

Summary

On the Legitimacy of Governments under International Law⁹⁴¹

Democracy has for a long time been a non-issue in international law. In 1986, the International Court of Justice declared in his Nicaragua judgment that customary international law did not contain any norm concerning the internal form of government. In the terms of the court, everything else would make nonsense of the principle of State sovereignty. This predominant view in international law scholarship changed dramatically in the 1990ies, after the end of the ideological dichotomy of the Cold War. The new interventionism of the UN Security Council and a large number of newly emerging democracies in Latin America, Asia and Africa led to a widespread euphoria about democracy. Francis Fukuyama predicted the end of history, and legal scholars started to discuss the emergence of a right to democratic governance.

Nearly two decades after the fall of the Berlin Wall, the democracy euphoria of scholars in international relations and international law has cooled down considerably. Democracy is not the cure-all it was widely considered to be. Moreover, the third wave of democratization was weaker in the end than many observers had foreseen in the beginning of the 1990s. Even though there is nearly a consensus in philosophy and political sciences that, in the long run, there can be no suitable alternative to democracy as a form of state, we have seen that democratization is not purely a simple change of the political status. Instead, it is a long-term and complex social process and its preconditions are still very much under discussion in social science research (Chap. 1).

This contribution has attempted to meet these concerns by framing democracy as a teleological principle. In international law, democracy is neither an absolute right nor a strict obligation (Chap. 2). The identified norm rather focuses on the process-like character of democratization.

⁹⁴¹ For a more extensive elaboration of the argument see *N. Petersen*, *The Principle of Democratic Teleology in International Law*, 34 *Brooklyn Journal of International Law* (forthcoming 2008)

In this respect, it has two dimensions: on the one hand, states have to enter into a progressive development towards democracy. Such an obligation can be deduced from declarations of the United Nations General Assembly. An analysis of different resolutions, such as those on the enhancement of elections or on the promotion and consolidation of democracy, shows that these rather use a process-oriented than a strictly prescriptive language. They stress democratization rather than democracy. However, as we are unable to identify ideal ways of democratization, this obligation does not lead to a concrete duty of action. Governments rather have a wide margin of appreciation. The bottom line is that only those governments have to be considered illegitimate, which' policy is clearly directed against the interests of the own population.

The principle of democratic teleology also has a second dimension: it is directed against regressions in the process of democratization. Such regressions may be coups d'état against legitimate governments. However, they may also concern setbacks, which are not accompanied by military force, such as the steady dismantling of the rule of law. This prohibition of regressions in the process of democratization is highlighted by several precedents. The most prominent are the UN Security Council backed interventions in Haiti and Sierra Leone in order to restore the constitutional order in these countries. Moreover, the OAS and the African Union have established sanction mechanisms, which are directed against unconstitutional changes of government within their member states.

Because of the binary character of legal norms, lawyers like to have clear standards. Karl-Heinz Ladeur once offered a metaphor in which he compared the law to a blind man who uses a stick in order to scan the ground on which he is walking. In this process, he always makes the distinction between a stable and an unstable ground. In so doing, he creates a system of orientation without being able to evaluate the world in its whole complexity. Lawyers act in a similar fashion when they merely ask about the legality or the illegality of certain actions or conditions. In this context, they need standards that allow them to make clear binary distinctions. The stricter legal standards are, the higher the determinacy of legal norms is. Against this background, the proposed legitimacy principle does not deserve very good marks. Whether a state has held elections or not is a question of fact that can be answered quite easily. In contrast, the question whether a government acts in the interest of its population requires difficult normative valuations.

However, strict normative standards do not always take into account the complexity of reality. Martti Koskenniemi has shown in his disser-

tation that the determinacy of international legal norms is always subject to a necessary structural deficit. According to Koskeniemi, absolute legal standards are always either over- or under-inclusive. International law thus suffers from an inherent tension between determinacy and justice. The more determinate legal standards are, the less apt they are to take into account the complexity of reality; and the more they adjust to complexity, the less determinate they are. International law, in particular, depending in its effectiveness on the acceptance of the actors it addresses, cannot afford to impose strict standards if the evaluation of different circumstances and strategies is as diverse as in the context of global democratization.

The third and final chapter of this book is dedicated to the consequences of the legitimacy principle for the international legal order. The fact that governments have to be legitimate does not lead a change in the doctrine of state or government recognition. There are good reasons to separate these two issues and to keep effectiveness of governments as the key constituent element for sovereign power. However, the international community may impose sanctions against states with illegitimate governments. Although unilateral military interventions have to be considered illegal, the UN Security Council may authorize collective military interventions. Furthermore, states have the right to act individually on the basis of non-military sanctions.

Another consequence of the legitimacy principle has an indirect effect. An illegitimate regime does not have the competence to enter into legal relationships which are not in the interest of the population. Debts resulting from such relationships are odious. They are obligations of the regime, not of the state. This concept has, furthermore, consequences for the practice of borrowing members of the World Bank or the IMF. The international financial institutions are not allowed to give loans to illegitimate regimes if they cannot ensure that the purpose of the loan can be implemented effectively. Finally, the legitimacy principle has implications for nation and constitution building in post conflict situations. In these circumstances, the principle of democratic teleology provides for the necessary flexibility. It does not stipulate that sovereign power has to be transferred to local elites as quickly as possible. Rather, it allows for an international transitional administration to ensure the essential stability in instable phases of national consolidation.