

Hans-Joachim Heintze

The OSCE – a Club of “Dyed-in-the-Wool Democrats”?

In 2004, former German Chancellor Gerhard Schröder described Vladimir Putin as a “dyed-in-the-wool democrat”.¹ In Germany, this expression has since become a cliché that is wheeled out whenever anyone wants to criticize Moscow.² The debate over Russia’s democratic deficits reached new heights on 2 March 2008, when the OSCE reacted to Russia’s late invitation by refusing to send election observers to the presidential election.³ The highly tense relationship between the OSCE and Russia – one of the most important OSCE participating States – is a good reason to examine the extent to which modern public international law obliges states to respect democratic norms, and the role that international organizations play in this connection.

Universal Public International Law and Democracy

According to modern public international law, all peoples have a right to self-determination. The exercise of this right by a people is the basic source of legitimacy of a state.⁴ The freedom of a people to choose its political status and the proscription of interference in this decision-making process means that other states must refrain from judging it. The preamble to the UN Charter expressly calls for the peoples “to practice tolerance and live together in peace with one another as good neighbours”, which takes account of the fact that the peoples live in states with different social and value systems. Accordingly, in the case of *Nicaragua v. United States*, the International Court of Justice (ICJ) ruled that the choice of a political system is a domestic matter and that public international law makes no prescription in this area.⁵

-
- 1 Cf. *FT.com*, Schröder and Putin’s “cosy” relationship under scrutiny, 2 December 2004, at: http://www.ft.com/cms/s/0/b685e688-4408-11d9-a5eb-00000e2511c8.html?nlick_check=1.
 - 2 Just how arbitrarily politicians deal with the “undemocratic” behaviour of their opponents is clear from the way they are willing to alter pro-democracy speeches at short notice when it appears opportune to do so. An example is the article in the *Frankfurter Allgemeine Zeitung* of 6 March 2008 with the headline: “Steinmeier zog Kritik an Russland zurück” [Steinmeier withdraws Criticism of Russia].
 - 3 Cf. OSCE Office for Democratic Institutions and Human Rights, Press Release, *OSCE/ODIHR regrets that restrictions force cancellation of election observation mission to Russian Federation*, Warsaw, 7 February 2008 at: http://www.osce.org/odihr-elections/item_1_29599.html.
 - 4 Cf. Daniel Thürer, Self-Determination, in: Rudolf Bernhardt (ed.), *Encyclopedia of Public International Law*, Vol. IV, Amsterdam 2000, p. 372.
 - 5 ICJ, *Military Activities in and against Nicaragua (Nicaragua v. USA)*, ICJ Reports, The Hague 1986, p. 133

Instead, it merely insists upon certain standards of behaviour. Article 4 para. 1 of the UN Charter thus requires of new members that they be “peace-loving”. The demand that UN member states be democratic was already rejected during the drafting of the Charter in San Francisco as interference in domestic affairs.⁶ Public international law makes an exception to its “blindness” regarding state form in the cases of Nazi and fascist regimes. Their ideologies were expressly condemned by General Assembly Resolution 36/162 on 16 December 1981. Public international law also outlaws racist regimes, as the many resolutions against the South African Apartheid regime show.⁷

From the right to internal self-determination, we can derive the right of peoples to play an active role in organizing the affairs of their societies under conditions of freedom and equality. This is as much a democratic moment as the common origin of human rights and democracy. This is particularly evident if we reflect that every significant advance in human rights depends upon the free self-determination that can only be achieved under democratic conditions. This is also the only way that the rights to democratic participation contained in Article 25 of the 1966 International Covenant on Civil and Political Rights can be realized.⁸ In any case, these rights operate at the domestic level, and no definition of democracy in terms of public international law, which would be a prerequisite for the international enforcement of any such standard, can be derived from them. The 1993 Vienna World Conference on Human Rights decided not to attempt a comprehensive definition of democracy, instead characterizing it as “full participation of people in all aspects of their lives”.⁹

A universal definition of democracy would also appear difficult to achieve because of the different sets of values prevailing in the various states. Furthermore, states such as Saudi Arabia explicitly take the position that democracy is not a state form that they consider sustainable for their country.¹⁰ In the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities, the question of the influence of democracy on

6 Cf. Konrad Ginther, Art. 4. In: Bruno Simma (ed.), *The Charter of the United Nations*, 2nd edition, Oxford 2002, p. 182, margin number 21.

7 Jean Salmon, Internal Aspects of the Right to Self-Determination: towards a Democratic Legitimacy Principle? In: Christian Tomuschat (ed.), *Modern Law of Self-Determination*, Dordrecht 1993, p. 260.

8 Cf. Sarah Joseph/Jenny Schultz/Melissa Castan, *The International Covenant on Civil and Political Rights*, Oxford 2000, pp. 495ff.

9 United Nations General Assembly, World Conference on Human Rights, Vienna, 14-25 June 1993, *Vienna Declaration and Programme of Action*, A/CONF.157/23, 12 July 1993, at: [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En); also in: *International Legal Materials*, 1993, No. 984, p. 1661.

10 Cf. Tom Farer, The Future of International Law Enforcement under Chapter VII: Is There Room for “New Scenarios”? In: Jost Delbrück (ed.), *The Future of International Law Enforcement*, Berlin 1993, p. 53.

the realization of human rights was seen above all as a problem of legal culture and the rule of law.¹¹

In its Millennium Declaration, the UN asserted that its members would “spare no effort to promote democracy and strengthen the rule of law”.¹² The member states committed themselves to implementing democratic practices and “genuine participation by all citizens”.¹³ Democracy is understood here above all as a universal human right.¹⁴ Also noteworthy are the many measures adopted by the United Nations with the aim of furthering democratization and development of states and “post-conflict” societies.¹⁵ In order to coordinate and guide these activities, the Security Council adopted Resolution 1645 on 20 December 2005, which created the UN Peacebuilding Commission, which is also responsible for democratization and hence the implementation of the right to self-determination.¹⁶

The Central Importance of Elections

A central element of democratization is the holding of elections, which have been called the “synthesis of all human rights”.¹⁷ The UN General Assembly first called for elections and the appointment of a government representative of the will of the people as early as 1946. In Resolution 39 (I) of 12 December 1946 on the Spanish question, the UN Security Council was called upon to take further measures “if, within a reasonable time, there is not established a government which derives its authority from the consent of the governed, committed to respect freedom of speech, religion and assembly and to the prompt holding of an election in which the Spanish people, free from force and intimidation and regardless of party, may express their will.”¹⁸ However, because of the Cold War, this demand was not followed up.

11 Cf. Osman El-Hajjé, *Working paper on the promotion and protection of human rights by the exercise of democracy and the establishment of a democratic society*, UN Doc. E/CN.4/Sub.2/1997/30, 5 June 1997, para. 15.

12 United Nations Millennium Declaration, A/RES/55/2, 13 September 2000, para. 24, at: <http://www.un.org/millennium/declaration/ares552e.htm>.

13 *Ibid.*, para. 25.

14 Cf. Henning Melber/Edward Newman/Roland Rich, *Die andere Art der Intervention [The Other Kind of Intervention]*, in: *Vereinte Nationen 5/2003*, pp. 161ff., pp. 161-162.

15 Cf. Samuel H. Barnes, *The Contribution of Democracy to Rebuilding Postconflict Societies*, AJIL 2001, pp. 86ff.

16 Cf. Hans-Joachim Heintze, *Die Vereinten Nationen und der Wiederaufbau von Nachkriegsgesellschaften [The United Nations and the Reconstruction of Post-War Societies]*, in: Sabine von Schorlemer (ed.), *Globale Probleme und Zukunftsaufgaben der Vereinten Nationen [Global Problems and the Future Tasks of the United Nations]*, 2006, pp. 66ff.

17 Karel Vasak, *Democracy, Political Parties and International Human Rights Law*, *Israel Yearbook of Human Rights*, Dordrecht 1996, p. 21.

18 United Nations General Assembly, Resolution 39 (I), *Relations of Members of the United Nations with Spain*, 12 December 1946, at: <http://www.un.org/documents/ga/res/1/ares1.htm>.

State practice shows that the will of the people is articulated particularly convincingly in democratic elections. In Resolution 45/150 of 18 December 1990, the UN General Assembly stated explicitly that “periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.”¹⁹ Given the emphasis placed on elections here, it would seem only consistent for the United Nations to see guaranteeing and observing free elections as among its central tasks. On 17 December 1991, the General Assembly adopted Resolution 46/137, establishing guidelines for election observation missions. To support the monitoring of elections by the UN, in April 1992, the Electoral Assistance Division was established within the UN Secretariat.²⁰ This service offered by the United Nations has been taken up by many states.²¹ The General Assembly underlines the importance of election assistance each year, most recently in Resolution 62/150 of 4 March 2008.

However, opinion on this is not undivided. A dissenting view was expressed in Resolution 60/164 of 2 March 2006, entitled “Respect for the principles of national sovereignty and diversity of democratic systems in electoral processes as an important element for the promotion and protection of human rights.” With reference to the rights to self-determination of peoples, this document underlines, in particular, that all peoples must be able to decide on their own fate without external interference, which means that, among other things, they should be able to choose the electoral procedures and relevant institutions themselves. The preamble stresses “the richness and diversity of democratic political systems and models of free and fair electoral processes in the world, based on national and regional particularities and various backgrounds”.²²

In practice, election observation remains free of consequences, as, for the United Nations, electoral fraud and non-acceptance of the correct result on the part of the loser do not establish an option – let alone a requirement – to intervene. Nevertheless, the UN Secretary General’s reports on election observation²³ create an impressive picture of the UN’s extensive activities,

19 United Nations General Assembly, Resolution 45/150, *Enhancing the effectiveness of the principle of periodic and genuine elections*, A/RES/45/150, 18 December 1990, at: <http://www.un.org/documents/ga/res/45/a45r150.htm>.

20 Its website can be found here: <http://www.un.org/Depts/dpa/ead/index.shtml>.

21 For the full list of states that have received assistance, see: <http://www.un.org/Depts/dpa/ead/eadhome.htm>.

22 United Nations General Assembly, Resolution 60/164, *Respect for the principles of national sovereignty and diversity of democratic systems in electoral processes as an important element for the promotion and protection of human rights*, A/RES/60/164, 2 March 2006, at: <http://www.undemocracy.com/A-RES-60-164.pdf>.

23 See e.g. United Nations General Assembly, *Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the*

and are certainly capable of influencing people in power who do not accept the results of elections by “blaming and shaming” them.

Regional Organizations Have a Clearer Conception of Democracy

A consensus on the content of democracy is easier to find within regional organizations, as the states that are members of these organizations generally possess common values and traditions. This is particularly true of the Organization of American States (OAS), whose charter explicitly states that “the solidarity of the American States and the high aims which are sought through it require the political organization of those States on the basis of the effective exercise of representative democracy.”²⁴ After all, it was in relation to this requirement that Cuba was suspended from the organization by the Eighth Meeting of Consultation of the Ministers of Foreign Affairs of the OAS in 1962, because Marxism-Leninism was incompatible with the inter-American system.

The case of Haiti shows, however, how complex it is to enforce OAS commitments, even with the full support of the international community. The OAS became involved in defending democracy there following the expulsion of the legally elected president, Jean-Bertrand Aristide, in 1991. In 1993, both the OAS and the UN Security Council unanimously imposed an oil and arms embargo on Haiti and froze Haitian assets.²⁵ Because these resolutions were approved under Chapter VII of the UN Charter, the Security Council assumed that “the continuation of this situation threatens international peace and security in the region” without detailing more closely what the actual threat to peace was. In Resolution 862 (1993) of 31 August 1993, the Security Council additionally spoke of “the international community’s commitment to a resolution of the crisis in Haiti, including a restoration of democracy.”²⁶

The then US Ambassador to the UN, Madeleine Albright, justified the necessity of the international community intervening in Haiti in terms of the violation of the right to self-determination of peoples. From this, it has been

promotion of democratization, Report of the Secretary General, A/60/431, 15 October 2005.

24 Organization of American States, *Charter of the Organization of American States*, Article 3 lit d, at: <http://www.oas.org/juridico/english/charter.html>; also in: *International Legal Materials*, 1994, No. 985, p. 1009.

25 Cf. United Nations Security Council, Resolution 841 (1993), S/RES/841 (1993), 16 June 1993, at: <http://www.un.org/Docs/scres/1993/scres93.htm>.

26 United Nations Security Council, Resolution 862 (1993), S/RES/841 (1993), 31 August 1993, at: <http://www.un.org/Docs/scres/1993/scres93.htm>. For more details, cf. Hans-Joachim Heintze, *Völkerrecht und demokratische Staatsordnung, Anmerkungen anlässlich des internationalen Engagements zur Wiederherstellung der Demokratie in Haiti* [International Public Law and Democratic Polity. Remarks on the Occasion of the International Intervention to Restore Democracy in Haiti], in: *Verfassung und Recht in Übersee* 1996, pp. 6ff.

concluded “that the right to self-determination has become a legal title that justifies the intervention – using violent means if necessary – in the jurisdictions of national states”.²⁷ However, this very far-reaching judgement was not shared by Security Council Resolution 940 (1994), which empowered the international community to use all means necessary to overthrow the military regime. Instead, the intervention was justified by the deterioration of the humanitarian situation, the systematic violation of basic rights, the desperate plight of Haitian refugees, and the expulsion of a civilian monitoring mission.²⁸ The only call for the restoration of democracy is contained in the “Governors Island Agreement”, concluded between President Aristide and Haiti’s military leaders.²⁹ From the text of the resolution, it is clear that the disregarding of the Governors Island Agreement was the reason for the UN’s threat of violence. However, the return of the democratically elected government did not lead to stability, so that Haiti, as a “failed state”, was deemed in Security Council Resolution 1529 (2004) to require further international assistance in the form of a UN stabilization mission.

The OSCE Sets the Pace

The OSCE’s turn to democratic values is one of the most remarkable developments within this regional organization. The engagement of the CSCE/OSCE is based on the Final Act of Helsinki of 1 August 1975,³⁰ which states that “all peoples always have the right, in full freedom, to determine, when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development”.³¹ As the 1989 revolutions and the collapse of the socialist states showed, the democratic demands contained in the Helsinki Final Act had developed an explosive power capable of sweeping away dictatorial regimes. This new development was formalized and carried forward in CSCE documents after 1989. The Charter of Paris for a New Europe of 21 November 1990³² imposed detailed new commitments on the CSCE States with regard to the form of democratic governance: “Democratic government is based on the will of the people, expressed regularly through free

27 Udo Fink, *Legalität und Legitimität von Staatsgewalt im Lichte neuerer Entwicklungen im Völkerrecht* [The Legality and Legitimacy of State Power in the Light of New Developments in Public International Law], *Juristen Zeitung*, 1998, pp. 330ff., p. 337 (author’s translation).

28 Cf. United Nations Security Council, Resolution 940 (1994), S/RES/940 (1994), 31 July 1994, at: <http://www.un.org/docs/scres/1994/scres94.htm>.

29 Cf. UN Doc. S/26063 of 12 July 1993.

30 Cf. the comments by Arie Bloed, *Two Decades of the CSCE Process: From Confrontation to Co-operation. An Introduction*, in: Arie Bloed (ed.), *The Conference on Security and Co-Operation in Europe. Analysis and Basic Documents, 1972-1993*, Dordrecht 1993, pp. 1ff., here: pp. 46ff. The text of the Final Act is also reproduced there, pp. 141ff.

31 *Ibid.* p. 147.

32 The text of the Charter of Paris is also reproduced in: *ibid.*, pp. 537ff.

and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.

Democracy, with its representative and pluralist character, entails accountability to the electorate, the obligation of public authorities to comply with the law and justice administered impartially. No one will be above the law.”³³

Although the Charter of Paris is not a treaty under international law, the literature increasingly speaks of the fact that the democratic legitimation of governments today has become a “normative rule of the international system”.³⁴ This view is supported by the use that has been made of key OSCE norms. For instance, the Europe Communities (EC) made the granting of recognition to the new states that emerged from the ruins of the Soviet Union dependent upon – among other things – their respecting the UN Charter, the CSCE Helsinki Final Act, and the CSCE Charter of Paris. In this way, democratic government was made a *de facto* precondition for the international recognition of new states. The fulfilment of this requirement was examined by the Arbitration Commission under Robert Badinter.³⁵

In the light of the OSCE’s activities, the literature increasingly speaks of an emerging duty to observe democratic standards as a matter of customary public international law.³⁶ There is much talk of “common value systems”, based upon the fundamental values of stable interstate relations and peace, and the protection of human rights and natural resources.³⁷

A Club of Dyed-in-the-Wool Democrats?

An international organization will always be involved in trying to ensure that its principles and norms are widely accepted. Like any other social entity, it will constantly have to struggle with challenges to its rules and breaches thereof. There will thus never be a club of dyed-in-the-wool democrats. Not even within the EU, which, unlike the OSCE, includes strong elements of supranationalism, can it automatically be assumed that all the fundamental principles of democracy are observed all the time. In 2000, for instance, the

33 Ibid. pp. 537-538.

34 Thomas M. Franck, The Emerging Right to Democratic Governance, *American Journal of International Law* 1992, p. 46.

35 For more details, cf. Danilo Türk, Recognition of States, in: *European Journal of International Law* 1993, p. 70.

36 Cf. Juliane Kokott, Souveräne Gleichheit und Demokratie im Völkerrecht [Sovereign Equality and Democracy in Public International Law], *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)* 2004, p. 517ff., here: p. 517.

37 Cf. Matthias Herdegen, Asymmetrien in der Staatenwelt und die Herausforderungen des „konstruktiven Völkerrechts“ [Asymmetries in the World of States and Challenges to “Constructive International Law”], in: *ZaöRV* 2004, pp. 571ff., here: p. 574.

EU was prepared to impose sanctions on Austria, a member state.³⁸ This was justified with reference to the participation in government of Jörg Haider, then chairman of the far-right Austrian Freedom Party (FPÖ), and a holder of racist views. The EU has been said to have applied the concept of “fortified democracy” (“*streitbare Demokratie*”) in relation to this case. This concept “stands for the attempt to create a synthesis between the principle of tolerance towards all political views and the commitment to inalienable fundamental values of a collective body.”³⁹ In plain language, this means that the majority may not call into question the basic consensus of a democratic order, the rule of law, and the protection of human rights.

This concept of fortified democracy must also apply at a basic level to the OSCE, as the 1990 Charter of Paris, in particular, obliged the participating States to establish democratic societies. Even earlier, the Copenhagen Document identified 21 elements that are indispensable to respect for inherent dignity and inalienable human rights.⁴⁰

However, the OSCE possesses no institutional mechanisms that can be compared to those of the EU. This should come as no surprise inasmuch as the OSCE understands itself to be foremost an instrument for promoting democratic change in states that were formerly ruled as dictatorships. It is therefore necessary to bring governments and civil societies together in ways that cross national frontiers to take part in a constructive dialogue on good governance. A key role here is played by the rule of law, which should be encouraged by supporting legislation in the participating States. This can be considered a matter of fine-tuning a culture of democracy, which must not be restricted to the holding of elections, but is characterized by institutions that – transparently and openly – exercise the mandate they have been granted by a majority in an election.

It is important to stress that this is a process, for although considerable progress has been made in promoting democracy in recent years, problems are still associated with the institutionalization of these developments. In particular, there have been problems with ensuring broad popular participation in politics and creating mechanisms for popular consultation. This is closely related to the activity of political parties. These fields of activity have always been at the heart of the work of the OSCE’s Office for Democratic Institutions and Human Rights (ODIHR). Experience shows that ODIHR’s work is not precisely delineated, but can be adapted flexibly to meet new

38 Cf. Gregory Fox/Georg Nolte, Intolerant democracies, in: Gregory Fox/Brad Roth (eds), *Democratic Governance and International Law*, Cambridge 2000, pp. 389ff.

39 Frank Schorkopf, *Die Maßnahmen der XIV EU-Mitgliedsstaaten gegen Österreich* [The Measures Taken by the XIV EU Member States against Austria], Berlin 2002, p. 123 (author’s translation).

40 Cf. Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, Copenhagen, 29 June 1990, in: Bloed (ed.), cited above (Note 30), pp. 439ff., paras 5.1-5.21. These elements include: free elections, a form of government that is representative in character, and human rights and fundamental freedoms guaranteed by law.

challenges.⁴¹ It therefore cannot be surprising that the topics of migration and human trafficking, which are closely related to human rights and democratization, have taken up ever more capacities in recent years.

Outlook

The OSCE is not a club of dyed-in-the-wool democrats. Nor can it be the Organization's goal to become one. It is far more important to support the participating States in establishing and consolidating democratic structures – including by giving critical advice – and to provide them with help in word and deed. In this regard, the OSCE is an instrument of co-operation. Randolph Oberschmidt was right to conclude in 2001 that the OSCE will achieve nothing if it criticizes states for human rights violations while offering neither coherent ideas nor concrete assistance with establishing institutions to support the rule of law and economic development.⁴² The OSCE's broad approach goes beyond the pro-democracy measures taken by the Council of Europe. Thanks to the latter's reporting system, which picks up on concrete issues,⁴³ it is the organization geared more towards the production of dyed-in-the-wool democrats than the OSCE. That is why it is right for the OSCE to react to deficiencies in the Russian parliamentary elections by refusing to send election observers. However, this act of abstention must be combined with the offer to provide Russia with further support in developing a functioning democracy.

41 Cf. Randolph Oberschmidt, Ten Years of the Office for Democratic Institutions and Human Rights – An Interim Assessment, in: Institute for Peace Research and Security Policy at the University of Hamburg/IFSH (ed.), *OSCE Yearbook 2001*, Baden-Baden 2002, pp. 387ff.

42 Cf. *ibid.* p. 400.

43 Cf. e.g. the report: *State of human rights and democracy in Europe*, Council of Europe Publishing, Strasbourg 2007.