“Listen to Them and Give Them a King”:
Self-Determination, Democracy, and the Proportionality Principle
Giordana Campagna and Raffael N. Fasel

Introduction

In a recent report to the General Assembly, Alfred-Maurice de Zayas, the UN Independent Expert on the promotion of a democratic and equitable international order, observed that “[s]elf-determination is an expression of the individual and collective right to democracy, as democracy is an expression of the individual and collective right of self-determination.”1 De Zayas is suggesting that there is an intimate connection in international law between the right to self-determination and the right to democracy; that both are, in a sense, expressions of each other. In making this suggestion, he is largely following an interpretation of the right to self-determination and the right to democracy first presented by Thomas Franck. According to Franck, self-determination and democracy are in perfect harmony, as democracy is simply a more advanced stage of self-determination.2

This harmonic interpretation is at odds with another reading of the right to self-determination. On 11 February 1918, when World War I was drawing to a close, President Woodrow Wilson addressed Congress on the issue of self-determination: “National aspirations must be respected; peoples may now be dominated and governed only by their own consent. ‘Self-determination’ is not a mere phrase. It is an imperative principle of action which statesmen will henceforth ignore at their peril.”3 According to Wilson, peoples should be able to determine their own affairs without external interference. But not once in his speech did he mention the term “democracy”. Whether democratic or not, he seemed to be saying, peoples’ right to determine “their own forms of political life”4 must be respected. Under this interpretation, we find no intimate connection between self-determination and democracy. Peoples’ “own forms of political life” are valuable independently of whether they are democratic or non-democratic.

Building on this interpretation of self-determination, some authors have recently argued against Franck that the whole idea of a right to democracy is a non-starter. If this right existed, they point out, it would limit a people’s right to freely determine its political form of life, as the right to democracy would necessarily

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1. UN General Assembly, Promotion of a democratic and equitable international order, Note by the Secretary-General, A/69/272 (2014) at § 32.
3. “President Wilson’s Address to Congress, Analyzing German and Austrian Peace Utterances” (11 February 1918), online: http://www.gwpda.org/1918/wilpeace.html.
4. Ibid.
limit the range of possible options to democratic forms of government. For this reason, they conclude, there can be no right to democracy. We will be referring to this position as the Incompatibility Thesis, and to its adherents as the Incompatibilists.

The Incompatibilists have a point, as we show in this article. If there was a right to democracy, it could indeed conflict with the right to self-determination. However, pace the Incompatibilists, we argue that such conflicts would not preclude the existence of a right to democracy. Our argument will proceed as follows. To show how the human right to democracy and the right to self-determination can conflict and still be compatible, we introduce a distinction—often neglected by the Incompatibilists—between two elements of self-determination. First, self-determination as a people’s ability to choose its own form of government (be it democratic or non-democratic). Second, self-determination as citizens’ status of political equality. Building on this distinction, we can then weigh the two elements of self-determination against each other (the first of which is protected by the right to self-determination; the second of which by the right to democracy). To do so, we will argue that both the right to democracy and the right to self-determination are best understood as principles (not rules) which can be balanced using the proportionality test. This test will permit us to argue that, depending on the circumstances, the right to self-determination outweighs the right to democracy or vice versa without any of these rights ceasing to exist. As a result, the Incompatibility Thesis fails.

This conclusion is a contingent one: it holds if there is a human right to democracy. Our aim in this article is not to determine definitively whether or not this right exists, nor whether it ought to exist. Instead, the approach we take is conditional: if there is a human right to democracy then the analyses and arguments presented here are valid. Perhaps there will be other difficulties with a human right to democracy, but the fact that it will conflict with the right to self-determination can no longer be invoked as a ground for rejecting it.

In the first part of this article, we will set the stage for our argument by clarifying the concepts of the right to self-determination and the right to democracy as well as by explaining the conflict between the two rights. The second part will introduce the distinction between the two elements of self-determination. It will also familiarize the reader with the theoretical framework needed for resolving rights conflicts: Robert Alexy’s bifurcation of norms into rules and principles and the related proportionality test. The third part is devoted to applying this theoretical framework to different constellations involving either one or both of the rights at hand. What we aim to show by this is that while conflicts between


6. There are, strictly speaking, three theses here. First, that the right to democracy and the right to self-determination are incompatible; second, that there is no right to democracy; and, third, that there is no right to democracy because the two rights are incompatible. For reasons of simplicity, we will be working with the less complex thesis set out above.
the right to self-determination and the right to democracy would certainly be possible, we can resolve these conflicts by balancing the two rights rather than by excluding democracy from the family of human rights altogether. A final part will conclude this article.

1. The Right to Self-Determination and the Right to Democracy

A. The Right to Self-Determination

To understand the right to self-determination as it has become enshrined in contemporary international law, one needs to grasp the value that self-determination has for a people. Long before self-determination was made a right in international law, peoples had an interest in determining their own affairs. The Books of Samuel provide a good example. According to Samuel, the Israelites were special because, unlike all neighboring peoples, they did not have a king. What might appear to many a contemporary observer as an appealing feature of the Land of Israel also struck a chord at the time. It was pointed out that the people of Israel enjoyed many benefits their neighbors lacked. For example, they had no immediate ruler who took away their sons to serve in the military, or their slaves and cattle for his own use. Nor did they have to pay the tithe. In spite of this, however, the Israelites insisted that they, too, wanted a king. They petitioned Samuel, their leader, to appoint a king to rule them. Samuel, who was displeased with this request, prayed to God. God agreed with Samuel that it would be detrimental for the people of Israel to have a king. Strikingly, however, He did not advise against granting them their wish, commanding instead: “Listen to them and give them a king.” Samuel went ahead and appointed Saul as the first king of the Israelites.

This biblical story illuminates a central point about self-determination that one regularly encounters in debates about the value of self-determination and its relationship with democracy: it is inherently valuable for a people to be able to choose its own system of government, regardless of the consequences. The Israelites wanted a king. Despite the fact that God foresaw the negative implications of this decision, He let them proceed because (we might speculate) He recognized the intrinsic value in their self-determination.

The core idea that a people should determine their own affairs has remained largely the same to this day. What has changed, however, is that it has become a human right in international law—and a relatively well-established one on top of that. The right to self-determination is, for example, enshrined in Article 1(1) of the International Covenant on Economic, Social and Cultural Rights and Article 1(1) of the International Covenant on Civil and Political Rights. According to the definition contained in these articles, the right to self-determination is understood as the right of all peoples to “freely determine their political status

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7. 1 Samuel 8: 11-17.
8. 1 Samuel 8: 22.
and freely pursue their economic, social and cultural development.” As Jeremy Waldron points out, however, it is not entirely clear what it means for peoples to “determine their political status”. He suggests that in its “widely accepted form, self-determination simply means that the people of a country have the right to work out their own constitutional and political arrangements without interference from outside”. Following Waldron’s interpretation, we can say that the right to self-determination in principle also includes a people’s freedom to choose a non-democratic arrangement, as in the example of the Israelites. This has raised questions as to what the relationship is between the right to self-determination and a potentially emerging right to democracy.

B. The Right to Democracy

Like self-determination, democracy existed long before anyone had the idea to claim a right to democracy. Notably, democracy was practiced in ancient Greece, with Plato describing it as “the rule of the many” and criticizing it as a distorted form of government. Other writers counteracted Plato and his followers’ aversion for the government of the rabble. Aristotle, for example, argued that democracy, although deviant, may in practice be the best form of government. This more favorable view of democracy would in later centuries become predominant.

The thought that there could be a right to democracy is a relatively recent occurrence. In a seminal paper from 1992, Thomas Franck was the first to argue that a right to democracy is emerging in international law. This right, he claims, “requires democracy to validate governance”. The legitimacy of governments is no longer just a matter of national arrangements, Franck argues, but one of international law. According to Franck, the right to democracy is made up of three pillar rights: the right to self-determination, the right of free political expression, and voting rights. It therefore constitutes what one could call a composite right.

A significant number of scholars and human rights bodies have joined Franck in asserting the emergence (or even the existence) of a right to democracy. They argue that the right to democracy has become part of customary international law. In contrast to the right to self-determination, however, which is defined

11. Plato, Republic, Book VIII.
14. See also David Miller, Is there a human right to democracy? in CSSJ Working Papers Series, 7 (2015) (noting similarly that “some features of democracy, in the wider sense, are themselves human rights”, citing freedom of speech, freedom of association, and procedural rights as examples).
15. See, e.g., Gregory Fox, Democracy, right to, international protection in Max Planck Encyclopedia of Public International Law, online: http://opil.ouplaw.com/home/EPIL. See however also Nigel White & Ademola Abass, “Countermeasures and Sanctions” in Malcolm Evans, ed, International Law, 4th ed (Oxford University Press, 2014) 537 at 549 (arguing that
legally, there is no comparable definition of the right to democracy. Being the considerably less well developed right, the right to democracy is still in motion.\textsuperscript{16} To provide a clearer sense of the right, David Miller has made the helpful suggestion to analyze existing democracies in order to distil which of their constituent elements could inform the content of the right to democracy. Miller emphasizes three such elements:

The first is a constitution, written or unwritten, that specifies the powers of each institution within the political system and guarantees certain fundamental rights. The second is the presence of a range of freedoms, [in] particular freedom of association and freedom of expression, without which political rights more narrowly conceived would have little value. And the third is a decision-making mechanism, either direct or through representatives, based on political equality and majority rule.\textsuperscript{17}

Drawing on Miller’s analysis, we can adopt a working account of the human right to democracy as a right that entitles its holders to some kind of constitutional separation of powers to protect citizens’ fundamental rights; to a range of such fundamental rights that are crucial for citizens’ participation in politics; and to a decision-making process that respects the political equality of the citizens.\textsuperscript{18} This account makes no claim of being final. It is simply one plausible way of spelling out what the right to democracy—which, as pointed out, lacks an accepted legal definition—could reasonably be taken to entail. The cogency of our argument does not turn on an adoption of this exact account, however.

Those who argue in favor of a right to democracy point out that this right would be instrumentally valuable because democracy yields desirable outcomes, such as an improved protection of basic human rights.\textsuperscript{19} Others who object to the idea of a right to democracy hold that such a right would be undesirable as it would deny people the right to govern their own affairs using non-democratic means (we will return to this point shortly). Yet others argue that while democracy may be the most just form of government, we should still reject the idea that there is a human right to democracy because such a right cannot be justified on grounds of public reason, and therefore not form part of a Rawlsian list of basic human rights.\textsuperscript{20}

As pointed out at the outset, our aim is not to determine definitively if there is or should be a human right to democracy. Franck and his followers put forward
plausible reasons for thinking that the right to democracy is no phantasm but a phenomenon that is to be taken seriously. Our arguments do not depend on the correctness of this claim, however, as our approach is merely conditional: if there is a human right to democracy then the arguments presented here are valid. The question we have to turn to then is whether such a right to democracy could coexist with the right to self-determination or whether there would be an irresolvable conflict between the two rights.

C. Two Incompatible Rights?

As hinted at above, the right to self-determination can conflict with the right to democracy. Let us go back to the example of the Israelites to envision the practical issues arising in such a situation of conflict. Imagine the Israelites had opted for a democratic form of government in lieu of appointing king Saul. Both the right to self-determination and the right to democracy would protect such a decision. Only the right to self-determination would protect their actual choice of a monarchical form, however. This is because a non-democratic form of government conflicts with the right to democracy in so far as the status of citizens as political equals would be infringed and because there would likely be an insufficient separation of powers to protect citizens’ freedoms (we will say more about this conflict in Section 2.B).

The right to self-determination not only protects the choice of a people to adopt a democratic form of government, but also the decision of such a people to subject itself to authoritarian and non-participatory forms of government. In other words, as far as the right to self-determination is concerned, a people can freely choose to elect a Leviathan—an absolute sovereign—as its leader and thereby abandon its political freedom. In On Liberty, J.S. Mill discussed a similar paradox, namely that of the freedom of people to sell themselves into slavery. According to Mill’s liberty principle, sane adults are free to do whatever they please unless doing so would result in harm to others. In principle, one might therefore think that—in analogy to the people choosing to submit themselves to an authoritarian sovereign—a person could decide to become a slave, provided that no one would be harmed as a result of that decision. However, Mill argued that there was an exception to the liberty principle that would prohibit a person from exercising his liberty in a way so as to relinquish it:

by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free, but is thenceforth in a position which has no longer the presumption in its favor that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free.21

In contrast to Mill’s liberty principle, the right to self-determination protects a people’s choice of an authoritarian form of government, that is, its choice of slavery over liberty, as it were.

As pointed out, such a choice conflicts with the right to democracy because it protects certain things (separation of powers, freedoms, political equality) that are generally infringed in non-democratic forms of government. The right to democracy thus drastically limits the range of governmental models that a people can adopt. Further, if there was indeed a human right to democracy, then the international community could be said to have a duty to protect and promote democracy everywhere. It could not tolerate societies which are not democratic and would have to interfere with their right to self-determination, if necessary.  

Some authors object at this stage that the right to self-determination and the right to democracy could only conflict if different right-holders were at play. However, they argue, the right to self-determination and the right to democracy would be held by the same right-holder, namely a particular people. If that people chooses to live under a monarch, it simply waives its right to democracy. Hence, there can really be no conflict between the two rights. This objection hinges on the assumption that the right to democracy could be waived. This seems problematic because the right to democracy, as analyzed above, provides a vital protection for citizens’ fundamental rights and for their respect as political equals. However, even if we assume for the sake of argument that the right to democracy could be waived, the objection fails because the rights to self-determination and to democracy are held by different right-holders. As pointed out above, the right to self-determination is the right of a people, thus constituting what is generally referred to as a group right. The right to democracy, on the other hand, is an individual right, belonging to all citizens. This is because, under the account we adopt, respect for citizens’ status as political equals is a crucial part of the right to democracy and is owed to citizens as individuals, not as a group. To be sure, the right to democracy also requires that certain collective institutional arrangements (separation of powers and a decision-making process that respects political equality) be put in place. This does not make the right to democracy a group right, however. Economic, social, and cultural rights generally also require significant institutional arrangements. Even traditional civil and political rights, such as for example the right to a fair trial or the right to property, necessitate collective institutions. Nevertheless, they remain individual rights. The same holds true for the right to democracy. Therefore, unless each and every citizen would waive his or her right to democracy, there will be a real conflict between the right to self-determination of a people and the right to democracy of at least some citizens of that people.

22. Cohen, supra note 5 at 234.
24. See supra Section 1.B at 5.
25. See supra Section 1.A at 3.
What are we to make, then, of this conflict between the right to self-determination and the right to democracy? Do we have to conclude that—to quote a line from the TV show Highlander—“there can be only one,” and that the other right has to abdicate as a result? Some authors, such as Joshua Cohen, David Reidy, and Matthew Lister, take this view. These Incompatibilists argue that because of the above-mentioned conflict with the well-established right to self-determination, there can be no such thing as a right to democracy. Cohen, for instance, holds that a human right to democracy would entail an equal individual right to political participation including voting rights, rights to association, and to office-holding. These rights would be infringed in a non-democratic system. Yet, a decent society’s choice of form of government—that is, a society in which basic human rights are protected and the conditions for self-determination are fulfilled—should be regarded as legitimate, even if it adopts a non-democratic system. Matthew Lister argues in this vein that “a largely ‘decent’ society that respects human rights is ‘beyond reproach’” for other states. A right to democracy would infringe the right to self-determination, according to these authors, because it would necessarily ignore the value that lies in a people freely choosing its (possibly non-democratic) form of government. For this reason, Cohen concludes that if “democratic ideas lack substantial resonance in the political culture, or the history and traditions of the country … the value of collective self-determination itself recommends resistance to the idea [of a right to democracy].” Based on these considerations, the Incompatibilists argue that the right to democracy and the right to self-determination are mutually incompatible and that, as a result, there can be no right to democracy.

2. Some Conceptual Clarifications

A. The Existence of a Conflict

To some, like Alfred-Maurice de Zayas, the UN Independent Expert mentioned at the outset of this article, the very idea of a conflict between the right to self-determination and the right to democracy is misguided. Common sense tells them that there is self-determination in democracy—plenty of it. Is not democracy the embodiment of self-determination, after all? Based on this intuition, they conclude that there can be no conflict between a right to self-determination and a right to democracy. Adopting a term that Frederick Schauer has recently revived, we will refer to those holding this view as the Panglossians. To the Panglossians, the claim that the two rights exclude one another is as absurd as

27. Reidy, supra note 5.
28. Lister, supra note 5.
29. Cohen, supra note 5 at 241.
30. Lister, supra note 5 at 263.
31. Cohen, supra note 5 at 234.
the claim that water and hydrogen could ever conflict.

Incompatibilists reject the Panglossian view. They point out rightly that the right to democracy can conflict with the right to self-determination. The Incompatibilists are mistaken, however, in believing that the existence of this conflict automatically precludes the coexistence of the right to self-determination and the right to democracy. To understand why this is so, we need to introduce a distinction—woefully neglected in the literature—between two different elements of self-determination. This distinction will prove illuminating, we hope, because contemporary writing on democracy and self-determination all too often confuses self-determination as such with the self-determination inherent in democracy. In distinguishing the two, we can gain clarity not only as to how democracy and self-determination can conflict, but also as to how this conflict can be resolved.

Let us first consider the confusion. As is often the case, differences in conceptual analysis are at the root of the problem. Thomas Franck, for instance, incorporates a certain degree of democracy in his account of self-determination. On Franck’s account, “self-determination postulates the right of a people … to determine its collective political destiny in a democratic fashion”. It is therefore “at the core of the democratic entitlement”.33 Hence, on Franck’s account, self-determination understood as a people’s right to self-determination and self-determination understood as a democratic form of expression are essentially the same. Franck comes to this harmonic conclusion because, on his account, self-determination and democracy are simply different stretches of the same road; self-determination is the stretch we pass first, and democracy the one we pass last. On this account of the right self-determination, it follows naturally that the idea of a conflict with the right to democracy makes little sense.

Franck’s account is at odds however with other prominent understandings of self-determination. In particular, it is at odds with an understanding of self-determination according to which self-determination is not necessarily connected with democracy. This view is held inter alia by the proponents of the Incompatibility Thesis. At the core of Cohen’s account of what he calls “collective self-determination”, for instance, is a “political process that represents the diverse interests and opinions of those who are subject to the society’s laws and regulations”.34 If citizens feel that their interests are not properly represented, they can express their dissent via an appeals mechanism. In response, the government has to issue an explanation, justifying its decisions by showing that they take into account the citizens’ interests and that they are based on the common good. In contrast to democratic governments, Cohen points out, the government of such a self-determined society is not under a duty to accord citizens’ interests equal respect. Such a government may be perfectly legitimate from the point of view of self-determination despite considerable political inequality.35 As Cohen argues, one

33. Franck, supra note 13 at 52.
34. Cohen, supra note 5 at 233.
possible way a people can exercise collective self-determination is by adopting a democratic form of government.\(^{36}\) In contrast to Franck, self-determination for Cohen can however also be legitimate when it yields non-democratic forms of government. Democracy, understood in this sense, is a possible but not a necessary outcome of exercising the human right to self-determination.\(^{37}\)

As we will argue in what follows, Cohen is right in holding—\textit{contra} Franck—that democracy and self-determination are not necessarily connected in so far as self-determination does not have to yield a democratic form of government, yet can still be valuable. What Cohen fails to see, however, is the exact nature of the relationship between self-determination and democracy. As a result, some of his assertions raise more questions than they answer. For example, he writes that sometimes democracy can fulfill self-determination. At other times, however, the right to democracy can conflict with self-determination. But how can friends suddenly become foes? To understand this, we need to dig deeper and unveil an important distinction that underlies the relationship between the right to self-determination and that to democracy.

\textbf{B. The Two Elements of Self-Determination}

More specifically, we need to distinguish between two different conceptual elements of self-determination. This distinction enables us to isolate the different values that lend legitimacy to democratic and non-democratic forms of government, and, with some more twists, to test whether the right to self-determination and the right to democracy are indeed irreconcilable conflict.

The first element of self-determination is a people’s choice of its form of government. When making this choice, a people has broadly two options: either it adopts a democratic system, or it adopts a non-democratic system. Regardless of which system it picks, it confers the same degree of legitimacy on the chosen form of government. This is because it is regarded as valuable for a people, consisting of individual autonomous agents, to determine its own political fate—regardless of what this fate may be. Recall our example of the Israelites. God and Samuel were skeptical about the Israelites’ decision to have a king. Nevertheless, they saw value in the fact that the Israelites wanted to choose their own form of government, which is why God advised Samuel to grant them their wish. Hence, even if a people chooses a non-democratic system, their choice will be valuable and it will confer a certain degree of legitimacy on this system. Note that a people can choose its system in various ways, only one of which uses the ballot. The people’s choice can also be expressed implicitly, for example through simple approval or general satisfaction with the regime (as expressed in representative polls, for instance).\(^{38}\)

\(^{36}\) Cohen, \textit{supra} note 5 at 233.
\(^{37}\) \textit{Ibid} at 245.
\(^{38}\) Legally, the only requirement pertaining to the method of exercising the right to self-determination is that “the free and genuine expression of the will and wishes of the people concerned” be reflected: Antonio Cassese, \textit{Self-Determination of Peoples: A Legal Reappraisal} (Cambridge University Press, 1995) at 131.
The second element of self-determination is the status of all as equal members of the political community. This element is characterized not by acts of choosing a particular form of government, as is the case with the first element. Rather, the second element of self-determination concerns the status as political equals that citizens possess. This status allows them not only to have their interests taken into account (this is equally possible in non-democratic regimes), but it furthermore permits them to actively participate and have an equal say in the decision-making process. For Thomas Christiano, the status of political equality means “that in collective decision making designed for the purpose of deciding upon collective properties of society, all the relevant means to securing desired ends ought to be distributed equally.”39 Such a status promotes the autonomy and equality of citizens, which are paradigmatic values. These values, in turn, confer legitimacy on the form of government which brings about the status of political equality. Because only democracies protect citizens’ status as political equals, we find the second element of legitimacy whenever a people lives under a democratic form of government. If a people instead chooses to be governed by a non-democratic system, then their choice accords some legitimacy to that form of government (the first element of self-determination), but it will not accord the additional legitimacy of making citizens political equals (the second element of self-determination). Perhaps some may find it confusing that we call this the second element of self-determination, despite the fact that it is not covered by the right to self-determination, but only the right to democracy. However, our choice of terms seems appropriate to us for it reflects the accurate insight of the Panglossians that democracy, too, is a form of (institutionalized and perhaps advanced) self-determination.

It follows that only a people that has itself chosen to live in a democracy, and has thereby granted the status of political equality to all citizens, combines the legitimacy that derives from both the first and second element of self-determination.40 A people that chooses a non-democratic system abdicates the second element of self-determination and the values it promotes. As pointed out, however, there is also legitimacy in such non-democratic forms of government insofar as the respective people adopted this system in a self-determined manner.

It is worth noting that while many democracies combine the legitimacy of both the first and second element—because the respective peoples chose to live in a democracy, and grant each other the status of political equals—there are some that lack the first element of self-determination. This is the case in states in which external forces have established a democratic system. In such states, the first element of self-determination is lacking because the people of that state did not choose to live in a democracy. However, there is value in their democracy due to the fact that these people are now able to participate in the decision-making

40. One could be tempted to think that because it is a people that chooses to live in a democracy, the right to democracy is a group right rather than an individual right. This would be to confuse things, however. A people’s choice to live in a democratic system is an exercise of its right to self-determination, not the right to democracy. With the choice of a democratic system, a people simply actualizes individuals’ rights to democracy that have been there all along.
process on equal terms (second element of self-determination).\footnote{It may be objected here that for a people who chooses not to live in a democracy, political equality would not be valuable. Due to lack of space, an account of the meta-ethical status of the value of political equality cannot be given here, which is why we will be working under the assumption that this value is sufficiently objective so as to be valuable also for a people who chooses not to live in a democracy.}

With this distinction between the two elements of self-determination in mind, we are now equipped to show what explains Cohen’s ostensibly conflicting statements, according to which

(1) self-determination can at times be fulfilled by means of democracy, while
(2) at other times democracy can conflict with self-determination.

Proposition (1) is true in situations where a people adopts a democratic form of government. In this case, both the first and second element of self-determination will be fulfilled. (2) is true, on the other hand, when the international community or some other external actor imposes democracy on a people which chose not to live in a democratic system. Unlike in the first case, democracy then conflicts with self-determination. This is because a non-democratic system that its people freely adopt enjoys the legitimacy of the first element of self-determination. While the status of political equality that external forces create would be valuable from the point of view of the second element of self-determination, it is clear that we are confronted with a real conflict between the right to democracy and the right to self-determination in this scenario. Probably this is what Cohen has in mind when he points out that in such a situation “the value of collective self-determination itself recommends resistance”.\footnote{Cohen, \textit{supra} note 5 at 234.}

For these reasons, Cohen and his fellow Incompatibilists are right in arguing, \textit{contra} the Panglossians, that there is a conflict between the human right to democracy and the right to self-determination. Where a people has chosen a non-democratic form of government it has conferred legitimacy on this form of government (first element of self-determination). To replace this government with a democratic one would create a genuine conflict with the value of political equality (second element of self-determination) that would be promoted in the process. In contrast to what the Incompatibilists assume, however, it does not follow from the existence of this conflict that the right to self-determination and the right to democracy are incompatible.

\textbf{C. Rules and Principles}

To understand how a conflict between the right to self-determination and the right to democracy is possible without corroborating the Incompatibility Thesis, it is necessary to employ a distinction commonly made between two different types of legal norms: rules and principles. As we will argue in this subsection, the Incompatibilists seem to hold the misguided view that the right to self-determination and the right to democracy are rules rather than principles. To understand
why principles are the more suitable category of norms for these rights, we first need to get a grasp of the central difference between rules and principles.

Originally introduced by Ronald Dworkin to mount a critique of H.L.A. Hart’s legal positivism, the distinction between rules and principles was geared to showing that, in addition to rules, legal systems also contain principles. In Dworkin’s original formulation, rules and principles are logically distinct types of norms. Rules apply in an “all-or-nothing” fashion, that is, they are either fully valid or not valid at all. For this reason, Dworkin argues, there can be no conflicts between valid rules. Principles, on the other hand, come in degree. More precisely, principles are requirements of morality that have a weight or importance that has to be taken into account when they conflict with other principles. In contrast to rules, principles are neither clear on their exact content, their subjects, their weight, nor the conditions in which they apply. That is why “they are particularly suitable for incorporating into the law very general goals and values”.

Some have further developed Dworkin’s distinction. Robert Alexy, most notably, argues that rules are “definitive requirements [which] insist that one does exactly as required”. Principles, on the other hand, can be “satisfied to varying degrees”. As Alexy adds, principles do not only come in degree but they also require that they “be realized to the greatest extent legally and factually possible”. For this reason, Alexy refers to principles as optimization requirements.

To be sure, this understanding of the distinction between rules and principles has not remained unchallenged. Most prominently, Joseph Raz has argued that rules and principles are not treated differently in cases of conflict because they are logically distinct kinds of norms. Rather, any differences in treatment are the result of policy considerations. This dispute need not concern us, however, for in practice, both Dworkin and Alexy as well as Raz agree that conflicts between principles have to be resolved in what is generally referred to as a balancing exercise. Their reasons for disagreeing as to why principles behave in this way are of no relevance for our purposes here.

If we now apply the distinction between rules and principles to the rights to democracy and to self-determination, we can see immediately that these rights are best classified as principles, not rules. Let us start with the right to

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44. Dworkin, supra note 43 at 40.
45. Ibid at 38-43.
47. Ibid at 841.
49. Ibid at 47-48.
50. Ibid at 57.
51. Ibid at 47.
52. Raz, supra note 46 at 834.
self-determination. As pointed out above, this right is generally understood as the right of a people to “freely determine their political status and freely pursue their economic, social and cultural development.” 53 This provides us with clarity neither on the right’s exact content, its subjects, its weight, nor the conditions in which it is supposed to apply. Further, the right seeks to promote certain values and goals, such as that of collective autonomy. Since these are the core marks of a principle, the right to self-determination is most plausibly classified as a principle, not a rule. The same can be said about the right to democracy. As shown above, this right entitles its holders to some sort of constitutional separation of powers; to a range of fundamental rights that are crucial for their participation in politics; and to a decision-making process that respects their political equality. Again, these notions are rather unclear and leave open central questions as to their precise content, their subjects, their weight, and their conditions of application. The right to democracy also promotes certain values such as collective autonomy, equality, and individual freedom. For these reasons, it is safe to say that also the right to democracy takes the form of a principle rather than a rule.

Now that we have established that the two rights in question are best interpreted as principles, we need to analyze how exactly conflicts between such principles can be resolved. Alexy has developed the most sophisticated account in this regard, which is why we will be drawing on his theory. 54

D. The Principle of Proportionality

Assume that principle X permits φing and that principle Y prohibits φing. How are we to resolve this situation? Alexy’s answer is that either principle X or principle Y has to outweigh the other principle. However, it does not follow from this that the outweighed principle ceases to be valid. As Alexy explains, that one principle outweighs the other

means neither that the outweighed principle is invalid nor that it has to have an exception built into it. On the contrary, the outweighed principle may itself outweigh the other principle in certain circumstances. In other circumstances the question of precedence may have to be reversed. 55

Dworkin concurs with Alexy on this point, arguing that in cases of conflicts, one must assess the competing principles and “make a resolution of these principles rather than identifying one among others as ‘valid.’” 56 For Alexy, it is a conceptual necessity that conflicts between principles be resolved in this way. Principles constitute limits to the reach of other principles, or—to use Alexy’s words—each

54. To be sure, Alexy’s account of how conflicts between principles are to be resolved diverges to some extent from Dworkin’s and Raz’s accounts. However, we believe that there is sufficient overlap between the three authors to be able to carry on our analysis by drawing on Alexy.
55. Alexy, supra note 48 at 50.
56. Dworkin, supra note 43 at 94.
principle “limits the legal possibility of satisfying the other”.\textsuperscript{57} We thus have to identify the exact reach of the conflicting principles by determining which one outweighs the other. Instead of declaring one principle invalid or to equip it with an exception, as would be the case with rules, Alexy proposes that conflicts between principles are to be resolved by “establishing a conditional relation of precedence between the principles in the light of the circumstances of the case. The relation of precedence is conditional,” Alexy continues, “because in the context of the case conditions are laid down under which one of the principles takes precedence. Given other conditions, the issue of precedence might be reversed.”\textsuperscript{58}

But how exactly are we to establish conditional relations of precedence, that is, how do we weigh the principles? Alexy’s key tool for this purpose is the principle of proportionality which, according to him, is conceptually linked to the category of principles.\textsuperscript{59} To understand why this is the case, we need to recall Alexy’s claim that principles are optimization requirements. Principles demand to be satisfied to the greatest extent possible even (and especially) in situations of conflict. This is where the proportionality principle comes in. It guarantees that the principle that is outweighed is outweighed in the least invasive way possible. In other words, the proportionality test tells us which principle needs to be complied with and makes sure that even the outweighed principle is optimized to the greatest extent possible.\textsuperscript{60}

According to Alexy, the proportionality principle consists of three sub-principles—suitability, necessity, and proportionality in its narrow sense—all of which are important to “the idea of optimization”.\textsuperscript{61} The third sub-principle is of particular interest to us because it provides us with the means of balancing two conflicting principles. As Alexy explains, at the core of proportionality in its narrow sense is the Law of Balancing, which he defines as follows: “[t]he greater the degree of non-satisfaction of, or detriment to, one principle, the greater must be the importance of satisfying the other”.\textsuperscript{62} This Law of Balancing can itself be broken down into three stages:

The first stage involves establishing the degree of non-satisfaction of, or detriment to, a first principle. This is followed by a second stage in which the importance of satisfying the competing principle is established. Finally, in the third stage, it is established whether the importance of satisfying the latter principle justifies the detriment to or non-satisfaction of the former.\textsuperscript{63}

As Alexy points out, the crucial part of the task of balancing is the making of rational judgements about questions of “degree” (first stage) and “importance” (second stage). To address this issue, Alexy introduces a scale with three stages: light, moderate, and serious. Both the degree of non-satisfaction of or detriment...
to the first principle as well as the importance of satisfying the second principle will be determined as either light (assigned the value 1), moderate (value 2), or serious (value 4). Building on this, Alexy introduces his Weight Formula:\(^64\)

\[
W_{ij} = \frac{I_i}{I_j}
\]

In abstract terms, this formula provides us with a tool to determine the relative weight of two competing principles. \(I_i\) stands for the intensity (or degree) of interference with the principle \(P_i\); \(I_j\) for the importance of satisfying the competing principle \(P_j\); and \(W_{ij}\) for the concrete weight of \(P_i\) relative to the competing principle \(P_j\).\(^65\) We can now fill in the values 1, 2, or 4. If the quotient \((W_{ij})\) is greater than 1, \(P_i\) prevails over \(P_j\). If the quotient is smaller than 1, then \(P_j\) prevails over, that is, outweighs \(P_i\). Because the Weight Formula always juxtaposes two principles, the concrete weight of a principle that it establishes is always a relative weight and thus bound to differ if juxtaposed with other principles.

Since relatively recently, the proportionality principle has come under fire from a range of authors who aim to shed critical light on the hitherto largely unchallenged practice of courts worldwide to use the proportionality principle to adjudicate rights conflicts.\(^66\) One important objection to the principle is that the idea of weighing rights seems to be at odds with the prevailing view of rights as having peremptory force.\(^67\) Another criticism that has been raised is that the proportionality principle actually involves weighing values that are incommensurable. As a result, these critics claim, the principle cannot deliver on the rationality of the judgments involved in balancing, as Alexy claims in his Weight Formula.\(^68\) These and further criticisms of the principle have to remain unanswered here, for it is not the purpose of our article to present an argument in favor of the proportionality principle. Other, more able authors, such as Kai Möller, have provided convincing defenses of the principle, and we will proceed under the assumption here that there are indeed plausible grounds for accepting the proportionality principle.\(^69\) The fact that the proportionality principle has become a widely-used method for adjudicating rights conflicts lends support to that assumption. Both domestic and international courts have successfully applied it for decades to deal with rights conflicts. With roots in German constitutional jurisprudence, as

\(^64\). Ibid at 575.
\(^65\). Ibid at 575-76.
\(^69\). See Möller, supra note 66 at 709 (rebutting some of the often-made criticisms).
Dieter Grimm points out, “the principle of proportionality spread to most other European countries with a system of judicial review, and to a number of jurisdictions outside Europe”.\textsuperscript{70} International courts such as the European Court of Human Rights also use it to resolve rights conflicts arising in their jurisdiction.\textsuperscript{71} Given these facts, it does not seem implausible to challenge the Incompatibility Thesis by drawing on the proportionality test. This approach suggests itself also because, as we have argued above, the right to self-determination and the right to democracy are best understood as principles, conflicts between which the proportionality test provides a convenient tool of resolving. We will be using Alexy’s account of balancing in particular because it forms part of what is arguably the most developed proportionality theory.

3. Applying the Proportionality Test

In this section, we will pull together the somewhat abstract threads from the preceding sections by applying our theoretical framework to the conflict between the rights to democracy and self-determination. We will show how the Incompatibility Thesis can be refuted by presenting two examples that illustrate how the right to democracy can be outweighed by the right to self-determination and vice versa (we will call these examples Carthago 1 and Carthago 2), and one example which shows how the right to democracy can play an important role independently of such a conflict (Carthago 3).

In our analysis of the conflict, the first principle which we have to balance is the right to self-determination. The second, competing principle is the right to democracy. Applying Alexy’s theory, we can say that whether the right to self-determination outweighs the right to democracy (or vice versa) depends on three factors: first, the degree of non-satisfaction or detriment to the right to self-determination; second, the importance of satisfying the competing right to democracy; and third, the outcome of the balancing exercise which determines whether or not the importance of satisfying the right to democracy justifies the detriment to or non-satisfaction of the right to self-determination. It is important to bear in mind that these criteria—the degree, importance, and, obviously, the balancing outcome—differ from case to case. They can thus only be established with respect to concrete circumstances. We must therefore now specify the circumstances of our examples in which the Law of Balancing is to be applied.

A. The Decent but Non-Democratic Society

The case that raises the most difficult questions and is therefore presumably the one most frequently invoked as an argument in favor of the Incompatibility Thesis is what we will call that of a decent but non-democratic society. The

\textsuperscript{70} Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007) 57 UTLJ 383 at 384.

\textsuperscript{71} Ibid.
distinctive mark of a decent but non-democratic society, which is similar to what John Rawls in *The Law of Peoples* calls a “decent hierarchical society”, is that it is a society that is in accordance with the right to collective self-determination but not with the right to democracy. Such a society is particularly relevant for our analysis because decent societies freely choose their form of government. Even if non-democratic, their government has at least some legitimacy (first element of self-determination), which makes any attempt to replace it with a democratic government problematic. A fictitious example will help illuminate this problem.

*Carthago 1*: The people living in the state of Carthago have submitted themselves to the rule of their benevolent king, Karthagos. Karthagos is no tyrant and has made it clear that his subjects retain an unlimited right to self-determination should they ever decide to depose him. The state of Carthago also guarantees everyone’s basic human rights. Certain non-basic rights are limited in Carthago, however. For example, upon assuming power, Karthagos adopted a law which effectively banned elections, arguing that he was so benevolent, the Carthagians would never feel the need to elect anyone else. Should they ever be dissatisfied with his rule, Karthagos claimed, they could file a complaint and he would step down immediately. So far, none of the Carthagians has ever thought about filing such a complaint because Carthago has become a thriving state under Karthagos. However, because the law he adopted violates Carthagians’ human right to democracy, the international community has been debating whether or not it should intervene in Carthago. “If there is a human right to democracy,” an enthusiastic state representative proclaimed in an emergency meeting of the international community, “then surely it comes with a duty to protect this right in other states, and for other peoples, regardless of how well they are otherwise doing!”

Note that while the law that Karthagos enacted infringes the principle of political equality, it does not change Carthago’s character as a decent society because the Carthagians continue to enjoy a high degree of protection of their basic human rights. In the real world, similar events to those in *Carthago 1* unfolded in the late 1970s and early 80s in Grenada. In March 1979, in a virtually bloodless coup d’état, Maurice Bishop, the leader of the communist movement, seized power. Although Bishop had no democratic legitimacy, he became extremely popular with Grenadians. Under Bishop, their economy soared and unemployment dropped significantly, the literacy rate reached almost 100%, free health care and secondary schooling were introduced, and Grenada’s basic human rights record, especially when compared to other Caribbean countries, was impressive. Bishop was however despised by hardliners in his own movement, who, after some turmoil, executed him in October 1983. Only a few days later,

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73. Note that the term “basic human rights” here is used in Cohen’s minimalist sense, which is similar to Rawls’s sense. According to their understanding, basic human rights do not include such things as a right to non-discrimination.
74. In contrast to Karthagos, however, Maurice Bishop seemed to be quite supportive of grassroots democracy: Stephen Zunes, “The US Invasion of Grenada”, *Global Policy Forum* (2003), online: https://www.globalpolicy.org/component/content/article/155/25966.html.
75. Ibid.
the US invaded Grenada. While Grenadians’ democratic rights were certainly not the US’s top priority, they may have played some role in the invasion. Indeed, a little over a year after the US invasion, Grenada held democratic elections. It could therefore be argued that, if we ignore some of the historic details, the situation of Grenada is similar enough to that in Carthago 1 in that both had a decent but non-democratic ruler who was toppled by external actors and replaced with a democratic government.

The problem that arises in cases like Grenada or Carthago 1 is that if the international community (or another external actor) decides to intervene, democracy is forced upon a perfectly decent but non-democratic society whose freely chosen government possesses some degree of legitimacy. This practical issue points to the more general question about the (in)compatibility of the right to self-determination and the right to democracy. To understand both the practical issue and the general question, we need to analyze if there is a conflict between the right to democracy and the right to self-determination in the stylized example Carthago 1.

A first answer could be that there is no such conflict in the case at hand. This is the response of Panglossians like Franck who understand self-determination as necessarily entailing democratic government. According to this view, it would be permissible for the international community to intervene in Carthago in order to enforce the right to democracy (at least if we assume that such an intervention is feasible and does not violate other human rights, or other obligations under international law). This answer, however, is not plausible in light of the understanding of the right to self-determination adopted in this article. There are good arguments for assuming that self-determination is not simply an early stretch of a road that will inevitably lead to democracy. Rather, self-determination promotes certain values independently of whether it yields democratic outcomes (first element of self-determination).

A second answer could be something like the following: The international community would violate Carthagons’ human right to self-determination if it ousted Karthagos and replaced him with a democratic government. Because this would constitute a conflict between the right to self-determination and the right to democracy, it follows that there is no right to democracy. This is the conclusion that Incompatibilists as well as those draw who, like Miller, assume that human rights more generally cannot conflict and coexist. As we have mentioned above and will take up later again, however, this conclusion is flawed.

A third answer could be that while forcing Carthago to live up to its human rights obligations would interfere with the right to self-determination, it does not follow from this that there cannot be a right to democracy. Instead, both rights could be held to coexist despite the conflict. In order to see how this can be the

76. See ibid.
77. “Full Circle in Grenada”, Washington Post (5 December 1984) A20 (noting that one of President Reagan’s promises “was to return to Grenada the opportunity to determine its own future democratically”).
78. Miller, supra note 14 at 3.
case, and to establish which right may prevail in the case at hand, we must now apply the Law of Balancing to Carthago.

**B. Balancing the Rights**

At the first stage of the Law of Balancing, we need to determine the degree of non-satisfaction that would be inflicted on our first principle, the right to self-determination. As outlined above, a people can confer legitimacy on its government if this is done in a self-determined way. Carthago, in virtue of being a perfectly decent society, has freely chosen its non-democratic form of government which is why its decision must be regarded as valuable (first element of self-determination). The international community’s replacement of king Karthagos with a democratic system would thus be seriously detrimental to the right to self-determination. Applying Alexy’s theory, we could assign the value 4 (serious) to the detriment caused to the right to self-determination. The detriment caused is not simply moderate (or light) because the Carthagonians’ choice of government is one that is valuable pursuant to the first element of self-determination. Albeit undemocratic, Carthago is a perfectly decent society.

Arriving at the second stage of balancing, we now need to establish the importance of satisfying the principle that competes with the right to self-determination, namely the right to democracy. As explained above, the right to democracy is valuable because it promotes the status of citizens as equal members of the political community, with an equal say in the decision-making process. In doing so, the right to democracy promotes individual and collective autonomy and the equality of citizens. Additionally, the right may be valuable insofar as it is conducive to peace and to the protection of human rights. In the case of Carthago, it can be argued that the importance of the right to democracy is only light (and thus to be assigned the value 1). This is because, Carthago being a decent society, the basic human rights of its citizens are protected. What would be added to Carthago in terms of value is the conferral of the status of political equality to all its citizens. Given the otherwise impeccable state of affairs in Carthago, however, this addition does not seem to give more than light weight to the right to democracy in this case.

In the third and last stage of balancing, we need to determine whether the importance of satisfying the right to democracy justifies the detriment to the right to self-determination. To do so, we can now fill in the values we assigned to our principles, using Alexy’s Weight Formula:

\[
W\left(\text{right to self-determination})\right) \frac{4}{W\left(\text{right to democracy})\right) = 1}
\]

The concrete weight of the right to self-determination relative to the competing right to democracy is 4. Given that this quotient is larger than 1, it follows that the right to self-determination outweighs the right to democracy in Carthago.

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1. In other words, a forcible replacement of Carthago’s non-democratic system would constitute a disproportionate infringement of the Carthagonians’ right to self-determination.80

Based on this outcome, one might be tempted to conclude, with the Incompatibilists, that where there is a right to self-determination, there is no room for a right to democracy. Such a conclusion would be premature, however. While in the particular circumstances of Carthago 1, the right to self-determination has indeed outweighed the right to democracy, this will not necessarily be the case under different circumstances.

C. Different Circumstances, Different Outcomes

To see how different circumstances can lead to different outcomes, consider two alternative cases. In Carthago 2, the right to democracy will be shown to outweigh the right to self-determination in a situation of conflict. In Carthago 3, by contrast, the right to democracy will be shown to play an important role independently of a conflict with the right to self-determination.

Carthago 2: After an ugly divorce, king Karthagos has turned from being the benevolent monarch he once was to being a mean despot. To vent his frustration on the Carthagonians, who had, in better times, freely chosen to subject themselves to his rule, Karthagos is now enacting new pestering laws with ever-increasing frequency. Most recently, for example, he decreed that all Carthagonians must file their taxes on a weekly basis. Even more dismayingly, although most Carthagonians’ basic human rights have remained largely unaffected by Karthagos’s laws, there are reports that the basic rights of a handful of citizens are being violated. To make matters worse, Karthagos, in a particularly bad mood, decided to abolish the individual complaint mechanism that would have previously allowed aggrieved citizens to voice their concerns in such matters. Because of this alarming state of affairs in Carthago, the international community, after some deliberation, has decided to oust Karthagos and to replace his regime with a state of the art democratic system that leaves nothing to be desired in terms of political equality and human rights protection.

A practical example that may, at least in some regards, come close to Carthago 2 is Afghanistan at the turn of the millennium. In 1996, the Taliban captured Kabul and established the Islamic Emirate of Afghanistan. They imposed Sharia law on the country, discriminated against women, and showed contempt for human rights in numerous other regards.81 However, despite these considerable

80. Some readers may of course disagree with our assessment of the degree of detriment to the first and the importance of the second right and our corresponding assignment of values 4 and 1, respectively. Determining the weights of the rights at stake is certainly not an exact science, and some disagreement as to which values should be assigned will be inevitable. However, while these disagreements need to be taken seriously, they do not imply that determining the exact weights is a matter of “anything goes” (see on this in particular Möller, supra note 66 at 727-30). More importantly, if one disagrees about the weight of the rights involved, one has already accepted the premise that the circumstances of the particular case will determine the outcome of the proportionality test.

deficiencies, the basic human rights of most Afghans remained largely unaffected. In 2001, the US invaded Afghanistan and overthrew the Taliban, *inter alia* with the goal of restoring democracy. After a three-year period under an interim government, presidential elections were held in which more than 70% of registered voters participated.

In a similar way as the Afghans under the Taliban regime, the Carthagons in *Carthago 2* live in a non-democratic state that is at the lowest end of the spectrum of decency. Yet, because most Carthagons’ basic human rights are respected, Carthago still has a decent government—albeit one that is on the brink of being indecent. Under these circumstances, then, the degree of harm that the international community’s intervention causes to the right to self-determination can be said to be lower than in *Carthago 1*: say, it can only be assigned the value 1 because the barely decent Carthagonian government is only minimally legitimate. The importance of the right to democracy, on the other hand, is higher (and to be assigned the value 2) because the Carthagons would come to benefit from first-rate political equality. In *Carthago 2*, then, we can conclude that the difference in circumstances warrants that the right to democracy outweighs the right to self-determination.

This, in turn, means that the Incompatibilists are wrong in claiming that the right to self-determination always outweighs the right to democracy. More importantly, the fact that the right to democracy can outweigh the right to self-determination under certain circumstances is evidence enough for rejecting the thesis that the right to self-determination precludes the existence of the right to democracy.

Perhaps, however, *Carthago 2* will not convince all Incompatibilists. There may be some who are not willing to accept that the circumstances can ever be such that the right to democracy outweighs the right to self-determination. Hence, these skeptical Incompatibilists will conclude that whenever the right to democracy conflicts with the right to self-determination, it is outweighed. This, they believe, confirms that the right to democracy cannot coexist with the right to self-determination. However, even if we granted for the sake of argument that the right to self-determination always outweighs the right to democracy, it would still not follow that the right to democracy could not exist independently of any conflict with the right to self-determination. To see why this is so, consider the following case.

*Carthago 3*: After some time, and some more vexatious laws, the situation in Carthago worsens to such an extent that even the most stoical Carthagons grow tired of Karthagos. Agreeing that their lives in Carthago have become a living hell, they decide to replace Karthagos’s rule with a democratic form of government. Unfortunately for them, Karthagos is anything but willing to give up power and is using all the might of the state to thwart attempts at abolishing his regime. Deeply

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concerned about the right to democracy of the Carthagonsians, the international community decides to intervene in Carthago, ousting king Karthagos and replacing his regime with a democratic government.

A real-world example similar to Carthago 3 can be found in the UN’s intervention in Haiti, where, in 1991, the democratically elected Jean-Bertrand Aristide was overthrown as a result of an internal armed conflict. The new government installed by the victorious rebels was not elected by the people and trampled on the Haitians’ human rights. The UN responded by intervening, arguing that it was doing so to restore democracy.

Under circumstances such as those in Haiti or Carthago 3, there is no conflict between the right to democracy and the right to self-determination. This is because one side of the scales—the side of self-determination—is essentially empty due to the lack of self-determination. As a result, there are no two competing rights in the first place. Also, and more interestingly for our purposes, Carthago 3 shows how the right to democracy can exist and play an important role independently of the right to self-determination. The international community can fulfil this right and create political equality for the citizens of a state without anyone needing to worry about how the right behaves in other situations when it conflicts with the right to self-determination. We can thus infer that the Incompatibility Thesis, according to which the right to democracy and the right to self-determination cannot coexist, fails. In circumstances such as those of Carthago 3, the right to democracy exists regardless of the concurrent existence of the right to self-determination.

Despite the emphasis put on balancing in the preceding paragraphs, the most important point of this section has not been to determine which right outweighs the other right in a given case. Rather, the crucial insight has been that, depending on the weight that we assign to these rights in specific circumstances, different outcomes are reached. Hence, while the right to self-determination can outweigh the right to democracy under certain circumstances (such as those in Carthago 1), there can be other circumstances where the right to democracy prevails (Carthago 2). Also, even if one rejects the possibility that the right to democracy ever outweighs the right to self-determination, the right to democracy can play an important role independently of a conflict with the right to self-determination (Carthago 3), or other rights, for that matter.

Conclusion

We started this article with two contradicting interpretations of the right to self-determination: the Panglossian interpretation which argues for a harmonic

84. The example is similar at least if we grant, for the sake of argument, that the will of the rebels cannot be equated with the will of the Haitian people as a whole.
picture in which the right to self-determination is intimately connected with the right to democracy, and the Incompatibilist interpretation according to which there can be no right to democracy, as this right would conflict with the right to self-determination.

We have argued that neither of these positions is correct and have shown that the right to self-determination and the right to democracy can conflict yet be compatible with each other. To do so, we have distinguished between two elements of self-determination: self-determination as a people’s ability to choose its own form of government (protected by the right to self-determination) and self-determination as citizens’ status of political equality (protected by the right to democracy). By conceiving of these rights as principles rather than rules, we then showed how, if one applies Alexy’s Law of Balancing, we can resolve any conflicts between these principles without having to conclude—as the Incompatibilists do—that they are mutually incompatible.

It is worth emphasizing the relatively modest aim of our article. Its goal was neither to defend the existence, nor the desirability of a human right to democracy. Nor have we provided a normative argument for adopting the proportionality test to resolve rights conflicts. Rather, our narrower focus has been to test whether a right to democracy could exist in light of a conflict with the right to self-determination. The outcome of our analysis is thus a contingent one. If one adopts the proportionality principle to resolve conflicts between the right to self-determination and the (potentially emerging) right to democracy, then the Incompatibility Thesis fails.