international law (Section I), the Article explains how modern administrations of territories have proven to be democracy-building machines (Section II). Finally, it offers a critical appraisal of the contemporary resolve of the international community to create democratic states (Section III).

I. PRELIMINARY REMARKS: DEMOCRACY IN INTERNATIONAL LAW

There is little doubt that the end of the Cold War and the sweeping fallout of that event on the international plane have impinged significantly on international law and some of its most fundamental principles. International legal scholars promptly recognized that the post–Cold War international legal order had become more amenable to the prominent role of democracy.

* Assistant Professor of Public International Law, University of Leiden.

¹ For a discussion of one example of this phenomenon, see generally Jean d’Aspremont, Regulating Statehood: The Kosovo Status Settlement, 20 Leiden J Intl L 649 (2007).
American liberal scholars, in particular, have enthusiastically supported the idea that democracy today plays a crucial role in the international legal order and have swiftly provided various optimistic accounts of the extent of the legal changes brought about by democracy.\(^2\) French positivist lawyers, although they have usually voiced greater skepticism and refrained from embracing the whole array of consequences that liberals attached to a lack of democracy, have also recognized that democracy can play a role in the international legal order.\(^3\)

Even if one does not agree with all the legal consequences that American liberals have associated with the emergence of democracy in the international legal order,\(^4\) it can hardly be contested that living up to some democratic standards corresponds with an international customary obligation. Indeed, contemporary practice shows that, to a large degree, states consider the adoption of the main characteristics of a democratic regime to amount to an international obligation and act accordingly toward nondemocratic states.\(^5\) It is of particular relevance that many nondemocratic states do not oppose the principle of democracy, and even claim that they are themselves in the midst of progress

\(^2\) The most radical liberal view on this question is probably offered by Fernando R. Tesón, *The Kantian Theory of International Law*, 92 Colum L Rev 53, 54–55 (1992) (presenting and defending the two Kantian arguments for the international human rights imperative). For milder forms of the democratic entitlement theory, see Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 Am J Intl L 46, 46 (1992) (“Democracy...is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”); Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 NYU J Intl L & Pol 289, 329 (1995) (“At a time when international organizations are routinely under attack for not solving all the world’s problems we should pause to marvel at the giant step that the recognition of democracy as an international human right portends for the peoples of the world.”). For an overview of how participatory rights emerged in international law, see generally Gregory H. Fox, *The Right to Political Participation in International Law*, 17 Yale J Intl L 539 (1992) (tracing the emergence of participatory rights in international law through the development of treaties and principles derived from UN-sponsored election monitoring guidelines and arguing that this process signals an emerging universal right to political participation). For a basic account of the arguments for and against the democratic entitlement theory, see generally Gregory H. Fox and Brad R. Roth, *Introduction: The Spread of Liberal Democracy and Its Implications for International Law*, in Gregory H. Fox and Brad R. Roth, eds, *Democratic Governance and International Law* 1, 11 (Cambridge 2000).


\(^4\) For one criticism of the liberal theories of democracy, see Jean d’Aspremont, *L’Etat non démocratique en droit international* (cited in note 3).

\(^5\) Id.
Post-Conflict Administrations as Democracy-Building Instruments
d'Aspremont

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

Nonetheless, this customary legal obligation to adopt a democratic regime
must not be exaggerated—such overreaching is where the aforementioned
liberal theories about democracy prove unconvincing. First, the scope \textit{ratione materiae }of the principle of democracy in international law is limited, as the
obligation rests on only an \textit{electoral} and \textit{procedural} understanding of democracy. States are customarily obliged to abide by democracy to the sole extent that their
effective leaders (or the parliamentary body that oversees their executive

\begin{itemize}
  \item For one example, consider the recent events in Pakistan. In particular, see the interview of
  President Musharraf on November 11, 2007, Carlotta Gall, David Rohde, and Jane Perlez,
  \textit{Rebuffing US, Musharraf Calls Crackdown Crucial to a Fair Vote}, NY Times A1 (Nov 14, 2007)
  ("Dressed in a dark business suit rather than his military uniform, General Musharraf spoke in a
  confident tone, saying the decree was justified because the Supreme Court had questioned the
  validity of his re-election, and because of the seriousness of threats from terrorists."). Musharraf
  has since stepped down from military leadership, see, for example, David Rohde and Carlotta
  Gall, \textit{In Musharraf’s Shadow, a New Hope for Pakistan Rises}, NY Times A3 (Jan 7, 2008) (describing
  President Musharraf’s decision to step down as army leader and serve as Pakistan’s civilian
  President). Also relevant are the developments in Myanmar. On this issue, see, for example, Seth
  Mydans, \textit{Myanmar Claims Step To Democracy, But Junta Still Grips to Power},Intl Herald Trib N3 (Sept
  4, 2007); see also Larry Diamond, \textit{Developing Democracy: Toward Consolidation} 8–9 (Johns Hopkins
  1999) (explaining that, while the electoral concept of democracy has expanded to address
  criticisms, it might still fail to address political marginalization that excludes significant segments
  of the population from exercising their democratic rights).

  \item See the criticism raised by d’Aspremont, \textit{L’Etat non démocratique} (cited in note 3).

  \item Gregory H. Fox, \textit{The Right to Political Participation in International Law}, in Fox and Roth, eds,
  \textit{Democratic Governance and International Law} 48, 49 (cited in note 2):

  \text{While democratic consequentialists argue persuasively that a whole range of}
  \text{civil rights and social prerequisites may be necessary for \textit{meaningful} popular}
  \text{consent, the fact of consent still lies at the heart of their theories. . . .}
  \text{International law’s modest approach to democratization, therefore, has}
  \text{focused on electoral processes.}

  For criticism of this “minimalistic” understanding of democracy, see Barry Gills, Joel Rocamora,
  and Richard Wilson, \textit{Low Intensity Democracy}, in Barry Gills, Joel Rocamora, and Richard Wilson,
  eds, \textit{Low Intensity Democracy: Political Power in the New World Order} 3, 21 (Pluto 1993); Diamond,
  \textit{Developing Democracy} at 8–9 (cited in note 6) (explaining that, while the electoral concept of
democracy has expanded to address criticisms, it might still fail to address political marginalization
that excludes significant segments of the population from exercising their democratic rights); J.
Roland Pennock, \textit{Democratic Political Theory} 3–15 (Princeton 1979); Richard Burchill, Book Review,
\textit{The Developing International Law of Democracy}, 64 Modern L Rev 123, 128 (2001) (reviewing Fox and
Roth, eds, \textit{Democratic Governance and International Law} (cited in note 2)); Russell A. Miller,
\textit{Self-Determination in International Law and the Demise of Democracy}, 41 Colum J Transnat L 601, 603–05
(2003) (criticizing Francis Fukuyama and Thomas Franck for adopting “anemic” definitions
of democracy in order to proclaim democracy’s triumph).

\end{itemize}
mandate) are chosen through free and fair elections. Likewise, this customary obligation, while being *erga omnes*, is certainly not of a *jus cogens* character, as it is underscored by the existence of numerous persistent objectors to that customary rule.

It would also be a mistake to consider the obligation to be democratic utterly groundbreaking. The development of a new customary norm in this area is unsurprising, given that international law has long regulated some aspects of states' political regimes. Through human rights law, the international community has regulated the way in which power is exercised. It has also prohibited some types of political regimes—for example, apartheid and, to a lesser extent, fascism. Moreover, the obligation to organize free and fair elections is not entirely new in the international legal order, as a similar obligation is already embedded in the International Convenant on Civil and Political Rights, which has been ratified by 161 States. It must be pointed out, however, that even if

---

10 Id at 291.  
11 The People's Republic of China and several states in the Middle East can probably be considered persistent objectors to that rule. See, for example, Andrew J. Nathan, *The Tiananmen Papers*, 80 Foreign Aff 2 (Jan/Feb 2001), adapted from Zhang Liang, compiler, Andrew J. Nathan and Perry Link, eds, *The Tiananmen Papers* (Public Aff 2001).  
13 In particular, see General Assembly Res No 36/162, UN Doc A/RES/36/162 (1981) ("Measures to be taken against Nazi, Fascist and neo-Fascist activities and all other forms of totalitarian ideologies and practices based on racial intolerance, hatred and terror.").  
15 See Status of Ratification of the Principal International Human Rights Treaties (June 9, 2004), available online at <http://www.unhchr.ch/pdf/report.pdf> (visited Apr 5, 2008). On the possible ratification of the ICCPR by the People's Republic of China, see Katie Lee, *China and the International Covenant on Civil and Political Rights: Prospects and Challenges*, 6 Chinese J Intl L 445 (2007) (evaluating the prospects for the ICCPR's ratification by the Chinese government and determining China will likely be receptive to prerequisite domestic legislative reforms); see also the signature of the ICCPR by Cuba on February 28, 2008 and the possible ratification in the
the international legal order enshrines a principle of procedural democracy applicable to the political regime of states, there is no corresponding requirement of democracy applicable to the structure and the functioning of the international legal system as a whole. This is not totally astonishing, given the inapplicability of the classical domestic blueprints of governance to the international system.\textsuperscript{16}

Despite its limited ambit, democracy has borne observable legal consequences. This is especially true in connection with the ability of states to take countermeasures to sanction violations of democracy. Indeed, notwithstanding the reserving clause adopted by the International Law Commission,\textsuperscript{17} there is a fair amount of practice as well as scholarship buttressing the idea that, in the case of the violation of democracy, all states—or at least those states party to the ICCPR, when the obligation only arises under that treaty—are entitled to take countermeasures against the offending state.\textsuperscript{18} Given the dramatic impact such sanctions may have, one should not underestimate the importance of such a remedy.

Leaving sanctions aside, it is paradoxical that the most significant effects that democracy may have in international law do not necessarily correspond to the legal consequences attached to its absence. Besides constituting a customary international legal obligation, democracy has become a fundamental criterion for the legitimization of governments in the sense that, nowadays, a new government hardly qualifies as the legitimate representative of a state if it has not been democratically elected.\textsuperscript{19} This formidable development is not a consequence of the obligation to have democratic institutions, but rests on the discretion of states to choose whether to recognize a new government. There is indeed no such obligation not to recognize nondemocratic governments. As mentioned above, the obligation to be democratic does not constitute a \textit{jus cogens}

\begin{footnotes}
\item On this question, see Jean d'Aspremont, \textit{Legitimacy of Governments in the Age of Democracy}, 38 NYU J Intl L & Pol 877 (2006).
\end{footnotes}
norm. Even if it were a *jus cogens* norm, it is not certain that a state, in recognizing a nondemocratic government, would also recognize as legal the violation of the obligation to be democratic.\(^\text{20}\) This discretionary practice of recognizing only new democratic governments—and despite the fact that States have toned down the solemnity of their recognition\(^\text{21}\)—does, however, bear substantially on the content of the rules of the international legal order, whose majority now constitute democratic states in the procedural sense mentioned above.

The same can be said about the emergence of new states on which this Article focuses. Statehood is an intrinsically factual phenomenon that remains outside the ambit of regulation by international law\(^\text{22}\)—let alone the influence of the criterion of legality on the recognition of a State.\(^\text{23}\) The mere fact that there is a customary obligation is of no direct consequence as regards the factual process leading to the (re)construction of a state. Prior to statehood, a nascent country is, *ex hypothesis*, not bound by any democratic obligation. The other countries or the international organizations that are supervising its (re)construction or administrating its territory in the transition period are not bound under international law to establish democracy as the political regime of the emerging state. The customary obligation to ensure that the determination of the executive powers be carried out through democratic elections does not embody an additional and specific obligation to guarantee that *any new states* be democratic.

Naturally, this does not mean that the emergence of new states is of no legal relevance.\(^\text{24}\) The foregoing only indicates that the protracted factual process that leads to the formation of a new legal subject unfolds irrespective of any international legal requirements pertaining to the type of institutions. In other words, the systematic creation of a democratic state through international administrations of territories by international organizations or individual states acting collectively could have occurred in the absence of an international obligation that compels states to be democratic. This is precisely why the practice related to the post-conflict restoration of states proves to be so remarkable. While not itself the result of the obligation to be democratic, the modern practice pertaining to the post-conflict administration of territories can, in turn, lead to dramatic transformation of the international legal system. Indeed, as post-conflict administrations favor the creation of democratic states, this

\(^{20}\) d'Aspremont, *L'Etat non-démocratique en droit international* at 151 (cited in note 3).

\(^{21}\) d'Aspremont, *Legitimacy of Governments* at 901, n 98 (cite in note 19).

\(^{22}\) See generally d'Aspremont, *Regulating Statehood* (cited in note 1).

\(^{23}\) See the difficulties pertaining to the application of the obligation not to recognize enshrined in Article 41 of the ILC Report at 113–16 (cited in note 18).

\(^{24}\) Id.
practice increases the number of democratic states in the international arena, thereby enhancing the customary obligation to be democratic. This is why it is of the utmost interest to briefly outline how new states are nowadays made democratic (Section II) and critically appraise the fundamental changes that this practice may provoke in the international legal order (Section III).

II. POST-CONFLICT ADMINISTRATIONS AS DEMOCRACY-MAKING BODIES

The phenomenon of a foreign state or an international organization administering a territory is not entirely new.\textsuperscript{25} The contemporary practice is nonetheless unprecedented in several respects. One novelty rests on the extent of powers that member states have been ready to bestow upon the organizations that have been involved in international administrations of territories. These powers very often exceed those with which these organizations originally were endowed. It is noteworthy that such an extension was hardly disputed by member states of the organization concerned.\textsuperscript{26} This Article is not concerned with these powers, but rather focuses on the other innovative dimension of these international administrations and, more especially, the types of institutions and governmental structure to which the restoration is directed. There is no need to refer extensively to a practice that has already been widely examined. It only matters for the sake of this Article to recall that the establishment of democratic institutions has been systematically included in the mandate of all post-conflict administrations since the end of the Cold War.\textsuperscript{27} It must be pointed


\textsuperscript{27} See generally Marc Cogen and Eric De Brabandere, *Democratic Governance and Post-Conflict Reconstruction*, 20 Leiden J Intl L 669 (2007). For an earlier account of this practice, see Jean
out that these post-conflict administrations mostly have been concerned with the establishment of electoral and procedural democracy. In that respect, the concept of democracy underlying this practice dovetails with the minimalist understanding of democracy reflected in international law as is explained above in Section I.

A. EARLY ATTEMPTS

Somalia probably constitutes the first case where international post-conflict administration was envisaged in the post-Cold War period, although the idea ultimately faltered. It is, however, Bosnia that saw the first actual implementation of post-conflict administration following the Dayton Agreement, which provided that “Bosnia and Herzegovina shall be a democratic state, which shall operate under the rule of law and with free and democratic elections.” Despite some recent political turmoil and serious difficulties looming large, it has never been disputed that Bosnia Herzegovina emerged as a democratic state.

B. EAST TIMOR, KOSOVO, AND IRAQ

1. East Timor

The international administration of the territory of East Timor has been the most wide-ranging post-conflict reconstruction operation to date. In accordance with the right to self-determination of the people of East Timor, the

---


28 For the contribution of post-conflict administrations to other dimensions of democracy, consider Cogen and De Brabandere, *Democratic Governance at* 685, 689 (cited in note 27) (describing freedom of association and freedom of expression as the two other pillars of democracy in post-conflict reconstruction situations).


30 Somalia probably constitutes the first case where international post-conflict administration was envisaged in the post–Cold War period, although the idea ultimately faltered. See generally id.


32 Bosnia and Herzegovina Const, art 1.2 (cited in 35 ILM 117 (1996)).

33 See Nicholas Wood, *Dire Bosnia Warnings Meet with Skepticism; Talk of Institutions Failing, or Conflict, Is Overblown, Many Analysts Maintain*, Intl Herald Trb N3 (Nov 20, 2007) (describing fears of crisis in Bosnia as largely exaggerated).
United Nations tried to organize a referendum to determine how the people of the territory wished to exercise that right.\textsuperscript{34} When violence ensued, the Security Council authorized the use of force,\textsuperscript{35} but subsequently set up the United Nations Transitional Administration in East Timor ("UNTAET") in accordance with the recommendation of the Secretary General.\textsuperscript{36} UNTAET was "endowed with overall responsibility for the administration of East Timor and ... empowered to exercise all legislative and executive authority."\textsuperscript{37} The Security Council also bestowed upon UNTAET the obligation to organize a new referendum\textsuperscript{38} in accordance with the requirements set by the International Court of Justice for the exercise of self-determination.\textsuperscript{39} The establishment of democratic institutions was not, however, directly included in the mandate devised by the Security Council. In the 1999 Resolution 1272, the Security Council highlighted the need to "carry out [this] mandate effectively with a view to the development of local democratic institutions, including an independent East Timorese human rights institution, and the transfer to these institutions of its administrative and public service functions."\textsuperscript{40} The duty of UNTAET had already been advocated by the UN Secretary General\textsuperscript{41} and reflected a consensus among major powers that the territory's institutions should be democratic.\textsuperscript{42} It is therefore not surprising that following its independence and upon its accession


\textsuperscript{36} See United Nations, \textit{Report of the Secretary-General on the Situation in East Timor}, UN Doc S/1999/1024, ¶ 26 (1999) (proposing, subject to Security Council approval, the establishment of a transitional administration in East Timor, which "would be empowered to exercise all legislative and executive authority, including the administration of justice").


\textsuperscript{38} Id at ¶ 8. See also United Nations, \textit{Report of the Secretary-General on the Situation in East Timor} at ¶ 32 (cited in note 36).

\textsuperscript{39} See Advisory Opinion No 61, \textit{Western Sahara}, 12 ICJ ¶ 58 (1975).

\textsuperscript{40} Security Council Res No 1272 at ¶ 8 (1999) (cited in note 37).

\textsuperscript{41} United Nations, \textit{Report of the Secretary-General on the Situation in East Timor} at IV (cited in note 36) (proposing the establishment of a United Nations Transitional Administration in East Timor, to be "endowed with the overall responsibility for the administration of East Timor" and "empowered to exercise all legislative and executive authority, including the administration of justice").

to the United Nations in 2002, East Timor could claim to be a democratic state. Despite some unrest, the successive elections organized in East Timor confirmed the democratic character of this new state. On top of underpinning the earlier practice of creation of democratic states by post-conflict administrations, the case of East Timor also demonstrated that the exercise of classical self-determination in the context of decolonization must now lead to the emergence of a democratic state.

---


44 This development was in line with the various agreements pertaining to the future exercise of self-determination by the people of Palestine. See, for example, Israel-Palestine Liberation Organization, Declaration of Principles on Interim Self-Government Arrangements (1993), 32 ILM 1525, 1528, art III.1 ("In order that the Palestinian people in the West Bank and Gaza Strip may govern themselves according to democratic principles, direct, free and general political elections will be held for the Council under agreed supervision and international observation."). See also US Department of State, Press Statement, A Performance-Based Roadmap to a Permanent Two-State Solution to the Israeli-Palestinian Conflict (Apr 30, 2003), available online at <http://www.state.gov/r/pa/prs/ps/2003/20062.htm> (visited Apr 5, 2008):

A two-state solution to the Israeli-Palestinian conflict will only be achieved through an end to violence and terrorism, when the Palestinian people have a leadership acting decisively against terror and willing and able to build a practicing democracy based on tolerance and liberty, and through Israel's readiness to do what is necessary for a democratic Palestinian state to be established...

The idea that the exercise of classical self-determination must lead to the emergence of a democratic State is also reflected in President George W. Bush's wish of an agreement between Israel and Palestine to negotiate a peace treaty by the end of 2008. See President George W. Bush, Address at the Annapolis Conference (Nov 27, 2007), available online at <http://www.whitehouse.gov/news/releases/2007/11/20071127-2.html> (visited Apr 5, 2008) ("We meet to lay the foundation for the establishment of a new nation: A democratic Palestinian state that will live side by side with Israel in peace and security."). For reporting on President Bush's remarks at the Annapolis Conference, see Steven Lee Myers and Helene Cooper, Middle East Treaty Vowed by End of 2008; Agreement Creates Structure for Talks, but Doesn't Address Fundamental Issues, Intl Herald Trib N1 (Nov 27, 2007). On the exercise of self-determination and the creation of democratic states, see d'Aspremont, La creation internationale d'Etats democratiques at 889 (cited in note 27).
2. Kosovo

It rapidly became clear that the post-conflict administration in East Timor would not remain unique. Indeed, the humanitarian disaster in Kosovo and the violations of human rights in that territory prodded the Member States of NATO to launch the bombardment of Yugoslavia. Falling short of determining the final status of that territory, the international community established a new post-conflict administration. Contrary to the situation in East Timor, there was no doubt that this administration was endowed with an express mandate to build democratic institutions on that territory. It was subsequently clarified by the international community that whatever the final status of the territory would be, the democratic character of the Kosovar institutions could not be questioned. This was confirmed by the regulations adopted by the United Nations Mission in Kosovo (“UNMIK”). The 2007 Kosovo Status Settlement devised by the UN Special Envoy echoed this objective. Indeed it was made clear that the new territory would not be recognized as a state or admitted to the United Nations and the Council of

---


47 But see the abstention of the People’s Republic of China on the occasion of the vote on UN Security Council Res 1244. UN SCOR 54th Sess, 4011th mtg at 9, UN Doc S/PV.4011 (1999). See also Peter Hilpold, Humanitarian Intervention: Is there a Need for a Legal Reappraisal? 12 Eur J Intl L 437, 441 (2001) (“It was also the G8 which drafted Security Council Resolution 1244 adopted on 10 June 1999 with 14 votes in favour and only China abstaining.”).

48 See UN Security Council, Statement by the President of the Security Council, UN Doc S/PRST/2003/26 (2003) (“The Security Council recalls the eight standards, namely: functioning democratic institutions; rule of law; freedom of movement; returns and reintegration; economy; property rights; dialogue with Belgrade; and the Kosovo Protection Corps.”). For further details, see d’Aspremont, 20 Leiden J Intl L at 649 (cited in note 1).

Europe if it failed to be democratic.\textsuperscript{50} Although the Kosovo Status Settlement has not been endorsed by the Security Council and the admission of Kosovo to the United Nations seems barred by Russia, the substance of the Settlement’s main provisions has inspired the behaviors and the reactions of most western countries following the unilateral declaration of independence adopted on 17 February 2008.\textsuperscript{51}

3. Iraq

Although not constituting a full-fledged post-conflict administration, the powers exercised by a few states in Iraq were also directed at the establishment of a new democratic governmental apparatus. The democratic requirement did not, however, concern the interim government, as the interim government was only due to be representative of the various political, religious, and ethnic components of the Iraqi society, and was not required to be duly elected.\textsuperscript{52} It was not until Resolution 1546 (2004) that the Security Council pointed to the need to establish a democratic government in Iraq and confirmed the importance of holding direct democratic elections.\textsuperscript{53} On June 28, 2004, the Coalition occupation of Iraq ended, and the Coalition Provisional Authority ("CPA"), which had administered Iraq since the fall of the former regime, was dissolved. An appointed Iraqi interim government wielded authority from June 2004 until the Transitional Government of Iraq was formed in May 2005 by the

\textsuperscript{50} For an analysis of the Kosovo Status Settlement, see d’Aspremont, 20 Leiden J Intl L at 649 (cited in note 1).

\textsuperscript{51} See, for instance, the European Union COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, which corresponds to the mission envisaged in the UN Kosovo Status Settlement, Official Journal, L 42/92 (Feb 16, 2008); see also U.S. and EU Powers Recognize Kosovo as Some Fear Precedent, Intl Herald Trib (Feb 18, 2008), available online at <http://www.iht.com/articles/reuters/2008/02/18/europe/OUKWD-UK-KOSOVO-SERBIA.php> (visited Apr 5, 2008). The late recognition of the Netherlands is particularly in line with the UN Kosovo Status Settlement as this country postponed its recognition to ascertain that the new entity will abide by human rights. The recognition by the Netherlands is noted in Angry about Kosovo, Serbian Nationalist Urges Unity Toward EU, Int Herald Tribune (Mar 4, 2008), available online at <http://www.iht.com/articles/2008/03/04/europe/serbs.php> (visited Apr 5, 2008), while the conditions upon which the recognition of the Netherlands were based are mentioned in The Netherlands Recognizes Kosovo, New Kosovo Report (Mar 4, 2008), available online at <http://www.newkosovareport.com/20080304694/politics/-The-Netherlands-recognises-Kosovo.html> (visited Apr 5, 2008).


Post-Conflict Administrations as Democracy-Building Instruments

Transitional National Assembly, members of which were directly elected for this purpose by the Iraqi people in January 2005. Even though the establishment of democratic institutions in Iraq did not ultimately ease the violence, it confirmed the similar practice observed in the cases of Bosnia, East Timor, and Kosovo.

III. THE DEMOCRATIC STANDSTILL AND THE MARCH TOWARD A UNIVERSAL COMMUNITY OF DEMOCRATIC STATES

The practice pertaining to the creation and restoration of states outlined in the previous section demonstrates that there is hardly any example of the creation/restoration of a new state in which the international community is involved where that state is not endowed with democratic governmental structures. It is worth mentioning that the trend is not limited to post-conflict administration, but also embodies the exercise of classical self-determination and the reconstructions of states short of any exercise of power by an international organization or foreign states. Against this backdrop, one can hardly dispute the manifest leaning towards the establishment of democracy by the international community whenever it or some of its members partake in the configuration of new states.

The relevance of the aforementioned international creation of democracies must be read in conjunction with the contemporary practice pertaining to coups d’etat especially when they come at the expense of democratic governments. Today, the community of states does not tolerate democratic states being stripped of their democratic trappings. Governments that seize power through a coup d’etat against a democratic government are systematically denied representation within international organizations, typically through nonrecognition or refusal of accreditation. This means that, on the one hand,
new states are provided with democratic structures or encouraged to adopt them and, on the other hand, that those states that are democratic can no longer change their political regime to a less democratic form of government. In other words, as soon as a nondemocratic state has made a significant leap towards democratic governance, the international community no longer tolerates this state shedding its commitments to democracy. These two phenomena—international creation of democratic states and rejection of coups d'états against democratic governments—thus constitute the bedrock of what can be seen as a principle of democratic standstill. This corresponds to the idea that a newly reached status cannot be legitimately downgraded, a principle already enshrined in human rights law. As far as democracy is concerned, it would of course be an exaggeration to interpret this tendency as reflecting any international legal norm similar to that which exists in human rights law. The practical fallout nonetheless remains the same: democratic states cannot expunge the democratic attributes of their political regime.

This democratic standstill that permeates contemporary practice is symptomatic of the ineluctable character of democracy's success. There is little doubt that more and more states will become democratic in the procedural and electoral sense described in Section I. It must be highlighted that this seemingly

---

57 In the 1990s, the UN accredited five governments that lacked actual territorial control over their respective states—Haiti, Sierra Leone, Cambodia, Liberia, and Afghanistan. See, for example, the decisions of the UN General Assembly Credentials Committee pertaining to the competing claims by the authorities in Liberia. United Nations, Credentials of Representatives to the Fifty-Second Session of the General Assembly, UN Doc A/52/719 ¶ 8 (1997). Consider Matthew Griffin, Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through Its Accreditation Process, and Should It?, 32 NYU J Int L & Pol 725, 725 (2000) (arguing "that though the Credentials Committee has begun, at least selectively, to take account of democracy, it is far from adopting a rule, in the sense of a legal rule of universal application, that limits participation in the General Assembly to representatives of democratic governments"). See generally Fox, The Right to Political Participation in International Law at 588–607 (cited in note 2) (suggesting, in 1992, that the UN should enforce the international obligation of participatory democracy by linking election results to accreditation).

compelling march toward a global community of democratic states does not stem from any dogmatism or allegedly universal values—and it is precisely the absence of dogmatism which bolsters the movement’s success. In other words, it is argued here that the significant espousal of the democratic pattern draws upon the practical effects of democracy. It is because (procedural) democracy boils down to a successful means to foster effectiveness of governments that it has thrived. Indeed, a government that is deemed democratic by the international community will enjoy a greater international effectiveness. Likewise, a government that rests on democratic elections—provided that the electoral process has been successfully completed—will enjoy a much stronger internal effectiveness. The success of the democratic model of governance draws on these significant practical benefits, more than the values that it may represent.

This consensus on the positive practical effects of democracy does not necessarily signal that the emergence of a universal community of democratic states is in sight. The rise of powerful nondemocratic states may delay that ambition for some decades. As illustrated by the rise of the People’s Republic of China and its increasingly influential foreign policy, conditioning economic and trade benefits on democratic requirements may take a back seat. In a world where democratic states already constitute a solid majority and are growing in number—thanks to the use of post-conflict administrations to build democratic states, among other things—and where the rules of the international legal order now show amenability to democracy, the impediment that these few states may

---


60 *Efficacité* is a term of art, without a true equivalent in English. It means that the government has an effective character, that its power is confirmed by the facts.

61 On the distinction between internal and external efficacité, see d’Aspremont, 38 NYU J Intl L & Pol at 901 (cited in note 19). See also d’Aspremont, 20 Leiden J Intl L at 654–655 (cited in note 1) (“There is no doubt that an entity, however well-defined its population and territory may be, whose government machinery lacks internal and international efficacité cannot qualify as a state.”) (responding to Joe Verhoeven, *La Reconnaissance Internationale: Désin ou Renouveau?*, 39 Annuaire Français de Droit International 7 (1993)).

62 Regarding the dwindling influence of the conditionality of European foreign policy, take as an example the Africa–EU Summit (Dec 8–9, 2007). In particular, see Stephen Castle, *Disputes Deepen at EU–Africa Summit; Trade Deal Spurned, and Mugabe’s Peers Reject Rights Pressure*, Intl Herald Trib N1 (Dec 10, 2007) (explaining how the “gathering designed to help Europeans retain their traditional influence in Africa . . . has been challenged by the rise of China”); Stephen Castle, *A Newcomer in the EU’s Backyard; EU Seeks To Counter Chinese Influence in Africa at Summit*, Intl Herald Trib N3 (Dec 8, 2007) (describing how although European leaders’ concerns about human rights abuses in Africa had delayed plans to hold the summit, China’s growing economic influence in Africa forced European leaders to attend).
cause does however not seem to suffice to thwart, in the long run, the march toward a world where all States will live up to procedural democracy.