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Franck's Right to Democratic Governance and the Role of Democratic Sanctions¹

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Abstract

In 1992, Tomas Franck conceptualized the democratic entitlement theory—a new approach regarding the international validation of governance, which was previously based solely on the “doctrine of effective control.” This led to the emergence of a new international norm under which only democracy can validate a government’s legitimacy. Twenty years later, the theory proposed by Franck has gained more currency. International organizations and states began and continue to address the legitimacy of a government by imposing democratic sanctions. This article proposes to corroborate the Franck democratic entitlement theory by incorporating democratic sanctions, while also consolidating cases where sanctions were applied, *inter alia*, construing legal status of such measures.

Key Words: democratic sanctions, democracy, the democracy norm, democratic legitimacy, government’s legitimacy.



Introduction

In 1992, leading American scholar Tomas Franck formulated a concept on the emerging right to democratic governance, under which “only democracy validates governance.”² Subsequently, Franck noted that the emerging right to democratic governance was “based in part on custom and in part on the collective interpretation of treaties... [This emerging right] is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations.”³ Franck substantiated the emergence of the right to democratic governance on two principal premises: first, the collapse of the Soviet Union; second, the resolution of the United Nations General Assembly (UNGA) on the restoration

1 The author hereby expresses his deep gratitude to Anton Lovin, Associate Professor at the Institute of International Relations Taras Shevchenko National University of Kyiv, for precious remarks. Additional appreciation goes to Vivica Williams for English review.

2 Thomas M. Franck, “The Emerging Right to Democratic Governance,” *American Journal of International Law* 86.1 (1992): 47.

3 Franck, “The Emerging Right to Democratic Governance,” 47.

of the democratically elected government in Haiti. The concept developed by Franck has led to a significant amount of literature and follow-up studies. His legacy has been subject to scrupulous assessment and review in light of the “rise and fall of the principle of democratic legitimacy in the practice of international law,”⁴ or the “prospects of the democratic norm.”⁵

Despite numerous studies, lacunae in complex rethinking of the emerging right to democratic government still exist. In 1992, when his paper was first published, Franck had at his disposal only a few cases where states or collective bodies addressed democratic legitimacy of a government, *inter alia*, by imposing sanctions. In the aftermath of two decades, the incidence of imposing sanctions aimed at addressing the democratic legitimacy of a government has been steadily increasing. Now, more than forty cases⁶ exist where states either unilaterally or collectively addressed the democratic legitimacy of a government, corroborating Franck’s democratic entitlement theory, i. e., “the emerging right to democratic governance.”

The democratic entitlement theory in principle contradicts conventional wisdom regarding the legitimacy of the international validation of governance. It may be described, using the case of Nicaragua, as follows:

...the régime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State. Consequently, Nicaragua’s domestic policy options, even assuming that they

4 See, Jean d’Aspremont, “The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks,” *European Journal of International Law* 22.2 (2011): 549–70.

5 See, Susan Marks, “What has Become of the Emerging Right to Democratic Governance?” *European Journal of International Law* 22.2 (2011): 507–24.

6 The EU democratic sanctions against Niger (1996, 1999, 2009–2010), Madagascar (2009), Guinea (2004, 2009), Mauritania (2005, 2008), Fiji (2000, 2007), Togo (1998, 2004), Guinea-Bissau (1999, 2003), Central African Republic (2003, 2013–2014), Zimbabwe (2001, 2008), Liberia (2001), Côte d’Ivoire (2000–2001), Haiti (2000), Comoros (1999), Venezuela (2017), Belarus (2004, 2011), Burundi (2015), Yemen (2014), and Turkey (1981–1986). The UN democratic sanctions against Yemen (2014–2015), Haiti (1991–1992), Sierra Leona (1997), Nigeria (1993–1998), Angola (1993–2002), Cambodia (1992). The US democratic sanctions against Chile (1975–1990), Romania (1990–1993), Haiti (1987–1994), Burma (1988), Sudan (1989), Kenya (1990, 1993), Zaire (1990–1997), Thailand (1991–1992), Peru (1991–1995), Malawi (1992–1993), Cameroon (1992–1998), Gambia (1994–1998), Ivory Coast (1999–2002), Pakistan (1991–2001), Guinea Bissau (2003–2004), Fiji (2006), Cambodia (1992). Information is collected from the EU sanctions map, available at <https://www.sanctionsmap.eu>, and from Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered*, 3rd ed. (Washington: Peter G. Peterson Institute for International Economics, 2007), 1–233.

correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the Respondent complained of. The Court cannot contemplate the creation of a new rule opening up a right of intervention by one State against another on the ground that the latter has opted for some particular ideology or political system.⁷

Thereby, the International Court of Justice (ICJ) absolutized in international law the principle of state sovereignty with respect to choosing a political model, whether democratic or not. In the dissenting opinion to this judgment, Judge Schwebel disagreed with the reasoning of the Court. He recalled that the Organization of American States Charter and the Contadora Document of Objectives (to which Nicaragua was a party) obliged its members to the “exercise of representative democracy” and “support for democratic institutions.”⁸ He consequently concluded, “*in Central America, [principles of international law governing the actions of States, e. g., exercise of representative democracy and promotion of democratic institutions] can hardly be matters within the exclusive domestic jurisdiction and determination of those States, including Nicaragua.*”⁹ In fact, the legal findings of the Court with respect to the legitimacy of the international validation of governance could not be regarded as all encompassing. The ICJ did not scrutinize such cases where legitimacy of a government due to its undemocratic nature was at stake or where certain political regimes, e. g., the Nazi regime, were internationally outlawed. Franck, however, noted, that “Genocide and Racism conventions certainly do qualify as rules of deportment imposed on all states by the community of nations. Having become customary, as well as treaty law—if not also rules of *jus cogens*—these Conventions may be said to exemplify the principle that states collectively have the authority to determine minimum standards of conduct from which none may long deviate without eventually endangering their membership in the club.”¹⁰

The position regarding the international validation of governance in the Nicaragua case represented commonly applied “effective control doctrine.” Under which, the internal process of gaining power and its exercise would not affect a government’s

7 Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*); Merits, International Court of Justice (1986), accessed December 4, 2018, <http://www.refworld.org/cases, ICJ,4023a44d2.html>.

8 Dissenting opinion of Judge Schwebel in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*); Merits, International Court of Justice (1986), accessed December 4, 2018, <http://www.refworld.org/cases, ICJ,4023a44d2.html>.

9 Dissenting opinion of Judge Schwebel in the Case Concerning Military and Paramilitary Activities in and Against Nicaragua (*Nicaragua v. United States of America*); Merits, International Court of Justice (1986), accessed December 4, 2018, <http://www.refworld.org/cases, ICJ,4023a44d2.html>.

10 Franck, “The Emerging Right to Democratic Governance,” 78.

legitimacy.¹¹ Democratic entitlement theory, in its turn, opened a debate around shifting an entrenched paradigm in international law regarding the international validation of governance. The theory presumes that the internal process of gaining power and its exercise in accordance with international standards matter and affect a government's legitimacy. This presumption gradually evolved into three blocks of international law: self-determination, freedom of political expression, and participatory electoral process. The present article proposes to corroborate the Franck democratic entitlement theory by incorporating an emerging fourth block: democratic sanctions.

In order to understand this incorporation, it is necessary first to define the normative dimension of democracy in terms of international law. Doing so will help the reader understand the roots of the right to democratic governance since the fundamental postulate of which is that only democracy validates government legitimacy. Both democracy and democratic legitimacy cover the theoretical premises of the right to democratic governance.

After the right to democratic governance is set as a norm within international (as *erga omnes partes*) legal order, the following question arises: how to enforce or validate this communitarian norm given a "limited toolbox"¹² of available measures. The article details how the tools of theory and law on international responsibility may be unified under the single concept of democratic sanctions. In legal terms, these sanctions may be in the form of reprisals (actions imposed as a response to the violation of international legal obligation, (e. g., suspension of obligations under bilateral/multilateral treaty), retorsion (e. g., travel bans), and/or retaliation.¹³ Only the first two will be considered here, as the two commonly coincide and can be difficult to differentiate.¹⁴ Hence, democratic sanctions may be a complementary source of international law with the help of which treaty or customary obligations may be interpreted.

One of the main cornerstones of the present study is to demonstrate that Franck's theory has been underpinned by the increasing number of unilateral and multilateral state acts in form of democratic sanctions. Further, to show the strong endorsement of the emergence of the right to democratic governance, this article will define normatively

11 David Wippman, "Pro-Democratic Intervention by Invitation," in *Democratic Governance and International Law*, ed. Gregory H. Fox and Brad R. Roth (Cambridge: Cambridge University Press, 2000), 297–98.

12 Martin Dawidowicz, "Introduction," in *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press, 2017), 12.

13 Alexander Orakhelashvili, "The Impact of Unilateral EU Economic Sanctions on the UN Collective Security Framework: The Cases of Iran and Syria," in *Economic Sanctions Under International Law: Unilateralism, Multilateralism, Legitimacy, and Consequences*, ed. Ali Z. Marossi, Marisa R. Bassett (The Hague: T. M. C. Asser Press, 2015), 15.

14 James Crawford and Martin Dawidowicz, "Foreword," in *Third-Party Countermeasures in International Law* (Cambridge: Cambridge University Press, 2017), 29. The work also deliberates on the notions of "sanctions," "countermeasures," "reprisals," and "retorsions."

democratic sanctions and provide a case study overview of how democratic sanctions have been applied throughout the modern history of international relations. It should be noted that this study focuses neither on the utility of sanctions¹⁵ nor on the political environment surrounding the imposition of sanctions¹⁶—the topics to which the majority, if not all, of studies are devoted.

1. Democracy: A Normative Definition

A basic premise of the right to democratic governance is that only democracy validates government. Hence, determining a normative definition for democracy is necessary. Currently there are no binding documents that prescribe or codify rules or methods for examining democracy and, as a consequence, a government's democratic legitimacy. Opponents argue that "democracy as a political system did not have a uniform model nor a 'best' model... The promotion of democracy should also be based on respect for the differing historical, social and economic backgrounds of countries."¹⁷ Is it actually true that democracy is unique everywhere? If the answer is yes, then Franck's right to democratic governance would be useless due to complete normative ambiguity. Here, we need to recall the Universal Declaration on Democracy, adopted by the Inter-Parliamentary Council, which reads as follows:

Democracy is both an ideal to be pursued and a mode of government to be applied according to modalities which reflect the diversity of experiences and cultural particularities without derogating from internationally recognized principles, norms and standards.¹⁸

Democracy has common and indispensable features. Some of these features are the existence of a multiparty political system, the maintenance of secularism, and so on. Normatively it allows the presumption that the fulfillment of the prescribed features is dogmatically characteristic of truly democratic regimes. The consolidating, streamlining and strengthening of the democracy norm in international law is a credit to the activities of international judicial institutions, especially of the European Court of Human Rights (ECHR). Yet, no one argues that decisions and interpretation of the ECHR may somehow be mandatory to non-European countries. Nevertheless, it is clear

¹⁵ For example, Hufbauer et al., *Economic Sanctions Reconsidered*.

¹⁶ For example, Christian von Soest and Michael Wahman, "Are Democratic Sanctions Really Counterproductive?," *Democratization* 22.6 (2015): 957–80.

¹⁷ Commission on Human Rights of the United Nations, "HR/CN/937 Resolution on Promotion of Democracy," Press Release, 1999, accessed December 4, 2018, <https://www.un.org/press/en/1999/19990428.HRCN.937.html>.

¹⁸ Inter-Parliamentary Union, "Universal Declaration on Democracy," 1997, accessed December 4, 2018, <https://www.refworld.org/docid/48abd598d.html>.

that the court's legal rulings, for example, regarding democratic constituent elements, have undoubtedly been taken into account in a wider context. For example, there is an existing European imperative to hold elections in a multiparty setting.¹⁹ Indeed, democracy assuredly means much more than mere compliance with international standards, but going beyond the established judicial settings of democracy definitely requires a separate study.

Identifying normative definition of democracy, the further step is to scrutinize a core pillar of a democratic government — legitimacy. International law covers legitimacy in two main aspects: the legitimacy of national governments themselves and the legitimacy of the international validation of the governance, its rules and stages.²⁰ Legitimacy is primarily secured by holding free and fair elections. Subsequently, the elected government maintains democratic governance by observing international standards in order to retain its democratic legitimacy. This idea lies at the root of the democratic entitlement theory under which the legitimacy of each government is also to be assessed through international standards, including democracy.²¹ International electoral standards are the integral and the most legally defined part of democracy standards. These international electoral standards are at the center of discourse on procedural view on democracy. The latest is opposite to the abovementioned substantive view, exemplified in the UNCHR Resolution Promotion of the Right to Democracy.²² The emerging right to democratic governance, which encompassed both procedural and substantive understanding, obviously is not implemented *per se*. This emerging right is implemented through international standards, which serve as yardstick for the legal qualification to contest government's democratic legitimacy.²³

1.1 Mandate of International Organizations to Promote and Assess Democracy

According to Franck, “the validation of governments by the international system is rapidly being accepted as an appropriate role of the United Nations, the regional systems and, supplementarily, for NGOs.”²⁴ Thus, international organizations have implied

19 Jure Vidmar, “Multiparty Democracy: International and European Human Rights Law Perspectives,” *Leiden Journal of International Law* 23.1 (2010): 240.

20 Gregory H. Fox, “Democracy, Right To, International Protection,” *Wayne State University Law School Research Paper* (2007): 3–4.

21 Jean d'Aspremont, “Responsibility for Coups d'État in International Law,” *Tulane Journal of International & Comparative Law* 18.2 (2010): 454.

22 Fox, “Democracy, Right To, International Protection,” 4.

23 Mykhailo Buromenskyi, “International Legal Standards of Internal Democracy,” *Herald of the National Academy of Legal Sciences of Ukraine* 2 (1997): 15, accessed December 4, 2018, <http://dspace.nlu.edu.ua/handle/123456789/4482>.

24 Thomas M. Franck, “Legitimacy and the Democratic Entitlement,” in *Democratic Governance and International Law*, ed. by Gregory H. Fox and Brad R. Roth (Cambridge: Cambridge

competence to assess the functioning of democratic institutions in member states or at least to evaluate elections. Such a mandate is embodied within the competence of, as said, the UN, OSCE, CE, OAS, and, to a lesser extent, the African Union. Judicial supervision over compliance with international (i. e., electoral) standards is reserved within the jurisdictions of the European Court of Human Rights and the Inter-American Court of Human Rights. This judicial supervision contributes to and reinforces an equal interpretation and convergence of Franck's idea of democratic entitlement.²⁵

Specifically, within the UN system, democratic initiatives are upheld, for example, with the help of the Electoral Assistance Division or the UNDP, which specifically deals with such matters. Within the EU, the existence of stable institutions for guaranteeing democracy is among the criteria for admission to membership. While the OAS explicitly proclaims democracy as an internationally guaranteed right and allows for the suspension of Member States in which a democratically elected government is overthrown. In other ways, democracy is promoted through the OSCE, the African Union, the Commonwealth, the Council of Europe, and the Mercosur. However, the democracy dimensions in European or Inter-American practice significantly contrast with the absence of any regional framework for democracy promotion in Asia and the Middle East.²⁶

2. The Right to Democratic Governance: A Quest for International Responsibility

In the Articles on State Responsibility for International Wrongful Acts (ARSIWA), the UN International Law Commission reserved the right of any non-injured state to invoke the responsibility of another state. Article 54 of the ARSIWA reads as follows:

This chapter [i. e. chapter II of part three on countermeasures] does not prejudice the right of any State... to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

In order to protect the collective interest of a group or due to a breach of obligation owed to the international community as a whole, any state, other than an injured state, is entitled under Article 48 of the ARSIWA

to invoke the responsibility of another State... if: (a) the obligation breached is owed to a group of States including that State, and is established for the protection of a collective interest of the

University Press, 2000), 41.

25 Franck, "Legitimacy and the Democratic Entitlement," 86.

26 Marks, "What Has Become of the Emerging Right to Democratic Governance?," 511.

group; or (b) the obligation breached is owed to the international community as a whole.

Yet, these Articles have not become a part of international conventional law; nonetheless, their impact and legal weight are out of any doubt.²⁷ The Commission called the above practice limited and rather embryonic.²⁸ Examples provided by the Commission deserve careful consideration; one of which is *Certain Western countries—Poland and the Soviet Union (1981)*, when a number of western countries and the United States imposed sanctions against Poland and the Soviet Union as a response to the enactment of martial law in Poland and suppression of political opposition. As one of the justifications for introducing sanctions, Reagan mentioned the “widespread violations of human rights occurring in Poland.”²⁹ In fact, Poland had placed disproportionate limitations on civil and political rights.³⁰ Therefore, actions against Poland and the Soviet Union clearly fell under Article 54 of the ARSIWA, because of the severe violations of human rights. As a result, the collective interest of the group was at stake, and sanctions were legitimately introduced as a response to the breach of the communitarian norm.

One may argue that the protection of democracy, i. e., in its substantive or procedural meaning, still does not constitute a collective interest (communitarian norm) in the sense of the ARSIWA comparable to the protection of human rights in the previously provided case. Indeed, many scholars suggest that the democracy norm (in procedural and substantive views) is still emerging;³¹ on the other hand, others argue that this norm in its procedural meaning is established.³² The cases below conclusively demonstrate that the democracy norm has become anchored as an inalienable feature of the European public order and of some other regions, but it is still far from being recognized as a universally accepted imperative.³³ In its turn, there is also an assumption that the idea of the democracy norm is conceptualized but only within the limits of the procedural understanding of democracy.³⁴

27 The ICJ mentioned these Articles in some of its judgments, for example, in the *Gabcikovo-Nagymaros Project (Hungary Slovakia)* Judgment.

28 International Law Commission of the United Nations, “Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries,” 2001: 137, accessed December 4, 2018, http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf.

29 Gregory F. Domber, *Empowering Revolution: America, Poland, and the End of the Cold War* (Chapel Hill: University of North Carolina Press, 2014), 33.

30 United Nations Commission on Human Rights, “Report on the 38th Session, 1 February—12 March 1982,” 1982: 143, accessed December 4, 2018, <http://repository.un.org/handle/11176/180637?show=full>.

31 Marks, “What Has Become of the Emerging Right to Democratic Governance?,” 511.

32 Buromenskyi, “International Legal Standards of Internal Democracy.”

33 Vidmar, “Multiparty Democracy,” 240.

34 d’Aspremont, “The Rise and Fall of Democracy Governance in International Law,” 549–70.

3. Democratic Sanctions: Pretext

One of the most widespread reasons to impose sanctions is to prevent and stop human rights violations. Yet another reason has also gained currency—to incline states toward democracy, or to restore democratic order.³⁵ The United States, the European Union, and the United Nations are key senders of such sanctions. In terms of effectiveness, collective sanctions are more valuable for the purpose of this research as they may reveal some communitarian norm purportedly protected by such actions. In this regard, the role of the EU as a sanctioning flagship is undoubted. The EU has imposed sanctions more than 30 times on different occasions.³⁶ Hence, these sanctions are becoming a common instrument in international affairs. Their application has grown progressively during the twentieth century and this is forecasted to remain a trend in upcoming decades as well.

Sanctions, *inter alia*, might pursue, “restoring a legitimate and/or democratically elected government to power,” i. e., democratic sanctions, and/or “facilitating the exercise or protection of human rights,” i. e., human rights sanctions.³⁷ The objective-regimes of these two sanctions are similar, but not identical. In the first case, a government’s democratic legitimacy is challenged. In the second, the legitimacy of a government’s actions is at stake. Moreover, only democratic sanctions contest a government’s legitimacy, while sanctions with all other objectives challenge only the actions of a government. This leads to an overarching distinctive pattern of democratic sanctions with potential legal and political consequences, such as non-recognition of a government, suspension from an international organization, freezing diplomatic relations and bilateral agreements, etc.

In addition, sanctions may be targeted at or implemented to achieve miscellaneous objectives: disarmament, nuclear non-proliferation, changes in trade policy, regime change, compliance with human rights standards, restoration of territorial integrity,

35 Peterson Institute for International Economics had analyzed more than 200 sanctions from 1914 to 2002 and compiled the following statistics: human rights served as a goal of sanctions 32 times; democracy served as an aim of sanctions 23 times. See also: <https://piie.com/summary-economic-sanctions-episodes-1914-2006>. Obviously, their analysis is not exhaustive. Since 2002, a number of other democratic sanctions have been introduced, for example, the EU sanctions against Belarus (2004), the EU sanctions against Venezuela (2017), the EU sanctions against Zimbabwe (2011), the EU sanctions against Burundi (2015), and the suspension of the right of Honduras to participate in the Organization of American States (2009).

36 Francesco Giumelli, “How EU Sanctions Work: A New Narrative,” in *Chaillot Paper* (Paris: European Union Institute for Security Studies, 2013), 7.

37 Jeremy Matam Farrall, *United Nations Sanctions and the Rule of Law* (Cambridge: Cambridge University Press, 2007), 135.

punishment for aggression, etc.³⁸ In this regard, a hallmark feature of democratic and human rights sanctions is that they are not directly related to interstate relations *per se*.

a. Democratic Sanctions: A Normative Definition

In normative terms, democratic sanctions should be understood as “*A third-party countermeasure [including retorsions]... taken by a State other than an injured State in response to a breach of a communitarian norm [democracy norm—in our case] owed to it (as defined in Article 48 ARSIWA) in order to obtain cessation and reparation.*”³⁹ This could mean, for example, the aim of restoring or promoting democracy and frequently regards human rights. Farrell likened sanctions “*...to action which seeks either to coerce the target into behaving in a particular manner, or to punish it for behavior considered unacceptable by the sender. The motive for imposing sanctions may be to respond to a breach of a norm or to prevent such a breach, but it may also be to pursue a foreign policy agenda or to gain some advantage over the target.*”⁴⁰ Ellet and Miron suggested a broad definition of sanctions, including counter-measures, as “*any unilateral coercive measure taken in reaction to an unlawful act...*”⁴¹ However the previous UN oriented definition approach is somehow out of date as its authors noted, especially in light of the growing practice of “countermeasures of general interest” or “multilateral sanctions.”⁴² Finally, Ellet and Miron referred to the ILC commentaries and case study of third-State countermeasures, the latter allowed them to delineate more a functional definition of sanctions as “*means of enforcement of erga omnes obligations [or erga omnes partes obligations] in cases of serious violations [of international law].*”⁴³

The European Union has not distinguished sanctions by objective, i. e., whether they are aimed at promoting democracy or human rights. According to the guidance of the Council of the European Union, “*Sanctions are one of the EU’s tools to promote the objectives of the Common Foreign and Security Policy (CFSP): peace, democracy and the respect for the rule of law, human rights and international law.*”⁴⁴ In case of the EU, sanctions, including democratic ones, are a tool to promote foreign policy objectives. Thus, the EU applies an all-encompassing instrumental understanding of sanctions. The scope and range of sanctions remains at the discretion of states and organizations.

38 Gary Clyde Hufbauer et al., *Economic Sanctions Reconsidered*, 3rd ed. (Washington: Peter G. Peterson Institute for International Economics, 2007), 233.

39 Crawford and Dawidowicz, “Foreword,” 34.

40 Farrall, *United Nations Sanctions and the Rule of Law*, 7.

41 Alain Pellet and Alina Miron, “Sanctions,” *Max Planck Encyclopedia of Public International Law* (Oxford: Oxford University Press, 2011), 2.

42 Pellet and Miron, “Sanctions,” 11.

43 Pellet and Miron, “Sanctions,” 11.

44 EU restrictive measures—Factsheet, Council of the European Union—Press Office, Brussels, 2014, accessed December 4, 2018, https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/EN/foraff/135804.pdf.

For example, the EU distinguishes and applies the following types of sanctions: arms embargo, restrictions or admissions, freezing of assets, economic sanctions.⁴⁵

In literature, the term “democratic sanctions” appears rather rarely. Instead the more common notion in academic discourse is “economic sanctions” to promote, for example, democratic goals or democratization.⁴⁶

When imposed as a response to the violation of human rights standards, sanctions are legitimate and justified, especially if based on information provided by international human rights supervisory mechanisms,⁴⁷ which can confirm the state of human rights compliance in a particular country. As introduced earlier, the democracy norm has been emerging as a regional imperative, particularly, in Europe. Non-European countries are also, however, being called to adhere to this democracy norm. There are at least a few reasons to justify such intervention.

Firstly, the democracy norm is coherently implied in two founding international documents: the International Covenant on Civil and Political Rights⁴⁸ and the Universal Declaration of Human Rights.⁴⁹ Democracy and elections are also mentioned in UN resolutions and documents of other international organizations with rising frequency.⁵⁰ Secondly, at least declaratorily, democracy is part of the constitutional orders of most states in the world. Thirdly, the UN—a universal organization—has also made attempts to restore democracy and used sanctions as a response to authoritarianism. In addition, there were numerous applications of democratic sanctions by the EU, the OAS, and some other regional organizations. Last but not least, there are two approaches in the doctrine on how to assess democracy. The first approach describes, “two forms of government, viz. such as possess institutions of this kind, and all others;

45 “Different Types of Sanctions,” accessed November 23, 2017, <http://www.consilium.europa.eu/en/policies/sanctions/different-types/#>.

46 Nikolay Marinov and Shmuel Nili, “Sanctions and Democracy,” *International Interactions* 41.4 (2015): 765–78.

47 For example, the United Nations Human Rights Council, the Office of the United Nations High Commissioner for Human Rights, the Human Rights Committee and others.

48 Article 25 reads as follows, “Every citizen shall have the right and the opportunity... 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.”

49 Article 21 reads as follows, “The will of the people shall be the basis of the authority of government.”

50 For example, Cotonou Agreement is a partnership agreement between the European Union and the members of the African, Caribbean and Pacific Group of States. This Agreement prescribes: “Democratic principles are universally recognized principles underpinning the organization of the State to ensure the legitimacy of its authority.” The UN Security Council Resolution 2048 (2012)—restrictive measures with regard to the situation in the Republic of Guinea-Bissau. This Resolution demands the following: “a democratic electoral process” and “the reinstatement of the legitimate democratic Government of Guinea-Bissau.” The UN Security Council Resolution 2140 (2014)—these measures prescribe the necessity to hold “timely general elections” in Yemen.

i. e. democracies and tyrannies.”⁵¹ The international legal doctrine favors this way of thinking a dichotomous approach to measuring democracy. This approach proposes to differentiate states as democratic and authoritarian at large; on the other hand, the doctrine also knows “continuous” approach—a set of indicators to identify the level or degree of democracy or authoritarianism.⁵²

For the purpose of this study, we will define democratic sanctions as a scope of permissible under international law legal actions, e. g., retorsions and reprisals, to which countries⁵³ and organizations⁵⁴ may resort in order to address the democratic legitimacy of a government. To summarize, all actions an organization or state uses to address the democratic legitimacy of a government in a non-coercive way may be unified under the single concept of democratic sanctions.

4. Democratic Sanctions: Case Studies

In order to create a new norm, akin to the right to democratic governance, one needs to combine a consistent practice and an enunciated concept.⁵⁵ The following case studies represent the emerged tendency of international organizations and states when they have addressed democratic legitimacy of governments at stake. Collected cases may serve to show that, by using democratic sanctions, international organizations and states have started to punish governments for undemocratic practices, and that actions of senders are solidifying into a coherent practice.

In the beginning of 1990s, Franck had only a few examples of practices where states or organizations addressed government legitimacy. These include:

The European Community v. Turkey, 1981. In 1981, the European Community adopted a package of sanctions against Turkey to punish its undemocratic practices. The debates over restoring democratic order were supported in other European institutions as well, such as in the Council of Europe.⁵⁶ After a few years of sanctions, Turkey adopted a new constitution and scheduled elections. Therefore, sanctions played a partial role in restoring Turkey’s democracy. The current conversation around imposing a new package of sanctions against Turkey began in response to the repression of the political

51 Karl Popper, *The Open Society and Its Enemies: The High Tide of Prophecy: Hegel, Marx, and the Aftermath* (London: George Routledge & Sons, Ltd., n. d.), 150.

52 Samuel P. Huntington, “The Third Wave: Democratization in the Late 20th Century,” *Journal of Democracy* 2.2 (1991): 12.

53 For example, the application of democracy clause in the EU treaties.

54 For example, the Article 9 of the OAS Charter prescribes suspension from the exercise of the right to participate in the activities of the organization in case of illegitimate overthrow of democratically elected government. Gaspare M. Genna and Taeko Hiroi in their book *Regional Integration and Democratic Conditionality* defined similar provisions as “democracy clause.”

55 Franck, “The Emerging Right to Democratic Governance,” 56.

56 Meltem Müftüleri-Bac, *Turkey’s Relations with a Changing Europe* (Manchester: Manchester University Press, 1997), 80.

opposition⁵⁷ after a failed coup d'état on 15–16 July 2016. European states, however, seem to be not as willing now to protect Turkey's democratic order as they were in 1981, evidenced by the rather careful approach taken by a number of leading EU states⁵⁸ regarding recent developments in the Republic of Turkey.

The EU and the United States democratic sanctions against some African states. In general, the sanctions policy of the United States and the European Union led to some positive steps towards democracy in Malawi (1992), and Niger (1996). While sanctions against Togo (1992), Equatorial Guinea (1992), Cameroon (1992), Burundi (1996), The Gambia (1994), and Ivory Coast (1999) were not very successful.⁵⁹

The UN against some African and Caribbean states. The United Nations, in its turn, made several attempts to promote, secure or restore democratic order in member states, namely in The Gambia (1994), Angola (1993), Haiti (1991),⁶⁰ Sierra Leone (1997), and Cambodia (1997).

The cases of Haiti and Sierra Leone are so far the most salient. First, in 1991, the UN strongly supported the strengthening of democratic institutions in Haiti after a coup d'état overthrew a democratically elected government. Subsequently, in 1994, the UNSC upheld the necessity to restore democracy and hold free and fair elections in Haiti.⁶¹ Years later, a number of other resolutions were adopted concerning Haiti; they all mentioned the necessity to hold free and fair elections⁶² and to restore democratic institutions.⁶³ In the second case regarding situation in Sierra Leone, the UNSC in 1997 stressed that “the military junta had not taken steps to allow the restoration of the democratically elected government... The Council then determined that the situation in Sierra Leone constituted a threat to international peace and security in the region.”⁶⁴

57 “Brussels: Turkey Could Face Economic Sanctions | News | DW | 13.11.2016,” 2016, accessed December 4, 2018, <http://www.dw.com/en/brussels-turkey-could-face-economic-sanctions/a-36373830>.

58 “Germany: Won't Talk about Sanctions Against Turkey, EU Needs Joint Response,” 2016, accessed December 10, 2018, <https://www.reuters.com/article/germany-turkey/germany-wont-talk-about-sanctions-against-turkey-eu-needs-joint-response-idUSB4N1BX004>.

59 Hufbauer et al., *Economic Sanctions Reconsidered*, 14.

60 General Assembly of the United Nations, “A/RES/46/7 Resolution on The Situation of Democracy and Human Rights in Haiti” (1991), accessed December 4, 2018, <http://www.un.org/documents/ga/res/46/a46r007.htm>.

61 Security Council of the United Nations, “S/RES/917(1994)” (1994), accessed December 4, 2018, [https://undocs.org/S/RES/917\(1994\)](https://undocs.org/S/RES/917(1994)).

62 Security Council of the United Nations, “S/RES/1542 (2004)” (2004), accessed December 4, 2018, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC_SRES_1542.pdf.

63 Security Council of the United Nations, “S/RES/1529 (2004)” (2004), accessed December 4, 2018, http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/Chap_VII_SRES_1529.pdf.

64 Farrall, *United Nations Sanctions and the Rule of Law*, 135.

In both cases, the UNSC found the overthrow of a democratically elected government as a threat to international peace and security.

More recent cases further illustrate the continuing propensity to use democratic sanctions, which additionally supplements Franck's doctrine.

The EU v. Belarus, 2004. The EU introduced restrictive measures against Belarus for the first time in 2004,⁶⁵ condemning the deterioration of democracy in the course of a doubtful referendum and parliamentary elections. After the Presidential elections in 2006, assessed by the OSCE/ODIHR to be fully or partially in contradiction with the OSCE Commitments for democratic elections,⁶⁶ a wider package of sanctions was introduced against Belarus.⁶⁷ Therefore, this instance is of particular importance that the EU clearly mentioned violation of international electoral standards as a ground for the sanctions.

The OAS v. Honduras, 2009. A possible reaction to undermining democracy is expulsion from an international organization.⁶⁸ Honduras' membership in the OAS, i. e. the right to participate in the activities of the organization, was suspended from 2009 to 2011.⁶⁹

The EU v. Zimbabwe, 2011. The European Union adopted a package of restrictive measures against Zimbabwe in 2011. All assets of governmental officials and others (natural and legal persons) "whose activities seriously undermine democracy" were frozen.⁷⁰

65 Council of the European Union, "Council Common Position 2004/661/CFSP Concerning Restrictive Measures against Certain Officials of Belarus" (2004), accessed December 4, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004E0661>.

66 Office for Democratic Institutions and Human Rights, the Organization for Security and Co-operation in Europe, "Final Report on Presidential Election in the Republic of Belarus, 19 March 2006," 2006, 3, accessed December 4, 2018, <http://www.osce.org/odihr/elections/belarus/19395?download=true>.

67 Council of the European Union, "Council Common Position 2006/276/CFSP Concerning Restrictive Measures against Certain Officials of Belarus and Repealing Common Position 2004/661/CFSP" (2006), http://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1499158810702&uri=CELEX:32006E0276#nr2-L_2006101EN.01000501-E0002.

68 Such provisions directly or in an implied manner are envisaged in the founding documents of the European Union, the Organization of American States, the Council of Europe, the Organization for Security and Cooperation in Europe and some others.

69 General Assembly of the Organization of American States, "AG/RES. 2 (XXXVII-E/09) Resolution on the Suspension of the Right of Honduras to Participate in the OAS" (2009), accessed December 4, 2018, http://www.oas.org/en/media_center/press_release.asp?sCodigo=e-219/09.

70 Council of the European Union, "Council Decision 2011/101/CFSP Concerning Restrictive Measures against Zimbabwe" (2011), accessed December 4, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011D0101>.

The EU v. Burundi, 2015. There were relatively the same reasons for introducing restrictive measures in response to the situation in Burundi; the Council of the European Union adopted a package of sanctions “against certain persons, entities or bodies responsible for undermining democracy.”⁷¹

The EU v. Venezuela, 2017. The European Union Council’s conclusions on Venezuela⁷² give us the most recent example, especially the statement that the European Union “cannot recognize the Constituent Assembly or its acts because of serious concerns about its legitimacy and representativeness.” Moreover, the Council noted that sanctions would specifically affect those who were in charge of “non-respect of democratic principles... The EU calls upon the government to urgently restore democratic legitimacy.”⁷³

a. Violation of International Electoral Standards: Outcomes of the Belarusian Case

The Belarusian case was of especial importance for several reasons. It was the first time international electoral standards appeared in an official document introducing sanctions. Target states often criticize democratic sanctions as politically motivated.⁷⁴ Sometimes democratic sanctions are even claimed to be contrary to international law.⁷⁵ Most surely, the practice of imposing such sanctions seems inconsistent, for instance, due to the reluctance of sender states to justify the application of sanctions (countermeasures) in legal terms.⁷⁶ In addition, some countries are not targeted, for example, China, while others are, like Zimbabwe.

71 Council of the European Union, “Council Regulation (EU) 2015/1755 Concerning Restrictive Measures in View of the Situation in Burundi” (2015), accessed December 4, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32015R1755>.

72 Council of the European Union, “Council Regulation (EU) 2017/2063 Concerning Restrictive Measures in View of the Situation in Venezuela” (2017), accessed December 4, 2018, <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32017R2063>.

73 Foreign Affairs Council of the European Union, “Venezuela: EU Adopts Conclusions and Targeted Sanctions,” Press Release, November 13, 2017, accessed December 4, 2018, <http://www.consilium.europa.eu/en/press/press-releases/2017/11/13/venezuela-eu-adopts-conclusions-and-targeted-sanctions/#>.

74 For example, Belarus accused the EU sanctions against it as “biased and selective” (2011), accessed December 4, 2018, <http://www.bbc.com/news/world-europe-12330051>.

75 For example, Venezuela’s President Nicolas Maduro called sanctions against him “illegal, insolent and unprecedented,” accessed December 4, 2018, <http://www.bbc.com/news/world-latin-america-40784516>.

76 Martin Dawidowicz, “Third-Party Countermeasures and Safeguards Against Abuse,” in *Third-Party Countermeasures in International Law*, 285–382, Cambridge Studies in International and Comparative Law (Cambridge: Cambridge University Press, 2017), 318.

With Belarus, the EU took a remarkable step towards consolidating democratic sanctions, specifically in normative dimension. Dawidowicz underlined that “...third-party countermeasures [including sanctions] must be subject to appropriate conditions and limitations in order to minimize the risk of abuse and seek to ensure that they are ‘kept within generally acceptable bounds.’” Limitations such as proportionality or humanitarian exemptions are rather established and granted;⁷⁷ whereas, the conditions for sanctions to be imposed (specially for democratic one) are vague and intertwined with “policy interests which go beyond mere law enforcement concerns.”⁷⁸ In turn, Dawidowicz concluded that fulfilling “procedural conditions” usually takes place with the help of international “institutional actors” who “call on the responsible State to comply with its obligations under international law prior to [sanctions imposition].”⁷⁹

As outlined, the democracy norm is implemented through international standards. Among international standards, electoral standards are best developed mainly due to the large number of soft-law documents and binding obligations in this field.⁸⁰ The international requirement to hold free and fair elections sets the scene for verifying the compliance. Thus, these electoral standards and their assessment can provide solid legal ground to assess actions of a government. If non-compliance is found, democratic sanctions ensue along with the de-legitimization of the government at issue. And, more importantly, if democratic sanctions imposed in the form of reprisals were based on the grounds of violations established by respective international institutional actors (either judicial or not), there is a limited opportunity to contest the legality of such sanctions.

Furthermore, there are few electoral supervisory mechanisms as recalled human rights control mechanisms, which can provide unbiased and qualified information on whether or not electoral standards are being observed. Such evaluation as a rule occurs only during an electoral period. The UN, OSCE, CE and other organizations usually carry out these election evolution missions. In the essence, these organizations have the appropriate tools and recognized competence to monitor compliance with electoral standards. Reported violations may serve as valid grounds to challenge the elected government’s legitimacy. The involvement of international organizations in implementing democratic sanctions also drastically decreases the legitimacy of affected government.⁸¹ Thus, the imposition of democratic sanctions on the grounds of electoral standards violation certainly fulfills procedural conditions that were mentioned by Dawidowicz.

77 Dawidowicz, “Third-Party Countermeasures and Safeguards Against Abuse,” 325.

78 Dawidowicz, “Third-Party Countermeasures and Safeguards Against Abuse,” 380.

79 Dawidowicz, “Third-Party Countermeasures and Safeguards Against Abuse,” 382.

80 “European External Action Service,” in *Compendium of International Standards for Elections*, 4th ed. (Luxembourg: Publication Office of the European Union, 2016), 1–288.

81 Hufbauer et al., *Economic Sanctions Reconsidered*, 173.

b. Political Agenda on Democratic Entitlement

The sporadic disregard of “non-democratic government due to geopolitical and strategic motives” is prevalent, but “leaving these situations aside, it can reasonably be argued that, since the end of the Cold War, democracy has become ‘the touchstone of legitimacy’ for any new government.”⁸² In practice, the aforementioned seems mostly true for newly established governments. This approach can hardly be applied to old-established authoritarian regimes. For instance, the Chinese government is ubiquitously accepted as legitimate, and nevertheless the same cannot be said with respect to Pakistan until the government agreed to organize democratic elections.⁸³ As well, like many other European governments, the German government does not heavily criticize or impose sanctions on China because of undemocratic behavior, mainly due to economic interests.⁸⁴ Another example is India, the largest democracy in the world, which has weak support for and poor willingness to promote democracy. Democracy promotion is not an integral part of the country’s strategic, economic, or political interests.⁸⁵ The fact remains that the most active promoter of democracy is the United States, which has taken a variety of democratic sanctions against Belarus, Myanmar, some Latin states and a number of other countries.⁸⁶ Observers noted, “fewer and fewer countries have been able to afford trade policies conditioned on the respect for some requirements as to the democratic origin of the partner.”⁸⁷ Contrary to this, it must be emphasized that this democracy clause is a unique pattern of international agreements concluded by the European Union and sometimes by the United States.

82 d’Aspremont, “The Rise and Fall of Democracy Governance in International Law,” 555.

83 d’Aspremont, “The Rise and Fall of Democracy Governance in International Law,” 555. this article reaches similar conclusions to those formulated by Susan Marks. It starts by showing that the years 1989\20132010 can be hailed as an unprecedented epoch of international law during which domestic governance came to be regulated to an unprecedented extent. This materialized through the coming into existence of a requirement of democratic origin of governments which has been dubbed the principle of democratic legitimacy. However, this article argues that the rapid rise of non-democratic super-powers, growing security concerns at the international level, the 2007\20132010 economic crisis, the instrumentalization of democratization policies of Western countries as well as the rise of some authoritarian superpowers could be currently cutting short the consolidation of the principle of democratic legitimacy in international law. After sketching out the possible rise (1

84 Freedom House, “Supporting Democracy Abroad—Germany,” 2014, accessed December 4, 2018, <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5497f82615&skip=0&query=democracy>.

85 Freedom House, “Supporting Democracy Abroad—India,” 2014, accessed December 4, 2018, <http://www.refworld.org/docid/5497f82715.html>.

86 Freedom House, “Supporting Democracy Abroad—United States,” 2014, accessed December 4, 2018, <http://www.refworld.org/docid/5497f82fc.html>.

87 d’Aspremont, “The Rise and Fall of Democracy Governance in International Law,” 562.

Henceforth, it would be inappropriate to suppose about a decline in the application of democratic conditionality in such agreements. The Belarusian case was one of the few recent examples where some consistency over a decade was demonstrated by the sender states, namely by members of the European Union. However, even this persistent approach towards delegitimizing undemocratic rule in the country declined slightly after partial lifting of sanctions in 2016.⁸⁸ In other cases, the EU has imposed restrictive measures under the democracy clause “in framework agreements on some twenty occasions since 1995, most frequently in response to a *coup d'état*, for flawed electoral processes and for “violation of human rights.”⁸⁹

Conclusion

Franck noted that the evolution of the emerging right to democratic governance occurred in three phases: “first came the normative entitlement to self-determination. Then came the normative entitlement to free expression as a human right. Now we see the emergence of a normative entitlement to a participatory electoral process.”⁹⁰ The evolution of this right in international law has shifted a paradigm where mode of government is no longer considered purely a matter of domestic policy. At the core, Franck’s democratic entitlement theory attempts to validate internationally a government’s legitimacy.

Since the emerging right to democratic governance presumes a tenet that only democracy validates government, this article guides further by proposing suitable normative dimensions both for democracy and for democratic legitimacy notions. In this regard, democracy in legal terms may be scrutinized using judicial interpretation of regional institutions and with the help of an appropriate field assessment produced by international organizations. Some inalienable features, such as multiparty systems, are strongly considered to be a characteristic exclusively of truly democratic regimes. In addition, doctrine asserts firm ground to assess democracy in its narrow procedural meaning, specifically within the frameworks of well-defined electoral standards. Subsequently, we depicted whether the right to democratic governance is emerged and framed tools of enforcement—democratic sanctions, which strongly endorsed this right.

Conversely, the legal status and nature of sanctions raised a complex debate regarding their legality and legitimacy. These democratic sanctions are remarkable due to their specific nature. First, there is no interstate element, because the goal of

88 “Belarus Sanctions: EU Delists 170 People, 3 Companies; Prolongs Arms Embargo,” Press Release, 2016, accessed December 4, 2018, <http://www.consilium.europa.eu/en/press/press-releases/2016/02/25/belarus-sanctions/>.

89 European Commission, “Using EU Trade Policy to promote fundamental human rights—Current policies and practices,” Non-Paper, 2012, 3, accessed December 4, 2018, http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149064.pdf.

90 Franck, “The Emerging Right to Democratic Governance,” 90.

democratic sanctions is to bring the national legislation or policy in line with the international obligations of the concerned state. Second, if commonly sanctions are criticized due to a lack of legal certainty in terms of their justification, democratic sanctions may be imposed with legal certainty in response to violations established by the respective international bodies. If these sanctions are in the form of reprisals, they would still not constitute a breach of international law, even in the case of being imposed unilaterally. Finally, these measures contest legitimacy of a government, which is unique for the international law context, while all other sanctions (human rights sanctions, for example) challenge only the legitimacy of a government's actions.

A fortiori the policy of imposing democratic sanctions by the OAS, EU, US, and to a lesser extent by the UN, demonstrates additional persuasive evidence in support of Franck's democratic entitlement theory. The practice of the UN, US, OAS shows that the international community continues to seek ways to punish the undemocratic governments of states through the most feasible methods and in the most appropriate legitimate form. The pioneering Belarusian case, in which violation of electoral standards was defined as one of the grounds for international responsibility, essentially amplify the legality of international validation of a government's legitimacy, *inter alia*, by means of sanctions.

Democracy is an autonomous and unique pattern in contemporary international law. The emerging right to democratic governance disseminates the necessity to adhere to international standards worldwide. Upholding these standards in an international spectrum is becoming the collective interest of a growing number of countries. If this ongoing practice of imposing democratic sanctions in response to a violation of international standards continues, the outcomes will lead to changes in a wider range of international norms, from recognition of governments to use of force.⁹¹

Two decades after Franck conceptualized the right to democratic governance, a new generation of democratic sanctions is in place to complement his theory. In terms of legal discourse, the emerged practice may be a tangible precondition for and a sign of a nascent international custom or constitute *opinion juris* related to, Article 38 of the Statute of the International Court of Justice. When these democratic sanctions are repeatedly and consistently introduced unilaterally or on behalf of international organizations, such actions may be regarded as evidence of generally (or at least regionally) accepted practice.

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