

**The Boy Who Cried Wolf! The Dimensions of Emergence of the Right to Democratic Governance and the Fundamentals of International Law:
An Introductory Overview**

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A mi hermana Margarita y a Nacho, este mi primer y humilde regalo de boda

It has become almost commonplace to affirm that democracy and international law did not go well together in international legal scholarship until the Cold War came to a close.² Several rationales have been pointed out to explain this commentators' restraint. First, the relatively small number of countries that could be described as democratic until the mid-1980s.³ Second, the ideologically charged character of the democratic label during the Cold War.⁴ Third, the rather undemocratic nature of classical international law.⁵ Fourth, the relative novelty of domestic elections by universal suffrage.⁶ Fifth, the extended perception among international lawyers that

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² See: 1) Marks Susan, «The End of History? Reflections on Some International Legal Theses», *E.J.I.L.*, Vol.8 N°3, (1997) pp. 449-477 at 449. Also, by the same author: *The Riddle of all Constitutions: International Law, Democracy and the Critique of Ideology*, O. U. P., 2000 at 30-31 2) Fox, Gregory.H., & Roth Brad.R., "Introduction: the Spread of Liberal Democracy and its Implications for International Law" in Fox, Gregory.H., & Roth Brad.R., (Eds). *Democratic governance and International law*, Cambridge University Press, 2000, pp.1-22 at 1. 3) Wheatley, Steven, « Democracy in International Law : A European Perspective » in *I.C.Q.J.*, vol. 51, April 2002 pp.225-247 at. 225. 4) Beetham, David, « Democracy and Human Rights : Civil, Political, Economic, Social and Cultural » in Symonides, Janusz (Ed.) *Human Rights : New Dimensions and Challenges : Manual on Human Rights*, Ashgate (Darmouth), 1998, pp.71-97at 71. 5) Ben Achour, Rafâa, "Le droit international de la démocratie" in *C.E.B.D.I.*, Vol.IV, Tirant Lo Blanc, 2000, pp.325-362 at 333

³ See: Crawford, James « Democracy and International Law » *B.Y.I.L.*, 1993, pp.113-133 at 113-116

⁴ See: 1) Marks, S., « The End... » *op.cit.*(note 1) at 449

⁵ *Ibid*, p.117-119

⁶ See: Fox, G.H., « The Right to Political Participation in International Law » (+ Remarks by Engle, Karen and Grossman, Claudio) in "National Sovereignty Revisited : Perspectives on the Emerging Norm of Democracy in International Law" *A.S.I.L. Proceedings*, 1992, pp.249-261at 249-250

the formation of national governments fell within States' exclusive jurisdiction.⁷ Sixth, the traditional consideration of democracy as part of the conceptual framework of other academic disciplines.⁸ Seventh, the neutrality of most international organisations on their member States' internal regimes.⁹ Eighth, the fact that strategic necessities prevented the US government from relying on the mode of governance of their allies.¹⁰ Ninth, the scant attention paid by the international law of recognition to how national governments were formed.¹¹ Tenth, the consideration of international law as being very much in service of "the State building enterprise".¹²

Despite the well-founded set of explanations procured in order to explain the international legal scholars' perceived reluctance to use the term democracy prior to the events of 1989-91, this common assumption neglects, however, previous debates linking both terms in international legal literature.¹³ This becomes apparent in view of the following set of non-exhaustive introductory reminders. Firstly, the consideration of democracy in connection with the long-standing debate on the legality of the threat and use of force in international relations was already embedded and, in some instances, argumentatively interwoven with a series of doctrinal interpretations put forward so as to extend the UN-Charter regime regulating the use of force.¹⁴ Secondly, the study of the "right to free and fair elections" within the framework of the universal and regional systems for the protection of human rights was far from being a novelty in international legal scholarship. Thirdly, the democratic legitimacy requirement of governments had long been present within the debate on the international recognition of States and governments.¹⁵ Fourthly, the pre-1990s long practice of UN monitoring elections activity in

⁷ See: 1) Beetham, D, *op.cit.* (note 1) at 71. 2) Fox, G.H., *op.cit.* (note 2) at 249

⁸ See: 1) Beetham, D, *op.cit.* (note 1) at 71. 2) Ben Achour, R, *op.cit.* (note 1) at 333

⁹ See: Fox, G.H., & Roth, B.R., *op.cit.* (note 1) at 1

¹⁰ See: Fox, Gregory, H., "Election Monitoring: The International Legal Setting" 19 *W.I.L.J.*, 2000-2001, pp. 295-320 at 296

¹¹ See: Fox, G.H., *op.cit.* (note 5) at 249-250

¹² See: Fox, G.H., *op.cit.* (note 9) at 297

¹³ See: in this respect, almost as an exception, J.Salmon writing in 1993: « On peut dire que l'ordre juridique international contient depuis un certain temps déjà des règles susceptibles de se développer pour donner sa pleine force au concept de démocratie » Salmon, Jean, « Vers l'adoption d'un principe de légitimité démocratique » in O.Corten et al., *A la recherche du nouvel ordre mondial - I : Le droit international à l'épreuve* Editions Complexe, 1993, pp. 59-89

¹⁴ See, e.g.: 1) Reisman, Michael, W, « Coercion and Self-determination: Construing Charter 2(4) » 78 *American Journal of International Law* 1984, 642 2) Schachter, Oscar "The Legality of Pro-democratic invasion" 78 *American Journal of International Law* 1984, 645. 3) Tesón, Fernando, R., « Le Peuple, c'est Moi! The World Court and Human Rights » in 81 *A.J.I.L.* No.1, January, 1987, pp.173-183 at 182. 4) Kirkpatrick, J.J., & Gerson, A., "The Reagan Doctrine, Human Rights and International Law" in *Right v.Might: International Law and the Use of Force* (Henkin et al.) Council on Foreign Relations Press, 1989

¹⁵ See e.g.: 1) Warbrick, Colin, "States and Recognition in International Law" in *International Law* (Ed. by Malcolm D.Evans) O.U.P., 2003, pp. 205-267 2) Murphy, Sean, D., "Democratic Legitimacy and the Recognition of States and Governments" in *I.C.L.Q.* Vol. 48, No. 3 (July, 1999), pp.545-581 3) Louise Doswald-Beck "The Legal Validity of Military Intervention by Invitation of the Government" in *B.Y.I.L.*, 1985 , pp.189-252 at 192-193, 4) Ruda, J.M.,

relation to colonial and non-self-governing territories did not go totally unnoticed within international legal scholarship.¹⁶ Fifthly, the progressive ascendancy of the so-called internal self-determination thesis within the framework of study of the right to self-determination in international law did also spur some doctrinal attention. Sixth, the claims made by the non-aligned countries in favour of the democratisation of the United Nations' system in the 70s are a clear precedent of contemporary international legal debates on the topic¹⁷. Seventh, democratic forms of government have long since been present in debates related to the conditions of membership in international organisations. Eight, "the cardinal value of democracy specified as the realisation of human dignity" is prominently present within the policy-oriented jurisprudence.¹⁸ Ninth, democracy was also present as "a distinct value in international law doctrines" in other sub-fields of international law like the "political-offence exception to extradition of criminal subjects" or in "the act -of- the- state doctrine" by which "democracy

Recognition of States and Governments, M.Bedjaoui (ed.), International Law: Achievements and Prospects, UNESCO & Martinus Nijhoff Publishers, 1997, pp. 449-465

¹⁶See e.g.: Beigbeder, Yves, *International Monitoring of Plebiscites, Referenda and National Elections: Self-determination and Transition to Democracy*, Martinus Nijhoff Publishers, Dordrecht, 1994

¹⁷ See e.g. : Feuer, Guy, « Nations Unies et démocratie » in *Le Pouvoir: Mélanges offerts à Georges Burdeau*, Paris, 1977 pp. 1073-1090

¹⁸See : M.S. McDougal & H.D.Laswell, "Legal Education and Public Policy: Professional Training in the Public Interest" 52 *Yale L.J.* (1943) 203-95. Also published in M.S. McDougal & H.D.Laswell, *Studies in World Public Order* New Haven Press, Martinus Nijhoff Publishers, 1987. A brief overview of the work of the classics and contemporary tenants of this "method of international law" proves its terminological chameleon-like character: Harold D.Laswell & Myres McDougal, *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (1992) Myres S.McDougal, H.D.Laswell & W.M.Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 *VA.J.Int'l L.* 189 (1968) W.M.Reisman, *The view from New Haven School of International Law*, 86 *ASIL Proc.*118 (1992) S.Wiessner & A.R.Willard, *Policy-Oriented Jurisprudence and Human Rights Abuses in Internal Conflict :Toward a World Public Order of Human Dignity* *AJIL* Vol.93 (1999). Against this background, it is worthwhile pointing out to the preference showed by some contemporary scholars ascribed to this theory of law to use the term *Policy Oriented Jurisprudence* in detriment to other denominations. Although a great set of reasons would explain this choice - candidly "because it focuses attention on the content of our theory about law" Wiessner & Willard, *AJIL* (1999)- it is worthwhile pointing out in this sense to the perceived anchorage of "McDougal and Laswell jurisprudence in the history of Cold War" as pointed by Falk (1995). Finally, it should also be noted that a fifth term has also been regularly used to label this jurisprudential trend: The Yale School or in French "l'Ecole de Yale". See an example in: Kohen, M.G."La pratique et la théorie des sources du droit international". *La pratique et le droit international, colloque de Genève*, Société française pour le droit international, Pedone, 2004. p.86. For a brief inquiry on New Haven, neocons and international law see: De la Rasilla del Moral, Ignacio, "Alicia a través del espejo: el derecho internacional en el pensamiento neoconservador y la escuela de New Haven" in *Los neoconservadores y la doctrina Bus: nuevos significados para viejos conceptos* Editorial Aconcagua, 2006 (*forthcoming*)

comes to influence practical determinations of the competence and jurisdiction of domestic institutions”.¹⁹

While some of the arguments listed in the first place can explain the shyness of international lawyers in making an argument in favour of what could be understandably perceived at the time as the pipe dream of the West,²⁰ they should not be seen as indicative of the fact, as some seemed to suggest, that there was almost no interest in international legal scholarship in the relation between international law and democracy before the “end of history” was announced. Today, far enough away from the blinding glare brought by the end of the ancient “Cold-world”, it would be wise to stop venerating the “*ab* early nineties *condita*” version of the relation between democracy and international law.²¹ Although the democratic entitlement thesis, which defends that a right to democratic governance²² is crystallising as an accepted norm in the customary realm, did spur a renewed interest among legal scholars in linking democracy and international law, neither did this spring *ex nihilo* nor does it constitute the only avenue of interaction between international law and democracy that has interested the international lawyer since the early nineties or before. Highlighting continuity, where others have opted for a *tabula rasa* approach, constitutes an attempt to rethink some of the framing categories that an insistence on novelty has left us with.

This stated, the proto-dimensional legal stage sketched here should be developed through an analytical framework which revolves around the notion of dimensions of emergence of the right to democratic governance. In introducing the question of whether there already exists a customary norm of democratic governance in international law (and, if so, what are the defining features of its legal characterisation) or whether we are merely witnessing a customary norm *in*

¹⁹ See: Bederman, David, J., *The Spirit of International Law*, The University of Georgia Press, 2002 at 123-125

²⁰ In fact, references to the factors noted by G.H.Fox, National Sovereignty *op.cit.* (notes 2 and 10) were signalled as responsible for the slow emergence of political participation as an accepted norm. The same is true about the references given by J. Crawford *op.cit.* (note 3)

²¹The works by Thomas M. Franck and Gregory H. Fox are commonly seen as seminal or groundbreaking in this domain; particularly, Franck's. See: 1) Franck, Thomas M., «The Emerging Right to Democratic Governance», 86 *American Journal of International Law* (1992) p.46-91. 2) Fox, Gregory .H., «The Right to Political Participation in International Law» 17 *Yale International Law Journal* (1992) pp.539-607. See also, however, Roldán Barbero, Javier. *Democracia y Derecho Internacional*. Editorial Civitas, 1994

²² This label is taken from the single monographic collective work on the topic: FOX, G.H. and ROTH B.R (Eds.) *Democratic governance and International law*, C. U. P., 2000. I adopt it as point of reference. Nonetheless, it should be stressed that there exist a great terminological indeterminacy as far as the academic labelling concerning this hypothetical right. Marks notes it and mentions seven “expressions that are employed with relativity interchangeability”, Marks, S.,”The End...”*op.cit.* (note 1) at 462. I will limit myself to double (+1) that number: 8) Right to internal self-determination 9) Collective right to democratic institutions 11) International norm of popular sovereignty 11) Democratic principle 12) The developing international law of democracy 13) Right to democratic government” 14) Democratic self-determination 15) human right to self-government. Finally, the first seven terms mentioned by Marks were: 1) Democratic entitlement 2) Right to democracy 3) Norm of democratic governance 4) Entitlement to a participatory electoral process 5) Right to political participation 6)Electoral rights 7) Right to free and open elections.

statu nascendi (and, if so, what are its emerging legal contours), it can be preliminarily stated that, as far as the positivist approach to norm identification is concerned, the so-called norm of democratic governance remains a doctrinal legal persuasion cumulatively built upon a number of international legal dimensions. These, which rank across a broad spectrum of international law, will be termed the dimensions of emergence of the right to democratic governance. A first introductory view of the different legal phenomena comprised in each of these dimensions of emergence follows.

The dimensions of emergence of the right to democratic governance

It should be noted from the onset that while the seeds of some of the dimensions of emergence of the right to democracy can be traced back to the proto-dimensions already referred, others sprung up mostly after or just before the fall of the Berlin Wall. This stated, even within those dimensions of emergence that draw on the previous set of legal debates, a series of new phenomena had gained doctrinal momentum since then. A brief introductory overview of these dimensions shall guide us into the analysis of the empirical basis indicative *prima facie* of proof of the practice and *opinio iuris* needed for the customary formation of the norm of democratic governance and into some of the interrelated international legal debates.

The late eighties²³ saw the beginning of the progressive end of the neutrality of the United Nations vis-à-vis the democratic domestic legitimacy of its member States. Having grown through the nineties and first *lustrum* of the 21st century, what can be termed the United Nations' pan-national democratisation paradigm defines itself, nonetheless, as a politically driven phenomenon loosely inspired by a nebulous general normative basis rooted in the maintenance of peace and the promotion of human rights in the UN Charter. The distance which separates a democratic principle of international law from occupying the place of the normative source behind the UN democratisation activity has been, however, constantly decreasing since the counter-trend against its legendary neutrality regarding political regimes²⁴ began to be operative. It would be wise, therefore, not to discard the existence of a latent principle of democratic governance both currently inspiring and taking shape behind the UN democratisation action. As the enforcing mechanisms of the norm, the eventual effective implementation of which would indicate that the threshold of normativity has been crossed as far as the UN legal system is concerned, should be located within the framework of what I shall term the integrating dimension of emergence of the right to democratic governance, it would be enough to retain, that being at the core of the international pan-national democratisation process, the UN institutional activity has played so far a key role in laying the foundations of the emergence of the norm within a great spectrum of fields of international law. One can, in this respect, introductorily, recall B.B.Ghali's²⁵ classification of the modalities through which the international law of democracy is

²³ See e.g. Vasak, Karel, "Democracy, Political Parties and International Human Rights Law", in Y.Dinstein (ed.) *Israel Yearbook on Human Rights*, 26, (1996) 15-28 at 15

²⁴ See e.g. Sicilianos, Linos-Alexandre, *L'O.N.U. et la démocratisation de l'Etat : systèmes régionaux et ordre juridique universel*. Editions A.Pedone, Paris, 2000, at 11.

²⁵ See: Boutros Ghali, Boutros, "Pour un droit international de la démocratie" in *Theory of International Law at the Threshhold of the 21st Century: Essays in honour of Krzysztof Skubiszewski*, Ed. By Jerry Makarczyk, Kluwer Law International, The Hague, 1996, pp.99-108. See also, "L'ONU et l'impératif de la démocratisation" in *Hector Gros Espiell Amicorum Liber: Persona humana y derecho internacional*, Bruylant, Bruxelles, 1997 pp.117-122.

put in practice as being those concerning the preservation of peace and those, more specifically, related to electoral assistance.²⁶

Paramount within the UN system is the General Assembly's constant activity in terms of norm-building declarations enhancing the effectiveness of the principle of periodic and genuine elections²⁷ and, since 1995, strengthening the role of the UN in enhancing the principle of periodic and genuine elections. This development should, however, be connoted by the existence of a parallel series of resolutions recalling that the enhancing of this principle should not "call into question each State's sovereign right freely to choose and develop its political, social, economic and cultural systems".²⁸ At the very least, two related aspects of interest for the study of the integrating dimension of the right to democratic governance can be advanced: the first one concerns the close relation of General Assembly's resolutions with the activities of monitoring election assistance of the UN at the request of independent States since 1989²⁹ in what constitutes a key legal phenomenon which is purported to be playing a decisive role in fleshing out (together with the development of election monitoring standards within what I shall term the human rights regional dimension of emergence of the norm) the content of the right to free and fair elections established in UN human rights treaties. In the second place, this schizophrenic-like legal development cannot be ignored in dealing with the analysis of the compatibility of the customary emergence of right of democratic governance with the principles of sovereignty equality, non-intervention and self-determination of which the State's right to freely choose and develop its political, social, economic and cultural systems is closely linked. While these selective remarks are far from exhaustive, the study of the GA activity in this respect (suffice it to think of the evolving path of these dual series of GA resolutions in light of the criteria set out, as far as the normative value of the GA resolutions is concerned, by the ICJ in *The Legality of the Threat or Use of Nuclear Weapons* case)³⁰, they can be seen as indicative of the no-way-back character of the UN democratic lodestar when connected, among others -like *verbigratia* the recent creation of a "Democracy Fund" in 2005³¹ - with the UN activity in promoting democratisation through

²⁶ For a seminal work, see: Fox, Gregory H « The Right to Political Participation in International Law », 17 Yale J.Int. L. (1992) 539-608. See also 1) Franck, Thomas, M., "Democracy as a Human Right" in *Human Rights: An Agenda for the Next Century*, Henkin, L., and Hargrove, J.L., Studies in Transnational Legal Policy, No.26, ASIL, Washington, D.C., 1994, pp.73-101 at 86. 2) Crawford, James « Democracy and International Law » *British Yearbook of International Law*, 1993, pp.113-133 at 123 3) Gounelle, Max, « La démocratisation, politique publique internationale » in *Mélanges offerts à Hubert Thierry: L'évolution du droit international*, Editions A.Pedone (Paris) 1998, pp.201-213 at 209 4) Fox, Gregory, H., "Multinational Election Monitoring: Advancing International Law on the High Wire" 18 *Fordham International Law Journal*, 1994-1995 pp.1658-1667

²⁷ See the first one: General Assembly's Resolution A/ Res.43/157, 8.12.1988 "Enhancing the effectiveness of the principle of periodic and genuine elections"

²⁸ See: Sapienza, Rosario, "Considerazioni sulla attività di assistenza e monitoraggio elettorale dell'ONU", *Rivista di Diritto internazionale*, Vol. LXXXVIII, 2005, Fasc.3, pp.647-666

²⁹ See e.g. : Hartland, John, « The Right to Free Elections : International Election Observation as a means towards Implementation » in *Karel Vasak Amicorum Liber : Human Rights at the Dawn of the Twenty-First Century*, Bruylant, Bruxelles, 1999, pp.243-259

³⁰ See: *The Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, p.254-255 para.70.

³¹ See: http://www.unfoundation.org/features/un_democracy_fund.asp (last visited May 2006)

international conferences. Important examples of the latter phenomenon are the 1993 Vienna Declaration and Programme of Action³² which had a catalytic role by providing the international community with a new framework³³ in which “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing”³⁴ or the regular holding of the International Conferences of New or Restored Democracies, the growing international relevance of which does not seem to bear discussion in the light of the increasing number of governmental delegations who have been attending them since the first one was held in Manila in June 1988.³⁵

The role played by the Security Council in this domain is commensurate to the importance of the maintenance of international peace and security as one of the modalities through which the international law of democracy has been channelled.³⁶ The interpretation by the SC of the notion of "threat to the peace" is being suffering, from years now, a process of extensive interpretation³⁷ or conceptual enlargement so as to cover a broader spectrum of issues to which the domestic democratic form of government is increasingly linked.³⁸ Should similar circumstances arise, an authorisation of the SC under Chapter VII to intervene to restore democracy as in 1994 in Haiti³⁹ would not come as a surprise. This ultra-abridged notice of the SC activity in this domain gives way to what I shall term the use of force dimension of

³² For the final report of the United Nations High Commissioner for Human Rights on the implementation of the Vienna Declaration and Programme of Action presented to the General Assembly see A/53/372 (11 September 1998) at <http://www.un.org/rights/HRToday/index.html> (last visited March, 2006)

³³ For a brief overview of follow-up mechanisms, see: <http://www.un.org/rights/HRToday/index.html>

³⁴ World Conference on Human Rights, June 14-15, 1993, Vienna Declaration and Programme of Action, art.1, 8, U.N.Doc.A/CONF/157/23 (1993) 32 I.L.M.1661(1993)

³⁵ The second one was held in Managua in July 1994; the third one in Bucharest in September 1997 and the fourth in Cotonou in December 2000. The Sixth Conference is scheduled to take place in Doha, Qatar, in November 2006. It should also be noted that “Since the 49th session of the General Assembly, an item entitled "Support by the United Nations System for the Efforts of Governments to Promote and Consolidate New or Restored Democracies" has been on the agenda of the General Assembly and the Assembly has asked the Secretary-General to prepare an annual report on the matter”. For more information, visit: http://www.un.org/Depts/dpa/prev_dip/fr_new_democracies.htm (last visited March 2006)

³⁶ See: Boutros G., B. *op.cit.* (note 28). See also : D’Aspremont, Jean, “La création internationale d’états démocratiques » *Révue Générale de Droit International Public*, Tome 109, 2005/4, pp. 889-908

³⁷ See e.g.: Blokker, Niels and Schrijver (Ed.) *The Security Council and the Use of Force: Theory and Reality- A Need for Change?* Martinus Nijhoff Publishers, 2005

³⁸ See, e.g. SC Res 1132 of 8th October 1997, concerning Sierra Leone and its sanction regime. Note also the intervention of ECOWAS as a sort of regional peace-keeping (-restoring democracy) intervention.

³⁹ S.C. Res. 940, U.N. SCOR, 49th Sess., 3413th mtg., UN Doc.S/RES/940 (1994). See among others e.g. Escudero Espinosa, J.F. “¿Hacia una intervención armada a favor de la democracia?: El “precedente” de Haití” *Anuario de Derecho Internacional*, 1996, pp.297-377 and Corten, Olivier, « La résolution 940 du Conseil de Sécurité autorisant une intervention militaire en Haïti : l’émergence d’un principe de légitimité démocratique en droit international? » 6 *E.J.I.L.*, 1995

emergence of the right to democratic governance.⁴⁰ A multifaceted dimension of analysis (which partially draws in one of the proto-dimensions that I have coined for explanatory purposes) I will limit myself to raise some questions related to the so-called pro-democratic intervention by invitation, a figure which has been considered the Trojan Horse for the edifice of established peace and security norms.⁴¹ It has long been widely acknowledged (by the doctrine,⁴² the

⁴⁰ The following introductory 15 references are in alphabetical order: 1) Byers, Michael and Chesterman, Simon, “You, the People”: pro-democratic intervention in international law” Fox, G.H. and Roth B.R (Eds.) *Democratic governance and International law*, Cambridge University Press, 2000, pp.259-292 2) Chesterman, Simon *Just War or Just Peace?: Humanitarian Intervention and the International Law*. Oxford University Press, Oxford, 2001, pp.88-112. By the same author see as well « The US Invasion of Panama » in *The Reality of International Law : Essays in Honour of Ian Brownlie*, Ed. by Goodwin-Gill, Guy, S and Talmon, Stefan, Clarendon Press (Oxford), 1999. pp.57-91 3) Clark Arend, Anthony and Beck, Robert, J., *International Law and the Use of Force*, Routledge (New York), 1993, at 191-194 4) Crawford, James, « The Right to Self-Determination in International Law : Its development and Future » in *People’s Rights* Ed. by Alston, Philip, Oxford University Press, 2001. pp.7-67 at 40-47 5) Cronin , Bruce « Multilateral Intervention and the International Community » in *International Intervention : Sovereignty versus Responsibility*. Ed. Keren, Michael and Sylvan Donald, A. Franck Cass, 2002 pp. 147-165) 6) D’Amato, Anthony, « The invasion of Panama was a Lawful Response to Tyranny » (1990) 84 *American Journal of International Law* 516 7) Farer, Tom, J., « The Promotion of democracy : International Law and Norms » in *The UN Role in Promoting democracy: Between Ideals and Reality* ed. by Newman, E., & Rich, R. United Nations University Press, 2004, pp. 32-61 at 54-58 8) Gray, Christine, *International Law and the Use of Force*, Oxford University Press, 2000. at 42-44 ; 196-197 ; 227-233 5 9) Kolb, Robert, *Ius contra bellum : le droit international relatif au maintien de la paix*, Bruylant, Bruxelles, 2003 at 231 10) Kritsiotis, Dino “Arguments of Mass Confusion” *European Journal of International Law* (2004) Vol.15 No.2 233-278 at 273-274. 11) Reisman, Michael, W, « Sovereignty and Human Rights in Contemporary International Law » (1990) 84 *American Journal of International Law* 886. Also by this author « Coercion and Self-determination: Construing Charter 2(4) » 1984) 78 *American Journal of International Law* 642 12) Schachter, Oscar, « Is There a Right to Overthrow an Illegitimate Government ? » in *Le Droit International au Service de la Paix, de la Justice et du Développement : Mélanges Michel Virally*, Editions A. Pédone, Paris, 1991 pp.423-430. See: also by the same author *International Law in Theory and Practice*, Martinus Nijhoff Publishers, Dordrecht, 1991 at 120-123 and “The Legality of Pro-democratic invasion” (1984) 78 *American Journal of International Law* , 645-650 at 646 13) Taghi Karoubi, Mohammad , *Just or Unjust War?: International Law and Unilateral use of Armed Force by States at the Turn of the 20th Century*, Ashgate, 2004 at 214 –233 14) Villani, Ugo “L’uso unilaterale de la forza per la tutela degli interessi fondamentali della comunità internazionale” in *Ordine Internazionale e Valori Etici*, Editoriale Scientifica, 2004, p.55-77 at 72-76. 15) Whipman, David, “Pro-democratic Intervention by Invitation” in Fox, G.H. and Roth B.R (Eds.) *Democratic Governance and International Law*, Cambridge University Press, 2000, pp. 293-327

⁴¹ Roth, Brad, « The Illegality of «Pro-Democratic » Invasion Pacts » in Fox, G.H. and Roth B.R (Eds.) *Democratic Governance and International Law*, Cambridge University Press, 2000, pp. 328-342 at 328

⁴² See e.g.: LeMon, J., “Unilateral Intervention by Invitation in Civil Wars: the Effective Control Tested”, 35 *N.Y.U.J. Int’l L. & Pol.* 2002-2003, 741.

jurisprudence,⁴³ the Security Council⁴⁴, the General Assembly⁴⁵ and the International Law Commission⁴⁶) that the request of a government of a State is an exception to the principle of non intervention provided the consent is valid and to the extent that the intervention remains within the limits of that consent. While noting that the classical exception in question was not reinforced or weakened by the democratic legitimacy of the requesting government, but that it sufficed that the government of the State was recognised in application of the effective control doctrine, one can identify, in view of the new appeal of the democratic entitlement thesis, at least six possible questions in this respect.

1) Can a non democratically elected government -but in effective control of the territory- invite the military intervention of a third country? 2) Can a State which has repeatedly subscribed to the democratic entitlement thesis legally accept an invitation of the latter kind? 3) Are we now confronted with a new double legal democratic standard by which, in situations of civil war in which the State's government is not in *de facto* control of the State, a democratic elected government would be entitled to consent foreign intervention while a non democratic elected government would not be so? 4) Does the invitation of the ousted democratic regime to foreign military intervention to restore the democratic rule constitute an exception to the principle according to which only the *de facto* government can legally consent to foreign intervention when those *de facto* authorities can claim effective control of the State over a significant period of time? 5) Could the conventional consent given by a State to intervene in case it is overthrown by a anti-democratic coup and absent contemporaneous consent by a government in effective control of the State be legal? In other words, are democratic intervention pacts legitimised?⁴⁷ 6) Could, by the same token, a non-democratic State subscribe a similar treaty understanding to cover the possibility of being overruled by any opposite force, democratic or not?. In short, this brief illustration should suffice to show that the emerging right to democratic governance risks affecting the international norms and principles dealing with intervention and the use of force in international law. The question remains, however, whether these well-known risks should lead the legal commentator to adopt, or not to adopt, what for a lack of a better word I shall term a prophylactic legal attitude vis-à-vis the development of the emerging norm.

Another field which can be identified as a constituting a dimension of emergence of the right to democratic governance is the field of recognition of states and governments. As for the recognition of States, elements of peoples' consent, although traditionally marginal, were at times present in practice related to State recognition within a legal framework, however indisputably

⁴³ See: Case *Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States) ICJ, (1986) p.126. See, also, case *Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)* ICJ, *Judgement, 19 December 2005, paras.42-54 and 128*; visit: <http://www.icj-cij.org>.

⁴⁴ See: SC Res 387 (1976) recognising "the inherent and lawful right of every State, in the exercise of its sovereignty to request assistance from any other state or group of States"

⁴⁵ See: 1974 GA Resolution on the Definition of Aggression No. 3314 (XXIX), Article 3 (e) and GA Res. 36/103 (1981)

⁴⁶ See: Articles 20 and 26 of the 2001 I.L.C.'s Articles on State Responsibility.

⁴⁷ See e.g.: Farer, Tom, J., « The Promotion of democracy : International Law and Norms » in *The UN Role in Promoting democracy: Between Ideals and Reality* ed.by Newman, E., &Rich,R. United Nations University Press, 2004, pp. 32-61

dominated by a Weberian-like inspired⁴⁸ “effective government”⁴⁹ doctrine which soon complemented one of the four classical Montevideo criteria of Statehood.⁵⁰ Against this background, it is worthwhile noting the potential role of democratic legitimacy can be seen to have been gaining momentum since 1989. As for the recognition of governments,⁵¹ although a domain, from early arbitral practice⁵² and the widely referred 1923 *Tinoco Concessions* arbitration⁵³, classically dominated by “*de facto* control test“, the role played by democratic legitimacy has traditionally been more doctrinally prominent than in their State recognition counterpart as witnessed by the attempts represented by 1907 Tobar, 1913 Wilson, 1963 Bethancourt and 80s Reagan doctrines. At present, and perhaps due to the fact that “the earlier function of recognising -or not recognising- governments has been folded into the institution of diplomatic relations”⁵⁴ as far as State bilateral relations is concerned, the stress seems to have moved to the practice of the democratic conditionality of recognition and membership in international organisations. Closely related to it stands the enforcing mechanism of the norm of democratic governance more repeatedly put forward in *lege ferenda* terms particularly where the UN is concerned: the amendment of articles 4 and 6 of the UN Charter.⁵⁵

As even the most summarised notice of the rest of dimensions of emergence of the norm would result in greatly exceeding the scope of this presentation, I see no alternative to providing the following non-exhaustive list. First, the UN human rights treaty law dimension comprising the precedents of the UN Charter and the UDHR. Second, the regional human rights treaty law dimension.⁵⁶ Third, the internal self-determination dimension.⁵⁷ Fourth, the participatory

⁴⁸ Warbrick, Colin, “States and Recognition in International Law” in *International Law* (ed. By Malcolm D.Evans) O.U.P., 2003, pp. 205-267

⁴⁹ See: 1) Murphy, Sean, D., “Democratic Legitimacy and the Recognition of States and Governments” in *I.C.L.Q.* Vol. 48, No. 3 (July, 1999), pp.545-581 and Murphy, Sean, D., “Democratic Legitimacy and the Recognition of States and Governments” in Fox, G.H. and Roth B.R (Eds.) *Democratic Governance and International Law*, Cambridge University Press, 2000, pp. 123-154

⁵⁰ See: Article 1 of the Montevideo Convention (convention of the Rights and Duties of States 1933)

⁵¹ See e.g.: Roth, Brad, R., *Governmental Illegitimacy in International Law*, Clarendon Press Oxford, 1999

⁵² For a brief account see: Louise Doswald-Beck “The Legal Validity of Military Intervention by Invitation of the Government” in *B.Y.I.L.*, 1985 , pp.189-252 at 192-193

⁵³ See: Moore, *International Arbitrations*, vol. 3 at 2876

⁵⁴ Crawford, James, *The Creation of States in International Law*, 2nd edition, Oxford University Press, 2006 at 152

⁵⁵ See e.g. Tesón, Fernando, R., “The Kantian Theory of International Law”, *Columbia Law Review*, vol.92:53 and Cerna, Christina, M., “Universal Democracy: An International Legal Right or the Pipe Dream of the West?”, 27 *New York Journal of International Law and Politics*, pp.289-329

⁵⁶ *Ibid.*

⁵⁷ See e.g.: 1) Cassese, Antonio, *Self-determination of Peoples: A Legal Reappraisal*, Cambridge University Press, 1995, at 52-66. See also 2) Christakis, Théodore, *Le droit à l’auto-détermination en dehors de situations de décolonisation*, Collection Monde européen et international du C.E.R.I.C., La Documentation Française, Paris, 1999. at. 324 3) Rosas,Allan « Internal Self-Determination » in *Modern Law of Self-Determination* ed.by Tomuschat,

mechanisms in international regulatory regimes dimensions.⁵⁸ Fifth, the political conditionality of the development aid dimension.⁵⁹

The meta-dimensions of emergence of the right to democratic governance

As I mentioned before, however, the democratic entitlement thesis considered in descriptive terms does not constitute the only avenue of interaction between international law and democracy that has interested the international lawyer since the early nineties or before. By reference to our subject-matter, under the umbrella of meta-dimensions of the emergence of the norm, I will broadly typify a number of analyses that, while not strictly legal positivist in scope, have been influencing the evolving path of the norm as far as its content or its mere convenience or possibility is concerned. A first sketched reference should be made to those approaches which have made recourse to other methodologies to foster the emergence of the democratic norm or principle. Under the heading of normative trends, one can generally include the work of international legal scholars as T.M.Franck -who add to his consideration as the father of the democratic entitlement in the rule-based approach realm, his theoretical work on the notions of legitimacy and fairness in international relations-⁶⁰, A.M. Slaughter (et al.) and her liberal theory of international relations,⁶¹ F.Tesón and his Kantian theory of International Law⁶² and policy-oriented scholars within the tradition of New Haven configurative jurisprudence.⁶³ The democratic peace theory since the early eighties and the vast amount of literature consecrated to the American foreign democratic paradigm⁶⁴ and the so-called end of history since the early nineties and again, specially, after 9-11 under the influence of the neo-conservative mantra “*si vis*

Christian, Kluwer Academics Publishers, Dordrecht, 1993, pp.225-252 at 228 4) Andres Saenz de Santa María, Paz “La libre determinación de los pueblos en la nueva sociedad internacional” en *Cursos Euromediterraneos Bancaja de derecho internacional*, Vol. 1, Aranzadi (1997) pp.113-203 at 153

⁵⁸See e.g.: Fox, Gregory, H., “Election Monitoring: The International Legal Setting” 19 *Wisconsin International Law Journal*, 2000-2001, pp. 295-320

⁵⁹ See: e.g. Bulterman, Mielle, *Human Rights in the Treaty Relations of the European Community Real Virtues or Virtual Reality?* Intersentia-Hart, 2001

⁶⁰Franck, Thomas M., *Fairness in the International Legal and Institutional System: General Course on Public International Law*, Collected Courses of The Hague Academy of International Law, 1993, Martinus Nijhoff Publishers (Dordrecht), 1994. See also: International Law Association (British Branch) First Program of Work of the Committee on Theory and International Law of the « Symposium on Thomas M. Franck’s Fairness in International Law and Institutions (1995) » *European Journal of International Law* (2002) Vol.13 No.4, 901-1030

⁶¹ See e.g.:Slaughter, Anne-Marie, « International Law in a World of Liberal States » 6 *European Journal of International Law* (1995) pp. 503-538

⁶²See e.g.:Tesón, Fernando, R., “The Kantian Theory of International Law”, *Columbia Law Review*, vol.92:53

⁶³ See e.g.:Reisman, Michael, W, « Sovereignty and Human Rights in Contemporary International Law » (1990) 84 *American Journal of International Law* 886

⁶⁴See e.g.:De la Rasilla del Moral, Ignacio “Sofisma y realidad del paradigma exterior democratico estadounidense: una aproximación” in *Revista Internacional de Pensamiento Politico*, No. 1./ 1º Semestre, Septiembre 2006, pp.69-95

*pacem, para bellum...*and extend democracy”⁶⁵ should be seen as the evolving cumulative intellectual background which has influenced, and against which the intellectual work of the legal scholars generally ascribed to this legal prescriptive trend is inevitably perceived. In this respect, it is perhaps not such a coincidence that the neo-conservative bias on the Bush Administration evidenced by the 2003 Iraq war had the effect of practically halting US’ legal scholarship related to the emerging norm of democratic governance. Common to these approaches, although in diverse degrees, is their attempt to operate a conceptual shift from State-oriented theories of international law to an individual-oriented theory of the discipline and the fact of being perceived from other scholarly quarters as promoters of the emergence of the norm as a smoke-screen from imperial ends.⁶⁶

Against this background, the key-scholarly contribution of S. Marks⁶⁷ in dealing with the concept of democracy underpinning the purposed emergence of the right bridges the gap between the authors aforementioned and the 90s important trend of studies related to the idea that democracy should be extended beyond the State commonly known as the project of cosmopolitan democracy.⁶⁸ On the highly controversial question of what we talk about when we talk about democracy, I will limit myself, at this general overview level, to point out the great terminological indeterminacy that exists in the legal academic scholarly labelling related to this subject-matter.⁶⁹ Also within the multifaceted field of study related to the implications of globalisation for democracy both at the international and domestic realms, a reference should be made to the debate on the legitimacy of international law in view of the democratic deficits of

⁶⁵ See: De la Rasilla del Moral, Ignacio “El interregno neoconservador” Estudio preliminar a *Peligros Presentes*, (ed, by R.Kagan y W.Kristol), Ed. Almuzara, 2005, pp. 9-33. See, as well, “Alicia a través del espejo: el derecho internacional en el pensamiento neoconservador y la escuela de New Haven” in *El imperio neo-conservador (prov.tit)* Editorial Aconcagua, 2006 (*forthcoming*)

⁶⁶ See: e.g. Koskenniemi, Martii, “Whose intolerance, Which Democracy?” in Fox, G.H. and Roth B.R (Eds.) *Democratic governance and International law*, Cambridge University Press, 2000, pp.436-440 at 439-440

⁶⁷ Marks, Susan 1) *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology*, Oxford University Press, 2000. 2) *Human rights, Democracy and Ideology*. Collected Courses of the Academy of European Law (1997) Vol. VIII Book 2. Published by Kluwer Law International (2000) 3) « Democracy and international governance » in Coicaud, J.Marc & Heiskanen, Veijo (Eds.) *The Legitimacy of International Organizations*, The United Nations University Press (New York), 2001, pp.47-68 4) Marks, Susan, « The “Emerging Norm” : Conceptualizing « Democratic Governance » » in “Implementing Democratization : What Role for International Organizations” in *American Society of International Law Proceedings*, 1997, pp.372-376 5) « The End of History ? Reflections on Some International Legal Theses », *European Journal Of International Law*, Vol.8 N°3, (1997) pp. 449-477 6) Marks, Susan, “Democratic Celebration, Democratic Melancholy”, *Finnish Yearbook of International Law*, 1998, pp.73-79 7) “Empire’s Law”, *Indiana Journal of Global Legal Studies*, Vol. 10, 2003, pp.446-449

⁶⁸ See introductory: Archibugi, Daniele & Koenig-Archibugi, Mathias, “Globalization, Democracy and Cosmopolitics: A Bibliographical Essay” in *Debating Cosmopolitics*, ed. By D.Archibugi, Verso, London, 2003 pp.272-291

⁶⁹ See: note 25, *supra*.

international decision-making;⁷⁰ the same one, paradoxically, that it is helping the norm of democratic governance emerge. The major developments marked by the European Union⁷¹ as a prime laboratory of increasingly imitated regional economic and political integration projects and the spreading of new actors within the framework of the so-called system of global governance should also be noted within this ultra-abridged notice of the meta-dimensions of emergence of the norm of democratic governance.

The integrating dimension of emergence of the right to democratic governance

Having said that, and back to the positivist standpoint, the question that ensues is how do all the legal parallel developments we have referred to as dimensions of emergence of the norm to democratic governance interrelate to each other? Is, *verbigratia*, the right to internal self-determination the umbrella under which all of them will reassemble and converge or are we witnessing the emergence of a new principle of international law which is independent of any self-determination related consideration?. This aspect of the analysis which I shall term the integrating dimension of the norm cannot be separated from the different existent theories of customary law formation;⁷² and even within a traditional approach to CIL to basic considerations of the sort of how the practice and *opinio iuris* of anything but fully democratic States could be taken into account so as to support the customary emergence of the norm. Another basic consideration is the extent to which the importance of *opinio iuris* is gaining momentum in view of the emergence of the international community as a legal entity⁷³ and how that phenomenon could influence the emergence of the democratic principle or norm. In the same vein, it is

⁷⁰See e.g.: Donoho, Douglas, Lee, “Democratic Legitimacy in Human Rights: The Future of International Law Making” 21 *Wisconsin Law Journal*, 1, 2003 pp.XXX and Kumm, Matthias, “The Legitimacy of International Law: A Constitutionalist Framework of Analysis” *European Journal of International Law*, Vol.15, n°5, 2004, pp.907-931

⁷¹ See e.g.: Burchill, Richard “International Law of Democracy and the Constitutional Future of the EU: Contributions and Expectations” *Queen’s Papers on Europeanisation*, No 3/2003, pp.1-20

⁷² See introductorily e.g.: Kelly, Patrick, J., “The Twilight of Customary International Law” 40 *Virginia Journal of International Law* 450, 1999-2000

⁷³ For a good array of inspiring readings on the emergence of the international community as a “legal entity” as put by Professor Tomuschat, See: 1) Dupuy, Pierre-Marie, *L’unité de l’ordre juridique international*, Cours général de droit international public (2000) 297 Recueil des Cours, Deuxième partie, Chapitre II (2002). 2) Simma, Bruno, *From Bilateralism to Community Interests in International Law*, 250 Recueil des Cours, 298 (1994) 3) Gowlland Debbas, Vera, “Judicial Insights into Fundamental Values and Interests of the International Community” in A.S. Muller et al. (eds.), *The International Court of Justice: Its Future Role after Fifty Years*, Kluwer Law International, 1997, pp. 327-366 4) Villapaldo, Santiago Martin, *L’émergence de la communauté internationale dans la responsabilité des Etats*, Thèse présentée à l’Université de Genève pour l’obtention du grade de Docteur en relations internationales (droit international) Thèse N°659, 2003. 5) Voefray, François, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales*, Publications de l’Institut de Hautes Etudes Internationales, Genève,” Presses Universitaires de France, 2004 (Prix Paul Guggenheim 2004) 6) Tomuschat, Christian, *Obligations Arising for States Without or Against their Will* , 241 Recueil des Cours, 236 (1993)

worthwhile noting that the close link between the achievement of community interests and intra-state democratization makes the norm of democratic governance a suitable candidate to be presented within the framework of a constitutionalist approach to international law.⁷⁴ The *erga omnes* character the norm would adopt according to A.Cassese⁷⁵ could be seen as a further argument in approaching the emergence of the right to democratic governance from such a conceptual viewpoint. In this respect, it should be noted that no attempt has been made yet at least “eo nomine” to present the emerging democratic entitlement of peoples as a “community interest” by placing it within the conceptual framework of a constitutionalist systematic approach to international law. The question remains, however, whether the constitutionalist standpoint should influence the examination of the customary international formation process of the norm (in view of its various descriptive dimensions of emergence) *ex ante*. That is to say, whether one should adopt a constitutional methodological approach from the onset or whether these particular lenses should be reserved for its use once (and only if) enough legal evidence supporting the customary existence of the norm has already been put forward. The international constitutionalist approach could also prove to be a good channel to confront the “serious conflicts with the fundamentals of IL”⁷⁶ that the hypothetically emerging norm poses.

A brief approach of the compatibility of the right to democratic governance with the fundamentals of international law

Having presented an ultra synthesised analytical framework in a *prima facie* basis to the study of the question of whether there is an emerging norm of democratic governance in customary international law, I should briefly approach the question of whether that norm would be compatible with so-called fundamentals of international law.⁷⁷ It should be noted that this is not the same as asking oneself if the democratisation activity of the UN is compatible with the

⁷⁴See e.g: St.John Macdonald, Ronald & Johnston, Douglas M.,(Eds), *Towards World Constitutionalism*, Koninklijke Brill, NV, 2005,

⁷⁵ See: Cassese, Antonio, *Self-determination of Peoples :A Legal Reappraisal*, Cambridge University Press, 1995

⁷⁶ See: Simpson, Gerry, « Imagined Consent : Democratic Liberalism in International Legal Theory”, *Australian Yearbook of International Law*, 1994, pp.103-124 at 123.

⁷⁷ By the fundamentals of international law, I shall be referring to what is known as the law of friendly relations between States, see: Salmon, Jean, « Introduction to the Law of Friendly Relations between States » in M. Bedjaoui ed. *International Law: Achievements and Prospects*, UNESCO and Martinus Nijhoff Publishers, 1991, pp.415-423. These seven basic principles are the principles of the prohibition of the threat and use of force, peaceful settlement of disputes, non intervention, duty to co-operate, of equal rights and self-determination of peoples, sovereign equality of States and the fulfilment on good faith of international obligations. It should be recalled, however, that the origins of the term “fundamentals of international law” lie in so-called “fundamental”, “primordial”, “inherent” or “absolute rights” of the State which in 1915 could “be summarised as the right of a state to exist, the right to independence, and the right to equality”; for a critical account of them at the time, see: Marshall Brown, Philip, “The Theory of the Independence and Equality of States” in 9 *A.J.I.L.*, 1915, pp. 305-335. Within the same period, see as well, Baker, P.J., “The doctrine of Legal Equality of States” in 4 *British Yearbook of International Law* , 1923-1924, pp.1-20 and Hicks, Charles Frederick, “The Equality of States and the Hague Conferences” in 2 *AJIL*, 1908, pp. 530-561

fundamental principles governing international relations. While I see no reason to oppose the view according to which as far as the UN democratization activity respects the so-referred fundamentals, there is no obstacle to it,⁷⁸ the aim of this brief theoretical exam is a different one.⁷⁹ This stated, the interest of this inquiry lies in the fact that the prior identification of the limitations that the fundamentals of international law would impose upon the emerging norm should help, in principle, to anticipate its legal characterisation. One would do well, however, in not ruling out other hypothesis of work as *verbigratia* that the emergence of the norm could, indeed, change the contours of the basic principles of international law as they stand as present. This question and the uncertain legal malaise that permeates it could well account for much of the great deal of criticism addressed to this hypothetically emerging norm from different standpoints. A short-cut to confront this issue is to recall the well known dictum of the I.C.J. in the Nicaragua Case in its paragraph 263.

“(…), adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State”⁸⁰

In a *prima facie* basis the Court’s declaration should lead one to interpret⁸¹ that the customary emergence of the norm to democratic governance is incompatible with the foundation of international law itself as such a norm “would make nonsense of the fundamental principle of State sovereignty on which the whole of international law rests”. Furthermore, the customary crystallisation of such a norm would also be incompatible with one of the elements of that “fiction juridique par excellence de l’ordre juridique international”⁸² known as the principle of sovereign equality of States as stated in Resolution 2625.⁸³ Besides considering it one of the elements of sovereign equality, Resolution 2625 also proclaims that “Every State has an inalienable right to choose its political, economic, social and cultural systems, without

⁷⁸ See: Salmon, Jean, « Démocratisation eat souveraineté : l’impossible conciliation » in *La contribution des Nations Unies à la démocratisation de l’Etat*, Ed.Pédone, 2003. pp.191-200

⁷⁹ It is worthwhile noting that the strict explicit scholarly references to this subject-matter continue to be, to say the less, succinct. For a brief reference in passing, see: Simpson, Gerry, « Imagined Consent : Democratic Liberalism in International Legal Theory », *Australian Yearbook of International Law*, 1994, pp.103-124 at 123.

⁸⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Merits*, Judgment, I.C.J. Reports 1986, p.133 para.263

⁸¹ I interpret the phrase “adherence to any particular doctrine” as comprising non-democratic political doctrines.

⁸² See : See: Dupuy, Pierre-Marie, *L’unité de l’ordre juridique international*, Cours général de droit international public (2000) 297 Recueil des Cours, Deuxième partie, Chapitre II, 245-269 (2002)

⁸³ See: General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA, Res. 2625 (XXV), 24 October 1970. Principle of sovereign equality of States, paragraph (e) “Each State has the right freely to choose and develop its political, social, economic and cultural systems”.

interference in any form by another State'. One is led again, therefore, to interpret that the customary emergence of the norm of democratic governance would also "make nonsense" of the principle of non-intervention (itself a "corollary of the principle of the principle of sovereign equality" according to the I.C.J.⁸⁴) if the norm is conceived in such a way that allows for an interference in any form by any other State. Finally, the State's right to freely choose and develop its political system is to be seen also as a consequence of the right to self-determination of peoples insofar as the peoples already constituting a State are concerned.⁸⁵ So, why so much ado about a norm the customary emergence of which would seemingly "make nonsense" of almost everything that stands as legally sacred in the international legal system: sovereignty, sovereign equality and, to a greater extent, non-intervention and the principle of self-determination?. Or is it perhaps that these apparent fundamental incompatibilities are, in fact, not so legally insurmountable as they appear to be in a prima facie basis?.

Leaving aside this sketched view, the question of how a certain understanding of the right to internal self-determination in line with the internal-self determination school⁸⁶ "provides the overall framework for the consideration of the principles relating to democratic governance"⁸⁷ and could influence the legal characterisation of both the principles of sovereign equality and non-intervention, an ultra-abridged approach to these incompatibilities could well begin by testing whether the State's right to freely choose and develop its political system et al. falls within the strict content of the principle of sovereign equality understood as "égalité juridique de tous les Etats membres de la société internationale".⁸⁸ In other words, the question would be that of knowing if one can disaggregate paragraph (e) from the "familiar but neglected"⁸⁹ principle of sovereign equality. Can one dispense with it and still keep the strict content of the principle of sovereign equality conceptually intact?. Not mentioned as one of the composing elements of the "new term"⁹⁰ that would become the principle upon which the UN was founded in the report of the technical committee⁹¹ on Article 2.1 of the UN Charter, the State's right to freely choose its own form of government would, however, make its appearance (as corollary of the State's right to independence, and, therefore, seemingly in line with the well-known Max Huber's definition

⁸⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.106

⁸⁵ See e.g. GA resolution 56/189 (2003) Respect for the Principles of national sovereignty and diversity of democratic systems in electoral processes as an important element of the promotion and protection of human rights (111-10-55)

⁸⁶ See an introductory bibliography see note 60 (supra).

⁸⁷ For the quotation expressly taken from a widely read manual of international law, see : Shaw, Malcolm, N., *International Law*, 5th Ed. C.U.P. ,2003 at 273

⁸⁸See: Kohen, M.G, « Article 2.1 » in J.Cot, A, Pellet et M.Forteaue (Ed.) *La Charte des Nations Unies : Commentaire article par article*, 3^{ème} édition, Ed. Economica, 2005, pp.399-416 at 407 at 406

⁸⁹ See: Simpson, Gerry, "The Great Powers, Sovereign Equality and the Making of the United Nations Charter" in 21 *Australian Yearbook of International Law*, 2000, pp.133-158 at 133

⁹⁰ For the drafting history, see: Fassbender, B. & Bleckman, A., "Article 2.1" *The Charter of the United Nations: A Commentary*, (Ed. by B. Simma), 2nd Ed., O.U.P., 2002 pp.68-91 at 83

⁹¹ See: UNCIO, Documents, VI, 457. See further: Goodrich, Hambro & Simons, *Charter of the United Nations: Commentary and Documents*, 3rd Revised Ed., Columbia University Press, 1969, pp. 36-40 and

of sovereignty⁹²) in Article 1 of the 1949 I.L.C.'s Draft Declaration on Rights and Duties of States.⁹³ Twenty-one years later the principle, now extended to all States, was included, and considered to be “the one significant addition to the 1945 formulation”⁹⁴ as one of the elements of the principle of sovereign equality in resolution 2625⁹⁵ in a part of the declaration that Professor Arangio-Ruiz would qualify at the time “as too tautological for words”.⁹⁶

In order to answer the question posed, therefore, one is called to identify the strict content of the principle of sovereign equality. Being in Paris, let me quote the last edition of the commentary to Article 2.1 of the UN Charter in French. “Si l’on se réfère strictement au contenu de l’égalité souveraine il y lieu de mentionner concrètement quatre éléments :

1. Les Etats souverains sont uniquement soumis au droit international;
2. Ils disposent de la même personnalité juridique internationale;
3. Ils ont les mêmes droits et obligations, dans les conditions fixées par le droit international ;
4. Ils participent tous au processus d’élaboration du droit international sur un pied d’égalité »⁹⁷

Therefore, if the State’s right to freely choose and develop its political system et al. is not strictu sensu an indispensable element of the legal definition of the principle of sovereign equality, what is it? The commentary to article 2.1 so mentioned does not provide a clear-cut answer to this question when it says “certains des éléments énumérés ci-dessus dépassent le cadre du principe ou sont plutôt conséquences de celui-ci”.⁹⁸ Can one conjecture that the State’s right

⁹² see: island of Palmas (Neth. V.U.S.) 2 R.I.I.A. 829 at 867 (Apr.4, 1928)

⁹³ See: Report of the ILC, GAOR 4th Sess., Supp.No.10 (A/925). See further: Kelsen, Hans, “The Draft Declaration on Rights and Duties of States: Critical Remarks” in *A.J.I.L.*, Vol. 44, No. 2, 1950, pp.259-276 . For Kelsen the, in his view incorrectly termed, “right” to independence is “the reflection of, because implied in, the duty to refrain from intervention, stipulated in article 3, and the duty to refrain from the threat or use of force (...)” p.265. Later on, he would also add: “Independence is not a right, it is an essential characteristic of the State. If a community is not independent it is not a State. Every state has the right that other states respect its existent independence” p.267

⁹⁴ See : Rosentock, Robert, “The Declaration of Principles of International Law Concerning Friendly Relations: A Survey”, 65 *A.J.I.L.*, 1971, pp.713-735 at 734

⁹⁵ See: General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations, GA, Res. 2625 (XXV), 24 October 1970. See also: “UN Committee Consensus on Sovereign Equality of States” , 4 *International Legal Materials*, 28, 1965 pp.28-50

⁹⁶ See: Arangio-Ruiz, Gaetano, “The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations” *Collected Courses of the Hague Academy of International Law*, 1972, III, Vol.137 at 574. in the choosing of the term “tautological” by Arangio-Ruiz one recognises the influence of Kelsen, See: Kelsen, Hans, “The Draft Declaration on Rights and Duties of States: Critical Remarks” in *A.J.I.L.*, Vol. 44, No. 2, 1950, pp.259-276 at 269

⁹⁷ Kohen, M.G, « Article 2.1 » in J.Cot, A, Pellet et M.Forteau (Ed.) *La Charte des Nations Unies : Commentaire article par article*, 3^{ème} édition, Ed. Economica, 2005, pp.399-416 at 407

⁹⁸ Kohen, M.G. *op.cit.*

in this domain is a consequence of the principle of sovereign equality? And if so, would it be a necessary consequence, a corollary without which the principle would be, so to speak, legally denaturalised?. In order to answer this question, it is sufficient to recall that the principle of sovereign equality equates the notions of sovereignty and equality, and the State's right to choose its own form of government is clearly an offspring of the former and not of the latter. As the Court said in the Nicaragua case "a prohibited intervention must accordingly be one bearing on matters in which each State is permitted, by the principle of State sovereignty, to decide freely. One of these is the choice of a political, economic, social and cultural system, and the formulation of foreign policy".⁹⁹ In view of this, the equality side of the most democratic of the international legal principles does not constitute an obstacle to the project of pan-national democracy that the customary emergence of the norm purports to channel; the difficulty, as this "sanctified absolute rule of law"¹⁰⁰ is concerned, lies within the sovereignty side of the principle. From this it follows, that the emergence of a norm to democratic governance can be channelled as constituting a new international legal condition imposed on a footing of equality to all States and that the principle of sovereign equality of States would not be inherently eroded for it.

Having said that, it should be recalled that the degree of freedom a State has in freely choosing its political system is, as common to the rest of sovereign rights, not absolute but conditioned by international law. One can again make recourse to the Nicaragua case in this respect "A State's domestic policy falls within its exclusive jurisdiction, provided of course that it does not violate any obligations of international law". However, even a "competencia discrecional"¹⁰¹ of the State like the election of its political system was far from absolute at the time the Court signalled that "adherence by a State to any particular doctrine does not constitute a violation of customary international law". This becomes evident in the light of the global condemnation of political regimes based on the tenets of racial discrimination and apartheid by the General Assembly,¹⁰² the Security Council¹⁰³, the explicit consideration of apartheid as an international crime within the conspicuous article 19 of the I.L.C.'s Draft Articles (since 1976 to 1996) on State Responsibility¹⁰⁴ all of them well known by the I.C.J. when it delivered its judgement in 1986. Also well known by the I.C.J. was Resolution 36/162, adopted without vote by the General Assembly in 1981, which reaffirms "that all totalitarian or other ideologies and practices, in particular Nazi, Fascist, and neo-Fascist based on racial or ethnic exclusiveness or intolerance, hatred, terror, systematic denial of human rights and fundamental freedoms, or which

⁹⁹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.108 para.205

¹⁰⁰ Ibid., Separate opinion of President Nagendra Singh at 156

¹⁰¹ As opposed to "competencia reglada" so as to make use of Spanish international scholarly terms; see: Pastor Ridruejo, José, A., *Curso de Derecho Internacional Público y Organizaciones Internacionales*, 9^o Ed. Editorial Tecnos, 2003, at 283

¹⁰² See: GA Res. 2775E (XXVI), 29 Nov.1971 and GA Res. 3411D (XXX), 28 Nov. 1975

¹⁰³ See: SC Res. 216 (1965), 12 Nov. 1965, SC Res. 418 (1977) and SC Res. 569 (1985)

¹⁰⁴ See: *Yearbook of the I.L.C., 1976*, vol. II, Part Two, pp.95-96. Today racial discrimination and apartheid follow the legal regime of peremptory norm of international law set by the 2001 ILC's Articles on State Responsibility; see, in special, articles 15, 40, 41, 42, 48 and 54. For a overview on the 2001 ILC's Articles, see my brief contribution: "Hobbes, Kant and the Likely Impact of the ILC's Articles on State Responsibility" in 11 *Revista Electrónica de Estudios Internacionales* (2006) at www.reei.org

have such consequences, are incompatible with the purposes and principles of the Charter of the United Nations (...)”¹⁰⁵

To the regime of general international law which influences the State’s right to freely choose and develop its political system (a regime which is indisputably evolving towards the incorporation of democratic considerations in parallel to the “development of international relations”) ¹⁰⁶ should, of course, be added the self-limitations by conventional means and others to their discretionary competencies by which States can limit (and have already limited in many instances and to various degrees) the “right of individuals in power to exercise whatever methods of government they choose to exercise, including authoritarian methods”.¹⁰⁷ Again one can quote the seemingly inexhaustible Nicaragua case in this respect “(...) the assertion of an agreement raises the question of the possibility of a State binding itself by agreement in relation to a question of domestic policy, such as that relating to the holding of free and fair elections on its territory. The Court cannot discover, within the range of subjects open to international agreement any obstacle or provision to hinder a State from making a commitment of this kind”.¹⁰⁸

Conclusion

The norm of democratic governance is both currently “emerging within” and being “imposed upon” the international legal system. While this is a common feature of international legal formation, it should be noted that in this particular case the degree of extrinsic pressure seems to have adopted a “no-way back” character. Therefore, the possibility that the tension between international effectiveness and legality will become greater should not be ruled out in the light of *verbigratia* a future “military pro-democratic intervention”. Some other land-marking legal event -not comporting the use of force- should not be ruled out either. It should be noted that these sort of “normative tests” could easily be politically designed in an “a crescendo” basis. Let me, in this sense, finish by quoting the National Security Strategy of the United States of America of March 2006, in which one finds a great number of pages dedicated to highlighting the importance of US democratic promotion¹⁰⁹ under the heading “The Way Ahead”: “To protect our Nation and honour our values, the United States seeks to extend freedom across the globe by leading an international effort to end tyranny and to promote effective democracy”¹¹⁰ and a few lines after “Although tyranny has few advocates, it needs more adversaries”.¹¹¹ The question that ensues is how long do we have to wait until the day we will be reading in a future US N.S.S. that the right to democratic governance has become a rule of international law. For better or worse, that

¹⁰⁵ See: *Yearbook of the United Nations* 1981, Vol. 35 at 876-877

¹⁰⁶ See: *Nationality Decrees issued in Tunisia and Morocco, Advisory Opinion of 7 March 1923, PCIJ, Collection of Advisory Opinions, Series B, no. 4*, p.227

¹⁰⁷ See: Tesón, Fernando, R., « Le Peuple, c’est Moi! The World Court and Human Rights » in 81 *A.J.I.L.* No.1, January, 1987, pp.173-183 at 182

¹⁰⁸ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p.108 para.259*

¹⁰⁹ See: The National Security Strategy of the United States of America, March 2006

¹¹⁰ *Ibid.* p.8

¹¹¹ *Ibid.* p.9

moment will come¹¹² and international legal scholarship would do well in being extremely well prepared for it.

Wolf!.

¹¹² See e.g.: De la Rasilla del Moral, Ignacio “Sofisma y realidad del paradigma exterior democrático estadounidense: una aproximación” in *Revista Internacional de Pensamiento Político*, No. 1./ 1º Semestre, Septiembre 2006, pp.69-95