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Global standards for national democracies? [1]

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1. The global legal space and the rule of law

The global legal space contains several provisions that subject national agencies to the rule of law[2].

Let me take two examples. According to the Rio Declaration, the Aarhus Convention recognizes that every affected person has the right to participate in decision-making proceedings on environmental matters. If a domestic legal order does not guarantee such a right, the affected person can ask a quasi-judicial body, the "Compliance Committee" (established by the Meeting of the Parties to the Convention), to evaluate the agency's decision and to issue a declaration of non-compliance (as occurred in the well-known *Green Salvation – Kazatomprom*[3] case).

Under the World Bank's "Operational Policies", borrowers must consult project-affected groups during environmental impact assessment processes (concerning the environmental aspects of the project in question) and take their views into account. If this does not occur, the affected person can request a quasi-judicial body, the Inspection Panel, to evaluate the situation and to issue recommendations (as happened, for example, in the *Mumbai urban transport* case[4]).

In these cases, global rules provide procedural standards. These standards are binding on national administrative authorities. Private parties can activate a dispute settlement mechanism in case of non-compliance.

The law that provides for consultation is global. The implementing authority is national. The reviewing "court" is, again, global.

[2] See *Global Administrative Law: Cases, Materials, Issues,* II ed., ed. by S. Cassese, B. Carotti, L. Casini, M. Macchia, E. MacDonald, M. Savino, Rome-New York, 2008, http://www.iilj.org/GAL/documents/GALCasebook2008.pdf .

[3] Aarhus Convention – UNECE Compliance Committee, Findings and Recommendations, 18 February 2005.

[4] World Bank Inspection Panel, Report and Recommendation, *India: Mumbai Urban Transport Project* (IBRD Loan No. 4665-IN, IDA Credit No. 3662-IN), September 3, 2004, INSP/R2004-0006. See also World Bank Inspection Panel, Report and Recommendation, *Papua New Guinea: Smallholder Agriculture Development Project (SADP)* (IDA Credit No. 43740-PNG), March 10, 2010, Report No. 53280-PG.

The rule of law, a set of institutional and procedural requirements developed within national governments (in Germany, it is referred to with the expression "*Rechtsstaat*", the State under the law), is transplanted into the global arena (bottom-up), and national rule of law is enhanced by global standards (top-down).

Many global legal orders provide an additional set of rules in order to make national governments more accountable, on the basis of which private parties receive a further opportunity to defend their rights.

2. The global legal space and democracy

Does a similar transplant occur for the second leg of modern "limited government", i.e. democracy?

Almost twenty years ago, Thomas Franck noticed that «the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance»[5] as «the community of states is empowered to compose and apply codes governing the comportment of governments toward their own citizens»[6]. As a result of this development, «the legitimacy of each government someday will be measured definitively by international rules and processes»[7]. He added that «[t]he transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually»[8]. The democratic entitlement – according to Franck – had three components: self-determination, freedom of expression and electoral rights.

[5] T.M. Franck, *The Emerging Right to Democratic Governance*, in «The American Journal of International Law», Vol. 86, No. 1,(Jan. 1992), p. 91.
[6] T.M. Franck, cit., p. 78.
[7] T.M. Franck, cit., p. 50.
[8] T.M. Franck, cit., p. 47.

But this point of view is not widely shared, with opinions on the issue being instead polarized around two opposite perspectives. According to the first of these, globalization, by striking at State sovereignty, threatens popular rule within democracies[9]: «if the United States can be subject to the will of outside powers, it cannot be governed by the scheme ordained in the Constitution»[10]. The second point of view, however, maintains that «multilateral institutions can empower diffuse minorities against special-interest factions, protect vulnerable individuals and minorities, and enhance the epistemic quality of democratic decision making in well – established democratic states»[11].

I do not wish to discuss here the more general problem of the relations between globalization and democracy (whether globalization constitutes a loss for democracy, through its attenuation of direct electoral control on national governments), nor that of the diffusion of democratic regimes through the import-export of democratic institutions from one State to another, nor that of the right of the people to democracy as guaranteed by international declarations and treaties[12]. I wish to address only the question of the global promotion of democracy. I shall, therefore, focus on the role of global institutions as sponsors of democratic processes and institutions vis-à-vis national communities.

[9] M. Goodhart, *Democracy as Human Rights: Freedom and Equality in the Age of Globalization*, New York, Routledge, 2005, p. 73 ff.

[10] J.A. Rabkin, *Law Without the Nations? Why Constitutional Government Requires Sovereign State*, Princeton Univ. Press, 2005, p. 266.

[11] R.O. Keohane, S. Macedo, A. Moravcsik, *Democracy-Enhancing Multilateralism*, in «International Organization», no. 63, Winter 2009, p.26.

[12] Universal Declaration of Human Rights (1948), Article 21: «(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures». International Covenant on Civil and Political Rights (1966), Article 25: «Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions: (a) To take part in the conduct of public affairs, directly or through freely chosen representatives; (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors; (c) To have access, on general terms of equality, to public service in his country». On these international documents, see L.M. Diez Picazo, *I problemi della democrazia nei livelli non statali di governo*, in M. Cartabia and A. Simoncini (eds.), *La sostenibilità della democrazia nel XXI secolo*, Bologna, Il Mulino, 2009, pp. 159-164.

In responding to the question of whether global standards of democracy are democracy-threatening or democracy-enhancing, I shall refer to six examples.

Firstly, I shall consider the Organization for Security and Cooperation in Europe (OSCE), the world's largest regional security organization, with 56 participating States. Within the OSCE, the Office for Democratic Institutions and Human Rights (ODIHR), based in Warsaw, Poland, is active throughout the OSCE area in the fields, *inter alia*, of democratic development, election observation, and non-discrimination.

Within the ODIHR, there are several different departments, one of which is the Democratization Department, which focuses on rule of law, equal participation in political and public life, promoting democratic governance, freedom of movement, and providing legislative support in these fields; another especially relevant unit is the Election Department, engaged in election observation and in technical assistance projects, including the review of election-related legislation and the promotion of domestic observer groups throughout the OSCE region.

In its democratization activities, the ODIHR aims to develop the necessary institutional capacity for the consolidation of a democratic culture, and responds to requests for assistance with drafting legislation.

With regard to elections, the ODIHR deploys observation missions to OSCE participating States to assess the implementation of OSCE election-related commitments, and publishes different documents depending upon the type of observation mission engaged in (e.g. needs assessment reports, which detail the type of mission to be deployed; interim reports, which provide insights into the issues confronting the mission in question prior to election day; preliminary statements, which are released the day after the completion of a mission and present the ODIHR's preliminary conclusions as to the

conduct of the election observed; and final reports, which are published subsequent to an in-depth analysis of the election observation and which also provide recommendations).

The Office also conducts technical assistance projects and legislative reviews. Some projects stem directly from recommendations made during observation missions, while others are the result of requests from participating States.

What can be learned from the activities of this organization? Firstly, national democracy matters on a global level too. Secondly, not only economic performance, but also political (democratic) performance can be subjected to independent evaluation. And thirdly, the global legal order is capable of promoting and assisting democratic institution-building.

My second example is the European Union enlargement process. The "Enlargement Strategy" is based on the "principles of consolidation of commitments": «The EU's enlargement policy allows for a carefully managed process where candidates and potential candidates approach the EU in line with the pace of their political and economic reforms as well as their capacity to assume the obligations of membership in accordance with the Copenhagen criteria»[13].

This strategy implies four important steps: the definition of benchmarks of democratic performance as conditions for accession; the securing of commitments from the

[13] Commission of the European Communities, *Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009 – 2010*, COM(2009) 533, 14.10.2009, p. 3. As for the Copenhagen criteria, see Copenhagen European Council, 21-22 June 1993, Conclusions of the Presidency, p. 13, I.13: «The European Council today agreed that the associated countries in Central and Eastern Europe that so desire shall become members of the European Union. Accession will take place as soon as an associated country is able to assume the obligations of membership by satisfying the economic and political conditions required. Membership requires that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities, the existence of a functioning market economy as well as the capacity to cope with competitive pressure and market forces within the Union. Membership presupposes the candidate's ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union».

candidates; the oversight of the implementation of these on the basis of annual reports; and the provision of pre-accession assistance.

As an example of the final two of these steps, I shall consider the case of Turkey. Turkey has been an EU associate since 1964, and applied to join in 1987. It was officially recognized as a candidate in 1999, and negotiations began in 2005. The Commission Staff Working Document entitled *Turkey 2008 Progress Report*[14] «analyses the situation in Turkey in terms of the political criteria for membership; analyses the situation in Turkey on the basis of the economic criteria for membership; [and] reviews Turkey's capacity to assume the obligations of membership, that is, the *acquis* expressed in the Treaties, the secondary legislation, and the policies of the Union»[15]. The Report covers issues of democracy and rule of law (including those relating to parliament, government, public administration, civil-military relations, the judicial system, and anti-corruption measures), and all forms of human rights (civil, political, economic, social, etc.) and protection of minorities[16].

The *Turkey 2009 Progress Report*[17], *inter alia*, «examines progress made by Turkey towards meeting the Copenhagen political criteria, which require stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities»[18].

[14] Commission of the European Communities, Commission Staff Working Document, *Turkey 2008 Progress Report*, *Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2008-2009*, SEC(2008) 2699, 5. 11. 2008.
[15] Para 1.1, p. 4.
[16] The same subjects are examined by the EU Commission in the framework of the enlargement strategy for other countries such as Croatia, the former Yugoslav Republic of Macedonia, Albania, Montenegro, Kosovo, Bosnia – Herzegovina, Serbia, and Iceland.
[17] Commission of the European Communities, Commission Staff Working Document, *Turkey 2009 Progress Report, Accompanying the Communication from the Commission to the European Parliament and the Council, Enlargement Strategy and Main Challenges 2009-2010*, SEC(2009)1334, 14. 10. 2009.
[18] P. 6.

The *Commission Decision on a Multi-annual Indicative Planning Document (MIPD) 2009-2011 for Turkey*[19], taken within the framework of the Instrument for Pre-Accession Assistance (IPA), provides that « [w]ithin the Institution Building component, the focus of assistance in the area of the political criteria will be on the institutions that are directly concerned by the reforms: the judiciary and the law enforcement services. A second priority will be support for the continued development of civil society organisations. Among the issues to be addressed, priority will be given to human rights and fundamental freedoms; gender issues and the fight against corruption»[20].

Here, once again, the global legal order places pressure on national institutions to improve their democratic performance[21]; this time, however, against a set of benchmarks, and through the monitoring of developments and provision of assistance. It is to be noted that, by involving itself in such issues, the European Union – like many other international organizations – exceeds its jurisdiction. For example, responsibility for anti-corruption policies has not been transferred to the Union.

The third example that I wish to refer to involves the United Nations Democracy Fund (UNDEF) and the European Instrument for Democracy and Human Rights (EIDHR).

With regard to the first, the General Assembly of the United Nations, on October 24th 2005, adopted a Resolution (World Summit Outcome) where it stated the following:

[19] Commission of the European Communities, Commission Decision, C(2009)5041 of 29 June 2009, on a Multi-annual Indicative Planning Document (MIPD) 2009-2011 for Turkey*, Instrument for Pre-Accession Assistance (IPA) Multi-annual Indicative Planning Document (MIPD) 2009-2011, Turkey.*

[20] P. 4.

[21] On the impact of the European measures, see F. Türkmen, *The European Union and Democratization in Turkey: The Role of the Elites*, in «Human Rights Quarterly», vol. 30, n. 1, February 2008, p. 147: «Since Turkey's candidacy to the European Union was officially confirmed by the Union on 11 December 1999 at the Helsinki Summit, the country has been undergoing a profound transformation in terms of democratization. Two series of constitutional amendments and eight reform packages, comprising more than 490 laws, were adopted or amended by the Turkish Parliament in the last six years. The issues addressed range from the abolition of the death penalty to the recognition of the right to be taught and broadcast in mother tongues other than Turkish, as well as the improvement of the legal situation of non-Muslim religious minorities and the expansion of civil and political rights in general».

«We reaffirm that democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. We also reaffirm that while democracies share common features, there is no single model of democracy, that it does not belong to any country or region, and reaffirm the necessity of due respect for sovereignty and the right of self-determination. We stress that democracy, development and respect for all human rights and fundamental freedoms are interdependent and mutually reinforcing. We renew our commitment to support democracy by strengthening countries' capacity to implement the principles and practices of democracy and resolve to strengthen the capacity of the United Nations to assist Member States upon their request. We welcome the establishment of a Democracy Fund at the United Nations. We note that the advisory board to be established should reflect diverse geographical representation. We invite the Secretary-General to help to ensure that practical arrangements for the Democracy Fund take proper account of existing United Nations activity in this field. We invite interested Member States to give serious consideration to contributing to the Fund»[22].

UNDEF was established in July 2005, with an Executive Head, a Secretary-General Advisory Board and a Programme Consultative Group. Thus far, 38 Member States have contributed to the Fund, which provides financing to civil society organizations every year, toward the ultimate aim of promoting democracy.

As for the EIDHR, the European Union Regulation no. 1889/2006 states the following: «This Regulation establishes a European Instrument for Democracy and Human Rights under which the Community shall provide assistance, within the framework of the Community's policy on development cooperation, and economic,

[22] United Nations General Assembly, resolution, A/RES/60/1, 2005 World Summit Outcome, 24th October 2005, p. 30.

financial and technical cooperation with third countries, consistent with the European Union's foreign policy as a whole, contributing to the development and consolidation of democracy and the rule of law, and of respect for all human rights and fundamental freedoms. Such assistance shall aim in particular at […] promoting and consolidating democracy and democratic reform in third countries, mainly through support for civil society organisations; […] strengthening civil society active in the field of human rights and democracy promotion; supporting and strengthening the international and regional framework for […] the promotion of democracy and the rule of law, and reinforcing an active role for civil society within these frameworks; […] building confidence in and enhancing the reliability of electoral processes, in particular through election observation missions, and through support for local civil society organisations involved in these processes»[23].

Since 2006, the European Instrument has funded civil society initiatives directed at supporting action on democracy and transparency of democratic electoral processes, in particular through election observation.

This example is different from those described earlier in two respects. In the first place, the addressees of the UN and EU initiatives are national governments only indirectly: both institutions provide incentives for civil societies, so that these may be the entities to put pressure on national governments. In the second place, both global institutions act through financial means, open to requests from interested parties.

My fourth example is Article 11 of the European Convention on Human Rights, which provides that «[e]veryone has the right to freedom of peaceful assembly and to freedom of association […]. No restrictions shall be placed on the exercise of these rights other

[23] Regulation (EC) No. 1889/2006 of the European Parliament and of the Council of 20 December 2006 on establishing a financing instrument for the promotion of democracy and human rights worldwide, Official Journal of the European Union, 29.12.2006, L 386/4.

than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others […]». The European Court of Human Rights can therefore decide whether, in one of the 47 countries that have ratified the Convention, the dissolution of a political party, or the temporary forfeiture of certain political rights, meets the tests prescribed by the Convention (i.e., that the act has a basis in domestic law; that it pursues one or more of the legitimate aims prescribed by Article 11 of the Convention; that it is necessary in a democratic society, to meet a pressing social need; and that it is proportionate to the aims pursued).

Such an evaluation was carried out, for instance, in the *Refah Partisi (The Welfare Party) v. Turkey* case[24]. The Refah Party, founded in 1983, became, after the 1995 general elections, the largest political party in Turkey. A 1998 Constitutional Court judgement had dissolved Refah on the ground that it had become a «centre of activities contrary to the principle of secularism». The national Constitutional Court had declared that «Democracy is the antithesis of sharia». The Strasbourg Court, on the basis of a careful examination of the national court's decision in the light of the Convention, reached the conclusion that «there has been no violation of Article 11 of the Convention», as «Refah's dissolution may be regarded as 'necessary in a democratic society' within the meaning of Article 11»[25].

[24] *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], no. 41340/98, 41342/98, 41343/98 and 41344/98, ECHR 2003-II, 13 February 2003.

[25] The European Court of Human Rights has been called to judge other cases of dissolution of political parties in Turkey (e.g. the *case of the United Communist Party of Turkey and Others v. Turkey,* 19392/92, 30 January 1998; the *case of the Socialist Party and Others v. Turkey,* 21237/93, 25 May 1998; the *case of Freedom and Democracy Party,* 23885/94, 8 December 1999. For a general overview see M. Koçak – E. Örücü, *Dissolution of Political Parties in the Name of Democracy: Cases from Turkey and the European Court of Human Rights*, in «European Public Law», Volume 9, Issue 3, 2003). However, the *Refah Partisi (The Welfare Party) v. Turkey* was the first case in which the Court endorsed a political party ban decision.

This case presents a much higher level of interference, operated by global law, with national law in the field of democracy, in that the supranational court legitimized a repressive strategy adopted by national authorities for the ultimate purpose of defending democracy.

A fifth example is Article 3 of Protocol No. 1 of the European Convention on Human Rights, which provides the following: «The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature».

A violation of this article was alleged in the case of *Yumak and Sadak v. Turkey* (8 July 2008)[26] because, according to two Turkish nationals, «the imposition of an electoral threshold of 10% in parliamentary elections interfered with the free expression of the opinion of the people in the choice of the legislature».

The Grand Chamber of the Strasbourg Court maintained that «[d]emocracy constitutes a fundamental element of the 'European public order', and the rights guaranteed under Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law», and reached the

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On this case, see D. Kugelmann, *Die streitbare Demokratie nach der EMRK*, in «Europäische Grundrechte Zeitschrift», 2003, Heft 17-20, p. 553; M. Levinet, *Droit constitutionnel et Convention européenne des droits de l'homme. L'incompatibilité entre l'Etat théocratique et la Convention européenne des droits de l'homme. À propos de l'arrêt rendu le 13 février 2003 par la Cour de Strasbourg dans l'affaire Refah Partisi et autres c/Turquie*, in «Revue française de droit constitutionnel», n. 57, 2004, p. 207; P. Harvey, *Militant democracy and the European Convention on Human Rights*, in «European Law Review», n. 29, June, 2004, p. 407; Y. Mersel, *The dissolution of political parties: the problem of internal democracy*, in «International Journal of Constitutional Law», vol. 4, no. 1, January 2006, p. 84; P. Macklem, *Militant democracy, legal pluralism, and the paradox of self-determination*, in «International Journal of Constitutional Law», vol. 4, no. 3, July 2006, p. 488; A. Nieuwenhuis, *The Concept of pluralism in the case-law of the European Court of Human Rights*, in «European Constitutional Law Review», no. 3, 2007, p. 367.
On the "militant democracy", see also K. Loewenstein, *Militant democracy and fundamental rights, I*, in «The American Political Science Review», no. 3, June 1937, p. 417 and more recently see M. Thiel (ed.), *The "Militant Democracy" Principle in Modern Democracies,* Farnham, Ashgate, 2009; S. Issacharoff, *Fragile Democracies*, in «Harvard Law Review», April 2007, Vol.120, Issue 6, pp. 1405-1467; A. Sajó (ed.), *Militant Democracy*, Utrecht, Eleven International, 2004.
See also the document of the Venice Commission: *Lignes directrices sur l'interdiction et la dissolution des partis politiques et les mesures analogues adoptées par la Commission de Venise lors de sa 41e réunion plénière (Venise, 10 – 11 décembre, 1999),* CDL-INF(2000)001, http://www.venice.coe.int/docs/2000/CDL-INF%282000%29001-f.asp

[26] *Yumak and Sadak v. Turkey* [GC], no. 10226/03, 8 July 2008.

conclusion that «in general a 10% electoral threshold appears excessive. In that connection, [the Court] concurs with the organs of the Council of Europe, which have stressed the threshold's exceptionally high level and recommended that it be lowered […]. It compels political parties to make use of stratagems which do not contribute to the transparency of the electoral process. In the present case, however, the Court is not persuaded that, when assessed in the light of the specific political context of the elections in question, and attended as it is by correctives and other guarantees which have limited its effects in practice, the threshold has had the effect of impairing in their essence the rights secured to the applicants by Article 3 of Protocol No. 1. There has accordingly been no violation of that provision»[27].

The Court makes use of a supranational standard of legality to measure the degree of democracy exhibited by a national government, and this standard is derived not from a global definition of national democracy, but rather from an internationally recognized human right (along the same lines, the Council of Europe established, in 1990, the European Commission for Democracy through Law – better known as the Venice Commission – for the purpose of upholding the three principles of Europe's constitutional heritage: democracy, human rights and the rule of law, in four key areas: constitutional assistance; elections and referendums, political parties; co-operation with

[27] On this case, see R. Zimbron, *The Unappreciated Margin: Turkish Electoral Politics before the European Court of Human Rights*, in «Harvard JIL Online», vol. 49, November 13, 2007, p. 10; M. Levinet, *Droit constitutionnel et Convention européenne des droits de l'homme. La confirmation de l'autonomie des États en matière de choix des systèmes électoraux. Brèves réflexions sur l'arrêt rendu par la Cour européenne des droits de l'homme dans l'affaire* Yumak et Sadak c/Turquie *(Gr. Ch., 8 juillet 2008),* in «Revue française de Droit constitutionnel», n. 78, Avril 2009, pp. 423 – 430; J. Levivier, *Droit à des élections libres*, in «Journal du Droit International», Juillet – Août – Septembre 2009, n. 3/2009, pp. 1072 – 1074; D. Popovic*, Prevailing of Judicial Activism over Self-Restraint in the Jurisprudence of the European Court of Human Rights*, in «Creighton Law Review», n. 42, 2009, pp. 361-396; J. Welch – A. Fairclough (eds.), Case comment, *Parliamentary Elections, national thresholds, Art. 3 of Protocol No. 1*, in «European Human Rights Law Review», Issue 6, 2008, pp. 792-795; S. Golubok, *Right to free elections: emerging guarantees or two layers of protection*? in «Netherlands Quarterly of Human Rights», Vol. 27/3, 2009, pp. 361–390.

constitutional courts and ombudspersons; and transnational studies, reports and seminars).

The last example that I wish to analyse here is provided by the history and processes of the Second Gulf War and of the Iraqi transition. On March 20th, 2003, a Multinational Force of 49 Nations[28] invaded Iraq. Some countries supported the invasion in a non-military fashion; many others subsequently withdrew their troops. On April 21st, 2003, the Coalition created a Coalition Provisional Authority (CPA) as a transitional government of Iraq, endowed with executive, legislative and judicial authority. In May 2003, the Coalition pronounced the "mission accomplished", signalling the end of major armed combat engagements. Saddam Hussein was captured in December 2003. On June 28th, 2004, the CPA transferred the "sovereignty of Iraq" to the "Iraqi Transitional Government", which began the trial of Saddam Hussein and the process of moving towards the establishment of open elections. On January 31st, 2005, direct democratic elections were held, electing members to the Transitional National Assembly, which was tasked with drafting a Constitution – a document that was ratified on October 15th, 2005. On December 15th, 2005, the members of the Iraqi National Assembly were elected. Finally, on May 20th, 2006, the Government of Iraq took office, succeeding to the Iraqi Transitional Government.

These steps were taken in accordance with the procedural provisions of Chapter VII of the UN Charter, which require a Security Council decision to determine the existence of a threat to peace, of a breach of the peace or of an act of aggression (Article 39). A complex structure was established by the United Nations in order to impose democracy in

[28] "Coalition of the Willing": phrase first used in the late 1980s to refer to nations acting collectively, often in defiance of the UN.

Iraq: a Special Representative for Iraq of the Security Council[29]; a United Nations Assistance Mission for Iraq (UNAMI)[30]; a Development Fund for Iraq, and an International Advisory and Monitoring Board of that Fund[31]; and a Multinational Force (MNF)[32].

The purpose of these efforts was to give to the United Nations a «leading role in assisting the efforts of the Iraqi people and Government in developing institutions for representative government and in promoting national dialogue and unity»[33]. The importance of the United Nations' role «in advising, supporting and assisting the Iraqi people and Government to strengthen democratic institutions, advance inclusive political dialogue and national reconciliation, facilitate regional dialogue, aid vulnerable groups including refugees and internally displaced persons, strengthen gender equality, promote the protection of human rights, and promote judicial and legal reform» was reaffirmed (in 2009)[34] in August 2010[35].

During the transition, it was held to be important to ensure welfare, security, stability, self-determination[36] and the presence of an internationally recognized, representative government to assume the responsibilities of the Authority[37].

According to the Security Council, the concept of democracy included the right of the Iraqi people to determine their own political future and control over their own natural

[29] Security Council Resolutions 1483(2003), Para. 8, 1546(2004), Para. 7, 1770(2007), Para. 2, 1830(2008), Para. 2 and 1883(2009), Para. 2.
[30] Security Council Resolutions 1500(2003), Para. 2, 1546(2004), Para. 7,1770(2007), Para. 2, 1830(2008), Para. 2 and 1883(2009), Para. 2.
[31] Security Council Resolution 1483(2003), Paras. 12 and 17, 1546 (2004), Para. 24, 1905(2009). Proceeds from export sales of petroleum products and natural gas are deposited into the Fund.
[32]Security Council Resolutions 1511(2003), Para. 13 and 1546(2004), Paras. 9 – 15.The mandate of UNAMI, of the Fund, of the Board and of the MNF have been extended with Resolutions 1619 and 1637 (2005), 1700 (2006), 1770 and 1790 (2007), 1830 (2008), 1859(2008), 1883 (2009) and 1905(2009),1936(2010).
[33] Security Council Resolution 1619(2005).
[34] Security Council Resolution 1883(2009), Para. 7.
[35] Security Council Resolution 1936(2010), Para. 7.
[36] Security Council Resolution 1483(2003), Para. 4.
[37] Security Council Resolution 1511(2003), Para. 1.

resources[38]; to independence, sovereignty, unity and territorial integrity[39]; to the rule of law[40]; to democracy, including free and fair elections[41]; and to an internationally recognized representative of the government of Iraq[42].

This last case raises the question of whether democracy can be imposed by military force. We might recall, in this regard, the achievements of occupation forces in Germany and Japan after World War II, and, more recently, in Bosnia and Herzegovina; however, the question of whether democracy can be imposed from outside, or can grow only by means of indigenous development[43], can also be raised in the present context.

3. Does the global legal space threaten or enhance democracy?

What do these cases have in common, and what are the differences between them?

As for the subject of regulation, all cases refer to national democracies. But all consider democracy in conjunction with human rights (and some additionally with the rule of law).

The addressees of these interventions are national governmental institutions; in most cases on a direct basis, in others (namely those concerning UNDEF and EIDHR) through civil societies.

The power to originate proceedings rests on a request from either national governments (as occurs in the context of the EU enlargement process and in the ODIHR case), or private parties (as in the UNDEF, EIDHR, and ECHR cases). Only in the case

[38] Security Council Resolutions 1511(2003), p. 1 (no. 2), 1546(2004), Para. 3, and 1637(2005), p. 1 (no. 4).
[39] Security Council Resolution 1546(2004), p. 1 (no. 3) and Resolutions 1619 and 1637(2005).
[40] Security Council Resolution 1546(2004), p. 1 (no. 10).
[41] Security Council Resolution 1546(2004), p. 1 (no. 10).
[42] Security Council Resolution 1483(2003), Para. 22.
[43] See S. Cassese, *The Globalization of Law*, in «NYU Journal of International Law and Politics», vol. 37, n. 4, 2005, Summer, pp. 973-974.

of the UN Security Council does the power to start proceedings rest on the authority that possesses jurisdiction.

Interventions consist in monitoring, issuing recommendations, and providing assistance; or, in the case of the ECHR, in adjudicating, and, in the cases of UNDEF and EIDHR, in financing.

Benchmarks are undisclosed, with the exception of those relevant to the European Union enlargement process (where the benchmarks consist of the Copenhagen criteria) and to ECHR judgements (where the benchmark is the European Convention)[44].

Finally, only the assessments given by the EU Commission and the European Court of Human Rights are binding. The remaining interventions constitute guidelines or incentives, promote, or advise, but do not bind.

The examples raise a number of different sets of questions.

Firstly, can democracy be imported from above (or protected from the outside)[45]? Should not democracy rely on self-creation and self-preservation, instead of depending on external pressures? How democratic is an imported democracy? And what is the proper role of the "demos" in a democracy? If global institutions are affected by a

[44] This lack of detailed indicators is significant: see K.E. Davis, B. Kingsbury, S.E. Merry, *Indicators as a technology of global governance*, New York University School of Law, IILJ Working Paper 2010/2, http://www.iilj.org/publications/documents/2010-2.Davis-Kingsbury-Merry.pdf

[45] The focus of the present contribution is on the promotion of democracy by global institutions, not on the import – export of democratic institutions and processes between countries. On this last topic there is a large body of literature. See, P. Burnell - R. Youngs (eds.), *New Challenges to Democratization*, London, Routledge, 2010; M. McFaul, *Advancing Democracy Abroad: Why We Should and How We Can*, Lanham, Rowman & Littlefield, 2010; A. Magen - T. Risse - M.A. McFaul (eds.), *Promoting Democracy and the Rule of Law: American and European Strategies*, Basingstoke, Palgrave, 2009; Z. Barany– R.G. Moser, *Is Democracy Exportable?,* Cambridge University Press, 2009; L. Morlino – A. Magen, *International Actors, Democratization and the Rule of Law, Anchoring Democracy?*, London, Routledge, 2009; P. Grilli di Cortona, *Come gli Stati diventano democratic*i, Bari – Roma, Laterza, 2009; L. Diamond, *The Spirit of Democracy*, Holt Paperbacks, 2008; P.F. Nardulli, *International Perspectives on Contemporary Democracy*, University of Illinois Press, 2008; N.S. Teixeira, *The International Politics of Democratization: Comparative Perspectives*, London, Routledge, 2008. On the emergent international backlash against democracy promotion, T. Carothers, *The continuing backlash against democracy promotion*, in P. Burnell - R. Youngs (eds.), *New challenges to democratization*, cit. , pp. 59 – 73; L. Diamond, *The Spirit of Democracy*, cit., cap. 3, «The Democratic Recession», pp. 56 – 87; L. Morlino – A. Magen (eds.), *International actors, Democratization and the Rule of law. Anchoring democracy?*, cit. ; *Crying for freedom*, in «The Economist International», January, 16th 2010, pp. 54 – 56.

democratic deficit, as there is no direct election at the global level, are they entitled to impose or promote democracy in national settings?

This argument descends into a contradiction: if democracy can only be self-given, the only way to introduce or protect democracy in a non-democratic country[46] (given that the people cannot express themselves through elections) is through a non-democratic, but domestic process: for example, a popular upheaval. However, as history teaches, the introduction of democracy, or its protection[47] against authoritarian impulses, are not necessarily domestic processes: they can be the product of external pressures or conditions, provided that these allow, after a certain amount of time, for local elections to be held. Therefore, external pressures or conditions can play the same role as a constituent process.

Moreover, democracy does not consist only of periodically held elections, but also of controlling special interest predomination, making institutions more inclusive by protecting individual and minority rights, and of fostering collective deliberation. And global institutions are well equipped for doing so[48].

Secondly, as there is not just one type or kind of democracy[49], the following question arises: *which* democracy should be imported or protected from the outside? For

[46] Assuming that "the people" do not agree to being governed by non-democratic rules. The existence of such support is often difficult to ascertain. But one can assume that, in this case, non-democratic rulers do enjoy some popular support. Therefore, there is some kind of (very limited degree of) democracy.

[47] On the conceptual distinction between democracy promotion and protection see P.C. Schmitter – I. Brouwer, *Conceptualizing, Researching and Evaluating Democracy Promotion and Protection*, EUI Working Paper, SPS No. 99/9, http://cadmus.eui.eu/dspace/bitstream/1814/309/1/sps99_9.pdf

[48] This point is made incisively by R.O. Keohane, S. Macedo and A. Moravcsik, *Democracy-Enhancing Multilateralism*, cit. p. 9 ff.

[49] See UN, *Guidance Note of the Secretary General on Democracy*, March 2010, p. 2: «The UN has long advocated a concept of democracy that is holistic: encompassing the procedural and the substantive; formal institutions and informal processes; majorities and minorities; men and women; governments and civil society; the political and the economic; at the national and the local levels. It has been recognized as well that, while these norms and standards are both universal and essential to democracy, there is no one model: General Assembly resolution 62/7 posits that "while democracies share common features, there is no single model of democracy" and that "democracy does not belong to any country or region". Indeed, the ideal of democracy is rooted in philosophies and traditions from many parts of the world. The Organization has never sought to export or promote any particular national or regional model of democracy».

example, should the emphasis be placed on free elections, or, rather, on a multi-party system? What about freedom of information, public access to official documents, equality, and the separation of powers? Should the global legal order also lend its support to forms of "militant democracy" ("*streitbare Demokratie*")[50]? Which attitude should the global system adopt vis-à-vis anti-system actors (such as insurrectionist parties) and secessionism (such as separatist parties)? Should the members of the judiciary be appointed through a democratic process, or selected according to merit?

This is a much more difficult question. Even if it is assumed that democracy can be transplanted from above, one must recognise that the choice from such a vast range of different alternative interpretations of the concept of democracy results from a non-democratic process, if left in the hands of global institutions. However, experience shows that democratic institutions imported from the outside are indeed capable of adjusting to the domestic context.

One good example of such an adjustment is that of local government in Germany. The *Länder* structure, while not entirely new, was introduced under pressure from allied military forces, following the American federalist example. After a few years, however, they evolved into an entirely novel institution; in their new context, they became different bodies from the originals upon which they were modelled.

Thirdly, at which stage should the global legal order defend democracy? At its very inception, seeking only to introduce democratic institutions? Or at a later stage too, in order to protect and safeguard democracy against extremism or other kinds of attack?

The democratic process is not necessarily a machine that runs by itself. In every democracy there are developments and setbacks. Therefore, corrections are necessary.

[50] «A democracy capable of defending itself against anti-democratic actors who use the democratic process in order to subvert it» P. Harvey, *Militant democracy and the European Convention on Human Rights*, cit., p. 408.

The example of the European Court of Human Rights is instructive, as its interference with national democracies, including mature ones, puts pressure on national governments to democratize: the domestic legal order is subject to a penalty in case of non-compliance. The Strasbourg Court introduces a "dialogue" between a global court and national governments.

This result raises a different question. A favourable international environment is important for the survival of democracy[51]. But can external pressures or conditions, even if they come from above (global bodies, a group of foreign governments), genuinely be effective?

Lastly, which is the authority with the power to decide when conflicting values arise, and, in particular, in extreme cases? Is it more democratic to prohibit or exclude insurrectionary and secessionist parties from the electoral arena, or to leave them to act freely? Must the domestic legal order adjust to the global standards? And where does the legitimacy of global standards come from, given that the global legal order is not democratic itself (i.e. that there is no cosmopolitan "demos"; no global public opinion, debate or deliberation; no global political party; no global elections; and no World Parliament[52])?

However, a real conflict between the legitimacy of global decisions and that of domestic authorities occurs only in extreme cases. Global institutions establish standards not in order to impose, but rather to promote and induce, democracy in domestic governments. They want – as a rule – national governments to respect democratic principles; they do not, however, seek to force such principles onto domestic institutions.

[51] G. Capoccia, *Defending Democracy*, Johns Hopkins Univ. Press, 2005, p. 224.

[52] The government of international organizations is an «undemocratic bureaucratic bargaining system» (R. Dahl, *Can international organizations be democratic? A skeptic's view*, in I. Shapiro and C. Hacker-Cordón (eds.), *Democracy's Edges*, Cambridge Univ. Press, 1999, p. 33. For a different point of view, see A. Buchanan and R.O. Keohane, *The Legitimacy of Global Governance Institutions*, in «Ethics and International Affairs», vol. 20, 2006, p. 405 ff.

The final observation brings me back to my point of departure. Democracy is strongly correlated with the rule of law[53] and with economic development[54]. In terms of the former, «[t]he relationship between the rule of law and liberal democracy is profound. The rule of law makes possible individual rights, which are at the core of democracy. A government's respect for the sovereign authority of the people and a constitution depends on its acceptance of law»[55]. In terms of the latter, «[…] for democracy to *endure*, historical experience suggests that the chances for democratic survival are directly linked to per capita GNP»[56].

This correlation has led many global institutions, such as the World Bank and the European Union, first, to develop indicators to evaluate and monitor respect for democracy and compliance with the rule of law; and then, to provide assistance and aid in order to promote both. Institutions engaged in promoting economic development have also become engaged in promoting a better institutional setting for policymaking, through

[53] See L. Morlino – A. Magen, *International Actors, Democratization and the Rule of Law, Anchoring Democracy?*, cit.; T. Carothers (ed.), *Promoting the Rule of Law Abroad: In Search of Knowledge,* Washington, Carnegie Endowment for International Peace, 2006; J.M. Maravall - A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press, 2003.

[54] See S.M. Lipset, *Some Social Requisites of Democracy: Economic Development and Political Legitimacy*, in «The American Political Science Review», Vol. 53, No. 1, (Mar., 1959) pp. 69 -105; L. Diamond, *Economic Development and Democracy Reconsidered*, in G. Marks - L. Diamond (eds.), *Reexamining Democracy: Essays in Honor of Seymour Martin Lipset*, London, Sage, 1992, pp. 93 - 139; A. Przeworski - M.E. Alvarez - J.A. Cheibub - F. Limongi, *Democracy and Development: Political Institutions and Well-Being in the World, 1950 – 1990*, Cambridge University Press, 2000.

Democracy is also seen as instrumental to other goals of the international community, such as peace and security, as noted by the European Council, by the European Parliament and by the United Nations Secretary General: «The best protection for our security is a world of well-governed democratic States. Spreading good governance, supporting social and political reform, dealing with corruption and abuse of power, establishing the rule of law and protecting human rights are the best means of strengthening the international order» (European Council, *A Secure Europe in a Better World – European Security Strategy 2003*, 12 December 2003, p. 10). «[D]emocratisation and good governance are not only ends in themselves, but are also vital for poverty reduction, sustainable development, peace and stability; […] as demonstrated by the EU's internal integration process, democracy helps to deliver not only political and civil rights, but also economic, cultural and social rights, including solidarity» (European Parliament, *Democracy building in external relations, European Parliament resolution of 22 October 2009 on democracy building in the EU's external relations*, P7_TA(2009)0056). «Democracy, based on the rule of law, is ultimately a means to achieve international peace and security, economic and social progress and development, and respect for human rights – the three pillars of the United Nations mission as set forth in the Charter of the UN». (*Guidance Note of the Secretary -General on Democracy,* March 2010, p. 2).

[55] T. Carothers, *The Rule-of Law Revival*, in T. Carothers (ed.), *Promoting the Rule of Law Abroad. In Search of Knowledge*, cit., pp. 4 - 5.

[56] E. Bellin, *The Iraqi Intervention and Democracy in Comparative Historical Perspective*, in «Political Science Quarterly», vol. 119, no. 4, 2004 – 2005, Winter, p. 597.

encouraging efficient administration, enhanced transparency and accountability, disclosure laws, more secure property rights, protection of shareholders, and anti-corruption regulations.

4. Democracy as a global problem

The subject of this contribution was not the widely discussed problem of the «democratization of the international realm»[57]. "Global democracy" – unlike global warming or global terrorism – simply does not exist. The proper setting of democracy remains exclusively the State[58].

This does not, however, mean that questions of democracy are irrelevant to global governance; quite the contrary. Firstly, democracy in the national setting suffers from many inherent weaknesses, and may gain in effectiveness if supported from outside (as illustrated by the example of Turkey before the Strasbourg Court). Secondly, many important actors within the global arena have an interest in increasing the spreading of democratic institutions (not least because it is often awkward for the heads of democratic States and governments to deal with partners who do not represent the will of their people).

Therefore, despite finding its proper location in the State, democracy is not only a domestic matter. Global institutions too care about national democracy, and there is widespread interest in the global arena in the goals of achieving, diffusing and maintaining democracy worldwide. The purpose of the present contribution is to seek to

[57] See A. von Bogdandy, *Globalization and Europe: how to square democracy, globalization, and international law*, in «The European Journal of International Law», vol. 15, no. 5, 2004, p. 899. This contribution is important because it lays down the "conceptual foundations" (p. 896) of the relations between globalization and democracy.

[58] For a different perspective see D. Archibugi, *The Global Commonwealth of Citizens: Toward Cosmopolitan Democracy,* Princeton University Press, 2008.

illustrate how, when and why global institutions take responsibility for introducing or defending democracy within national institutions.

As the preceding analysis has illustrated, global institutions make use of a wide array of instruments, using benchmarks and other means of evaluating democratic performance, in order to fulfil the varied goals of promoting, assisting, monitoring, judging or imposing democracy. Moreover, they take action both in terms of introducing democracy into States in which it is not present, and of strengthening democracy in States in which it is under threat. Lastly, different global institutions can and do act to further different conceptions of democratic governance.

Each of these conclusions raises many problems of its own. The various means of introducing democracy can be classified under one of two major categories: soft and hard interventions. While those in the first category act as incentives, the second seek to impose democracy from above, and their results should be at least ratified or confirmed by subsequent popular elections.

A second major problem stems from the interventions of global institutions in democratic societies, performed with the aim of adjusting or improving domestic democracy. The legitimacy of any such interventions can be considered doubtful, as particular non-democratic practices can themselves be the product of a democratic regime (consider, for example, the lack of transparency rules in many democratic legal systems). But democracy does not mean only democratic investiture through elections: it also implies a wealth of other institutions (among others, free speech, transparency, and local government), the absence of which can, indeed, endanger elections themselves.

A third major problem concerns global judicial oversight over the basic institutional arrangements of national politics. When the global body in question is not

"political" (such as the United Nations), but, rather, judicial in nature (such as the Strasbourg Court), there is a risk that «courts […] enter the political domain». In the national arena, «it is becoming commonplace for courts to confront questions that were long deemed beyond the realm of possible judicial competence. […] [C]ourts now routinely engage the complicated world of political power in ways unimaginable a few generations back»[59]. The question remains, however: are courts beyond the State entitled to exercise similar control?

A fourth major problem concerns the definition of democracy: beyond self-determination and representative government, should it also be conceived of as including pluralism, self-government, and the separation of powers? Should only a common core of democratic institutions and rules be imposed from the outside, or should the global bodies in question seek, rather, to ensure that each country imports the entire panoply of democratic arrangements? The answers to these questions cannot be furnished by abstract reflection alone, but require, instead, decisions to be made in consideration of the particular context of each individual case.

[59] S. Issacharoff, *Democracy and Collective Decision Making*, in «International Journal of Constitutional Law», vol. 6, April, 2008, p. 266.