

Construction of Narratives in International Law: A Study of Democratic Governance Discourses

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Abstract

It is common these days to lament the recession of democracy around the world. In academic circles, such discussions generate empirical data that suggest democracy is in decline. It is striking that these discussions are often accompanied by a feeling of despair or disappointment in the face of what looks like a failed expectation. This study addresses the feeling amongst international lawyers of a failed expectation with respect to democracy. It locates the creation of an expectation that democracy would steadily consolidate over time in the progress narrative of democratic governance discourses that started to take shape at the beginning of the 1990s. This study argues that the discussions on the recession of democracy and the current mood of despair are due to an unwarranted expectation of a post-Cold War democratic heyday which was problematic in the first place. Today's dismay about the recession of democracy should be seen as an offspring of the progress narrative about democratic governance. As the study locates today's despair in academic writings defending an emerging right to democratic governance, it elucidates the narrativisation techniques that international lawyers used to construct democratic governance discourses. In particular, it identifies three of these narrativisation elements, namely the formal, temporal and spatial elements, to understand how these recurring writing strategies have been instrumental in the creation of these discourses. The formal element explains how international lawyers drew the legal contours of these discourses and anchored the subject into a legal framework. The temporal element examines how scholars used the periodisation of history to situate their discourses in time and how the use of the Cold War – post-Cold War dichotomy helped to create a progress narrative. The spatial element explains how the narrative is situated in space and explores how international lawyers used the idea of universality to determine where an emerging right to democratic governance would be applicable. Analysing these three narrativisation elements allows one to understand how international lawyers construed the developments with regard to democracy in progressive terms and envisaged history as a linear path continually moving towards a more advanced order. In elucidating the narrativisation elements of democratic governance discourses, this study ultimately shows that international lawyers have been complicit in the creation of an expectation that democracy would steadily consolidate over time and that today's failed expectation stems from the progress narrative of these discourses.

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Abbreviations

AFRC: Armed Forces Revolutionary Council

AJIL: American Journal of International Law

ASIL: American Society of International Law

AU: African Union

BYBIL: British Yearbook of International Law

CUP: Cambridge University Press

ECHR: European Convention on Human Rights

EComHR: European Commission of Human Rights

ECtHR: European Court of Human Rights

ECOWAS: Economic Community of West African States

EJIL: European Journal of International Law

EU: European Union

EUI: European Society Institute

ICCPR: International Covenant on Civil and Political Rights

IEC: Independent Electoral Commission

IMF: International Monetary Fund

JIL: Journal of International Law

OAS: Organization of American States

OAU: Organization of African Unity

OUP: Oxford University Press

PSC: Peace and Security Council

RUF: Revolutionary United Front

TWAIL: Third World Approaches to International Law

UN: United Nations

WTO: World Trade Organization

YBIL: Yearbook of International Law

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1. Introduction

It is common these days to lament the recession of democracy around the world. In academic circles, such discussions generate empirical data that suggest democracy is in decline. In 2018, Abramowitz, the President of Freedom House, declared that democracy was in crisis.¹ Freedom House data, which examines the protection of political and civil rights around the world, revealed that in 2017 the protection of fundamental rights hit their worst score in the last decade, following a constant decline since 2005.² While the rate of democratic breakdown was decreasing in the early years of the 1990s, it has been climbing in recent years.³ The number of electoral democracies, which expanded between 1975 and 2006, is now manifesting a period of standstill.⁴ These statistics constitute sophisticated data for those who claim that democracy has been underperforming in recent years. When the scholarship on current developments is examined, a quick study of articles published in the Journal of Democracy reveals that since 2014, more than thirty articles have grappled with global democratic backsliding alone and dozens with the democratic decline in many states. Most of the recent articles on democracy agree that the last decade has been marked by a global democratic decline,⁵ retreat,⁶ backsliding,⁷ rollback,⁸ rise of populism,⁹ backlash¹⁰ or a deepening of authoritarianism.¹¹ What is meant by democratic backsliding in general terms is 'a deterioration of qualities associated with democratic governance' which is also 'a discontinuous series of incremental actions, not a one-time *coup de grâce*'.¹² While some argue that 'Western democracy is going through a mid-life crisis'¹³ others claim that due to the rise of populism and the deterioration of human rights 'these are extraordinarily dangerous times'.¹⁴

¹ Michael Abramowitz and Sarah Repucci, 'Democracy Beleaguered' (2018) 29 Journal of Democracy 128, 128.

² *ibid.* While the latest Freedom House data report more net improvements in 2018 compared to the democratic gains of 2017, this does not change the overall decline regarding the protection of civil and political rights for the 13th consecutive year. For the latest report, see Freedom House, 'Freedom in the World 2018: Democracy in Crisis', <<https://freedomhouse.org/report/freedom-world/freedom-world-2018>> accessed 22 August 2019.

³ Larry Diamond, 'Facing up to the Democratic Recession' (2015) 26 Journal of Democracy 141, 144.

⁴ *ibid.* 141-42.

⁵ Marc Plattner, 'Is Democracy in Decline?' (2015) 26 Journal of Democracy 5.

⁶ Robin Niblett, 'Liberalism in Retreat: The Demise of a Dream' (2017) 96 Foreign Affairs 17.

⁷ Gero Erdmann 'Decline of Democracy: Loss of Quality, Hybridisation and Breakdown of Democracy' in Gero Erdmann and Marianne Kneuer (eds), *Regression of Democracy?* (Springer 2011), Amel Ahmed, 'Rethinking Backsliding: Insights from the Historical Turn in Democratization Studies' (2014) 12 American Political Science Association's Comparative Democratization Newsletter 2, Nancy Bermeo, 'On Democratic Backsliding' (2016) 27 Journal of Democracy 5, Valeriya Mechkova, Anna Lührmann and Staffan Lindberg, 'How Much Democratic Backsliding?' (2017) 28 Journal of Democracy 162.

⁸ Larry Diamond, 'The Democratic Rollback: The Resurgence of the Predatory State' (2008) 87 Foreign Affairs 36.

⁹ Christine Schwöbel-Patel, 'Populism, International Law, and the End of Keep Calm and Carry on Lawyering' (13 December 2018), forthcoming in the Netherlands Yearbook of International Law, <<https://ssrn.com/abstract=3300695>> accessed 22 August 2019, William Galston, 'The Populist Challenge to Liberal Democracy' (2018) 29 Journal of Democracy 5. On populism and constitutionalism, see also the double special issue of the German Law Journal, vol. 20 (2) (2019) and vol. 20 (3) (2019).

¹⁰ Thomas Carothers, 'The Continuing Backlash Against Democracy Promotion' in Peter Burnell and Richard Youngs (eds), *New Challenges to Democratization* (Routledge 2010).

¹¹ Larry Diamond, Marc Plattner and Christopher Walker (eds), *Authoritarianism Goes Global: The Challenge to Democracy* (Johns Hopkins University Press 2016).

¹² David Waldner and Ellen Lust, 'Unwelcome Change: Coming to Terms with Democratic Backsliding' (2018) 21 Annual Review of Political Science 93, 95.

¹³ David Runciman, *How Democracy Ends* (Profile Books 2018) 5.

¹⁴ Philip Alston, 'The Populist Challenge to Human Rights' (2017) 9 Journal of Human Rights Practice 1, 14. See also Susan Marks, 'Backlash: The Undeclared War against Human Rights' (2014) 4 European Human Rights Law Review 319. On the relationship between neoliberalism and democratic backlash, see George Katrougalos, 'Neoliberalism

For many, the current decline in democratic rule comes as a surprise. Democratic backsliding, which has been filling the pages of academic journals and books quite widely in recent years, seems to be an unexpected episode. Fukuyama, for example, questioned 'why the performance of democracy around the world has been so disappointing.'¹⁵ Galston stated that 'In just twenty-five years, the partisans of liberal democracy have moved from triumphalism to near despair.'¹⁶ Mounk, on the other hand, opined that in recent years, voters have opted 'for policies that were unthinkable until yesterday'.¹⁷ These examples can be multiplied without much difficulty.¹⁸ Scholars commonly compare the democratic heyday of the 1990s with the current state of affairs regarding the protection of democratic values and highlight how the optimism of the post-Cold War era ceded its place to a gloomier picture nowadays.¹⁹ The feeling of despair due to democratic backlash suggests that in the aftermath of the Cold War, the victory of liberal democracy over communism created the expectation that democratic rule and good governance would incrementally consolidate. For those who believed in this expectation, the current episode of democratic decline was either unlikely or completely unanticipated. The way scholars address the issue of democratic backsliding shows that there is a significant gap between the expectation about democracy's anticipated course of development and the current state of affairs. It can be stated that the triumphant atmosphere of the 1990s regarding liberal democracy seemed to promise a seamless progress which did not allow any downturn.

International lawyers have taken ownership of democracy as a research topic around 30 years ago. Soon after the collapse of the Soviet Union and the fall of the Berlin Wall, they started examining how the victory of liberal democracy over communism could be translated into legal terms and how international law could claim authority over the subject. Traditionally, international law does not impose a particular form of government that states should adopt. The UN Charter is agnostic regarding governmental forms which is deemed to be a matter 'essentially within the domestic jurisdiction' of a state.²⁰ After the collapse of communist states, many legal scholars questioned whether the neutrality of international law with regard to governmental forms could be maintained. It was Thomas Franck who broached the subject and asked whether there was an emerging right to democratic governance in international law.²¹ He claimed that the indifference of the UN Charter regarding governmental forms was

and Democracy' in Margot Salomon and Bruno de Witte (eds) *Legal Trajectories of Neoliberalism: Critical Inquiries on Law in Europe*, EUI Working Papers RSCAS 2019/43, <https://cadmus.eui.eu/bitstream/handle/1814/63447/RSCAS_2019_43.pdf?sequence=8&isAllowed=y> accessed 29 August 2019.

¹⁵ Francis Fukuyama, 'Why is Democracy Performing so Poorly' in Larry Diamond and Marc Plattner (eds), *Democracy in Decline?* (Johns Hopkins University Press 2015) 12.

¹⁶ William Galston, *Anti-Pluralism: The Populist Threat to Liberal Democracy* (Yale University Press 2018) 17.

¹⁷ Yascha Mounk, *The People Vs. Democracy: Why Our Freedom is in Danger and How to Save it* (Harvard University Press 2018) 7.

¹⁸ Ivan Krastev, 'The Unraveling of the Post-1989 Order' (2016) 27 *Journal of Democracy* 88, Roberto Stefan Foa and Yascha Mounk, 'The Signs of Deconsolidation' (2017) 28 *Journal of Democracy* 5, Steven Levitsky and Daniel Ziblatt, *How Democracies Die* (Penguin Books 2018) 9-24.

¹⁹ Abramowitz and Repucci (n 1) 128.

²⁰ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, article 2 (7).

²¹ Thomas Franck, 'The Emerging Right to Democratic Governance' (1992) 86 *AJIL* 46.

being challenged by a new customary rule which required states to validate their governance through free and fair elections. He argued that states no longer enjoyed a constitutional liberty to determine their governmental form and that international law was becoming increasingly involved in determining the legitimate representative of a state. According to Franck, this 'emerging right to democratic governance' obliged states to legitimise their rule through elections as a customary international law norm. He initiated a debate on the validation of national governance through international law that has produced a vast volume of scholarship, dubbed the 'democratic entitlement school' or the 'Manhattan School of international law'.²²

For the purposes of this study, international law writings discussing the legitimacy of governments as an emerging norm in the aftermath of the Cold War will be called democratic governance discourses.²³ According to these discourses, the test of effectiveness which had been used since the 17th century to determine the representative body of a state in the international arena, started to be challenged by a test of legitimacy in the early 1990s. While acknowledging that these discourses cannot be evaluated as a homogenous set of writings, it is possible to note that the main argument of writings on democratic governance is centred around demonstrating that international law is no longer agnostic to the way in which governments come into being and that not only national but also international law validates governance. These discourses argued that states are losing their constitutional freedom to decide the form of their government and that democracy is on its way to becoming the litmus test of governmental legitimacy. Their claim is therefore focused on proving that international law provides the tools to regulate national governance and that it is no longer a matter that is strictly within the internal jurisdiction of a state. In that sense, the argument embodies an endeavour to transform an extra-legal issue in international law into an exercise that should be governed and monitored through international law instruments. Democratic governance discourses can be seen as an enterprise to apprehend the birth of governments in international law and to domesticate this phenomenon by determining its rules, scope and application.

Democratic governance has been on the agenda of international lawyers since the end of the Cold War and several legal scholars have pondered how the rules determining the exercise of power at the domestic level could be regulated through international law. Nevertheless, a new focal point with regard to the relationship between democracy and international has arisen in recent years. As discussed above, recently the spotlight has been on the recession of democratic rule, rather than its consolidation. It is possible to witness across the scholarship that the optimism of the post-Cold War era with regard to the consolidation of democratic

²² David Kennedy, 'Tom Franck and the Manhattan School' (2002) 35 New York University JIL and Politics 397.

²³ Discourse here is used to define engagement with a subject whether in speech or writing that creates a particular understanding to the exclusion of alternative ways of interpreting the same phenomena in order to claim authority over that subject. This definition draws from Andrea Bianchi's approach who defines discourse as 'what keeps certain practices and procedures in circulation while others are excluded' in Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 258. For an extended discussion on discourse, see Michel Foucault, 'Order of Discourse' in Robert Young (ed), *Untying the Text: A Post-Structuralist Reader* (Routledge 1981) 48-78.

governance is replaced by a growing concern about a possible recession. It is striking that the discussions on democracy's performance are often accompanied by a feeling of astonishment or almost even a feeling of disappointment. After three decades of intense discussions on how the consolidation of democratic rule is changing the rules of international law, scholars seem to be disappointed that practice did not follow their prediction. This study addresses the feeling amongst scholars of what looks like a failed expectation with regard to democracy. It is intriguing why the recent fluctuation in the protection of democratic values is not regarded as a natural course of events, but rather there is a sense of astonishment that is very much prevalent in the majority of recent writings on democracy. The recession of democracy is seen as an unexpected phenomenon, a disconcerting episode which was not anticipated. Why the regress of democracy in some states is regarded as an unexpected phenomenon that does not conform to our prediction for democracy's future? Why did we expect that democracy would follow a linear path and consolidate over time? How did we come to think that democracy was here to stay? In order to answer these questions, this study investigates how the perception that democracy would gradually consolidate was created in international law.

1.1. Object and Main Claim

Democratic governance discourses adopt a progressive interpretation of history. Indeed, proponents of an emerging right to democracy argue that states are increasingly becoming more active in the validation of national governance through free and fair elections. The idea of 'emergence' specifically suggests that a customary norm that did not exist before the end of the Cold War is now coming into being in light of recent state practice and will soon compel all international actors to legitimise their governments in democratic terms. According to this understanding, history is presupposed to unfold in a linear way that distinguishes a beginning, a middle and an end regarding the formation process of this emerging right. In other words, democratic governance discourses tell a story of change where a new customary international law rule is changing the way we determine the representative body of a state in the international arena. They simultaneously presume that incrementally the number of states holding elections to determine their governance will increase and that this will also be followed by a shared belief among international actors that this practice is becoming part of international law. In that sense, democratic governance discourses do not only describe the state of affairs regarding how the neutrality of international law with regard to governmental forms is changing, but they also predict how future practice will unfold. They create an expectation about the consolidation of democratic rule by providing a progressive reading of history. Nevertheless, this linear progressive interpretation of history has been challenged by recent discussions on the global recession in democratic rule. The expectation that was created by international law scholars that we are steadily moving towards an era where only democracy validates governance seems to be rebutted by the narrative on democracy's backlash.

This study aims to unearth international law's complicity in the fabrication of a progressive interpretation of history which predicts that democracy will consolidate over time. It locates the creation of an expectation that democracy will steadily consolidate to become an enforceable right under international law in the progress narrative of democratic governance discourses that started to take shape at the beginning of the 1990s. Progress narratives assume that history unfolds based on a linear trajectory and that we are moving towards a more advanced legal structure in parallel with time. They construe international law as a set of coherent events following one another and disregard discontinuities that might disrupt this linear trajectory. History is portrayed as a collection of homogenous events rather than a series of developments and setbacks. As in the case of democratic governance discourses, they might also predict how the future will unfold and create an expectation regarding the emergence or consolidation of a right or practice. This study demonstrates that democratic governance discourses produced following the end of the Cold War rely on a progressive interpretation of history which is projected to follow a linear path. It claims that the discussions on the recession of democracy and the current mood of despair are due to an unwarranted expectation of a post-Cold War democratic heyday which was problematic in the first place. Today's dismay about the recession of democracy is an offspring of the progress narrative about democratic governance.

As the study locates today's despair about the recession of democracy in academic writings defending an emerging right to democratic governance, it elucidates the narrativisation techniques that international lawyers used to construct democratic governance discourses. Since international law discourses are constructed based on some narrativisation strategies, it is possible to deconstruct these narratives into their components and understand the elements that allowed a progressive interpretation of history. In particular, it takes a critical look at three of these narrativisation techniques, namely the construction of the formal, temporal and spatial elements of the narrative to understand how they have been instrumental in the creation of an idea of progress. The formal element explains how international lawyers drew the legal contours of these discourses and anchored the subject into a legal framework. The temporal element examines how scholars used the periodisation of history to situate their discourses in time. The spatial element explores how the idea of universality was used by these discourses to determine within which space this narrative would have an impact.

Analysing these three narrativisation elements allows one to understand how international lawyers construed the emergence of democratic governance in progressive terms and envisaged history as a linear path continually moving towards a more advanced form of law. Examining the narrativisation techniques at work in democratic governance discourses demonstrates that the discussions on democratic backsliding and the current mood of despair are due to an unwarranted expectation of a post-Cold War democratic heyday which was problematic in the first place. Instead of qualifying the 1990s as the era of democratic 'victory'

and the last decade as the doomsday for democracy, scholars should come to terms with the hopeful image they painted after the end of the Cold War. Today's dismay about democratic backsliding should be nuanced by accepting the illusion that was created in the scholarship with the progress narrative of democratic governance discourses. In elucidating the narrativisation techniques of democratic governance discourses, this study ultimately shows that today's failed expectation regarding the consolidation of democracy stems from the progress narrative of these discourses.

1.2. State of the Art and the Innovative Character of the Inquiry

A large body of scholarly effort has been devoted to understanding how international law can regulate domestic governance and what impact democracy might have on international affairs. Democratic governance has been influential in international law on a wide range of subjects. Membership to international organisations,²⁴ representation in international organisations,²⁵ use of force and regime change,²⁶ election monitoring,²⁷ democratic peace thesis,²⁸ human

²⁴ Christina Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West' (1994) 27 New York University JIL and Politics 289, Matthew Griffin, 'Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy through its Accreditation Process, and Should It' (1999) 32 New York University JIL and Politics 725, Jan Wouters, Bart de Meester and Cedric Ryngaert, 'Democracy and International Law' (2003) 34 Netherlands YBIL 139.

²⁵ Gregory Fox, 'The Right to Political Participation in International Law' (1992) 17 Yale JIL 539, James Crawford, 'Democracy and International Law' (1993) 64 BYBIL 113.

²⁶ Michael Reisman, 'Humanitarian Intervention and Fledgling Democracies' (1994) 18 Fordham International Law Journal 794, Michael Byers, Simon Chesterman, "'You the People': Pro-Democratic Intervention in International Law' in Gregory Fox, Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000), Mehrdad Payandeh, 'The United Nations, Military Intervention, and Regime Change in Libya' (2011) 52 Virginia JIL 355, Jure Vidmar, 'Democracy and Regime Change in the post-Cold War International Law' (2013) 11 New Zealand Journal of Public and International Law 349, Jay Butler, 'Responsibility for Regime Change' (2014) 114 Columbia Law Review 503. See also Michael Reisman, 'Why Regime Change is (Almost Always) a Bad Idea' (2004) 98 ASIL Proceedings 290, Steven Wheatley, 'The Security Council, Democratic Legitimacy and Regime Change in Iraq' (2006) 17 EJIL 531, Sara McLaughlin Mitchell, Paul Diehl 'Caution in What You Wish For: The Consequences of a Right to Democracy' (2012) 48 Stanford JIL 289.

²⁷ Yves Beigbeder, *International Monitoring of Plebiscites, Referenda and National Elections: Self-Determination and Transition to Democracy* (Martinus Nijhoff Publishers 1994), Douglas Anglin, 'International Election Monitoring: The African Experience' (1998) 97 African Affairs 471, Gregory Fox, 'Election Monitoring: The International Legal Setting' (2000) 19 Wisconsin International Law Journal 295, Christina Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (2007) 13 European Public Law 133, Judith Kelley, 'Assessing the Complex Evolution of Norms: The Rise of International Election Monitoring' (2008) 62 International Organization 221, Judith Kelley, *Monitoring Democracy: When International Election Observation Works, and Why It Often Fails* (Princeton University Press 2012), Arturo Santa-Cruz, *International Election Monitoring, Sovereignty, and the Western Hemisphere: The Emergence of an International Norm* (Routledge 2013).

²⁸ Erich Weede, 'Some Simple Calculations on Democracy and War Involvement' (1992) 29 Journal of Peace Research 377, Randall Schweller, 'Domestic Structure and Preventive War: Are Democracies More Pacific?' (1992) 44 World Politics 235, Tom Farer, 'Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect' (1993) 15 Human Rights Quarterly 716, Bruce Russett, *Grasping the Democratic Peace: Principles for a post-Cold War World* (Princeton University Press 1994), Michael Edward Brown, Sean Lynn-Jones and Steven Miller, *Debating the Democratic Peace* (The MIT Press 1996), Steve Chan, 'In Search of Democratic Peace: Problems and Promise' (1997) 41 Mershon International Studies Review 59, John Owen, *Liberal Peace, Liberal War: American Politics and International Security* (Cornell University Press 2000). Kant has been an important influence on this thesis, see Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Pauline Kleingeld ed, Yale University Press 2006). On the application of Kant's theory to liberal peace, see Michael Doyle, 'Kant, Liberal Legacies, and Foreign Affairs' (1983) 12 Philosophy & Public Affairs 205, John Norton Moore, 'Beyond the Democratic Peace: Solving the War Puzzle' (2003) 44 Virginia JIL 341, Joanne Gowa, *Ballots and Bullets: The Elusive Democratic Peace* (Princeton University Press 2011).

rights,²⁹ post-conflict reconstruction,³⁰ intervention by invitation³¹ and economic growth³² can be identified as some examples.³³ Writings on democratic governance are abundant and this study does not endeavour to re-evaluate the arguments already stated in the literature nor does it discuss whether a right to democratic governance has now emerged. This study does not concern itself with the identification of democracy's normative content and its place within customary international law as an emerging right. This has already been performed by a sheer number of writings which themselves are the main focus of this study.

This study deploys a critical mindset and seeks to understand how democratic governance discourses have been complicit in the creation of an expectation that democracy would eventually emerge as a right. Many critics have already been vocal against democratic governance discourses regarding its limited regional validity and desirability,³⁴ neo-colonial approach,³⁵ neo-authoritarianism,³⁶ theoretical flaws,³⁷ and its temporary relevance.³⁸ The innovative character of this inquiry stems from its focus on how the progress narrative of democratic governance discourses has been constructed. More specifically, it aims to bring to light the narrativisation techniques that international lawyers have resorted to in order to construct the building blocks of this narrative. It provides an original account by construing international law as a set of narratives and endeavours to understand how these narratives are produced. Today's discussions on democratic backsliding suggest that the facts on the ground do not reflect the development of democratic rule as it was anticipated. In order to understand why there is a gap between the expectation of a democratic future and the current state of affairs, this study aims to assess how the argument of an emerging right to democratic governance has been instrumental in the creation of this expectation. Zooming in on the narrativisation techniques of this narrative will demonstrate how these discourses rely on a

²⁹ Crawford, 'Democracy and International Law' (n 25).

³⁰ Gregory Fox, 'International Law and the Entitlement to Democracy after War' (2003) 9 *Global Governance* 179, Julia Leininger, 'Democracy and UN Peace-Keeping – Conflict Resolution through State-Building and Democracy Promotion in Haiti', <<https://ssrn.com/abstract=2046657>> accessed 22 August 2019, Jean d'Aspremont, 'Post-Conflict Administrations as Democracy-Building Instruments' (2008) 9 *Chicago JIL* 1, Matthew Saul, *Popular Governance of Post-Conflict Reconstruction: The Role of International Law* (CUP 2014).

³¹ Jan Wouters, Bart de Meester and Cedric Ryngaert, 'Democracy and International Law' (2003) 34 *Netherlands Yearbook of International Law* 139, Robert Lancaster, 'Intervening Interests: Humanitarian and Pro-Democracy Intervention in the Asia-Pacific' (2009) 16 *Australian International Law Journal* 103, Brad Roth, 'The Virtues of Bright Lines: Self-Determination, Secession, and External Intervention' (2015) 16 *German Law Journal* 384, Roger Bond Choquette, 'A Rebuttable Presumption Against Nondemocratic Consensual Intervention' (2016) 55 *Columbia Journal of Transnational Law* 138.

³² Mancur Olson, *Power and Prosperity: Outgrowing Communist and Capitalist Dictatorships* (Basic Books 2000).

³³ For a bibliography on democratic governance writings, see also Steven Wheatley, 'Democracy' in Oxford Bibliographies in International Law, Anthony Carty (ed) OUP.

³⁴ Thomas Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law' (1992) ASIL Proceedings 261, Brad Roth, *Governmental Illegitimacy in International Law* (OUP 2000), Thomas Carothers, 'The Backlash Against Democracy Promotion' (2006) 85 *Foreign Affairs* 55.

³⁵ Martti Koskeniemi, 'Whose Intolerance, Which Democracy?' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000).

³⁶ Susan Marks, *The Riddle of All Constitutions* (OUP 2000). See also Gills and others, 'Low Intensity Democracy' in Barry Gills, Joel and Rocamora and Richard Wison (eds), *Low Intensity Democracy: Political Power in the New World Order* (Pluto Press 1994), William Robinson, *Promoting Polyarchy: Globalization, US Intervention and Hegemony* (CUP 1996), Ruth Hanau Santini and Oz Hassan, 'Transatlantic Democracy Promotion and the Arab Spring' (2012) 47 *The International Spectator* 65.

³⁷ Euan MacDonald, *International Law, Democratic Governance and September the 11th*, (2002) 3 *German Law Journal*, <<https://germanlawjournal.com/volume-03-no-09/>> accessed 22 August 2019.

³⁸ Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 *EJIL* 549.

linear interpretation of history which promised a smooth progress towards the crystallisation of a right to democratic governance.

1.3. Conceptual and Methodological Choices

International law can be defined in several ways: as rules, processes, practices and many other theoretical approaches can be put forward.³⁹ This study construes international law as a set of narratives. The focus on narratives can be justified by the object of inquiry. The main inquiry here is about how international lawyers created the expectation that democracy would consolidate over time. In order to address this inquiry, academic writings discussing whether there is an emerging right to democratic governance that obliges states to validate their governance through free and fair elections will be considered as forming part of a narrative. The expectation that democracy would consolidate over time to give rise to a new customary norm in international law is a narrative construction that international lawyers create through some writing strategies. Meaning is not intrinsic to facts. International lawyers need to mould historical events, legal sources, doctrines, judgments and international practice to give them a meaning. The production of meaning is a narrativisation process whereby scholars have to create links between these facts that do not have a meaning on their own. Facts need to be made part of a coherent story in order to support an argument. In an effort to explain how international lawyers create coherent stories and generate meaning in their writing, this study identifies some narrativisation elements that are instrumental in building a narrative. These narrativisation elements are not always accessible for the audience at a first reading. By bringing these narrativisation elements to light, the study demonstrates how international lawyers create new necessary causalities between historical events, legal sources, doctrines, judgments and international practice to create meaning in a text and advance an argument.

In international law scholarship, approaches that emphasise the narrativisation elements of international law are not very common. While different strands of international law, including Critical Legal Studies, Feminist Approaches and TWAIL, have addressed the close relationship between politics, ideology and law to argue that international law stories do not describe an objective account of the world that exists out there, they have not framed their claim on the basis of international law's narrativisation elements. One of the reasons why international lawyers have shied away from analysing the narrativisation elements can be explained by the desire to maintain international law's uniqueness as a discipline. Engaging with narratology and arguing that international law writings can be subject to a literary analysis impairs the autonomy of the discipline by opening it to the scrutiny of another field which

³⁹ For different approaches to international law, see Andrea Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (OUP 2016). For accounts that highlight the relationship between practice and theory, see also the symposium on method in international law organised by AJIL, in (1999) 93 AJIL 291-423.

undermines its scientificity.⁴⁰ For instance, Pierre Schlag warned against what he called ‘the dedifferentiation problem’ and argued that, as a consequence of new approaches to international law theories, we are facing the risk of constantly creating new relations between international law and other disciplines, which makes a disservice to the autonomy of the discipline.⁴¹ Nevertheless, international lawyers cannot escape from telling stories since they need to elaborate upon their argument and explain why the case they make, is persuasive. This inevitably requires constructing narratives that will establish the premise of their argument. Construing international law as a set of narratives is important for several reasons. First, it allows us to conceptualise international law as a language that consists of more than a system of rules and procedures in the service of legal disputes.⁴² Indeed, it provides an approach that does not see the legal system as a mechanical tool of dispute resolution.⁴³ When one sees international law as a set of narratives, it helps to understand how international lawyers create the world they live in, how certain topics enter the international lawyers’ radar, how these topics are domesticated and turned into a legal subject by a narrativisation process. In that sense, it provides a space for reflexivity.⁴⁴ Second, analysing the narrativisation process of these international law stories showcases how, rather than a neutral finding, international law writings provide perspectives generated through some narrative strategies. While it is no longer a novel claim to state the subjectivity of international law discourses, laying bare the pillars that holds an argument in place showcases how in practice this subjectivity is constructed. An approach that emphasises the elements of narrativisation shows that an international law narrative represents only one of many other possible accounts. It demonstrates that truth or reality do not exist out there expecting the intermediary of an international lawyer to be translated into words, but rather meaning is produced through a narrativisation process whereby the narrator has to connect facts together in a way that would convey her argument.⁴⁵ Third, acknowledging the narrative character of international law writings not only highlights the subjective character of these narratives but it also shows that these narratives are contingent. International law is a narrativisation practice and the way we interpret facts and the stories that we tell each other are not part of a fatality that we cannot escape from. These are not narratives that are necessary, and they could be told otherwise. Acknowledging the anti-necessitarian character of international law opens up a space that

⁴⁰ Peter Goodrich, *Law in the Courts of Love: Literature and Other Minor Jurisprudences* (Routledge 1996) 112, Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (OUP 2008) 140, Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (n 39) 288. On the scientific nature of international law, see Anne Orford, ‘Scientific Reason and the Discipline of International Law’ (2014) 25 EJIL 369. On the functioning of a scientific field, see also Pierre Bourdieu, ‘The Specificity of the Scientific Field and the Social Conditions of the Progress of Reason’ (1975) 14 Social Science Information 19.

⁴¹ Pierre Schlag, ‘The Dedifferentiation Problem’ (2009) 42 Continental Philosophy Review 35.

⁴² James Boyd White, ‘Law as Language: Reading Law and Reading Literature’ (1981) 60 Texas Law Review 415.

⁴³ Robert Cover, ‘Foreword: Nomos and Narrative’ (1983) 97 Harvard Law Review 4, 5. Schultz stated that even dispute settlement should not be seen as a pure technical exercise of doing law and that international lawyers should be more interested in thinking about law, see Thomas Schultz, ‘Doing Law and Thinking about Law’, (2013) 4 Journal of International Dispute Settlement 217. On a managerial approach to international law, see also Martti Koskeniemi, ‘The Fate of Public International Law: Between Technique and Politics’ (2007) 70 The Modern Law Review 1.

⁴⁴ Paul Gewirtz ‘Narrative and Rhetoric in the Law’ in Peter Brooks and Paul Gewirtz (eds), *Law’s Stories: Narrative and Rhetoric in the Law* (Yale University Press 1996) 4. On the importance of reflexivity in international law, see Andrea Bianchi, ‘Reflexive Butterfly Catching: Insights from a Situated Catcher’ in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012).

⁴⁵ Gewirtz ‘Narrative and Rhetoric in the Law’ in Brooks and Gewirtz (eds) (n 44) 3.

prevents the overestimation of grand narratives that have become mainstream or have long been unquestioned. Thinking about international law in terms of contingency enables the reinterpretation of not only mainstream or controversial narratives but also fundamental doctrines and generates transformative power.⁴⁶ Fourth, shifting our focus from law identification to the way in which law has been constructed and shaped sheds light on the processes by which international law scholars create law. If international law is a narrative exercise, international law scholars have a significant role in determining what should be accepted as law.⁴⁷ Accordingly, focusing on the narrativisation elements of international law can provide a necessary space to capture the role that international law scholars play as lawmakers.

This study aims to elucidate the narrativisation elements of democratic governance discourses in order to understand how they generated an expectation with regard to democracy's consolidation. To that end, it conducts a discourse analysis and examines academic writings that advocated an emerging right to democracy. In its simplest version, discourse analysis can be defined as the examination of narrativisation structures that generate meaning.⁴⁸ The resort to discourse analysis in legal studies warrants a few observations. Discourse analysis was a point of enquiry firstly among structuralists and then post-structuralists in social sciences before it became a popular subject for international law scholars.⁴⁹ One of the main theses of structuralism has been about shedding light on the underlying structure that constructs meaning within the text. Ferdinand de Saussure's argument about the meaning's relational existence between the signifier, the utterance, and the signified, the immaterial concept, has been instrumental in allowing us to examine the text in order to excavate its operational structure.⁵⁰ According to this understanding, linguistic signs do not have an intrinsic meaning prior to human experience and it is the network created between signs that generate meaning.⁵¹ Structural analysis became in this regard a method by which one could read a text closely in order to decode this network and discover the structures that create meaning which is not always visible at a first reading.⁵² Consequentially, structuralists who started to ponder the use of these linguistic structures came to assert that language was not a simple form of transmitting an idea but rather, it has its own rules which direct the reader to a particular

⁴⁶ Roberto Mangabeira Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (Verso 2004) xxiii. See also Ingo Venzke, 'What If? Counterfactual (Hi)Stories of International Law' (2018) 8 Asian JIL 403. For a nuanced approach to false necessity see Susan Marks, 'False Contingency' (2009) 62 Current Legal Problems 1.

⁴⁷ Jan Klabbers, 'On Epistemic Universalism and the Melancholy of International Law' (2018) 29 EJIL 1057, 1059.

⁴⁸ Thomas Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press 2010) 32.

⁴⁹ See generally Gillian Brown and George Yule, *Discourse Analysis* (CUP 1983), Terry Eagleton, *Literary Theory: An Introduction* (Basil Blackwell 1986), Pierre Macherey, *A Theory of Literary Production* (Routledge 1986), Brian Paltridge, *Discourse Analysis: An Introduction* (Continuum Publishing 2006), James Paul Gee and Michael Handford (eds), *The Routledge Handbook of Discourse Analysis* (Routledge 2013), Barbara Johnstone, *Discourse Analysis* (John Wiley & Sons 2017).

⁵⁰ Ferdinand de Saussure, *Cours de Linguistique Générale* (Grande Bibliothèque Payot 1995) 144-84.

⁵¹ *ibid* 158-62.

⁵² For a primary reading explaining how to conduct structural analysis, see Roland Barthes, 'An Introduction to the Structural Analysis of Narrative' (1975) 6 New Literary History 237. See also, Tzvetan Todorov, 'Structural Analysis of Narrative' (Arnold Weinstein tr, 1969) 3 NOVEL: A Forum on Fiction 70.

understanding.⁵³ In that sense, truth or reality are not intrinsic to a text; rather, they are constructions of the narrative.⁵⁴

While structuralism has been preoccupied with establishing the rules that govern the language in order to create meaning, poststructuralism has been engaged in questioning the alleged scientificity of structuralism's method of linguistic analysis. Poststructuralists parted ways with structuralists in their approach to the nature of linguistics. According to Ferdinand de Saussure language was a rational system which provided an operational structure whose laws could be determined through a scientific method of analysis.⁵⁵ While his earlier works were central texts of structuralism, Roland Barthes's *S/Z* is considered the 'work of the break'⁵⁶ between the two movements.⁵⁷ The shift from structuralism to poststructuralism in *S/Z* can be observed in the way Roland Barthes treated the text under his examination. He no longer claimed to deploy an objective method to decipher the structure of the text and emphasised the plurality of meaning within the text.⁵⁸ Similarly, Jacques Derrida disagreed with the idea that language could be envisaged as a closed system that could be investigated with a scientific method and argued that meaning is constructed in a more arbitrary way due to the volatile nature of language.⁵⁹ This critique has led Jacques Derrida to establish deconstruction as a new method to conduct discourse analysis in an effort to dismantle settled categories and concepts.⁶⁰ He explained how hierarchies of thought in a text could be reversed and how the way two opposite structures are defined could be replaced with each other. Jacques Derrida opined that law too, could be subject to such an analysis due to its mystical character and for being constructed on 'interpretable and transformable textual strata'.⁶¹ Poststructuralists borrowed from structuralism the refusal to recognise an *a priori* meaning to linguistic structures that exists before interpretation. However, they differed in their approach to the possibility of determining rules of linguistic structures and the stability of the language.⁶²

A few remarks should be mentioned on how the discourse analysis conducted in this study will draw from both of these movements. This study aims to shed light on how scholars defending an emerging right to democratic governance constructed their narrative and created an expectation that democracy would consolidate over time by adopting a progressive interpretation of history. To that end, discourse analysis is used as a method to bring to light the underlying narrativisation structure of democratic governance discourses. In that regard, discourse analysis helps to unravel how a certain understanding regarding the relationship

⁵³ Sara Mills, *Discourse* (Taylor and Francis 2004) 7.

⁵⁴ Meaghan Morris and Paul Patton (eds), *Michel Foucault : Power, Truth, Strategy* (Feral Publications 1979) 46.

⁵⁵ de Saussure (n 50) 107-08.

⁵⁶ Eagleton (n 49) 137.

⁵⁷ Roland Barthes, *S/Z* (Blackwell 1990).

⁵⁸ *ibid.*

⁵⁹ Jacques Derrida, *Of Grammatology* (Johns Hopkins University Press 2016).

⁶⁰ *ibid* 30-40.

⁶¹ Jacques Derrida, *Acts of Religion* (Anidjar Gil ed, Routledge 2002) 242.

⁶² 'The text has no stable identity, stable origin ... each act of reading "the text" is a preface to the next' in Derrida, *Of Grammatology* (n 59) xii.

between international law and democracy has been envisaged through the construction of some narrativisation elements. Discourse analysis allows us to demonstrate that the way the narrative has been constructed seeks to immobilise a certain interpretation of facts and therefore obstructs alternative readings. When the scholar tells a story, she seems to be depicting the things as they are in an objective way. She positions herself outside the world where these things happen and adopts the position of an objective arbiter. Discourse analysis serves as a tool to understand how one creates an order to make sense of the world and how this order can be challenged by showing the possibility of alternative interpretations. In that sense, discourse analysis is used as a method to examine the narrative strategies that a narrator uses in her writing and challenges assumptions that we might take for granted regarding the meaning created in some fundamental texts. Second, discourse analysis allows the dismantling of a narrative which tries to immobilise a certain meaning or understanding about a concept and neutralise a particular way of thinking about it. Although democratic governance writers do not form a homogenous group, it can be argued that their discourses posit a particular vision about the relationship between democracy and international law. In that sense, they contend to have captured this relationship and present the reader with what already exists. However, this cannot escape the criticism that it is each and every narrator's own vision of democracy and their own interpretation of that relationship that is reflected in their writings, rather than something that exists as a neutral fact. In that regard, it is possible to dismantle that understanding in order to demonstrate that the way democratic governance discourses construct their argument on an emerging right to democracy is not the only way to understand the place of democracy in international law. Said differently, discourse analysis helps to suspend the correspondence that was created between facts and legal sources. The purpose here is to see whether the same facts can be interpreted differently by trying to give facts different meanings.⁶³

An important caveat regarding the objective pursued by conducting a discourse analysis must be formulated. This study does not aim to create a meta-language which can objectively demonstrate how the operational structure of democratic governance discourses function. Said differently, the objective here is not to provide some technical tools that allows us to reach a final interpretation about the way the meaning has been produced in a narrative. It would be contradictory to the argument of the study to claim that the analysis conducted here provides the tools to decode the language of an international law narrative. Instead, this study provides a snapshot about the possible narrative structure of democratic governance discourses. Another reader of democratic governance discourses might see other structures which are equally plausible.⁶⁴ As famously argued by Roland Barthes:

⁶³ Anne Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (CUP 2003) 38.

⁶⁴ Eagleton (n 49) 137.

A text is made up of multiple writings, drawn from many cultures and entering into mutual relations of dialogue, parody, contestation, but there is one place where this multiplicity is focused and that place is the reader, not, as was hitherto said, the author. The reader is the space on which all the quotations that make up a writing are inscribed without any of them being lost; a text's unity lies not in its origin but in its destination.⁶⁵

In that sense, this analysis is a reader's interpretation of what she sees when she reads democratic governance discourses. It provides one of many possible accounts that can be presented regarding the way international lawyers have constructed democratic governance discourses. The aim here is to analyse these discourses and shed light on its narrative structure. It is therefore only a proposal.⁶⁶ It does not seek to provide a final reading nor a metanarrative that explains how democratic governance discourses have been constructed. It aims to open a discussion to understand the narrativisation elements that generated meaning in a particular narrative.

The main source material of the abovementioned discourse analysis is provided by democratic governance discourses. In 1992, Thomas Franck put forward the central argument of democratic governance and argued that there was an emerging right to democratic governance in international law which required states to validate their rule through democracy.⁶⁷ Several scholars followed suit and Thomas Franck's article generated a discussion that produced a sheer number of writings on the increasing role of international law with regard to governmental legitimacy. The scholarly writings that will be investigated in this study are those from that part of this democratic entitlement school, writings discussing to what extent international law can provide the tools to validate governance. In that regard, several writings will be part of this inquiry and an intertextual discourse analysis will be geared towards discovering the narrativisation element that recur in these writings. As argued by Paul de Man 'Literature as well as criticism – the difference between them being delusive – is condemned (or privileged) to be forever the most rigorous and, consequently, the most unreliable language in terms of which man names and transforms himself.'⁶⁸ In that regard, while scholarly texts are meant to be a sophisticated form of knowledge, they are also the most unreliable source and can therefore be dissected to reveal the way they constructed their argument.

⁶⁵ Roland Barthes, 'The Death of the Author' in David Graddol and Oliver Boyd-Barrett (eds), *Media Texts: Authors and Readers* (Multilingual Matters 1994) 170. Culler also argued that a reader should not only be seen as the consumer of a text, but also producer, see Jonathan Culler, *On Deconstruction: Theory and Criticism after Structuralism* (Cornell University Press 2007) 38.

⁶⁶ Mieke Bal, *Narratology: Introduction to the Theory of Narrative* (University of Toronto Press 2002) 11.

⁶⁷ Franck, 'The Emerging Right to Democratic Governance' (n 21).

⁶⁸ Paul de Man, *Allegories of Reading* (Yale University Press 1979) 19.

1.4. Outline

The study is structured as follows. Chapter 2 sketches out the conceptual framework of the study. This chapter explains how at first, narratives became an object of inquiry in the 1960s based on the linguistic studies of Ferdinand de Saussure and how narratology was transposed in legal theory. The chapter then turns more specifically to international law. It focuses on the specificities of international law narratives in order to explain how they are different than any other type of narrative due to their objective and the language that they speak. It provides an overview of different ways in which international lawyers have touched upon the narrative structure of international law discourses without necessarily addressing the issue from a narrative perspective. The chapter then proposes three narrativisation elements that international lawyers construct in their narratives. The formal element describes the process by which the narrator anchors the subject into an international law framework and spells out the evidence that the subject-matter deserves to be discussed under the rubric of international law. The temporal element situates the narrative in time and determines how the narrative will be limited within a timeframe. The spatial element situates the narrative in space and describes within which space the narrative will modify relations between actors. After presenting three major building blocks of international law narratives, the chapter explains how these three elements can be built with a linear interpretation of history in order to generate a progress narrative.

Chapter 3 presents an overview of democratic governance discourses in order to determine the scope of the material that will be discussed. First, it discusses democratic liberalism that forms the basis of democratic governance discourses. It expands on the scholarship of scholars who challenged the ideological plurality of the UN Charter by relying on a democratic liberal understanding. It then concentrates on democratic governance discourses by presenting an overview of these writings in three stages. First, the chapter explains the pioneering writings of Thomas Franck and Gregory Fox who put forward the argument that the neutrality of international law with regard to governmental forms is changing. Then, it provides an overview of how this idea has been received by other scholars who continued to develop these discourses. In a third step, it shows how these discourses still keep up their momentum and maintain their place in the agenda of international lawyers. The chapter finishes by demonstrating why these discourses on democratic governance can be construed as a narrative.

Chapter 4 examines the construction of the formal element. Scholars need to find the facts that will help them prove their argument and create the necessary links between these facts in order to anchor their narrative into a legal framework. This chapter focuses on how scholars construct the legal contours of their narrative. A common technique that is used in democratic governance discourses is the frequent repetition of some cases with a similar interpretation

which function as 'normative markers' to establish the formal element of the narrative. First, the chapter defines what is meant by normative marker and then illustrates its use in democratic governance discourses through three case studies: Haiti, Sierra Leone and Côte d'Ivoire. It is argued that the repetition of the same cases with the same interpretation turns these cases into normative markers of democratic governance discourses in order to demonstrate the beginning, consolidation and confirmation of a new customary norm. The chapter then analyses how the Security Council and its authorisation to use force are central elements in the construction of these normative markers.

Chapter 5 explores the temporal element of the narrative. It focuses on the use of periodisation in the construction of democratic governance discourses and investigates how the Cold War and post-Cold War dichotomy is used to justify the emergence of a right to democratic governance. The periodisation of history through the Cold War and post-Cold War dichotomy whereby the former represents an era when international law was neutral towards governmental changes and the latter a period which is no longer agnostic to the way a government is formed, is put into perspective in order to understand how the creation of these two periods supports the argument of democratic governance discourses. It examines both the Cold War and post-Cold War international practice to demonstrate that ultimately, the creation of a turning point in history is a narrative construction that scholars use to justify their argument.

Chapter 6 investigates the construction of the spatial element in democratic governance discourses. It discusses how the concept of universality is used in order to create the space where this emerging right to democracy will have an impact. After presenting an overview on what is meant by the universality of international law, the chapter explores how as an abstract concept, democracy forms an 'object of agreement' that attracts the readers' attention as an argumentative hook and facilitates their adherence to the argument. This section illustrates how as an abstract concept democracy can easily claim universality due to its imprecise and broad connotations and how this universality is hardly transferable when this abstract concept is transformed into a right. Then, it discusses how the universality of democracy can be used as a hegemonic tool.

Chapter 7 presents an overview of the findings of the study and concludes with a few remarks on the potential of the approach adopted here in international legal scholarship.

2. Construction of Narratives in International Law

This chapter sets the stage for the subsequent chapters by presenting the conceptual framework adopted by the study. Despite the impossibility of an objective disclosure regarding the theoretical foundations of a work, reflexivity is an essential duty in explaining how one constructed the research.⁶⁹ Venturing to unmask the theoretical biases can help the reader to better comprehend the way in which international law has been represented in one's work and the language that it will speak. It is therefore a necessity to disclose the conceptual basis upon which the argument of this work will be built. To that end, this chapter seeks to demonstrate that international law can be construed as a set of narratives and that the mainstream understanding of democratic governance discourses is one of many possible narratives. Construing international law as a set of narratives is not common in the scholarship.⁷⁰ When one sees international law as a collection of narratives, rather than as treaties, rules, institutions or judicial decisions, it brings a new perspective to the way we perceive the discipline. Looking at international law with the lens of narratology allows one to go beyond the rules that determine how international disputes should be settled and opens up a space to take a broader view regarding how we perceive the world as international lawyers. It explains not only how we solve disputes but also how we create the problems, how we establish the institutions that create problems and their solutions. While subsequent chapters will focus on particular narrative elements in the construction of democratic governance discourses, this chapter explains why international law can be regarded as a set of narratives which do not present a verifiable truth. It is argued that despite the wide acceptance of some founding narratives as valid, such as democratic governance discourses, their narrative structure can be analysed by breaking it into its components in order to understand how meaning has been produced.

There are certainly very different ways of conceptualising how international legal discourses function. This chapter explains what is meant by the narrative structure of international law in

⁶⁹ Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Duckworth London 1988) 367, Pierre Bourdieu, 'Participant Objectivation' (2003) 9 *Journal of the Royal Anthropological Institute* 281, 284, Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher' (n 44) 200, Jean d'Aspremont, *Epistemic Forces in International Law* (Edward Elgar Publishing 2015) 1. According to Stanley Fish, reflexivity is not only unnecessary but also impossible: 'One is always aware; one always knows what one is doing, and, when challenged, one can always give reasons of the kind given by the department chairmen to whom my committee wrote. But those reasons are like the reasons given in the catechism; they are reasons for your faith, and they are also reasons that derive from your faith in a circular but not vicious relationship; and when that faith is succeeded by another, a new set of reasons will accompany it, and that set of reasons will be the instantiation of a new awareness.' in Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary & Legal Studies* (Duke University Press 1989) 462.

⁷⁰ Some exceptions that conceptualise international law in narrative terms include, Joseph Slaughter, 'Enabling Fictions and Novel Subjects: The Bildungsroman and International Human Rights Law' (2006) 121 *Publications of the Modern Language Association of America* 1405, Joseph Slaughter, *Human rights, Inc.: The World Novel, Narrative Form, and International Law* (Fordham University Press 2007), Martti Koskeniemi, 'The Fate of Public International Law: Between Technique and Politics' (2007) 70 *The Modern Law Review* 1, 24-25, Anne-Charlotte Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law' (2009) 22 *Leiden JIL* 1, Skouteris (n 48), Andrea Bianchi, 'Terrorism and Armed Conflict: Insights from a Law and Literature Perspective' (2011) 24 *Leiden JIL* 1, Lucas Lixinski, 'Narratives of the International Legal Order and Why They Matter: An Introduction' (2013) 6 *Erasmus Law Review* 2, Sahib Singh, 'Narrative and Theory: Formalism's Recurrent Return' (2014) 84 *BYBIL* 304, Matthew Windsor, 'Narrative Kill or Capture: Unreliable Narration in International Law' (2015) 28 *Leiden JIL* 743, Anne Saab, *Narratives of Hunger in International Law: Feeding the World in Times of Climate Change* (CUP 2019).

four steps. At first, it enquires how narratology, as a discipline that examines the construction of meaning in a text, has been developed and transposed into legal theory (2.1.). This section explains why it is important to pay attention to the way in which narratives are constructed. It further explains how the narrative genre in law is different than any other type of narrative based on the objective pursued and the language that it speaks. Second, the chapter focuses on rhetorical narratives in international law (2.2.). This section starts by highlighting how international lawyers touched upon the narrative structure of international law without necessarily framing their discussion around narrative theory. It then discusses the role of interpretation as a tool to create international law narratives. A final sub-section questions whether we can still talk about validity of arguments when we accept that international law discourses can be conceptualised as narratives. The third section presents the building blocks of international law narratives (2.3.). It explains how the formal, temporal and spatial elements are constructed in a narrative to anchor the narrative in an international law framework, to situate it in time and space. The fourth section examines how these three narrativisation elements are built by creating a particular causal link between the facts in accordance with the outcome that the narrative tries to achieve (2.4.). To that end, it focuses on progress narrative and explains how international lawyers adopt a linear reading of history in order to argue that international law progresses over time.

2.1. Narratology and Legal Theory

Narratology refers to the systemic analysis of a text that aims to discover its grammar to understand how the meaning has been constructed.⁷¹ It studies how facts have been created, interpreted and connected to one another in order to generate a story that presents a particular account. Narratology gained prominence first in France as a systemic analysis of narratives in the 1960s with the works of Roland Barthes,⁷² Gérard Genette,⁷³ Claude Lévi-Strauss⁷⁴ and Claude Bremond⁷⁵. They developed methods to analyse narratives based on the linguistic studies of Ferdinand de Saussure who examined how meaning is constructed as a consequence of arbitrary relations between the signified and the signifier.⁷⁶ The simplest definition that we can give to narrative is 'the representation of an event or a series of events'.⁷⁷ Narratives tell a story of change,⁷⁸ a story which has a beginning, a middle and an end.⁷⁹ Hayden White defined narrative as 'a metacode, a human universal on the basis of which

⁷¹ Barthes, 'An Introduction to the Structural Analysis of Narrative' (n 52). The word 'narratology' is coined by Tzvetan Todorov, see Tzvetan Todorov, *Grammaire du Décaméron* (Walter de Gruyter 1969).

⁷² Barthes, 'An Introduction to the Structural Analysis of Narrative' (n 52), Barthes, *S/Z* (n 57).

⁷³ Gérard Genette, *Narrative Discourse: An Essay in Method* (Cornell University Press 1983), Gérard Genette and Ann LeVonas, 'Boundaries of Narrative' (1976) 8 *New Literary History* 1.

⁷⁴ Claude Lévi-Strauss, 'The Structural Study of Myth' (1955) 68 *The Journal of American Folklore* 428.

⁷⁵ Claude Bremond, 'The Logic of Narrative Possibilities' (1980) 11 *New Literary History* 387.

⁷⁶ David Herman, *Basic Elements of Narrative* (Wiley-Blackwell 2009) 28. See generally, Carol Sanders (ed), *The Cambridge Companion to Saussure* (CUP 2004).

⁷⁷ Porter Abbott, *The Cambridge Introduction to Narrative* (CUP 2002) 12.

⁷⁸ *ibid* 12.

⁷⁹ Hayden White, 'The Structure of Historical Narrative' in Hayden White, *The Fiction of Narrative: Essays on History, Literature, and Theory, 1957–2007* (Robert Doran ed, Johns Hopkins University Press 2010) 112.

transcultural messages about the nature of a shared reality can be transmitted'.⁸⁰ Narrative allows us to translate what we see around us into words and becomes a repository of our interpretation of facts. It transforms the human experience into stories and produces an account of reality.⁸¹ It names facts, events, values, identities and allows us to make sense of our surroundings. It can be argued that there is no factual reality that exists independently from the narrative.⁸² Narrative does not only give life to phenomena and make them visible, but it also creates hierarchies, ideologies and can be used as a form of power.⁸³

Narratives that we tell, whether in law, literature, history or everyday life, are constructed based on our interpretation of facts. One needs to translate the events that take place into a narrative in order to give them a meaning. Narratology studies the operational structure of a narrative to understand how the narrator creates and connects facts together to come up with a story.⁸⁴ It examines some characteristics that are common to all narratives, such as the narrator, narratee, time, events, setting, story and plot.⁸⁵ Narrative can be subjected to such an examination because it always represents a particular perspective, a specific way of reading phenomena, rather than a neutral description of facts.⁸⁶ Narratology should not be seen as a reductionist method to decode a narrative. On the contrary, it seeks to find out different processes by which a certain meaning is transferred to the audience. In other words, it helps to demystify the text, to unravel its building blocks. It demonstrates that 'meaning was not "natural", a question of just looking and seeing, or something eternally settled; the way you interpreted your world was a function of the languages you had at your disposal, and there was evidently nothing immutable about these'.⁸⁷ In that sense, investigating how narratives are constructed illustrates the writing strategies we use to generate meaning in a text.

Narratology became a prominent discipline in the 1960s with the works of structuralist writers in order to examine fictional texts. It did not take a long time however, for narrative theory to migrate outside literary studies. It influenced various areas of legal thought. Four different

⁸⁰ Hayden White, 'The Value of Narrativity in the Representation of Reality' (1980) 7 *Critical Inquiry* 5, 6. Hayden White differentiated between narrative and discourse, the former referring to an objective representation of facts where the narrator is almost absent, the latter a subjective account where the narrator's presence is easily identifiable. He added a third category that he called 'narrativizing discourse' which is identified with the absence of a narrator and 'the events seem to tell themselves'. See *ibid*, 7. For different accounts on narrative, descriptive and argumentative see Bal (n 66) 8.

⁸¹ Roland Barthes, 'Le Discours de l'Histoire' (1967) 6 *Social Science Information* 63, 74.

⁸² As famously stated by Jacques Derrida, 'There is nothing outside of the text [there is no outside-text; il n'y a pas de hors-texte]' in Derrida, *Of Grammatology* (n 59) 646. Similarly, White argued that there is no historical reality outside the discursive form, see Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press 1975) 5-27. On the narrative structure of history, see also Paul Ricoeur, *Time and Narrative* (University of Chicago Press 1988).

⁸³ Michel Foucault, 'Truth and Power' in Michel Foucault, *The Foucault Reader: An Introduction to Foucault's Thought* (Paul Rabinow ed, Penguin Books 1984) 51-75.

⁸⁴ Paul Wake, 'Narrative and Narratology' in Paul Wake and Simon Malpas (eds), *The Routledge Companion to Critical Theory* (Routledge 2006) 14.

⁸⁵ Barbara Johnstone, 'Discourse Analysis and Narrative' in Deborah Tannen, Heidi Hamilton and Deborah Schiffrin (eds), *The Handbook of Discourse Analysis* (Wiley Blackwell 2005) 637-38.

⁸⁶ Hayden White, 'Storytelling: Historical and Ideological' in Hayden White, *The Fiction of Narrative: Essays on History, Literature, and Theory, 1957-2007* (n 79) 274.

⁸⁷ Eagleton (n 49) 107.

strands can be identified in this regard.⁸⁸ Legal scholars pondered how the adjudicative processes can be analysed based on the narratives produced through decision making and how some narrativisation techniques are used by judges when they draft their decisions.⁸⁹ Another strand that has been popular among legal scholars is law and literature. Scholars have been interested in both law in literature⁹⁰ and law as literature⁹¹. James Boyd White, as one of the pioneers of the law as literature movement conceived law as a rhetorical tool and argued that law was 'an art of speaking and writing'.⁹² Similarly, Robin West construed law as a language and emphasised how law, rather than being simple texts of rules, is indeed constitutive of an interactive community of shared moral and social values.⁹³ Robert Cover vigorously highlighted the interdependence between narrative and law and illustrated how lawyers create the normative universe they inhabit.⁹⁴ He explained how lawyers give meaning to what we should understand as right and wrong, lawful and unlawful: 'No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning (...) Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.'⁹⁵ Narrative has also been a point of inquiry in legal philosophy. For instance, Costas Douzinas investigated how law serves as a narrative of order and justice between the narrator and the narratee.⁹⁶ In his theory of judicial interpretation, Ronald Dworkin argued that new legal judgments, which necessarily have to be in coherence and integrity with existing law, can be seen as the new chapters of a 'chain novel'.⁹⁷ A final strand that draws on narrative theory can be identified in critical studies. Peter Fitzpatrick compared law and mythology to argue that while both claim to represent reality, the former denies its narrative structure in order to claim scientificity.⁹⁸ Anthony Paul Farley, on the other hand, highlighted how narrative tools have been used to construct racial identities.⁹⁹

⁸⁸ For a fuller explanation of these four accounts, see David Herman, Jahn Manfred and Ryan Marie-Laure (eds), *Routledge Encyclopedia of Narrative Theory* (Routledge 2008) 271-75. For a different taxonomy on legal approaches to narrative, see Greta Olson, 'Narration and Narrative in Legal Discourse' in Peter Hühn and others (eds), *Handbook of Narratology* (De Gruyter 2014) 371. Michigan Law Review has a special issue on the relevance of seeing legal discourses as narrative, see (1989) 87 Michigan Law Review.

⁸⁹ Bernard Jackson, *Law, Fact and Narrative Coherence* (Deborah Charles Publications 1988), Brooks and Gewirtz (n 44), Anthony Amsterdam and Jerome Bruner, *Minding the Law* (Harvard University Press 2000), Robert Burns, 'Advocacy in the Era of the Vanishing Trial' (2012) 61 University of Kansas Law Review 893, Greig Henderson, *Creating Legal Worlds: Story and Style in a Culture of Argument* (University of Toronto Press 2016).

⁹⁰ Richard Weisberg, *Poethics: And Other Strategies of Law and Literature* (Columbia University Press 1992), Richard Posner, *Law and Literature* (Harvard University Press 2009), Maria Aristodemou, *Law and Literature: Journeys from Her to Eternity* (OUP 2008).

⁹¹ James Boyd White, *The Legal Imagination* (University of Chicago Press 1973), Sanford Levinson, 'Law as Literature' (1982) 60 Texas Law Review 373, Ian Ward, *Law and Literature: Possibilities and Perspectives* (CUP 1995), Peter Brooks, 'Narrative Transactions - Does the Law Need a Narratology' (2006) 18 Yale Journal of Law & the Humanities 1.

⁹² James Boyd White, *The Legal Imagination* (n 91) xiv.

⁹³ Robin West, 'Community, Texts, and the Law: Reflections on the Law and Literature Movement' (1988) 1 Yale Journal of Law & the Humanities 129.

⁹⁴ Cover (n 43). For a symposium discussing the legacy of the article, see Symposium 'Rethinking Robert Cover's Nomos and Narrative' (2005) 17 Yale Journal of Law & the Humanities.

⁹⁵ *ibid* 4-5.

⁹⁶ Costas Douzinas, Ronnie Warrington and Shaun McVeigh, *Postmodern Jurisprudence: The Law of the Text in the Text of the Law* (Routledge 1993).

⁹⁷ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986) 228-32. Dworkin proposed that one should draw on literary interpretation to better understand legal interpretation, see Ronald Dworkin, 'How Law is Like Literature' in Ronald Dworkin, *A Matter of Principle* (Harvard University Press 1985).

⁹⁸ Peter Fitzpatrick, *The Mythology of Modern Law* (Routledge 2002).

⁹⁹ Anthony Paul Farley, 'The Black Body as Fetish Object' (1997) 76 Oregon Law Review 457.

The narrative genre that legal scholars commonly engage with is distinct from other narrative genres. First, legal narration differs from other narrative writings by its purpose. Legal narration is mostly geared towards proving an argument. The primary objective of the narrator is to elaborate an argument, develop it with different narrativisation techniques and finally present a persuasive narrative.¹⁰⁰ Narrative can be historical, biographical or completely fictional and the sole aim of the narrator might be to entertain or inform the reader regardless of an effort to persuade the reader. Legal scholars, however, are concerned with presenting a claim that will convince their audience to side with them. The legal scholar, i.e. the narrator, will put forward a claim and create a narrative to prove that the claim presents a convincing interpretation of facts. In that sense, legal narration is different from other narratives by the objective that it pursues. Second, although it is a truism, it is important to underline, that legal narration speaks a legal language.¹⁰¹ The language of law that the legal scholar will have to speak determines the boundaries of imaginary possibilities for narrative construction. In that sense, legal sources establish the contours within which a legal narrator can exercise her creative talent. Narrative activity in law will be constrained by rules, principles, precedents that the narrator will constantly try to either refute or endorse. While the identification and application of sources provides a broad area of manoeuvre and enrich the possibility of different narratives, the legal vocabulary that one can derive from legal sources is not limitless. In that sense, sources are the gatekeepers that determine the language any narrative that claims to make a legal argument will speak. These two points regarding the purpose and the language of legal narration demonstrate that when we study narratives in legal theory, we are engaging with a specific genre of narrative that will be called rhetorical narrative for the purposes of this study. The next section turns to this specific genre and explains why international law writings constitute rhetorical narratives.

2.2. Rhetoric as the Narrative Genre in International Law

Rhetoric is the art of persuasion which finds its roots in Ancient Greece.¹⁰² It seeks to persuade an audience by explaining on which grounds the argument being advanced makes for a solid and convincing case. Argumentation, can be defined in similar terms, as the exercise of presenting an argument based on a systemic form of reasoning.¹⁰³ While the two terms can be used interchangeably, the former focuses more on the objective targeted by the speaker or writer and the latter term connotes a greater emphasis on the reasoning developed and the argument being advanced. Rhetoric might have different objectives. For some, it is only about convincing the reader: It is an egocentric exercise where the writer seeks to gain approval

¹⁰⁰ Brooks and Gewirtz (n 44) 5.

¹⁰¹ James Boyd White, 'Law as Language: Reading Law and Reading Literature' (1981) 60 Texas Law Review 415.

¹⁰² Aristotle, *On Rhetoric: A Theory of Civic Discourse* (George Kennedy ed and tr, OUP 2006).

¹⁰³ See generally Stephen Toulmin, *The Uses of Argument* (CUP 1958), Douglas Walton, *Methods of Argumentation* (CUP 2013). On legal argumentation see Chaïm Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation* (University of Notre Dame Press 1969), Robert Alexy, *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (OUP 1989).

from the readership by the story created through interpreting facts and documents. According to this writer-centric approach, the key objective of rhetoric is to put forward an argument which can persuade the audience. From another perspective, rhetoric can be seen as an activity of exposing views on a topic which is primarily conducted for the sake of the argument.¹⁰⁴ Rather than focusing on the profit that the writer is going to derive, this approach puts more emphasis on the ideas formulated.

It is not unheard of that international law is an argumentative practice¹⁰⁵ and that it produces its own reality.¹⁰⁶ It relies not only on the narrator's own judgment, research and analysis but also discretion to determine which facts should be selected and examined in order to put forward an argument.¹⁰⁷ Law does not pre-exist our imagination.¹⁰⁸ International law scholars observe, think and, finally, create law. Every piece of research starts with an immature idea which needs to be researched, improved, mastered and embellished in order to be part of a coherent story. In that regard, there cannot be a legal analysis without a preconception influenced by the narrator's personal intellectual and cultural background and biases.¹⁰⁹ It is based on this preconception that the narrator chooses the relevant sources and facts that would reflect one's stance and neglects others.¹¹⁰ Rhetorical narrative consists of selecting the relevant facts, arranging them according to a logical manner and integrating them into a pattern wherein the narrator fills the gaps, in order to reach a coherent narrative.¹¹¹ In other words, rhetorical narrative is composed of not only what it actually says but also the silence of the writing on excluded facts, constitutes an important component of the narrative.¹¹² A legal scholar makes use of heterogeneous facts so as to produce a story in which selected components are linked to each other as if they were parts of a single homogeneous happening. Consequentially, there is no reality outside of the law that can be identified as a fact, but it is

¹⁰⁴ Ivor Richards, *The Philosophy of Rhetoric* (OUP 1965) 24.

¹⁰⁵ Friedrich Kratochwil, *Rules, Norms, and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs* (CUP 1991) 236-47, Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (CUP 2006), Martti Koskenniemi, 'Methodology of International Law' *Max Planck Encyclopedia of Public International Law*, <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1440?prd=EPIL>> accessed 22 August 2019, para. 1, d'Aspremont, *Epistemic Forces in International Law* (n 69) 1.

¹⁰⁶ Philip Allott, 'Language, Method and the Nature of International Law' (1971) 45 BYIL 79, 118. Philip Allott also argued that 'international law is a fiction' in Philip Allott, 'The Idealist's Dilemma: Re-Imagining International Society', <<http://www.ejiltalk.org/the-idealists-dilemma-re-imagining-international-society/>> accessed 22 August 2019.

¹⁰⁷ d'Aspremont, *Epistemic Forces in International Law* (n 69) 22.

¹⁰⁸ Neil MacCormick, 'The Ethics of Legalism' (1989) 2 Ratio Juris 184, 191, Jason Beckett, 'Countering Uncertainty and Ending up/down Arguments: Prolegomena to a Response to NAIL' (2005) 16 EJIL 213, 214-15, Joseph Raz, *Between Authority and Interpretation: On the Theory of Law and Practical Reason* (OUP 2009) 31.

¹⁰⁹ Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (Harvard University Press 1980) 284. Oscar Schachter and Olivier Corten argued, on the contrary, that the author could dissociate oneself from her personal beliefs and adopt an objective stance towards the subject of investigation and that this was what a proper international law methodology required, see Oscar Schachter, 'Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review 217, 220-21, Olivier Corten, *Méthodologie du Droit International Public* (Université de Bruxelles 2009) 118-19. On how personal beliefs and biases can affect one's interpretation, see generally John Berger, *Ways of Seeing* (Penguin 2008).

¹¹⁰ Iain Scobbie, 'A View of Delft: Some Thoughts About Thinking About International Law' in Malcolm Evans (ed), *International Law* (OUP 2010) 80.

¹¹¹ Allott, 'Language, Method and the Nature of International Law' (n 106) 104, Jean Salmon, *Droit International et Argumentation* (Primento 2014) 47.

¹¹² Pierre Macherey, *Pour une Théorie de la Production Littéraire* (ENS Editions 2014) doi:10.4000/books.enseditions.628, para 183-84.

the narrative constructed by the narrator that determines how an idea should be transmitted to the audience.¹¹³

The purpose of rhetorical narrative in international law is to persuade the audience to accept the argument put forward.¹¹⁴ It is a process geared towards finding the best rhetorical manoeuvres to persuade the reader that the story being told is the most plausible version that one can bring to that subject. In that regard, in legal academic writing there is no interest in wandering into different ways of seeing but only an endeavour to find the most solid and persuasive argument. Instead of the plurality of imaginary possibilities or new ideas put forward, it is the narrator's proficiency to develop the finest and the strongest idea that is valued. If one construes international law as a set of narratives, engagement with the discipline boils down to two main roles: For the narrator, it is an exercise of persuading the audience and for the one who looks for an answer it is a search for the most persuasive argument. This narrative struggle is a social exercise as well, since the whole process of seeking persuasiveness and searching for an answer requires a continuous interaction between the actors.¹¹⁵ It is therefore not a solitary activity but requires the existence of a community where there is a constant exchange of arguments and a battle to secure persuasiveness.¹¹⁶

2.2.1. Different Approaches to the Narrative Structure of International Law

Despite the lack of focus on construing international law as a set of narratives, scholars have highlighted the subjectivity of international law from different perspectives. Martti Koskenniemi examined the construction of international legal discourses and explained how international law oscillates between ascending and descending arguments by trying to satisfy both normativity and concreteness in an incompatible way.¹¹⁷ David Kennedy, on the other hand, considered international law as a dialectical process whereby the inconsistency of international legal doctrines can only be apprehended by examining how meaning is constructed based on binary structures that contradict one another.¹¹⁸ Jean d'Aspremont approached the construction of discourses from a different perspective. He argued that based on liberal legal reasoning, international law is validated by fundamental doctrines, such as the doctrines of sources, interpretation and responsibility, which establish their own origin and determine their operational structure.¹¹⁹ In that sense, international law is a set of beliefs that the members of a group accept as true in order to explain the world around them.¹²⁰ These

¹¹³ Jack Balkin, 'The Proliferation of Legal Truth' (2003) 26 Harvard Journal of Law & Public Policy 5, 11.

¹¹⁴ Perelman and Olbrechts-Tyteca (n 103) 26-31, Jean d'Aspremont, 'Wording in International Law' (2012) 25 Leiden JIL 575, Ingo Venzke, 'What Makes for a Valid Legal Argument?' (2014) 27 Leiden JIL 811, Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015), Koskenniemi, 'Methodology of International Law' (n 105) para. 1.

¹¹⁵ Jean d'Aspremont, 'Non-State Actors and the Social Practice of International Law' in Noortman Math, Reinisch August and Ryngaert Cedric (eds), *Non-State Actors in International Law* (Hart Publishing 2015) 13.

¹¹⁶ Stanley Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (n 109).

¹¹⁷ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105).

¹¹⁸ David Kennedy, 'Theses about International Law Discourse' (1980) 23 German YBIL 353, David Kennedy, *International Legal Structures* (Nomos-Verlag-Ges. 1987).

¹¹⁹ Jean d'Aspremont, *International Law as a Belief System* (CUP 2017) 3-14.

¹²⁰ *ibid* 3.

beliefs find their explanation not in the reason but in 'transcendental validators'.¹²¹ In that sense, they are self-explanatory and do not form part of a rational deductionist reasoning.

Rather than presenting a general theory on the international legal discourse, some scholars concentrated on particular doctrines so as to examine how they have been constructed. For instance, Andrea Bianchi put emphasis on the role of international lawyers as magicians in reference to the way in which they developed the doctrine of *jus cogens*. He claimed that *jus cogens* was a concept developed by scholars in order to provide the international law community with a hierarchy of norms which consolidated the discipline's theoretical basis.¹²² Dunbar qualified customary international law as 'myth' due to the difficulty of its ascertainment and determination of its content.¹²³ D'Aspremont qualified the transformation of state building into a legal phenomenon as an 'invention' of the 20th century, and claimed that statehood theory is a product of the rise of liberal legal thought and a consequence of the decolonisation process.¹²⁴ Another particular topic which has been subject to debate is the treaty of Westphalia regarding its role as the starting point of sovereign equality of states. According to the mainstream understanding, the Thirty Years War was between universalist states attempting to impose their dominance on particularists which claimed that all states should be independent and sovereign. Andreas Osiander rejected this traditional portrayal of the War and qualified the emphasis placed on Westphalia as a 'myth', a story which has intentionally been distorted so as to find a niche for the sovereign equality principle.¹²⁵ Other scholars have followed suit and expanded on the mythical character of the Treaty of Westphalia.¹²⁶

Belief system, magic, invention, mysticism, and myth are all different terms used to describe the narrative structure of the international legal discourse. While they approach the way in which narratives are being constructed from different angles, some presenting general theories and others focusing on particular subjects, they highlight the self-referentiality of international law discourses.¹²⁷ In their own ways, they illustrate the remoteness of international legal scholarship from representing a sort of truth and underline how the accounts that international lawyers present as interpretation of facts all reflect a particular perspective. They demonstrate how some fundamental doctrines such as *jus cogens*, statehood or sovereignty rely on vulnerable grounds that can be attacked due to their narrative structure.

¹²¹ *ibid.*

¹²² Andrea Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19 EJIL 491, 493-94. Pierre Schlag also referred to 'magical thinking' when he criticised scholars for their theological approach to legal argumentation, see Pierre Schlag, 'Law as the Continuation of God by Other Means' (1997) 85 California Law Review 427.

¹²³ N C H Dunbar, 'The Myth of Customary International Law' (1978-80) 8 Australian YBIL 1.

¹²⁴ Jean d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (2013) 29 Connecticut JIL 201, Jean d'Aspremont, 'The International Law of Statehood and Recognition: A Post-Colonial Invention' in Thierry Garcia (ed), *La Reconnaissance du Statut d'Etat à des Entités Contestées* (Pedone 2018).

¹²⁵ Andreas Osiander, 'Sovereignty, International Relations, and the Westphalian Myth' (2001) 55 International Organization 251.

¹²⁶ Benno Teschke, *The Myth of 1648: Class, Geopolitics, and the Making of Modern International Relations* (Verso 2003), Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP 2007), Pärtel Piirimäe, 'The Westphalian Myth and the Idea of External Sovereignty' in Hent Kalmo and Quentin Skinner (eds), *Sovereignty in Fragments: The Past, Present and Future of a Contested Concept* (CUP 2010).

¹²⁷ d'Aspremont, *International Law as a Belief System* (n 119) 55-70.

They illustrate how some interpretations that international lawyers brought to these topics have been accepted as valid only because they have been deemed to present persuasive accounts. In that sense, the criticisms they advance illustrate not only the narrative structure of international law but also they emphasise how rather than the correctness of the argument, it is the persuasiveness that counts for the acceptance of the narrative.¹²⁸ According to this understanding, it is the general acceptance of an argument within the international community that will showcase its quality.¹²⁹ This understanding regards international law as 'a rabbit to be produced from the hat of any international lawyer who could win the acquiescence of his admiring audience'.¹³⁰ Thus, international law is not a purely law-finding occupation; rather, it is about constructing it.

2.2.2. Interpretation as the Tool to Construct Rhetorical Narratives

Rhetorical narrative in international law is an exercise of interpreting various different sources including treaties, judgments, international practice, academic writings in order to put forward a claim.¹³¹ Meaning is not intrinsic to any of these sources and every argument must rely on a particular way of interpreting a document or practice. The assertion that interpretation is what makes international law is followed by an inquiry about how this interpretation will be made. More specifically, we need to ask whether there are any rules of interpretation or whether international argumentation is akin to a ruleless activity where any argument can be made. Owen Fiss opined that legal argumentation was not a completely unprincipled exercise and that some 'disciplining rules' for interpretation could be determined to draw some limits to interpretive possibilities.¹³² This idea relies on the assumption that these rules by themselves form a meta-text that can be situated above any other texts to be used in interpretation. This, however, does not seem plausible since the 'disciplining rules' also require to be interpreted and assigned a meaning before they determine how to interpret another text.¹³³ Even if we accept that some rules can be determined to regulate how interpretation should be put into practice, these rules will also have to be interpreted in order to establish their content and application. In that regard, interpretation can hardly be delimited by rules and this provides a vast area of manoeuvre for the narrator. The plurality of interpretive possibilities relies on the

¹²⁸ Venzke, 'What Makes for a Valid Legal Argument?' (n 114) 813, Chaïm Perelman and Lucie Olbrechts-Tyteca, *Traité de l'Argumentation: La Nouvelle Rhétorique* (Editions de l'Université de Bruxelles 1988) 59.

¹²⁹ Ivor Richards argued that not all rhetoric was about convincing the audience, but it might simply aim to express a view, see Ivor Richards, *The Philosophy of Rhetoric* (n 104) 24.

¹³⁰ Allott, 'Language, Method and the Nature of International Law' (n 106) 121.

¹³¹ Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (n 109), Peter Schanck, 'The Only Game in Town: An Introduction to Interpretive Theory, Statutory Construction, and Legislative Histories' (1988) 38 *The University of Kansas Law Review* 815, Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' (n 114) 64.

¹³² Owen Fiss, 'Objectivity and Interpretation' (1982) 34 *Stanford Law Review* 739.

¹³³ Stanley Fish, 'Fish v. Fiss' (1984) 36 *Stanford Law Review* 1325, 1326-27, Anthony d'Amato, 'Can Legislatures Constrain Judicial Interpretation of Statutes?' (1989) 75 *Virginia Law Review* 561, Andrea Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the Genealogy of Meaning' in Pieter Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010) 48, H L A Hart, *The Concept of Law* (OUP 2012) 126.

absence of an authoritative body which can validate or invalidate a particular interpretation.¹³⁴ Indeed, there is no international court or institution to assume the role of determining the right interpretation and to rule out alternatives on the same topic.¹³⁵

Some scholars argue that there is a limit to indeterminacy when it comes to textual interpretation.¹³⁶ In the case of customary law ascertainment and its content determination, however, rather than the interpretation of a written document, one has to determine whether a particular right has emerged through interpretation of international practice and create the right's building blocks. In that sense, when scholars deal with a subject where there is no treaty law, interpretation provides a wider space of manoeuvre for narrativisation. This does not mean that treaty interpretation is a straightforward process as it is exemplified by the vast amount of scholarship on the topic.¹³⁷ However, as in the case of democratic governance, when the aim is to prove an emerging right, a customary norm in formation, there is neither a binding legal document nor a formal methodology prescribing how the practice should be interpreted. In that regard, as long as the scholar abides by the very broad limits of international law sources, any argument can be put forward. Indeed, International law sources can only form a primary step in the identification of what law is and it is interpretation that will attribute a meaning to these sources.¹³⁸ Constructing an argument about an emerging customary norm requires us to produce the written evidentiary source. In that sense, in the case of customary law, a convincing narrative can make the scholar the lawmaker.¹³⁹ While Duncan Hollis called this the 'existential function' or the 'inventive potential' of interpretation,¹⁴⁰ Ingo Venzke highlighted the role of the scholar in fixing meaning through interpretation and described this as the 'semantic authority' which allows one to 'establish its communications as authoritative reference points in legal discourse'.¹⁴¹

¹³⁴ Jean d'Aspremont, 'The Multidimensional Process of Interpretation: Content-Determination and Law-Ascertainment Distinguished' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 115.

¹³⁵ According to Anne Orford, the lack of an authoritative body to determine what law is stands as one of the central anxieties of international lawyers, see Anne Orford, 'The Destiny of International Law' (2004) 17 *Leiden JIL* 441.

¹³⁶ Andrea Bianchi, 'Textual Interpretation and (International) Law Reading: The Myth of (in) Determinacy and the Genealogy of Meaning' in Pieter Bekker, Rudolf Dolzer and Michael Waibel (eds), *Making Transnational Law Work in the Global Economy: Essays in Honour of Detlev Vagts* (CUP 2010), d'Amato, 'Can Legislatures Constrain Judicial Interpretation of Statutes?' (n 133).

¹³⁷ Ulf Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties* (Springer 2007), Mark Eugen Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Brill 2008), Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary* (OUP 2011), Christian Tams, Antonios Tzanakopoulos and Andreas Zimmermann (eds), *Research Handbook on the Law of Treaties* (Edward Elgar 2014), Richard Gardiner, *Treaty Interpretation* (OUP 2015), Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (Springer 2018). See also Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) (1980) 1155 UNTS 331.

¹³⁸ Ingo Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2012) 30, Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105) 531.

¹³⁹ Andrea Bianchi, 'The Game of Interpretation in International Law: The Players, the Cards, and Why the Game is Worth the Candle' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 55.

¹⁴⁰ Duncan Hollis, 'The Existential Function of Interpretation in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 85.

¹⁴¹ Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (n 138) 63.

An important consequence of this interpretive freedom is that meaning is never settled and is constantly in the making.¹⁴² It can be argued that there can be as many interpretations as the number of authors and therefore, the impossibility of pinning down a single meaning to a practice or to a document renders the meaning that can be constructed, indeterminate. In other words, rather than determining the meaning, interpretation can have a destabilizing effect for allowing the production of several alternative narratives.¹⁴³ Due to the plurality of possible interpretations, rhetorical narrative is not an exercise of reaching a right, valid or appropriate outcome. It is a 'wordfare' of narrative construction which is inconclusive.¹⁴⁴ In that sense, the purpose of academic writing can hardly be about unearthing a hidden truth. Since rhetorical narration in international law is inconclusive, the purpose is rather making sense of international law sources in order to make a claim which can be persuasive, gain recognition for one's work and endorsement of the argument by way of approval.

What allows us to construe international law as a set of narratives is also the impossibility of providing an objective account through interpretation. Objectivity requires that some standards evaluate the value neutrality of a matter. In international law, however, there is no parameter by which to determine how unbiased or neutral an argument is. Martti Koskenniemi presented three main arguments to explain why international legal discourse cannot be objective. Firstly, one of the reasons as to why objectivity is not possible derives from the inseparability of law from politics.¹⁴⁵ It can be argued that there needs to be a parameter by which we can ascertain the difference between international law and politics and that objectivity of the former serves such a purpose. This requires that legal norms be both concrete, distant from a natural morality and in accordance with the state's will and interest, and normative and enforceable even against the state's will.¹⁴⁶ Concreteness and normativity, however, cannot be simultaneously fulfilled due to the contradictory nature of the objectives that they aim to realise.¹⁴⁷ Therefore, international legal discourse cannot meet these conflicting aims at the same time and will inevitably fail to be objective. Furthermore, the necessity of interpretation renders objectivity inaccessible. Rules are not tools that can be mechanically applied in order to solve problems. The need for interpretation will eventually make the legal discourse subjective, since there is no hierarchy between different interpretations.¹⁴⁸ Finally, lawyers attempt to validate their argument by referring to the subjectivity of the counterargument. Nevertheless, the same criticism can be valid for every position in a debate.¹⁴⁹ Thus, subjective politics can never truly be detached from law and objectivity is not a purpose that the scholar can establish when constructing narratives.¹⁵⁰

¹⁴² Fish, 'Fish v. Fiss' (n 133) 1336.

¹⁴³ Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (n 138) 13.

¹⁴⁴ d'Aspremont, 'Wording in International Law' (n 114) 576.

¹⁴⁵ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105) 16-23.

¹⁴⁶ *ibid* 58.

¹⁴⁷ *ibid*, Martti Koskenniemi, 'The Politics of International Law' (1990) 1 EJIL 4, 38-40.

¹⁴⁸ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105) 282, 531-32.

¹⁴⁹ *ibid* 70.

¹⁵⁰ For a contrary account see Fiss, 'Objectivity and Interpretation' (n 132).

The impossibility of objectivity should not, however, be regarded as a downside of international law scholarship. This is, on the contrary, the lack of one single veracity that allows the diversity of ideas and the richness of different narratives. It can even be argued that the freedom of legal argumentation is the reason as to how in a legal field in which there are a limited number of sources, a sheer number of researches on similar topics are still possible and continuously being produced.¹⁵¹ Philip Allott opined that 'We make the human world, including human institutions through the power of the human mind.'¹⁵² This is also how we can unmake and remake it. Since there is no extratextual parameter by which to verify the objectivity of a text or prove the superiority of a claim over another, narrative possibilities are the only limits of the legal narration.¹⁵³ Fundamental doctrines of international law such as sources, statehood and responsibility, determine the basis upon which the narrative will be constructed and spell out a framework that delimits the narrative possibilities.¹⁵⁴ Said differently, when speaking of international law, scholars do not describe a world of law which exists out there; firstly, they need to construct this world according to some authoritative sources through interpretation.

2.2.3. Validity of Rhetorical Narratives

Against this backdrop, it is important to discuss whether validity is the right question to ask when examining the persuasiveness of an argument. Taking into account the argumentative freedom that scholars enjoy in a field wherein there is no absolute truth but rather various narratives, it is argued here that it is not plausible to discuss the validity of an argument. Although validity is not equated with truth or correctness, scholars do very commonly resort to this term when they need to assess how legal arguments are received by their audience.¹⁵⁵ International law is a field in which one can construct any narrative possible based on the guidance of the doctrine of sources. Validity presupposes a certain level of accurateness and there is no institution or club of international lawyers that can bestow such authority to a narrative. Thus, instead of naming the acceptance of an argument as validity, it is argued here that certain narratives are more dominant than others or that they are more followed than other accounts. It is possible to make a distinction between theoretical and social validation and argue that international law is interested in the latter.¹⁵⁶ However, this does not change the

¹⁵¹ David Kennedy, 'A New Stream of International Law Scholarship' (1988) 7 Wisconsin International Law Journal 1, 39.

¹⁵² Philip Allott, *Eunomia: New Order for a New World* (OUP 2001) xxvii.

¹⁵³ The argumentative freedom of international law, however, has not gone unchallenged. It has been argued that the level of argumentative diversity can be counter-productive in the sense of damaging the authoritative power of doctrines by reducing constraint on legal argumentation if any argument is allowed to be put forward, see Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part 1' 14 April 2014, EJIL: *Talk!* <www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/> accessed 22 August 2019, and Jean d'Aspremont, 'Customary International Law as a Dance Floor: Part 2' 15 April 2014, EJIL: *Talk!* <www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/> accessed 22 August 2019.

¹⁵⁴ d'Aspremont, *International Law as a Belief System* (n 119) 32.

¹⁵⁵ Venzke, 'What Makes for a Valid Legal Argument?' (n 114).

¹⁵⁶ d'Aspremont, *Epistemic Forces in International Law* (n 69) 181.

fact that the international community does not have the power to accord validity to an argument, since there is no parameter by which this mission can be accomplished.¹⁵⁷

Law is a profession of 'naming' things in order to create a 'monopoly of power' over these things named.¹⁵⁸ If we were to accept that an argument is valid only because the majority of the international community affiliate thereto, it would inevitably give a certain authority to the majority as the guardians of validity. It is, however, suggested in this study that, without involving a question of validity, international law narratives should be regarded as part of a big compilation of narratives where one can stand alongside the view that they consider the most cogent among many other competing ideas. A general categorisation of a narrative as good, bad, plausible or valid according to its level of persuasiveness gives to *the invisible college of international lawyers* a power that they do not actually possess. Consequentially, the predominance of a particular narrative or its level of persuasiveness does not make it more or less valid. Rather than validity, the dominance of a particular narrative would illustrate more accurately the broad acceptance of an argument as persuasive. This is why it is argued here that although democratic governance discourses have been a dominant narrative in international law, attracting the attention of several scholars, it is not a validated narrative simply because it has been accepted as a persuasive line of argument by the international community. Thus, this study does not intend to invalidate these discourses, but aims only to analyse how they have been constructed through different narrativisation techniques.

2.3. Building Blocks of Rhetorical Narratives in International Law

Each international law narrative relies on certain narrativisation elements that the narrator will use in order to transmit her argument. While the argument of the narrative can be a simple assertion, a controversial point, endorsement or rebuttal of an opinion, a claim on an emerging customary norm as in the case of democratic governance discourses, that argument needs to be illustrated by using certain narrativisation elements that will build the narrative and will lead the reader to the outcome sought by the narrator. This study focuses on three main narrativisation elements that form the building blocks of international law narratives. The objective here is not to provide an exhaustive list of narrativisation elements that can be captured in all international law narratives. Nevertheless, it is possible to identify three narrativisation elements that provide effective tools to analyse the construction of a narrative in international law. It can be observed that each international law narrative tries to anchor the argument into a legal framework and explains why the issue discussed is part of international law. This constitutes the formal element that differentiates the subject from all non-law subjects and situates the narrative in a particular legal framework. Additionally, the narrator has to explain the historical time frame that will delimit the story. The way in which events are

¹⁵⁷ Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (n 39) 18.

¹⁵⁸ Pierre Bourdieu, 'Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 *Hastings Law Journal* 805, 837-38.

periodised constitutes the temporal element and situates the narrative in time. Finally, an international law narrative necessarily indicates where the law in question will be applicable. This constitutes the spatial element of the narrative. The next sub-sections explain in turn the purpose that the formal, temporal and spatial elements serve in international law narratives.

2.3.1. The Formal Element

International law narratives differ from other narrative genres by their purpose and their language. As explained above, narratives that international lawyers create aim to persuade the audience that the argument put forward makes a convincing claim. International lawyers have to adopt a legal language and need to engrave their narrative into a legal framework. They need to demonstrate not only why the stories they tell are different from any other non-law stories but how they are emancipated from any other legal branch as well. In that regard, the narrator needs to create the necessary links between facts and tie the narrative into an international law framework. Since facts do not in themselves incorporate a legal significance, it is the narrator's role to create the link between the facts and legal sources broadly construed to make them part of international law. It is argued here that the narrativisation technique that allows the legal scholar to anchor the narrative into an international law framework and differentiate it from any other non-international law narrative is the construction of the formal element. There are several ways to distinguish a narrative from a non-international law narrative. The identity of the narrator, their affiliation, background, expertise, profession, the conference where the article is presented, the journal where it is published can all be parameters that evidence the narrator is telling a story that pertains to international law.¹⁵⁹ These parameters are, however, external to the act of narrating. They are aspects that can be gauged without any prior knowledge as to what the narrative is saying. The formal element explained here deals with the act of narration itself and tries to understand the ways in which an international lawyer uses fundamental doctrines and sources to demonstrate that the subject in question deserves indeed the lens of international law.

Giddens argued that the creation of 'expert systems' that provide professional expertise and knowledge to organise everyday life was an essential component of modernity.¹⁶⁰ The creation of expert systems can be witnessed in international law with the professionalisation of the discipline which started to take place in the second half of the 19th century with the establishment of institutions, journals and professorships dedicated to this specific branch of law.¹⁶¹ It can be stated that the transformation of international law into an autonomous

¹⁵⁹ Jean d'Aspremont, 'Professionalisation of International Law' in Jean d'Aspremont and others (eds), *International Law as a Profession* (CUP 2017) 20.

¹⁶⁰ Anthony Giddens, *The Consequences of Modernity* (Polity Press 1996) 27-29.

¹⁶¹ Martti Koskenniemi, 'The Legacy of the Nineteenth Century' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 141-42. See also Orford, 'Scientific Reason and the Discipline of International Law' (n 40).

discipline was followed by the creation of a separate community of lawyers.¹⁶² This community can be described in various ways, such as an epistemic community,¹⁶³ community of practice,¹⁶⁴ interpretive community,¹⁶⁵ invisible college¹⁶⁶ or divisible college.¹⁶⁷ For the sake of the argument made here, it is argued that this community differentiates itself from non-law and non-international law communities with the language that it speaks. Whether it is construed as an epistemic or interpretive community, it can be stated that international lawyers share an internal language that is not easily accessible to non-members who do not have the necessary expertise and communicative skills.¹⁶⁸ This language will be constructed during the narrative exercise by demonstrating how international law, rather than any other legal discipline, is well suited to capture the subject-matter and explain its implications. To do so, the legal scholar will have to construct the formal element of the narrative and demonstrate the ways in which international law can intervene in that particular issue.

One caveat must be formulated. The creation of the formal element in the narrativisation process does not imply that this narrativisation element creates a sharp distinction between what is law and non-law. Each and every narrative of international law does not necessarily rely on bindingness as the ultimate parameter to define what international law is. The evaluation of what constitutes law is subject to a long debate that does not need to be detailed here.¹⁶⁹ The scholar might think that there is a clear distinction between what should be

¹⁶² For a more sceptical approach to the autonomy of international law as a discipline, see Richard Collins and Alexandra Bohm, 'International Law as Professional Practice: Crafting the Autonomy of International Law' in Jean d'Aspremont and others (eds), *International Law as a Profession* (CUP 2017) 67.

¹⁶³ Andrea Bianchi defined an epistemic community as 'fairly heterogenous social groups that perform functions related to the formation of knowledge in the field of international law.' in Andrea Bianchi, 'Epistemic Communities' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 251. Peter Haas defined an epistemic community as 'a network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area' in Peter Haas, 'Introduction: Epistemic Communities and International Policy Coordination' (1992) 46 *International Organization* 1, 3.

¹⁶⁴ Emanuel Adler defined a community of practice as a 'domain of knowledge, which constitutes like-mindedness, a community of people, which "creates the social fabric of learning," and a shared practice, which embodies "the knowledge the community develops, shares, and maintains"' in Emanuel Adler, *Communitarian International Relations: The Epistemic Foundations of International Relations* (Routledge 2005) 14. For an account approaching international law as a community of practice, see Jutta Brunnée and Stephen Toope, *Legitimacy and Legality in International Law: An Interactional Account* (CUP 2010).

¹⁶⁵ Stanley Fish defined interpretive community as 'a group of individuals who shared a point of view, but a point of view or way of organizing experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance were the content of the consciousness of community members who were therefore no longer individuals, but, insofar as they were embedded in the community's enterprise, community property' in Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary & Legal Studies* (n 69) 141. See also Michael Waibel, 'Interpretive Communities in International Law' in Andrea Bianchi, Daniel Peat, Matthew Windsor (eds) *Interpretation in International Law* (OUP 2015).

¹⁶⁶ Oscar Schachter, 'Invisible College of International Lawyers' (n 109).

¹⁶⁷ Anthea Roberts defined divisible college as a community where 'members hail from different states and regions and often form separate, though sometimes overlapping, communities with their own understandings and approaches, as well as their own distinct influences and spheres of influence' in Anthea Roberts, *Is International Law International?* (OUP 2017) 2.

¹⁶⁸ This does not mean, however, that all international lawyers share the same objectives, projects and method when they speak this internal language or always understand each other. Andrea Bianchi stated that 'International law is no longer a language universally spoken and there seems to be as many dialects as there are observers and commentators', see Bianchi, 'Reflexive Butterfly Catching' (n 44) 207. See also d'Aspremont, 'Professionalisation of International Law' (n 159) 32-33.

¹⁶⁹ For an account presenting different perspectives on how to differentiate between law and non-law in international law, see Joost Pauwelyn, 'Is It International Law or Not, and Does It Even Matter' in Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds), *Informal International Lawmaking* (OUP 2012) 125.

considered law and non-law¹⁷⁰ or argue that normativity is multi-dimensional and cannot be comprehended in a binary opposition.¹⁷¹ While a narrative might not present a clear description as to what law is, it will, nevertheless, indicate why the subject-matter deserves the attention of international law. In most cases, it is more convenient for the narrator to rely on bindingness to provide a more convincing case, but it does not rule out the possibility of constructing the formal element of the narrative with non-binding instruments that still generate legal effect. In that sense, the formal element should be understood as a narrativisation element that evidences how the narrative speaks the language of international law, rather than an element that constructs the distinction between law and non-law.

2.3.2. The Temporal Element

In order to construct narratives, the narrator has to select the relevant facts and then make the necessary connections between them to create a story. How these facts will be organised depends on the narrator's judgment and how things will be put in order is therefore an arbitrary exercise.¹⁷² As argued by Paul Ricoeur 'time becomes human time to the extent that it is organized after the manner of a narrative; narrative, in turn, is meaningful to the extent that it portrays the features of temporal experience'.¹⁷³ The temporal element of the narrative situates the narrative in time and determines the time frame that will be used to advance an argument. It is up to the narrator to determine the time frame of the research and important events that will mark the beginning and the end of a period. The way certain dates are highlighted plays an essential role in the construction of that narrative. For instance, the establishment of the League of Nations, the adoption of the UN Charter, the end of the Cold War are important historical moments that international lawyers are all very familiar with due to their frequent use. They are accepted almost as natural turning points in history that do not require any justification when used by the narrator. The reason why periodisation seems to be a mechanical activity of dividing the history into parts that seem to include similar events is due to the lack of interest in the scholarship on theorising what it actually entails.¹⁷⁴ Despite the sheer volume of writings on the history of international law and its periods,¹⁷⁵ very few studies

¹⁷⁰ Prosper Weil, 'Towards Relative Normativity in International Law?' (1983) 77 AJIL 413, Jan Klabbers, 'The Redundancy of Soft Law' (1996) 65 Nordic JIL 167, Jean d'Aspremont, 'Softness in International Law: A Self-Serving Quest for New Legal Materials' (2008) 19 EJIL 1075.

¹⁷¹ Richard Baxter, 'International Law in "Her Infinite Variety"' (1980) 29 International & Comparative Law Quarterly 549, Michael Reisman, 'A Hard Look at Soft Law' (1988) 82 ASIL Proceedings 371, Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990), Rosalyn Higgins, *Problems and Process: International Law and How We Use it* (OUP 1995), John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case', (1996) 16 Oxford Journal of Legal Studies 84. In response to Tasioulas, see Jason Beckett 'Behind Relative Normativity: Rules and Process as Prerequisites of Law' (2001) 12 EJIL 627.

¹⁷² Reinhart Koselleck stated that 'all chronologies are products of certain cultures and are, in this respect, relative' in Reinhart Koselleck, *The Practice of Conceptual History: Timing History, Spacing Concepts* (Stanford University Press 2002) 106.

¹⁷³ Paul Ricoeur, *Time and Narrative* (n 82) 3.

¹⁷⁴ Oliver Diggelmann, 'The Periodization of the History of International Law' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (OUP 2012) 999.

¹⁷⁵ For central texts, see Arthur Nussbaum, *A Concise History of the Law of Nations* (Macmillan 1954), Jan Hendrik Willem Verzijl, *International Law in Historical Perspective*, vol 3 (Brill Archive 1970), Wilhelm Grewe, *The Epochs of International Law* (Walter de Gruyter 2000), Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (CUP 2002). For a comparative analysis of different periodisations in international law

directly address the implications of creating historical periods in international law. Nevertheless, these turning points or periods that divide the past into different compartments are not facts as such.¹⁷⁶ History does have natural 'important dates' but it is the narrative that turns some temporal facts into decisive moments through interpretation. Rather than representing an objective methodology, periodisation provides a narrativisation tool for interpreting historical facts.¹⁷⁷

International law narratives use periodisation to create periods which are separated from each other by a treaty, the establishment of an international organisation or an important political event which are often qualified as turning points. Two major reasons for the use of this narrativisation element can be identified: pragmatism and normativity. Firstly, there is a pragmatic reason why periodisation is essential in creating narratives. History accommodates a very complex and heterogeneous set of events. The narrator's goal is to make sense of this complicated fate of history by regulating the relevant facts. Historical facts are put in order not only by referring to the specificities of the event but also the date and place of that incident are highlighted in order to operate as pinpoints for our comprehension. Instead of envisaging history as a collection of dissimilar, independent and multifaceted diverse events, the surgical operation of cutting the history and stitching it again based on periods with similar facts allows us to simplify a complicated structure for our understanding. When events are regrouped in periods, this linear narrative creates a story which has a beginning, a middle and an end. Thus, it eliminates indeterminacy and provides a clear and comprehensible history. Periodisation becomes an exercise of stabilising the past by using temporal anchors in order to increase historical determinacy.¹⁷⁸ In that sense, it is also efficient in creating and transmitting an idea by rendering the very complex structure of history into defined, squared and intelligible blocks of information.

Secondly, and more importantly for the purposes of this study, dividing history into periods is not a technical exercise outside the narrative but it directly forms part of the argument put forward. Periodisation plays an essential role in giving a normative direction to the narrative, especially in progress narratives. In order to create periods, some turning points have to be determined. The narrative will then use the before/after binary to contrast how that turning point instigated a new era and how the two periods have different characteristics. Binary structures, seeing and reading phenomena as a rivalry between two opposing concepts, are

see William Butler, 'Periodisation and International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar 2011) 379.

¹⁷⁶ Tilmann Altwickler and Oliver Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (2014) 25 EJIL 425, 433.

¹⁷⁷ Diggelmann (n 174) 999.

¹⁷⁸ Uri Margolin, 'Of What is Past, is Passing, or to Come: Temporality, Aspectuality, Modality, and the Nature of Literary Narrative' in David Herman (ed), *Narratologies: New Perspectives on Narrative Analysis* (Ohio State University Press 1999) 150.

frequently used in international legal discourse.¹⁷⁹ Periodisation can be used to confine a concept, a principle or a practice into an old era while another trend will be the mainstream of a new period. This argumentative tool is used as an effective method in progress narratives to justify why there was a need to create a new period. In particular, historical turning points have a fundamental mission to promote an idea of progress over time.¹⁸⁰ Dates that are qualified as 'turning points' mark a moment which separates one phase of international law from the succeeding period by the progress that the latter period brought. These binary structures help the narrator to construct a progress narrative by first determining a turning point in time which then allows us to compare and contrast the two periods as complete oppositions.¹⁸¹ Succeeding pinpoints create a linear development of history which enables us to tell a story of progression moving forward in time.¹⁸²

An examination of international law texts will easily reveal that the scholarship is abundant with examples on how certain particular dates and times in history, such as the Peace of Westphalia, the UN Charter, Nuremberg trials are used to create a dichotomous framework to contrast the two periods and finally construct a linear progressive trajectory for international law.¹⁸³ However, it should be recognised that periodisation is not a neutral practice and reflects the normative structure that the narrator aims to establish.¹⁸⁴ Koller called these places and times 'metaphysical geographies of international law' and stated that:

This exercise in metaphorical cartography is not a neutral endeavour. Rather, it is part and parcel of an effort to give international law a more or less explicit normative direction. In the dominant narrative of the field, historical events situated at particular coordinates in space and time are co-opted to tell a story of international law's progressive development over time. As these events are made to fall along an invisible line of progress, the history and, more importantly, the future of international law can be told as a series of place names and dates, each bringing us closer to the ideal.¹⁸⁵

Periodisation assists the creation of a progress narrative by turning history into a collection of continuities with short intervals of discontinuities. Turning points are small fractures in the linear progress of time and they allow jumping from one historical phase to another by determining at which date another period of continuity will start. Instead of envisaging history as a set of heterogeneous set of events where continuities and discontinuities co-exist, they

¹⁷⁹ Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 49, Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105) 58-69.

¹⁸⁰ David Koller, '... and New York and The Hague and Tokyo and Geneva and Nuremberg and...: The Geographies of International Law' (2012) 23 EJIL 97.

¹⁸¹ Skouteris (n 48) 91.

¹⁸² Koller (n 180) 100.

¹⁸³ *ibid.*

¹⁸⁴ Ignacio de la Rasilla, 'The Problem of Periodization in the History of International Law' (2019) 37 Law and History Review 275.

¹⁸⁵ Koller (n 180) 98.

create a linear progress where similar events are regrouped within the same period which will be succeeded by another period of different continuities. In that sense, it oversimplifies the very complex scope of cognizable knowledge.

Periods should be understood as artificial boundaries drawn on the map of history in order to transmit an idea. From a pragmatic perspective, periodisation does provide help in understanding the subject-matter. However, we should be wary of its limits geographically and substantially. Certain dates such as 1945 or 1991 should not be accepted as natural road signs to guide the reader towards the right direction. Periods should be understood as artificial flags placed on history by the narrator in order to facilitate understanding of the very complex structure of past events. Since they are not objective or neutral, they are loaded with meanings and values that the narrator wants to transmit to the audience. While drawing boundaries, it is inevitable that some information will be excluded in order to save space for what is going to be included. In that sense 'whoever draws the boundaries has the power of determining where the line must be drawn, both literally and metaphorically'.¹⁸⁶ For this reason, while reading a text a reader should be cautious about the temporal limits created by the narrator. The fact that some well-established turning points like the creation of the UN or the end of the Cold War have been so commonly used and not challenged to a great extent do not mean that they have passed the persuasiveness test and acquired a level of objectivity. Since these dates are signposts created by the narrator in order to organise the research, their accuracy can always be questioned. More than a possibility, challenging these commonly used turning points is indeed a necessity since their undisputed nature may lead to the perception that they are set in stone and provide the only possible way of imagining history.

2.3.3. The Spatial Element

International law discourses necessarily include a spatial dimension and define a certain space where the law will be applicable. In that sense, when one constructs an international law narrative, it will not only discuss the legal content of that subject matter, the international actors involved or how it is situated in time, but it will inevitably comprise of a spatial dimension to indicate where the law will take effect. This constitutes the spatial element of the narrative. The spatial element is different from the temporal element in the sense that the former refers to the area occupied by the narrative while the latter situates the narrative in time.¹⁸⁷ It is important to ponder how a narrative structures its spatial element in order to understand how the narrator invents the space where the law will be applied. The narrator will have to construct the space where the normativity produced by the narrative will compel international law actors

¹⁸⁶ Bianchi, *International Law Theories: An Inquiry Into Different Ways of Thinking* (n 39) 24.

¹⁸⁷ While this distinction is nowadays standard, Anthony Giddens argued that the separation between time and space happened only after the mechanical clock started to be shared by a large majority of the society in the late 18th century. He stated that in pre-modern times 'the time reckoning which formed the basis of day-to-day life, certainly for the majority of the population, always linked time with place - and was usually imprecise and variable. No one could tell the time of day without reference to other socio-spatial markers: "when" was almost universally either connected with "where" or identified by regular natural occurrences.' in Giddens (n 160) 17.

or subjects to act in a certain way. In that sense, space is a narrative construct and will be imagined and created since it does not exist unless one wants to have an effect upon others through the narrative.¹⁸⁸ Nonetheless, creation of the narrative space is not a neutral exercise.¹⁸⁹ This is why Henri Lefebvre opined that we should not only 'see' the space but also conceptualise what it represents.¹⁹⁰ Space does not only consist of a material existence but should rather be construed as an abstract concept that does not exist prior to the narrative. It does not only refer to a natural territory or a geography where the law discussed will be applied but it carries with it social, political and legal references as well.

While the space where international law claims to exercise power has hardly been systematically theorised and explicitly discussed,¹⁹¹ almost any topic in the discipline will necessarily include a spatial dimension.¹⁹² The state, as the main actor of the discipline, relies on an abstraction of space and international lawyers have long discussed modes of acquiring territory, occupation, self-determination, cession and accretion.¹⁹³ In particular, they have been highly creative regarding the regulation of the sea and many spaces, such as the territorial sea, high seas, continental shelf, the exclusive economic zone, archipelagic waters, subsoil, superjacent waters, semi-enclosed seas, contiguous zone, straight baseline, sea-bed, ocean floor, have all been invented in order to keep these places under control.¹⁹⁴ Recent scholarship demonstrates that international law is not confined to a state's land mass and waters. Extensive research has been conducted to create new spaces to discuss the extraterritorial application of human rights law or the law-making power of non-state actors which create their own geographies. The way international organisations include and exclude certain states as members, the structure of their legal framework, the roles and responsibilities they create determine the impact that they will have on a certain geographical ambit and will

¹⁸⁸ Robert David Sack, *Human Territoriality: Its Theory and History* (CUP 1986) 30.

¹⁸⁹ Michel Foucault is a prominent name whose works on the production and exercise of power were closely linked to spatiality. He argued that 'the anxiety of our era has to do fundamentally with space, no doubt a great deal more than with time' in Michel Foucault (Jay Miskowiec tr), 'Of Other Spaces' (1986) 16 *Diacritics* 22, 23. See also Jeremy Crampton and Stuart Elden (eds), *Space, Knowledge and Power: Foucault and Geography* (Ashgate 2007).

¹⁹⁰ Henri Lefebvre, *The Production of Space* (Blackwell 1991) 93-94.

¹⁹¹ For an account calling for more attention to geography in international law see Carl Landauer, 'Regionalism, Geography, and the International Legal Imagination' (2011) 11 *Chicago JIL* 557. Jonathan Pugh argued that the spatial turn in other social sciences took place in the late 1990s, see Jonathan Pugh, 'The Spaces of Democracy and the Democracy of Space: A New Network Exploring the Disciplinary Effects of the Spatial Turn' (2009) 13 *Space and Polity* 159.

¹⁹² A few exceptions on the relevance of space in legal theory include Kim Economides, Mark Blacksell and Charles Watkins, 'The Spatial Analysis of Legal Systems: Towards a Geography of Law' (1986) 13 *Journal of Law and Society* 161, Nicholas Blomley, *Law, Space and the Geographies of Power* (The Guilford Press 1994), Nicholas Blomley, David Delaney and Richard T Ford (eds), *The Legal Geographies Reader: Law, Power and Space* (Blackwell 2001), Andreas Philippopoulos-Mihalopoulos, 'Law's Spatial Turn: Geography, Justice and a Certain Fear of Space' (2011) 7 *Law, Culture and the Humanities* 187.

¹⁹³ Jeppe Strandsbjerg stated that 'The modern territorial state can be said to rely on an abstraction of space to the extent that the notion of sovereignty indicates a relationship between a territorial space and a centralized government whose claim to legitimate authority is demarcated in spatial terms. And in that respect, political space comes to be abstracted from particular, or local, social experiences and reconfigured in terms of a universal notion of particular sovereign space.' in Jeppe Strandsbjerg, *Territory, Globalization and International Relations: The Cartographic Reality of Space* (Palgrave Macmillan 2010) 13.

¹⁹⁴ On the power of imagination in international law, see generally, Zoran Oklopčic, *Beyond the People: Social Imaginary and Constituent Imagination* (OUP 2018) 1-82.

thereby draw their spatial contours.¹⁹⁵ Moreover, when humans' reach extended to outer space in the second half of the 20th century with the launch of satellites and space stations, the legal questions that these activities raised led to the regulation of a new space that was until then unknown to international law.¹⁹⁶ These few examples show that in addition to traditional forms of spaces such as a state's territory and waters, new spaces are constantly being imagined and crafted in a way that would fit the purpose targeted by the narrative in which they take place.

Reflecting on the spatial element of a narrative is important mainly for three reasons. First, the space that has been created by the narrator defines the territory that will be controlled by the narrative.¹⁹⁷ It will impose boundaries within which the narrative will have an impact, exercise power and modify relations between actors. It will dictate how they should behave in a certain context by advancing a normative framework to be followed. Another way of exercising power through the spatial element becomes evident when one thinks about the way space has been used in a narrative in order to include and exclude certain actors.¹⁹⁸ Said differently, space determines the beneficiaries, members and also outsiders of the narrative by drawing boundaries. Third, the spatial element of the narrative might be used to shift the reader's focus from the narrator to the space that is being discussed.¹⁹⁹ Highlighting how the space is regulated in a particular context can displace the emphasis from the narrator to the territory and remove the former's agency in the creation of the latter. In that regard, it can serve to tell an impersonal story which seems to depict the world from an external point of view.

2.4. Narrativisation of Progress

As has previously been highlighted, international law can be construed as a set of narratives. It is possible to distinguish three main narrativisation elements that are common to the rhetorical narratives of international law, namely the formal, temporal and spatial element. These elements constitute the building blocks of a rhetorical narrative whose purpose is to persuade the audience by the argument put forward. It is, however, at the discretion of the narrator to decide how the three narrativisation elements will be constructed. The way in which these elements will be articulated in the narrative can take various forms. To be more specific, the causal link that will be created between facts when these three elements are brought to life is a narrative preference.²⁰⁰ Historical facts, events, treaties, principles, theories, practice

¹⁹⁵ On the effectiveness of international organisations in relation to their geographical reach, see Laurence Boisson de Chazournes, 'Relationships and Interfaces between Regional and Universal Organizations: Room for New Developments' (2012) 9 *International Organizations Law Review* 263.

¹⁹⁶ Matthew Craven qualified the creation of outer space as a new site to be controlled by international law as 'the enactment of a utopian imaginary', see Matthew Craven, "'Other Spaces': Constructing the Legal Architecture of a Cold War Commons and the Scientific-Technical Imaginary of Outer Space' (2019) 30 *EJIL* 547.

¹⁹⁷ Sack (n 188) 32.

¹⁹⁸ *ibid* 32.

¹⁹⁹ *ibid* 33.

²⁰⁰ On the creation of causal sequencing in a narrative, see Jean d'Aspremont, 'Critical Histories of International Law and the Repression of Disciplinary Imagination' (2019) 7 *London Review of International Law* 89, 95-96.

of international law actors, doctrines, academic writings, decisions, judgments are all some of the raw materials that are at the disposal of the narrator. They need to be put in order through an interpretation process in order to generate meaning and constitute a narrative. The way the narrator constructs the causal link between these facts and the effect she wants to create with this causal sequencing will determine the rhythm of the narrative with regard to its impact on international law as a discipline. Diggelmann distinguished four different patterns with regard to the rhythm of an international law narrative.²⁰¹ An international law narrative can tell a story of progress or regress explaining how international law as a discipline developed or declined because of the issues discussed in the narrative. An international law narrative can as well tell a story which constitutes a separate unit in itself without necessarily suggesting an idea of development of regress within international law. Finally, the rhythm of the narrative might rely on a cyclical pattern rather than a progressive, regressive or static pattern. As it will be explained in the following chapters, democratic governance discourses rely on a progressive reading of history. Before expanding on each of the three narrativisation elements and how they are constructed in democratic governance discourses, this section provides an overview of what is meant by progress narrative.

In order to create consistent stories, scholars tend to disregard discontinuities and envisage international practice as a homogenous collection of events which add to one another as part of a progressive trajectory. This allows international lawyers to draw a path within that narrative where only similar facts are discussed and form a progressive interpretation. However, history does not present a linear development moving towards a better and superior world order and the way international law proceeds historically cannot always be read as progress. Although it is commonplace to read international practice with a progressive approach, it is not self-evident that the history of international law inevitably presents a progressive trajectory. It is because international law discourses are products of a narrativisation process that historical facts can be read as being part of a linear and progressive development. Constructing narratives as if everything falls on a linear path and progresses over time accords well with the linear structure of a text.²⁰² In contrast to other artistic forms, such as visual arts, a text has a linear structure. Sentences follow each other to lead to an outcome or to construct an argument. The reader expects that the narrative develops over the course of reading and takes her to a different point than she was before the reading. This is what Mieke Bal calls double linearity: 'that of the text, the series of sentences, and that of the fabula, the series of events'.²⁰³ In that regard, it is not ordinary for the reader to expect a deviation in the sequential ordering of a text. Rather, we are inclined to follow a linear rhythm in the text that derives from a certain point in history and leads to a more developed or farther place in time. In that sense, progress narratives accord well with the linearity of the act of reading.

²⁰¹ Diggelmann (n 174) 1007.

²⁰² Bal (n 66) 81.

²⁰³ *ibid* 81.

The idea of progress is a recurrent theme in various subjects of international law. This is the case not only for democratic governance discourses but also for several articles on international criminal law,²⁰⁴ international arbitration,²⁰⁵ human rights law,²⁰⁶ decolonisation²⁰⁷ or the international legal order itself.²⁰⁸ Scholars regularly adopt a linear timeframe to explain how the law evolved over time and this is often followed by an acclamation of law's progress on that subject matter. This type of legal reading assumes that international law, despite possible short setbacks, evolves towards a more superior level of law over time. For instance, according to Philip Allott, law is the source of human progress. He argued that the 'extraordinary progress of the human species would not have been possible without law'.²⁰⁹ Similarly, Ole Spiermann began his article by stating that 'It would have been hard to imagine a 20th century in which international law had not evolved and expanded', which indicates that he already has a preconceived idea that international law must surely have progressed, even before delving into an examination.²¹⁰ According to progress narrative, international law constitutes a set of coherent events following one another, heading towards a more just world worthier of living, than present. Argued in an explicit or implicit tone, the trajectory of international law is projected as a linear one: history presents a less just order and owing to the progress of international law, be it by agreements,²¹¹ the establishment of new tribunals or institutions,²¹² we are moving towards a more just world.

Historically, the idea of progress can be traced back to the 18th century, when important achievements in natural sciences led Enlightenment writers to ponder over the progress of humanity.²¹³ Hegel is one of the prominent thinkers arguing for a linear, progressive history in which, from an age of darkness and ignorance, humanity is moving towards a more advanced future. When he examined the evolution of ideas throughout history he concluded that ancient times symbolised an era wherein ideas were not as mature as they were in modern times: 'The earliest is the simplest while the latest philosophy is the most concrete and profound.'²¹⁴ In a similar vein, Comte, who coined the word 'sociology' as a field that studies social order and change, defended that intellectual development is the main source of human progress in our societies.²¹⁵ Kant, on the other hand, argued that progress is indispensable in order to

²⁰⁴ Jonathan Charney, 'Progress in International Criminal Law' (1999) 93 AJIL 452, Sean Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the former Yugoslavia' (1999) 93 AJIL 57.

²⁰⁵ M A Bedikian, 'Triumph of Progress: The Embrace of International Commercial Arbitration' in Russell Miller and Rebecca Bratspies (eds), *Progress in International Law* (Brill 2008).

²⁰⁶ Louis Henkin, 'Introduction', in Louis Henkin (ed), *The International Bill of Rights: The Covenant on Civil and Political Rights* (Columbia University Press 1981).

²⁰⁷ Akbar Rasulov, 'Imperialism' in Jean d'Aspremont and Sahib Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019) 431-32.

²⁰⁸ Anne-Marie Slaughter, *A New World Order* (Princeton University Press 2009).

²⁰⁹ Philip Allott, 'The True Function of Law in the International Community' (1998) 5 Indiana Journal of Global Legal Studies 391, 394.

²¹⁰ Ole Spiermann, 'Twentieth Century Internationalism in Law' (2007) 18 EJIL 785, 785.

²¹¹ Edith Brown Weiss considered the increasing number of international law agreements as a sign of 'health', see Edith Brown Weiss, 'The Rise or the Fall of International Law' (2000) 69 Fordham Law Review 345, 346.

²¹² Manley Ottmer Hudson considered the proliferation of international organisations a progress, see Manley Ottmer Hudson, *Progress in International Organization* (Stanford University Press 1932).

²¹³ For a historical account of the idea of progress see Margaret Meek Lange, 'Progress', in Edward Zalta (ed), *The Stanford Encyclopedia of Philosophy* (2011), <<https://plato.stanford.edu/entries/progress/>> accessed 22 August 2019.

²¹⁴ G W F Hegel, *Introduction to the Lectures on the History of Philosophy* (OUP 1985) 45.

²¹⁵ Auguste Comte, *The Positive Philosophy of Auguste Comte* (J. Chapman 1853) 47-48.

develop human faculties and move 'from barbarism to culture'.²¹⁶ It is only by developing their talents that human beings can add value to their lives; otherwise, 'The end for which they were created, their rational nature, would be an unfilled void.'²¹⁷ However, this understanding of human progress has not gone unchallenged and encountered severe criticism following the atrocities of the two world wars. Adorno has been critical of Hegel's reading of history, which claims that tragedies should be evaluated in light of their overall contribution to progress. The scale of atrocities witnessed during the Second World War led Adorno to defend a historical reading that included both advancements and drawbacks and he objected to the qualification of regress as an exception to progress.²¹⁸

There is almost an instinctive tendency to think that international law inevitably improves over time and that each historical period presents a better and more advanced structure than the preceding period. This attitude is, however, self-justificatory. How do we measure progress? Is it more codification, more accountability or more institutions? It is argued here that it is the causal sequencing constructed between facts by the narrator that creates the notion of progress by presenting facts according to a linear developmental structure. Otherwise, progress does not have a meaning on its own.²¹⁹ As argued above, some might say that international law is in itself a progressive field aiming to create an ideal world. However, international law is far from depicting the facts as they are, since it does not constitute a neutral practice, rather, arguments are presented through a narrativisation process. The narrative creates its own reality, presents facts from the scholar's own perspective and is inevitably tainted by its creator's ideology, priorities and personal choices. It should also be noted that international law does not acquire this progressive purpose on its own or *in abstracto* but scholars find in their profession an almost sacred meaning which presents an ultimate good for the world.²²⁰ A commitment to the purpose of establishing the international order or a form of quest for perpetual peace, sculpts the way international scholars see, read and create international law. The professional ambition of those who see international law as a civilising mission leaves no room for alternative scenarios and international law narratives necessarily tell a story of improvement.²²¹ International law scholars might assume to be fighting very noble causes against war, disorder, human rights abuses, climate change or terrorism and find in their profession an ambition to make things better for a more developed world.²²² For instance, Lassa Oppenheim stated that from the Middle Ages up until now, all developments have helped 'the shaping, and the ultimate victory of international law over international anarchy'.²²³ In that sense, international law should continually and steadily progress in order

²¹⁶ Immanuel Kant, 'Idea for a Universal History with a Cosmopolitan Purpose' in H Reiss (ed), Kant: *Political Writings* (CUP 1991).

²¹⁷ *ibid* 45.

²¹⁸ Theodor Adorno, *Minima Moralia: Reflections from Damaged Life* (Verso 1974) 55.

²¹⁹ Skouteris (n 48) VII.

²²⁰ David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow' (1994) 4 *Transnational Law and Contemporary Problems* 329, 335.

²²¹ Diggelmann, 'The Periodization of the History of International Law' (n 174) 1008-09.

²²² David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 *Leiden JIL* 9, 91.

²²³ Lassa Oppenheim, 'The Science of International Law: Its Task and Method' (1908) 2 *AJIL* 313, 317.

to satisfy its mission to create a just order and contribute to a more prosperous future.²²⁴ It is therefore no coincidence that several international law writings will adopt by varying degrees, a form of progress narrative.

Since progress does not reveal whether it purports qualitative or quantitative progress or whether it refers to more regulation or consensus, it is up to the narrator to give the meaning that she deems the most appropriate. In that regard, a progressive reading of international law will inevitably include certain facts and exclude others. For example, in his examination of international law's journey over time, Edith Brown Weiss concluded that despite certain problematic issues, such as the lack of accountability of non-state actors, international law is surely rising and progressing, owing to the proliferation of international norms.²²⁵ This demonstrates how scholars concentrate on certain facts, rather than others, to build a progress narrative. The progress of international law is projected as the rule and problematic areas are classified as exceptions to the rule. In that sense, progress narrative helps to tell a story which has a beginning, a middle and an end. It transforms the complex world of international practice into a coherent set of events which derive from a particular place in time, follow a determined trajectory and proceed towards a foreseeable future. International practice is shown as succeeding events, adding one to the other, instead of a more heterogeneous collection of setbacks and advancements. This creates a hierarchy where certain facts are praised for contributing to the progress of international law and others are labelled as regress or totally ignored. In that sense, progress narrative functions as a complexity reduction tool by disregarding discontinuities in order to form a coherent story. Michel Foucault objected to the simplification of history through a linear reading which erased all forms of struggle and dissent against the status quo and confirmed existing power relations.²²⁶ He defended that history should be analysed with a genealogical approach which interpreted history as a collection of discontinuous events that did not necessarily lead to one another in a rational line of sequencing.²²⁷

Nathaniel Berman echoed Michel Foucault's approach to history and advocated that international law should be analysed with a genealogist approach. More specifically, Berman criticised progress narratives for their reformist agenda that helped to create an 'old' and a 'new' era.²²⁸ He stated that international lawyers had a tendency to think that at certain points in history, as in 1648 or in 1945, international law broke away with its injustices and

²²⁴ The Preamble of the UN Charter states 'WE THE PEOPLES OF THE UNITED NATIONS DETERMINED (...) to promote social progress and better standards of life in larger freedom, (...) to employ international machinery for the promotion of the economic and social advancement of all peoples [...] hereby establish an international organization to be known as the United Nations.' in Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI.

²²⁵ Weiss (n 211) 372.

²²⁶ Michel Foucault, 'Nietzsche, Genealogy, History' in Michel Foucault, *The Foucault Reader: An Introduction to Foucault's Thought* (Paul Rabinow ed, Penguin Books 1991) 76-100. See also Susan Marks, 'The End of History: Reflections on Some International Legal Theses' (1997) 8 EJIL 449, 459-60.

²²⁷ Foucault, 'Nietzsche, Genealogy' (n 226) 76-100.

²²⁸ Nathaniel Berman, 'In the Wake of Empire' (1999) 14 American University International Law Review 1515. See also, Altwickler and Diggelmann, 'How is Progress Constructed in International Legal Scholarship?' (n 176) 432-34.

deficiencies.²²⁹ He objected to those who see international law as a linear line of progress; instead of continued development, he argued that this was a field which continually presented progress and regress, full of disasters, flaws and deficiencies.²³⁰ In contrast to the genealogist, he posited the renewer-restater, who periodically renewed international law with a restatement of a 'new international law' which allowed for a more developed and advanced field.²³¹ In his opinion, 'Genealogy sees international law — its doctrines as well as its participants — as normatively impure, culturally heterogeneous, and historically contingent. This approach enables it both to mourn legal history's horrors and to believe in law's ever-present emancipatory potential.'²³² According to Berman, the renewer-restater approach does not present an accurate image, since it conceptualises international law as a terrain between the great powers and other less powerful states.²³³ He concluded by stating that 'international legal history must be pluralized: just as imperial identity forms differently in relation to its different Others, so international legal history has a variety of temporal lines, which the genealogist must disentangle.'²³⁴

It can be argued that a progressive reading of international law is not a neutral exercise and 'the language of progress is also a language of authority, to legitimize and de-legitimize'.²³⁵ Since the idea of progress makes use of temporal comparisons in order to show how the current setting is more advanced than previous periods, it allows not only to reform international law but also to legitimise a new order.²³⁶ Progress narrative, which might be presented as depicting the natural course of events, legitimises certain facts while delegitimising undesired ones. This not only allows the narrator to mould the history of international law as she deems appropriate, but also helps her to shape international law's future. Joel Trachtman argued that it should be an international lawyer's duty to think about and prepare for the future: 'Small adjustments today can make the future significantly better — indeed, the only way to achieve a good result may be to plan ahead, and with growing complexity more issues may require us to develop a longer horizon.'²³⁷ In that regard, a progressive reading allows one to dictate how the future should be designed. It may finally be stated that among different ways of reading and interpreting history, the progress narrative stands out as a perspective which highlights the gradually developing nature of international law in favour of a more superior order. This is a commonly adopted type of narrative in order to praise contemporary developments, find relief in today's order and hope in the future. This is especially the case regarding democratic governance discourses since there is an

²²⁹ Berman, 'In the Wake of Empire' (n 228).

²³⁰ *ibid* 1523.

²³¹ *ibid*.

²³² *ibid* 1524.

²³³ *ibid* 1539.

²³⁴ *ibid* 1552.

²³⁵ Skouteris (n 48) 5.

²³⁶ Randall Lesaffer, 'The Grotian Tradition Revisited: Change and Continuity in the History of International Law' (2003) 73 BYBIL 103, Agatha Verdebout, 'The Contemporary Discourse on the Use of Force in the Nineteenth Century: A Diachronic and Critical Analysis' (2014) 1 Journal of the Use of Force and International Law 223, 238.

²³⁷ Joel Trachtman, *The Future of International Law: Global Government* (CUP 2013) 68.

instinctive inclination to think about democracy in progressive terms. Thomas Skouteris noted that 'we all have different ideas about what true democracy is and how to achieve it, we all think that achieving more democracy means progress because, ultimately, there is an essence in democracy (democratic institutions, democratic processes, in the social outcomes of the institutions, etc.) which transcends all our individual definitions and truly constitutes a greater good.'²³⁸ It will be demonstrated in the following chapters, how scholars conceptualised democratic governance in progressive terms through the construction of the formal, temporal and spatial elements of the narrative.

2.5. Conclusion

How international law discourses function can be explained in several different ways. This study construes international law as a set of narratives, rather than rules, processes or practices. It is argued here that construing international law as narratives is important for providing a tool to understand how law is made.²³⁹ It gives an opportunity to understand how international lawyers create the normative world where they live, argue, discuss, agree and disagree with each other.²⁴⁰ Elucidating the narrative structure of international law demonstrates how arguments are presented in a way that would persuade the reader. In that sense, the study focuses on the narrativisation elements that support an argument, rather than the argument itself. This chapter showed that based on fundamental doctrines and sources broadly construed, there are various possibilities that allow narrators to shape their narrative in the way they deem the most appropriate or useful. International lawyers enjoy a wide area of manoeuvre when they construct narratives to advance their argument. Interpretation of different historical facts, events, doctrines, sources, judgments will give form to these raw materials which do not have a meaning unless they undergo a narrativisation process. Taking into account the narrative structure of international law not only rules out the possibility of reaching a final interpretation on a subject but also saves the reader from falling into the trap of overemphasising one interpretation over another. As it will be shown in the subsequent chapters, narratives can be unmade and remade through a reconfiguration of facts and alteration of meaning assigned to these facts.

This chapter identified three narrativisation elements that constitute the building blocks of rhetorical narratives in international law. First, the formal element is a narrativisation element that ties the narrative into an international law framework. Rhetorical narratives of international law differ from other narratives by the objective they pursue and the language they speak. In that sense, any narrative in international law has to use a legal vocabulary that will evidence the relevance of the subject in question with this field of law. Facts do not reveal in themselves how they make part of a legal narrative. It is by constructing the formal element of the narrative

²³⁸ Skouteris (n 48) 15-16.

²³⁹ Brooks and Gewirtz (n 44) 3.

²⁴⁰ Cover, 'Foreword: Nomos and Narrative' (n 43).

that the reader will be informed about the legal significance of the subject-matter. Second, the temporal element situates the narrative in time. Facts need to be organised along a certain timeframe to delimit the narrative. Periodisation of history provides in that regard a pragmatic and normative tool that allows the narrator to tell a story which starts and finishes at a certain date. Finally, the spatial element situates the narrative in space. Every international law narrative will have an impact on a particular space. This space, however, does not exist out there with its autonomous identity. It is the narrator who will construct the space where the narrative will modify the relations between international law actors.

The way in which these three narrativisation elements will be formed also depend on the causal sequencing created between facts. The narrative might have a static, linear or cyclical rhythm that all tell different stories with regard to the narrative's impact on international law as a discipline. This study focuses on democratic governance discourses and seeks to examine its narrative structure. To that end, it concentrates on progress narratives that adopt a linear approach to historical reading. Progress narratives are structured in such a way that history seems to move forward in time towards a more superior and advanced legal order. In order to create this progressive understanding, discontinuities are disregarded, and the course of history is presented as a homogeneous set of events leading to a more just world. While history might accommodate very complex events, progress narratives transform this complexity into well-defined and simple sets of information that present a coherent story. Rather than a heterogeneous collection of progress and decline, international law is projected as a discipline that continually follows a linear path of improvement and advancement. This type of causal sequencing also allows to reform international law in the direction that the narrator deems appropriate. The linear path can be divided into 'old' and 'new' periods in a way that legitimises the future where international law should be geared towards, according to the narrator's preferences. The idea of progress, however, is a narrative construct and in that sense can be subject to examination through a discourse analysis. Before delving into an examination of the formal, temporal and spatial narrativisation elements, the following chapter will present an overview of the literature on democratic governance to determine the scope and limits of the discourses that will be analysed in subsequent chapters.

3. Democratic Governance Discourses

The way in which a government comes into being has long been considered a matter outside the scope of international law. Since the 17th century, the main criterion for the recognition of governments has been the principle of effectiveness rather than legitimacy.²⁴¹ Lassa Oppenheim stated that 'The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution according to its discretion.'²⁴² Governmental forms were regarded as a matter 'essentially within the domestic jurisdiction'²⁴³ of a state and international law did not take a firm stance regarding unconstitutional changes of government until the late 20th century. Following the German reunification and the demise of the Soviet Union, international lawyers started to discuss whether the neutrality of international law with regard to governmental forms was being challenged. In 1992, Thomas Franck and Gregory Fox published two articles and became the pioneers of an important debate on the relationship of democracy with international law which later has formed the basis of democratic governance discourses.²⁴⁴ In a nutshell, democratic governance discourses submit that international law is no longer indifferent to the way in which a government comes into being and that not only national but also international law determines the legitimacy of a government through democracy. It further claims that the validation of national governance is becoming enforceable under international law as part of customary international law. After these two prominent scholars brought the subject to the forefront of international law literature, many others followed suit to discuss the neutrality of international law with regard to political regimes that states can adopt.

Born in the US in 1992 with the prominent works of Franck and Fox and continued with several other writings, the idea of democratic governance first travelled to the UK, then to the rest of the Europe. The instinctive idea that democracy will make the world a better place generated a voluminous scholarship. Democratic governance discourses have been revisited several times and have been keeping the international law literature busy for the last three decades. The aim of this chapter is to provide an overview of democratic governance discourses before the study concentrates in subsequent chapters on specific narrativisation elements that have been used to construct these writings. The chapter first looks at the liberal foundations of

²⁴¹ Hersch Lauterpacht, *Recognition in International Law* (CUP 1947) 102, Ian Brownlie, 'Recognition in Theory and Practice' (1983) 53 BYBIL 197, Martha Peterson, *Recognition of Governments, Legal Doctrine and State Practice: 1815-1995* (Palgrave 1997) 36, James Crawford, *The Creation of States in International Law* (OUP 2011) 46. See also Stefan Talmon, *Recognition of Governments in International Law with Particular Reference to Governments in Exile* (OUP 2004) 107-08.

²⁴² Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green and Co. 1905) 403. See also the Tinoco Arbitration where it was stated that 'non-recognition on the ground of illegitimacy of origin was not a postulate of international law and did not secure general acquiescence' in *Angular-Armory and Royal Bank of Canada Claims (Great Britain v. Costa Rica)* (1923) 1 RIAA 369, *Arbitration between Great Britain and Costa Rica* (1924) 18 AJIL 147.

²⁴³ Charter of the United Nations (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI, Article 2 (7).

²⁴⁴ Franck, 'The Emerging Right to Democratic Governance' (n 21), Fox, 'The Right to Political Participation in International Law' (n 25).

democratic governance and examines how democratic liberalism challenged the ideological plurality established by the UN Charter in order to proclaim democracy as the only acceptable governmental form (3.1.). Second, it identifies three stages of democratic governance writings (3.2.). This section first looks at how Franck and Fox became the pioneers of the argument that there is an emerging right to democratic governance in international law. It then focuses on the consolidation of these discourses in the 1990s and early 2000s when several academics joined the debate. The third sub-section demonstrates how these discourses are resilient to this day and preserve their place in the international research agenda. After presenting an overview of democratic governance discourses, the third section explains why these writings form part of a single narrative (3.3.).

3.1. Democratic Liberalism

Democratic governance discourses find their theoretical foundations in a liberal understanding of international law. Liberalism in international law is used to define different concepts, however two major meanings can be distinguished from the scholarly debates. Firstly, liberalism can be equated to legalism that implies an idea of separation between law and politics.²⁴⁵ In that sense, liberalism denotes a legal system where law is perceived as a technical tool which provides formal and objectives rules detached from moral judgments.²⁴⁶ Secondly, it is used to define an understanding of international law which evaluates the democratic credentials of states in order to rule on their membership status to the international community.²⁴⁷ The writings on democratic governance have mostly dealt with the latter meaning by focusing on how democratic principles have challenged the main doctrines such as statehood, recognition and governmental legitimacy. For the purposes of this study, this approach will be called 'democratic liberalism'. This understanding of liberalism is about determining the standing of states in the international community according to their political structures and their adherence to liberal values. It should, however, be noted that taking into account the abounding number of writings on the subject, it is not possible to construe liberalism which forms the theoretical basis of democratic governance writings as a monolithic idea. Nevertheless, it is important to examine the common theoretical idea underlying these writings in order to understand how scholars conceptualised their arguments.

Democratic liberalism puts a special emphasis on the democratic credentials of a state's political structures and the protection of fundamental rights. This challenges the political agnosticism that was established by the UN Charter on the basis of non-intervention and sovereign equality principles, a period dominated by what Gerry Simpson calls 'Charter

²⁴⁵ d'Aspremont, *International Law as a Belief System* (n 119) 10-11.

²⁴⁶ *ibid* 11. See also Judith Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press 1986) 1-28, Roberto Mangabeira Unger, *Knowledge and Politics* (Free Press 1975) 76-81, Koskeniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 105) 71-157, Florian Hoffman, 'International Legalism and International Politics' in Anne Orford and Florian Hoffmann (eds), *The Oxford Handbook of the Theory of International Law* (OUP 2016).

²⁴⁷ For a fuller explanation of this latter account, see Gerry Simpson, 'Two Liberalisms' (2001) 12 EJIL 537.

liberalism'.²⁴⁸ Since democratic governance writings challenge a very fundamental understanding of the Charter era, namely neutrality towards governmental forms, it is crucial to map different views that contributed to this argument. The transition from the Charter liberalism, which allowed the diversity of political values and therefore sustained equality of states through the principle of sovereignty to an era where states have to live up to some democratic standards to continue being members of the international society, took place, according to Anne-Marie Slaughter, by elevating the status of individuals in the international order.²⁴⁹ She argued that the traditional approach would identify international law as a field regulating the rules that govern inter-state relations, these rules being determined by states themselves with a top-down approach.²⁵⁰ However, liberal international law reverses this understanding by adopting a bottom-up approach where individuals, non-governmental organisations and international organisations take part in shaping what we consider international law.²⁵¹ This understanding values the participation and representation of not only individuals but also the diversity of actors in consolidating democratic governance.

When constructing a liberal theory of international law, Slaughter adopted the criticisms that scholars voiced against a realist understanding of international relations and applied them to the international law order. According to the realist school of international relations, states are the primary actors of the international community with rational and determined preferences.²⁵² Those who opposed this understanding and defended a liberal approach to international relations argued that domestic social structures and individual preferences are the main determinants of state behaviour.²⁵³ She transposed the same idea into international law by alleging that the emphasis on state consent for law creation and reliance on sovereign equality disregarded the political and ideological disparities among members of the international community.²⁵⁴ The traditional structure, with its undue insistence upon universal inclusion of all states within the international community regardless of their internal political regimes, did not take into regard and recognise the value of democratic governmental institutions which more and more commonly showed their effectiveness in the governance of states. According to Anne-Marie Slaughter, the reason for the shift from a state-centric approach to a more liberal understanding was not only due to the growing interest in democratic institutions but also to the necessity of empowering trans-governmental institutions to combat recent problems such as, among others, terrorism, climate change and international financial security issues.²⁵⁵ Therefore, rather than a traditional approach where the mere recognition as a state would be

²⁴⁸ *ibid.*

²⁴⁹ Anne-Marie Slaughter, 'A Liberal Theory of International Law' (2000) 94 ASIL Proceedings 240.

²⁵⁰ *ibid.* 242.

²⁵¹ *ibid.*

²⁵² Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics' (1997) 51 International Organization 513, 516-24, David Armstrong, Theo Farrell and Hélène Lambert, *International Law and International Relations* (CUP 2012) 88-99.

²⁵³ Moravcsik (n 252).

²⁵⁴ Anne-Marie Slaughter, 'International Law in a World of Liberal States' (1995) 6 EJIL 503.

²⁵⁵ Anne-Marie Slaughter, 'Government Networks: The Heart of the Liberal Democratic Order' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 200.

sufficient for membership to the international community, the liberal approach distinguished between different types of states regarding their domestic political organisation and attachment to liberal values.

Kant can be cited as an anchor point for the historical foundations of democratic liberalism in international law. He opined that the perpetual peace depended on the establishment of an international community composed of republican states which respected fundamental rights of their citizens.²⁵⁶ Kant opposed a procedural form of democracy which relied on a majoritarian understanding that would confine it to elections and claimed that it would result in tyranny.²⁵⁷ He emphasised the importance of a republican constitution that would enshrine rights to guarantee individual autonomy.²⁵⁸ Therefore, his conception of a republican state which would be the pillar of perpetual peace can be interpreted as a liberal democratic state. While Kant's approach to democracy as an engine that would guarantee world peace was criticised as a 'consoling myth' by some,²⁵⁹ according to Fernando Teson, this provided an ideal vision for international law. He argued that international law should be conceived as a field reflecting Kant's vision of liberalism which prioritised individuals as norm setters instead of states.²⁶⁰ At a time when a state-centric approach was already being challenged,²⁶¹ he claimed that international law could no longer maintain a statist view and had to adopt a more liberal approach whereby individuals would be regarded as primary subjects and individual preferences and freedom would be valued.²⁶² In parallel, he defended that only democratic states could be members of the society of nations by making a clear distinction between liberal and illiberal states.²⁶³

Thomas Franck seems to have taken Fernando Teson's understanding of liberalism one step further to declare that the ascertainment of people's will was not only a central tool to ensure democratic liberalism, but this was also supported by the main actors of the field, the states themselves. In that sense, he provided the necessary normative foundation to Teson's idealist perspective of liberalism in international law. Indeed, Franck defined a new form of liberalism in international law: states still had to give their consent to create international law, however their ability to give consent depended on their validation by their citizens. As it will be explained in more detail in the next section, he made the state's consent conditional on the ascertainment of people's will and thus elevated the individual to the centre of international law. It is also noteworthy that in his approach to democratic governance, Franck diverted from an

²⁵⁶ Immanuel Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (Pauline Kleingeld ed, Yale University Press 2006) 74-81.

²⁵⁷ *ibid* 76-78.

²⁵⁸ *ibid*.

²⁵⁹ Philip Allott, 'The True Function of Law in the International Community' (1998) 5 *Indiana Journal of Global Legal Studies* 391, 391.

²⁶⁰ Fernando Teson, 'The Kantian Theory of International Law' (1992) 92 *Columbia Law Review* 53.

²⁶¹ Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (1990) 84 *AJIL* 866, Anthony d'Amato, 'The Invasion of Panama Was a Lawful Response to Tyranny' (1990) 84 *AJIL* 516.

²⁶² Teson (n 260) 54.

²⁶³ For a tripartite distinction between liberal, illiberal and outlaw states, see John Rawls, *The Law of Peoples: with 'The Idea of Public Reason Revisited'* (Harvard University Press 1999).

international law perspective which was upholding the primacy of states. In his previous work, Franck had defended a more traditional approach to international law where states were the main subjects and at the epicentre of the field.²⁶⁴ However, with the democratic entitlement argument, Franck not only aligned with Teson's liberalism but also carried it even further by providing its normative basis.²⁶⁵ In that regard, he challenged the well-established principle of representation in international law and wanted to replace the test of effectiveness with a test of legitimacy.²⁶⁶

One of the most assertive claims challenging Charter liberalism is put forward by Russell Buchan. He argued that in the light of post-Cold War practice and the growing interest in elected governments and democratic decision-making mechanisms, the principle of sovereign equality could not maintain its traditional role in international law.²⁶⁷ He conceived international order composed of two different groups of states: international society and international community whereby the former represented states accepted as sovereign equals by the UN Charter system and the latter formed mostly in the post-Cold War era by liberal states to the exclusion of states which do not embrace democratic and liberal values.²⁶⁸ He reserved sovereign rights to liberal states and stated: 'a grandiose aspiration, I suggest that ultimately the *telos* of the international community is to construct a world composed exclusively of liberal states'.²⁶⁹ While Russell Buchan repeatedly emphasised that his argument was not normative but explanatory, it is possible to deduce from his analysis of the international order that he prescribed liberal states on the one hand to actively promote democratic values to non-liberal states and on the other hand, cautioned non-liberal states that unless they complied with the rules of the international community, they would have to relinquish their sovereign rights.²⁷⁰

Democratic governance discourses rely on a liberal understanding of international law by placing the individual in its centre and more specifically giving the people's will the power to validate national governance. Rather than states determining their own political regimes which would reflect a more traditional account of international law, the emphasis is shifted in favour

²⁶⁴ Thomas Franck, 'Is Justice Relevant to the International Legal System' (1989) 64 *Notre Dame Law Review* 945.

²⁶⁵ For a critique of both Fernando Teson and Thomas Franck's approach to democratic liberalism, see Gerry Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory' (1994) 15 *Australian YBIL* 103.

²⁶⁶ While Philip Allott argued that international law did not have a theory of representation, James Crawford stated that international law's theory of representation was effectiveness, see Philip Allott, *Eunomia: New Order for a New World* (OUP 2001) 307-08, Crawford, 'Democracy and International Law' (n 25) 129.

²⁶⁷ Russell Buchan, *International Law and the Construction of the Liberal Peace* (Bloomsbury Publishing 2013).

²⁶⁸ *ibid* 5.

²⁶⁹ *ibid* 6. For a similar account see Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (n 261). For a contrary argument see James Crawford, 'Democracy and the Body of International Law' in Gregory Fox, Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 108-09.

²⁷⁰ For criticism on Russell Buchan's view, see Brad Roth, 'International Law's Enemy Within: Buchan's "International Community" as Rival to the Positive Legal Order', *EJIL: Talk!* 17 November 2014, <www.ejiltalk.org/international-laws-enemy-within-buchans-international-community-as-rival-to-the-positive-legal-order/> accessed 22 August 2019, Jean d'Aspremont, 'Democracy and International Law according to Russell Buchan: Prescribing under the Guise of Explaining?' *EJIL: Talk!* 17 November 2014, <www.ejiltalk.org/democracy-and-international-law-according-to-russell-buchan-prescribing-under-the-guise-of-explaining/> accessed 22 August 2019, Gregory Fox, 'A Comment on Russell Buchan's "International Law and the Construction of the Liberal Peace"', *EJIL: Talk!*, 18 November 2014, <www.ejiltalk.org/a-comment-on-russell-buchans-international-law-and-the-construction-of-the-liberal-peace/> accessed 22 August 2019. For Russell Buchan's reply see Russell Buchan, 'Response to Roth, d'Aspremont and Fox', *EJIL: Talk!*, 19 November 2014, <www.ejiltalk.org/response-to-roth-daspremont-and-fox/> accessed 22 August 2019.

of individuals who bestow the power of determining the legitimacy of their state in the international community. Many critiques have been raised against democratic liberalism regarding its potential exclusionist outcomes,²⁷¹ the pitfalls of combining international relations with international law,²⁷² and more recently its inability of dealing with populist policies.²⁷³ The emphasis in this study will be on how democratic liberalism envisages international law as a progressive field and how scholars construct their argument based on a linear understanding of historical process. To that end, three important points can be distinguished as to how democratic liberalism contributes to the construction of democratic governance discourses as a progress narrative.

Firstly, According to Anne-Marie Slaughter and Fernando Teson, liberal states are more willing to respect international law, fundamental rights and the rule of law and as an associated corollary, democratic states are less prone to fight against each other.²⁷⁴ Many scholars pondered democratic states' tendency to use friendly means and arbitration for solving their disputes and this has produced a huge amount of scholarly work famously known as the 'democratic peace thesis'.²⁷⁵ Proponents of democratic liberalism claim that in order to maintain international peace and security, restructuring the international order in a liberal manner is only a rational endeavour. This, however, relies on the assumption that democratisation of states is a linear path which eventually leads to more compliance with international law and stronger protection of international order and peace. José Alvarez argued that the contention that liberal states behaved better than non-liberal states was not backed by international practice and remained as wishful thinking.²⁷⁶ He claimed that the democratic peace thesis which contended that liberal states did not wage war against each other, relied on very arbitrarily chosen cases and definitions.²⁷⁷ Therefore, liberal scholars' use of progress narrative to argue that more democracy will bring more compliance, rather than reflecting the state of the art on the subject, prescribes how international law should be reimaged in order to fulfil its function to maintain international order.

A second important point which demonstrates how liberal scholars envisage the relationship between democracy and international law in progressive terms can be seen in the way they interpret the historical evolution of the subject matter. Anne-Marie Slaughter traced a

²⁷¹ David Kennedy, 'The Disciplines of International Law and Policy' (1999) 12 Leiden JIL 9, 109-10.

²⁷² Martti Koskeniemi, 'Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations' in Michael Byers (ed) *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 29-34.

²⁷³ Alston (n 14), Eric Posner, 'Liberal Internationalism and the Populist Backlash' (2017) University of Chicago Public Law Working Paper, No 606, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=2071&context=public_law_and_legal_theory> accessed 22 August 2019.

²⁷⁴ Slaughter, 'International Law in a World of Liberal States' (n 254) 510-14, Teson (n 260) 74-81. The assertion that Western democratic states perform better in observing international law is not new, see Louis Henkin, *How Nations Behave: Law and Foreign Policy* (Columbia University Press 1979) 63.

²⁷⁵ For democratic peace thesis see (n 28).

²⁷⁶ José Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (2001) 12 EJIL 183, 194-223. See also Eyal Benvenisti, 'Judicial Misgivings Regarding the Application of International Law: An Analysis of Attitudes of National Courts' (1993) 4 EJIL 159.

²⁷⁷ Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory' (n 276) 234-38.

genealogical time span to demonstrate how international relations evolved over time to reach a point where the growing number of liberal states has also expanded the zone of peace among states.²⁷⁸ According to Anne-Marie Slaughter, starting with Wilsonian internationalism, going through realism and finally reaching liberalism, history progressed in a one-way direction to arrive at a more advanced period where democratic liberalism is the only alternative for international law. When Fernando Teson relied on Kant as a historical validator for his argument, he also used a linear progressive approach to history to prove his claim. As explained in Chapter 2, Kant strongly believed that humanity progressed over time since their *raison d'être* depended on improving their faculties to make life more meaningful.²⁷⁹ More specifically in terms of liberal theory, he defended that the perpetual peace depended on the progress of all states to become republics.²⁸⁰ It is also possible to see that Russell Buchan made a comparison between now and then when it comes to states' commitment to liberal values and emphasised how much states which form the international community advanced over time to reach a significantly different level than non-liberal states. The way liberal scholars read history contributes in an extensive way to the construction of democratic governance discourses as a progress narrative.

Another important tool used in progress narratives, as it can be witnessed in democratic liberalism, is classifications. Creating new classifications or drawing boundaries between different groups are effective ways to justify exclusionary policies for the sake of legal precision. For Anne-Marie Slaughter the distinction is between the liberal and non-liberal state and for Russell Buchan between the international community and international society. The UN Charter is based on the fiction that all states are equal sovereigns and at the time of its adoption it did not prescribe any particular form of political structure for a state to be part of the international community. However, after 1945 some states advanced in consolidating the democratic foundations of their governmental structures. Due to the difference between states who succeeded in proving their loyalty to democratic values and those who did not, demonstrate the same level of advancement, for some scholars it was no longer sustainable to have only one league of states where everyone was equally sovereign. They claimed that it was necessary to redefine sovereignty and classify states in different leagues regarding their compliance with some democratic standards. In the post-Cold War era, by relying on the advancement of democratic structures, it was possible to underline how much some states progressed and others did not and prescribe a new international order in this way. In that regard, classifications used by democratic liberalism are clear signs of this progress narrative. Two criticisms can be brought against these types of divisive policies. On the one hand, these classifications create a broad space to strong states for 'power politics',²⁸¹ and on the other

²⁷⁸ Susan Marks, 'The End of History: Reflections on Some International Legal Theses' (1997) 8 EJIL 449, 468.

²⁷⁹ Kant, *Political Writings* (n 216) 44-45.

²⁸⁰ Kant, *Toward Perpetual Peace and Other Writings on Politics, Peace, and History* (n 256) 74-81.

²⁸¹ Harold Hongju Koh, 'Why Do Nations Obey International Law' (1996) 106 Yale Law Journal 2599, 2650.

hand, these distinctions are reminiscent of the 19th century classification of the European and non-European which described states as advanced or barbaric.²⁸²

It can be summarised that while Anne-Marie Slaughter and Fernando Teson advised how international law should be restructured in prescriptive terms, Thomas Franck provided the normative background for the liberal project and substantiated how international practice evidenced the shift from a traditional approach which was agnostic to political regimes of states to a liberal approach which takes into regard whether the government is representative of people's will. The UN system, when it was founded did not make a distinction between states as regards their internal political governance structures. However, democratic liberalism puts a special emphasis on the way states were governed and different classifications have been formulated regarding the level of attachment of states to liberal values. Therefore, the way the theoretical foundations of democratic governance discourses are structured relies on these prescriptive and normative paradigms which eventually form a progress narrative.

3.2. Three Stages in the Development of Democratic Governance Discourses

In the early 1990s, after the fall of the Berlin Wall and the demise of the Soviet Union, scholars became interested in evaluating the consequences of the Cold War and started a new debate on the neutrality of international law towards governmental forms and ideologies. Communism was allegedly defeated by the US, and democracy at the time seemed to be the only reasonable and acceptable form of governance. While the UN Charter system did not oblige states to adopt a particular form of political structure, this neutrality was challenged, and scholars started to discuss whether the political agnosticism of the Charter was still sustainable and in compliance with international practice. Thomas Franck's 'The Emerging Right to Democratic Governance'²⁸³ and Gregory Fox's 'The Right to Political Participation in International Law'²⁸⁴ were published in 1992 and they now constitute the founding articles of democratic governance discourses. The two scholars became the pioneers of a debate over democracy's role in validating national governance that has since then never lost its significance and generated a voluminous amount of writings. Following Thomas Franck and Gregory Fox's works, many scholars continued to develop the literature on democratic governance and to reshape the relationship between democracy and international law.²⁸⁵ The growing focus on democracy as a validation tool for governance has opened new areas of research and created several branches each discussing a different side of the topic. Although democracy did not enter the international law lexicon in the 1990s, its 'retroactive emergence'

²⁸² Antony Anghie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law' (1999) 40 *Harvard International Law Journal* 1, 77-78.

²⁸³ Franck, 'The Emerging Right to Democratic Governance' (n 21).

²⁸⁴ Fox, 'The Right to Political Participation in International Law' (n 25).

²⁸⁵ Two major edited volumes have so far been published on democratic governance: Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000), Richard Burchill (ed), *Democracy and International Law* (Ashgate 2006).

instigated a greater awareness and interest for the examination of its historical roots and presence in practice.²⁸⁶ While in the 1990s and early 2000s, writings on democratic governance proliferated, it can be observed that in recent scholarship, the topic continues to preserve its place in international lawyers' research agenda. The following sub-sections will provide an overview of democratic governance discourses over the last three decades.

3.2.1. Genesis

In his seminal work, Thomas Franck's main claim was that international law would increasingly be involved in regulating national governance.²⁸⁷ He argued that democratic entitlement, i.e. validation of national governance through the expression of people's will, has emerged based on two expectations which mutually reinforced each other: governments increasingly followed an emerging international law obligation to hold democratic elections in order to legitimate their rule and in return, international law increasingly expected states to secure people's consent to govern.²⁸⁸ He relied on a progressive understanding of international law in order to explain how over time, democracy has become a yardstick to determine the legitimacy of national governance in a field which was known to be agnostic towards the political regimes of its main actors. He stated that 'The transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually. In the past decade, however, the tendency has accelerated.'²⁸⁹ Thereafter, he determined three key points which formed the premises of the democratic entitlement thesis, namely self-determination, free speech and free elections. He opined that these three principals have become more determinate over time regarding their content and that this gradual consolidation allowed the progressive development of democracy as an emerging rule under international law. Hence, the gradual development of international law has made possible the acceptance of democracy as a validation tool.

Throughout the article, Franck's main concern was with the normativity of the democratic entitlement rule. The driving force in determining the normative character of democratic entitlement was to conclude that it was enforceable against states. Franck aimed to prove that democratic entitlement has reached a certain level of legitimacy and thus could be qualified as an enforceable rule. In a previous work, he had discussed the potential of democracy as a tool to reform the institutional foundation of the UN, but at the time he had abstained from arguing for the enforceability of a possible emerging rule of democratic governance.²⁹⁰ His claim in his 1992 dated article is taking his previous work one step further to discuss how

²⁸⁶ Richard Burchill, 'The Developing International Law of Democracy' (2001) 64 *The Modern Law Review* 123, 124.

²⁸⁷ Franck, 'The Emerging Right to Democratic Governance' (n 21). See also, Thomas Franck, 'Democracy as a Human Right' in Louis Henkin and John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (ASIL 1994).

²⁸⁸ Franck, 'The Emerging Right to Democratic Governance' (n 21) 46.

²⁸⁹ *ibid* 47.

²⁹⁰ Thomas Franck, 'United Nations Based Prospects for a New Global Order' (1990) 22 *New York University JIL and Politics* 601.

democracy is on its way to acquire the necessary normative power to be enforceable. In order to do that and to ascertain the legitimacy of this emerging norm, he referred back to his monograph *The Power of Legitimacy Among Nations* and argued that legitimacy depended on four parameters: pedigree, determinacy, coherence and adherence.²⁹¹ He examined these four parameters respectively to demonstrate how democratic entitlement has satisfied them all by the progressive development of self-determination, free speech and free elections.

His focus was first and foremost on the pedigree of democratic entitlement as it constituted the historical foundation which demonstrated how much this principle was rooted and consolidated by international practice. Pedigree formed one of the criteria to be fulfilled in order for a rule to be considered legitimate and therefore the historical development played a paramount role in the legitimacy of this new rule. To that end, he explained in great detail the development of the right to self-determination which allowed people to determine their political, social and economic future and thus formed the pedigree of democratic governance. In order to determine whether democratic entitlement has become an enforceable rule under international law, he also examined international practice and regulations and illustrated how this emerging rule has gradually developed its content. He tried to make the rule more visible by referring to several examples and transformed it into a more concrete and thus normative rule. He stated that 'A rule that is vague opens itself to creative misconstruction by those whose conduct it is intended to regulate.'²⁹² Therefore, he made his own construction of what he named democratic entitlement and moulded it in the way that he deemed the most appropriate.

Franck's use of temporality is an important element in the construction of his progress narrative. Two central points can be distinguished in this regard. First, he very often relied on the comparison of the past with present to build the progress narrative. He stated that the dictatorship of the proletariat was rejected by the people and was a thing of the past.²⁹³ He argued that 'people almost everywhere now demand that government be validated by western-style parliamentary, multiparty democratic process. Only a few, usually military or theocratic, regimes still resist the trend. Very few argue that parliamentary democracy is a western illusion and a neocolonialist trap for unwary Third World peoples.'²⁹⁴ According to Franck, when compared with the past, democracy has globally triumphed as the only way of validating governance. However, at a time when only a small number of states had liberal democracies with free and fair elections, it is not easy to understand how the comparison between the past and present allowed him to arrive to this conclusion. Second, he argued that democratic governance was an 'emerging' right. The idea of a new era or new right 'emerging' is a

²⁹¹ Franck, 'The Emerging Right to Democratic Governance' (n 21) 51. See also Thomas Franck, *The Power of Legitimacy Among Nations* (OUP 1990) 50-194.

²⁹² Franck, 'The Emerging Right to Democratic Governance' (n 21) 56.

²⁹³ *ibid* 49.

²⁹⁴ *ibid*.

narrative tool that Franck used in other works as well.²⁹⁵ Arguing that something is not yet fully developed but on its way towards becoming an enforceable right is a subtle shield against counter-arguments. It allows the narrator to use time in his favour by relying on the unmistakably progressive course of events which will eventually turn the emerging norm into an enforceable rule. In that sense, 'emergence' serves the progress narrative in three stages: it uses history to prove that the seeds of an emerging right (democratic governance) already exist, it indicates a discomfort with the current state of affairs and finally hints that it will soon be changed when the claim eventually emerges as a full-fledged norm.²⁹⁶

While the epicentre of Franck's claim was the formation of national governments through elections, it is noteworthy that he did not confine himself only to democratic elections and made use of the consolidation of self-determination and free speech to construct a new form of obligation that he called 'democratic entitlement'. Franck argued that the customary character of article 25 of the ICCPR which guaranteed free and fair elections is supported by an overwhelming practice and also *opinio juris*. However, his main focus was not whether democratic elections were becoming binding upon all states. He took a different approach and deviated from a narrative with an emphasis on the customary character of article 25 of the ICCPR. The distinction he made between a mere right to free and fair elections and democratic entitlement is that the former is a right conferred on people to determine their governments, whereas the latter is about the validation of a national government to legitimately represent a state within the international community. He aimed to create a new type of rule which holds the keys of being a member of this new community of states. In that regard, the type of obligation he intended to create, and call 'entitlement' or 'global standard'²⁹⁷ has a very broad character which allowed him to make his own creative construction in order to determine which role democracy should play in international law.

Franck stated that:

We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitively by international rules and processes. We are not quite there, but we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement. For some states, that process will merely

²⁹⁵ For example, 'an emerging legal system' at 7 and 'emerging legal community' at 13, in Thomas Franck, *The Empowered Self: Law and Society in the Age of Individualism* (OUP 1999), 'We are witnessing the dawn of a new era, defined both by moderate scarcity and by an emerging sense of global community. We have not arrived there yet but it is where we seem to be heading' at 11 in Thomas Franck, *Fairness in International Law and Institutions* (OUP 1995).

²⁹⁶ Martti Koskeniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World' (2002) 35 *New York University JIL and Politics* 471, 485.

²⁹⁷ Franck, 'The Emerging Right to Democratic Governance' (n 21) 47.

embellish rights already protected by their existing domestic constitutional order. For others, it could be the realization of a cherished dream.²⁹⁸

This statement demonstrates that according to Franck, a new tool of validation was coming into existence and although 'we are not quite there' yet, international law will eventually evolve to provide the tools to legitimate national governments. Franck saw only one possible direction towards where the future of international law could evolve. He did not take into consideration the fact that there could be other alternative futures for international law with regard to democracy and disregarded any possible setbacks from the linear advancement of democratic rule.

In parallel, in his article 'International Right to Political Participation in International Law' Gregory Fox investigated the existing law on participatory rights.²⁹⁹ In contrast to Franck, Fox concentrated only on participatory rights and analysed international conventions and regulations in order to understand whether this right could be regarded as an emerging universal right that was part of customary international law. Fox adopted a historical perspective to draw the genealogy of participatory rights by firstly looking at regulations that existed before the Second World War. He then focused on the UN era and examined how the right to political participation has been regulated in the ICCPR and other regional human rights instruments. After a very detailed and thorough examination of treaty sources, he concluded that a 'review of global and regional treaty systems reveals that a free, fair and legally sufficient election consists of the following four elements as a matter of treaty law: universal and equal suffrage; a secret ballot; elections at reasonable periodic intervals; and an absence of discrimination against voters, candidates, or parties'.³⁰⁰ In a second part, Fox turned his attention to the enforcement of the right to free elections and examined how the UN's election monitoring practice, helped establishing standards for free and fair elections.³⁰¹ He argued that the UN monitored elections not only within the context of decolonisation as in the cases of West Irian and Namibia, but also in the post-colonial period as it can be exemplified by the cases of Nicaragua and Haiti. In a final step, he suggested that the Credentials Committee could take an active role in the enforcement of participatory rights by basing the accreditation process of General Assembly delegates on the results of elections, rather than applying a test of effectiveness which did not comply with the international law of participatory rights.³⁰²

Until Fox took ownership over the subject, not much interest existed in international law on participatory rights despite the heavy focus on human rights.³⁰³ Fox made an encyclopaedic investigation of the existing law on the right to participate in political affairs and complemented

²⁹⁸ *ibid* 50.

²⁹⁹ Fox, 'The Right to Political Participation in International Law' (n 25).

³⁰⁰ *ibid* 570.

³⁰¹ *ibid* 572-96.

³⁰² *ibid* 603-04.

³⁰³ The only exception is Henry Steiner, 'Political Participation as a Human Right' (1988) 1 *Harvard Human Rights Yearbook* 77.

Franck's work by drawing attention to a long-neglected topic. His in-depth analysis concluded that participatory rights, which were once ambiguous and at times contradictory, enjoyed an unprecedented coherence. He further claimed that there was a new branch of human rights that we could call international law of participatory rights.³⁰⁴ Fox examined how historically, participatory rights developed and became part of a single branch of law that can easily be identified from other branches due to its determinate content and coherent practice. The progressive development of these rights by securing a place in binding international conventions and enjoying a consistent practice was put into practice by the enforcement mechanisms of international organisations such as election monitoring. According to Fox, the bindingness of these rules did not only stem from international treaties and regulations, but it was also plausible to argue that these rights were now on their way towards becoming part of customary international law.

Franck and Fox turned the collapse of the Berlin Wall and the demise of the Soviet Union into important milestones to create a new narrative on democratic governance. On the one hand Franck initiated a new debate on the neutrality of international law regarding governmental forms and claimed that it was no longer possible to argue that states enjoyed an unlimited freedom with regard to the way in which their government came into being. On the other hand, Fox laid down the foundations of this idea by exploring existing law on the matter. These two articles paved the way for subsequent discussions on democratic governance. Before examining the narrative construction of democratic governance discourses in the following chapters, a few preliminary remarks can be made regarding the way Franck and Fox justified their argument. It is possible to identify three common narrativisation patterns that both Franck and Fox used in order to argue that now, we are witnessing the genesis of a new era in international law. First, both Franck and Fox compared the past with the present to defend the idea that a new era in international law was starting to take shape where state sovereignty was gradually being replaced by popular sovereignty since governments had to ensure respect for the will of the people. Franck argued that democratic entitlement was 'unthinkable even a decade ago'.³⁰⁵ Likewise, Fox stated that 'only four years ago' political rights were not determinate enough to be considered an autonomous branch of human rights law but in the aftermath of the Cold War, it was possible to assert that they constituted a separate subject that could be called 'international law of participatory rights'.³⁰⁶ According to Franck and Fox, the difference between the past and present was indicative of a new era for international law which was no longer agnostic to the way in which a government came into being.

Second, they both put great emphasis on the normative character of democratic governance by exploring how international treaties and regulations progressively provided them with binding force. They both adopted a historical approach to examine how these rights developed

³⁰⁴ Fox, 'The Right to Political Participation in International Law' (n 25) 607.

³⁰⁵ Franck, 'The Emerging Right to Democratic Governance' (n 21) 77.

³⁰⁶ Fox, 'The Right to Political Participation in International Law' (n 25) 607.

over time and how the consolidation of their content and also the coherent practice of international organisations in their enforcement played a significant role to strengthen the normative force of these rules. While Franck concentrated on the consolidation of the right to self-determination, free speech and free and fair elections as the basis of an emerging right to democracy, Fox put emphasis on the development of participatory rights. By proving the content of a rule that requires states to form their government by democratic means, they concluded that, democratic entitlement required a government to validate its legitimacy through free and fair elections and that this requirement was gradually becoming part of customary international law.

Third, this new era was also distinguished from the past by the use of new terminology that Franck and Fox introduced to international law scholarship. Franck called this new emerging right 'democratic entitlement' which meant the validation of governments through democratic elections. Democratic entitlement did not equate to the right to free and fair elections and also included the right to self-determination and free speech. This was therefore an unprecedented norm that was becoming part of international law in this new era. Fox on the other hand preferred to use the term 'participatory rights'. This term did not equate to free and fair elections but included international law regulations that very broadly related to the formation of a democratic government. Not only political rights in human rights law are targeted by this term but also election monitoring mechanisms and enforcement tools are also part of this new 'international law of participatory rights'. The use of a new terminology which allowed to differentiate the present from the past was used as a way of proving that we entered a new era in international law and needed a new language to define it.

3.2.2. Consolidation

The first two decades following the end of the Cold War witnessed an extensive amount of interest in the democratic governance topic by international lawyers. Christina Cerna was one of the first scholars to follow up the discussion on the incremental relevance of democracy in international law. Although Franck had a cautious tone in determining the legality of a principle of democracy in international law and qualified it as an 'emerging right', Christina Cerna presented a more determinate account and defended that democracy has become a legal right under international law.³⁰⁷ Her approach to the subject was from a human rights perspective and highlighted the importance of democracy as an overarching value for the protection of fundamental rights. Her argument bore upon both the procedural and substantial dimensions of democracy for the protection of human rights and did not only focus on the holding of free and fair elections as a validation tool for national governance. She made a bold

³⁰⁷ Cerna, 'Universal Democracy: an International Legal Right or the Pipe Dream of the West' (n 24). For another account that qualifies democracy as a human right, see Steven Wheatley, *Democracy, Minorities and International Law* (CUP 2005) 136-37. For a different account on the relationship between human rights and democracy which shies away from qualifying the latter as a right, see Henry Steiner, 'Two Sides of the Same Coin?: Democracy and International Human Rights' (2008) 41 *Israel Law Review* 445.

move by distinguishing democracy as a separate right from human rights which has acquired legally binding force under international law.³⁰⁸ However, it is hard to establish what this right to democracy incorporates or how it is distinct from other human rights, rather than constituting a value pertaining to the protection of fundamental rights and the rule of law.

When the idea of democratic governance travelled from the United States to Europe, James Crawford was one of the first scholars to tackle the subject. He explained that the main reason for the lack of interest in democratic governance in international law until the 1990s was related to certain undemocratic structural problems that the international order itself presented at the time.³⁰⁹ According to James Crawford, the growing interest in the democratic credentials of a state was due to the increasing practice of monitoring elections and its institutionalisation, the involvement of international adjudicatory bodies to pronounce on undemocratic practices and the growing interest in compliance with democracy in decision-making processes.³¹⁰ He adopted a cautious tone in order not to overestimate the relevance of democracy in decision-making processes in international law in the early 1990s and underlined that all these developments should be read carefully not to strike out effectiveness as the main test for recognition of governments.³¹¹ As one of the early writings on the subject, the article drew attention to recent changes but at the same time called for an attentive examination of these practices. Similarly, Steven Wheatley declared that due to the large number of states which did not embrace democratic rule as a form of validation for their government, it was not possible to conclude that under general international law there was an obligation to hold elections for the formation of government.³¹² He noted, however, that such an obligation existed in Europe as a regional custom which could be confirmed by the practice of regional organisations such as the EU, the Council of Europe and the OSCE.³¹³

In his article 'The Legitimacy of Governments in the Age of Democracy', Jean d'Aspremont discussed how international law coped with the legitimacy problem of illiberal democracies and distinguished between the legitimacy of origin and the legitimacy of exercise.³¹⁴ This duality suggested that the legitimacy which stemmed from a procedural approach to democracy had a 'qualifying' function whereas the legitimacy of exercise represented a 'disqualifying' function in international practice.³¹⁵ While states made use of free and fair elections as a qualifying tool for the recognition of governments, the protection of substantial human rights acted as a disqualifying tool especially in cases of intervention by invitation.³¹⁶

³⁰⁸ Cerna, 'Universal Democracy: an International Legal Right or the Pipe Dream of the West' (n 307).

³⁰⁹ Crawford, 'Democracy and International Law' (n 25) 117.

³¹⁰ *ibid.*

³¹¹ *ibid.* 128.

³¹² Steven Wheatley, 'Democracy in International Law: a European Perspective' (2002) 51 *International & Comparative Law Quarterly* 225, 233.

³¹³ *ibid.* 234-35.

³¹⁴ Jean d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (2005) 38 *New York University JIL and Politics* 877. See also Obiora Chinedu Okafor, 'The Concept of Legitimate Governance in the Contemporary International Legal System' (1997) 44 *Netherlands International Law Review* 33.

³¹⁵ d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (n 314).

³¹⁶ *ibid.*

The article took for granted that Franck's assertion that the normative character of democratic entitlement had been widely accepted and went further to argue that the legitimacy of exercise would increasingly expand its ambit. It defended the claim that illiberal states would face withdrawal of recognition due to undemocratic practices in the exercise of their governmental power to a growing extent. This allowed Jean d'Aspremont to expand the application of the legitimacy which should not only be applicable to evaluate the democratic formation of a national government but also for its exercise. In an article co-authored with Eric de Brabandere, they re-evaluated the prediction that the legitimacy of exercise would be more widely accepted and declared that recent practice has confirmed their claim.³¹⁷ In this extended version of the previous article, they joined Fox and Cerna's claim on the normativity of democratic legitimacy and declared that 'living up to some democratic standards corresponds with an international customary obligation'.³¹⁸ Although the previous article was alluding to the customary character of the legitimacy of origin in a very implicit tone, the latter explicitly advocated the normativity of democratic governance.

Besides those who made strong statements as to the legality of a right to democracy, some scholars put more emphasis on the 'emergence' of a democratic norm and highlighted how the normative character of this emerging norm was gaining more authority. Brad Roth examined the non-recognition practices and rather than legitimacy, he discussed how a rule on illegitimacy was emerging with regard to undemocratic forms of government.³¹⁹ Through several case studies, he established how the principle of effectiveness was being challenged in favour of an emerging pattern not to recognise governments that came into being by undemocratic means, but added that this growing practice fell short of proving a right to democracy.³²⁰ Niels Petersen claimed that considering all the treaty law and international practice, it was not possible to deny that states had an obligation to move towards democracy, this obligation not necessarily being in the form of a right to democracy.³²¹ Similarly, Martha Peterson did not go as far as claiming a customary rule on democracy but argued that states were compelled on the one hand, to prevent undemocratic practices and on the other take the necessary steps for a more democratic governance.³²² After analysing the practice of international organisations for the promotion of democracy, Roland Rich underlined that time was not yet ripe to declare democratic governance as a universal norm due to inconsistent state practice but emphasised that democracy was increasingly consolidating its normative value to take its place alongside other human rights.³²³ He added that it was not too long until

³¹⁷ Jean d'Aspremont and Eric de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (2010) 34 *Fordham International Law Journal* 190.

³¹⁸ *ibid* 199. See also Jean d'Aspremont, 'Responsibility for Coups d'Etat in International Law' (2010) 18 *Tulane Journal of International & Comparative Law* 451 which states that the overthrow of a democratically elected government by a military coup is a violation of international law.

³¹⁹ Brad Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii' (2000) 98 *Michigan Law Review* 2056.

³²⁰ *ibid*.

³²¹ Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2008) 34 *Brooklyn JIL* 33.

³²² Peterson (n 241) 82.

³²³ Roland Rich, 'Bringing Democracy into International Law' (2001) 12 *Journal of Democracy* 20.

'the universal applicability of the right to democratic governance [would] be as broadly accepted internationally as other human rights'.³²⁴

Franck's main thesis was about the validation of governments first at the national level through democracy and then the validation of that government's legitimacy at the international level. Therefore, his primary concern was on an emerging international law rule that would regulate the validation of governments and hence recognition. His argument challenged the well-established rule on recognition which relied on effectiveness and claimed that it was being replaced by a test of legitimacy. Many scholars pondered the impact that democracy would have on recognition practices. Writings have mostly concentrated on comparing the Cold War and post-Cold War practice in order to demonstrate the emphasis was shifting from effectiveness to legitimacy. A growing interest in this regard can be witnessed regarding the practice of regional organisations and their rules on membership. The non-recognition practice of regional organisations towards unconstitutional changes of government has been extensively studied. The practice of the EU and Council of Europe,³²⁵ African Union³²⁶ and Organization of American States³²⁷ have been examined to demonstrate that regional organisations developed a practice towards unconstitutional changes of government.³²⁸

Following the dissolution of socialist states, new questions were raised regarding state creation outside the colonial context. In recent scholarship, scholars have been preoccupied in assessing the implications of democratic governance on statehood theory. According to James Crawford and Sean Murphy recent practices and the increasing interest in the establishment of democratic institutions in newly created states did not alter the relevance of democracy as a statehood criterion and that there was no requirement for a new entity to be democratic in order to be recognised.³²⁹ In a similar vein, Stefan Talmon argued that the ICJ's Advisory Opinion in the Western Sahara case where it declared that 'No rule of international law, in the view of the Court, requires the structure of the State to follow any particular pattern, as is evident from the diversity of the forms of State found in the world today'³³⁰ still represented the prevalent international law standards for recognition of states.³³¹ On the other hand, Anne Peters opined that statehood criteria should be re-assessed and refined in order

³²⁴ *ibid* 33.

³²⁵ Wheatley, 'Democracy in International Law: a European Perspective' (n 312).

³²⁶ Eki Yemisi Omorogbe, 'A Club of Incumbents: The African Union and Coups d'Etat' (2011) 44 *Vanderbilt Journal of Transnational Law* 123.

³²⁷ Dexter Boniface, 'Is There a Democratic Norm in the Americas - An Analysis of the Organization of American States' (2002) 8 *Global Governance* 365.

³²⁸ On the effectiveness of democracy clauses to prevent undemocratic changes of government, see Jacob Wobig, 'Defending Democracy with International Law: Preventing Coup Attempts with Democracy Clauses' (2015) 22 *Democratization* 631.

³²⁹ Sean Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (1999) 48 *International & Comparative Law Quarterly* 545, James Crawford, *The Creation of States in International Law* (OUP 2006) 150-55.

³³⁰ Western Sahara, Advisory Opinion, I.C.J. Reports 1975, p. 12, 43-44, para 94.

³³¹ Stefan Talmon, 'The Constitutive versus the Declaratory Theory of Recognition: Tertium non Datur?' (2005) 75 *BYBIL* 101, 122. See also, Christian Hillgruber, 'The Admission of New States to the International Community' (1998) 9 *EJIL* 491.

to go beyond a 'facticist approach' which 'implies the abdication of international law'.³³² She argued that effectiveness should not be sufficient for the independence of new entities and presented a prescriptive list of criteria that should be taken into account when evaluating statehood.³³³ She claimed that recent cases of state creation also supported democracy as a condition for statehood to be fulfilled.³³⁴

While James Crawford did not support an argument on the acceptance of democracy as statehood criteria and Anne Peters was in favour, Jure Vidmar's position seems to present a middle ground. He put forward a different thesis when he re-evaluated the statehood criteria in light of recent practice following the dissolution of the Soviet Union and Yugoslavia. He claimed that the post-Cold War practice reshaped the statehood theory and that the creation of a new state was not a simple task of fulfilling the statehood criteria; rather it was a 'law-governed political process' in which 'some democratic procedures' needed to be followed.³³⁵ He differentiated between internationalised and non-internationalised state creation. He argued that while the establishment of democratic institutions became more prevalent in the former case where state creation was usually a contested situation, democracy did not present the same level of relevance for the latter where mostly secession was consensual.³³⁶ Eventually, he concluded that the relevance of democratic decision-making in the creation of a new state depended on the circumstances of the case and rather than the fulfilment of a checklist, statehood should be regarded as a political process where the question of democracy may or may not be significant.

3.2.3. Resilience

While in the 1990s democratic governance discourses lived its heyday and have filled the pages of academic journals quite widely, recent scholarship shows that the subject did not lose its appeal. After almost two decades of euphoria about an emerging right to democratic governance, a wave of writings started to revisit the validity and relevance of the claim. In the last decade, setbacks in the protection of human rights and democratic values have been an important concern worldwide.³³⁷ In hindsight, some scholars who had previously defended the emergence of a right to democracy as part of customary international law started to question whether the project of revamping the neutrality of international law towards governmental forms was still a feasible project. When he revisited the topic, Jean d'Aspremont reversed the position he held in his previous writings. In 2010, Jean d'Aspremont and Eric de Brabandere had argued that the legitimacy of exercise was 'gaining momentum' and that this represented

³³² Anne Peters, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality' in Proceedings of the European Society of International Law, Vol. 3 (2010) <<https://ssrn.com/abstract=1720904>> accessed 22 August 2019, 2.

³³³ *ibid* 9.

³³⁴ *ibid* 2.

³³⁵ Jure Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (Hart Publishing 2013) 10.

³³⁶ *ibid*.

³³⁷ Alston, 'The Populist Challenge to Human Rights' (n 14), Marks, 'Backlash: The Undeclared War against Human Rights' (n 14) 319.

a 'paradigm shift in the manner in which legitimacy of governments is appraised'.³³⁸ In a recent article, Jean d'Aspremont adopted a more nuanced tone to declare that recent practice indicated a shift from an emphasis on the legitimacy of origin towards the legitimacy of exercise of power and that it was possible to notice 'a return to *Real Politik*' which led to a retreat from an obligation to hold elections to validate national governance.³³⁹ It is noteworthy that while the article recognised that the increasing number of non-democratic states, prioritisation of national security over fundamental rights and the 2007-2010 economic crisis took their toll on the consolidation of this emerging norm, it still did not shy away from reiterating that 'living up to some democratic standards ... increasingly turned to correspond with an international customary obligation.'³⁴⁰

Susan Marks first addressed the relationship between democracy and international law in *The Riddle of All Constitutions*.³⁴¹ Rather than focusing on the normative content of an emerging right to democracy, in her monograph she examined how scholars writing on democratic governance defended a procedural understanding in their approach and confined themselves to equating democracy to free and fair elections. She criticised how this narrow understanding of what she called 'low-intensity democracy' ignored any other form of democracy except a liberal one and concluded that it did not provide an adequate framework to achieve substantial results.³⁴² She opined that her concern was not about the state practice and *opinio juris* regarding whether there was an emerging right to democracy. Despite her claim about taking a neutral stance towards these debates and concentrating rather on the way scholars conceptualised the status of democracy in international law, it can still be noted that her main argument on the construction of democracy's role in international law within narrow limits implied that a broader and bolder normative narrative would produce more beneficial results. This is more clearly exemplified in her later piece where she revisited the topic a decade after the publication of her monograph. She discussed how the recent practice affected the argument on an emerging right to democratic governance and examined the issue from four different perspectives, namely legitimacy, security, development and ideology.³⁴³ While she stated that the norm was severely undermined following the events of 9/11 and the subsequent American foreign policy agenda, in terms of legitimacy she presented a more positive picture.³⁴⁴ She highlighted the increasing number of scholars defending the validity of an emerging norm and further stated that democracy promotion through non-recognition and election monitoring practices could not be disregarded.³⁴⁵ While the question about an emerging right to democracy seems to be peripheral to her main focus, it can be argued that

³³⁸ d'Aspremont and Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (n 317) 215.

³³⁹ Jean d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (2011) 22 EJIL 549.

³⁴⁰ *ibid* 553.

³⁴¹ Marks, *The Riddle of All Constitutions* (n 36).

³⁴² *ibid* 50-75.

³⁴³ Susan Marks, 'What has Become of the Emerging Right to Democratic Governance?' (2011) 22 EJIL 507.

³⁴⁴ *ibid*.

³⁴⁵ *ibid* 511-13, 521.

she did not object to the fact that democratic governance was increasingly gaining normative authority in international law.

Despite the nuanced approach some scholars adopted in the last decade, it can still be argued that the democracy argument did not lose its credibility for the majority of those interested in the topic. In 2010, Christian Pippan reached the conclusion that over the past two decades, the idea about a growing emphasis on the democratic formation of national governments has considerably expanded in scope to include many other fundamental rights owing to the practice of states and international organisations and that the content of this emerging norm was increasingly strengthened.³⁴⁶ Christina Binder on the other hand concentrated on election monitoring practices and examined how these mechanisms could be strengthened to further democracy.³⁴⁷ Taking into account the expansion of election monitoring activities, the increasing number of signatory states to human rights treaties which protect the right to free and fair elections and the commitment of the international community for the protection of democratic values, she reached the conclusion that this commitment was an almost universally recognised value.³⁴⁸ In a similar vein, in 2011 when she revisited the international practice since the end of the Cold War, she stated more explicitly that 'international law seems no longer indifferent to the way a regime is formed and an emerging right to democratic entitlement is perceivable'.³⁴⁹ She based her argument on the widespread practice of election monitoring which provided enough evidence to prove international actors' readiness to monitor the democratic formation of governments.³⁵⁰

25 years after the publication of 'The Emerging Right to Democratic Governance', AJIL Unbound organised a symposium to analyse the contemporary relevance of Franck's claim.³⁵¹ Gregory Fox and Brad Roth, two scholars who have extensively discussed the subject, went back to Franck's article to examine its limitations. The article focused on the weaknesses of Franck's argument and stated that Franck's central flaws were firstly, not to define what he meant by democracy and secondly, not to predict how states would fight back against undemocratic practices within their domestic jurisdiction.³⁵² Another line of criticism that they brought against Franck was centred around the claim that the UN should spearhead the strengthening of democratic governance by supervising elections. They argued that rather

³⁴⁶ Christian Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': has Democracy Finally Emerged as a Global Entitlement?' (2010) Jean Monnet Working Paper, <<http://jeanmonnetprogram.org/wp-content/uploads/2014/12/100201.pdf>> accessed 22 August 2019. See also Johannes Hendrik Fahner, 'Revisiting the Human Right to Democracy: A Positivist Analysis' (2017) 21 The International Journal of Human Rights 321, Amnon Rubinstein and Yaniv Roznai, 'The Right to a Genuine Electoral Democracy' (2018) 27 Minnesota JIL 143.

³⁴⁷ Christina Binder, 'Two Decades of International Electoral Support: Challenges and Added Value' (2009) 13 Max Planck Yearbook of United Nations Law Online 213.

³⁴⁸ *ibid* 215.

³⁴⁹ Christina Binder, 'Anything New Since the End of the Cold War? or International Law Goes Domestic: International Electoral Standards and Their Legitimacy' (2011) 27 Anuario Español de Derecho Internacional 435, 436.

³⁵⁰ *ibid*.

³⁵¹ Tom Ginsburg, 'Introduction to the Symposium on Thomas Franck, "Emerging Right to Democratic Governance" at 25' (2018) 112 AJIL Unbound 64.

³⁵² Gregory Fox and Brad Roth, 'The Dual Lives of "The Emerging Right to Democratic Governance"' (2018) 112 AJIL Unbound 67, 68-70.

than the UN or other well-established international organisations in Europe, it was international organisations in Africa and Latin America that organised and put in practice the most effective democracy monitoring mechanisms.³⁵³ It is noteworthy that Gregory Fox and Brad Roth did not pay much attention to the democratic recession debates of recent years and preferred to evaluate how in hindsight Franck's argument on an emerging right to democracy missed addressing some key issues. Their discussion on how Franck did not prescribe a mechanism for states to fight against undemocratic practices implies that as a rule states are supposed to protect democratic rule and the backlash in this practice should be seen as an exception that should be halted. They did not question the premises of Franck's argument but rather discussed how his claim could be better supported in light of recent international practice in order to improve and strengthen his thesis.³⁵⁴

The four other articles of the Symposium focused on the rising impact of populism and all underlined the narrow scope Franck adopted in his article by not venturing beyond free and fair elections. Roberto Gargarella criticised Franck's emphasis on elections and argued that international lawyers should not shy away from expanding the scope of a right to democratic governance, this role being especially important for international courts which can provide a richer content to this emerging right.³⁵⁵ In a similar vein, Bojan Bugarič stressed that the democratic backsliding in Europe was orchestrated by democratically elected leaders which proved that elections did not constitute the core of democratic governance.³⁵⁶ According to Khalifa Alfadhel, the outcomes of the Arab Spring were a clear indication that a procedural understanding of democracy becomes void unless democracy is seen as instrumental for guaranteeing all other fundamental rights.³⁵⁷ He further opined that international organisations and actors should take an active role in providing democracy with a richer content. In parallel, Dobrochna Bach-Golecka underlined the importance of good governance without which a right to democracy would never be fulfilled.³⁵⁸ A common ground between these four articles is their strong commitment to the idea of an emerging right to democracy. While they all discussed the recent democratic recession, they did not challenge Franck's argument, but rather investigated how this emerging right could be further empowered in order to suppress the rise of undemocratic practices. It can be argued that 25 years later, even in an era where recent practice no longer provides a positive picture regarding the consolidation of democracy, international lawyers are still hopeful about the fabulous virtues of an emerging right that would ensure a democratic order.

³⁵³ *ibid* 71.

³⁵⁴ This is also in line with Fox's 2008 entry to Max Planck Encyclopedia of Public International Law, see Gregory Fox, 'Democracy, Right to, International Law' in Max Planck Encyclopaedia of Public International Law, available at www.mpepil.com.

³⁵⁵ Roberto Gargarella, 'Democracy's Demands' (2018) 112 AJIL Unbound 73.

³⁵⁶ Bojan Bugarič, 'The Right to Democracy in a Populist Era' (2018) 112 AJIL Unbound 79.

³⁵⁷ Khalifa Alfadhel, 'Toward an Instrumental Right to Democracy' (2018) 112 AJIL Unbound 84.

³⁵⁸ Dobrochna Bach-Golecka, 'The Emerging Right to Good Governance' (2018) 112 AJIL Unbound 89.

3.3. What Makes Democratic Governance Discourses a Narrative?

After having discussed how the argument on an emerging right to democracy relies on a democratic liberal understanding of international law and taken stock of the main writings on the topic, it is necessary to explain why these discourses can be qualified as a narrative. First, narratives tell a story of change rather than making a simple description of facts.³⁵⁹ Writings on democratic governance convey the story of a transition process. As it has already been mentioned, all the academic writings that have been briefly explained above concentrate on the growing relevance of democracy in international affairs. More specifically, they discuss whether there is an emerging right to democracy that obliges states to adopt a democratic form of government and how the neutrality of international law is changing in favour of a test of legitimacy. They describe the process by which international actors are changing their behaviour towards the ideological plurality that was preserved by the UN Charter. In that sense, rather than merely describing some facts, these discourses tell a story of transition in international practice where facts are connected to each other with a causal sequencing. Hayden White emphasised a similar point and noted that narratives are stories telling a process of change with a beginning, a middle and an end.³⁶⁰ Democratic governance discourses illustrate this characteristic very vividly by positing the period where international law was neutral towards governmental forms as the beginning, the changing international practice as the middle and the time when the right to democratic governance will be an enforceable norm as the end of the story. In that regard, these discourses begin at some point in history, describe a process of transition in international practice and predict where international law is headed.

Second, as explained in Chapter 2, narratives in international law are distinct from other narratives genres in literature. While some narratives can be fictional and only aim to entertain the reader without an endeavour to convince the reader about the claim put forward, rhetorical narratives in international law seek to gain persuasiveness. The motives that lie behind a quest of persuasiveness regarding the legalisation of national governance in international law are multi-fold. First, from a professional perspective the transformation of an extra-legal issue into an international law subject is symptomatic of scholars' ambition to see and interpret all phenomena that surround them as a legal matter.³⁶¹ Scholars constantly strive to make sense of the international world and try to render phenomena intelligible in legal terms. In that regard, legalisation is an important tool to claim authority over a subject in order to control and regulate it. Said differently, democratic governance discourses can be seen as a 'regulatory project' which seeks to replace a facticist approach to recognition of governments with a legalist approach based on the test of legitimacy.³⁶² This professional motive to capture national

³⁵⁹ Porter Abbott, *The Cambridge Introduction to Narrative* (CUP 2002) 12.

³⁶⁰ White, 'The Structure of Historical Narrative' (n 79) 112.

³⁶¹ Jean d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (2013) 29 *Connecticut JIL* 201.

³⁶² *ibid* 217-19.

governance as an international law topic is also accompanied by a desire to render the field more sophisticated. Scholars inherently feel the need to make their field of study more elaborate and legalisation allows the necessary space to create new rules for a more refined international law by expending the limits of scholars' reach. Second, scholars are also guided by law's ultimate mission of ensuring order in the society.³⁶³ Law can be used as a mechanism to set rules and provide a systematic arrangement with regard to relations between its actors. By acting as missionaries to advance law's ultimate objective to ensure order, scholars might feel endowed with the duty to design the right legal framework which would provide greater good. In that regard, legalisation of national governance can be seen as a useful project by some scholars for the advancement of the discipline. Third, the political agenda behind the legalisation of national governance cannot be disregarded. As a discourse born in the US, which first travelled to the UK and then to the rest of Europe, this is a Western project of regulating liberal democracy in international law. Western scholars took ownership of the subject to legalise the legitimacy of governments through elections, a practice that was well established in the West that could only be exported to other states where the rule was not fully implemented.

Finally, the narrative on democratic governance discourses is constructed through different narrativisation elements. Since the aim of this study is to unpack the narrative structure of democratic governance discourses, the next chapters will elaborate on the formal, temporal and spatial elements that have been used in the construction of this narrative. The examination of these three elements will also demonstrate how they have been constructed in a way that generates a progress narrative.

3.4. Conclusion

There is no doubt that democratic governance discourses have been influential in the way governmental legitimacy is discussed in international law today. The principle that 'the will of the people shall be the basis of the authority of government' has acquired a new role following the demise of communist states which has been interpreted by the democratic governance scholars as the confirmation of the triumph of Western democracy.³⁶⁴ This challenged a fundamental feature of international law, namely ideological plurality, established by the UN Charter on the basis of sovereign equality and non-intervention principles. The 1990s was a favourable time to discuss whether international order could continue to be agnostic towards states' political structures. Anne-Marie Slaughter and Fernando Teson were in favour of democratic liberalism which valued individuals' consent more than states' liberty to decide how national governance should be structured. Thomas Franck provided the normative framework to democratic liberalism by stating that it was not only desirable to base national governance

³⁶³ Verdebout (n 236) 243.

³⁶⁴ UN GA Res. 217 (III) A, adopted 10 December 1948, 'Universal Declaration of Human Rights', article 21.

on individuals' consent but that it was also backed by international practice. Gregory Fox followed Thomas Franck's steps and delved into participatory rights to declare that they enjoyed an unprecedented coherence and acceptance from the international community which would allow them to be qualified as part of customary international law. Thomas Franck's claim on an emerging right to democratic governance was boosted by Gregory Fox's claim which required all states to hold free and fair elections for a legitimate government.

On the one hand, Thomas Franck initiated the debate on the normative authority of an emerging rule determining the representative body of a state in the international arena, a norm that he called 'democratic entitlement' and on the other, Gregory Fox investigated positive law to appraise the customary character of rights that he named 'participatory rights'. This debate appealed to a large group of scholars who tackled the subject from very different perspectives. While Christina Cerna's approach was from a human rights perspective, Jeames Crawford put more emphasis on the growing interest in international law in monitoring elections and international organisations' practice with regard to undemocratic changes of government. Jean d'Aspremont expanded the scope of the discourses by differentiating between legitimacy of origin and legitimacy and exercise and provided an additional dimension to the discussions. The relevance of democracy with regard to statehood generated varying views. Anne Peters argued that statehood criteria should be re-evaluated in light of recent practice regarding the democratic formation of governments. Jure Vidmar's approach was more nuanced and he claimed that the relevance of democracy as a criterion in the creation of a new state depended on the political context. These discourses did not lose much of their momentum in recent scholarship and many scholars examined the continued relevance of democracy in international law. The AJIL Symposium organised in 2018 to revisit these discourses is a clear indication that the topic has been resilient enough to occupy international lawyers' agenda. Several scholars discussed how Franck's arguments could be improved in order to respond to current problems with regard to democratic governance. It can be noted that the current discussions of recent years on democratic backsliding encouraged scholars to ask for more precision with regard to the content of a right to democracy for its enforceability rather than a complete abandonment of the idea.

Democratic governance discourses tell a story of transition in international law where international actors start abandoning their indifference to the way in which a government comes into being and pay attention to the democratic formation of governments. In that sense, the discourses on how the neutrality of international law is ceding its place to an emerging rule that obliges states to hold free and fair elections is a narrative that explains a process of change, rather than merely describing some facts or events. Since rhetorical narratives aim to persuade the reader, the motives that trigger international lawyers' engagement with the subject are of particular importance. Transformation of an extra-legal issue into an international law subject and exercising control over it, advancing the discipline by providing

rules to monitor the formation of governments and finally supporting a particular political agenda are only some of the driving forces that motivate international lawyer to write and speak on democratic governance. The following chapters will take a closer look at the narrative construction of these discourses and will examine in detail how the formal, temporal and spatial element of this narrative have been created in order to generate a progress narrative.



4. The Formal Element: Normative Markers of Democratic Governance Discourses

International law narratives can be about diverse topics, such as a dispute, regulatory framework, legal institution, form of adjudication or an emerging right. Legal scholars are constantly in search of finding the right words to describe the issue that they are grappling with and seek to gain acceptance from the international community of scholars, judges and institutions whose support will yield authority to their argument. This battle of persuasiveness can only be fought based on an antagonism since in order to put forward a new argument in international law, there must be an idea that one tries to refute, challenge or change.³⁶⁵ In that sense, narrative construction in international law is built on opposing ideas where the claimant has to find the most efficient way to gain acceptance from her peers to defeat the counter-claim. Proponents of democratic governance discourses argue that the long-established principle of effectiveness for the recognition of governments is being challenged by a test of legitimacy which requires that governments validate their rule by the holding of free and fair elections. This provides the necessary source of conflict that the scholar will have to resolve by finding how the international practice is taking shape with regard to undemocratic governmental changes. In order to prove that argument, scholars will have to investigate regulations and various practices which demonstrate this emerging norm.

This narrative exercise of proving how the test of effectiveness is being replaced by a test of legitimacy will necessarily have to explain how the neutrality of the UN Charter with regard to governmental forms is changing in recent practice. In that sense, one needs to demonstrate how an extra-legal issue is becoming part of international law. The interpretation that the narrator will bring to the facts will establish the formal element of the narrative by determining why the matter discussed belongs to international law rather than any other non-law discipline. As explained in Chapter 2, when international lawyers have to advance an argument, they need to spell out why the subject-matter deserves the attention of international law by constructing the formal element of the narrative in order to tie their argument into an international law framework. The formal element of the narrative which shows that governmental changes is a subject that falls under the rubric of international law can be constructed in several different ways. The formal element of an emerging right to democratic governance can be constructed by examining its genealogy and tracing back its pedigree,³⁶⁶ presenting the development of political participation rights in positive law,³⁶⁷ analysing the relations between democratic and undemocratic states,³⁶⁸ emphasising the practice of international regional organisations and the UN with regard to democratic principles and

³⁶⁵ d'Aspremont, 'Wording in International Law' (n 114) 592.

³⁶⁶ Franck, 'The Emerging Right to Democratic Governance' (n 21).

³⁶⁷ Fox, 'The Right to Political Participation in International Law' (n 25).

³⁶⁸ Jean d'Aspremont, *L'Etat Non Démocratique en Droit International: Etude Critique du Droit International Positif et de la Pratique Contemporaine* (Pedone 2008).

especially election monitoring,³⁶⁹ or focusing on the protection of democratic principles in the practice of states and international organisations.³⁷⁰ While these methods are not mutually exclusive and highlight different perspectives in the regulation of governmental changes, a common argument which runs through a great majority of these writings is the reaction of the Security Council and the authorisation to use force to restore an elected government. This chapter focuses solely on the way in which international lawyers resort to the involvement of the Security Council as a narrative technique that provides persuasiveness to their argument. Despite the variety of narrative techniques, the reaction of the Security Council to undemocratic changes of government and its authorisation to use force are by far the most recurring methods to prove an emerging right to democracy and form the backbone of several writings on the subject.

This chapter grapples with the construction of the formal element in democratic governance discourses. In particular, it focuses on one of the ways in which scholars crafted this element. It examines how they present the evidence that the formation of a government which was traditionally an extra-legal matter in international law is now gradually becoming part of the discipline by reference to the practice of the Security Council. It analyses how proponents of an emerging right to democratic governance tie their narrative into a legal framework through Security Council Resolutions with a progressive reading of history. Since democratic governance discourses aim to prove a customary norm for a new right, i.e. the right to democratic governance, this new right has to be created from scratch. Scholars have to mould this right by finding a way to prove its legal pedigree and justify its customary character. This can only be achieved by creating the legal pillars of this right in order to establish the place that it occupies within international law.³⁷¹ An important step of creating the formal element of the narrative is to find within the international practice a pattern of behaviour which is consistently repeated after similar circumstances. In that sense, cases that represent the growing practice with regard to the legitimacy of governments will be carefully chosen and interpreted in such a way that proves the emergence of this new norm.

How scholars pick and choose cases that will prove their argument is a narrative exercise. When they build their narrative, scholars are free to choose the relevant international practice to illustrate their argument and find the most appropriate interpretation that will help them make their narrative more convincing. In that regard, an important part of narrative construction depends on choosing relevant facts that will lead to the outcome that the scholar wants to reach. With regard to democratic governance discourses, it is possible to observe that some cases of the international practice are frequently cited in order to demonstrate how

³⁶⁹ Crawford, 'Democracy and International Law' (n 25), Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (n 27), Wheatley, 'Democracy in International Law: a European Perspective' (n 312).

³⁷⁰ Pippan, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': has Democracy Finally Emerged as a Global Entitlement?' (n 346).

³⁷¹ Fish, *Is There a Text in This Class?: The Authority of Interpretive Communities* (n 109) 294.

international law intervenes in validating national governance. Any reading on democratic governance will most likely make a reference to the 1991 military takeover in Haiti and to the 1997 military coup in Sierra Leone. The intervention of the Security Council in the post-election crisis in Côte d'Ivoire is a recent case which has become another pillar supporting the validation of national governance through international law. These three cases are so frequently cited in democratic governance discourses that they acquire an increased visibility which then elevate them into a higher level of importance. It is argued here that international lawyers keep reproducing the same interpretation regarding the involvement of the Security Council in Haiti, Sierra Leone and Côte d'Ivoire to the extent that these three cases become the normative markers of a progress narrative. The accretion of several writings upholding the same interpretation of these cases transforms them into normative markers of the narrative that help to serve as signposts to engrave the argument into a legal framework. The interpretation of these cases as if they follow one another in a linear way serves to produce a progress narrative.

This chapter is organised as follows. First, it explains what is meant by normative markers and what importance it presents in international law narratives (4.1.). It then turns to writings discussing the emergence of a right to democratic governance and investigates how international lawyers very commonly refer to the same cases that have been brought before the Security Council (4.2.). It concentrates on three of these cases, namely, the case of Haiti, Sierra Leone and Côte d'Ivoire. It starts by analysing how the exceptional character of the authorisation to use force in order to restore a constitutional order in Haiti following the overthrow of the elected government was presented as the first step of an emerging right. In a second step, it looks at the way democratic governance scholars interpreted the involvement of the Security Council in Sierra Leone as the confirmation of the Council's practice in Haiti. It then turns to the case of Côte d'Ivoire which has also been interpreted as a continuation of the Security Council's practice in reinstating the legitimate government in a member state. Finally, it analyses how the normative markers of democratic governance discourses are created by way of using the Security Council and the exceptional character of the authorisation of the use of force as tools that bestow normative authority to the narrative on democratic governance (4.3.).

4.1. Normative Markers as a Formal Element of International Law Narratives

For the purposes of this study, normative markers are defined as cases which are repetitively used by scholars as part of a continuous international practice proving the formation of an emerging right or a pattern of behaviour gaining consistency at an accelerating rate. As it will be explained in the following sections, democratic governance discourses rely on a handful of cases where the international community has been actively involved in debating the legitimacy of a government. These cases are interpreted in a way which presents them as the first

instances where states and international organisations altered their approach to undemocratic changes of government. In order to prove their argument, international lawyers isolate certain cases from the rest of the international practice and not only examine them in detail but also diligently polish them to build the formal element of their narrative. The repetition of the same cases with the same interpretation turns them into normative markers that will support the argument put forward. It will be demonstrated in the following section that the accretion of the same interpretation of Security Council Resolutions regarding Haiti, Sierra Leone and Côte d'Ivoire bolsters the consistency of the argument that international actors are no longer indifferent to the way in which governments come into being and the repetition of the same interpretation helps to rule out alternative interpretations that one might bring to these cases.

Three main reasons can be distinguished why scholars use normative markers as a narrativisation technique when they construct narratives. First and foremost, in order to put forward a claim, the scholar will have to find the relevant facts that will prove her argument. This, however, cannot be realised by a mere strategic reading of facts. The narrator has to explain why the topic on hand is part of law, and also find the links that will tie the topic into a legal framework. To that end, an efficient way of establishing the formal element of the narrative is to demonstrate the growing concern among international actors with regard to that topic and prove the consistent pattern of behaviour that is repeated following similar circumstances. Normative markers become an important narrative technique especially in cases where there is no treaty law and the debates are centred around a customary rule in formation.³⁷² In the absence of treaty obligations, one has to turn to customary law to take advantage of the wide area of manoeuvre it provides for the creation of new rules.³⁷³ An emerging customary norm requires consistent international practice and relying on a few cases as markers that illustrate this emerging pattern of behaviour is an important step of custom creation. To construct these markers, some cases will be given a particular meaning and the continuous repetition of the same international practice will provide consistency to the narrative. In that sense, normative markers will not only make the narrative more consistent and hence maximise its power of persuasion but also constitute the legal pillars of the narrative.³⁷⁴ Second, creating normative markers helps to fix a certain meaning to international practice. There are no set rules on how international practice should be interpreted and it depends on the narrator to make the necessary links between facts and legal sources in order to generate meaning. While the same international practice can be interpreted in various ways, when a few cases receive more attention than others and they are interpreted in a similar way, the repetition of the same interpretation will also help to fix the meaning they represent. This allows the narrator to determine the most plausible interpretation that one might bring to these

³⁷² For a critique on the use of customary international law to impose hegemonic policies, see Bhupinder Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1. Contra see Jean d'Aspremont, 'A Postmodernization of Customary International Law for the First World?' (2018) 112 AJIL Unbound 293.

³⁷³ Jean d'Aspremont, 'Expansionism and the Sources of International Human Rights Law' in Yoram Dinstein (ed), *Israel Yearbook on Human Rights Vol. 46* (Brill Nijhoff 2016) 230.

³⁷⁴ Yonatan Lupu and Erik Voeten, 'Precedent in International Courts: A Network Analysis of Case Citations by the European Court of Human Rights' (2012) 42 British Journal of Political Science 413, 416.

cases among many other possible interpretations. Moreover, fixing meaning for some cases that will serve as normative markers of the narrative has a prospective outcome: any future case which will present similar characteristics will also be interpreted in the way the meaning has been fixed for the previous cases. Therefore, creating normative markers allows to determine the interpretation of not only past but also future cases. Finally, since the ultimate goal of narration in international law is to convince the audience, when not only one but several scholars keep reproducing the same cases with the same interpretation, the consistency of the narrative is bolstered by the fact that it is a recurrent narrative defended by a cohort of scholars. Since knowledge production is a social process and is a struggle to gain persuasiveness, securing approval among peers is an important element for consolidating the authority of the argument.³⁷⁵ In that regard, creation of normative markers should be understood as a collective work and the authority of the narrative is strengthened by the repetition of the same interpretation by several scholars.³⁷⁶ The following section will detail how democratic governance discourses created normative markers to realise these objectives.

4.2. Normative Markers of Democratic Governance Discourses

The military coup that toppled the first democratically elected government in Haiti in 1991 and the authorisation of the Security Council to use force to restore the constitutional order has been the exemplar of writings on democratic governance and has been cited several times as a case in favour of an emerging right to democracy.³⁷⁷ Due to its frequent citation as a case

³⁷⁵ d'Aspremont, 'Wording in International Law' (n 114) 11-12, Bruno Latour, *Science in Action: How to Follow Scientists and Engineers Through Society* (Harvard University Press 1987).

³⁷⁶ Harlan Grant Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 274.

³⁷⁷ Franck, 'The Emerging Right to Democratic Governance' (n 21) 47, 65-66, 72-74, 85-86, Fox, 'The Right to Political Participation in International Law' (n 25) 583-86, 603-04, Christina Cerna, *The Case of Haiti before the Organization of American States* (CUP 1992), Cerna, 'Universal Democracy: an International Legal Right or the Pipe Dream of the West' (n 24) 289, 289-90, 314-20, Michael Reisman, 'Haiti and the Validity of International Action' (1995) 89 AJIL 82, Obiora Chinedu Okafor, 'The Concept of Legitimate Governance in the Contemporary International Legal System' (1997) 44 Netherlands International Law Review 33, 50, Gregory Fox, Brad Roth, 'The Spread of Liberal Democracy' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000), 3, 9, Rich (n 323), Dexter Boniface, 'Is There a Democratic Norm in the Americas - An Analysis of the Organization of American States' (2002) 8 Global Governance 365, 369-372, d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (n 314) 877, 893, 898, 901-902, 908, Sebastian von Einsiedel and David Malone, 'Peace and Democracy for Haiti: A UN Mission Impossible?' (2006) 20 International Relations 153, Julia Leininger, 'Democracy and UN Peace-Keeping - Conflict Resolution through State-Building and Democracy Promotion in Haiti' (2006) 10 Max Planck Yearbook of United Nations Law 465, Niels Petersen, 'The Principle of Democratic Teleology in International Law' (2008) 34 Brooklyn JIL 33, 75-81, Crawford, 'Democracy and International Law' (n 25) 129, d'Aspremont, *L'Etat Non Démocratique en Droit International: Etude Critique du Droit International Positif et de la Pratique Contemporaine* (n 368) 116-17, 148-52, 164-66, 314-15, 321, Pippin, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': has Democracy Finally Emerged as a Global Entitlement?' (n 346) 34-35, d'Aspremont and de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (n 338) 190, 207, Marks, 'What has Become of the Emerging Right to Democratic Governance?' (n 343) 519-22, Roth, *Governmental Illegitimacy in International Law* (n 34), 365-87, Wheatley, 'Democracy in International Law: a European Perspective' (n 312) 233, Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (n 335), 32-34, 37, 149, Buchan, *International Law and the Construction of the Liberal Peace* (n 267) 39-40, 116-23, Michael Reisman, 'Sovereignty and Human Rights in Contemporary International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 251-52, Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (n 329) 146, Stephen Schnably, 'Constitutionalism and Democratic Government in the inter-American System' in *ibid*, 168-71, David Whippman, 'Pro-Democratic Intervention by Invitation' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 301-03.

proving that international law is becoming increasingly involved in regulating national governance, the case of Haiti can be considered among the normative markers created by democratic governance discourses. States' almost unanimous reaction to the military coup and their endorsement of the elected government as the legitimate representative has been a driving force for scholars to conclude that states and international organisations were now actively engaged to evaluate the legitimacy of a government and that this was the first instance proving an emerging norm. The qualification of Haiti as the beginning of a new era where international law intervenes to validate national governance was received with enthusiasm. This interpretation of the international community's reaction to the 1991 military takeover has also been used as the basis for subsequent action taken by the Security Council in similar cases such as in Sierra Leone and Côte d'Ivoire.

The idea that the principle of effectiveness could be replaced by a test of legitimacy received several supporters and this paved the way for scholars to interpret Sierra Leone as a continuation of the Security Council's approach towards undemocratic changes of government. This emerging norm of validation of governance through free and fair elections was initiated by the case of Haiti which marks the beginning, confirmed by the case of Sierra Leone and finally, Côte d'Ivoire consolidated the argument by adding another case to the narrative. These three cases have been interpreted as part of a linear history to generate a progress narrative. This section investigates how the reaction of the Security Council to these three cases can be interpreted differently and demonstrates that the interpretation provided by democratic governance scholars can be challenged by a different reading of the legal instruments for a counter-narrative. Examining the mainstream interpretation of these three cases will reveal how scholars created one of the formal elements of their progress narrative through normative markers.

Before examining the three normative markers of democratic governance discourses, a few remarks on the interpretation of the Security Council Resolutions must be indicated. Security Council Resolutions are an important point of reference as a source of law since they can be binding according to article 25 of the UN Charter depending on their nature and content and they can also represent state practice or *opinio juris*.³⁷⁸ The UN Charter does not include any provision regarding the interpretation of Security Council resolutions. The ICJ stated in its Advisory Opinion on Kosovo that 'While the rules on treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties may provide guidance, differences between Security Council resolutions and treaties mean that the interpretation of Security Council resolutions also require that other factors be taken into account.'³⁷⁹ The Court added that it would also analyse other resolutions of the Council, statements by representatives made

³⁷⁸ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 21-23.

³⁷⁹ Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion [2010] ICJ Rep 403, 442, para 94.

at the time of adoption of the resolution and subsequent practice of the UN bodies.³⁸⁰ This indicates that there is no general rule on how Security Council resolutions should be interpreted. It can further be claimed that there is no single method of interpretation due to the distinctness of each Resolution, its circumstances, context and aim.³⁸¹ Therefore, the interpretation of Security Council resolutions requires that the intent of the Council be determined.³⁸²

The emphasis of this section will be on how scholars used not only the involvement of the Security Council in a case as a central element demonstrating the emerging customary character of democratic governance, but it will also discuss how the authorisation of the use of force bestowed authority to their argument. The interpretation of Security Council resolutions as to whether they authorise the use of force has often been subject to controversy due to the ambiguous formulations it usually adopts. This has been extensively discussed among scholars and it would be beyond the scope of this chapter to reiterate the same arguments. Here, it suffices to say that according to the UN Office of Legal Affairs, whether a resolution authorises the use of force 'depends upon the interpretation of the resolution, specifically, on the ordinary and natural meaning which is to be given to its terms when they are read in the context of the resolution as a whole and in the light of its object and purpose'.³⁸³ This suggests that the interpretation as to whether a resolution authorises the use of force requires a thorough analysis of the circumstances of the case. Finally, it can be stated that the rules on the interpretation of Security Council resolutions are far from providing narrow and precise limits. The following sub-sections will illustrate how this large area of interpretation has been used by scholars writing on democratic governance to create normative markers.

4.2.1. Haiti

The involvement of the UN in relation to governmental changes in Haiti is two-fold: The UN was firstly an active player in the 1990 elections and in its aftermath regarding the 1991 military coup to return Aristide to power and secondly, it also stepped in with regard to the events that took place following the 2000 elections to remove Aristide from power. The two governmental changes received contradictory responses from the international community, and it is necessary to unpack whether the involvement of the international community with the 1991 coup in Haiti really forms the first precedent for an emerging right to democratic governance. To that end, this section questions whether Haiti represents a case of mutation in the UN's reaction to unconstitutional changes of government or an exception. The contradictory response of the Security Council to two similar situations in Haiti and that only the Security

³⁸⁰ *ibid.*

³⁸¹ Michael Wood, 'The Interpretation of Security Council Resolutions, Revisited' (2017) 20 Max Planck Yearbook of United Nations Law Online 1, 10.

³⁸² East Timor (Portugal v Australia) [1995] ICJ Rep 90, 104, para 32. See also Marko Divac Öberg, 'The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ' (2005) 16 EJIL 879.

³⁸³ United Nations Juridical Yearbook (2003), UN Doc ST/LEG/SER/C/41, 539.

Council's involvement in the 1991 coup is part of democratic governance discourses will illustrate how the creation of normative markers is the result of a narrativisation process.

At first, in 1990, following the request of the President, the General Assembly decided to provide electoral assistance to presidential elections in Haiti.³⁸⁴ The 1990 elections in Haiti were followed by severe political turmoil and Aristide, the first democratically elected president of the country, was forced into exile by a military coup in September 1991.³⁸⁵ The OAS subsequently adopted resolutions to condemn the overthrow of the elected President and called on its members to suspend their commercial and diplomatic relations with those who held office illegally.³⁸⁶ The General Assembly, as well, condemned the military coup unanimously and demanded the return of the legitimate President to power.³⁸⁷ The issue was also brought to the attention of the Security Council but during informal deliberations the majority of states, especially China and India, stressed that the coup was an internal matter and did not deem the Council's involvement as necessary.³⁸⁸ The Security Council intervened in June 1993, two years after the military coup, to deplore the fact that the legitimate government of President Aristide had not been restored and imposed a trade, oil and arms embargo on Haiti unanimously.³⁸⁹ Due to the failure of sanctions imposed on Haiti, in July 1994 the Security Council adopted Resolution 940 and authorised the use of force.³⁹⁰ The language of the Resolution makes it clear that the Security Council authorised the use of force by acting under Chapter VII and asking a multinational force to use all necessary means to restore the constitutional order in Haiti. The Resolution stated:

Acting under Chapter VII of the Charter of the United Nations, authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti.³⁹¹

³⁸⁴ UNGA Res 45/2 (10 October 1990) UN Doc A/RES/45/2.

³⁸⁵ Military coup Elections [sic], (1 September 1991), Keesing's Record of World Events, Vol. 37 (1991), Issue 12 (December) 38430.

³⁸⁶ OAS, (Ministers for Foreign Affairs Committee) MRE/RES.1/91 (3 October 1991), OAS, (MFAC) MRE/RES.2/91 (8 October 1991), OAS, (MFAC) MRE/RES.3/91 (17 May 1992), OAS, (MFAC) MRE/RES.4/92 (13 December 1992), OAS, (MFAC) MRE/RES.5/93 (5 June 1993), OAS, (Permanent Council of the Organization of American States) CP/RES.575 (885/92), OAS, (PCOA) CP/RES.594 (923/92), OAS, (PCOA) CP/RES.610 (968/93), OAS, (PCOA) CP/DEC.8 (927/93), OAS, (PCOA) CP/DEC.9 (931/93), OAS, (PCOA) CP/DEC.10 (934/93), OAS, (PCOA) CP/DEC.15 (967/93).

³⁸⁷ UNGA, Res 46/7 (11 October 1991) UN Doc A/RES/46/7, see also UNGA, Res 46/138 (17 December 1991) UN Doc A/RES/46/138, UNGA, Res 47/20A (24 November 1992) UN Doc A/RES/47/20A, UNGA, Res 47/143 (18 December 1992) UN Doc A/RES/47/143.

³⁸⁸ David Malone, *Decision Making in the UN Security Council* (Clarendon Press 1998) 63. Malone also stated that when on 3 October Aristide attended a formal meeting of the Security Council it was the first time that the Council hosted a toppled head of state by a military coup, in *ibid*.

³⁸⁹ UNSC Res 841 (16 June 1993) UN Doc S/RES/841.

³⁹⁰ UNSC Res 940 (31 July 1994) UN Doc S/RES/940, UNSC Res 944 (29 September 1994) UN Doc S/RES/944.

³⁹¹ *ibid*.

Nevertheless, the political crisis in Haiti did not draw to a close after the return of Aristide to the presidency. Following elections in 2000, Aristide was re-elected as president by receiving 92% of the vote.³⁹² However, his authority was challenged once again by an attempted military coup³⁹³ and violent protests.³⁹⁴ Amid political and social unrest, the government was unable to resist militia groups and finally, in February 2004, Aristide was taken to the Central African Republic by American forces.³⁹⁵ The same day, the Security Council adopted Resolution 1529 to recognise the 'resignation' of Aristide and the 'swearing-in of President Boniface Alexandre as the acting President of Haiti in accordance with the Constitution of Haiti'.³⁹⁶ The Security Council further stated that the new President was requesting international support for the restoration of peace and security in the country and based on this request, it allowed the deployment of a multinational interim force in Haiti under Chapter VII of the UN Charter.

The case of Haiti is of particular importance for democratic governance because not only for the first time did the UN impose economic sanctions to restore the constitutional authority in a country where the democratically elected president was overthrown by a military coup, but it also authorised the use of force. It is important to unveil the democracy argument of the UN in order to understand how international lawyers interpreted this case to transform it into a normative marker of a right to democratic governance. When the debates leading to the adoption of the Security Council Resolution 940 are examined, it can be seen that several states, including China, Brazil, Cuba, Nicaragua, Mexico and Uruguay, voiced their concern about the use of Chapter VII measures. Mexico stressed that the use of force would give 'rise to grave legal and practical doubts', since the case of Haiti was 'not a threat to peace, a breach of the peace or an act of aggression such as would warrant the use of force in accordance with Article 42 of the Charter'.³⁹⁷ In parallel, the representatives of Cuba and Uruguay stated that the situation in Haiti did not amount to the level of a threat to international peace and security and therefore, the use of force to resolve an internal conflict would exceed the mandate of the Security Council.³⁹⁸ During deliberations, the representative of Brazil underlined the importance of the principles of the peaceful settlement of disputes and non-intervention, and further declared that the use of force would 'constitute a worrisome departure from the principles and customary practices adopted by the United Nations as regards peace-keeping'.³⁹⁹ China warned against the case of Haiti becoming a precedent to resort to force in cases of internal conflict.⁴⁰⁰ Although Russia voted in favour of the Resolution, it underlined

³⁹² Haiti, (1 November 2000), Keesing's Record of World Events, Vol. 46 (2000), Issue 11 (November) 43852.

³⁹³ Haiti, (1 December 2001), Keesing's Record of World Events, Vol. 47 (2001), Issue 12 (December) 44503.

³⁹⁴ Haiti, (1 October 2003), Keesing's Record of World Events, Vol. 49 (2003), Issue 10 (October), 45643, Haiti, (1 November 2003), Keesing's Record of World Events, Vol. 49 (2003), Issue 11 (November) 45691, Haiti, (1 January 2004), Keesing's Record of World Events, Vol. 50 (2004), Issue 1 (January) 45784.

³⁹⁵ 'Aristide: US Forced me to Leave' (BBC, 2 March 2004) <<http://news.bbc.co.uk/1/hi/3524273.stm>> accessed 22 August 2019.

³⁹⁶ UNSC Res 1529 (29 February 2004) UN Doc S/Res/1529. See also Frederic Kirgis, 'Security Council Resolution on Multilateral Interim Force in Haiti', <<https://www.asil.org/insights/volume/8/issue/4/security-council-resolution-multinational-interim-force-haiti>> accessed 22 August 2019.

³⁹⁷ UNSC Verbatim Record (31 July 1994) UN Doc S/PV.3413, 4.

³⁹⁸ *ibid* 6, 7.

³⁹⁹ *ibid* 10.

⁴⁰⁰ *ibid*.

that the Security Council intervention in Haiti was also backed by the elected President of Haiti.⁴⁰¹

Some scholars argued that the overthrow of the democratically elected president and the human rights violations that followed the 1991 coup in Haiti, were reasons enough for the UN to consider the incident as a threat to international peace and security and to intervene in Haiti.⁴⁰² Others opined that the intervention served the international economic and political interests of a number of states and that it was not normative concerns on democracy but rather political interests that guided the reaction of these actors.⁴⁰³ This controversy sheds doubt on the objectives of the UN and requires a re-examination of the events that led to the 1994 intervention. One of the central arguments for those who argued that economic interests in Haiti outweighed concerns about democracy drew attention to the economic reforms that Haiti had to undertake as a result of international pressure by the US and IMF, and emphasised how privatization, reduction of import tariffs and the displacement of domestic production transformed Haiti into a country economically dependent on the US.⁴⁰⁴ Moreover, the assistance that the US provided to the military against Aristide prior to the 1991 coup brings into doubt the democracy argument. In this vein, Richard Falk asserted that since the US provided support to the resistance, their primary aim was not the promotion of democracy and involvement of the UN should thus be qualified as an 'anomaly'.⁴⁰⁵ Although human rights concerns were voiced at the UN, the 1994 intervention in Haiti cannot be designated as a collective humanitarian intervention authorised by the Security Council, since the main purpose was not to halt human rights violations.⁴⁰⁶ It may however be classified as peace enforcement if we define its purpose as restoring the democratically elected government.⁴⁰⁷ Conversely, the interventionist practice of the UN may be criticized if we conclude that the economic interest of intervening in states seems to prevail over concerns about democracy. Therefore, it is possible to make a case against the pro-democratic objectives of the UN by emphasising that the aim of the intervention was to restore a president who would not be recalcitrant to international economic pressure.

⁴⁰¹ *ibid* 23.

⁴⁰² Sebastian von Einsiedel and David Malone, 'Peace and Democracy for Haiti: A UN Mission Impossible?' (n 377) 154. Michael Reisman argued that the UN was right to intervene because 'The credibility of the United Nations, no less than that of the United States, [was] at stake.' in Michael Reisman, 'Haiti and the Validity of International Action' (n 377).

⁴⁰³ Michel Chossudovsky, 'US Sponsored Coup d'Etat: The Destabilization of Haiti, Global Research' (26 February 2013) <www.globalresearch.ca/us-sponsored-coup-detat-the-destabilization-of-haiti/5323726> accessed 22 August 2019.

⁴⁰⁴ Peter Hallward, 'Option Zero in Haiti' (May-June 2004) 27 *New Left Review* 31-33, Justin Felux, 'Debunking the Media's Lies about President Aristide', <<http://dissidentvoice.org/Mar04/Felux0314.htm>> accessed 22 August 2019. For a contrary account see Boniface (n 377) 370-71.

⁴⁰⁵ Richard Falk, 'The Haiti Intervention: A Dangerous World Order Precedent for the United Nations' (1995) 36 *Harvard International Law Journal* 358.

⁴⁰⁶ Ruth Gordon, 'Humanitarian Intervention by the United Nations: Iraq, Somalia, and Haiti' (1996) 31 *Texas International Law Journal* 52. For a contrary account see Michael Reisman, 'Humanitarian Intervention and Fledgling Democracies' (n 26), Inger Österdahl, 'By All Means, Intervene! The Security Council and the Use of Force under Chapter VII in Iraq, in Bosnia, Somalia, Rwanda and Haiti' (1997) 66 *Nordic Journal of International Law* 241.

⁴⁰⁷ William Durch, 'Keeping the Peace: Politics and Lessons of the 1990s' in William Durch (ed) *UN Peacekeeping, American Politics, and the Uncivil Wars of the 1990s* (St Martin's Press 1996) 6.

The scepticism about the democratic purpose of the 1994 intervention becomes even more prevalent when it is read in conjunction with the events leading up to the 2004 coup in Haiti and its aftermath. It is possible to notice that similar facts received contradictory responses from the UN. Although the 1991 coup has been an extensively examined case in international law, the 2004 coup did not attract the same attention. China Miéville criticised the lack of interest in international law scholarship concerning the contradiction of the UN's reaction to the 2004 coup, and dubbed this silence as 'damning'.⁴⁰⁸ In 1994, the UN authorised the use of force to restore Aristide yet only ten years later, when the armed rebels were taking control of a greater part of Haiti, Aristide was forced to leave the country escorted by American forces and, the same day, the Security Council recognised the 'resignation' of Aristide.⁴⁰⁹ Although in 1991, the General Assembly determined the coup as a 'sudden and violent interruption of the democratic process' and 'strongly condemn[ed] the attempted illegal replacement of the constitutional president of Haiti',⁴¹⁰ the overthrow of Aristide in 2004 was not qualified as a coup; on the contrary, the Security Council recognised 'the swearing-in of President Boniface Alexandre as the acting President'.⁴¹¹ It further authorised the use of force, not in order to restore the democratically elected president, but to 'contribute to a secure and stable environment' and 'facilitate the provision of humanitarian assistance' in Haiti.⁴¹²

From the outset, in 1991, the UN sided with the overthrown President and supported his immediate return to power. The main argument of both the General Assembly and the Security Council was centred on the restoration of democracy in Haiti. Nevertheless, following the overthrow of Aristide in 2004, instead of restoring the elected president, the Security Council this time lent support to his ousting. The controversy concerning the approach of the United Nations to two similar cases downplays the argument which presents the 1994 intervention of the Security Council in Haiti as a case of pro-democratic intervention and also as one of the first steps towards an emerging right to democratic governance. This illustrates how some cases are highlighted by scholars in order to create normative markers to support the narrative's argument and how similar cases with unfavourable outcomes are disregarded.

4.2.2. Sierra Leone

Other contentious cases concerning the legitimacy of a government that came before the Security Council demonstrate that the authorisation of the use of force in Haiti can be interpreted as an exceptional situation rather than the beginning of a more relaxed policy with regard to the prohibition of the use of force in similar cases. The military coup that took place in Sierra Leone in May 1997 is one of these cases that has been repeatedly examined in

⁴⁰⁸ China Miéville, 'Multilateralism as Terror: International Law, Haiti and Imperialism' (2009) 19 Finnish YBIL 63, 76.

⁴⁰⁹ Aristide stated that he was forced to leave Haiti, see 'Aristide: US Forced me to Leave' (BBC, 2 March 2004) <<http://news.bbc.co.uk/1/hi/3524273.stm>> accessed 22 August 2019.

⁴¹⁰ UNGA Res 46/7 (11 October 1991) UN Doc A/RES/46/7.

⁴¹¹ UNSC Res 1529 (29 February 2004) UN Doc S/RES/1529.

⁴¹² *ibid.*

democratic governance discourses.⁴¹³ The Armed Forces Revolutionary Council (AFRC) overthrew the elected government of President Ahmad Tejan Kabbah in Sierra Leone which at the time was already in the midst of a civil war. The National Patriotic Front of Liberia led by Charles Taylor was lending support to an insurgent group in Sierra Leone called the Revolutionary United Front (RUF) which was active in that territory since 1991.⁴¹⁴ The Abidjan peace agreement that was reached right after the elections in 1996 between the Kabbah government and the RUF deteriorated over time and this led to the overthrow of the elected government by the AFRC with the support of the RUF.⁴¹⁵ The AFRC's response to the popular opposition to the coup was violent and this caused severe clashes between the revolutionary forces and ECOWAS which was already present in the country in a peacekeeping role with the consent of the Kabbah government.⁴¹⁶ The active involvement of ECOWAS in the political instability of the region and the widespread violence that followed the coup have been determinant factors for the Organization of African Unity to condemn the military takeover and to call for ECOWAS to restore the elected government only a week after the coup.⁴¹⁷

Regarding the ousting of the elected government, the President of the Security Council made three statements on behalf of the Council, one in May 1997 calling 'for an immediate restoration of constitutional order',⁴¹⁸ one in July 1997 welcoming the decision of the OAU which supported ECOWAS in the restoration of 'the constitutional order in that country'⁴¹⁹ and one in August 1997 to express 'its appreciation to the Committee of Four Foreign Ministers of the Economic Community of West African States (ECOWAS) for their efforts to negotiate (...) a peaceful resolution of the crisis'.⁴²⁰ Due to the political deadlock and continued violence, in October 1997 the Security Council adopted Resolution 1132.⁴²¹ The Resolution deplored 'the fact that the military junta has not taken steps to allow the restoration of the democratically-elected Government and a return to constitutional order' and determined that 'the situation in Sierra Leone constitute[d] a threat to international peace and security in the region'.⁴²² Acting under Chapter VII of the UN Charter, it demanded that 'the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order', imposed an oil and arms embargo

⁴¹³ Fox and Roth, 'The Spread of Liberal Democracy' (n 377) 3, 9, Buchan, *International Law and the Construction of the Liberal Peace* (n 267) 119-20, Roth, *Governmental Illegitimacy in International Law* (n 34) 405-10, Rich (n 323), Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (n 377) 252-53, Pippin, 'International Law, Domestic Political Orders, and the 'Democratic Imperative': has Democracy Finally Emerged as a Global Entitlement?' (n 346) 34-35, d'Aspremont, *L'Etat Non Démocratique en Droit International: Etude Critique du Droit International Positif et de la Pratique Contemporaine* (n 368) 148-52, 164-66, 321, Whippman, 'Pro-Democratic Intervention by Invitation' (n 377) 303-11, Murphy, 'Democratic Legitimacy and the Recognition of States and Governments' (n 329) 149, Karsten Nowrot and Emily Schebacker, 'The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone' (1998) 14 *American University of International Law Review* 321.

⁴¹⁴ Roth, *Governmental Illegitimacy in International Law* (n 34) 405.

⁴¹⁵ UN Doc S/1996/1034.

⁴¹⁶ Roth, *Governmental Illegitimacy in International Law* (n 34) 405.

⁴¹⁷ Organisation African Unity (31 May 1997) CM/Dec.356 (LXVI).

⁴¹⁸ UNSC, Statement by the President of the Security Council (27 May 1997) UN Doc S/PRST/1997/29.

⁴¹⁹ UNSC, Statement by the President of the Security Council (11 July 1997) UN Doc S/PRST/1997/36.

⁴²⁰ UNSC, Statement by the President of the Security Council (6 August 1997) UN Doc S/PRST/1997/42.

⁴²¹ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

⁴²² UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

and demanded from ECOWAS to supervise the implementation of the Resolution provisions.⁴²³

Some scholars argued that the Resolution was an open authorisation for ECOWAS to use force in order to restore the constitutional order in the country and used this practice as an element that strengthens the normative value of democratic rule in international law.⁴²⁴ This, however, is not a straightforward conclusion that one can reach due to the ambiguous language of the Resolution as to whether there is an express authorisation to use force. An alternative reading of the Resolution might suggest that the Security Council did not, implicitly or expressly, allow ECOWAS to use force to restore the constitutional order in Sierra Leone. The Resolution referred to the involvement of ECOWAS in the region in two respects. First, in its preamble it welcomed the 'mediation efforts' of ECOWAS and appreciates its commitment to resolving the political crisis through peaceful means. Second, the Resolution referred to ECOWAS in its operative paragraphs:

Acting under Chapter VII of the Charter of the United Nations,
(...)

3. Expresses its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourages it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations;

4. Encourages the Secretary-General, through his Special Envoy, in cooperation with the ECOWAS Committee, to assist the search for a peaceful resolution of the crisis and, to that end, to work for a resumption of discussions with all parties to the crisis⁴²⁵

These paragraphs can be interpreted as showing the commitment of the Security Council to the peaceful resolution of the crisis. This interpretation can further be supported by the emphasis that the Council put on the importance of resolving the issue without involving the use of force. The Resolution stated that:

8. Acting also under Chapter VIII of the Charter of the United Nations, authorizes ECOWAS, cooperating with the democratically-elected Government of Sierra Leone, to ensure strict implementation of the provisions of this resolution relating to the supply of petroleum and petroleum products, and arms and related matériel of all types, including, where necessary and in conformity with applicable international standards,

⁴²³ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

⁴²⁴ Buchan, *International Law and the Construction of the Liberal Peace* (n 267) 119-20, Roth, *Governmental Illegitimacy in International Law* (n 34) 405-10, Rich (n 323), Reisman, 'Sovereignty and Human Rights in Contemporary International Law' (n 261) 252-53.

⁴²⁵ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

by halting inward maritime shipping in order to inspect and verify their cargoes and destinations, and calls upon all States to cooperate with ECOWAS in this regard.⁴²⁶

This paragraph can be read to argue that the authorisation given to the ECOWAS by the Security Council was only limited to supervising the implementation of the oil and arms embargo and did not include the right to use force to restore the toppled government. Therefore, it is possible to conclude that the Resolution underlined on several occasions the importance to resolve the crisis through peaceful means and that it called upon ECOWAS to ensure the implementation of the oil and arms embargo which fell short of an open authorisation to use force. This conclusion also complies with an approach that requires a narrow interpretation of Security Council resolutions where the language on the authorisation of the use of force is ambiguous in a way that respects the UN's commitment to use force for the settlement of disputes only as a last resort.⁴²⁷

A broader inspection of the Security Council's reaction to similar situations also sheds doubt on the normative value that the case of Sierra Leone can represent for democratic governance. While the Security Council issued a statement in July 1997 to show its support for Kabbah and demanded his return to power, this statement was made on the same day that the Council reaffirmed 'the need to respect the principles of national unity, territorial integrity and sovereignty of the Kingdom of Cambodia' where the elected First Prime Minister was overthrown by a military coup.⁴²⁸ The forceful removal of the elected Prime Minister was not deplored or qualified as 'unacceptable' as was the case with Sierra Leone. The Security Council's simultaneous reaction to two military coups differed considerably. The fact that the situation in Sierra Leone was presenting a protracted and violent political crisis which was engendering the stability of the region and also the fact that other regional organisations such as ECOWAS and the OAU were actively involved in the situation played a significant role in the Security Council's active stance. This is also exemplified by the preamble of Resolution 1132 which stated the Council was 'Gravely concerned at the continued violence and loss of life in Sierra Leone following the military coup of 25 May 1997, the deteriorating humanitarian conditions in that country, and the consequences for neighbouring countries.'⁴²⁹ This reinforces the argument that the Council's adamant approach with respect to Sierra Leone mostly stemmed from a concern regarding the widespread violence which was spilling over the region, rather than an interest in the legitimacy of a government.

⁴²⁶ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

⁴²⁷ Jules Lobel and Michael Ratner, 'By Passing the Security Council: Ambiguous Authorizations to Use Force, Cease-Fires and the Iraqi Inspection Regime' (1999) 93 AJIL 124, 129. For an argument defending an implied *ex post facto* authorisation see Olivier Corten and François Dubuisson, 'L'Hypothèse d'une Règle Emergente Fondant une Intervention Militaire sur une Autorisation Implicite du Conseil de Sécurité' (2000) 104 Revue Générale de Droit International Public 873.

⁴²⁸ UNSC, Statement by the President of the Security Council, 11 July 1997, UN Doc S/PRST/1997/37.

⁴²⁹ UNSC Res 1132 (8 October 1997) UN Doc S/RES/1132.

It can finally be concluded that the normative value that Sierra Leone represents for democratic governance is attenuated when one adopts a different interpretation of the Security Council's Resolution. If one wants to interpret Resolution 1132 as authorising the use of force to restore the elected government, it is possible to turn the reaction of the Security Council into a case following the precedent set by Haiti. On the other hand, it is equally plausible to argue for a different interpretation of the Resolution by highlighting the fact that ECOWAS was only authorised to monitor the implementation of the oil and arms embargo, rather than to use force to oust an illegitimate government.

4.2.3. Côte d'Ivoire

The political quagmire in Côte d'Ivoire regarding Ouattara and Gbagbo's claims to be the legitimate representative of the government following the 2010 elections surpassed the domestic borders and became a centre of attention for the international community.⁴³⁰ The history of the conflict can be traced back to 1999 when Côte d'Ivoire witnessed its first coup d'état after declaring independence in 1960. The following year, in 2000, a new constitution was adopted, and it was prohibited for those whose parents were not Ivorian to run for presidential elections. This prohibition reflected the tension between the South which was controlled by the central government where most people were Ivorian and the North which was mostly controlled by rebels and where people were predominantly of foreign origin.⁴³¹ The requirement of being of Ivorian origin barred Ouattara, an important political figure in the 1990s in Côte d'Ivoire, from standing in the presidential elections. Gbagbo won the first elections that took place following the coup in 2000. This, however, did not end the political unrest and a civil war broke in 2002 between the rebel-held North and government-controlled South.⁴³² The presidential election that was supposed to take place in 2005 was delayed for five years due to the civil war which was settled by a peace agreement signed in 2007 after arduous negotiations.⁴³³

In the aftermath of the 2010 presidential elections, the Independent Electoral Commission (IEC), a public institution set up by the Constitution to supervise that the elections were free and fair, declared that Ouattara gained 54% of the vote. Gbagbo argued that the elections were rigged and refused to cede power to his opponent. In contrast to the IEC, the President of the Constitutional Council declared that the results of the elections were invalid. Although, two domestic bodies, the IEC and the Constitutional Council reached different conclusions regarding the winner of the elections, the international community was swift to confirm Ouattara's legitimacy as the representative of the Ivorian government. The ECOWAS declared

⁴³⁰ Jean d'Aspremont, *Duality of Government in Côte d'Ivoire*, EJIL: *Talk!*, 4 January 2011, <www.ejiltalk.org/duality-of-government-in-cote-divoire/> accessed 22 August 2019.

⁴³¹ Daniel Chirot, 'The Debacle in Côte d'Ivoire' (2006) 17 *Journal of Democracy* 63, 67-69.

⁴³² See generally, Abu Bakarr Bah, 'Democracy and Civil War: Citizenship and Peacemaking in Côte d'Ivoire' (2010) 109 *African Affairs* 597.

⁴³³ Peace Agreement annexed to the 'Letter dated 13 March 2007 from the Secretary-General addressed to the President of the Security Council' UN Doc S/2007/144.

that it recognised Ouattara as the new President and suspended Côte d'Ivoire from all decision-making bodies based on article 45 of the ECOWAS Protocol on Democracy and Good Governance until Gbagbo stepped down.⁴³⁴ In parallel, the Peace and Security Council of the African Union endorsed ECOWAS's decision and suspended Côte d'Ivoire in accordance with article 30 of its Constitutive Act from the Union's activities until Ouattara resumed office.⁴³⁵

The UN was already actively involved in Côte d'Ivoire, first to ensure that the presidential elections were free and fair, it renewed the mandates of the United Nations Operation in Côte d'Ivoire (UNOCI) to that end, and also charged the Special Representative of the Secretary-General in Côte d'Ivoire to 'certify that all stages of the electoral process provide all the necessary guarantees for the holding of open, free, fair and transparent presidential and legislative elections in accordance with international standards'.⁴³⁶ The Security Council continued to oversee the situation until the elections.⁴³⁷ In the aftermath of the elections, it expressly stated that it welcomed the decisions adopted by the ECOWAS and the AU and recognised the declaration of the IEC as the legitimate election results.⁴³⁸ The international community's endorsement of Ouattara as the legitimate representative of the Ivorian government did not however halt the violence that was already on-going in the country. Due to the escalation of violence following the duality of government, the Security Council adopted Resolution 1975 to urge Gbagbo to leave office and acting under Chapter VII of the UN Charter reiterated 'its full support given to the UNOCI, while impartially implementing its mandate, to use all necessary means to carry out its mandate to protect civilians under imminent threat of physical violence'.⁴³⁹

The Security Council's authorisation to use all necessary means in Resolution 1975 prompts the question as to whether this case can be read as the continuation of the Council's approach to the legitimacy of governments. Several scholars adopted a similar interpretation as in the case of Haiti and Sierra Leone, and argued that the Resolution was an open authorisation for the UNOCI to use force for the restoration of the elected government.⁴⁴⁰ The case of Côte d'Ivoire was illustrated as the confirmation of the Security Council's approach to

⁴³⁴ ECOWAS (The Heads of State and Government) Extraordinary Session of the Authority of Heads of State and Government on Côte d'Ivoire (7 December 2010) ECW/CEG/ABJ/EXT/FR./Rev.2.

⁴³⁵ African Union (The Peace and Security Council) 252nd Meeting (9 December 2010) PSC/PR/COMM.1(CCLII).

⁴³⁶ UNSC Res 1765 (16 July 2007) UN Doc S/RES/1765.

⁴³⁷ UNSC Res 1933 (30 June 2010) UN Doc S/RES/1933, UNSC Res 1962 (20 December 2010) UN Doc S/RES/1962, UNSC Res 1967 (19 January 2011) UN Doc S/RES/1967, UNSC Res 1968 (16 February 2011) UN Doc S/RES/1968, UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975.

⁴³⁸ UN SC Res 1962 (20 December 2010) UN Doc S/RES/1962. For the General Assembly Report of the Credentials Committee which recognised the election results declared by the EIC, see UN Doc A/65/583/Rev.1 (22 December 2010) and the General Assembly Resolution approving the Report of the Credentials Committee, see UN GA Res 65/237 (23 December 2010) UN Doc A/RES/65/237.

⁴³⁹ UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975.

⁴⁴⁰ Yejoon Rim, 'Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Cote d'Ivoire' (2012) 25 Leiden JIL 683, Yasmine Nahlawi, 'The Legality of NATO's Pursuit of Regime Change in Libya' (2018) 5 Journal on the Use of Force and International Law 295, Claus Kreß and Benjamin Nußberger, 'Pro-Democratic Intervention in Current International Law: The Case of the Gambia in January 2017' (2017) 4 Journal on the Use of Force and International Law 239.

undemocratic changes of government which could be qualified as a threat to international peace and security and that the Council was ready to use its Chapter VII powers for pro-democratic interventions. However, when we take a closer look at the wording of the Resolution, it is possible to determine that the Council authorised the use of all necessary means in order to 'protect civilians under imminent threat of physical violence'.⁴⁴¹ While the Council reiterated on several occasions in the Resolution that Ouattara was the legitimate representative of Ivory Coast and that Gbagbo should immediately step down and recognise the result of the elections, the Council's focus with regard to Chapter VII powers can be read as aiming to protect civilians from widespread violence rather than restoring the democratically elected president by force.⁴⁴² In addition, the Council recalled its authorisation to use all necessary means, rather than providing the basis for a new authorisation.⁴⁴³ As discussed above, UNOCI was mandated with supervising the election process,⁴⁴⁴ and it is before the elections that the Security Council authorised the use of force in June 2010 in order for UNOCI to carry out its mandate.⁴⁴⁵ The Council's reiteration of Chapter VII powers aims to emphasise the additional mandate given to the UNOCI to 'prevent the use of heavy weapons against civilian populations'.⁴⁴⁶

When the meeting records that led to the adoption of Resolution 1975 are examined, it can be argued that the authorisation to use force did not directly target the restoration of the democratic order. While France and Nigeria, who prepared the draft resolution, stated that the continuation of violence could be related to the refusal of Gbagbo to leave office, other states were more hesitant to interpret the authorisation of Chapter VII powers as a way to oust the incumbent president from power.⁴⁴⁷ India emphasised the importance for the UN operation in the region to stay neutral to the conflict and added that 'peacekeepers should draw their mandate from the relevant resolutions of the Security Council. They cannot be made instruments of regime change. Accordingly, the United Nations Operation in Côte d'Ivoire should not become a party to the Ivorian political stalemate'.⁴⁴⁸ South Africa as well underlined that the UN operation in Côte d'Ivoire had to keep its neutrality while performing its mandate of protecting civilians from the conflict.⁴⁴⁹ Brazil indicated the importance of UNOCI's impartiality for a negotiated process between the warring parties.⁴⁵⁰ In addition, China expressly highlighted that 'United Nations peacekeeping operations should strictly abide by the principle of neutrality', which can be an indication that the Operation was not charged with

⁴⁴¹ UNSC Res 1975 (30 March 2011) UN Doc S/RES/1975.

⁴⁴² Antonios Tzanakopoulos, 'The UN/French Use of Force in Abidjan: Uncertainties Regarding the Scope of UN Authorizations', EJIL: *Talk!*, 9 April 2011, <www.ejiltalk.org/the-un-use-of-force-in-abidjan/> accessed 25 August 2019.

⁴⁴³ Dire Tiadi, 'The Intervention in Côte d'Ivoire – 2011' in Tom Ruys, Olivier Corten and Alexandra Hofer (eds), *The Use of Force in International Law: A Case-Based Approach* (OUP 2018) 786.

⁴⁴⁴ UN SC Res 1765 (16 July 2007) UN Doc S/RES/1765.

⁴⁴⁵ UN SC Res 1933 (30 June 2010) UN Doc S/RES/1933.

⁴⁴⁶ UN SC Res 1975 (30 March 2011) UN Doc S/RES/1975.

⁴⁴⁷ UN SC Verbatim Records (30 March 2011) UN Doc S/PV.6508, 2.

⁴⁴⁸ UN SC Verbatim Records (30 March 2011) UN Doc S/PV.6508, 3.

⁴⁴⁹ UN SC Verbatim Records (30 March 2011) UN Doc S/PV.6508, 4.

⁴⁵⁰ UN SC Verbatim Records (30 March 2011) UN Doc S/PV.6508, 4.

replacing an effective government with an elected one, but its mandate was limited to restoring the peace in the region.⁴⁵¹ While the Resolution was adopted with unanimity, the Verbatim Records can be used as evidence that the main purpose of the authorisation to use force was the restoration of peace, rather than the elected government.

Despite its firm stance against the refusal of Gbagbo to step down, the AU's approach to Resolution 1975 is also an indication that the Resolution is not necessarily an open authorisation for a pro-democratic intervention by force.⁴⁵² After the adoption of Resolution 1975, the Peace and Security Council of the AU made a press statement to state its concern about the civilian killings in the region and declared that it 'encouraged UNOCI, within the framework of the relevant resolutions of the Security Council of UN, to vigorously implement its mandate to protect civilians'.⁴⁵³ It further stated that it welcomed the adoption of Resolution 1975 by the Security Council and expressed its readiness to assist the consolidation of peace in the country. This can also be used as an indication that the AU did not regard the Resolution as permitting the use of force but rather endorsed its adoption as a confirmation of a call for impartiality when UNOCI conducted its mandate. Consequentially, two important points regarding Resolution 1975 become evident. First, it can be argued that the authorisation to use force was targeted to protect civilians in the conflict which is also exemplified by the literature discussing the precedential value that the case presents for the responsibility to protect doctrine.⁴⁵⁴ Second, UNOCI was instructed to act impartially in its operations. Despite the refusal of Gbagbo to step down and the escalation of violence due to the two leaders' battle over gaining control over the government and the recognition of Ouattara as the legitimate representation of Côte d'Ivoire, it is far from certain that the Security Council's Resolution 1975 warranted ousting the incumbent president.

4.3. The Centrality of the Security Council in the Creation of Normative Markers

In the struggle for proving an emerging right, one has to create the formal element of the narrative that will anchor the subject into a legal framework. In the case of democratic governance discourses, scholars try to prove an emerging right to democratic governance whereby states have to validate their governance through free and fair elections. To that end, the narrative has to find a pattern of behaviour which is consistently repeated after similar circumstances. As it has been examined in the previous section, democratic governance

⁴⁵¹ UN SC Verbatim Records (30 March 2011) UN Doc S/PV.6508, 7.

⁴⁵² Tladi, 'The Intervention in Côte d'Ivoire – 2011' (n 443) 789.

⁴⁵³ African Union (Peace and Security Council) Press Statement of the 270th Meeting of the Peace and Security Council (5 April 2011) 270th meeting, PSC/PR/BR.1(CCLXX).

⁴⁵⁴ Alex Bellamy and Paul Williams, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect' (2011) 87 *International Affairs* 825, Foluke Ipinyomi, 'Is Côte d'Ivoire a Test Case for R2P? Democratization as Fulfilment of the International Community's Responsibility to Prevent' (2012) 56 *Journal of African Law* 151, Dire Tladi, 'Security Council, the Use of Force and Regime Change: Libya and Cote d'Ivoire' (2012) 37 *South African YBIL* 22, Cónan Kenny, 'Responsibility to Recommend: The Role of the UN General Assembly in the Maintenance of International Peace and Security' (2016) 3 *Journal on the Use of Force and International Law* 3, Graham Melling, 'Beyond Rhetoric? Evaluating the Responsibility to Protect as a Norm of Humanitarian Intervention' (2018) 5 *Journal on the Use of Force and International Law* 78.

discourses rely to a great extent on the reaction of the Security Council and its authorisation to use force to prove that international law is becoming involved in validating national governance. These three cases are cited in several writings defending an emerging right to democratic governance with a very similar interpretation. According to these writings, the Security Council's post-Cold War practice suggests that international law is no longer agnostic to the way in which a government comes into being and the failure to put into practice the results of a free and fair election can become a threat to international peace and security which can not only lead to economic or more targeted measures but also entails the authorisation to use force to restore the democratic order. This section examines first how these normative markers are created by scholars and then focuses on the purposes that they serve.

In relation to the creation of normative markers of democratic governance discourses, firstly, the involvement of the Security Council appears as an important element for an event to acquire a different status compared to other cases. The intervention of the Council when an elected leader is overthrown by a military coup or when a leader does not recognise the election results and refuses to step down, seems to be a central element that provides the normative character scholars look for to prove an emerging right. In the Cold War period, it is possible to find cases where undemocratic changes of government received severe reactions from states⁴⁵⁵ and international organisations.⁴⁵⁶ However, according to mainstream writings on democratic governance, rather than unilateral or collective sanctions, the fact that the issue is brought before the Security Council elevate them into a different status. The reliance of scholars on the authority of the Security Council and the authorisation to use force can be explained by the formation process of customary norms.⁴⁵⁷ The ascertainment of customary law is a non-formal process short of a written instrument and this makes it very difficult to establish the difference between law and non-law.⁴⁵⁸ Due to the indeterminate character of custom ascertainment, scholars need to provide strong evidence that will demonstrate that a new customary norm is emerging.⁴⁵⁹ While the ascertainment of customary law is a non-formal process, its evidentiary process can be formal.⁴⁶⁰ In that regard, scholars relied on the

⁴⁵⁵ After the 1966 military coup in Argentina, the US suspended financial aid and Venezuela and Colombia refused to recognise the military government, see General Onganía becomes President. - The Statute of the Argentine Revolution. - Abolition of Congress, (1 November 1966), Keesing's Record of World Events, Vol. 12 (1966), Issue 11 (November) 21707. After the 1973 military coup in Chile, Denmark, Sweden, the Netherlands, Belgium and the German Federal Government suspended their financial aid, the Soviet Union, the German Democratic Republic, Bulgaria and Romania suspended diplomatic relations with the military junta, see Military Junta Assumes Power, (1 October 1973), Keesing's Record of World Events, Vol. 19 (1973), Issue 10, 26151.

⁴⁵⁶ The Council of Europe's pressure over Greece ended in Greece's withdrawal from the Council, see Council of Europe (Committee of Ministers) (12 December 1969) Res (69) 51. The Council of Europe decided not to prolong the term of the Turkish delegation following the 1980 military coup, see Council of Europe (Parliamentary Assembly) (14 May 1981) Order 398 (1981).

⁴⁵⁷ On identification of customary international law, see International Law Commission, Draft Conclusions on Identification of Customary International Law, with Commentaries in UN Doc. A/73/10 (2018) 117-56.

⁴⁵⁸ Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP 2013) 164. Contra see Gennadii Mikhaïlovich Danilenko, *Law-Making in the International Community* (Martinus Nijhoff Publishers 1993) 30. For a model of formalisation of customary international law, see Anthony d'Amato, 'What "Counts" as Law?' (1982) Northwestern University School of Law Faculty Working Papers, 132, < <https://scholarlycommons.law.northwestern.edu/facultyworkingpapers/132/> accessed 22 August 2019.

⁴⁵⁹ According to Thomas Franck, a norm has to be 'legitimate' to differentiate itself from non-law and fulfil four criteria: pedigree, determinacy, coherence, adherence, see Franck, *The Power of Legitimacy Among Nations* (n 291).

⁴⁶⁰ d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (n 458) 152.

authority of the Security Council and its Resolutions as evidence proving states' willingness to rule on the legitimacy of national governments. In the past, the Security Council has been severely criticised for assuming a legislative function in its Resolutions that contained too general provisions.⁴⁶¹ In the case of democratic governance, this legislative function was not directly executed by the Council itself, but scholars attributed a normative role to the Council as an organ that generated important practice to prove their argument.

The attribution by scholars of a central place to the resolutions of the Security Council to ascertain the normativity of an emerging customary norm is closely linked to the Council's revitalised function following the end of the Cold War. As the mainstream narrative goes, the Security Council was paralysed because of the power tensions between the US and the Soviet Union during the Cold War and the demise of the latter resuscitated the Council as the guardian of peace and security.⁴⁶² The case of Haiti where the Security Council expressly authorised the restoration of a constitutional order through the use of force showcases the Council's commitment at the time to actively determine how states should behave not only with regard to their international affairs but even regarding national governance. When the Security Council took a pro-active stance following the military coup in Haiti, scholars seized the opportunity to transform this case into one of the building blocks of their argument. Rather than an exception, Haiti's capacity to become the pillar of a new norm inspired the interpretation of subsequent cases. While in the aftermath of the Cold War, the Security Council assumed a new mission to determine new rules for international actors,⁴⁶³ scholars took advantage of the Council's authority to derive credibility for their argument.

Secondly, the authorisation to use force seems to be of utmost importance for a case to present normative value. In all the above-discussed cases, scholars highlighted the Security Council's waiver on the prohibition to use force to demonstrate that the international community was ready to use all necessary means to restore a democratic order. It is important to emphasise that the prohibition to use force constitutes one of the fundamental principles of the UN system which is built upon the ideal that all disputes be resolved by peaceful means. In that sense, the authorisation to use force is considered to be the last resort regarding the UN's mission to preserve peace and security. This is why the UN sets out in Chapter VII a gradual system for the Security Council to implement measures in case of non-compliance with Charter obligations. The prohibition being the rule and the authorisation representing the exception, the authorisation to use force to restore a democratic order is vested with a

⁴⁶¹ Martti Koskeniemi, 'The Police in the Temple Order, Justice and the UN: A Dialectical View' (1995) 6 EJIL 325, Paul Szasz, 'The Security Council Starts Legislating' (2002) 96 AJIL 901, José Alvarez, 'Hegemonic International Law Revisited' (2003) 97 AJIL 873, José Alvarez, 'The UN's War on Terrorism' (2003) 31 International Journal of Legal Information 238, Stefan Talmon, 'The Security Council as World Legislature' (2005) 99 AJIL 175. For Security Council Resolutions that have been criticised for including general provisions rather than targeted sanctions for particular states, see UNSC Res 1267 (15 October 1999) S/RES/1267, UNSC Res 1373 (28 September 2001) S/RES/1373, UNSC Res 1390 (28 January 2002) S/RES/1390.

⁴⁶² Michael Reisman, 'International Law after the Cold War' (1990) 84 AJIL 859, Nicholas Rostow, 'The International Use of Force after the Cold War, (1991) 32 Harvard International Law Journal 411.

⁴⁶³ Martti Koskeniemi, *The Politics of International Law* (Hart Publishing 2011) 104.

significant authority to create normative markers. The exceptional character of the use of force elevates cases where the Security Council approved this exception into a higher level of normative authority. It can be concluded that the involvement of the Security Council in a case and its authorisation to use force stand out as two important elements that bestow normative authority to cases.

Three points can be distinguished as to what purposes the above-mentioned three cases serve as the normative markers of democratic governance discourses. First, they anchor the relationship between democracy and international law into a legal framework. The interpretation that scholars bring to the post-election events that took place in these states provide the legal anchors to the narrative. The examination of the international actors' reaction to the undemocratic practices witnessed in these states and the effort to prove the consistent approach of these actors, provide the necessary markers for this subject to fall within the realm of international law. In that regard, the interpretation of Haiti as the beginning, Sierra Leone as the consolidation and Côte d'Ivoire as the confirmation of an emerging right establishes one of the legal premises of the narrative. Second, it can be stated that these three cases are interpreted in a similar way to prove an emerging right. While the narrative created by the proponents of democratic governance discourses provides one single interpretation of the post-election irregularities in these states, the previous section has shown that alternative interpretations can equally be put forward. In that regard, it can be argued that proponents of democratic governance discourses try to fix the meaning that should be attributed to these cases and rule out alternative interpretations. Fixing the implications that an event can have on international law enables scholars to predetermine how future events should be interpreted as well. Moreover, the fact that the same interpretation of these cases becomes a recurrent pattern consolidates the consistency of the normative framework that the narrative wants to establish. Despite the possibility of bringing a different reading, the accumulation of the same interpretation bolsters the persuasiveness of the argument. Finally, these cases are interpreted with a progressive approach to history. In progress narratives, in order to create a coherent story in which the course of events leads to the consolidation of an emerging right, cases will be carefully chosen to reflect how the law progressed over time. The way in which the normative markers of democratic governance discourses are created, demonstrates how scholars interpret these cases as if they add one to another in order to prove an emerging right. The three cases mark the beginning, the consolidation and the confirmation of a practice which helps to generate a progress narrative.

4.4. Conclusion

In the aftermath of the Cold War, scholars were prone to highlight the progressive development of international law and examined the role that international law could play in ensuring the implementation of democratic rule. They highlighted the progress witnessed in human rights

law through the ratification of international conventions on fundamental rights and the involvement of the UN and regional international organisations in the implementation of these rights. The defeat of communism by the Western powers initiated an era where democracy was seen as the only plausible form of governance and this is reflected in international law scholarship by the increased interest in examining international practice related with governmental legitimacy. For some scholars, this examination has been mostly geared towards proving a customary norm which would transform the formation of national governance into a topic governed by international law. It is to this end that international practice has been examined and this purposive interpretation shaped the construction of the narrative on democracy. An important element of this narrative is the creation of normative markers which represent cases that scholars frequently cite with an almost identical interpretation in order to prove their argument.

This chapter has examined how democratic governance discourses created normative markers in order to establish the formal element of the narrative. Scholars have to attribute a certain meaning to international practice through interpretation and explain how they relate the facts to a legal framework. Legal meaning is not inherent in international practice and international lawyers have to create the necessary links between facts and legal sources in order to produce meaning in their narrative. In this exercise of finding a meaning to international practice, bestowing certain cases with normative authority allows to create the formal element of the narrative by anchoring the subject into an international law framework. Democratic governance discourses try to prove an emerging rule of governmental legitimacy. To that end, the post-election crises in Haiti, Sierra Leone and Côte d'Ivoire are transformed into normative markers of democratic governance by emphasising the Security Council's involvement in these cases in order to prove the growing consistent practice regarding undemocratic changes of government. The creation of these normative markers relies on a particular interpretation of the Security Council resolutions which highlights the active participation of the Council in the restoration of the constitutional order and its readiness to authorise the use of force to that end. This allows the narrative to create a relationship between past, present and future.⁴⁶⁴ Eventually, this linear reading of Haiti, Sierra Leone and Côte d'Ivoire as if they form part of a cumulative practice helps to produce a progress narrative.

The mainstream interpretation of international practice pertaining to the involvement of the Security Council in cases where democratic governance has been disputed can be challenged by a counter-narrative which brings into question the normative value of these normative markers created by the proponents of these discourses. The possibility of interpreting the same practice in a different way demonstrates the narrative structure of these discourses. As a narrative technique, scholars transformed the cases of Haiti, Sierra Leone and Côte d'Ivoire

⁴⁶⁴ Harlan Grant Cohen, 'Theorizing Precedent in International Law' in Andrea Bianchi, Daniel Peat and Matthew Windsor (eds), *Interpretation in International Law* (OUP 2015) 274.

into normative markers in order to establish the formal element of democratic governance discourses. These cases illustrate the growing practice regarding the legitimacy of governments which is gaining consistency and hence normative authority. Moreover, the accretion of the same interpretation determines how future cases with similar characteristics should be interpreted as well. The Security Council and the authorisation to use force stand out as two important tools with probative value to provide determinacy to a rule in flux. Since force cannot be used too hastily and the Council is required to authorise the use of force only as a last resort, the exceptional character of this rule is vested with a significant authority to create normative markers. After discussing how the formal element of democratic governance discourses has been constructed, the next chapter turns to the creation of the temporal element of this narrative.



5. The Temporal Element: The End of the Cold War as a Turning Point

'Prior to the events of 1989–91, "democracy" was a word rarely found in the writings of international lawyers.'⁴⁶⁵ This is the opening sentence of *Democratic Governance and International Law* which stands as the guiding reference book on democratic governance. It is clear from this introductory remark that the end of the Cold War played a crucial role not only in the way international law scholars treated the subject matter, but it also implies that a lack of focus prevailed in international law practice in regard to democracy which eventually led to the indifference of scholars on the topic. The Cold War – post-Cold War dichotomy is not only used by the editors of the above-mentioned volume.⁴⁶⁶ Many other scholars writing on democratic governance also use it to compare the two periods and show how the reaction of international actors changed regarding undemocratic practices, especially when it concerns the formation of a government.⁴⁶⁷ Democratic governance discourses use the end of the Cold War to mark a rupture between a Cold War period which represents an era when international law was neutral towards governmental changes and a post-Cold War period which is no longer agnostic to the way in which a government comes into being and that the legitimacy of government is increasingly determined by its compliance to democratic norms. In that regard, the end of the Cold War signifies a turning point which altered international law's agnosticism with regard to governmental changes. The temporal framework of democratic governance discourses relies on this dichotomous interpretation of history.

The interpretation of history regarding the organisation of events and their periodisation is an important narrativisation exercise. While every event is a singular happening in time, when they are made part of a story, the way in which these events are connected to one another becomes a constituent element of the narrative. The way they are connected will not only show the causal link between different facts or why these facts and not others are relevant for the story being told, but it will also delimit the narrative in time. Some events will present a particular importance for that narrative and will be qualified as turning points or axial moments

⁴⁶⁵ Gregory Fox and Brad Roth, 'Introduction: The Spread of Liberal Democracy and its Implications for International Law' in Gregory Fox and Brad Roth (eds), *Democratic Governance and International Law* (CUP 2000) 1.

⁴⁶⁶ On the use of Cold War as a historical turning point, see Randall Lesaffer, 'The End of the Cold War: An Epochal Event in the History of International Law?' Tilburg Working Paper Series on Jurisprudence and Legal History 10 (2010), <<https://ssrn.com/abstract=1663871>> accessed 22 August 2019.

⁴⁶⁷ Franck, 'The Emerging Right to Democratic Governance' (n 21), Fox, 'The Right to Political Participation in International Law' (n 25), Cerna, 'Universal Democracy: an International Legal Right or the Pipe Dream of the West' (n 24), Peterson (n 241), Marks, *The Riddle of All Constitutions* (n 36), Rich (n 323), Euan MacDonald, 'International Law, Democratic Governance and September the 11th' (2002) 3 German Law Journal 2, Wheatley, 'Democracy in International Law: a European Perspective' (n 312), Boniface, (n 377), Gregory Fox, 'International Law and the Entitlement to Democracy After War' (2003) 9 Global Governance 179, d'Aspremont, *L'Etat Non Démocratique en Droit International: Etude Critique du Droit International Positif et de la Pratique Contemporaine* (n 368), Petersen (n 377), d'Aspremont and de Brabandere, 'The Complementary Faces of Legitimacy in International Law: The Legitimacy of Origin and the Legitimacy of Exercise' (n 338), Peters, 'Statehood after 1989: 'Effectivités' between Legality and Virtuality' (n 332), Phipan, 'International Law, Domestic Political Orders, and the "Democratic Imperative": Has Democracy Finally Emerged as a Global Legal Entitlement?' (n 346), Roth, *Governmental Illegitimacy in International Law* (n 34), Marks, 'What has Become of the Emerging Right to Democratic Governance?' (n 343), d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (n 339), Binder, 'Anything New Since the End of the Cold War? or International Law Goes Domestic: International Electoral Standards and Their Legitimacy' (n 349), Vidmar, *Democratic Statehood in International Law: The Emergence of New States in Post-Cold War Practice* (n 335), Buchan, *International Law and the Construction of the Liberal Peace* (n 267).

that mark the beginning of a new period.⁴⁶⁸ Pinning down certain dates which mark the beginning of a new period is an effective way to show how the history unfolded. More importantly, it is an essential element of progress narratives. When two periods are separated from each other by a 'turning point' it allows the narrator to claim that due to the progress witnessed during that time, the subsequent period can be qualified as a new chapter in history.⁴⁶⁹ However, how these periods are separated from each other solely depends on the narrator's discretion and how one wants to tell the story. Although it is inevitable to determine certain key dates in history in order to organise the events and to form a coherent narrative, the way events are periodised is a narrative technique that needs to be put into perspective.

This chapter shows that the presentation of the end of the Cold War as a turning point constitutes the temporal element of democratic governance discourses. It examines whether in hindsight, the Cold War - post-Cold War dichotomy is the sole narrative that can be used to explain how the neutrality of international law evolved over the years and how it served to justify a particular vision of governmental legitimacy. The chapter argues that the end of the Cold War is not necessarily an undisputed turning point to examine the relationship between democratic governance and international law. It does so by focusing on international practice to see whether there is really a stark distinction between the two periods. The comparison of pre-1991 practice with post-Cold War practice will reveal that pinning down the end of the Cold War as a turning point for democratic governance in international law is not a natural outcome of the international practice but a deliberate choice of scholars. This chapter demonstrates that periodisation is an important narrative technique to create progress narratives in international law.

To this end, the chapter investigates whether the end of the Cold War represents a turning point apropos the neutrality of international law. First, it focuses on international practice before the end of the Cold War and examines cases where unconstitutional changes of government have been part of a practice that is not so different from what was witnessed after the Cold War (5.1.). Thereafter, it analyses the post-Cold War era and argues that the triumphalist atmosphere of the early 1990s regarding democracy is a narrative construction of democratic governance discourses (5.2.). Recent practice reveals that strong claims can be made about a possible democratic. Rather than consolidating its normative character, an emerging right to democratic governance can be challenged by the decline of democratic rule in several states. This section will further demonstrate that an argument can be made regarding a shift towards good governance, which challenges the consolidation of a right focusing on the legitimacy of the origin of governmental power. Finally, the chapter concludes by demonstrating that the use of the Cold War – post-Cold War periodisation serves as the temporal element of democratic governance discourses in order to support a progress narrative.

⁴⁶⁸ Ricoeur, *Time and Narrative* (n 82) 106.

⁴⁶⁹ Emile Benveniste, *Problèmes de Linguistique Générale, Volume 2* (Gallimard 1974) 71-72.

5.1. International Practice before the End of the Cold War

Democratic governance discourses consider the end of the Cold War the watershed moment with regard to international law's neutrality towards governmental forms. Not only in Thomas Franck and Gregory Fox's examination of the relationship between democracy and international law but also in subsequent writings, it is easy to observe that the fall of the Berlin Wall and the demise of the Soviet Union have a special importance. In that respect, the end of the Cold War plays an essential role in dividing international law into two parts and creating a dichotomy in order to explain how the law transformed from one phase to another. The end of the Cold War signifies a turning point not only in democratic governance discourses but no doubt any reading of history will dedicate a particular importance to that time. The idea that the end of the Cold War establishes a breaking point in international legal history is so much engrained in all mainstream writings that it has almost been accepted as a natural outcome of historical interpretation. It has become a common practice to use this dichotomy to construe how international law progressed over the years. Against this backdrop, this section re-evaluates whether international practice before the end of the Cold War was totally agnostic to undemocratic practices in a way that allows an undisputed turning point at a particular time in history.

Since the 17th century, international actors have mostly relied on the principle of effectiveness in order to determine the representative body of a state. Yet, this does not mean that governmental change was completely alien to international actors. For instance, the Holy Alliance represents one of the earliest cases where states have been vocal about governmental change. When the great monarchies of that time, Austria, Prussia and Russia, allied under the name of the Holy Alliance in order to restrain the proliferation of the impact of the French Revolution in the region, they issued a declaration which stated that:

Any state forming part of the European Alliance which may change its form of interior government through revolutionary means, and which might thus become a menace to other states, will automatically cease to form a part of the Alliance, and will remain excluded from its councils until its situation gives every guarantee of order and stability.⁴⁷⁰

Two other important cases originate in American states. Firstly, Article 29 of the Treaty of Union, League and Perpetual Confederation issued by the Congress of Panama, which gathered together several American States in 1826, declared that an essential change in the governmental system of a member state could cause the suspension of membership.⁴⁷¹

⁴⁷⁰ William Cresson, *The Holy Alliance: the European Background of the Monroe Doctrine* (OUP 1922) 99, cited in Lauterpacht, *Recognition in International Law* (n 241) 103.

⁴⁷¹ Treaty of Union, League and Perpetual Confederation art. 29, July 15, 1826 reprinted in James Scott, *The International Conferences of American States, 1889-1928* xxiv, 1931, cited in Jean d'Aspremont, 'Responsibility for Coups d'État in International Law' (2010) 18 *Tulane Journal of International & Comparative Law* 455. See also,

Secondly, in 1907, five Central American states, namely Costa Rica, El Salvador, Honduras, Guatemala, Nicaragua, agreed that they would not recognize a revolutionary government in any of the contracting states unless it obtained the approval of people's representatives.⁴⁷² By 1927, they had removed the approval criterion and decided not to recognise any revolutionary government.⁴⁷³ However, this principle to withhold recognition from unconstitutional governments, also called the Tobar Doctrine, did not receive wide acceptance.⁴⁷⁴ While at the time, state practice has been consistent in recognising effective governments without any evaluation as to its revolutionary or constitutional structure, these exceptional cases that put emphasis on the legitimacy of governments can still be noted.

In the early years of the 20th century, Woodrow Wilson's Fourteen Points marked an important step for the creation of new links between democratic governance and international law. When the American President addressed Congress to state the fourteen principles that should form the basis of a peaceful process following the end of World War I, he emphasised that people should have the freedom to choose the form of their own government.⁴⁷⁵ Despite the indeterminacy as to its extent, the speech paved the way for the understanding of self-determination as a principle for peoples to determine their own sovereign. The increasing attention of international law towards democracy is also marked in Elihu Root's opening address to the annual meeting of the American Society of International Law in 1917, where he stated that:

The greatest change in the conditions of national life during the past century has been in the advance and spread of democratic government, and the correlative decrease in the extent and power of autocratic and dynastic governments. It is impossible to regard the advance of democracy as being merely local or temporary. It has been the result of long-continued and persistent progress.⁴⁷⁶

It can be observed that in the early years of the 20th century, democracy was becoming a relevant topic not only for the internal governance of a state, but also as a matter of international concern.

Charles G Fenwick, 'Meeting of Presidents at Panama' (1957) 51 AJIL 83. It should be noted that the Treaty was ratified only by Gran Columbia, comprised of present-day Colombia, Ecuador, Panama, and Venezuela among four other participants including Peru, Mexico, the United Provinces of Central America (El Salvador, Costa Rica Honduras, Guatemala, Nicaragua).

⁴⁷² Lauterpacht, *Recognition in International Law* (n 241) 129, James Scott, 'The Central American Peace Conference of 1907' (1908) 2 AJIL 134, Charles Stansifer 'Application of Tobar Doctrine to Central America' (1967) 23 The Americas 253.

⁴⁷³ Lauterpacht, *Recognition in International Law* (n 241) 129.

⁴⁷⁴ Thomas Galloway, *Recognizing Foreign Governments: The Practice of the United States* (American Enterprise Institute 1917) 10. While the Tobar doctrine was named after the Minister of Foreign Affairs of Ecuador, it can be contrasted with the Estrada doctrine, named after the Minister of Foreign Affairs of Mexico. Estrada doctrine requires that states do not base their recognition practice on the legitimacy of governments, see Philip Jessup, 'The Estrada Doctrine' (1931) 25 AJIL 719.

⁴⁷⁵ Antonio Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (CUP 1995) 20.

⁴⁷⁶ Elihu Root, 'The Effect of Democracy on International Law' (1917-1918) 4 International Conciliation 167.

When we look at the legal framework that forms the foundation of democratic governance, it is possible to identify that, under the auspices of the UN, popular sovereignty is apparent in the earliest works of the organisation. Firstly, article 21 of the Universal Declaration of Human Rights declared that 'The will of the people shall be the basis' of national governance.⁴⁷⁷ Secondly, the decolonisation process played a crucial role in the development of self-government within the newly independent states. Chapters XI and XII of the UN Charter and the principle of self-determination, as enshrined in article 1, paved the way for the independence of trust and dependant territories. Soon after, the General Assembly adopted Resolution 1514, which proclaimed self-determination as a right of all peoples.⁴⁷⁸ In addition, Resolution 1541 explained how non-self-governing entities should reach full self-government by underlining the importance to ascertain the genuine will of the dependent people.⁴⁷⁹ During the decolonisation process, the UN supervised several elections and plebiscites and election monitoring became a commonly used tool for the independence of dependant territories.⁴⁸⁰ In the 1975 Advisory Opinion on Western Sahara, the ICJ declared that the right to self-determination requires the free and genuine expression of peoples regarding the determination of their political status, and underscored the exigency of a democratic process to reach self-government.⁴⁸¹ It can further be mentioned that the adoption of the International Convention on the Elimination of All Forms of Racial Discrimination⁴⁸² in 1965 and the International Convention on the Suppression and Punishment of the Crime of Apartheid⁴⁸³ in 1973 put in place important guarantees for equal representation of all peoples in the government. The prohibition of the regime of apartheid is clearly exemplified in the case of Rhodesia where the Security Council⁴⁸⁴ and General Assembly⁴⁸⁵ adopted Resolutions to call upon states not to recognise the declaration of independence. Another example that demonstrates the active involvement of the General Assembly with regard to political regimes is the condemnation of fascist regimes.⁴⁸⁶

⁴⁷⁷ Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A (III) (UDHR) art 21.

⁴⁷⁸ UNGA, Res 1514 (XV) (14 December 1960) UN Doc A/RES/1514(XV).

⁴⁷⁹ UNGA, Res 1541 (XV) (15 December 1960) UN Doc A/RES/1541(XV).

⁴⁸⁰ It was upon the practice of the decolonisation period that election monitoring became a standard procedure in independent territories. For election monitoring, see Binder, 'International Election Observation by the OSCE and the Human Right to Political Participation' (n 27), Christina Binder and Christian Pippan, 'Election Monitoring, International' Max Planck Encyclopedia of Public International Law, <<https://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1036>> accessed 22 August 2019.

⁴⁸¹ *Western Sahara* (Advisory Opinion) [1975] ICJ Rep 12.

⁴⁸² International Convention on the Elimination of All Forms of Racial Discrimination (adopted 21 December 1965, entered into force 4 January 1969) 660 UNTS 195. Article 3 states that 'States Parties particularly condemn racial segregation and apartheid and undertake to prevent, prohibit and eradicate all practices of this nature in territories under their jurisdiction.'

⁴⁸³ Convention on the Suppression and Punishment of the Crime of Apartheid (adopted 30 November 1973, entered into force 18 July 1976) 1015 UNTS 243. Article 1 states that 'The States Parties to the present Convention declare that apartheid is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law.'

⁴⁸⁴ UNSC 216 (1965), UN Doc. S/RES/216 (12 November 1965).

⁴⁸⁵ UNGA 2022 (XX), UN Doc A/RES/2022 (XX) (1965) (5 November 1965).

⁴⁸⁶ UNGA 36/162, UN Doc. A/RES/36/162 (16 December 1981). The Resolution states that the General Assembly 'condemns all totalitarian or other ideologies and practices, in particular against Nazi, Fascist, neo-Fascist, based on racial or ethnic exclusiveness or intolerance, hatred, terror, systematic denial of human rights and fundamental freedoms or which have such consequences.'

Likewise, the International Covenant on Civil and Political Rights occupies a central role in the normative framework of democratic governance by guaranteeing not only fundamental rights but, especially, for making the right to free and fair elections a universally enforceable right.⁴⁸⁷ Article 25 of the ICCPR entered into force in 1976, but the *travaux préparatoires* of the Covenant were initiated in the earliest years of the UN.⁴⁸⁸ Moreover, the Economic and Social Council of the UN led off the first steps of a human rights covenant in 1946 by establishing the Commission on Human Rights tasked with working on the preparation of an international bill of human rights.⁴⁸⁹ During the first session of the Drafting Committee on the International Bill of Human Rights, the first proposal by the Secretariat already included a clause on free, fair and periodic elections.⁴⁹⁰ In 1955, the annotation of the draft covenants prepared by the Secretary-General indicated that the discussion on article 25 very nearly presented a consensus that the elections had to be genuine, periodic, by universal and equal suffrage, and by secret ballot.⁴⁹¹ Similarly, the adoption of the draft article at the Third Committee of the General Assembly was by 71 votes to none, with only 4 abstentions, which also shows the strong commitment of member states to the right to free and fair elections.⁴⁹² Finally, the General Assembly adopted the ICCPR in 1966 and the Covenant was then opened to signature.⁴⁹³ In 1976, there were 147 UN members, and the ICCPR entered into force when it was ratified by 35 states, and 27 more states had signed but not ratified. In total, 62 states, almost the half of all members, had already declared their intention to be bound by the ICCPR by 1976.

Apart from the ICCPR, the Cold War period also witnessed the entry into force of regional human rights treaties providing guarantees for holding free and fair elections. Article 3 of the First Optional Protocol to the European Convention on Human Rights,⁴⁹⁴ article 23 of the American Convention on Human Rights⁴⁹⁵ and article 13 of the African Charter on Human and Peoples' Rights,⁴⁹⁶ all provide the legal basis for the establishment of a government through free and fair elections. Indeed, the proliferation of several human rights mechanisms tasked with monitoring their implementation; namely, UN human rights institutions and regional human rights courts before 1991, proved that human rights protection was not only the concern of a few states but was an important part of international law.⁴⁹⁷ It is because of this legal

⁴⁸⁷ International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR).

⁴⁸⁸ Marc Bossuyt, *Guide to the 'Travaux Préparatoires' of the International Covenant on Civil and Political Rights* (Martinus Nijhoff Publishers 1987).

⁴⁸⁹ UN Economic and Social Council, Res 5 (I) (16 February 1946).

⁴⁹⁰ UN Economic and Social Council, Commission on Human Rights, Report of the Drafting Committee on an International Bill of Human Rights, Annex A, (1 July 1947) E/CN.4/21, 17.

⁴⁹¹ UNGA, 'Draft International Covenants on Human Rights, Annotation prepared by the Secretary-General' (1 July 1955) A/2929, Chapter VI, para. 174.

⁴⁹² UNGA, Third Committee, 1096th Session (8 November 1961) A/C.3/SR.1096.

⁴⁹³ UNGA Res 2200 A (XXI) (16 December 1966).

⁴⁹⁴ First Optional Protocol to Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR).

⁴⁹⁵ American Convention on Human Rights 'Pact of San José, Costa Rica' (adopted 22 November 1969, entered into force 18 July 1978) OAS Treaty Series No. 36; 1144 UNTS 123; 9 ILM 99 (1969).

⁴⁹⁶ African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) (1982) 21 ILM 58 (African Charter).

⁴⁹⁷ Gerd Oberleitner, *Global Human Rights Institutions* (Polity Press 2007) 30.

framework that by the 1970s human rights had already become the new 'utopia of international law'.⁴⁹⁸ Therefore, it is possible to note that the Cold War tensions did not prevent the development and adoption of the normative architecture of democratic governance.

The Council of Europe was the first international organisation to openly condemn and exert political pressure on member states where the government had been toppled by a military coup. The case of Greece represents a clear example of the international community's involvement in national governance as early as the 1960s. In April 1967, the Greek military junta overthrew the legitimate government, declared martial law, and initiated a military rule that would last until 1974.⁴⁹⁹ Only a few days after the coup, the Parliamentary Assembly of the Council of Europe declared that it deplored the coup and called on 'the Greek authorities to restore the constitutional regime and system of parliamentary democracy'.⁵⁰⁰ In June 1967, the Parliamentary Assembly adopted a Resolution whereby it reminded member states of their 'duty' to bring an inter-state action before the Strasbourg Court in accordance with the European Convention on Human Rights, and added that 'if they do not act as requested, the mechanism of collective guarantee of human rights set up by the Convention runs the risk of becoming meaningless'.⁵⁰¹ Following that request, Denmark, Norway, Sweden and the Netherlands lodged a complaint before the European Court of Human Rights against Greece in order to safeguard European democratic values.⁵⁰² When the report of the European Commission of Human Rights was transferred to the Committee of Ministers, the suspension of Greece from the Council was the main subject of debate. Before the voting of a resolution asking for the suspension of Greece, the Greek foreign Minister declared that they would withdraw from the Council.⁵⁰³ The Committee thus decided to acknowledge the withdrawal of Greece in accordance with article 7 of its Statute.⁵⁰⁴ Right in the midst of the Cold War, the Council of Europe did not abstain from ardently discussing the suspension of a member state. For the first time in its history, the Council of Europe forced a country to leave the union until it regained legitimacy by establishing the parliamentary order.

Similarly, the Council was actively involved in adopting counter-measures following the military coup that took place in Turkey in September 1980. Immediately after the overthrow of the elected government, the Council adopted a Recommendation whereby it declared that 'the assumption of power by any group of civilians or military personnel that results in the overthrow of a system of parliamentary democracy, whatever the reason alleged, is contrary to the principles on which the Council of Europe is based'.⁵⁰⁵ The following year, it decided that 'it

⁴⁹⁸ Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2012) 7.

⁴⁹⁹ Political Developments. - The Aspida Trial. - New Cabinet formed by Mr. Kanellopoulos. - Government overthrown by Militia, Greece, (1 May 1967), Keesing's Record of World Events, Vol. 13 (1967), Issue 5 (May), 22023.

⁵⁰⁰ Council of Europe, Parliamentary Assembly, (26 April 1967) Order 256 (1967).

⁵⁰¹ Council of Europe, Parliamentary Assembly, (23 June 1967) Res 346 (1967).

⁵⁰² Denmark, Norway, Sweden and the Netherlands v. Greece ('The Greek Case'), EComHR, App no 3321, 3322, 3323, 3344/67, Report of the EComHR (5 November 1969).

⁵⁰³ Council of Europe (Committee of Ministers) (12 December 1969) CM (69) PV 4, 20.

⁵⁰⁴ Council of Europe (Committee of Ministers) (12 December 1969) Res (69) 51.

⁵⁰⁵ Council of Europe (Parliamentary Assembly) (1 October 1980) Recommendation 904 (1980).

would be out of order to envisage the prolongation of the term of office of the Turkish parliamentary delegation to the Council of Europe' and did not prolong the term of the Turkish delegation, which was not the legitimate representative of the member state.⁵⁰⁶ In that regard, the Council had openly applied a test of legitimacy for a member's representatives instead of effective control. Later on, the Parliamentary Assembly called on member states to take action against Turkey before the European Court of Human Rights.⁵⁰⁷ Contrary to its stance in the Greek case, regarding the military coup in Turkey, the Council preferred not to proceed with suspension but to use its political pressure upon the country in order to enable the return to democracy. Although regional practices, the reaction of the Council of Europe to the military coups in Greece and Turkey shows that unconstitutional changes of government were not an issue completely alien to international actors in the 1960s or 1980s.

While the Council of Europe is the only international organisation to adopt collective measures against the overthrow of an elected government by a military coup during the Cold War era, states have likewise reacted unilaterally to military takeovers. When a military coup took place in Argentina in 1966, on the same day the US declared that it regretted 'the break in continuity of democratic constitutional government' and it suspended the financial aid provided to the country.⁵⁰⁸ During a meeting at the Council of the Organization of American States, Venezuela condemned the unconstitutional governmental change and qualified the event as 'as a blow against representative democracy'.⁵⁰⁹ In line with Venezuela, Colombia as well refused to recognise the military government.⁵¹⁰ In the case of Chile, when Pinochet ousted Allende from power in 1973, Denmark, Sweden, the Netherlands, Belgium and the German Federal Government suspended their financial aid as a reaction to the military takeover.⁵¹¹ Moreover, the Soviet Union, the German Democratic Republic, Bulgaria and Romania suspended diplomatic relations with the military junta.⁵¹² These reactions demonstrate that during the Cold War era, states did take action against governmental changes which they deemed did not entirely pertain to the internal affairs of a state.

5.2. International Practice after the Cold War

Following the writings of Thomas Franck and Gregory Fox, the 1990s and 2000s witnessed the heyday of democratic governance discourses and several scholars were occupied with demonstrating how the international practice was moving towards the acceptance of

⁵⁰⁶ Council of Europe (Parliamentary Assembly) (14 May 1981) Order 398 (1981).

⁵⁰⁷ Council of Europe (Parliamentary Assembly) (22 January 1982) Res 765 (1982). France, Denmark, Norway, Sweden and the Netherlands brought a case against Turkey before the EComHR which ended in friendly settlement: France, Denmark, Norway, Sweden and the Netherlands v. Turkey, EComHR, 9940-9944/82 (7 December 1985).

⁵⁰⁸ General Onganía becomes President. - The Statute of the Argentine Revolution. - Abolition of Congress, (1 November 1966), Keesing's Record of World Events, Vol. 12 (1966), Issue 11 (November) 21707.

⁵⁰⁹ *ibid.*

⁵¹⁰ *ibid.*

⁵¹¹ Military Junta Assumes Power, (1 October 1973), Keesing's Record of World Events, Vol. 19 (1973), Issue 10, 26151.

⁵¹² *ibid.*

democratic formation of a government as an enforceable rule. Although there were scholars who voiced caveats to the ideological victory of liberal democracy,⁵¹³ at the time, there was an accelerating trend to investigate the practices that formed part of this argument. Democratic governance scholars considered the consolidation of democratic rule as a one-way journey. According to the proponents of these discourses, the agnosticism of the Cold War era with regard to democracy was shaken by the fall of communist regimes and the practice of the post-Cold War era was indicative of the growing interest in the democratic formation of governments. This growing interest, however, was envisaged as the only possible future for international law and it was expected that an emerging right to democratic governance would sooner or later crystallise to become a full-fledged right. In order to construct a persuasive and coherent argument, relevant events for democratic governance were carefully selected to represent the stark difference of practice between the Cold War and the post-Cold war era. As highlighted above, the period before the end of the Cold War was not totally agnostic to undemocratic practices and it will be shown in this section that the post-Cold War era is far from presenting a coherent collection of events supporting an emerging right to democratic governance. The first part will examine the claims on a possible democratic recession that scholars have been discussing in the last decade and the second part will explain how the cases of Egypt, Zimbabwe and Venezuela can be used to create a narrative that upholds a return to *realpolitik* in international law with regard to undemocratic changes of government.

5.2.1. Claims on a Possible Democratic Recession

The narrators of democratic governance discourses presumed that the future of international law was predictable and that we were steadily moving towards an era where only democracy could validate governance. However, the hopeful atmosphere that scholars created in the early 1990s for a liberal democratic future has been overshadowed by claims of a global recession in democratic rule. Recent years have been marked by a possible backsliding in the protection of democratic values and the current practice is far from consolidating an emerging right to democratic governance. In that sense, the way democratic governance discourses used periodisation to create two periods where the former period represents an era where international law was agnostic to the way in which a government comes into being and a latter period where democracy is increasingly gaining a normative power was a simplistic way of depicting the status of international affairs. A common understanding among democratic governance scholars was that once a state was holding elections, this would be followed by the consolidation of democratic rule since all other ideologies had already died out. Nevertheless, the belief that democracy was 'the only game in town' has been severely undermined by recent practice.⁵¹⁴ The uncontested nature of liberal democracy as the only

⁵¹³ David Held and Anthony McGrew, 'Globalization and the Liberal Democratic State' (1993) 28 *Government and opposition* 261, Fareed Zakaria, 'The Rise of Illiberal Democracy' (1997) 76 *Foreign Affairs* 22, Marks, *The Riddle of All Constitutions* (n 36).

⁵¹⁴ Juan Linz and Alfred Stepan, 'Toward Consolidated Democracies' (1996) 7 *Journal of Democracy* 14, 15.

viable governmental form that was promoted in the early post-Cold War era can now be qualified as the pipe dream of democracy triumphalism.

If the relationship of democracy with international law can be grouped under two pillars, one being the procedural approach, which focuses on the holding of free and fair elections, and the other one being the substantial approach, which concentrates on the realisation of all other fundamental rights for a democratic rule, democratic governance discourses have mainly been preoccupied with the former. The argument on an emerging right to democracy has mainly relied on a procedural approach which emphasised the increasing expectation in the international community that a government validates its rule by free and fair elections.⁵¹⁵ Scholars' focus on elections can be explained via two points. First, a right to democratic governance which requires that a government comes into being through free and fair elections, provides a simple normative content which can easily be monitored by states and international organisations. In that sense, a new right on democracy which emphasises a procedural approach can be translated into an international law framework in a more efficient way than a substantial approach which requires a more demanding scrutiny.⁵¹⁶ Second, it can also be argued democratic governance was seen as a rational corollary of democratic elections. This led many scholars to think that if international law provides the tools to monitor the democratic formation of a government, this would become the basis upon which democratic governance could be built and flourish.

Democratic governance scholars concentrated their attention on the holding of free and fair elections that was regarded to be the premise of democratic rule. Nevertheless, recent practice proved that examining procedural and substantive democracy separately, where the former pertains to the right to free and fair elections and the latter to the protection of fundamental rights, does not provide an efficient method. The current discussions on global democratic decline show that democratic rule cannot only be equated to free and fair elections. One of the main threats that populist leaders pose against liberal democracies is not that they directly undermine the holding of free and fair elections. On the contrary, most of the leaders that are claimed to support a populist regime are elected through free and fair elections in states which are considered democratic. However, once in power, these leaders attack the rule of law and the protection of fundamental rights which eventually have a detrimental impact on the conditions for holding free and fair elections.⁵¹⁷ The narrowing scope of the freedom of speech, censorship on media outlets and marginalisation of the opposition groups do a severe disservice to the electoral process.⁵¹⁸ Indeed, populist leaders use the benefits of an electoral

⁵¹⁵ David Ricci, 'Democracy Attenuated: Schumpeter, the Process Theory, and American Democratic Thought' (1970) 32 *The Journal of Politics* 239. For a criticism of scholars' emphasis on a procedural understanding of democracy, see Marks, *The Riddle of All Constitutions* (n 36) 50-75.

⁵¹⁶ Richard Burchill, 'The Developing International Law of Democracy' (2001) 64 *The Modern Law Review* 123, 125.

⁵¹⁷ Yascha Mounk, 'The Undemocratic Dilemma' (2018) 29 *Journal of Democracy* 98, 99.

⁵¹⁸ William Case 'Democracy and Democratic Change' in Mark Beeson and Nick Bisley (eds), *Issues in 21st Century World Politics* (Palgrave Macmillan 2013) 245, David Waldner and Ellen Lust, 'Unwelcome Change: Coming to Terms

democracy in order to gain power and then start eroding the liberal democratic order by amending existing law, a common phenomenon among authoritarian rulers that scholars call 'autocratic legalism'⁵¹⁹ or 'constitutional capture'.⁵²⁰ Therefore, the current democratic backsliding relies heavily on leaders' dismissal of the rule of law once they gain power through democratic elections and the transformation of the liberal system into majoritarian rule.⁵²¹

The failure of democracy to fulfil its promises,⁵²² increasing distrust in elections' power to represent the popular will⁵²³ and the decline in electoral turnouts⁵²⁴ are only some of the issues scholars have been tackling in the scholarship regarding the deterioration of democratic rule in recent years. Statistics show that since 2005 the protection of civil and political rights has been constantly in decline.⁵²⁵ Larry Diamond stated that the number of electoral democracies expanded between 1975 and 2006 but this has been followed by a period of standstill.⁵²⁶ He cited three main reasons regarding the stagnation in the number of electoral democracies and also the deterioration of good governance.⁵²⁷ First, the democratic formation of a government through free and fair elections has been interrupted by military coups, electoral fraud, violation of opposition rights or executive abuses at an increasing rate since 1994.⁵²⁸ While the rate of democratic breakdown was decreasing between 1974 and 1994, it has started to climb since then.⁵²⁹ Apart from the growing number of failures in electoral democracies, the quality of democracy in developing states witnessed considerable decline since 2005 according to Freedom House surveys.⁵³⁰ He noted that when the Freedom House data of 2005 and 2013 are compared there is a stark decline in terms of the protection of political and civil rights and that especially third wave democracies in Africa appear to be more fragile than expected where transparency and the rule of law have considerably declined.⁵³¹ Third, the rise of authoritarianism, not only in Russia, China, Venezuela, most of the post-Arab Spring states, but also in Western states contributed to a great extent to the claims on democratic recession, scholars have been discussing in the last decade.⁵³²

with Democratic Backsliding' (2018) 21 Annual Review of Political Science 93, 95, Abramowitz and Repucci, 'Democracy Beleaguered' (n 1) 135.

⁵¹⁹ Kim Lane Scheppele, 'Autocratic Legalism' (2018) 85 University of Chicago Law Review 545.

⁵²⁰ Jan-Werner Müller, Rising to the Challenge of Constitutional Capture (Eurozine, 21 March 2014), <www.eurozine.com/rising-to-the-challenge-of-constitutional-capture/> accessed 22 August 2019.

⁵²¹ Tom Ginsburg, Aziz Huq and Mila Versteeg, 'The Coming Demise of Liberal Constitutionalism' (2018) 85 University of Chicago Law Review 239, 244.

⁵²² Jason Brennan, *Against Democracy* (Princeton University Press 2016), Christopher Achen and Larry Bartels, *Democracy for Realists* (Princeton University Press 2016).

⁵²³ David van Reybrouck, *Against Elections: The Case for Democracy* (Penguin 2016).

⁵²⁴ Peter Mair, *Ruling the Void: The Hollowing of Western Democracy* (Verso 2013).

⁵²⁵ Freedom House, 'Freedom in the World 2018: Democracy in Crisis', <<https://freedomhouse.org/report/freedom-world/freedom-world-2018>> accessed 22 August 2019.

⁵²⁶ Diamond, 'Facing up to the Democratic Recession' (n 3) 141-42.

⁵²⁷ *ibid* 144.

⁵²⁸ *ibid* 144-47.

⁵²⁹ *ibid* 144.

⁵³⁰ *ibid* 147-48. For the decline in the protection of human rights see also Makau Mutua, 'Is the Age of Human Rights Over?', in Sophia McClennen and Alexandra Schultheis Moore (eds), *Routledge Companion to Literature and Human Rights* (Routledge 2016) 450-58, Heike Krieger and Georg Nolte, The International Rule of Law - Rise or Decline? Points of Departure (KFG Working Paper Series, No. 1, 2016) <<https://papers.ssrn.com/sol3/Papers.cfm?abstractid=2866940>> accessed 22 August 2019, Ingrid Wuerth, 'International Law in the Post-Human Rights Era' (2017) 96 Texas Law Review 279.

⁵³¹ Larry Diamond, 'Facing up to the Democratic Recession' (n 3) 148.

⁵³² *ibid* 151-53.

Steven Levitsky and Lucan Way had a different take on the recent discussion regarding democratic backsliding and explained the current mood of despair by an unrealistic vision of a post-Cold War democratic heyday which was problematic in the first place:

Perceptions of a democratic recession (...) are rooted in a flawed understanding of events of the early 1990s. The excessive optimism and voluntarism that pervaded analyses of early post-Cold War transitions generated unrealistic expectations that, when not realized, gave rise to exaggerated pessimism and gloom.⁵³³

Instead of qualifying the 1990s as the era of democratic victory and the last decade as the doomsday for democracy, they argued that scholars should come to terms with the flawed image they painted after the end of the Cold War and rather than a decline, the current state of democratic rule should rather be interpreted as a period of stability.⁵³⁴ They stated that there were two main reasons why there was an unrealistic optimism about democratic governance in the 1990s. First, scholars were too quick to conclude that the breakdown of authoritarian regimes or dictatorships would pave the way for a democratic rule.⁵³⁵ In practice, there was no empirical data suggesting that a governmental breakdown of an authoritarian regime would be followed by democracy.⁵³⁶ Second, following the fall of the Berlin Wall and the demise of the Soviet Union, democracy seemed to be the only viable form of governance and therefore, there was an unfounded expectation that authoritarian regimes in transition would eventually become democracies.⁵³⁷ This, however, was proved wrong since most of the weak or unstable authoritarian regimes, rather than transitioning into a more democratic rule, solidified their grip over power.⁵³⁸ As a result, they concluded that the triumphant atmosphere that scholars created about democracy in the aftermath of the Cold War was illusory.

This is further exemplified in a research analysing whether there has been a significant decline in the number of military coups in Africa following the end of the Cold War. Statistical research demonstrates that the frequency of military coups does not flag up a turning point at the end of the Cold War. When the military coups that took place in Africa between 1950 and 2014 are examined, the most significant decline in the number of military coups did not occur at the end of the Cold War; indeed, the meaningful shift came about when the African Union adopted a comprehensive framework to prevent and apply sanctions against military coups.⁵³⁹ When the coup rate during the Cold War and 1990-2001 period (until the establishment of the AU) is compared, there is no meaningful shift in coup numbers. Yet, the analysis reveals an important shift when the period 1990-2001 is compared with the years following the entry into force of the Constitutive Act of the AU. This demonstrates that the succession of the Organization of

⁵³³ Steven Levitsky and Lucan Way, 'The Myth of Democratic Recession' (2015) 26 *Journal of Democracy* 45, 45-46.

⁵³⁴ *ibid* 46.

⁵³⁵ *ibid* 49.

⁵³⁶ *ibid*.

⁵³⁷ *ibid*.

⁵³⁸ *ibid* 52.

⁵³⁹ Jonathan Powell and others, 'Combating Coup D'Etat in Africa, 1950-2014', doi: 10.1007/s12116-015-9210-6, 3.

African Unity by the AU has affected the frequency of coups more than the end of the Cold War.⁵⁴⁰ The research 'provides strong evidence that international norms are most likely to be respected when they are clearly codified by the prevailing regional body'.⁵⁴¹ The statistical data demonstrates that the end of the Cold War does not represent a meaningful reference point in history when it comes to unconstitutional changes of government in Africa. This shows that trying to nail down the emergence of a right to democratic governance to the end of the Cold War creates a Eurocentric narrative which does not provide an accurate image of international practice.⁵⁴²

5.2.2. Return to *Realpolitik*

Recent practice provides sufficient data that can be used to build a narrative against the consolidation of a right that requires states to validate their governance through elections. It can be argued that rather than the origin of governments, international actors pay closer attention to the way in which governmental power is exercised. Indeed, this is an argument put forward by Jean d'Aspremont who argued that in light of recent practice, it is the legitimacy of exercise rather than the legitimacy of origin that gained prominence and that states' diplomatic relations have not been severely hindered due to undemocratic changes of governments.⁵⁴³ This is further illustrated in the recent cases of Egypt, Zimbabwe and Venezuela where the international community has been more concerned with the establishment of a government that would be amenable to good governance and disregarded attacks against an elected government. This sub-section will detail these three cases in order to demonstrate that the post-Cold War practice does not present a coherent set of events that would strengthen the emergence of a right to democratic governance. This section demonstrates that the use of the end of the Cold War as a watershed moment with regard to the neutrality of international law is a narrative construction that can be challenged by cases where international actors paid closer attention to the legitimacy of exercise, rather than legitimacy of origin.

Egypt

Despite the growing importance attached to the right to free and fair elections in the international community, a very recent case demonstrates that the nullification of democratic elections can still be overlooked and that the normative concerns about the democratic formation of a government can be overridden by political interests. When a military coup took place in Egypt in June 2013, the reaction of the international community to the overthrow of the elected government was highly controversial. After a one-man rule of 30 years, Mubarak

⁵⁴⁰ *ibid* 5.

⁵⁴¹ *ibid* 17.

⁵⁴² On the use of Cold War as a Eurocentric turning point see Lesaffer, 'The End of the Cold War: An Epochal Event in the History of International Law?' (n 466).

⁵⁴³ d'Aspremont, 'The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks' (n 339).

stepped down from office in 2011 and in June 2012, Morsi swore in as the first democratically elected president of Egypt. His government attracted a great deal of opposition and only one year after he took office, on 3 July 2013, Sisi, the commander-in-chief of the Egyptian army, overthrew the elected government in a military coup.⁵⁴⁴ Although the military assumed power and unseated a democratically elected president, this move was not qualified as a coup by all states and international organisations. Egyptian military officials called their act a 'popular revolution'.⁵⁴⁵ Others designated it as a 'democratic (popular) coup',⁵⁴⁶ 'popular impeachment'⁵⁴⁷ and 'soft coup'.⁵⁴⁸ In many of these cases, the reason for the coup not being dubbed a coup was grounded in the fact that the Egyptian people had backed the ousting of Morsi and that the army had popular support.

At the same time, the reaction of the international community was mixed. Immediately following the coup, the US president declared that he was 'deeply concerned by the decision of the Egyptian Armed Forces to remove President Morsi and suspend the Egyptian Constitution'.⁵⁴⁹ It was clear from that statement that the US did not want to qualify the incident as a military coup.⁵⁵⁰ Indeed, it was not only the US but also the EU that had an ambivalent approach to the coup. On the day following the coup, the European Parliament adopted a resolution and affirmed 'its deep concern at the situation in Egypt following the military intervention' and stressed that 'power should be transferred to democratically-elected civilian authorities as soon as possible'.⁵⁵¹ On 14 July 2013, the High Representative of the European Union for Foreign Affairs and Security Policy and the Vice President of the Commission declared that 'The EU is following the recent developments in Egypt with deep concern. The military must accept and respect the constitutional authority of the civilian power as a basic principle of democratic governance'.⁵⁵² The Foreign Affairs Council reiterated a similar stance in their July meeting.⁵⁵³ Although it declared that 'the armed forces should not play a political role in a democracy',⁵⁵⁴ it avoided use of the term 'coup'. At the UN level, the Security Council was silent on the subject. Neither a presidential statement was issued, nor a resolution

⁵⁴⁴ 'Mohamed Morsi Ousted in Egypt's Second Revolution in Two Years' *The Guardian* (London, 4 July 2013) <www.theguardian.com/world/2013/jul/03/mohamed-morsi-egypt-second-revolution> accessed 22 August 2019.

⁵⁴⁵ African Union (Peace and Security Council) Final Report of the African Union High-Level Panel For Egypt (17 June 2014) PSC/AHG/4.(CDXVI).

⁵⁴⁶ Mohamed Arafa, 'Whither Egypt? Against Religious Fascism and Legal Authoritarianism: Pure Revolution, Popular Coup, or a Military Coup D'État?' (2014) 24 *Indiana International & Comparative Law Review* 877.

⁵⁴⁷ *ibid.*

⁵⁴⁸ Michael O'Hanlon and Tamara Wittes, 'A Popular Impeachment in Egypt: Column' *USA Today* (Virginia, 4 July 2013) <www.usatoday.com/story/opinion/2013/07/04/michael-ohanlon-and-tamara-wittes-on-what-next-in-egypt/2489419/> accessed 22 August 2019.

⁵⁴⁹ David Kirkpatrick, 'Army Ousts Egypt's President; Morsi Is Taken into Military Custody' *The New York Times* (New York City, 3 July 2013) <<http://www.nytimes.com/2013/07/04/world/middle-east/egypt.html>> accessed 22 August 2019.

⁵⁵⁰ Regarding the reasons why the US did not call the ouster of Morsi a coup, see Peter Baker, 'A Coup? Or Something Else? \$1.5 Billion in U.S. Aid Is on the Line' *The New York Times* (New York City, 4 July 2013) <www.nytimes.com/2013/07/05/world/middleeast/egypts-arrests-of-islamists-pose-test-to-us-over-military-aid.html> accessed 22 August 2019, Sahar Aziz, 'U.S. Foreign Aid and Morsi's Ouster' (Middle East Institute, 31 July 2013) <www.mei.edu/content/us-foreign-aid-and-morsis-ouster> accessed 22 August 2019.

⁵⁵¹ European Union (the European Parliament) Situation in Egypt (4 July 2013) Res 2013/2697(RSP).

⁵⁵² European Union, 'Declaration by the High Representative Catherine Ashton, on behalf of the European Union on the Situation in Egypt' (14 July 2013) 12306/1/13 REV 1.

⁵⁵³ European Union (the Council of the European Union) (22 July 2013) 12584/13.

⁵⁵⁴ *ibid.* 20.

adopted. However, when the meeting records of the General Assembly are examined, it is possible to remark that a great majority of states which referred to the situation in Egypt avoided use of the term 'coup'.⁵⁵⁵ Moreover, in October 2015, Egypt was elected by the General Assembly as one of the ten non-permanent members of the Security Council.⁵⁵⁶ The most unequivocal response came from the African Union which, by the decision of the Peace and Security Council, suspended the participation of Egypt in the Union's activities in accordance with article 30 of its Constitutive Act.⁵⁵⁷ The Council stated that 'the overthrow of the democratically elected President does not conform to the relevant provisions of the Egyptian Constitution and, therefore, falls under the definition of an unconstitutional change of Government'.⁵⁵⁸

In May 2014, with a 47.5% turnout, Sisi was elected the president of Egypt by securing 97% of the vote.⁵⁵⁹ However, the participation of Sisi in elections was contrary to the Assembly decision AU/Dec.269(XIV) Rev.1 which declares that coup perpetrators must not run for elections.⁵⁶⁰ The Charter on Democracy, Elections and Governance as well reiterates in article 25 (4) the same prohibition but it should be noted that Egypt is not a party to the Charter.⁵⁶¹ In that regard, holding elections was not sufficient for Sisi to legitimise his rule. Nonetheless, when he was elected as the new president of Egypt, in June 2014, the AU's High-Level Panel on Egypt, which was established after the coup,⁵⁶² recommended to the PSC that the suspension be lifted:

Considering (a) the progress made in the formal restoration of constitutional order, (b) the fact that the suspension of the country for close to a year has sent a strong message to the Egyptian stakeholders regarding AU's attachment to its principles and instruments, and (c) the need for the AU to remain engaged with Egypt and to accompany the efforts of the Egyptian authorities for the full implementation of the Roadmap.⁵⁶³

⁵⁵⁵ See UNGA, 5th Plenary Meeting (24 September 2013) UN Doc A/68/PV.5, UNGA, 13th Plenary Meeting, (26 September 2013) UN Doc A/68/PV.13, UNGA, 12th Plenary Meeting (26 September 2013) UN Doc A/68/PV.12, UNGA, 14th Plenary Meeting (26 September 2013) UN Doc A/68/PV.14, UNGA, 15th Plenary Meeting (27 September 2013) UN Doc A/68/PV.15, UNGA, 18th Plenary Meeting (28 September 2013) UN Doc A/68/PV.18, UNGA, 20th Plenary Meeting, (28 September 2013) UN Doc A/68/PV.20, UNGA, 19th Plenary Meeting (28 September 2013) UN Doc A/68/PV.19, UNGA, 21st Plenary Meeting (30 September 2013) UN Doc A/68/PV.21, UNGA, 22nd Plenary Meeting (30 September 2013) UN Doc A/68/PV.22.

⁵⁵⁶ UNGA, 33rd Plenary Meeting (15 October 2015) UN Doc A/70/PV.33.

⁵⁵⁷ African Union (The Peace and Security Council) 384th Meeting (5 July 2013) PSC/PR/COMM.(CCCLXXXIV).

⁵⁵⁸ *ibid.*

⁵⁵⁹ Presidential Election, (1 May 2014), Keesing's Record of World Events, Vol. 60 (2014), Issue 5 (May), 53383.

⁵⁶⁰ African Union (Assembly of the African Union) Decision on the Prevention of Unconstitutional Changes of Government and Strengthening the Capacity of the African Union to Manage Such Situations, Doc. Assembly/AU/4(XVI) (31 January – 2 February 2010) Assembly/AU/Dec.269(XIV) Rev.1.

⁵⁶¹ African Charter on Democracy, Elections and Governance (adopted 30 January 2007, entered into force 15 February 2012) Assembly/AU/Dec. 147 (VIII) art 25.

⁵⁶² African Union (The Peace and Security Council) 384th Meeting (5 July 2013) PSC/PR/COMM.(CCCLXXXIV).

⁵⁶³ African Union (The Peace and Security Council) 442nd Meeting (17 June 2014) PSC/AHG/4.(CDXVI).

In accordance with the findings of the High-Level Panel, the PSC lifted the suspension of Egypt's participation in the Union's activities.⁵⁶⁴ This was followed by the participation of the Egyptian delegation, together with President Sisi, in the AU's 23rd summit in Equatorial Guinea the same month.⁵⁶⁵ The lifting of Egypt's suspension in relation to the AU's activities marks a defining moment for AU's practice regarding unconstitutional changes of government. Except in the cases of Tunisia, Egypt and Libya during the Arab Spring until the 2014 military coup in Egypt, the AU consistently implemented its mechanism set up against unconstitutional changes of government and maintained its policy of suspending members where an elected government had been overthrown by a military coup, as it can be observed in the cases of Togo,⁵⁶⁶ Guinea,⁵⁶⁷ Madagascar⁵⁶⁸ and Niger.⁵⁶⁹ Although the participation of Sisi in elections was contrary to the Assembly decision AU/Dec.269(XIV) Rev.1 and the Charter on Democracy, Elections and Governance, due to the international support that his government received, the AU could not persist following its traditional policy and lifted the suspension. This created a fracture in AU's consistent policy towards unconstitutional changes of government. It further demonstrates that international actors are ready to disregard an unconstitutional governmental change if the new government seems to be in favour of a more democratic government.

Zimbabwe

The resignation of Mugabe represents another instance where several states and the AU disregarded the overthrow of an elected government. On 15 November 2017, following a rule of 37 years since the independence of Zimbabwe, President Mugabe was placed under house arrest by the army. Mugabe resisted stepping down for a week but then finally resigned on 21 November when the Parliament initiated impeachment proceedings. Mnangagwa, the former Vice-President, who was fired by Mugabe only a week before the military intervention, was sworn in as president on 24 November, and the military granted Mugabe immunity from prosecution. When Mugabe stepped down, the Chairperson of the AU Commission declared that they 'welcomed' the resignation and clearly did not qualify the event as a military coup.⁵⁷⁰ Indeed, the declaration referred to the events as the legitimate expression of the will of the people:

⁵⁶⁴ *ibid.*

⁵⁶⁵ African Union, Statement of the Chairperson of the African Union Commission, Dr. Nkosazana Dlamini Zuma to the 25th Ordinary Session of the Executive Council, (23-24 June 2014) <https://au.int/sites/default/files/speeches/25392-sp-ec_28th_session_welcome_ndz_statement_malabo_23_june_2014_final.pdf> accessed 22 August 2019.

⁵⁶⁶ African Union (The Peace and Security Council) 25th Meeting (25 February 2005) PSC/PR/Comm. (XXV).

⁵⁶⁷ African Union (The Peace and Security Council) 165th Meeting (29 December 2008) PSC/PR/Comm (CLXV).

⁵⁶⁸ African Union (The Peace and Security Council) 181st Meeting (20 March 2009) PSC/PR/COMM.(CLXXXI).

⁵⁶⁹ African Union (The Peace and Security Council) 216th Meeting (19 February 2010) PSC/PR/COMM.2(CCXVI).

⁵⁷⁰ African Union, Statement of the Chairperson of the Commission of the African Union on the Situation in Zimbabwe (21 November 2017), <www.peaceau.org/uploads/auc-statement-zimbabwe-21nov2017english.pdf> accessed 22 August 2019.

The African Union recognizes that the Zimbabwean people have expressed their will that there should be a peaceful transfer of power in a manner that secures the democratic future of their country. President Mugabe's decision to resign paves the way for a transition process, owned and led by the sovereign people of Zimbabwe.⁵⁷¹

In contrast with its previous practice, the AU preferred to refer to the will of the people, rather than underlining the role of the military regarding the resignation of the elected president.

The recent case of Zimbabwe is not the first time that the AU was confronted with a situation where a ruler who is notorious for his authoritarian politics has been overthrown by the military. In 1992, Taya became the first democratically elected president of Mauritania. He was elected again in the 1997 and 2003 elections. Nonetheless, opposition groups questioned the credibility of the elections and measures were subsequently taken by the government to silence anti-government critics. In August 2005, the military overthrew Taya's government.⁵⁷² On the day following the coup, the AU condemned the unconstitutional change of government and suspended membership of the country from the organisation.⁵⁷³ The AU lifted the suspension only after the holding of parliamentary and presidential elections. A similar approach was adopted by the AU in Niger. Tnadjia became the president initially in 1999 and then again in 2004 for a second term. After constitutional amendments that strengthened Tnadjia's grip over power, in 2010, the military overthrew Tnadjia from power. The AU was swift to condemn the coup and suspended the state from the organisation's activities.⁵⁷⁴ The AU lifted the suspension only when elections were held, and the constitutional order was restored. As discussed above, in 2013, the response of the AU was the same when the military overthrew Morsi in Egypt and it suspended the country from the organisation despite the abstention of many states, including the US and EU countries, to call the event a military coup.⁵⁷⁵ As it can be observed in these cases, the AU applied the suspension mechanism regardless of the prospective advantages of the coups and did not discuss whether the coup could be instrumental for the acceleration of the democratisation process.

However, the case of Zimbabwe presents a rupture in the AU's approach. The Zimbabwe episode demonstrates that the AU is changing its policy towards unconstitutional changes of government as regards the overthrown of established authoritarian regimes. It did not adopt the same approach it had followed in many other cases, because the target of the military takeover was a long-standing president notorious for his authoritarian rule. The approach of

⁵⁷¹ African Union, Statement of the Chairperson of the Commission of the African Union on the Situation in Zimbabwe (21 November 2017), <www.peaceau.org/uploads/auc-statement-zimbabwe-21nov2017english.pdf> accessed 22 August 2019.

⁵⁷² Mauritania, (1 August 2005), Keesing's Record of World Events, Vol. 51 (2005), Issue 12 (December) 46766.

⁵⁷³ African Union (Peace and Security Council) Statement Of the 36th Meeting, (4 August 2005) PSC/PR/Stat.(XXXVI)–(ii).

⁵⁷⁴ African Union (Peace and Security Council) Statement Of the 216th Meeting, (19 February 2010) PSC/PR/Comm.2(CCXVI).

⁵⁷⁵ African Union (Peace and Security Council) 384th Meeting (5 July 2013) PSC/PR/COMM.(CCCLXXXIV).

AU was echoed in several other states including the UK, US, France and China who welcomed the transition process that seemed to promise a more democratic rule.⁵⁷⁶ The AU and many other international actors regarded the event as an opportunity for the establishment of a more democratic rule in the country. This approach suggests that some coups might be more democracy-promising than others and eventually be tolerated for its potentially beneficial outcomes. Therefore, Zimbabwe represents a significant case where the international community rather than condemning, tolerated or even welcomed, a military coup.

Venezuela

The political quagmire between Maduro and Guaidó represents another case where rather than elections, legitimacy of a government to exercise power was emphasised by international actors. On 23 January 2019 Guaidó, the president of the National Assembly, declared himself president and claimed to be the legitimate representative of Venezuela. This has generated an important debate on recognition since Maduro was relying on the 20 May 2018 election results for the legitimacy of his government. Following Guaidó's attempt to assume power, first US⁵⁷⁷ then Canada,⁵⁷⁸ Brazil and Colombia declared that they recognised Guaidó as the new interim President of Venezuela.⁵⁷⁹ On 26 January 2019, at a Security Council meeting, the UK, Germany, France and Belgium declared that unless Maduro consented to hold new elections in eight days, they would recognise Guaidó as the interim president.⁵⁸⁰ The same day, the High Representative of the EU issued a declaration on behalf of all member states that urged Venezuela to hold new elections.⁵⁸¹ At the time, the OAS had already adopted a Resolution not to recognise Maduro as the legitimate representative of Venezuela.⁵⁸² Following the eight-day deadline, the UK, Germany, France, Spain, Sweden and Denmark have recognised Guaidó as the interim president of Venezuela.⁵⁸³ As of June 2019, more than 50 states recognise Guaidó as the interim president.⁵⁸⁴

⁵⁷⁶ Africa Portal, Robert Mugabe Resigns: Reaction from around the World (22 November 2017) <www.africaportal.org/features/robert-mugabe-resigns-reactions-around-world/> accessed 22 August 2019, Reuters, France Welcomes Mugabe's Decision to Resign (21 November 2017) <<https://uk.reuters.com/article/uk-zimbabwe-politics-france/france-welcomes-mugabes-decision-to-resign-idUKKBN1DL2LP>> accessed 22 August 2019.

⁵⁷⁷ US Department of State, Recognition of Juan Guaido as Venezuela's Interim President (23 January 2019) <www.state.gov/secretary/remarks/2019/01/288542.htm> accessed 22 August 2019.

⁵⁷⁸ Government of Canada, Canada recognizes the interim President of Venezuela (23 January 2019) <www.canada.ca/en/global-affairs/news/2019/01/canada-recognizes-the-interim-president-of-venezuela.html> accessed 22 August 2019.

⁵⁷⁹ BBC, Venezuela Crisis: What now for Maduro and his Allies? (24 January 2019) <www.bbc.co.uk/news/world-latin-america-46991976> accessed 22 August 2019.

⁵⁸⁰ UNSC UN Doc. S/PV.8452 (26 January 2019).

⁵⁸¹ EU, Council of the EU, Declaration by the High Representative on behalf of the EU on the situation in Venezuela, Press Release 43/19 (26 January 2019).

⁵⁸² OAS, Permanent Council, OEA/Ser.G, CP/RES.1117 (2200/19) Resolution on the Situation in Venezuela (10 January 2019).

⁵⁸³ Guardian, EU Countries Recognise Juan Guaidó as Interim Venezuelan Leader (4 February 2019) <www.theguardian.com/world/2019/feb/04/juan-guaido-interim-venezuela-leader-europe> accessed 22 August 2019.

⁵⁸⁴ BBC, 'Canada Suspends Operations at its Venezuela Embassy', 3 June 2019 <www.bbc.co.uk/news/world-latin-america-48496542?intlink_from_url=https://www.bbc.co.uk/news/topics/cg41ylwvwgxt/venezuela&link_location=live-reporting-story> accessed 22 August 2019.

The duality of government in Venezuela represents an intricate case with regard to international practice on recognition.⁵⁸⁵ First, it should be noted that the fraud allegations surrounding the 20 May 2018 elections is one of the reasons for some states' readiness to recognise Guaidó as the interim president.⁵⁸⁶ In that sense, although Maduro emerged as the winner of May elections, in the eyes of OAS and several EU states, the high probability of electoral fraud was a major concern regarding Maduro's governmental legitimacy. However, the involvement of international actors to recognise a self-declared president as the representative of a state still represents an important practice. When Guaidó proclaimed himself president, although some clashes were taking place during street protests, the situation could hardly be labelled as a threat to international peace and security.⁵⁸⁷ When the declarations of states that recognised Guaidó as the legitimate representative are examined, the reason why the international community felt entitled to be involved in the duality of government in Venezuela seems to stem from Maduro's undemocratic rule. While the US called the government of Maduro a 'dictatorship',⁵⁸⁸ the UK, France and Germany emphasised for how long the Venezuelan people had been living under constant violation of fundamental rights,⁵⁸⁹ and the OAS specifically referred to the situation as a 'humanitarian crisis'.⁵⁹⁰ Apart from a few states' support for Maduro, including Russia, China, Cuba and Turkey, an important part of the international community welcomed a transition process to democracy that would be led by Guaidó.⁵⁹¹ Taking into account that this reaction came not after the elections or the inauguration of Maduro but only after Guaidó declared himself president and the fact that the OAS, EU and other states emphasised the undemocratic rule of Maduro in their statements provide strong indications about a shift towards the prominence of legitimacy of exercise in international practice.

The main argument of democratic governance discourses assumed that in an increasing manner, international law would be involved in bestowing legitimacy to national governance through the right to free and fair elections. The emphasis was on a procedural understanding

⁵⁸⁵ See Ralph Janik, 'European Recognition Practice on Venezuela: The Devil in the Details' *OpinioJuris* 8 February 2019, <<https://opiniojuris.org/2019/02/08/european-recognition-practice-on-venezuela-the-devil-in-the-details/>> accessed 22 August 2019, Ralph Janik, 'Intervention (by Invitation) in Venezuela?', *OpinioJuris*, 11 February 2019, <<https://opiniojuris.org/2019/02/11/intervention-by-invitation-in-venezuela/>> accessed 22 August 2019.

⁵⁸⁶ BBC, 'Venezuela Election: Maduro Wins Second Term Amid Claims of Vote Rigging', 21 May 2018, <www.bbc.co.uk/news/world-latin-america-44187838> accessed 22 August 2019.

⁵⁸⁷ This situation turned more violent, however, in the subsequent months due to the crackdown of the government on the protests which was followed by a refugee flux to neighbouring states, see BBC, 'Venezuela Crisis: Four Millions have Fled the Country UN Says', 7 June 2019, <www.bbc.co.uk/news/world-latin-america-48559739?intlink_from_url=https://www.bbc.co.uk/news/topics/cg41ylwvwxgt/venezuela&link_location=live-reporting-story> accessed 22 August 2019.

⁵⁸⁸ US Department of State, Recognition of Juan Guaido as Venezuela's Interim President, 23 January 2019, <www.state.gov/secretary/remarks/2019/01/288542.htm> accessed 22 August 2019.

⁵⁸⁹ UNSC UN Doc. S/PV.8452 (26 January 2019).

⁵⁹⁰ OAS, Permanent Council, OEA/Ser.G, CP/RES.1117 (2200/19) Resolution on the Situation in Venezuela (10 January 2019). For the report of the UN High Commissioner of Human Rights on the human rights situation in Venezuela from January 2018 to May 2019, see UN Doc A/HRC/41/18 (5 July 2019).

⁵⁹¹ A draft resolution sponsored by the US at the Security Council asking 'for the start of a peaceful political process leading to free, fair, and credible presidential elections' was vetoed by Russia and China, see UN Doc S/2019/186 (28 February 2019). Russia proposed another Resolution expressing 'concern over the attempts to intervene in matters which are essentially within the domestic jurisdiction of the Bolivarian Republic of Venezuela, in breach of the provisions of Article 2.7 of the Charter of the United Nations' which did not reach the necessary number of affirmative votes for passage, see UN Doc S/2019/190 (28 February 2019).

of international law which challenged states' liberty with regard to political structures and required that governments represent the will of the people. Electoral democracy was the main focus as it was seen to be the premise of a democratic rule. The image that scholars created by the dichotomous framework of Cold War – post-Cold War, whereby the latter period represented an era where only democracy can validate governance, is however a narrator's endeavour to create a progress narrative. The use of a dichotomous timeline in order to construct a progress narrative does omit several events that would undermine the strength of an emerging right to democracy. The recent practice can easily be construed in a way that prioritises legitimacy of exercise rather than legitimacy of origin. The cases of Egypt, Zimbabwe and Venezuela are far from providing a holistic picture of international practice. However, they illustrate that the post-Cold War era can be interpreted in a way that does not constitute a consistent practice with regard to international actors' commitment to the democratic formation of governments. Therefore, the dichotomous timeline used in democratic governance discourses proves to be vulnerable against cases that do not support a linear narrative defending the progressive consolidation of a right to democratic governance.

5.3. Conclusion

Periodisation is a narrative exercise that helps to bring an order to the heterogeneous collection of events in history. It limits the subject being investigated by placing temporal signposts and allows to make comparisons between different periods. However, historical periods are not natural facts that already exist in the past, but they are products of the narrator that help to transmit an idea in a particular way. As a temporal element of narratives, periodisation serves two main purposes. First, periodisation allows to simplify the complex structure of comprehensible knowledge and presents it in a limited package that is easy to understand. Second, it shapes the normative content of the subject matter by creating periods which can then depict history as a progressive linear development. Discontinuities are disregarded in order to form a story where periods with similar facts follow each other to demonstrate how much we progressed over time. Therefore, when reading a text, the reader should be cautious about the limits created by the narrator and the values that these temporal limits represent.

Additionally, creating normativity through periodisation allows the narrator to separate herself from the concepts that she does not want to be associated with in the present. Setting a time shift at the end of the Cold War makes it possible to push away illiberal democracy to the Cold War era. We, living in the post-Cold War era, now have to hail the liberal revolution and we can distance ourselves from illiberal democracy by identifying it as a Cold War concept. These time shifts allow us to compartmentalise concepts in historical boxes which do not always reflect an accurate image. However, some cases of the recent practice can be narrated in a way that challenges the consolidation of an emerging right to democratic governance. The

normative aspect of periodisation is especially apparent in the way the dichotomous framework helps to reform international law: the dichotomy allows the transition of international law from one phase to another. The end of the Cold War signifies the victory of Western liberal democracy over communism, and the defeat of the Soviet Union by the US. The dichotomy also allows 'a move from an *exceptional* situation to a *normality* where the rules of civilised behaviour would come to govern international life'.⁵⁹² Therefore, choosing particular dates as turning points in history provides the narrator with the ability to shape the future of international law as she deems appropriate, necessary or ideal. Eventually, the path created by the narrator herself becomes the 'official history' of international law for the ideal future of the field. The analysis of the Cold War and post-Cold War practice demonstrates that apart from serving these pragmatic and normative purposes, the Cold War dichotomy is a simplistic and artificial narrative construction.

The dichotomous narrative is a commonly used pattern in democratic governance discourses in order to contrast the illiberal Cold War with the liberal revolution of the post-Cold War. Susan Marks stated that 'by presenting the alternatives in terms of stark oppositions, and ruling out intermediate possibilities, these writings help to sustain a highly attenuated [sic] conception of democracy'.⁵⁹³ This dichotomous framework has been accepted almost as a given by many scholars without much questioning and, as it has been shown it is not self-evident that the end of the Cold War constitutes an absolute watershed moment for the neutrality of international law toward governmental forms. Democratic governance discourses rely on a mythical turning point and the dichotomous framework used to explain the international practice is a deliberate choice of its narrators rather than a natural outcome. Instead of a break at the end of the Cold War, international law practice can equally be read as cumulative practices which harbour continuities and discontinuities at the same time. It is important to acknowledge how the temporal element of the narrative on democracy has been constructed since too much focus on historical breaking points can undermine a thorough analysis of the social and political implications of the subject being discussed.⁵⁹⁴ Indeed, it may be concluded that the Cold War and post-Cold War distinction, in relation to the legitimacy of governments, is a Western myth trying to legitimise and prove the victory of Western democracy.

This chapter has shown that the dichotomous framework, instead of providing a neutral timeline, serves particular purposes. It simplifies the multi-faceted and complicated international practice into two parts, enables the transformation of international law from one phase to another and eventually allows the narrator to dissociate from illiberalism by qualifying it as an obsolete concept. Nonetheless, even as early as the 19th century, governmental changes were subject to international agreements. The normative framework of liberal

⁵⁹² Martti Koskeniemi, 'The Lady Doth Protest Too Much': Kosovo, and the Turn to Ethics in International Law' (2002) 65 *The Modern Law Review* 159, 160.

⁵⁹³ Marks, *The Riddle of All Constitutions* (n 36) 67.

⁵⁹⁴ Ingo Hueck, 'The Discipline of the History of International Law: New Trends and Methods on the History of International Law' (2001) 3 *Journal of the History of International Law* 194, 197-98.

democracy was given considerable attention during the Cold War despite the ideological tensions of two superpowers. The post-Cold War practice, on the other hand, is far from presenting a consistent approach toward unconstitutional changes of government due to democratic recession claims and international actors' varying reactions to undemocratic changes of government. In the mainstream literature, in order to create a liberal post-Cold War, the relation of international law with regard to democracy has been stretched to two extreme poles; on the one hand we have an agnostic period which does not prescribe for democratic national governance and on the other, a liberal democratic post-Cold War where democracy has almost become a right, or will be, in a not so distant future. However, democratic principles have been developing over decades and it is not so certain whether the end of the Cold War represents a pivotal turn in this regard. Therefore, periodising international practice within a strict dichotomous framework in a way that hinders alternative readings is too restrictive and is not the only narrative that can be used to explain neutrality.



6. The Spatial Element: The Universality of Democracy

Every narrative in international law needs to indicate where the law in question will have an impact. The narrator has to construct this space and tell the reader how the subject-matter will regulate, change or affect the relations between international law actors on a particular territory. With regard to democratic governance discourses, the spatial element of the narrative is closely related to the universality of democracy as a governmental form. While scholars do not state in an express or plain manner that democracy as such is a universal value and should thus be accepted by all states, the universality of democracy as the only acceptable form of governance is implied in a much more subtle way. As has been discussed in previous chapters democratic governance discourses rely on an emerging right to democracy as part of customary international law. Since there is no treaty obligation to force states to adopt a democratic form of governance, scholars' first aim is to prove that despite the absence of a treaty obligation, the practice of international actors can be interpreted in a way that proves an emerging right on this matter. When one proves the emergence of a customary rule, it means that the rule will apply to all states except a few persistent objectors.⁵⁹⁵ In that regard, it is not hard to state that once this right is established, it will have a universal application. Therefore, the customary character of an emerging right to democracy necessarily relies on the universality of this governmental form.

In his famous article, Thomas Franck stated that:

People almost everywhere now demand that government be validated by western-style parliamentary, multiparty democratic process. Only a few, usually military or theocratic, regimes still resist the trend. Very few argue that parliamentary democracy is a western illusion and a neocolonialist trap for unwary Third World peoples.⁵⁹⁶

In parallel, Gregory Fox argued that 'treaties establish a right to political participation amongst signatory states, and evidence an emerging universal right to political participation not contingent upon treaty agreements'.⁵⁹⁷ He further explained what he meant by a 'universal right to political participation' and defended that 'The ordinary meaning of a term is presumably one which does not vary with the context of its use but which rather has acquired a universal understanding. The terminology of participatory rights has now achieved such a context.'⁵⁹⁸ According to Gregory Fox, global acceptance of political participation rights allowed to reach a consensus on what these rights mean. The same understanding is echoed by Christina Cerna who stated that although democracy is a Western idea, in the aftermath of the Cold

⁵⁹⁵ On the controversy regarding the persistent objector rule, see Jonathan Charney, 'The Persistent Objector Rule and the Development of Customary International Law' (1986) 56 BYBIL 1, Ted Stein, 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law' (1985) 26 Harvard International Law Journal 457.

⁵⁹⁶ Franck, 'The Emerging Right to Democratic Governance' (n 21) 49.

⁵⁹⁷ Fox, 'The Right to Political Participation in International Law' (n 25) 543.

⁵⁹⁸ *ibid* 588.

War, it has become a universal value.⁵⁹⁹ Similarly Jean d'Aspremont stated that following the end of the ideological dualism, 'the idea that democracy is the only acceptable type of regime has gained broad support, even monopolizing the political discourse'.⁶⁰⁰ It can be observed that supporters of an emerging right to democratic governance asserted that this right enjoyed universal application.

Martti Koskenniemi stated that 'the point of the law is to detach the particular from its particularity by linking it with narratives in which it received a generalizable meaning'.⁶⁰¹ In that sense, law inherently aspires to become general. This is even more prevalent in customary international law which is in search of international practice gaining consistency that can be accepted as legally binding with global reach. Nevertheless, not much has been said about how the identification, or in narrative terms the creation, of these customary norms construct the space where these rules will be applied. Since customary rules are binding on all states, it can be said that they enjoy universal applicability. The creation of a space which includes all members of the international community is an important exercise that has not only practical consequences and determines the borders where the narrative will have an impact but also significant theoretical dimensions. More specifically, in the case of democratic governance discourses, the claim on a universal right to democratic governance implies that all international actors have to validate their governance through free and fair elections and that this particular form of government represents the only viable political governmental structure. It can be stated that there is a common practice in Western states with regard to elections. The aim of democratic governance discourses is to universalise what is already established in one part of the world and make it enforceable globally. The exercise of creating space for these discourses aims to universalise a particular form of government which eventually will produce a progress narrative. These discourses adopt a linear approach to history whereby it is demonstrated that increasingly more and more international actors adopt the same practice which leads to the emergence of a customary norm on the subject-matter. In that sense, the concept of universality, the claim that all states should be bound by this rule, provides a progressive reading of history.

This chapter engages with the production of meaning regarding what is regarded as universal in democratic governance discourses. Sundhya Pahuja called the transformation of a value into a universal and the stabilisation of its meaning, the 'operationalisation of universality'.⁶⁰² This operationalisation of universality is discussed here from a narrative perspective and the chapter focuses on how the claim on the universality of an emerging right to democratic governance helps to build the spatial element of these discourses. First, the chapter provides a general overview of traditional approaches to universality in international law (6.1.). It then

⁵⁹⁹ Cerna, 'Universal Democracy: an International Legal Right or the Pipe Dream of the West' (n 24) 290.

⁶⁰⁰ d'Aspremont, 'Legitimacy of Governments in the Age of Democracy' (n 377) 884-85.

⁶⁰¹ Martti Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 EJIL 113, 120.

⁶⁰² Sundhya Pahuja, *Decolonising International Law: Development, Economic Growth and the Politics of Universality* (CUP 2011) 41.

explains how universality can be used in discourse as both an abstract element which does not incorporate an identifiable content and also as a hegemonic tool that allows the narrator to impose a particularity as something that should be shared by all (6.2.). This section benefits from the writings of Laclau, who focused on the impossibility of universality, and Butler, who underlined the constant hostility between universal and particular. The following section demonstrates how democratic governance discourses transformed the abstract concept of democracy into a well-defined right and tried to transfer the universality of the former to the latter (6.3.). Next, the chapter examines how universality can be used as a hegemonic tool to impose a particular as universal and how democratic governance discourses create a centre and periphery through the concept of universality to exercise control over the latter (6.4.).

6.1. Universality of International Law

The universality of international law is commonly used to refer to the application of international law as a global legal system binding on all states. Despite the existence of other legal systems developed by various civilisations, classical international law stemmed from a European legal tradition which has become the dominant legal model.⁶⁰³ Different accounts have been put forward to explain the development of international law into a universal legal system. According to Antony Anghie and Liliana Obregon, international law became universal through the imposition of European legal standards upon other states to legitimise their colonial rule.⁶⁰⁴ Arnulf Becker Lorca on the other hand argued that it is only when jurists from non-Western states have internalised the European international law tradition that it became universal and that rather than the expansion it was the appropriation of European legal tradition that played a crucial role in the universalisation of international law.⁶⁰⁵ Historically, the idea of international law's universality as a system of law can be traced back to the Roman law notion of *jus inter gentes*.⁶⁰⁶ The first theorists of the field, such as Grotius, Vattel or Wolff secularised the scholastic vision of Suarez and Vitoria, and envisaged international law as a legal system that represented neutral and universal values that should apply to every state.⁶⁰⁷ In that sense, since the very beginning, the European perspective on international law was not seeking regional application or representing some particular or domestic value, but it was supposed to

⁶⁰³ Onuma Yasuaki, 'When was the Law of International Society Born?—An Inquiry of the History of International Law from an Intercivilizational Perspective' (2000) 2 *Journal of the History of International Law* 1.

⁶⁰⁴ Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 126) 1-114, Liliana Obregón, 'Empire, Racial Capitalism and International Law: The Case of Unumitted Haiti and the Recognition Debt' (2018) 31 *Leiden JIL* 597, 597-98.

⁶⁰⁵ Arnulf Becker Lorca, 'Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation' (2010) 51 *Harvard International Law Journal* 475.

⁶⁰⁶ Gordon Sherman, 'Jus Gentium and International Law' (1918) 12 *AJIL* 56, 59-60. See also Arthur Nussbaum, 'Significance of Roman Law in the History of International Law' (1952) 100 *University of Pennsylvania Law Review* 678. Nollkaemper situated the roots of international law's universality in Christian doctrine, see André Nollkaemper, 'Universality' in Max Planck Encyclopedia of Public International Law, <<http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e1497>> accessed 22 August 2019. On the historical development of universality see also, Geoff Gordon, 'Universalism' in Jean d'Aspremont, Sahib Singh (eds), *Concept for International Law: Contributions to Disciplinary Thought* (Edward Elgar 2019).

⁶⁰⁷ Emmanuelle Jouannet, 'Universalism and Imperialism: The True-False Paradox of International Law?' (2007) 18 *EJIL* 379, 380, Iain Scobbie, 'A View of Delft: Some Thoughts about Thinking about International Law' in Malcolm Evans (ed), *International Law* (OUP 2010) 61-62.

apply to everyone regardless of their cultural or historical approach to law. The dominance of the natural law school at the time bolstered the understanding that the European international legal order was based on certain values that were common to all and hence could be applied to all.⁶⁰⁸ When the mainstream approach shifted from naturalism towards positivism, the idea that there are certain common values at the core of the international legal system did not fade away. While as a formal concept, universality alludes to the bindingness of a system of international law for all, a substantial approach emphasises the rights and obligations applicable to all states that can be considered the coded version of some common values of the international community.⁶⁰⁹ In that sense, the universality of fundamental rights stems from a 'denaturalized natural law' approach which accepts that there are certain moral values shared by humankind without necessarily reflecting a particular's view.⁶¹⁰

Bruno Simma differentiated between three approaches regarding the universality of international law. First, he argued that in the simplest way, universality of international law signifies the existence of a legal structure regulating the relations between international actors that applies to all members of this community without any distinction and binding for all.⁶¹¹ In that regard, although there might be sources that can be relevant only to some members of the international community, such as regional customs or treaties, all the international law rules still make part of a single legal unity. Second, universality of international law can be opposed to the fragmentation of the field where the former implies the coherence of all international legal rules as part of this legal unity.⁶¹² In that sense, fragmentation poses a threat to the idea of universality by underlining the possibility of different normative systems co-existing at an equal level as part of international law.⁶¹³ According to the International Law Commission, this threatens the discipline's consistency and stability and therefore needs to be addressed in order to ensure the progressive development of international law.⁶¹⁴ A third approach to the universality of international law highlights the evolution of the field over the years and its transformation into a legal system that goes beyond rules between states and constitutes not only an international community but also a legal community.⁶¹⁵ Bruno Simma opined that this idea of universalism 'implies the expansion of international law beyond the inter-state sphere, particularly by endowing individuals with international personality, establishing a hierarchy of norms, a value-oriented approach, a certain "verticalization" of international law'.⁶¹⁶

⁶⁰⁸ *ibid* 381.

⁶⁰⁹ Nollkaemper, 'Universality' (n 606) para. 5.

⁶¹⁰ Frédéric Mégret, 'International Human Rights Law Theory', <<https://ssrn.com/abstract=1539591>> accessed 22 August 2019, 22.

⁶¹¹ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (2009) 20 EJIL 265, 267.

⁶¹² *ibid* 267.

⁶¹³ Martti Koskeniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 Leiden JIL 553. See also Mario Prost, *The Concept of Unity in Public International Law* (Bloomsbury Publishing 2012).

⁶¹⁴ International Law Commission, Report of the Working Group on Long-term Programme of Work, Risks Ensuing from the Fragmentation of International Law, ILC (LII)/WG/LT/L.1/Add. 1 (25 July 2000), 25-43.

⁶¹⁵ Bruno Simma, 'Universality of International Law from the Perspective of a Practitioner' (n 611) 268.

⁶¹⁶ *ibid* 268.

This very brief history of universality and its different taxonomies disregard, however, the relationship between imperialism and modern international law. Scholars who are associated with Critical Legal Studies or TWAIL have long discussed the relevance of the past with the present legal status quo. Following the successful completion of the decolonisation process, many argued that modern international law managed to dissociate itself from the imperial past and that the current international legal order no longer suffers from the hegemony of Western states.⁶¹⁷ In that regard, universality of international law seemed to be realised by providing a legal basis that could solve contemporary problems.⁶¹⁸ Brad Roth, for instance, argued that following the decolonisation process, international law has liberated itself from its colonial features and invoking the continuity of Western states' imperial ambitions diminished the importance of anti-colonial efforts of both sides.⁶¹⁹ Others claimed that the imperial aspects of contemporary international law could not be disregarded and a reading of international law history should take into account how colonial objectives of Western states shaped the current international legal order. Anne Orford stated that the criticism brought against the reading of contemporary international law as a field which has substantially decolonised, jeopardised a very fundamental principle of international law: universality.⁶²⁰ Contemporary international law is supposed to be universal and apply to everyone equally. However, claiming that colonialism has no effect on today's legal order breaks all links between the current developmental problems of post-colonial states and the involvement of colonial states in ongoing inequalities.⁶²¹ Instead of acknowledging that the current developmental problems could be a continuation of their past administration, most colonial states preferred to discover new ways of intervention in order to redress these problems.⁶²²

6.2. Abstract and Hegemonic Dimensions of Universality

Universality is a term constantly invoked by international lawyers regarding the application of customary norms, the bindingness of international law or to refer to the ubiquitous presence of the discipline. The search of universality and in particular, a universal political form, accelerated in the aftermath of the Cold War. Following the victory of liberal democracy over its long-time rival communism and the end of ideological dualism, not only international lawyers but also political theorists and philosophers pondered whether there could be a political universal that can legitimately claim to represent everyone's best interest. In the 1990s, the search of a political universal was qualified by Linda Zerelli as the 'wild child of the collapse of communism' and many others discussed what might universality mean in political representation.⁶²³ This section investigates how universality can be conceptualised in

⁶¹⁷ Anne Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (2011) IILJ Working Paper 2012/2, <<https://ssrn.com/abstract=2090434>> accessed 22 August 2019, 1.

⁶¹⁸ *ibid* 1.

⁶¹⁹ Roth, 'Governmental Illegitimacy and Neocolonialism: Response to Review by James Thuo Gathii' (n 319).

⁶²⁰ Orford, 'The Past as Law or History? The Relevance of Imperialism for Modern International Law' (n 617).

⁶²¹ *ibid*.

⁶²² *ibid*.

⁶²³ Linda Zerelli, 'This Universalism Which is not One' (1996) 28 *Diacritics* 3, 5.

discourse with the two following points. First, it examines how universality functions at an abstract level in the construction of a narrative without providing an identifiable content. Second, it analyses how the binary opposition between universality and particularity works as a hegemonic tool.

First, in broad terms universality can be explained as the quality of something that pertains to everyone. To be more specific, in order to understand what universality means the context in which it has been used and how it differs from its binary opposite, particularity, have to be taken into consideration. Said differently, universality can only be apprehended through its antagonism with particularity. According to Ernesto Laclau, universality and particularity are interdependent and cannot be conceived as standalone concepts: 'The universal emerges out of the particular not as some principle underlying and explaining the particular, but as an incomplete horizon suturing a dislocated particular identity.'⁶²⁴ In that regard, one needs to construct universality by moulding it from a particular. He argued that universality could not be fixed by a specific content because it did not have in itself an authentic essence that did not derive directly from a particular.⁶²⁵ Universality should be conceived at an abstract level as an empty frame which does not have a content.⁶²⁶ According to Laclau, universality cannot be realised. It does not have an essence that can be materialised by transcending all differences among particularisms.⁶²⁷ This led him to defend that universality was impossible and that Society could not be represented in its fullness without being distorted.⁶²⁸ For instance, he objected to the representation of European concepts as universals:

European imperialist expansion had to be presented in terms of a universal civilizing function, modernization and so forth. The resistances of other cultures were, as a result, presented not as struggles between particular identities and cultures, but as part of an all-embracing and epochal struggle between universality and particularisms - the notion of peoples without history expressing precisely their incapacity to represent the universal.⁶²⁹

Hence, universality can be invoked only when one refers to an abstract concept that does not provide a specific content.

Second, Judith Butler highlighted how the antagonism between the universal and particular can function as a hegemonic tool. She adopted a different approach from Laclau and claimed that the creation of universality through particularity did not mean that any universality was

⁶²⁴ Ernesto Laclau, *Emancipation(s)* (Verso 2007) 28.

⁶²⁵ *ibid* 22-23.

⁶²⁶ *ibid* 35.

⁶²⁷ *ibid* 35.

⁶²⁸ Ernesto Laclau, 'Identity and Hegemony: The Role of Universality in the Constitution of Political Logics' in Judith Butler, Ernesto Laclau and Slavoj Žižek (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso 2000).

⁶²⁹ Laclau, *Emancipation(s)* (n 624) 24.

false.⁶³⁰ She rather focused more on what is included and excluded in the construction of universality. She claimed that the assertion that something is universal needs to strip away from that concept everything that might represent a particularity. In that sense, a universal concept transcends all cultural or historical belongings and has to be freed from any aspect that might reflect a particular's interpretation. Butler defined this tension between universality and particularity as a hostility: 'The universal can be the universal only to the extent that it remains untainted by what is particular, concrete, and individual.'⁶³¹ The universal is therefore in a constant struggle to demonstrate its detachment from the particular. This is, however, a paradoxical task since whenever a narrator makes the argument that something represents what belongs to everyone, that claim needs to draw from a particular. Universality has to be deduced from a particularity and it can never be authentic. Therefore, the claim to universality is always a hegemonic struggle that aspires to project what belongs to a group as what should belong to everyone. The following sections will demonstrate how these abstract and hegemonic dimensions of universality play out in democratic governance discourses to establish the spatial element of this narrative.

6.3. Democracy as an Abstract Concept

Democracy is an abstract concept that does not have an inner meaning. Its content depends on the context in which it has been used, the purpose of the narrative and the message that the narrator wants to convey. In that sense, democracy can be used with various meanings. While many other details can be added to clarify what is meant, it can be stated that democracy is commonly defined as a governmental form based on the will of the people. Despite the lack of an identifiable content, democracy is a word which comes with strong positive connotations. One is intuitively inclined to believe in democracy due to its aspirational power and promise to establish a governmental structure that will be in everyone's best interest. Democracy is very commonly associated with good governance, equality, progress and development. These are only some of the presumptions that would cross one's mind when discussing democracy, some usual commonplace remarks or even platitudes that are frequently repeated and accepted without much controversy. It is this positive and progressive understanding of democracy that led in the 20th century to the belief that it is also a universal value.⁶³² According to this understanding, due to the benefits that democracy is expected to provide, democracy is a universal value for the inherent goods that it represents. In that regard, the universality of

⁶³⁰ Judith Butler, 'Restating the Universal' in Judith Butler, Ernesto Laclau and Slavoj Žižek (eds), *Contingency, Hegemony, Universality: Contemporary Dialogues on the Left* (Verso 2000) 23-24. In international law, a similar approach is adopted by Luis Eslava and Sundhya Pahuja who proposed to develop a 'praxis of universality' in order to understand what type of universality can be valid for international law, see Luis Eslava and Sundhya Pahuja, 'Between Resistance and Reform: TWAIL and the Universality of International Law' (2011) 3 Trade, Law and Development 103. See also Susan Marks 'Introduction' in Susan Marks (ed), *International Law on the Left: Re-Examining Marxist Legacies* (CUP 2008) 6.

⁶³¹ Butler, 'Restating the Universal' (n 630) 23.

⁶³² Amartya Kumar Sen, 'Democracy as a Universal Value' (1999) 10 Journal of Democracy 3, 3.

democracy stems from its abstraction. It is a universal value because it only represents a vague concept that is commonly linked with progressive ideas.

This study is premised on the idea that international law is a narrative exercise of persuasion. The narrator seeks to convince the audience to adhere to her argument by finding the most effective narrative techniques that will prove her case. This section questions how all these above-mentioned positive characteristics that are commonly attributed to democracy constitute a ground that paves the way for the reader to sympathise with the argument put forward. It is argued here that the intuition of democracy's linkage with good governance and especially the appeal to its universality is an effective method to start the narrative with a premise that the audience will hardly oppose. Chaïm Perelman and Lucie Olbrechts-Tyteca stated that if the starting point of an argumentation is a basis that the audience already agrees with, then the argument can be developed as a continuation of this agreement.⁶³³ In other words, using an 'object of agreement' to initiate a debate is an effective method to hook the reader's attention to the narrative and enable their adherence to the main argument.⁶³⁴ The narrator is not addressing a tabula rasa and the predispositions of the audience can work as a to find the right method of persuasion.⁶³⁵ In that regard, as an abstract concept that does not have a specific content but comes with positive connotations, democracy constitutes an object of agreement. The narrator can use democracy as an object of agreement since the audience is inclined to be persuaded by a narrative that defends democratic rule.

Perelman and Olbrechts-Tyteca classified two types of 'object of agreement': those that relate to the real, such as facts, truths and presumptions and those that relate to the preferable, such as values, hierarchies and lines of argument.⁶³⁶ Among these different types of object of agreement, democracy can be qualified both as a presumption and value. Democracy can be defined as a presumption because it represents a system which promises to establish a political structure that promotes equality, progress and inclusion. While these expectations are very frequently and almost inherently associated with democracy, the question whether democracy can deliver these expectations is highly disputed.⁶³⁷ In that sense, the positive connotations that democracy is generally linked with can be classified as presumptions rather than facts or truths since it is only a matter of likelihood that democracy will live up to its promise. Second, democracy can be classified as a value if it is considered as an overarching concept for all the values that it represents.⁶³⁸ Democracy might be seen as a value that includes equality for all, economic development, political freedom, right to free and fair

⁶³³ Perelman and Olbrechts-Tyteca (n 103) 65-66.

⁶³⁴ *ibid.*

⁶³⁵ Iain Scobbie, 'Rhetoric, Persuasion, and Interpretation' (n 114) 70, Chaïm Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (Dordrecht 1980) 169-170.

⁶³⁶ Perelman and Olbrechts-Tyteca (n 103) 65-114.

⁶³⁷ Marks, 'What has Become of the Emerging Right to Democratic Governance?' (n 343) 519. See also Jodi Dean, *Democracy and Other Neoliberal Fantasies: Communicative Capitalism and Left Politics* (Duke University Press 2009).

⁶³⁸ Amartya Kumar Sen, 'Democracy as a Universal Value' (n 632).

elections and other fundamental rights. It is in that sense a value that defines a system where the rule of law guarantees equal participation to politics and protection of basic rights.

The characteristic that allows democracy to function as an object of agreement in an argumentation is its abstract nature. What is meant by democracy as an abstract concept is the use of democracy as a vague and broad term to comprise several meanings and connections with other abstract concepts, rather than an easily identifiable content. Perelman opined that it is almost inevitable in international law to resort to words that have several connotations in order to find a common ground between international actors with different interests.⁶³⁹ He gave the example of the Universal Declaration of Human Rights which succeeded to secure approval from states with very different ideologies owing to the broad and vague contours of principles that it included.⁶⁴⁰ When one starts a discussion with terms like justice, human dignity, rule of law or democracy, this provides the advantage of defending these highly vague, unformalistic but intuitively positive sounding terms. Perelman borrowed the term 'prenotion' from stoics to define these all-encompassing terms whose level of vagueness and abstraction make them an effective object of agreement to start a debate and to pave the way for the reader's adherence to the argument.⁶⁴¹ It is the abstract nature of democracy, its use as an overarching concept that represents positive values associated with good governance that transformed it into a compelling buzzword in international law scholarship after the end of the Cold War. Its abstract nature provides democracy with a shield that protects it from possible criticisms. It is only a vague concept of good values without providing too much to be called into question. It is indeed this abstraction that forms the basis of its universality. It is only because democracy is an abstract concept that represents nothing but good values about protecting fundamental rights that are shared by all, that it can be seen as a universal value 'which everyone respects but which everyone conceives in his own way'.⁶⁴² All the positive assumptions associated with democracy and its universality can survive as long as democracy remains an abstract and vague concept.⁶⁴³

Democratic governance discourses had to transform this abstraction into a concrete right by determining its content and explaining how international practice supports the democratic formation of governments. Democracy, however, will lose its universality once its content is specified in order to provide it with normativity as an emerging customary norm in international law. An important characteristic of universality is its appeal to a norm that can be globally applied. This, however, disregards the agency through which the idea of universality is constructed.⁶⁴⁴ If a value is universal, there must be someone to make such a claim and hence subjectivity becomes inevitable. This immediately requires reducing the universal to particular,

⁶³⁹ Perelman, *Justice, Law, and Argument: Essays on Moral and Legal Reasoning* (n 635) 99.

⁶⁴⁰ *ibid.*

⁶⁴¹ *ibid* 100.

⁶⁴² *ibid* 99.

⁶⁴³ Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' (n 114) 71.

⁶⁴⁴ Martti Koskeniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197, 198.

since it will always be a particular's view that will determine what is meant by the universal.⁶⁴⁵ It is the narrator's particular preferences and interpretation of facts, in other words her particular way of conceptualising democracy, that will define how democracy should be defined in international law as a right. As also stated by Pierre Bourdieu: 'The tendency to universalize one's mode of living, broadly experienced and recognized as exemplary, is one of the effects of the ethnocentrism of dominant groups. It is also the basis for belief in the universality of the law.'⁶⁴⁶ The consequence of universalising a certain vision of democracy is creating an official account of an abstract value which no longer can present a variety of meanings or applications in different parts of the world. It is the transformation of an abstraction into a concrete right that determines what should be understood by democracy, what it should include, how it should be applied and how the non-compliance should be sanctioned.

Democratic governance discourses start the debate on an emerging right to democracy with an object of agreement by discussing whether democracy can be enforceable in international law. As an abstract concept, democracy can be persuasive in its claim to universality owing to its broad connotations. In that sense, the vagueness and abstraction of democracy provide a sound basis for its acceptance as a universal value. As argued by Iain Scobbie 'universal values have a persuasive function: they may be used to justify a choice or decision by operating as an empty frame of reference'.⁶⁴⁷ However, when the content of an emerging right is to be determined and the abstract concept of democracy is turned into a well-defined right, universality can no longer be sustained. The more democratic governance is defined, the more it loses from its abstraction. Reaching a consensus that there is a right to democracy is only possible at the expense of various definitions and meanings that can be allocated to the abstract concept of democracy.⁶⁴⁸ In that sense, the abstraction needs to be sacrificed in order to settle what we should understand from this very vague concept. The specificity that a normative rule requires cannot allow an abstract but universal term to be fixed in time.

It is argued here that democratic governance discourses use the abstract concept of democracy as an object of agreement to convince the audience to adhere to its argument by relying on the positive values that are commonly associated with this term. Democracy as a vague and abstract concept can easily persuade the audience to adhere to an argument that requires states to adopt democratic governance. As an abstract concept democracy can be a universal value. However, the claim on the universality of a right to democracy can only be made if one disregards the agency through which the content of the right has been determined. The transformation of the abstract concept of democracy into a concrete right does not transfer the universality of the former to the latter. Democratic governance discourses use the

⁶⁴⁵ *ibid.* See also Judith Butler, 'Contingent Foundations: Feminism and the Question of Postmodernism' in Judith Butler and Joan Scott (eds), *Feminists Theorize the Political* (Routledge 1992).

⁶⁴⁶ Pierre Bourdieu, 'Force of Law: Toward a Sociology of the Juridical Field' (1986) 38 *Hastings Law Journal* 805, 847.

⁶⁴⁷ Scobbie, 'Rhetoric, Persuasion, and Interpretation in International Law' (n 114) 71.

⁶⁴⁸ Martti Koskeniemi, 'What is International Law For?' in Malcolm Evans (ed), *International Law* (OUP 2010) 29.

agreement that the audience has on the supposedly positive benefits of an abstract concept of democracy in order to establish the universality of a right to democracy.

6.4. Democracy as a Hegemonic Tool

As it is manifested in the UN Charter, modern international law is premised on the idea that it constitutes a system of law that applies to all states equally. In 1945 the aspiration of uniting states under some common values and objectives did not extend to the regulation of national governance through international law. In that sense, no particular form of political regime was imposed upon states. The demise of the Soviet Union and the fall of the Berlin Wall led scholars to challenge this neutrality of international law with regard to governmental forms. For the proponents of democratic governance discourses, this meant that a new customary norm, a universal rule, regarding the formation of national governments through free and fair elections was emerging. The argument about an emerging customary norm that delimited states' constitutional freedom to choose their political structure and imposed an obligation for governments to have a democratic origin aimed at turning the particularity of democracy as a political structure into a universal rule. The way in which democratic governance scholars make use of universality comes at a time when colonisation has almost come to an end, most African states have gained their independence and international law appears to provide an unbiased platform based on sovereign equality.

While democratic governance discourses started to take shape at a time when international law seemed to be freed from its colonial baggage, some scholars took issue with the neo-colonial undertones of these discourses. Antony Anghie's approach to democratic governance deserves particular attention for the connection that it makes between liberal democracy and universality. He argued that Third World states gained their independence at a time when sovereign states accepted limitations on their internal authority through human rights law.⁶⁴⁹ In that regard, as soon as Third World states had the power to govern their own territory, they were already bound by the limits created and imposed by Western states.⁶⁵⁰ Following the end of the Cold War, the victory of liberal democracy was declared and Western scholars, including Franck and Fox, initiated a debate about international law's involvement in the protection of democratic governance.⁶⁵¹ Anghie took issue with the regulation and protection of democratic governance through international law which relied on a purely Western interpretation of democracy. According to Anghie, in this debate about the determination of states' governmental and political structures, cultural relativism and the contribution that Asian values could provide were disregarded in favour of a monolithic vision of Western democracy.⁶⁵² He stated that:

⁶⁴⁹ Anghie, *Imperialism, Sovereignty and the Making of International Law* (n 126) 254.

⁶⁵⁰ *ibid* 254.

⁶⁵¹ *ibid* 254-55.

⁶⁵² *ibid* 255.

Contemporary debates on governance focus largely on the relations between the governors and the governed (...) My argument, however, is that, historically, the international legal discourse on government has been shaped not so much by a concern for the governed (...) but by a concern to impose “universal standards” that essentially furthered European/Western interests. This history of governance exerts an enduring and powerful pressure on the present. The relationship between globalization and governance can be seen, I suggest, in the same way: governance is now designed to provide the political institutions that will enable the furtherance of globalization. Specifically, this is to be achieved through the international human rights norms that are seen as prescribing universally accepted international standards and which are used as a basis to further governance.⁶⁵³

Anghie opined that democratic governance discourses are a continuation of Western states’ imperial aspiration to keep non-Western states under control on the basis of universal values and human rights. He argued that the concept of good governance played an important role to keep Third World states under control. While good governance meant the protection of human rights regarding states’ exercise of power internally, at the international level it rarely applied to Western states.⁶⁵⁴ Good governance was in that sense a concept created to monitor the political structures of Third World states which, unlike Western powers, needed democratisation in order to achieve economic development. Due to the correlation created between development and good governance, international financial institutions such as the World Bank or IMF assumed the role of promoting good governance for the sake of economic growth.⁶⁵⁵ In that regard, democracy had to be exported from the West to the rest of the world if progress was going to be achieved which was nothing less than a new ‘civilizing mission’.⁶⁵⁶

Martti Koskenniemi as well underlined the risk of imposing a monolithic idea of liberal democracy through international law that would have a universal application. He stated that those who defended the validation of national governance through free and fair elections, seemed to know what ‘true’ or ‘real’ democracy is and that any other definition that might be brought by others would be a wrong approach to the subject-matter.⁶⁵⁷ He further argued that the postulation of a particular account of democracy provided the defenders of democratic governance discourses with the ability to create defence mechanisms against practices that would not comply with their own account of democracy.⁶⁵⁸ Anyone who does not adhere to the democratic governance principles postulated by democratic governance discourses risks being marginalised for not defending the right account and can be sanctioned for this failure.

⁶⁵³ *ibid* 253-54.

⁶⁵⁴ *ibid* 249.

⁶⁵⁵ *ibid* 249.

⁶⁵⁶ *ibid* 249-50.

⁶⁵⁷ Martti Koskenniemi, 'Intolerant Democracies: A Reaction' (1996) 37 *Harvard International Law Journal* 231, 231.

⁶⁵⁸ *ibid* 231.

He stated that trying to disseminate a so-called real democracy and vilifying the opponent would only serve to legitimise a narrative that divides between 'us' and 'them', a narrative that could hardly escape imperialism criticisms.⁶⁵⁹ This approach is echoed by Duncan Kennedy who stated that the discourse on universality inevitably creates a right and wrong approach to the subject-matter and hence allows to force the particular to adjust to the universal's way of thinking.⁶⁶⁰ It is therefore important to take a cautious approach when stating that the account of democracy that has been postulated by these discourses represent a universal account without due regard to its historical, cultural and political origin.

The idea of emergence is a subtle way to shield from these criticisms of imperialism. According to these discourses, democratic governance is emerging in international law. As argued by Thomas Franck 'we are not quite there'.⁶⁶¹ Nevertheless, the progressive interpretation adopted by these discourses hints that we are moving towards a future where international law will provide the tools to validate national governance. On the one hand, democratic governance discourses try to universalise a particular form of government but on the other, allow some space for states that do not currently comply with this new right to adjust their governmental form. In that sense, these discourses function with a certain dose of liberal tolerance while on the other hand, they impose a particular way of structuring governmental power. Thomas Carothers presented a similar criticism and argued that Franck overestimated the spread of democracy.⁶⁶² He argued that although there was a trend toward democratisation, Franck was too fast to conclude that this could be generalised as a global trend towards the acceptance of democracy as a validation tool in international law. He disagreed with the argument that democratic governance could become a universal norm since the fate of this Western governmental form was still uncertain in several African, Arab and Asian states.⁶⁶³ He argued that the idea that there is an emerging universal norm of democracy was 'too reductionist and reflects the traditional American tendency to universalize at the drop of a hat and to disregard deeply rooted historical patterns'.⁶⁶⁴

6.5. Conclusion

The ability to demonstrate the universality of a rule ensures the omnipresence of international law, in other words the 'ubiquity of the discipline'.⁶⁶⁵ Nevertheless, the quest for universality is an inconsequential effort to find a common ground on which everyone can agree. The constant struggle to find universal rules in international law imply that international lawyers have the

⁶⁵⁹ *ibid* 232-33.

⁶⁶⁰ Duncan Kennedy, 'The Critique of Rights in Critical Legal Studies' in Janet Halley and Wendy Brown (eds), *Left Legalism/Left Critique* (Duke University Press 2002) 188.

⁶⁶¹ Franck, 'The Emerging Right to Democratic Governance' (n 21) 50.

⁶⁶² Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law* (n 34) 262.

⁶⁶³ *ibid* 262-64.

⁶⁶⁴ *ibid* 263-64.

⁶⁶⁵ d'Aspremont, 'The International Law of Statehood: Craftsmanship for the Elucidation and Regulation of Births and Deaths in the International Society' (n 361) 223.

desire to create a world where everyone lives and thinks the same way. Difference is regarded as a problem to be overcome and this fear of disparity is reflected in law by an endeavour to universalise different aspects of international affairs. The normative endeavour to create new customary norms seems to stem from an effort to unify our modes of living, thinking and seeing the world. Disparity in the way governmental power is exercised constitutes a source of anxiety and democratic governance scholars are in a constant search for creating legal claims that can provide determinacy to the way in which governments come into being. The effort to reduce the plurality of governmental structures into one single form and making its adoption an international law obligation is only possible if this governmental form is branded as universal.

This chapter investigated how democratic governance discourses construct the spatial element of the narrative in order to determine where this emerging norm will have an impact. It is argued here that these discourses use the concept of universality and defend that a particular form of political structure is now on its way to becoming a globally shared governmental form. After presenting an overview of traditional approaches to universality in international law, the chapter examined how universality can be conceptualised at an abstract level and also as a hegemonic tool. Ernesto Laclau's approach to universality is important for demonstrating how it is impossible to settle the content of universality. Any claim on universality will necessarily have to draw from a particular and reflect an individual's account. Universality does not have an essence in itself and hence there is no possibility to construct a purely universal position that does not rely on a particular. Judith Butler's approach to universality stressed the antagonism between universal and particular and underlined how a narrative differentiates between the two poles, what it includes and excludes. She emphasised how the construction of a universal can serve hegemonic purposes to acclaim a superiority over a particular. These two approaches help us better understand how the concept of universality is used in democratic governance discourses. Laclau's focus on the abstract nature of universality provides an important insight to explain how democratic governance discourses construct the universality of democracy. While democracy can be a universal concept at an abstract level, legal scholars try to turn this abstraction into a right. The universality of democracy as an abstract concept cannot, however, directly be transferred to this concrete right of democratic governance. In addition, Butler's focus on how the universal and particular are created helps us understand how a Western interpretation of what a universal right to democracy means can be used as a hegemonic tool over non-Western states.

The examination of how universality is used in democratic governance discourses does not imply that the claim of universality is redundant and should be disposed of. In that regard, elucidating how democracy is portrayed as a universal value does not necessarily mean that there is a false universality in play. The examination showcases the process by which a certain perspective on democracy is posited as the universal democracy. As explained in Chapter 3,

it was first Franck and then Fox who argued that international actors were no longer indifferent to undemocratic governmental forms. Their discourse has been popular among several other scholars mostly in the US and Europe. In that sense, the argument that the neutrality of international law is changing in favour of a test of legitimacy has been predominantly produced in a particular region. This Western narrative does not directly create any instant obligation for states where it originated from. Most of the states where these discourses have been produced already hold free and fair elections and possess governments that represent their people. These discourses can only be exported to other states in order to oblige them to legitimate their governance through free and fair elections and force them to transform their governmental structure. Questioning how the spatial element of these discourses is constructed through the concept of universality helps us understand that the effort to identify customary norms comes with important issues that need to be unpacked. This chapter aimed to shed light on some of these issues and elaborated on the functions that universality plays in democratic governance discourses.

7. Concluding Remarks

7.1. Findings of the Study

This study inquired why there is a sense of disappointment in scholarly writings with regard to a recession in democratic governance. It investigated the gap between an expectation that democracy would spread globally and strengthen its normative power and the current discussions revolving around what some scholars call democratic backlash. It located the creation of an expectation that democracy would consolidate over time in the progress narrative of democratic governance discourses that started to take shape following the end of the Cold War. In order to understand how international law was complicit in the creation of this expectation, it conducted a discourse analysis and examined the narrative structure of democratic governance discourses. A closer reading of international law writings defending an emerging right to democratic governance showed that the feeling of a failed expectation that is very much prevalent in several writings discussing the recession of democracy stems from the progress narrative of democratic governance discourses. International lawyers have been complicit in the creation of this expectation by building their narrative on a progressive understanding of history. The linear trajectory they envisaged for a liberal democratic future turned out to be overshadowed by the discussions on a global recession in democratic rule. The uncontested nature of liberal democracy as the only viable governmental form that was promoted in the early post-Cold War scholarship can now be qualified as the pipe dream of democracy triumphalism. Today's dismay about the recession of democracy is due to an unwarranted expectation that was created with the progress narrative of democratic governance discourses.

Many criticisms have been put forward against democratic governance discourses. This study provided a novel account by approaching international law as a set of narratives and proposed to analyse democratic governance discourses through the lens of narrative theory. While international lawyers have long discussed how ideology, gender, politics, colonialism have precluded any kind of objectivity that can be found in the discipline, not much has been said about the subjectivity of academic writings on the basis of their narrative structure. This study endeavoured to provide a reader's snapshot regarding the way one can analyse international law narratives. It is no longer much disputed that the claims put forward in international law do not represent an objective account of factual interpretation. Rather, international law is a storytelling exercise based on interpretation that is geared towards advancing an argument that would convince the audience. In the quest of developing a persuasive account, it is possible to observe that international law narratives are built on some narrativisation strategies that are recurring in most writings. This study has identified three of these narrativisation elements that are fundamental in constructing international law narratives. The formal element determines the way in which international lawyers engrave their narrative into a legal

framework. Since international law narratives differ from other genres' narratives not only by their objective but also their language, the narrator has to indicate why the subject-matter deserves to be studied under the rubric of international law. The temporal element indicates how the narrative is situated in time. It demonstrates how the history is periodised in a way that would effectively convey the narrative's argument. The spatial element determines within which space the narrative will have an impact and where it will modify the relations between actors.

The examination of these three narrativisation elements helps us understand how the narrative on democratic governance has been constructed with a progressive reading of history. With regard to the construction of the formal element, the analysis of cases which are most commonly used in democratic governance discourses, namely Haiti, Sierra Leone and Côte d'Ivoire, demonstrated that international lawyers prefer to rely on cases where the Security Council has been actively involved in denouncing an undemocratic practice. While it is possible to find cases where states or international organisations have reacted to the undemocratic overthrow of a government, rather than unilateral reactions or sanctions imposed by international organisations, the fact that these practices are discussed at the Security Council level provide important normative value to prove an emerging right. Among many different cases in international practice, international lawyers highlight cases that will provide persuasiveness to their argument. Cases, which are frequently cited in several writings with a similar interpretation, become the normative markers that illustrate why the argument put forward makes a compelling case. Regarding democratic governance discourses, Haiti, Sierra Leone and Côte d'Ivoire became normative markers of these discourses by demonstrating the growing practice of governmental legitimacy and their linear interpretation helped to generate a progress narrative. The involvement of the Security Council and its authorisation to use force stand out as two important elements that help to construct the formal element of these discourses.

Any narrative will necessarily have to indicate how the subject matter is situated in time. Examining the temporal element of democratic governance discourses reveals that the end of the Cold War is presented as an undisputable turning point in history. Several proponents of democratic governance discourses make reference to this date to indicate when the right to democratic governance started to emerge. The Cold War period is narrated as a time when international actors were not concerned with the way in which a government came into being and the post-Cold War practice is narrated as a time when the ideological plurality of the UN Charter started to fade away. Nevertheless, analysing the international practice of these two periods shows that there is no stark difference with regard to international actors' reaction to undemocratic changes of government. It is possible to observe that there is relevant practice regarding how states reacted to undemocratic changes of government during the Cold War and the post-Cold War practice does not provide a coherent image supporting a practice in

favour of legitimacy of governments. Indeed, the creation of two periods which proceed each other is an efficient tool to create a progress narrative by telling a story where history seems to develop in a linear path. This examination eventually reveals that periodisation of history is a narrative construction that helps to classify a complex collection of information and allows to present it in a simple manner. In that regard, the focus on how the temporal element has been constructed in a narrative helps us understand that we should be wary of conceptual limits that are created by periodisation.

In a third step, the study focused on the construction of space within democratic governance discourses. Every narrative will indicate a certain space that will be occupied by that narrative. International lawyers have generally been generous in creating new spaces for expanding the discipline's reach. Democratic governance discourses make a bold claim and argue that this emerging right is becoming part of customary international law. The idea that a right is binding on all states and hence universal represents what should be shared by all. Any claim on universality needs to draw from a particularity. Universality does not have an essence in itself and constantly needs to rely upon a particular's account to acquire meaning. Moreover, projection of a particular as universal, means that a particular's account takes precedence over other accounts. The creation of this dichotomy is followed by the creation of a hegemony where the universal reigns over the particular. As a narrative born in the US and mostly discussed in Western states, the argument of democratic governance discourses does not create an instant obligation for these states who are not the primary audience of these discourses. Rather, it creates a right that can be exported to other states where the right does not yet enjoy full implementation. Eventually, examining how the idea of universality is used in democratic governance discourses demonstrate how international lawyers create the space where an emerging right to democratic governance would be applicable.

7.2. The Potential of this Study in International Legal Scholarship

This study concentrated on the processes by which international lawyers construct meaning in their narrative. More specifically, the focus was on how they use some narrativisation elements to convey their argument in democratic governance discourses. Construing international law as a set of narratives provided an efficient method to explain how a progress narrative was constructed by the proponents of an emerging right to democracy. This study demonstrated how international lawyers make use of some raw materials such as historical events, legal sources, doctrines, judgments and international practice to make them part of a coherent story. Approaching international law from an angle that focuses on the narrativisation elements allowed to see that international law is not only a collection of rules or practices in the service of dispute resolution, but it is an exercise of meaning production that takes place in a specific context, time and space. International law does not consist of ready-made solutions for resolving problems of international law actors, but it is a language that creates a

normative world. Hence, shedding light on the narrativisation elements of international law provides an opportunity to reflect on the way we create this world and how meaning is produced through a narrativisation process. While this study focused on democratic governance discourses, the method deployed here can be instrumental in laying bare the narrative structure of other discourses as well. This section concludes with a few remarks that appraise the potential of this study in international legal scholarship.

The approach that has been adopted here could be used to elucidate other discourses in international law. As has been previously discussed, international lawyers are inevitably situated.⁶⁶⁶ There is no neutral position which can allow a scholar to speak in an objective manner and explain things as they are without involving value judgments. In other words, international law discourses have been produced to advance political projects. Throughout history, the way in which these projects have been shaped and told has necessarily affected how we see, read and interpret international law today. As stated by Martti Koskenniemi 'The limits of our imagination are a product of a history that might have gone another way. There is nothing permanently fixed in those limits. They are produced by a particular configuration of commitments and projects by individual, well-situated lawyers.'⁶⁶⁷ Accordingly, examining the construction processes of contemporary discourses can provide an opportunity to understand how the stories that we create today delimit our imagination and preclude alternative scenarios.

The method deployed in this study can be deployed to shed light on other contemporary discourses to understand how current trends are formed, supported or rejected by international lawyers. Rhetorical narratives endeavour to fix the meaning that should be attributed to facts. It is important to call into question discourses that gained currency in international legal scholarship and analyse the way they conceptualise international law. For instance, investigating discourses on climate change, withdrawal from international organisations and courts, changing trade tariffs and WTO, counterterrorism, responsibility to protect, refugee crisis would not only bring to light the narrativisation strategies of these discourses, but it would also make the processes that construct meaning in these discourses more transparent and intelligible.⁶⁶⁸ Adopting an approach that concentrates on the narrativisation process of international law discourses should not only be seen as a method that can be applied to doctrinal discourses. There are various ways of thinking about international law and discourses on international legal theory can equally be examined in order to understand how they conceptualise the legal world.⁶⁶⁹ Theories on constitutionalism, legal pluralism, fragmentation of international law have been widely discussed in the recent

⁶⁶⁶ 'We are never not in a situation' in Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (n 109) 276. See also Bianchi, *International Law Theories: An Inquiry into Different Ways of Thinking* (n 39) 3.

⁶⁶⁷ Koskenniemi, *The Gentle Civilizer of Nations* (n 175) 5.

⁶⁶⁸ For accounts that discuss discourses on counterterrorism, see Andrea Bianchi, 'Terrorism and Armed Conflict: Insights from a Law & Literature Perspective' (2011) 24 *Leiden JIL* 1, Windsor (n 70).

⁶⁶⁹ Sahib Singh's article employs narrative analysis to Jean d'Aspremont's account on legal formalism, see Singh, 'Narrative Theory: Formalism's Recurrent Return' (n 70).

scholarship.⁶⁷⁰ These theories project a certain vision about how international law should be construed. They can be discussed through the lens of narrative theory in order to reflect on the way they interpret what international law is or should be. While in this study the emphasis up until this point has been on the way in which international legal scholars have constructed their discourses, this should not lead to the conclusion that narrativisation is an exercise reserved only for academic thinking and writing. Judges of international courts and tribunals, arbitrators, members of various dispute settlement bodies are constantly narrativising to explain their decisions. For instance, judgments or advisory opinions of the International Court of Justice, its established case-law on a particular matter or a new position that it has recently taken, can be analysed to understand how judges structure their argument and arrive at a particular conclusion rather than another.⁶⁷¹ These are only some of the avenues that can further be analysed with a method that focuses on the elements that construct a narrative. Every international lawyer sees the world in a different way and communicates her perception of the legal world through the medium of discourse. Construing international law as a set of narratives carries a valuable potential to develop reflexivity in order to explore the ways in which we tell each other how to do and think about international law.

⁶⁷⁰ For an account that discusses legal pluralism and constitutionalism as narratives, see Martti Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics', (2007) 70 *The Modern Law Review* 1.

⁶⁷¹ For an account that examines the rhetorical tools of persuasion used by the ICJ, see Andrea Bianchi, 'Gazing at the Crystal Ball (again): State Immunity and Jus Cogens beyond Germany v Italy' (2013) 4 *Journal of International Dispute Settlement* 457. On different styles of judicial writing, see also Benjamin Cardozo, 'Law and Literature' (1925) 14 *Yale Law Review* 699, reprinted in (1939) 48 *Yale Law Journal* 490.

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