Democratic Governance and International Law, edited by Gregory H. Fox and Brad R. Roth

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Democratic Governance and International Law

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Unlike twenty years ago, today's students of international law and politics cannot remain impervious to the notion of democratic governance, which has become so fundamental and pervasive in the literature and understanding of their disciplines. Along with respect for the rule of law, protection of human rights, sustainable development, protection of the environment, and, arguably, greater economic equality, democratic governance is an important facet of the holy-grail that is the ideal form of social organization. Yet, for all the rhetoric surrounding the notion of democratic governance, and there is a considerable amount of it, there appears to be little real consensus about what the notion means; what the content of it is and should be; its theoretical and conceptual basis; and, perhaps most importantly for international lawyers, whether it exists as an international legal norm. Any publication that can serve as a guiding light through these complex issues is to be strongly welcomed. Gregory H. Fox and Brad R. Roth have produced just such a book.¹

Democratic Governance and International Law is a collection of nineteen essays from leading writers on democracy in the fields of international law and political science. Although most of these essays have been published elsewhere, bringing them together in a single volume has great value, for much of the work in this area is quite disparate and an understanding of the core issues should be as broadly informed as possible. This book also includes new material and a useful introduction by the editors that sets out the conceptual background to the issues and the relationship between law and politics.

In Part I of this Review, I consider the individual essays, highlighting what they seek to add to the discourse on democracy and international law. In Part

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¹ DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000).
II, I evaluate the overall contribution of the book. In particular, I analyze whether international law is capable of effecting a supervisory role over an emerging norm of democratic governance.

I.

Democratic Governance and International Law breaks down into five broad areas in an effort to provide a well-rounded perspective on the nature and implications of the right to democratic governance in international law. Part I of the collection considers the systematic foundation of the right, and it is fitting that the first contribution is by Thomas M. Franck, who has been particularly influential in this area. Franck first advanced the right-orientated thesis that international law is beginning to embrace a norm of democratic governance, according to which international law evaluates the legitimacy of national governments. For Franck, democracy means that the right to govern is to be derived from the consent of the governed. His analytical focus is the relatively uncontroversial issue of election monitoring, although this issue is still fraught with difficulties. I do not suggest that Franck is unaware of the implications of democracy, but rather that election control might be as much as the “frail” international system can presently sustain.

In the next essay, Gregory H. Fox adopts a similarly positive outlook for democracy. Framing the question as the right to political participation in international law, Fox seeks to show how this right now has a firm grounding in human rights law and the practice of multilateral election monitoring. Although Fox restricts his survey to the procedural right of elections, this focus is not a rejection of other substantive democratic tenets but a recognition that elections are the means by which other democratic goals are to be achieved. Fox also recognizes that international law has not and is not ready to incorporate and advance an all-encompassing notion of democracy.

This essay is followed by James Crawford’s skeptical review of


3. Gregory H. Fox, The Right to Political Participation in International Law, in Democratic Governance and International Law, supra note 1, at 48.
democratic governance in international legal doctrine.⁴ He starts by outlining the profoundly undemocratic nature of classical international law as manifested in certain key principles such as non-intervention, recognition of the executive’s power to make binding commitments on behalf of the State, and the absence of autonomous rights in respect of remedies. This situation developed not only because the majority of States were undemocratic but also because of the structure of international law. He states that as recently as 1986, in the Nicaragua v. United States case before the International Court of Justice,⁵ this State-centric view of the international order has been clearly prevalent. However, Crawford notes the systemic changes in the nature of international law. He then highlights the developing practice of election monitoring by international organizations, moves to institutionalize this practice, and the work of human rights organizations in the democratic governance and other areas. Crawford identifies a tension between what is, what could be, and what should be; and he warns about being unrealistic in our evaluation of the evolution of democratic governance. In a reprise to his original essay, Crawford emphasizes the obstacles to establishing a right to democracy in international law. First, much disagreement still exists about the articulation of such a right at the international level, as evidenced by the long debates in April 1999 behind the first resolution of the Commission on Human Rights on the subject of democracy.⁶ Such disagreements have carried through to State practice, which has been inconsistent in recent years. Second, there is the issue of justiciability or the margin of appreciation. This doctrine is often relied on as a means of avoiding judicial scrutiny of certain issues that are politically sensitive, such as issues of democratic governance that run to the heart of a State’s political order.

Part II of the book contains three essays on recent developments in inter-State relations concerning democracy. Sean D. Murphy considers the impact of democracy as a criterion for the recognition of States and governments.⁷ After reviewing traditional theory, past practice, and contemporary practice

⁴ James Crawford, Democracy and the Body of International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at 91.
⁷ Sean D. Murphy, Democratic Legitimacy and the Recognition of States and Governments, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at 123.
he concludes that democracy (democratic legitimacy) is one element among many in States' recognition practice. Although democracy is an increasingly important consideration, States still take account of other factors such as economic development, peace and security, and the effectiveness and stability of the regime in control of the State.

Stephen J. Schnably considers the impact of democracy in the practice of the Organization of American States. In this context, a clear tension exists between democracy and respect for the principle of non-intervention; and a failure to resolve this tension has undermined the role of the OAS. A differing approach is provided by Anne-Marie Slaughter, who looks not to the empowerment of international institutions such as the United Nations as the way forward for democracy, but rather to the evolving practice of formal and informal governmental networks as the most realistic hope for asserting democratic principles. This arises principally because States are unwilling to cede power to international organizations. Thus, direct transnational interaction between the diffuse organs of the State is becoming more popular. Yet, it remains to be seen whether this process, which is more typical of Western liberal democracies, actually embodies notions of democratic accountability. The deficiencies of traditional forms of co-operation through regional institutions can be evaluated against the scope and aims of their constitutional documents, but the impact of informal arrangements is far more difficult to assess. As there is no formal recognition of the role of government networks, accountability remains a concern. Unless transparency and certainty over the impact of such processes are present, government networks may reinforce the traditional undemocratic features of international law by consolidating the position of the State over the individual. In this prescriptive process, the benefits of greater plurality will be lost.

Part III of the book contains five essays on the relationship between democracy and the use of force. W. Michael Reisman juxtaposes the criteria of de facto or effective control with that of democratic entitlement, arguing that developments since the Tinoco Case show that democracy has overtaken effectiveness as the factor that legitimizes governments. He contends that

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10. W. Michael Reisman, Sovereignty and Human Rights in Contemporary International Law, in
sovereignty today can only mean popular sovereignty. Yet things are not as clear-cut as this, and effectiveness still has an important role to play. At the end of the day, a truly legitimate government would demonstrate both democracy and effective control. Reisman argues for the removal of any anachronistic notions of sovereignty by a process of actualization, an updating of the meaning of the term to match its contemporary understanding.

It is difficult to disagree with the actualization process, but it is a task to be undertaken with a great deal of caution. Apart from such conceptual obstacles, the practical problems include determining the "people," the "will of the people," and the requisite course of action necessary to realign their will with a system of political organization. To Reisman's credit, he acknowledges the practical problems that flow from this approach and hints at a solution in the form of centralized international institutions specifically equipped to deal with the issues. Yet, from this uncertain position, he then continues to advocate the unilateral use of force to reassert democratic rights. He justifies this position on the basis that sanctions, which admittedly acknowledge community support for human rights, are non-discriminatory and thus ill-suited as sanctions against the party responsible for violating the basic rights.\footnote{11} Despite Reisman's moral defense of the short-term legitimacy of unilateral intervention, and apart from the legal ramifications, there remain equally powerful moral and legal arguments against intervention. One has to question whether every instance of intervention would be beneficial. Will it destabilize the State and perhaps the regional or international order? Will it actually achieve success or merely compound the difficulties faced by the native population?

It is precisely these questions which Michael Byers and Simon Chesterman ask in their contribution.\footnote{12} They adopt a more traditionalist approach to the issue with strong positivist overtones. Whereas Reisman advocates unilateral intervention to sustain popular sovereignty, Byers and Chesterman maintain that the right to democratic governance is not as simple as popular sovereignty and that those seeking to intervene are themselves restrained by rules of law—principally the international legal prohibition on

\footnotesize{DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at 239.}
\footnotesize{11. Id. at 248. Iraq is seen to be a case in point.}
\footnotesize{12. Michael Byers & Simon Chesterman, "You, the People": Pro-Democratic Intervention in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at 259.}
the use of force. The essay proceeds to outline the precise limits of the limitation on the use of force and the exceptional situations in which it can lawfully be used, showing that Article 2(4) of the United Nations Charter cannot be interpreted in a manner permitting the use of force other than in individual or collective self defense. This is reaffirmed by practice, judicial authority, and the fact that any new rule of custom (permitting, for example, humanitarian intervention) must meet the rigorous requirements set out in the North Sea Continental Shelf Case. Although the outcome might be unpalatable, Byers and Chesterman are convinced that strong limitations exist on using force to enforce the right of democratic governance. These same limitations preclude the expansion of actions under Chapter VII of the United Nations Charter to include humanitarian intervention, unless there exist other destabilizing factors such as genocide or massive refugee movements. Of course, it remains open to Reisman, and those of a similar persuasion, to suggest that the limitation on the use of force was designed to deal with inter-State conflicts, that these are of peripheral concern in contrast to internal conflict and systematic human rights abuses, and that to subject intervention to such a limitation is a denial of the reality of the problems facing contemporary international society.

The next two essays concentrate on a specific form of intervention—intervention by invitation, with David Wippman making the case for such intervention, and Brad Roth arguing to the contrary. We can distinguish between two different situations where an invitation is extended. In the first situation, a government that retains both political legitimacy and a substantial degree of de facto control over the country issues an invitation. The intervention of the United Kingdom in Tanganyika in 1964, which received general acquiescence, provides an example. In the second situation, the

13. Thus, the U.S. did not formally explain its intervention in Panama, or its missile strikes on Iraq, or its actions in Grenada, on the grounds of democratic intervention. Id.
16. David Wippman, Pro-Democratic Intervention by Invitation, in Democratic Governance and International Law, supra note 1, at 293.
17. Brad R. Roth, The Illegality of "Pro-Democratic" Invasion Pacts, in Democratic Governance and International Law, supra note 1, at 328.
legitimate government is ousted by a coup and a regime assumes de facto control over the nation. Although there is general agreement that intervention in the former context is permitted, substantial disagreement exists about the permissibility of intervention by invitation in the latter. Wippman concentrates on this latter intervention context. Wippman's argument is that consent allows a deviation from the accepted norms on the use of force, and so the crux of the issue becomes the determination and legitimacy of the consent expressed. Given the paucity of practice in this area, much of the discussion is speculative; yet Wippman maintains that the benefits of intervention outweigh the risks. Indeed, any use of force entails risks; so why should intervention by invitation be discounted on this ground. The risks need to be minimized, and Wippman leans towards some form of collective appreciation of the quality of the ousted regime's democratic credentials before intervention takes place. Ideally this should take place within the United Nations, which turns the discussion into one about the legitimacy of such collective action. Intervention might be possible in other circumstances, but Wippman highlights the acute difficulties in facilitating intervention. The issue whether political legitimacy or effectiveness is the prevailing basis for international authority is a question that has not been fully resolved.

Roth takes a narrower view on the legality of pro-democratic invasion pacts. The peremptory nature of the prohibition on the use of force can only be questioned in the face of other equally fundamental imperatives, such as self-defense or the prohibitions against genocide and slavery. Despite the current popularity of democracy, Roth strongly doubts whether it has sufficient status to qualify the prohibition on the use of force. Roth further doubts the utility of consent as a means of derogating from the limitations on the use of force. It is often said that the greater includes the lesser, but such syllogistic reasoning does not automatically apply so simply to the present issue. Although a State can extinguish its sovereignty by merging with another State (the recent example of Germany stands out), it does not follow that a State can voluntarily rid itself of those features that make it a State and still remain a State. There is a minimum functional core to the notion of sovereignty that cannot be incrementally diminished, which includes some aspect of the doctrine of effective control. He also points out that the problem with generic invasion pacts is that the logic used to support them could apply to undemocratic pacts, such as the Holy Alliance of the nineteenth century or
the Brezhnev Doctrine of the twentieth century. Roth finally considers consociational pacts as a possible exception to the rule. These, however, fall foul of many of the same problems, in particular the fact that such pacts seek to set in concrete some form of socio-political organizations that cannot always be guaranteed to be the true manifestation of the will of the people. By focusing on the past will of the people, such pacts divert attention from an evaluation of the present will, which is of course the true measure of a regime’s legitimacy.

In the final essay in this section, John M. Owen IV considers the “peace thesis:” the idea that liberal States (democratic regimes) do not fight each other, and thus the goal of liberalism is justified by the benefits that are brought to the international system.19 Noting that the peace thesis is often inadequately supported, Owen seeks to empirically test the causal link between liberalism and peace. Owen presents a qualified version of the peace thesis, arguing that liberalism can help achieve peace through the use of liberal ideology and liberal institutions working in tandem. This thesis is then tested in four case studies: Franco-American relations 1796-1798, Anglo-American relations 1803-1812, Anglo-American relations 1861-1863, and Anglo-American relations 1895-1896. From these case studies, Owen concludes that there is a causal link between liberalism and peace.20 The case studies are not conclusive evidence of an absolute link, but instead offer a plausible account of how liberal values are a constant within the political discourse that shape inter-State relations. Limitations are acknowledged when power politics have heavily circumscribed liberalism. Owen also makes clear that perceptions of liberalism play as much a role in the process as do actual instances of liberalism.

Owen is to be applauded for his balanced approach, seeking to reconcile liberalism with realism and acknowledging that liberalism is only one factor among others that motivate States towards war or peace. Owen deserves credit also for highlighting other goals that international society actively pursues, such as sovereignty or stability. Given the complexity of the issues and varying goals, he cautions against the indiscriminate pursuit of liberalism because of the unintended consequences that might follow. Vietnam and the

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20. Id. at 348. It is notable that more contemporary accounts of the impact of liberalism are absent.
Balkans are testament to this cautionary advice. More critically, one also suspects that a truly definitive empirical account of the peace thesis is an impossible task given the multiplicity and complexity of these factors.

The penultimate section considers the problems raised by conflicting imperatives. Gregory H. Fox and Georg Nolte grapple with a particularly thorny issue in their essay "Intolerant Democracies." They pose the question: to what extent should a democratic State tolerate anti-democratic forces that seek to extinguish democracy, such as occurred during the rise of the Nazi Party under the Weimar Constitution in the early 1930's or the rise of the Islamic Salvation Front in Algeria in 1991? The crux of the problem is that in order for a democratic society to continue to exist, it may have to sacrifice some of its democratic credentials to suppress such undemocratic forces. The authors favor measures to constrain anti-democratic forces and seek to substantiate this in theory and practice. A review of State practice shows that in most western democracies some form of protection against anti-democratic forces exists. This situation conforms to Rawl's observation that "[j]ustice does not require that men must stand idly by while others destroy the basis of their existence." A brief review of treaty law shows support for the notion that restrictions on anti-democratic forces are justified. More difficult is the question of how to exercise this power. In treaty law, such restrictions have to be necessary or reasonable, but this is in turn subject to the State's margin of appreciation. So, although there are rules in place that circumscribe States' responses to anti-democratic forces, these rules remain precarious and subject to abuse.

In his response, Martti Koskenniemi expresses skepticism about Fox and Nolte's justification of intolerant democracies, and is disturbed by this paternalistic approach to liberal democracy. In the first place, he feels that as observers we are poorly placed to judge a conflict and run the risk of neo-imperialism. Fox and Nolte's analysis also reveals a general failure to appreciate the full gamut of democratic potentialities and a tendency to focus

on a limited range of procedural or Westernized conceptions of democracy. A false association of democracy and peace further compounds this obsession with a particular form of democracy. Returning to the fundamental problem of the commentators' acceptance of universal (Westernized) norms of democracy, Koskenniemi calls for a greater degree of active participation and inclusive understanding in the socio-political process of other States. Similar concerns are voiced by Roth, who notes that, although Fox and Nolte commit themselves to a substantive view of democracy, they hold back from substantiating this, perhaps realizing that to do so would provoke ideological confrontation. By limiting themselves to a notion of democracy that is essentially procedural – one that facilitates the "choice" of the people – they are unable to justify adequately their withholding of choice from those exercising it. In reply to these criticisms, Fox and Nolte reassert their credentials. Their thesis is to be understood against a background of change in the way in which democracy is appreciated at the international level. Certain core elements to democracy are emerging that give credence to their appreciation of the normative role of democracy in contrast to the agnosticism of Koskenniemi and Roth.

In the final essay in this section, Stephen Ratner considers the interaction of democracy and accountability. States facing the transition to democracy must reckon with their undemocratic legacies and decide whether or how to hold former leaders responsible for human rights atrocities. Experience shows that holding past regimes accountable for their wrongs can interfere with the transition to democracy. Although accountability is seen as a feature of a democratic regime, it is often sacrificed for civil stability. As a result, the duty to punish, if conceived of as merely criminal prosecution, is, in Franckian terminology, lacking coherence or adherence because States will offset the costs of holding individuals to account against the prospects of sustainable democracy. Ratner suggests that, if we adopt a broader conception of accountability, to include truth commissions, amnesties, investigations, or lustration, accountability and democracy are easier to reconcile.

25. Brad R. Roth, Democratic Intolerance: Observations on Fox and Nolte, in Democratic Governance and International Law, supra note 1, at 441.
27. Steven R. Ratner, Democracy and Accountability: The Criss-Crossing Paths of Two Emerging Norms, in Democratic Governance and International Law, supra note 1, at 449.
Rounding off the book is a series of essays that offer a critical perspective on democratic governance. The essays by Roth, Jan Knippers Black, and Susan Marks stress the dangers of indulging in messianism and complacency by overstating the case for the democratic ideal. Roth emphasizes that the concept of democracy is not well enough understood and that assumptions made about it are not universally attractive.\(^\text{28}\) These invariably link democracy to liberalism. Without denying the validity of narrow or liberal conceptions of democracy, Roth urges us not to consider democracy "in isolation from egalitarian social policies."\(^\text{29}\) To do this would intensify exclusion in the face of economic inequality and power disparities. Popular sovereignty and constitutionalism are progress to be welcomed, but they should not be regarded as sufficient, or synonymous with democracy.

Jan Knippers Black offers us a sober reminder of the other stakes in the global economy.\(^\text{30}\) Drawing on the experience of Latin America, she shows that wealth, power, and their redistribution, do not always sit comfortably with democracy. It is difficult to disagree with the author that democratic progress must be measured alongside politics, the global market, and other socio-economic factors. The link between democracy and these other factors is profoundly complex. Although assumptions should not be made, it seems likely that these factors operate to entrench existing power structures and undermine international law’s ability to facilitate democracy.

By citing the pro-democratic theses within the broader school of liberal millenarianism, Susan Marks highlights some of the crucial concerns that should circumscribe our wholehearted embrace of democratic governance.\(^\text{31}\) Unless the notion of democracy is fully explored and understood, it would be foolhardy to pursue it as a visionary ideology. Pro-democratic theses often portray democracy as being identifiable, stable, and coherent, when in reality it embraces a wide diversity of ideas and principles. The narrow focus on elections serves to obscure other issues at the heart of democracy from view. Hand in hand with this goes the risk of establishing cosmetic democracy –

\(^{28}\) Brad R. Roth, Evaluating Democratic Progress, in Democratic Governance and International Law, supra note 1, at 493.

\(^{29}\) Id. at 505.

\(^{30}\) Jan Knippers Black, What Kind of Democracy Does the Democratic Entitlement Entail?, in Democratic Governance and International Law, supra note 1, at 517.

\(^{31}\) Susan Marks, International Law, Democracy, and the End of History, in Democratic Governance and International Law, supra note 1, at 532.
elections that disguise the actual lack of democratic credentials of a government. There is also a strong tension between democracy and liberalism as the two are not entirely synonymous, although this is often made out to be the case. The author raises questions about the place of liberalism in the ongoing process of globalization that have not been fully explored. The peace thesis is also heavily circumscribed, failing to account for internal conflict and other non-State conflict. The peace thesis suggests that global liberalism will lead to global peace, thus advocating liberalism and countenancing the rejection of other forms of government. For Marks, this is liberal imperialism and is as unacceptable as any other form of imperialism. As if this were not enough, liberal millenarianism risks the dangerous complacency that flows from the overly optimistic and false perception of liberalism as a panacea.

II.

If it does indeed contain a norm of democratic governance, international law would impose on States the obligation to ensure that democratic principles are respected as a mode of national socio-political organization. This poses a number of questions that Democratic Governance and International Law explores. What is democracy? Does a right to democracy exist? And what does such a right entail? In exploring these questions, most of the essays make the assumption that international law is well placed to facilitate a norm of democratic governance. This is an assumption that requires further investigation. It can be argued that structural and normative deficiencies in international law are counter-productive to international law supervising a right of democratic governance, which in turn weakens the notion of democratic governance at a fundamental level. There are two facets to this problem: (1) international law's lack of democratic credentials, and (2) international law's structural and normative limitations. The crux of the issue is that democracy is a form of accountability, and accountability is severely attenuated at the international level. Although the structure of international law has changed in the twentieth century, existing structures in key areas remain unchanged and so militate against many of the claims for democratic governance.

32. Id. at 561 ("Peace may entail more than a failure to resort to arms.").
33. See, e.g., Crawford, supra note 4, at 114 (discussing idea of "modified skepticism").
Implicit in the statement that "the will of the people shall be the basis of the authority of government" is the hope that individuals will participate equally in the ordering of their social context. However, the relationship between domestic law and international law is not so fluid as to ensure this outcome, nor can international law by itself be seen to facilitate it. To focus on democratic governance at the domestic level is to paint half of the picture. Philip Allott has pointed out a serious flaw in the theory of representation as it operates at the international level. The system contains a false dialectic that distorts the obtainability of social objectives. In theory, the State as a receptacle of collective interests should represent these interests at the international level. During the conception and development of international law, however, the process became distorted; and, instead of aggregating individual and sub-national interests, the respective aggregations of State interests came to be seen as original interests. Thus, the international system became a process of interaction between notional national interests. This dynamic is reflected in the priority of State rights over individual rights.

Hersch Lauterpacht also pointed out the ambiguous position of individuals at the level of international law. Although the idea that individuals are the "true subjects of international law" has been argued, there are no means by which they contribute to its making.

The disaggregation of individual interests is clear in the way in which classical international legal doctrine has developed, and we should recall James Crawford's six defects in classical international legal doctrine. First, international law assumes that the executive can make commitments binding on the State and hence individuals, without their consent or knowledge. Second, national law, no matter how democratic, is an excuse for a failure to comply with international law. Third, the individual has no autonomous rights in respect of remedies. These lie in the hands of the executive. Fourth, there is the principle of non-intervention in the domestic affairs of States. Fifth, the principle of self-determination cannot interfere with existing territorial boundaries. Sixth, there are seemingly no limits on the power of a

government to bind the State for the future. Classical international law prioritizes the State and its institutions over the individual, which may well render international law incompatible with more substantive notions of democracy. I am not asserting that this classical position prevails absolutely today, and indeed some inroads have been made. Thus, individuals can petition human rights bodies directly, and domestic jurisdiction is no longer as absolute as it once was. The point is that a deep-rooted State-centric model of international law cannot be easily overturned. This process is only just beginning.

It is not just a matter of reconceiving modes of representation through the States; it is also a matter of reconceiving the process of law creation between States and between other international agencies. Even if we consider just briefly how law is created and power exercised at the international level, the need is quite apparent. Treaties, despite their "contractual" element, are invariably affected by extra-legal inequalities between the participants. Although sovereign equality suggests that treaties are negotiated on an equal footing, an element of bargaining power will come into play distorting that equality. As Byers notes, that power is "less constrained by the law of treaties than it is by most national laws of contract." States can utilize economic and military means to supplement their sovereign equality and so distort the law creation process. Another problem is that States are able to participate in the law creation process and yet opt out of the implementation stage by failing to ratify the agreement. In the formation of customary international law, no formal weight is given to individual State practice, meaning that more powerful States can influence the development of law in a disproportionate manner. If the law creation process is unrepresentative, then questions must be asked about the development of substantive rules of democracy that purport

40. This was clearly the case regarding the participation by the U.S. in the development of the United National Convention on the Law of the Sea, 21 I.L.M. 1261 (1982), which the U.S. has failed to ratify. As a package deal, the treaty represented a trade-off of various interests, and the U.S. has been left open to criticism of subverting the treaty as a result.
to be in line with the expectations of the broader community.

The process of international law is equally skewed at the institutional level with little evidence of the democratic credentials that are expected at the domestic level. Many features of the United Nations reflect this situation. For example, consider the Security Council and the use of the veto. The five permanent members have exercised their veto power over numerous measures that were perceived contrary to their national interests. Important measures such as the authorization of collective security or the imposition of sanctions were often vetoed. Schnably raises similar points with regard to the independence of the Organization of American States (OAS) from its member's interests. Although the United Nations General Assembly is perceived as an agency of policy formulation, the normative results of this are not formally guaranteed. Indeed, there is much dispute about the normative value of General Assembly resolutions. As statehood is a prerequisite of membership, one can question whether or not the United Nations is truly representative of the global community. The position of indigenous peoples, minorities, and other self-determination groups is well documented elsewhere. Because States remain the principal agents of international law, the independence and function of international organizations are compromised. This lack of independence and representation runs counter to the claim of international law on legitimate domestic systems of representation. These structural deficiencies affect the content of international law.

If we examine the development of substantive rules (e.g., recognition and intervention), then the above criticism is borne out. As an exercise of sovereignty, recognition remains a discretionary act. Although loose conditions for recognition exist, there is no hierarchy among them, reducing recognition to subjectivism. In practice, subjectivism is manifest in the arbitrary and inconsistent use of recognition. Advocates of democracy


43. SCHNABLY, supra note 8, at 155.

44. Take, for example, the refusal of the EC to recognize Macedonia as a State. Although Macedonia met the EC's criteria, Greece objected for political reasons. Conference on Yugoslavia Arbitration Commission, Conference on the Recognition of the Socialist Republic of Macedonia by the European Community and its Member States, Opinion No. 6, 31 I.L.M. 1507 (Jan. 11, 1992). Another example involves the lack of recognition by the U.S. of North Korea and Communist China. MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 127-28 (1961).
would have democratic governance be the decisive criterion for recognition, although this cannot be considered to be the case at present. The act of recognition tends to provide us with a static reference point for the prevailing opinion on a regime's or State's legitimacy at a particular point in time. This situation contrasts with the notion that democratic governance is a dynamic and ongoing process and raises questions as to how well suited recognition is to the question of democratic governance.

If different States can reach different conclusions as to the legal capacity of a State when the same facts present themselves, then ineffective or countervailing legal rules are operating. Not only does this undermine the quality of rules, but it also raises serious questions about the capacity of international law to apply systematically rules of fundamental importance, ones that enable an entity to participate in the international prescriptive process. Apart from certain political repercussions, adverse legal consequences do not flow from the recognition of an illegitimate government. This lack of legal constraints weakens the argument that the rule of law prevails at the international level.

It has already been pointed out that the tension between democratic intervention and the restriction on the use of force remains unresolved both in practice and in doctrine. The law is clearly equivocal on the matter. Like recognition, the right of intervention has been applied in an arbitrary manner.

How are we to evaluate United States interventions in Panama, Haiti, Grenada, and Nicaragua? Overlapping concerns, such as the protection or affirmation of democracy, the protection of human rights, self-defense, and maintaining international peace and security obfuscate the matter and make the identification of the core legal regime difficult. Reaction to intervention often depends on its success, yet this cannot be the legitimating factor. Neither should the identity of the intervening actor. If international law is incapable of applying fundamental laws in a systematic manner, then surely this casts into doubt its credentials as a guarantor of democracy. Some of the contributors touch upon these issues. For example, Franck raises the question of “the legitimacy of the increasing international validation of the

45. Murphy, supra note 7, at 153.
46. See generally, DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, supra note 1, at Part III.
47. Crawford, supra note 4, at 106.
governance, and the rules and processes of that validation. For him, this question is to be answered by the existence and quality of rules and procedures by which democracy is judged.

It is easy to accuse those who discern a normative basis for the right to democracy in the historical development of human rights law. How can human rights law be the basis of a customary rule when the notion of a democratic right only emerged in the late 1980's? Surely, the quality of the right should be evaluated from its emergence as a distinct concept. Yet, this ignores the fact that law does not exist in a vacuum. Human rights are predicated on the same grounds as democracy – liberty and egalitarianism – and are conceptualized as interdependent. There is a persuasive case to be made for a democratic tradition in international law. Even the strongest critics of democracy are not denying the value of the concept, but rather they are cautious about accepting it blindly and ignoring the consequences and other potentially valid ideological perspectives. They are concerned about real change rather than mere rhetoric.

The rhetoric of democracy has an important role to play in light of the aforementioned difficulties; for in the absence of systemic democracy at the international level, it is a way in which international law can legitimately claim authority to determine the content of democracy at the national and sub-national level. The difficulty is, however, that democracy is open to interpretation. On the one hand, various instruments, such as the Universal Declaration of Human Rights, represent indices of what is legitimate, and on the other hand there are the subjective responses of States. On the positive side, international organs are developing more precise interpretations of the meaning of democratic entitlement with respect to elections; and this growing consensus and certainty will lead to internal legitimacy. Yet, there is also evidence of a failure of the democratic rhetoric. For example, the Santiago Commitment of the OAS has arguably legitimized the practice of interpreting other States constitutions in the region. The lack of objective determination of these issues is a failure of democratic rhetoric and has manifested itself in

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48. Franck, Legitimacy and the Democratic Entitlement, in Democratic Governance and International Law, supra note 1, at 29.
49. Id. at 31-32.
50. See generally, Human Rights Declaration, supra note 34.
51. See generally Fox supra note 3, at 48.
52. See Schnably, supra note 8, at 160.
the poor track record of the OAS. At a doctrinal level, this lack of an objective democratic rhetoric is quite evident in the contrasting opinions of writers, a useful cross-section of which the present collection captures. This is quite apart from the question of whether such a democratic truth is desirable. As Roth states: "[e]ven a benevolent ideological legitimism will deprive international law of its indispensable role as an overlapping consensus among societies that otherwise radically differ on fundamental matters (including, but not limited to, choices among 'democratic' priorities)."

These criticisms do not in any way denigrate the efforts and calls for greater democracy. As some of the essays show, certain features of democratic governance are successfully being implemented. Rather, these criticisms sound a warning that crucial obstacles for international law remain to be overcome before it can legitimately regulate internal matters of governance. We are moving towards a fragmented international society in this respect as democracy is enforced on some, requested by others, ignored by others, and administered by yet others. Unless international law is articulated, formed, and enforced in a transparent, coherent, and systematic manner, we should not put too much faith in its ability to act as a guarantor of democracy.

It is clear that the issue of democratic governance is not simply a matter of electoral process. It entails a whole bundle of concerns that penetrate to the heart of a State's capacity to function at the international level. The fundamental nature of this issue brings into focus the deficiencies of international law that must not be forgotten in the quest for democracy. Neither should we forget that other powerful non-legal concerns may operate against democracy. Ironically, the system that advocates and requires "democratic entitlement" may not itself embody many of the attributes of a democratic polity. There is no clear link between the exercise of power at the international level and accountability for so doing. Neither can international law be seen as truly representative of individual interests. These are just some of the difficulties facing advocates of the right-orientated thesis that must be

53. See also Brad R. Roth, Governmental Illegitimacy in International Law (1994).
54. Roth, supra note 25, at 442.
55. As Fox and Roth point out: "the putative right embodies a marriage of law and politics that is in many ways unprecedented in international law. The entitlement is not simply law affected by politics. It is law that penetrates and regulates the very essence of political life, both domestically and internationally." Fox & Roth, Introduction: The Spread of Liberal Democracy and Its Implications for International Law, in Democratic Governance and International Law, supra note 1, at 18.
overcome. Before international law turns itself to the task of regulating domestic constitutional orders, it should perhaps look to getting its own house in order.

Short questions are often deceptively simple, hiding acutely difficult issues of fact, interpretation, perception, and understanding of theory, practice and ideology. All manner of empirical research might be called for and then rigorously pored over, debated and denied, embraced then eschewed. Take for example, the question what is democratic governance? Even if this question is answered, other equally taxing questions demand attention. This engaging collection of essays does not answer this challenging question but strives to make our understanding of the intricate complexities and implications of it far more clear. *Democratic Governance and International Law* is to be highly recommended to everyone with a concern for the future development of international law.