

## A Heartfelt Apology: Democratic Governance in International Law

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### THEORETICAL PERSPECTIVE: BETWEEN UTOPIA AND APOLOGY

A possible positive to result emerging from the terrorist attacks of September 11th is their illustration of the need for a critical examination of the emerging right to democratic governance in international law.<sup>1</sup> Martti Koshenniemi argues that international law pivots between apology, for the accurate description of state power, and utopia, an unrealised vision of progressive justice.<sup>2</sup> The utopian approach to international law describes how states ought to behave and provides a critical normative framework for judging state practice. It recognises the importance of the directive nature of normative rules in international law. The apologetic approach lacks this directive quality because it derives international law from the actual practice of states. It claims that law becomes irrelevant when it ceases to interact with reality.<sup>3</sup> Actual public international law reflects both the history of state practice and the dominant normative values of the international community. It is evident that state practice and *opinio juris* comprise the main body of customary international law. The normative function of international law is evident in the ratification of human rights treaties, like the *International Convention on Human Rights*, by the majority of states and the international recognition of universally inalienable rights. Not surprisingly, it seems that the more dominant a state's ideology is in the global community, the more willing they are to follow the rules of international law.<sup>4</sup> After the collapse of the Soviet Union, "U.S. interests were once again served by the promulgation and enforcement of international norms. The result was that previous differences within the discipline of public

international law became blurred and a large degree of consensus formed around a common project".<sup>5</sup> This project was the expansion of liberal democracy and the promotion of the right to democratic governance.

The "temporary coincidence" between American foreign policy in the nineteen nineties 1990s and the normative direction of international law appeared to dissolve the tension between the apologetic and utopian approaches to international law.<sup>6</sup> It was in the early stages of this convergence between liberal ideology and the exemplar of the world's single remaining superpower that Thomas Franck wrote "Democratic Governance." With two thirds of the world's states declaring an intention to hold free, legitimate democratic elections by the end of the nineties, it appeared that the spread of liberal democracy was a *fait accompli*.<sup>7</sup> However, as soon as the U.S.'s interests no longer corresponded with the letter of the law, the importance of international legality was trumped by national security. The 9/11 attacks, the events that followed, and the subsequent reaction of the international community illustrate the continued tension between action and intention in international law, particularly in regards to the United States.<sup>8</sup> It is difficult to forecast the possible future effect on international law of the United State's break from the United Nations and their doctrine of preemptive strike. However, the results of the aggressive pursuit of liberal democracy and a global free market system by the United States and the Western world in the last half-century are clearer.

### IS THERE A RIGHT TO DEMOCRATIC GOVERNANCE?

#### *Utopia: The Normative Perspective*

The origins of the right to democratic governance again speak to the prescriptive function of international law. The inclusion of the prohibition of the use of force in the United Nations Charter in 1945 and the UN's subsequent adoption of *The*

<sup>1</sup> Euan Macdonald, "International Law, Democratic Governance and September the 11th" (2002) 3 German Law Journal. 1

<sup>2</sup> Ibid. 7.

<sup>3</sup> Ibid.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid. 10

<sup>8</sup> Ibid. 14.



*Universal Declaration of Rights and Freedoms* in 1948 marks a turn from international law as the mere description of state practice to the acceptance of normative goals and values within the international community.<sup>9</sup> Article 21.3 of *The Declaration* states: "will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures." This endorsement of peace and democracy is unsurprising given the recent victory over fascism in Europe and the looming threat of communism as an alternative to both capitalism and democracy. A half century later all but twenty-nine states have signed and ratified *The International Covenant of Civil and Political Rights*, a document which safeguards the right of all peoples to "take part in the conduct of public affairs" and "to vote and to be elected at genuine periodic elections... guaranteeing the free expression of the will of the electors".<sup>10</sup> Similar regional treaties confirm these rights in Europe, Africa and the Americas.<sup>11</sup> Although technically legally binding, these treaties primarily represent the acceptance of the democratic process as an international norm. Even Roth, who argues vehemently against the right to democracy in international law, admits that the discourse of democracy is becoming both more pervasive and more standardized:

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A new, more uniform terminology is evident in the following trends: 1) more States have ratified instruments protecting participatory rights; 2) regional bodies from Europe, Latin America, and

Africa have pursued virtually identical agendas of consolidating electoral democracy; 3) leaders' credibility in describing their States as 'democratic' turns increasingly on the judgments of international actors; 4) the criteria of fairness applied by UN monitors has become so widely accepted that their terms are repeated virtually verbatim from mission to mission; and 5) all parties to the major human rights conventions also have voted to establish the UN monitoring missions and to approve reports detailing participatory rights scrutinized by observers.<sup>12</sup>

Human rights treaties, UN and regional elections monitoring bodies, and a general body of standards, commitments, resolutions and joint statements, all indicate an emerging right to democratic governance. This right is further evidenced by state practice. Unilateral or UN intervention in areas such as Panama, Haiti, Sierra Leone and Kosovo have all been wholly or partially justified, according to the intervener, by the establishment or defence of democracy.<sup>13</sup>

Various States and scholars contest the legality of each of these actions, but the mere act of invoking the protection of democracy to legitimate forceful intervention suggests that a right to democratic governance is an established international norm. Despite this the right to democratic governance is treated as soft law by the international community. That is, "although [it] remains legally unregulated" democratic governance has become "the object of agreed guidelines, or statements of common positions or policies."<sup>14</sup> There are three main reasons that the right to democratic governance is not recognised as a binding legal principle in the international community. First, as has been suggested, is the normative nature of a right to democratic governance. Second, the right to democratic governance has been subsumed within a broader

<sup>9</sup> James Crawford. "Democracy and the body of international law". *Democratic Governance and International Law*. Ed. Gregory H. Fox and Brad R. Roth. (Cambridge, 2002) 97.

<sup>10</sup> Article 25, 1-2. *International Covenant on Civil and Political Rights*. University of Minnesota: Human Rights Library Website. Jan 2009 <<http://www1.umn.edu/humanrts/instree/b3ccpr.htm>>.

<sup>11</sup> Brad R. Roth, Rev. of *The Riddle of all Constitutions: International Law, Democracy, and the Critique of Ideology*, by Susan Marks". *International Affairs*. Vol. 77, No. 2 (Apr 2001): 411-412. Jan 2009 (JSTOR) 86.

<sup>12</sup> Ibid.

<sup>13</sup> Carsten Stahn. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" *The American Journal of International Law*. Vol. 101, No. 1 (Jan 2007): 99-120. Jan 2009 (JSTOR)

<sup>14</sup> Antonio Cassese. *International Law*. 2nd ed. (Oxford: Oxford UP, 2005.) 196.



human rights discourse. Third, numerous non-Western states are skeptical of the right to democratic governance and its implications for state sovereignty.

### *Apology: The Descriptive Perspective*

In describing how the international community perceives things should be, instead of how they are, a right to democratic governance would be difficult to apply and enforce in the real world of international politics. This is particularly true when the kind of pluralistic self-governance envisaged in Article One of *The International Covenant of Civil and Political Rights* runs counter to the mainstream ideology of the West. The promotion of liberal democracy is not divorced from geopolitical strategy and self-interest and governments legitimate military and economic policy under the guise of the protection of democracy.<sup>15</sup> This kind of arbitrary application would weaken the rule of law in international relations if the right to democratic governance was viewed as hard law.<sup>16</sup> Similarly, adherence to a real right to democratic governance would likely result in "a radical change in the discipline's very *raison d'être*" as it would "begin to function as the meta-conceptual framework through which all rights would be viewed and thus understood."<sup>17</sup>

Instead of emphasizing the ideologically loaded "right to democratic governance," recent human rights discourse has focused on the right of peoples to self-determination and the inalienable rights of individuals. The right to democratic governance is subsumed within these rights but it is no longer advocated as a reason for humanitarian intervention. The establishment of democratic elections is an almost inevitable part of the ongoing process entailed in the "responsibility to rebuild" but the specific right to democratic governance has been

de-emphasized.<sup>18</sup> In its place, the "responsibility to protect" has emerged, with a primary focus on the responsibility of the broader community of states to protect all peoples from mass atrocity and crimes against humanity.<sup>19</sup> The responsibility to protect is gaining prominence as an emerging legal principle in international law but some States would prefer to couch it in moral rather than legal terms.<sup>20</sup> Significantly, the United States refused to accept that "either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law".<sup>21</sup> The subservience of the ideal of humanitarian intervention to self-interest is evident in the logic of this statement. Although the ability to intervene can be useful, the obligation to intervene will likely be detrimental. Ironically, all states emphasize the necessity of both UN Security Council authorization and the collective nature of intervention.<sup>22</sup> The "responsibility to protect" is not yet a legal norm, but it seems to have replaced the right to democratic governance as the justification for legitimate intervention in international law. As an emerging principle of international law the responsibility to protect relies on a much broader, and more palatable, human rights discourse. This discourse encompasses the rights to self-governance and self-determination, but does not place the right to democratic governance at the forefront of the ongoing struggle for human rights.

Arguably the right to democratic governance is no longer broadly debated in international forums because it is a largely excepted norm. However, some non-Western states, specifically Cuba and China, condemn the violation of the principle of sovereignty entailed in the right to democratic governance.<sup>23</sup> This condemnation is particularly understandable from non-liberal democratic societies. While the principle of radical democracy would have ramifications for even the most complacent of first world liberal democracies, the

<sup>15</sup> Richard Falks Rev. of "The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology, by Susan Marks". *The American Journal of International Law*. Vol. 96, No. 1 (Jan 2002): 264-268. Jan 2009 (JSTOR) 65.

<sup>16</sup> Michael Byers and Simon Chesterman. "You, the People: pro-democratic intervention in international law". *Democratic Governance and International Law*. Ed. Gregory H. Fox and Brad R. Roth. (Cambridge, 2002) 267-8.

<sup>17</sup> Euan Macdonald. "International Law, Democratic Governance and September the 11th" 14.

<sup>18</sup> Carsten Stahn. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" 64.

<sup>19</sup> Ibid. 99.

<sup>20</sup> Ibid. 108.

<sup>21</sup> Ibid.

<sup>22</sup> Ibid. 106.

<sup>23</sup> Thomas M. Franck, "Legitimacy and the Democratic Entitlement" *Democratic Governance and International Law*. Ed. Gregory H. Fox and Brad R. Roth. (Cambridge, 2002) 43.



right to democratic governance as it is practiced would only impact the sovereignty and economy of non-liberal countries, leaving the dominant global ideology untouched. It is widely recognised that sovereignty is no longer a valid excuse for human rights abuses:

The principle of non-intervention and the prohibition of the use of force under Article 2(4) are meant 'to protect the citizens of a state, rather than the state as an entity. This rationale ceases to apply in favour of the state when the domestic sovereign violates the rights of its own population.'<sup>24</sup>

However, a state that undertakes the primary responsibility of protecting the rights of its citizens need not conform to the Western conception of liberal democracy. Despite the evident appeal of a rule which enables all people to "determine their political status and freely pursue their economic, social and cultural development," in practice the predominance of the right to democracy over sovereignty comes dangerously close to neo-imperialism.<sup>25</sup> Instead of freeing people for political, economic, social and cultural development, it would only serve to reinforce the global order such that "the inequalities of the existing unevenness of gains and losses between peoples in the world seem frozen in the container of a supposedly peaceful world composed of liberal democracies".<sup>26</sup> It is primarily this tendency toward the export of a particular species of liberal democracy that generates skepticism for the right to democratic governance, particularly as described by Franck and his disciples.

### *Democratic Governance and International Legitimacy*

The separation of utopian theory and self-interested state practice that keeps the right to democratic governance from becoming a universally

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enforceable international law is evident in both the value-laden tenor of Franck's arguments and the pitifully "thin" version of democracy that he sees as fulfilling the right to democratic governance. Franck's arguments seem to be founded in examples

of significant state practice and *opinio juris*. However, there is also evidence that effective control is still considered the main test of legitimacy.<sup>27</sup> Brad R. Roth argues that effective control is a sign of popular consent and adherence to the rule of sovereign equality, except in instances of widespread human rights abuse, is merely the acceptance of plural ideologies.<sup>28</sup> His main contention that practicality and the rule of sovereign equality continue to

dictate legitimacy in international law is particularly persuasive in light of United State's welcome of non-democratic regimes such as Pakistan into the international coalition against terrorism.<sup>29</sup> Popular consent and democratic governance both play a role in the recognition of state legitimacy but recognition is also based on other political and economic considerations. Similarly, a stable, if non-democratic, government conforms to the declarative theory of statehood by performing the functions of a state both domestically and internationally, regardless of recognition. This descriptive assessment of the role of democratic governance in determining state legitimacy within the international community illustrates the normative quality of Franck's arguments.

Despite the evidence he presents, Franck's argument remains largely prescriptive in its suggestion that the acceptance of the international community of a state's genuine democratic governance should be the test of global legitimacy. Franck himself admits that although there is a trend towards international rules and processes for basing state legitimacy on democratic governance, these are

<sup>24</sup> Carsten Stahn. "Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?" 113.

<sup>25</sup> *International Covenant on Civil and Political Rights*, Article 1.1.

<sup>26</sup> Richard. Falks Rev. of "The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology, by Susan Marks." 266.

<sup>27</sup> Alain Pellet. Rev. of "Government Illegitimacy in International Law", by Brad R. Roth." *The American Journal Of International Law*. Vol. 94, No. 2 (Apr 2000): 419-421. Jan 2009 (JSTOR) 420.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid. : Euan Macdonald. "International Law, Democratic Governance and September the 11th" 11



not yet recognised in international law.<sup>30</sup> The difficulty with Franck's attempt to identify the right to democratic governance and its legitimizing force within the international community is that it undermines his normative argument. He uncritically conflates the normative goal of "the right of people to be consulted and to participate in the process by which political values are reconciled and choices made" with the promotion and practice of liberal democracy, electoral monitority and military intervention.<sup>31</sup> The impoverishment of the ideal of democratic governance in practice is particularly evident in Franck's use of UN election monitority in Nicaragua as an example of the "recent surge of [democratic] entitlement" coming, as it did, on the heels of unilateral US intervention against a democratically elected leader in that country.<sup>32</sup> Even if the international community considers that these governments are not actually legitimate, "foreign officials must act as if they were legitimate, that is, must not make war against them" because to do so is to forgo "the respect that foreigners owe to a historic community and to its internal life".<sup>33</sup> An examination of Franck's uncritical salutation of the rise of democratic governance illustrates that this right as it is expressed in the *Universal Declaration of Human Rights* and the *International Covenant on Civil and Political Rights* is far from the reality of liberal democratic practice that is promoted by the West throughout the globe.

### SHOULD THERE BE A RIGHT TO DEMOCRATIC GOVERNANCE?

#### *Democratic Peace Theory: The Justification of Peace*

One central argument for the universal promotion of liberal democracy is the democratic peace theory, which was first presented by Emmanuel Kant in the essay *Perpetual Peace*. Kant suggests that in a republic the people who bear the burden of war are the same as those who must consent to war, making them

unlikely to do so.<sup>34</sup> This principle is taken up and expanded upon by numerous supporters of liberal democracy and the right to democratic governance.<sup>35</sup> The argument reads as follows: Since peace is of the highest concern to the international community, and since liberal democracies are invariably pacifist, the right to democratic governance should have pre-eminence as the right that brings peace. Michael Doyle defines the requirements for a perpetual peace as "formal democracy; a market economy based on private property rights; respect for other civil and political rights" and a separate judicial system committed to the rule of law".<sup>36</sup> This makes logical sense; states that are economically interdependent and share similar values, ideological convictions and governments structures seem less likely to disagree and more likely to avoid aggressive solutions to any disagreements that do arise.<sup>37</sup> Similarly, it seems natural that states whose citizens bear the cost of war will vote for peaceful representatives and vote against any political parties who unwisely enter or prolong war. If it is the case that joint liberal democracies are inherently peaceful, both a right to democratic governance and forceful intervention in defence of democracy seem justified.

However, in contradiction to the logic of the democratic peace theory, empirical evidence suggests that joint liberal democracies are not always peaceful, particularly with regards to terrorist activity, and that the variable of liberal democracy may not be the determining factor in peace. Susan Werner argues persuasively that political similarity of any kind greatly reduces the risk of conflict between states.<sup>38</sup> In fact, "when data from the 20th century are excluded...similar democratic states are generally *more* conflict prone than are other types of politically similar states, not less as generally presumed".<sup>39</sup> Although the study also

<sup>34</sup> Emmanuel Kant. *Perpetual Peace: A Philosophical Sketch*. (1795) Vincent Ferraro Website, Jan 2009  
<<http://mtholyoke.edu/adad/ntrel/feros-pg.html>>.

<sup>35</sup> Euan Macdonald. "International Law, Democratic Governance and September the 11th"

<sup>36</sup> Ibid. 5.

<sup>37</sup> Suzanne Werner. "The Effects of Political Similarity on the Onset of Militarized Disputes, 1816-1985." *Political Research Quarterly*. Vol. 53, No. 2 (Jun 2000): 343-374. Jan 2009 (JSTOR) 344.

<sup>38</sup> Ibid.

<sup>39</sup> Ibid. 365.

<sup>30</sup> Thomas M. Franck, "Legitimacy and the Democratic Entitlement" 27.

<sup>31</sup> Ibid. 25.

<sup>32</sup> Ibid. 35.

<sup>33</sup> Michael Walzer. "The Moral Standing of States: A Response to Four Critiques." *Philosophy and Public Affairs*. Vol. 9, No. 3 (Spring 1980): 209-229. Jan 2009 (JSTOR) 216, 212.



showed that joint liberal democracies are usually pacific, there remains compelling evidence that democracy is not inherently peaceful. If peace is a function of political similarity, then the 'democratic peace' is merely a reflection of the status of liberal democracy as the dominant global ideology. Liberal democracies may actually be more prone to conflict with other non-liberal states as "the liberal ideology upon which democratic institutions rest may in fact inherently produce such crusading tendencies".<sup>40</sup> Similarly, although joint liberal democracies tend to be pacifism at the state level, a study by Eubank and Weinberg found that "terrorist attacks occur most often in stable democracies and that both the perpetrators and victims of those attacks are from the same democratic states".<sup>41</sup> However, this study is not uncontested. It does seem likely that certain aspects of liberal democracy, such as the marginalization of minority groups, the suppression of genuine pluralism and general subservience to the market, would promote terrorist activities.<sup>42</sup> However, other integral aspects of democracy, like democratic participation and increased political efficacy, are equally likely to reduce transnational terrorism.<sup>43</sup> Regardless, the prevalence of both terrorists from democratic states and terrorist attacks in democratic states contradicts the democratic peace theory in a way Kant could not have foreseen. The democratic peace theory seems to justify international support for the right to democratic governance in the interests of peace. However, empirical evidence suggests that liberal democracy is not always the form of governance most conducive to peace on the level of both the state and the individual. Further, empirical studies also suggest that the liberal and democratic quality of governments may be irrelevant to their peacefulness, with political similarity being the deciding factor in peace.<sup>44</sup> An additional critique of the democratic peace theory does not disprove it empirically but attempts to dismantle the ideology of liberal democracy and illustrate the danger of

promoting a single form of global governance and economic practice.

### *Ideal Democracy: Liberal Ideology and Illiberal Action*

The ideal of a right to democratic governance as the self-determination and self-governance of all peoples is discernable in international law. However, this "utopian" goal is in tension with both the liberal democratic ideology of Western states, transnational corporations and some transnational organization, and the reality of global democratic practice. Although this gap between reality and ideal generates a positive space for critiquing the growing liberal democratic hegemony, it leaves little hope for achieving radical democracy and self-governance in either the developed or developing world.

Democracy is defined as government by the will of the people. The only recognised way to determine the will of the people is through the mechanism of genuine, periodic and competitive elections, ensured by civil rights, equal access to media, and the rule of law.<sup>45</sup> However, concentration on standardized electoral procedures as the instrument of democratic rule has diminished the understanding of democracy as "self-government, and not just about legitimating government by others".<sup>46</sup> This is because citizens of the liberal Western states that stand as a template for successful democracy have themselves forgotten, or perhaps have never experienced, the power of radical democracy and true self-government. Democracy in its true form embodies the belief that "freedom is our natural right and essential need" as human beings.<sup>47</sup> Even in the most well established of democracies this vision of radical freedom and self-governance remains unrealised. For Chomsky the remarkable fact is not that humanity yearns toward radical freedom but that the few are largely content to be ruled by the many.<sup>48</sup> The more nominally free a population is,

<sup>40</sup> Ibid. 346.

<sup>41</sup> Quan Li. "Does Democracy Promote or Reduce Transnational Terrorist Incidents?" *The Journal of Conflict Resolution*. Vol. 49, No. 2, (Apr. 2005): 278-297. Jan 2009 (JSTOR) 279.

<sup>42</sup> Ibid. 294.

<sup>43</sup> Ibid.

<sup>44</sup> Suzanne Werner. "The Effects of Political Similarity on the Onset of Militarized Disputes, 1816-1985." 365.

<sup>45</sup> Thomas M. Franck, "Legitimacy and the Democratic Entitlement" 25-26., Susan Marks. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. (Oxford: Oxford UP, 2003.) 1., Euan Macdonald. "International Law, Democratic Governance and September the 11th" 1-2.

<sup>46</sup> Susan Marks. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. 2.

<sup>47</sup> Noam Chomsky. *Chomsky on Anarchism*. Ed. Bary Pateman. (Edinburgh: AK Press, 2005) 162.

<sup>48</sup> Ibid. 155.



the more deeply entrenched the ideology of passivity and submissiveness must become.<sup>49</sup> The need to subdue the "ignorant masses" from "interfering with public affairs" comes from the fear of genuinely popular government and the protection of inequality by the wealthy:

"Control over investments, production, commerce, finance, conditions of work, and other crucial aspects of social policy lies in private hands, and the same is true of articulate expression, largely dominated by major corporations that sell audiences to advertisers and naturally reflect the interest of the owners and their market".<sup>50</sup>

Because all major parties running for office within most liberal democracies have fundamentally similar economic policies, that is, they support varying degrees of liberal free market capitalism, the central democratic tenant of choice becomes a mere illusion.<sup>51</sup> In the United States, for example, "since both major political parties accept the main precepts of neo-liberalism, political debate and outcomes, especially with regard to economic issues, lose most of their relevance for the citizenry".<sup>52</sup> This goes a long way to explaining political apathy and poor voter turnout in the US. When individuals do attempt to exercise their democratic right to present an alternative to the ruling elite they are forcibly rebuffed. This brand of "militant democracy" places "certain core foundational values beyond the reach of the democratic process".<sup>53</sup>

Recent examples include "the 2004 banning by the Belgian High Court of the Vlaams Blok, a Flemish independence party," the 2005 proposal in the United Kingdom "to ban an Islamic political party, Hizb-ut-Tahrir," the 2003 proscription of Batasuna, "a political party which supported the formation of a separate Basque state," and the 1998 dissolution of

the United Communist Party of Turkey, among numerous others.<sup>54</sup> Total democracy cannot be allowed both because radical political parties threaten the status quo and because there remains an elitist perception that "the people" are not actually capable of determining their own interests.<sup>55</sup> Here, democracy is not understood as the right to any choice of government, but only a legitimate choice, where legitimacy is no longer conferred solely by the people but is now dictated by some outside body.

Emerging democracies are similarly hobbled in their ability to shape their own identity by economic and political pressure from dominant world powers.<sup>56</sup> In the Haitian intervention, often touted as an example of legitimate multilateral intervention in defence of

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democracy, President Aristide was reinstated only on the condition that "economic policies be adopted which essentially reflect those required by the IMF—an export-driven trade and investment policy intended to open Haiti to both foreign investment and imports".<sup>57</sup>

New democracies are also more at risk of being subsumed within the processes of globalisation by which "the fate of national communities is increasingly shaped by decisions taken outside the framework of national political institutions—in other countries, but also in international organizations, informal meeting of national and international officials, and the 'private' domain of global markets.<sup>58</sup> It is possible that the current financial crisis may result in further questioning of the dominance of transnational free market economic

<sup>49</sup> Ibid.

<sup>50</sup> Ibid. 157.

<sup>51</sup> Mansell, Meteyard and Thomson. "Legitimation, Sovereignty and Globalisation." from *A Critical Introduction to Law* (Cavendish 3rd ed 2003) 127.

<sup>52</sup> Richard. Falks Rev. of *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*, by Susan Marks." 266.

<sup>53</sup> Henry J. Stiner, Philip Alston and Ryan Goodman. *International Human Rights in Context: Law, Politics, Morals*. 3rd Ed. (Oxford: Oxford UP, 2008.) 980.

<sup>54</sup> Ibid. 981.

<sup>55</sup> Noam Chomsky. *Imperial Ambitions: Conversations on the Post-9/11 World*. Int. David Barsamian. (New York: Metropolitan, 2005.) 151-162.

<sup>56</sup> Mansell, Meteyard and Thomson. "Legitimation, Sovereignty and Globalisation." 158.

<sup>57</sup> Ibid. 131-2.

<sup>58</sup> Susan Marks. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. 2.



practice. The almost entirely unregulated liberalism currently practiced and promoted by the United States, the IMF and the WTO limits most peoples' freedom to choose a government that endorses socialist or protectionist economic practices. Developing countries may themselves buy into the dominant Western ideology, but as although often they, or at least some of their citizens, are often aware of the dangers of unfettered liberalism and consumerism, yet they remain powerless in the face of first world investment, aid, political pressure and military force. In a Western poll of Iraqis "50 percent said the United States wants to establish a democracy in Iraq but would not permit the Iraqi government to carry out its own policies without U.S. influence".<sup>59</sup> Such a regime might take the form of democracy but it will be devoid of all essential content of self-government and rule "by will of the people."

When states do practice real self-determination that runs counter to liberalism, the principle of democratic governance is quickly forgotten in favour of first world interest. One of the clearest examples of the predominance of liberalism over democracy is the US action in Nicaragua.<sup>60</sup> Franck is right to assert that the principle cause of war has become "how the means of a good life are distributed among peoples and person and whether people and persons are adequately consulted in the decisions that determine their life prospects".<sup>61</sup> But he seems blithely unaware that the distribution of 'the means of a good life' in liberal democracies is based primarily in the economic system of free market capitalism, and only secondarily in the political system of democracy. The model of democratic governance promoted by the West entails capitalism.

As such, Western interest in 'free and fair' elections and 'the basic principles of equality and the rule of law' extend only so far as free markets and liberal

ideology can follow. The ideal of democratic governance as "the basic democratic ideas of popular self-government and political equality" deserves to be protected and enforced.<sup>62</sup> However, in real terms, the so-called right to democratic governance means the right to hegemonic liberal ideology and the liberal democratic model of democracy.

## CONCLUSION:

### THEORETICAL DISTANCE AND POSSIBLE UTOPIA

The rhetoric of the right to democratic governance implies dangerous ideological undertones, but more problematic is the intersection between "utopia" and "apology" asserted by Franck in his identification of this right. Normative prescription must stay 'ahead' of state practice if there is to be any possibility of critique or transformation in international law. This is the central problem of the right to democratic governance. In its ideal form the right to democratic governance holds transformative power for all peoples to "freely determine their political status and freely pursue their economic, social and cultural development," but this ideal is always subject to the self-interested actions and ideology of reality.<sup>63</sup> The "thin democracy" copy of liberal templates envisaged by Franck and practiced in many countries, including the West, is an impoverished ideal. However, the project of radical democracy and the right to real democratic governance should not be abandoned. As Chomsky hopefully declaims: "The instinct for freedom can be dulled, and often is, but it has yet to be killed".<sup>64</sup> With constant critique from a normative perspective that describes how democracy *should* function and constant vigilance in not conflating the right to democratic governance with the neo-imperialist liberal democratic paradigm of the West, human freedom as it can only be realised under self-government remains a possible goal that is grounded in the international legal principle of the right to democratic governance.

<sup>59</sup> Noam Chomsky. *Imperial Ambitions: Conversations on the Post-9/11 World*.

<sup>60</sup> Michael Byers and Simon Chesterman. "'You, the People': pro-democratic intervention in international law." 280., Noam Chomsky. *Imperial Ambitions: Conversations on the Post-9/11 World*. 154, 165., James Crawford. "Democracy and the body of international law." 99.

<sup>61</sup> Thomas M. Franck, "Legitimacy and the Democratic Entitlement" 24.

<sup>62</sup> Susan Marks. *The Riddle of All Constitutions: International Law, Democracy, and the Critique of Ideology*. 4.

<sup>63</sup> International Covenant on Civil and Political Rights. Article 1.1

<sup>64</sup> Noam Chomsky. *Chomsky on Anarchism*. Ed. Bary Paterman. (Edinburgh: AK Press, 2005) 171.