

# STATEHOOD AND SELF-DETERMINATION

Reconciling Tradition and Modernity  
in International Law

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takeover of certain functions traditionally exercised by states. The creation of international organisations at the regional or supranational level is not necessarily threatening to the current conception of statehood. The type of legitimacy used to assess the authority of international organisations determines assessment of the alleged weakening of state sovereignty.

As long as international organisations are viewed as deriving their legitimacy from the powers that have been conferred to them by the member states of that organisation, and the exercise there of in conformity with these powers, this reinforces rather than weakens the position of states. However, if one takes into account the recent inclination of certain international organisations to establish a form of legitimacy through several forms of direct or popular legitimacy, supranationalism can amount to a theoretical weakening of the current conception of state sovereignty. In the view of the developments described, one can easily see a trend which tends to remove the legitimacy of the existence of the international organisation, and the exercise of the assigned functions by that organisation, from the sole prerogative of states.

However, I have questioned whether this phenomenon implies either a threat to the sovereignty of states, or a weakening of the central role of states in international law and international relations. The tendency to rely more on a form of legitimacy which depends on the consent of the population clearly shows that in certain institutions, the consent of states as the primary legitimating factor is being complemented by the consent and/or control by the population directly affected by measures taken by that organisation. To that extent, it is clear that the state, although in a limited way, is losing part of its exclusive control over the legitimacy process. Such an evolution is not as dramatic as it might seem on first sight, especially considering that states not only remain the primary actors in the creation and functioning of international organisations, but also in ensuring the legitimacy of the organisation. The legitimacy of international organisations resting on the direct consent or approval of the population is still in its infancy, and it is doubtful whether this form of legitimacy will ever be able fully to replace state-centred legitimacy.

## Democracy out of instrumental reason? Global institutions and the promotion of liberal governance

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### I. Introduction

The recent wave of popular uprisings in the Middle East suggests that the value of democracy has universal appeal across cultures and religions. These events once again raise the question whether the international community should support internal democracy, and if so, in what manner it should do so. For its part, international law had historically little interest in domestic politics and took an agnostic attitude towards the political organization of power within states. Only in the 1990s did the political form of government become an issue of concern to international legal scholarship.<sup>1</sup> In the wake of third wave democratization,<sup>2</sup> the thesis of an emerging democratic entitlement argued for international law's embrace of multi-party democracy, elevating a Western ideal to a global legal standard. For a number of commentators, the altered geopolitical context of the post-Cold War, characterized by an 'almost-complete triumph of the democratic notions of Hume, Locke, Jefferson

<sup>1</sup> See G. H. Fox and B. R. Roth 'Introduction: The Spread of Liberal Democracy and its Implications for International Law' in G. H. Fox and B. R. Roth (eds.), *Democratic Governance and International Law* (Cambridge University Press, 2000), pp. 1–22; and other contributions in the volume.

<sup>2</sup> Describing the spread of modern democracy, Samuel P. Huntington distinguished between three waves of democratization. The first had its root in the American and French revolutions of the late eighteenth century; the second followed allied occupation after World War II; the third wave began with the overthrow of dictatorships in Southern Europe, then spread to Latin America and parts of Asia, before reaching the Soviet Union and the Baltic Republics. See S. P. Huntington, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press, 1991).

and Madison<sup>3</sup> in many parts of the world, raised the prospects for the crystallization of liberal democracy into a global norm.

The ensuing years, however, demonstrated that the end of the Cold War had not led to the anticipated 'political unification of the world'.<sup>4</sup> Although the number of formal democracies had increased considerably by the end of the twentieth century, the rise of powerful non-democratic states precluded the emergence of a unipolar world order based on one political system adopted by all states. Democracy, though often invoked in international fora, never attained a determinate content in international law. Rather than viewing democracy as a legal requirement, states preferred to invoke it as a political ideal with vague contours. No global consensus that ascribes to one form of domestic order exclusive legal legitimacy has emerged within the international community to date.

Yet, in spite of this lack of agreement, international institutions have increasingly engaged in the replication of the liberal model of the state. Moral, security and economic concerns have placed increased focus on domestic governance, widening the remit of outside intervention. Within the context of state-building operations and good governance programmes, global actors have shaped the form of domestic institutions to an unprecedented level. Acting on the assumption that liberal governance is instrumental for the achievement of sustainable peace and development, international organizations have come to view this particular form of political organization within a state as the basic governance template for strife-ridden under-developed countries.

The chapter aims to highlight this institutional practice which has promoted liberal governance in an instrumental manner and to reflect on its consequences for international law. To better appreciate the nature of this practice, section II reviews the lack of post-Cold War consensus within the international community on any one form of domestic order. Despite the high expectations for a liberal democratic world order following the end of the Cold War, discussions on democracy within international fora have pointed to the lack of a global consensus on democratic government as a legal requirement for all states. Against this background, section III describes the replication of liberal institutions at the domestic level within the context of post-conflict peace-building operations and

development assistance. The chapter focuses on the contribution of the United Nations (UN) and the World Bank. Both organizations are global actors that are not mandated by their constitutive agreement to promote a particular political system within states. Notwithstanding their global character, both actors have taken on a leading role in the promotion of democracy and good governance. In doing so, they have adopted an instrumental approach given the perceived factual benefits that liberal democracy has for the achievement of peace and development. The chapter concludes by providing an assessment of the consequences of this development on international law. It will be argued that current practices constitute a profound challenge to international law's traditional principle of regime neutrality and its underlying conception of a pluralistic world order.

## II. The lack of post-Cold War consensus on one form of domestic order

Prior to the end of the Cold War, the form of a state's government did not receive much attention in international law. Although the right to free elections had been part of the international bill of human rights that developed in the UN era,<sup>5</sup> Cold War tensions precluded any substantive engagement with the scope of this right – let alone its implications for the form of government a state had to choose. With the exception of the condemnation of the system of apartheid,<sup>6</sup> the form of domestic political organization within states was generally regarded as a matter beyond the reach of international law.<sup>7</sup>

The end of the bipolar political order in 1989, however, seemed to afford an opportunity to radically break with international law's regime

<sup>3</sup> T.M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *American Journal of International Law*, 49.

<sup>4</sup> C. Mouffe 'Democracy in a Multipolar World', (2009) 37 *Millennium: Journal of International Studies*, 553.

<sup>5</sup> Art. 21 Universal Declaration of Human Rights, UNGA Res. 217 A (III) (10 December 1948) GAOR 3rd Session Part I Resolutions 71; Art. 25 International Covenant on Civil and Political Rights (adopted 19 December 1966, entered into force 23 March 1976) 999 UNTS 171.

<sup>6</sup> See, e.g., UNGA Res. 1761 (XVII) (6 November 1962) and A/RES/36/162 (16 December 1981).

<sup>7</sup> In this sense, see ICJ judgment, *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)* ICJ Rep. 1986, 14. As late as 1986, the World Court declined to find Nicaragua internationally accountable in the conduct of elections. Commenting on the Court's attitude, James Crawford observed that '[t]he holding of free elections was treated still as essentially a matter of "domestic policy"'. See J. Crawford, 'Democracy and the body of international law' in Fox and Roth (eds.), *Democratic Governance and International Law*, p. 100.

neutrality. In the 1990s a number of international legal scholars argued for the emergence of a democratic norm in international law. What became known as the democratic entitlement school was a group of scholars who claimed that the trend towards democratization in international relations had altered international law. In his influential article, 'The Emerging Right to Democratic Governance', Thomas M. Franck argued that liberal democracy was on the way to becoming a global entitlement which required 'democracy to validate governance'.<sup>8</sup> He predicted the emergence of a new world in which 'citizens of each State [would] look to international law and organization to guarantee them fair access to political power and participation in societal decisions'.<sup>9</sup> Proponents of the democratic entitlement asserted that the political participatory norms enshrined in international human rights instruments in the post-Cold War era had finally achieved a 'determinate content grounded in liberal-democratic institutional practices'.<sup>10</sup> Since the right to political participation pertains to the 'fundamental question of who holds sovereign authority within a State', it impacts on the freedom of states to choose a political system. The question of regime legitimacy would thus be conditioned upon the 'fulfilment of liberal-democratic participatory standards', making the traditional understanding of state sovereignty 'outmoded'.<sup>11</sup>

These propositions appeared to be largely informed by the commentators' empirical observations about the increasing acceptance of liberal democracy beyond the confines of Western states. In Franck's account, the formation of the democratic entitlement in international law 'is due in part to the very recent political reality of a burgeoning pro-democracy movement within States that constitutes the world community'. As a consequence of the continuing spread of democracy movements he viewed the 'entitlement now aborning' as 'widely enough understood to be almost universally celebrated'.<sup>12</sup> Similarly, Cerna asserted that 'Western ideas have gained the legitimacy and currency of universal values'.<sup>13</sup> She characterized 'the right to live under a democratic form of government' as having achieved 'universal recognition', pointing to

<sup>8</sup> Franck, 'The Emerging Right to Democratic Governance', 47. <sup>9</sup> Ibid. at 50.

<sup>10</sup> As formulated by Fox and Roth (eds.), 'Introduction', p. 11.

<sup>11</sup> G. H. Fox 'The Right to Political Participation in International Law', (1992) 17 *Yale Journal of International Law*, 592, 595.

<sup>12</sup> Franck, 'The Emerging Right to Democratic Governance', 90.

<sup>13</sup> C. Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', (1995) 27 *New York University Journal of International Law and Politics*, 290.

the proliferation of regional instruments and mechanisms in support of democracy.<sup>14</sup>

Yet, arguments in favour of the democratic norm thesis seemed not only driven by the continuing expansion of liberal democracy.<sup>15</sup> Rather than merely describing a legal development occurring, most commentators also took the view that international law *should* embrace democracy. For some, international law's perceived turn to democracy followed a long overdue moral imperative. Not only was international law's regime blindness an 'anachronism' – it was also morally indefensible. While Tesón expressed sympathy for the reluctance of international lawyers to 'forsake the statist assumptions of classical international legal discourse', he saw the time ripe for a re-conceptualization of that discourse as 'a more liberal world needs a more liberal theory of international law'.<sup>16</sup> According to his 'Kantian' theory of international law, it was only through a society of liberal democratic states that a just international order could be achieved. That order also brought the promise of peace among nations, as democratic governments that were accountable to their peoples were less likely to engage in war than autocratic ones whose contempt for human rights at home made an aggressive foreign policy more likely.

In addition to the furtherance of human rights, justice and peace, the democratic entitlement was also seen to promote greater prosperity, 'open[ing] the stagnant political economies of states to economic, social and cultural, as well as political development'.<sup>17</sup> Finally, the democratic norm thesis also appealed to international lawyers for structural reasons, promising to remedy the legitimacy-deficit of international decision-making.<sup>18</sup> As Eric Stein observed, 'a tension prevails between the currently expanding acceptance of the idea of democracy and the growth of diverse international organizations and regimes'.<sup>19</sup> The prospect for a norm requiring democratic governance at the domestic level provided at least a fig leaf of popular legitimation.

<sup>14</sup> Ibid. 291.

<sup>15</sup> For a critical account of the underlying assumption of the democratic entitlement thesis, see S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford University Press, 2000).

<sup>16</sup> F. R. Tesón, *A Philosophy of International Law* (Boulder, CO: Westview Press, 1998), p. 1.

<sup>17</sup> Franck, 'The Emerging Right to Democratic Governance', 90.

<sup>18</sup> See contributions in R. Wofrum and V. Röben (eds.), *Legitimacy in International Law* (Heidelberg, Berlin: Springer, 2008).

<sup>19</sup> E. Stein, 'International Integration and Democracy: No Love at First Sight', (2001) 95 *American Journal of International Law*, 489.

The post-Cold War expectations concerning democracy's normative value in international law can be rather sharply contrasted with the continuing diversity of views on democracy expressed by states. Although the number of (formal) democracies within the UN did increase following third-wave democratization, the world organization continued to include ideologically diverse states. In contrast to regional organizations in Europe,<sup>20</sup> the Americas<sup>21</sup> and Africa,<sup>22</sup> which had all expressed a commitment to democracy as a legal standard after the end of the Cold War, no comparable development had taken place within the United Nations. Given the substantial number of states which remained non-democratic at the end of the twentieth century,<sup>23</sup> it may not be surprising that a cross-cultural consensus on liberal democracy as a legal requirement for all states was never articulated within UN bodies – even though resolutions and declarations invoking democracy proliferated with the end of the bipolar order.

Since the end of the 1980s the General Assembly has adopted a series of resolutions on the principle of genuine periodic elections. While the first of these resolutions, entitled 'Enhancing the effectiveness of the principle of periodic elections', attempted to define democratic processes, specifying the need for an electoral process which 'accommodates distinct alternatives',<sup>24</sup> subsequent resolutions adopted under the same

<sup>20</sup> The Council of Europe, the first regional organization which was founded in Europe after World War II, envisioned the construction of a new Europe founded on the principle of democracy; see Statute of the Council of Europe (signed 5 May 1949, entered into force 3 August 1949) CETS No 1. The EU, although initially focused on integration through economic cooperation, also developed into a value community, making democracy a condition of ongoing membership in Art. 7 TEU. Europe's most inclusive organization, the Organization for Security and Co-operation in Europe, has similarly made democracy the only system acceptable within it; see, e.g., Charter of Paris for a New Europe (done and entered into force 21 November 1990) (1991) 30 ILM 190.

<sup>21</sup> While the 1948 Charter of the Organization of American States (entered into force 13 December 1951, 119 UNTS 3) made reference to the principle of 'representative democracy', it was only in the post-Cold War era that democracy effectively became a regional standard of governance. See, e.g., OAS Resolution 1080 'Representative Democracy', adopted 5 June 1991, OEA Ser. P, AG/RES.1080; Protocol of Washington, adopted 14 December 1992, OEA/Ser. A/2 Add. 3; Inter-American Democratic Charter, adopted 11 September 2001, www.oas.org.

<sup>22</sup> In contrast to the Organization of African Unity, the African Union commits its members to promote and defend democracy. See Art. 3(g) and Art. 30 Constitutive Act of the African Union (done 11 July 2000, entered into force 26 May 2001) 2158 UNTS 3.

<sup>23</sup> According to the 1999 survey of Freedom House, over one-third of all states could not be classified as democracies. See www.freedomhouse.org.

<sup>24</sup> A/RES/43/157 (18 December 1988).

title could not sustain this commitment to multi-party pluralism and used more evasive language.<sup>25</sup> This series of resolutions was, moreover, accompanied by counter-resolutions, entitled 'Respect for the principle of national sovereignty and non-interference in the internal affairs of states in electoral processes'.<sup>26</sup> A frequent inclusion in both types of resolutions was the statement that there was 'no single political or electoral method that is suited to all nations and their people'. Rather than affirming a legal requirement for all states to hold multi-party elections, these resolutions expressed a more ambiguous attitude towards democratic standards of governance.<sup>27</sup>

Discussions on democracy within the now defunct Human Rights Commission did not fare much better in establishing the parameters of democracy's legal content. The debate within the Commission concerning the Resolution 'Promotion of the Right to Democracy 1999/57' is particularly illustrative of the misgivings many states had in defining democracy as a right. The Representative of the United States, the main sponsor of the resolution, had noted at the outset that 'it was time that all members of the Commission supported the notion that the right to democratic governance was not just a privilege...but a fundamental human right'.<sup>28</sup> Yet, it was precisely the legal characterization of democracy as 'right' that caused most controversy within the Commission. India's representative stated that his delegation would have preferred omitting any reference to the concept of a right, as the proposed title 'raised questions and legal issues that found little support in international human rights instruments'. Pakistan's delegate also voiced doubts about the title of the resolution, expressing hope that it 'was used in a political and ethical sense rather than in a legal one'. Similarly, the Russian Federation, though supportive of the 'ideas contained in the resolution', argued that 'the concept [of a right to democracy] required further discussion by experts in intergovernmental forums'. Cuba considered the resolution 'a dangerous precedent', proposed that the title be changed to 'Promotion of Democracy', and asked that a separate vote

<sup>25</sup> E.g., A/RES/44/146 (15 December 1989); A/RES/45/150 (18 December 1990); A/RES/46/137 (17 December 1991).

<sup>26</sup> E.g., A/RES/44/147 (15 December 1989); A/RES/58/189 (22 March 2004).

<sup>27</sup> In this sense, see observation by S. Laghmani, 'Vers une légitimité démocratique?' in R. Ben Achour and S. Laghmani (eds.), *Les nouveaux aspects du droit international* (Paris: Pedone, 1994), p. 273.

<sup>28</sup> E/CN.4/1999/SR.57.

should be taken. While the Cuban proposal was narrowly defeated,<sup>29</sup> the vote and the preceding discussion demonstrate the lack of agreement among states on a legal requirement of democratic governance.

The above cited resolutions provide an indication that neither the content of democratic processes nor their legal status has been clearly defined by states. Rather than pointing to a common conviction regarding liberal democracy's normative value, these resolutions demonstrate the lack of agreement on a general norm requiring states to have a democratically legitimated government. What has changed, however, is the fact that 'the language of democracy is now widely accepted by international institutions'.<sup>30</sup> Hence, states did not shy away from expressing their commitment in the 2000 Millennium Declaration to 'promote democracy'.<sup>31</sup> In the 2005 World Summit Outcome Document, UN member states even went so far as to describe democracy as a 'universal value', but reiterated at the same time that 'there is no single model of democracy' and the 'necessity of due respect for sovereignty and the right of self-determination'.<sup>32</sup> While statements on democracy have thus become more frequent within the international community, they 'lack clear indications of whether the statements are *lex lata*, *de lege ferenda* or mere political aspirations'.<sup>33</sup>

### III. The replication of the liberal model of the State by global institutions

Despite this lack of consensus on one form of domestic organization as a normative requirement, since the end of the Cold War global actors have become engaged in the promotion of liberal institutions at the domestic level. Within the framework of post-conflict peace operations and good governance programmes, the UN Security Council and the World Bank have come to support one substantive model of societal organization.

<sup>29</sup> Twelve Members voted in favour of the Cuban amendment (Bhutan, Chile, Congo, Cuba, India, Indonesia, Madagascar, Mexico, Pakistan, Russian Federation, Sudan), while 28 states rejected it and 13 abstained. The resolution was finally adopted by 51 votes to none, with two abstentions.

<sup>30</sup> B. Bowden and H. Charlesworth, 'Defining Democracy in International Institutions' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *The Role of International Law in Rebuilding Societies after Conflict* (Cambridge University Press, 2008), p. 100.

<sup>31</sup> A/RES/55/2 (8 September 2000). <sup>32</sup> A/RES/60/1 (16 September 2005).

<sup>33</sup> G. H. Fox, 'Democracy, Right to International Protection' in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2012).

Both actors have justified the shaping of domestic governance by adopting an instrumental logic.

#### 1. *The UN Security Council, state-building and the creation of democratic institutions*

The UN has not traditionally been an agent for democratization. Since its inception, the organization has comprised states with diverse political regimes – from dictatorships to liberal democracies. Although it had been debated at the San Francisco conference whether membership should be restricted to states that are democratically constituted, the principle of universality prevailed in the end.<sup>34</sup> The UN Charter espoused in Article 2(1) the principle of sovereign equality, according to which states enjoy the same rights under international law, regardless of their internal political institutions. While the right to political participation, included in the canon of international human rights law that was adopted under the aegis of the United Nations, could have provided a challenge to the non-judgmental attitude of the organization towards political regimes, Cold War tensions precluded any consensus on what kind of political organization they prescribed. Writing in the 1980s, Louis Henkin observed with regard to the Universal Declaration of Human Rights that in so far as it expressed a commitment to democracy, it was 'consistent with different brands of democracy'.<sup>35</sup>

Only in the aftermath of third-wave democratization did democracy become an issue on the agenda of the UN. Support for democratization became an objective of many activities carried out by the Organization. In 1989 Nicaragua requested the UN to observe its national elections – which marked a new phase of electoral assistance following the period of decolonization. Since the beginning of the 1990s, more than 100 independent countries have received various forms of UN assistance for the holding of multi-party elections.<sup>36</sup> Democratic processes have been

<sup>34</sup> See R. B. Russel and J. E. Muther, *A History of the United Nations Charter* (Washington DC: Brookings Institution, 1958). See also, G. Simpson, *Great Powers and Outlaw States* (Cambridge University Press, 2004), p. 263.

<sup>35</sup> L. Henkin, 'Introduction' in L. Henkin (ed.), *The International Bill of Rights* (New York: Columbia University Press, 1981), p. 28. Similarly, Karl Josef Partsch remarked with regard to the political participation clause of the 1966 International Covenant on Civil and Political Rights, that it 'does not establish clear standards for democratic and representative government'. K. J. Partsch, 'Freedom of Conscience and Expression and Political Freedoms', in *ibid.* at p. 238.

<sup>36</sup> [www.un.org/wcm/content/site/undpa/main/issues/elections](http://www.un.org/wcm/content/site/undpa/main/issues/elections).

further promoted through the UN Development Programme, which directs a significant portion of its funding to activities which aim to consolidate and deepen democratic practices.<sup>37</sup> In addition, in 2005 the UN established the Democracy Fund, which supports democratization efforts through project funding that strengthens civil society, promotes human rights, and encourages inclusive democratic processes.<sup>38</sup>

This move by the world organization to promote democratic processes within member states coincided with a more general preoccupation within the international community concerning the quality of domestic governance. Since the 1990s, the UN has increasingly become involved in matters that were formerly considered to be purely internal ones.<sup>39</sup> The Security Council demonstrated a greater willingness to use its Chapter VII powers, characterizing internal matters as a threat to peace and security.<sup>40</sup> It made use of its enforcement powers under Chapter VII not only to secure humanitarian relief and protect civilians, but also to restore democratic rule following military coups.<sup>41</sup> From a moral or humanitarian perspective, the scope of domestic jurisdiction has come under attack from a heightened concern among member states for human rights abuses committed by governments against their own people. This development has found expression in the doctrines of humanitarian intervention and the responsibility to protect.<sup>42</sup> In addition, security concerns militated in favour of regulating domestic

<sup>37</sup> See contribution by UNDP administrator M. M. Brown, 'Democratic Governance: Toward a Framework for Sustainable Peace', (2003) 9 *Global Governance*, 141–6. See also, analysis of UNDP's work in promoting democracy, in S. Marks, 'What has Become of the Emerging Right to Democratic Governance?', (2011) 22 *European Journal of International Law*, 515–17.

<sup>38</sup> www.un.org/democracyfund.

<sup>39</sup> In this sense, see Grewe's comment that 'developments seem to indicate that the traditional loophole of the Charter's domestic jurisdiction clause (Art. 2(7)) might narrow to a needle's eye'. W. Grewe, 'History' in B. Simma (ed.), *The Charter of the United Nations: A Commentary* (Munich: Beck, 1995), p. 21.

<sup>40</sup> As evidenced by the statement of the President of the Security Council at the conclusion of the 3046th meeting held at the level of Heads of State and Government on 31 January 1992 in connection with the item entitled 'The responsibility of the Security Council in the maintenance of international peace and security' (S/23500).

<sup>41</sup> E.g., S/RES/794 (3 December 1992) concerning the establishment of 'a secure environment for humanitarian relief operations' in Somalia; S/RES/929 (22 June 1994) authorizing the use of force to protect civilians in Rwanda; S/RES/940 (31 July 1994) authorizing the formation of a multinational force to 'facilitate the departure from Haiti of the military leadership'; S/RES/1132 (8 October 1997) imposing a mandatory arms embargo against Sierra Leone's military junta.

<sup>42</sup> A/RES/63/308 (7 October 2009).

governance structures, as so-called 'failed states' were perceived as breeding grounds for violence, extremism and terrorism. In the words of Orford, '[t]he collective security system. . . has come to represent a means for the liberal alliance of democratic states to bring human rights, democracy, and humanitarian principles to those in undemocratic or failed states'.<sup>43</sup>

In the field of peacekeeping the Security Council since the 1990s has authorized complex missions that not only include the classical tasks of monitoring ceasefires, creating buffer zones and rebuilding a war-torn country's infrastructure, but also aimed at building democratic institutions. An early example of a 'multidimensional' mandate was that of the ONUMOZ mission in Mozambique, established under SC Resolution 797 (1992), which combined political, military and humanitarian elements. In accordance with the General Peace Agreement signed by the President of the Republic of Mozambique and the President of the Resistência Nacional Moçambicana (RENAMO), the UN mission was to verify the ceasefire, to monitor the disbanding of irregular armed groups and the collection of weapons, to provide security for UN activities, to monitor humanitarian assistance operations, and to assist with the organization and holding of elections. In Resolution 957 (1994), the Security Council gave particular weight to the political aspect of the mission. Welcoming the October 1994 elections held in Mozambique, the Council called upon 'all Mozambican parties to complete the process of national reconciliation based. . . on a system of multi-party democracy and the observance of democratic principles which will ensure lasting peace and political stability'.<sup>44</sup>

In subsequent UN practice, the establishment of democratic institutions through the holding of multi-party elections has remained an essential aspect of peacekeeping. As conceptualized by the 'Capstone Doctrine', rule of law activities (reform of military, armed forces and judiciary), the promotion of human rights, the strengthening of state institutions and the provision of electoral assistance, constitute key elements of complex missions.<sup>45</sup> In this 2008 Capstone document, which sets out the guiding principles and core objectives of contemporary peacekeeping operations, the successful holding of elections is

<sup>43</sup> A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', (1997) 38 *Harvard International Law Journal*, 443.

<sup>44</sup> S/RES/957 (15 November 1994), para. 3.

<sup>45</sup> United Nations Peacekeeping Operations, *Principles and Guidelines* (Capstone, 2008).

assigned a two-fold function: it is viewed as an integral part of UN post-conflict operations and serves as an indicator for the success of a mission, often providing the exit strategy and end point of a mission.

The involvement of the UN in building democratic regimes has been even more extensive in the case of international territorial administration.<sup>46</sup> In the face of severe internal crises, the Security Council in some instances has authorized missions temporarily to administer a territory in place of the national government. The mandates of such missions have consistently aimed at the creation of democratic institutions viewed as a precondition for self-government. Thus SC Resolution 1272 (1999) which established the UNTAET mission in East Timor, emphasized 'the need for UNTAET to consult and cooperate closely with the East Timorese people in order to carry out its mandate effectively with a view to the development of local democratic institutions'.<sup>47</sup> The objective to build democratic institutions has also been formulated as a primary aim of the UNMIK mission in Kosovo. SC Resolution 1244 (1999) characterizes as objectives of the civil presence in Kosovo to establish and oversee 'the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.<sup>48</sup> The aim of ensuring a democratic future for Kosovo has been further reaffirmed in the course of the UNMIK mission by the Security Council's approval for the 'standards before status' policy which made the question of Kosovo's status dependent on the fulfilment of democratic standards of governance.<sup>49</sup>

In comparison to peace-building missions, the UN, when taking the role of interim-administrator, has even greater influence over the shaping of new governance structures, accompanying the constitution-drafting process and the adoption of electoral laws. In doing so, the Organization exercises decisive influence and can promote policy objectives, e.g. the inclusion of women into political processes despite local resistance. As Tansey notes:

through their extensive authority at the domestic level and their explicit aims to promote democracy, international administrations can ensure

<sup>46</sup> O. Tansey, *Regime-Building: Democratization and International Administration* (Oxford University Press, 2009) and J. d'Asprémont, 'Post-Conflict Administrations as Democracy-Building Instruments', (2008) 9 *Chicago Journal of International Law*, 1–16; M. Cogen and E. De Brabandere, 'Democratic Governance and Post Conflict Reconstruction', (2007) *Leiden Journal of International Law*, 669–93.

<sup>47</sup> S/RES/1272 (25 October 1999), para. 8. <sup>48</sup> S/RES/1244 (10 June 1999), para. 10.

<sup>49</sup> Statement by the President of the Security Council of 12 December 2003 (S/PRST/2003/26).

that some avenues are closed off for those who would seek to undermine democratic development, and thus create opportunities for successful democratization.<sup>50</sup>

While the promotion of democracy has constituted but one aspect of a broad post-conflict agenda of UN peace operations, the creation of democratic institutions has become an indispensable component of such missions, which have all followed a 'democratic reconstruction model'.<sup>51</sup>

## 2. *The World Bank and the promotion of good governance*

In the last few decades, concern for domestic governance has also permeated the World Bank's agenda.<sup>52</sup> The institution's mandate as 'financier of investment for productive purposes in reconstruction or development efforts, and as facilitator of international investment and trade'<sup>53</sup> does not ascribe to the Bank a role in promoting a particular model of domestic politics. In fact, the Articles of Agreement, the Bank's constitutive treaty, specifically provide that 'the Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decision by the political character of the member or members concerned. Only economic consideration shall be relevant to their decisions, and these considerations shall be weighed impartially'.<sup>54</sup> During the drafting process, Harry D. White and Lord Keynes, the authors of the provisions, placed strong emphasis on the political and ideological neutrality of the institution which was designed as an organization of universal membership.<sup>55</sup> As explained in a World Bank legal memorandum of 1967, the rationale of the political prohibition was twofold: First, in an organization comprising governments with 'different political characters and aims or interests' it was thought necessary 'to prevent the use of the leverage that would be provided by granting or

<sup>50</sup> Tansey, *Regime-Building*, p. 31.

<sup>51</sup> Term ascribed to M. Ottaway in C. T. Call and S. E. Cook, 'On Democratization and Peacebuilding', (2003) 9 *Global Governance*, 233.

<sup>52</sup> The 'World Bank', or 'Bank' for the purposes of this contribution, refers to the International Bank for Reconstruction and Development and the International Development Authority.

<sup>53</sup> I. F. I. Shihata, *The World Bank in a Changing World*, Vol. I (Dordrecht: Martinus Nijhoff, 1992), p. 5.

<sup>54</sup> Art. 4 Section 10, Articles of Agreement.

<sup>55</sup> Ibid. Vol. III at 164–5. For a detailed account of the drafting history of Art. IV Section 10 of the Bank's Articles of Agreement, see S. Killinger, *The World Bank's Non-Political Mandate* (Köln, Berlin, München: Heymanns, 2003), pp. 91–6.



withholding financial assistance...for the furtherance of the political aims of any member'. Second, strict political neutrality was regarded as 'essential for the ability of the Bank to raise large amounts of capital from the savings of the investing public'.<sup>56</sup> In light of the prohibition to take political considerations into account, the World Bank has traditionally been concerned with the quality of government only in a narrow sense, relating to issues of economic management.

Coinciding with the end of the Cold War, however, the World Bank has widened its focus on governance. The experience of structural adjustment lending in the 1980s had revealed that economic liberalization without far-reaching institutional reform was insufficient for achieving economic development.<sup>57</sup> In 1989 the Bank published the report, 'Sub-Saharan Africa: from Crisis to Sustainable Growth – A Long-Term Perspective Study', which described a 'crisis of governance' as one of the root causes of the continent's development problems.<sup>58</sup> The report noted that the countries with the best economic performance in Africa had 'effective parliamentary democracies'.<sup>59</sup> To achieve better outcomes, the report called for a 'political renewal' in Africa, comprising the creation of a 'pluralistic institutional structure'.<sup>60</sup> The report marked a shift in World Bank thinking which has since placed increased emphasis on the state as the framework for development.<sup>61</sup>

Defining governance as 'the manner in which power is exercised in the management of a country's economic and social resources for development',<sup>62</sup> the World Bank has paid attention to governance issues in three main areas: (i) legal reform, (ii) public sector management, and (iii) civil society involvement.<sup>63</sup> Legal reform and rule of law programmes are viewed as essential for creating an enabling environment for economic

<sup>56</sup> Memorandum transmitted to the UN on 5 May 1976, UN Doc. A/6825 (1976). For the background of events leading to the 1965 memorandum, see V. E. Marmorstein, 'World Bank Power to consider Human Rights Factors in Loan Decision', (1978–9) 13 *Journal of International Law and Economics*, 113–36.

<sup>57</sup> World Bank, *World Bank Development Report 1990*, p. 115.

<sup>58</sup> World Bank, *Sub-Saharan Africa: From Crisis to Sustainable Growth 1989*, p. 60.

<sup>59</sup> Ibid. at p. 61. <sup>60</sup> Ibid.

<sup>61</sup> On the role of the state in World Bank thinking, see A. Orford and J. Beard, 'Making the State Safe for the Market: The World Bank's World Development Report 1997', (1998) 22 *Melbourne University Law Review*, 195–216. See also, A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the World Bank', (1999–2000) *New York University Journal of International Law and Politics*, 257.

<sup>62</sup> World Bank, *Governance and Development*, 1992.

<sup>63</sup> For an analysis of the content of the governance agenda, see Killinger, *The World Bank's Non-Political Mandate*, pp. 121–31 and S. Seppänen, *Good Governance in International*

growth. According to the Bank, only where laws are applied without arbitrary interference and fair processes are established through functioning government and judicial institutions can market-led growth occur.<sup>64</sup> Legal and judicial reform as components of the Bank's governance agenda thus focus mainly on ensuring the predictability of legal frameworks necessary for the protection of property rights and the enforcement of contracts. Good governance, according to the Bank, further requires a civil service that is free from corruption and operates in an accountable and transparent manner.<sup>65</sup> The role of the Bank in improving public sector management has involved reducing public sector personnel, strengthening administrative capacity and bureaucratic procedures and promoting accountability of public funds. In particular, the fight against corruption has become a central theme of World Bank policies. In addition, the Bank's governance agenda seeks the advancement of civil society. Recognizing the link between participation and development, the World Bank has included non-governmental organizations in development projects, aiming to strengthen a public sphere in an effort to develop institutionally plural environments.<sup>66</sup> In its 1999/2000 World Development Report, 'Entering the 21st Century: The Changing Development Landscape', the Bank described 'greater participation in public life' as a 'pre-condition for sustainable development', adding that 'authoritarian regimes...except in rare cases have not succeeded in creating efficient, technocratic bureaucracies or in single-mindedly pursuing development'.<sup>67</sup>

While the World Bank's governance agenda has traditionally not included civil and political rights, the notion of 'empowerment', introduced in the World Development Report 2000/2001, 'Attacking Poverty', has widened the conception of governance, characterising the absence of 'voice' and 'participation' as 'key dimensions of poverty'.<sup>68</sup> The Bank's concern for accountability has thus come to include overt

*Law* (Helsinki: Erik Castrén Institute of International Law and Human Rights, 2003), pp. 86–8.

<sup>64</sup> Shihata expresses this view when stating 'reforms aimed at ensuring the rule of law...are of obvious importance in achieving the order essential for economic growth...'. Shihata, *The World Bank in a Changing World*, vol. II, p. 58.

<sup>65</sup> For an early articulation of this component of the Bank's governance agenda, see The World Bank, *Development in Practice: Governance* (Washington DC: IBRD, 1994).

<sup>66</sup> World Bank, *The World Bank and Participation*, 1994.

<sup>67</sup> World Bank, *World Development Report 1999/2000*, p. 2.

<sup>68</sup> World Bank, *World Development Report 2000/2001*, p. 112. In this sense, see also contribution by World Bank legal counsel R. Danino, 'The Legal Aspects of the World Bank's Work on Human Rights: Some Preliminary Thoughts' in P. Alston and

political dimensions – as reflected by the 2006 statement by then World Bank President Wolfowitz – who defined as important components of good governance ‘an independent judiciary, a free press, and a vibrant civil society’ as ‘[t]hey balance the power of governments, and ‘hold them accountable for delivering better services, creating jobs, and improving living standards’.<sup>69</sup> The World Development Report 2007, ‘Development and the Next Generation’, also underlined the value of political participation, observing that: ‘citizen participation is greater in democracies than in non-democracies, almost by definition, and some evidence indicates that democracies, on balance, have better development outcomes than authoritarian government’.<sup>70</sup>

Although it would be an overstatement to equate the Bank’s governance approach with a prescription for liberal democracy, the World Bank policy invariably implies that the liberal democratic state is the gold standard of societal organization. As William and Young note, the Bank’s ‘so-called “technical reforms” are necessarily guided by a prior conception of the good’.<sup>71</sup> They view the Bank’s ‘construction of governance’ as based ‘upon three levels of transformation: at the institutional level the creation of a “neutral” State; at the social level the creation of a liberal public sphere of civil society; and at the personal level the corresponding creation of a liberal “self” and “modern” patterns of behaviours’.<sup>72</sup>

#### IV. The instrumental turn to democracy

Common to both the UN and the World Bank is that their respective mandates do not embrace the promotion of a particular model of politics that would give preference to the system of governance of some of their members to the exclusion of others.<sup>73</sup> Yet, as the preceding sections have

M. Robinson (eds.), *Human Rights and Development: Towards Mutual Reinforcement* (Oxford University Press, 2005), p. 522.

<sup>69</sup> Address by P. Wolfowitz, ‘Good Governance and Development – A Time For Action’, Jakarta, Indonesia (11 April 2006).

<sup>70</sup> World Bank, *World Development Report 2007*, p. 165.

<sup>71</sup> D. Williams and T. Young, ‘Governance, The World Bank and Liberal Theory’, (1994) 42 *Political Studies*, 94.

<sup>72</sup> *Ibid.* at 99.

<sup>73</sup> The conditions under which the UN and the World Bank promote a democracy and good governance agenda are thus entirely different from those under which regional bodies operate. Whereas regional organizations such as the Organization of American States, the EU, or the African Union have all embraced democracy as a constitutive community value in the post-Cold War era, if not before, no comparable agreement has been reached within the UN. The difference between the regional and the global level is

sketched out, both the UN and the World Bank have become engaged in promoting democracy within the context of post-conflict reconstruction and development assistance. Constrained by their duty of political impartiality, both institutions have justified the shaping of domestic governance – privileging a liberal model of the state – by adopting a functional approach. Achieving sustainable peace and development necessitates, in the view of these organizations, the creation of liberal domestic institutions.

The instrumental justification for the UN’s involvement in democracy promotion in the 1990s has been most clearly expressed by UN Secretary-General Boutros Boutros-Ghali in his triple agenda on peace, development and democracy. In the first of the three agendas, Boutros-Ghali noted the global phenomenon of democratization within formerly authoritarian regimes and advocated support for democratic institution-building which was, in his view, conducive to peace within states as well as to peace among states.<sup>74</sup> He further expanded on the link between democracy and peace in his Agenda for Democratization. Regarding peace among states, he noted that ‘the accountability and transparency of democratic Government... may help to restrain recourse to military conflict with other States’.<sup>75</sup> With respect to internal peace, the Secretary-General underlined that freely chosen governments are ‘more likely to promote and respect the rule of law’ and ‘cope effectively with social conflict’.<sup>76</sup> In addition to establishing a correlation between peace and democracy, Boutros-Ghali in his Agenda for Development outlined the importance of democratic institutions in achieving development, noting that in ‘the absence of democracy... development will remain fragile and be perpetually at risk’.<sup>77</sup> This approach to democracy has been shared by Secretary-General Kofi Annan, who emphasized that ‘efforts to promote democracy and good governance are fundamental to the consolidation of peace and development’.<sup>78</sup>

also evident if one compares the Agreement establishing the European Bank for Reconstruction and Development, which explicitly expresses in its Preamble a commitment to ‘the fundamental principles of multiparty democracy, the rule of law, respect for human rights and market economics’ with the World Bank’s Articles of Agreement. See I. F. I. Shihata, *The European Bank for Reconstruction and Development: A Comparative Analysis of the Constituent Agreement* (Leiden: Brill, 1991).

<sup>74</sup> Boutros Boutros-Ghali emphasized the ‘obvious connection between democratic practices... and the achievement of true peace and security in any new and stable order’, A/47/277-S/24111 (17 June 1992), para. 59.

<sup>75</sup> A/51/761 (20 December 1996), para. 18. <sup>76</sup> *Ibid.* para. 17.

<sup>77</sup> A/48/935 (6 May 1994), para. 122. <sup>78</sup> A/52/513 (21 October 1997), para. 26.

More than a decade later, Secretary-General Ban Ki-moon, noting the debate surrounding democracy assistance through the UN, issued his 'Guidance Note on Democracy'. In this document, he conceptualized the UN approach to supporting democracy along the same lines as his predecessors, characterizing democracy as an 'instrument' for achieving the main purposes of the organization: peace, respect for human rights and development.<sup>79</sup> '[D]emocracy', the Secretary-General observed, 'is indeed inextricably linked with the three pillars of the United Nations, in that genuinely democratic institutions and practices are essential for fostering long-term security and stability by allowing peaceful political dialogue and contestation...'.<sup>80</sup> While the assumption of a positive correlation between democracy and peace, including internal peace, has received much criticism in the political science literature,<sup>81</sup> from both an empirical and a theoretical perspective, suffice it to note that it has provided the legitimation for UN democracy promotion and has formed the rationale for the Security Council's post-conflict agenda.

The promotion of liberal governance for functional purposes is perhaps even more apparent in the World Bank's good governance agenda. In light of the political prohibition contained in its Articles of Agreement, the Bank has consistently linked its concern for governance to economic consequences, making the consideration of political factors dependent on their 'effects on a country's economy or on the feasibility of project implementation of monitoring'.<sup>82</sup> The very appeal of the term 'good governance' for the Bank lies arguably in its technocratic apolitical character.<sup>83</sup> The term does not name what or whose concept of 'good' it purports to promote, but presents 'good' simply as a 'self-evident' qualification of governance. In Bhuta's view, the concept of good governance 'takes institutions that are the *products* of a

<sup>79</sup> Guidance Note on Democracy [www.un.org/en/globalissues/democracy](http://www.un.org/en/globalissues/democracy).

<sup>80</sup> Ibid. Section III 'Guiding Principles for Effective Assistance'. See also, comment by R. Rich in *Journal of Democracy*, 21 (2010), 182.

<sup>81</sup> See, e.g., A. Chua, *World on Fire: How exporting Free Market Democracy breeds Ethnic Hatred and Global Instability* (New York: Doubleday, 2003); R. Paris, 'Peacebuilding and the Limits of Liberal Internationalism', *International Security*, 22 (1997), 54–89; and R. Schweller, 'US Democracy Promotion: Realist Reflections' in M. Cox, G. J. Ikenberry *et al.* (eds.), *American Democracy Promotion: Impulses, Strategies, and Impacts* (Oxford University Press, 2000), pp. 41–62.

<sup>82</sup> M. Cogen, 'Human rights, prohibition of political activities and the lending-policies of World Bank and International Monetary Fund' in S. R. Chowdhury, E. M. G. Deters *et al.* (eds.), *The Right to Development in International Law* (Dordrecht: Martinus Nijhoff, 1992), pp. 379–96.

<sup>83</sup> J. Demmers, A. E. F. Jilberto and B. Hogenboom (eds.), *Good Governance in the Era of Global Neoliberalism: Conflict and Depoliticalisation in Latin America, Eastern Europe, Asia and Africa* (London: Routledge, 2004).

particular history and trajectory of political development and posits them as the principal *solutions* to undesirable political dynamics and outcomes'.<sup>84</sup> Indeed, the World Bank's preference for democracy seems largely guided by empirical observations of how (idealised) liberal states function.

The concept of good governance itself has undergone an evolution. While starting from a predominantly technical conception which avoided direct references to democracy, in recent years it has more forcefully articulated a political dimension. The basic premise of the Bank's policy, that is, subjugating demands for governance to their consequences for development has, however, remained unchanged.

## V. Conclusion

The institutional practice reviewed above profoundly challenges the traditional principle of international law's regime-neutrality. Notwithstanding the lack of a global consensus on one form of domestic order within the international community, democracy, and more specifically liberal democracy, has emerged as the dominant model of domestic political organization for fragile states. In the fields of post-conflict reconstruction and development assistance, global actors such as the UN and the World Bank have consistently promoted the creation of domestic institutions that are accountable through periodic elections, respect the rule of law, and embrace market freedoms. In the context of UN peace operations, the establishment of 'democratic institutions' through multi-party elections has become a key component of the organization's post-conflict missions, offering recipient states no alternative to the liberal model of the state. Whereas democracy is not prescribed as such by the World Bank's good governance agenda, its emphasis on an efficient civil service, the rule of law and a vibrant civil society is clearly modelled on the organization of political power in 'modern' liberal societies. As former legal counsel Shihata of the World Bank acknowledged, the Bank plays a significant role in 'paving the way to more democratic forms of governance',<sup>85</sup> even though it has not completely adopted the language of democracy promotion.

A defining feature of the work of the UN and the World Bank in promoting liberal governance is the adoption of an instrumental logic in privileging one substantive model of domestic order over others. In light

<sup>84</sup> N. Bhuta, 'Democratization, State-building and Politics as Technology' in B. Bowden, H. Charlesworth and J. Farrall (eds.), *The Role of International Law in Rebuilding Societies after Conflict* (Cambridge University Press, 2009), p. 52 (emphasis in original).

<sup>85</sup> Shihata, *The World Bank in a Changing World*, vol. III, p. 151.

of their universal mandate, both actors have justified their support for liberal institutions by reference to the supposed factual outcomes they produce. Rather than invoking democracy as a normative requirement,<sup>86</sup> global institutions have thus supported liberal governance as an instrument for peace and prosperity, de-politicizing the shaping of domestic governance along liberal parameters.<sup>87</sup> Their support for democracy is thus not based on the global acceptance of a standard of governmental legitimacy, but is the result of a widespread assumption of a positive correlation between democracy, peace and development.<sup>88</sup>

Notwithstanding the functional approach these institutions have adopted, their considerable practice of promoting a particular form of domestic order sits uneasily with international law's tolerance of diversity, signalling the turning away from a pluralistic conception of world community.

<sup>86</sup> In this sense, see T. J. Farer, 'Promoting Democracy: International Law and Norms' in E. Newman and R. Rich (eds.), *The UN Role in Promoting Democracy: Between Ideals and Reality* (Tokyo: UN Press, 2004), pp. 32–61. Commenting on UN practice, he contemplates: 'Must we construe this practice as implying UN recognition of democracy as a legally privileged political arrangement? Not necessarily. While it is susceptible to that construction, UN practice also could be construed more modestly as imputing to democracy the character of a very useful, perhaps even indispensable, tool in the context of intrastate conflict for the reshaping of violent competition for power into less destructive forms' (p. 52).

<sup>87</sup> On the subject of de-politization, see D. Chandler, *Empire in Denial: The Politics of State-building* (London: Pluto Press, 2006); Demmers, Jilberto and Hogenboom (eds.), *Good Governance in the Era of Global Neoliberalism*.

<sup>88</sup> Susan Marks comments in relation to development: 'the democratic norm [Thomas M. Franck] had in mind has mutated into something else. Whereas his vision was of a universal entitlement backed up by an institutionalized and ideally world-wide system of election-monitoring, today democracy promotion is a dimension of development work'. In 'What has Become of the Emerging Right to Democratic Governance?', (2011) 22 *European Journal of International Law*, 515.

## Federated entities in international law: disaggregating the federal State?

GLEIDER I. HERNÁNDEZ

The dominant role of the sovereign State in international relations, it hardly needs recalling, remains the basis for our conception of international law; it is generally accepted that this has been so since the Peace of Westphalia imposed a horizontal inter-State model of international relations.<sup>1</sup> However, such a paradigm does not easily reconcile itself to the long-standing practices of certain subnational components of a federation to assert themselves and act on the international plane, forging links with each other or with foreign States. This is a practice which has amplified in recent years due to the growing interdependence between States and economies. The interface between international and domestic legal orders is reciprocal: the expansion of international law to touch upon issues heretofore considered as within the reserved domain of domestic constitutional law, and even to the activities of the federated entities of States, has led to a search for alternative paradigms through which better to understand how international law accommodates such entities.

In this respect, the orthodoxy that a central executive acts exclusively on behalf of a State in matters of foreign policy<sup>2</sup> has come to be challenged, and in many respects has a marked impact on the internal legal order of a federal State.<sup>3</sup> Yet, international legal scholarship has yet

<sup>1</sup> R. Falk, 'The Interplay of Westphalia and Charter Conceptions of International Legal Order', in R. Falk and C. Black (eds.), *The Future of the International Legal Order* (Princeton University Press, 1969), vol. I, pp. 32, 43.

<sup>2</sup> The classic expression of this rule may be found in Article II of the Montevideo Convention on the Rights and Duties of States, Montevideo, 26 December 1933, in force 26 December 1934, 165 LNTS 19.

<sup>3</sup> See, e.g., B. Hocking (ed.), *Foreign Relations and Federal States* (Leicester University Press, 1993), p. 6, suggesting that it would be misleading to dismiss non-central governments as second-order players: '[t]he global web of world politics ensures that non-central governments have interests and responsibilities which can often, quite unexpectedly and sometimes against their wishes, project them into the international limelight'.