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International Legal Encounters with Democracy

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Abstract

The language of democracy has become common in international law, the legal system that regulates relations between nation states. This interest in democracy has however largely ignored democracy at the international level and focused instead on national democratic standards. In this paper, I start by sketching the threadbare debates about democracy beyond political borders in international law and then turn to the way that international institutions have developed this concept, particularly in the peace and state-building boom associated with the end of the Cold War. The two contexts for democracy have taken different directions. In the case of democracy at the international level, the discussion has become polarised between global North and South, with democracy being promoted by the South as an omnibus agenda to remedy economic and political inequalities. In the case of democracies within states, international lawyers have taken democracy to have a fixed form, associated with specific institutional practices and structures, limiting its capacity for transformation.

Democracy beyond borders

The international legal system is based on fictions of state equality and state consent (Simpson, 1994). States, whatever their political and economic power, are assumed to be equal participants in the generation and application of principles of international law. The traditional sources of international law are based on the idea of states' voluntary

assumption of obligations – for example by becoming a party to a treaty or acquiescing in
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the development of rules of customary international law (Statute of the International Court of Justice, art. 38(1)). Many international institutions give all states, whatever their size and power, an equal vote. While these fictions have a democratic aura in the sense that they align with the idea of equality of rights of participation in a particular community or institution (Gould, 2013), discussed below, many other features of the international legal system acknowledge and reinforce the substantial power differentials between its participants. The special status of the permanent members of the United Nations Security Council and their capacity to veto resolutions are examples of this (Charter of the United Nations, ch V).

Developing states have had particular interest in applying notions of democracy within international institutions. In the United Nations General Assembly, where each member state has an equal vote, the majority of states are from the developing world, allowing it to shape the Assembly's agenda. This has caused friction between the Assembly and the Security Council in many different contexts, notably economic and military (Anghie, 2007; Zaum, 2008).

The democratic critique of international institutions has inspired two different types of response: proposals to restructure the Security Council to reduce the power of the permanent members and their associated veto power (Fassbender, 2003; Schrijver, 2007), and advocacy for global peoples' assemblies that would give voice to civil society and transnational interest groups (see e.g. Falk, 2007; *Widener Law Review*, 2007; Young, 2000, pp. 273–274). Both types of reform are animated by an idea of democracy based on broader participation in decision-making.

In 1996 United Nations Secretary-General Boutros Boutros-Ghali's *An Agenda for Democratization* addressed the implications of democracy at the international level in a general and abstract manner. He argued that it was difficult to endorse democracy within states if the international system was itself undemocratic (para. 67). He referred to 'substantial differences' between democracy within states and democracy among state-based institutions (para. 61), arguing that '[d]ominance by one country or group of countries must over time evolve into a democratic international system in which all countries can participate, along with new non-State actors involved in international affairs' (para. 70). Boutros-Ghali hinted at, but did not develop, a redistributive element to international

democratisation, suggesting that it requires ‘the reduction of the North-South gap, so that all States are empowered to participate in the international political system, to which they all belong’ (para. 175).

The now defunct United Nations Commission on Human Rights was an important forum for the campaign by developing states and some powerful non-Western states to promote a version of democracy at the international level. This campaign seemed to be a response to a Western-sponsored series of resolutions on democracy *within* states, described in the next section. From 2001 onwards the Commission adopted a series of resolutions under the rubric ‘promotion of a democratic and equitable international order’ (see e.g. UN Doc E/CN.4/RES/2001/65, 25 April 2001), often sponsored by China, Cuba and Islamic states and routinely rejected by Western states on the Commission. These resolutions emphasised the economic and social dimensions of democracy. In defining democracy, they invoked concepts such as self-determination, permanent sovereignty over natural wealth and resources, the common heritage of mankind, the right to development, the principle of solidarity (which calls for the distribution of the costs of global challenges ‘in accordance with basic principles of equity and social justice’), and the right to a healthy environment. They also emphasised the concept of a new international economic order ‘based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems, which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries, and ensure steadily accelerating economic and social development and peace and justice for present and future generations’ (UN Doc E/CN.4/RES/2001/65, 25 April 2001).

The United Nations Human Rights Council, which replaced the Commission in 2006, has adopted annual resolutions on the promotion of a democratic and equitable international order, in similar terms to those of the Commission (see e.g. UN Doc A/HRC/RES/8/5, 18 June 2008; UN Doc A/HRC/RES/18/6, 13 October 2011). The 2016 resolution, for example, elides human rights language with the rights of states, linking the human right to equality between men and women with the equal rights ‘of nations large and small’ (UN Doc. A/HRC/RES/33/3, 6 October 2016, Preamble).¹ The resolution emphasises multilateralism in responding both to economic and social issues as well as

threats to international peace and security and insists that in these contexts 'the central role must be played by the United Nations as the most universal and representative organization in the world'. It contains many references to the inequality of the global economic order, calling for realisation of a suite of rights championed by developing states, including the right to self-determination, to permanent sovereignty over natural wealth and resources, and to development. These resolutions on a democratic and equitable international order are invariably supported by a coalition of African, Asian, Islamic and Latin American states along with China and Russia and are opposed by all Western members of the Council. This voting pattern was repeated when, in 2011, the Human Rights Council adopted a mandate for an Independent Expert on the Promotion of a Democratic and Equitable International Order (UN Doc A/HRC/RES/18/6, 13 October 2011), whose term has now been extended until 2017. In his annual reports, the Independent Expert, Alfred de Zayas, has criticised both military expenditure and free trade agreements as obstacles to international democracy.²

Ideas about international forms of democracy have also accorded prominence to the role of non-state actors as participants in the formal international system (Thérien and Bélanger Dumontier, 2009). This approach is in some tension with the state-oriented version of international democracy evident in Human Rights Council resolutions. In 2003 the United Nations General Assembly adopted a resolution endorsing 'the right to equitable participation of all, without any discrimination, in domestic and global decision-making' (UN Doc. A/RES/57/213, 25 February 2003).³ The following year the Cardoso report on UN-Civil Society Relations endorsed 'participatory democracy and deeper accountability of institutions to the global public' (UN Doc. A/58/817, 11 June 2004, pp. 8–9). The democratisation of the United Nations was declared the central objective of the 2008 General Assembly session (UN Doc. GA/10744, 16 September 2008).

The increasing involvement of civil society in major United Nations conferences has been interpreted as a form of 'globalisation from below' (see, e.g. Brecher, 2000; Falk, 1997). For example the United Nations Conference on the Human Environment in Stockholm in 1972 attracted 134 non-government participants, while 50,000 people attended the non-government meetings attached to the 2009 United Nations Climate Change Conference in Copenhagen. While many scholars have celebrated the growth of a

global civil society as a force to democratise international politics and to destabilise the monopoly of states in this arena, these developments also raise questions about the representativeness and accountability of non-state actors. This may lead, rather than to globalisation from below, to what Jai Sen has termed 'globalisation from the middle' or the domination of progressive reform movements by civil society elites, typically men of middle or upper class or caste (Sen, 2007). Sen points out that this tendency effectively consolidates unequal social and political relations, undermining democracy by valuing participation over representation and accountability.

The campaign for democracy within international institutions has become ensnared in tensions between the global North and South. The polarisation is particularly evident in Human Rights Council debates, where the right to a democratic and equitable international order has become a code for resistance by the developing world against perceived Western domination and intervention. The expansion of international forms of democracy to include groups and individuals has however been resisted by both Northern and Southern states.

Democracy within states

International perspectives on democracy have been most fully elaborated in the context of requirements for democracy at the domestic level, within nation states.

Defining democracy

The term 'democracy' does not appear in the Charter of the United Nations and is not a prerequisite for membership of the organisation. Article 4 of the Charter simply provides that the United Nations is open to all 'peace-loving states'. While Cold War tensions restrained the development of the notion of democracy in the early days of the United Nations, decolonisation from the 1960s on prompted a thoroughgoing critique of the concept on the basis that it was fundamentally a Western political tool. The argument was that democracy is a product of Western thought and one that has been imposed in non-Western contexts. An example of such a critique is Singaporean Prime Minister Lee Kuan Yew's declaration in 1994 that he was 'not intellectually convinced that one-man, one-vote is the best [system]'. Nor did he believe the fundamental democratic principle 'that all men

are equal ... They are not' (Zakaria, 1994, pp. 119, 117). Other observers have accepted the value of democracy, but questioned the priority of democracy over more immediate concerns, claiming that democratisation is an unnecessary distraction that diverts attention and resources away from essential economic development and infrastructure projects (Emmert, 2007; Klein, 2004).

Yash Ghai has pointed out the dissonance between on one hand the rejection of democracy as a manifestation of Western hegemony by some Asian governments and, on the other hand, its significance for marginalised groups within Asia, such as indigenous peoples. This latter group have regularly used the language of democracy to challenge governmental monopolies on political power (Ghai, 1994).

The critique of democracy as a Western concept has reduced the willingness of the United Nations to develop a substantive notion of democracy. The approach has been to endorse democracy as a principle, but to remain vague about its content and meaning. For example, the second World Conference on Human Rights, held in Vienna in 1993, declared that:

Democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives. In the context of the above, the promotion and protection of human rights and fundamental freedoms at the national and international levels should be universal and conducted without conditions attached. The international community should support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world. (UN Doc. A/CONF.157/23, 12 July 1993, para. 8).

The elaboration of the notion of democracy by the United Nations occurred primarily in the Commission on Human Rights. The Commission adopted a series of resolutions on democracy from 1997 onwards, endorsing the process of democratisation of states and presenting 'free and fair elections [as] an essential feature of democracy' (see e.g. UN Doc. E/CN.4/RES/1999/57, 27 April 1999; UN Doc. E/CN.4/RES/2001/41, 23 April 2001). These resolutions also identified a range of civil and political rights, such as those to freedom of

expression, thought and association, as central to democracy. These resolutions were supported by Western members of the Commission, while non-Western states typically abstained from voting. Since the inception in 2006 of the Human Rights Council, whose structure has reduced the influence of Western states (Spohr, 2010), momentum has moved to the promotion of a democratic and equitable international order, described above.

A human right to democracy?

The concept of democracy has had its most extensive encounter with international law in the context of human rights. The drafting of the Universal Declaration of Human Rights (UDHR) in 1947–1948 prompted an explicit discussion of democracy, with much contention about the best form of governance for the protection of human rights (see Morsink, 1999). The final outcome of this debate was Article 21, which presents an election-focused notion of democracy, while not explicitly mentioning the idea of democracy:

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

...

(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections ...’.

Article 21 was later incorporated into Article 25 of the 1966 International Covenant on Civil and Political Rights (ICCPR) in a slightly amended form:

‘Every citizen shall have the right and the opportunity, without [discrimination] and without unreasonable restrictions: ...

(b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot (*International Covenant on Civil and Political Rights*, art. 25).

Henry Steiner (1988) has noted that the drafting history of Article 25 of the ICCPR 'reflects concern by states on both sides of the Cold War divide to ensure that their own system of politics was not in instant violation of [the provision]'. Neither the UDHR nor the ICCPR use the term 'democracy'. Article 29 of the UDHR refers to 'the general welfare in a democratic society' as a possible limitation on the exercise of rights (Morsink, 1999, pp. 63–5). Similarly, the ICCPR makes reference to 'a democratic society' in various articles in the context of permissible restrictions on human rights. For example, Article 14, the right to a fair trial, contemplates a closed trial where questions of 'national security in a democratic society' are at stake (see also ICCPR, arts. 21 and 22(2)).

Article 25 is noteworthy as the only ICCPR right that is confined to citizens. It is less than a right to democracy, but is rather a right of political participation and to political accountability through elections. While they are expressed in individual terms, however, Articles 25 (a) and (b) make full sense only in the context of a political society; to have meaning, they involve a collective enterprise. The tension between individual claims and the collective political context this creates has emerged in the jurisprudence of the ICCPR's monitoring body, the UN Human Rights Committee.

An example is a case brought against Namibia by a minority community, the Rehoboth Basters, for (among other things) violating Articles 25 (a) and (c) through merging the Baster community into regional electoral districts which effectively reduced their voting power (*Diergaardt v Namibia* (2000), Communication No. 760/1997, UN Doc. CCPR/C/69/D/760/1997). The Human Rights Committee found that these rights were individual rights that could not be asserted by the community as a whole (*Diergaardt v Namibia*, para. 10.8). A separate opinion by Martin Scheinin however criticised the Committee's insistence on the individual nature of Article 25 rights. He argued that:

there are situations where article 25 calls for special arrangements for rights of participation to be enjoyed by members of minorities and, in particular, indigenous

peoples. When such a situation arises, it is not sufficient under article 25 to afford individual members of such communities the individual right to vote in general elections. Some forms of local, regional or cultural autonomy may be called for in order to comply with the requirement of effective rights of participation. (*Diergaardt v Namibia* (2000))

The United Nations Human Rights Committee described Article 25 as lying 'at the core of democratic government based on the consent of the people' in a General Comment adopted in 1996 (UN Doc. CCPR/C/21/Rev.1/Add.7, 7 December 1996). The Committee read the provision as implicitly holding elected representatives accountable for the exercise of public power. It also articulated a duty on states to ensure that the right to vote can be exercised, including positive steps to reduce barriers to political participation such as poverty and illiteracy. The General Comment, however, provided a thin legal articulation of the value of democracy. It was mainly concerned with the details of electoral practices, although it noted the significance of citizen participation in the conduct of public affairs through 'public debate and dialogue with [political] representatives or through their capacity to organize themselves' (para. 8). While the General Comment also emphasised the protection and promotion of freedom of expression, assembly and association as 'essential conditions of the right to vote' (para. 12), it did not elaborate the connections between these rights and democracy.

Another treaty provision that supports a democratic ideal is common Article 1 of the two human rights covenants, the ICCPR and the International Covenant on Economic, Social and Cultural Rights, which proclaims the right to self-determination, including the right of a people to 'freely determine their political status' (*International Covenant on Economic, Social and Cultural Rights*). The link between self-determination and democracy was noted by Martin Scheinin in the case of *Diergaardt v Namibia*. He regarded Article 1 as affecting the interpretation of Article 25 of the ICCPR, allowing group, rather than individual, interests to be taken into account. The meaning of the promise that peoples have the right to 'freely determine their political status' is not immediately obvious. Crawford (2007, p. 333) argues that the right to self-determination does not necessarily mean the establishment of a form of government based on the idea of 'one vote, one value'. He points to cases such as Swaziland where the United Nations General Assembly has sanctioned governance by

traditional authorities (in Swaziland's case a hereditary monarchy) because they have the support of the people. In the case of Fiji, the United Nations approved the adoption of a constitution in 1970 that discriminated between racial groups, giving preference to Indigenous Fijians over Fijians of Indian ancestry (Crawford, 2007, p. 333). On the other hand, the minimum core of the right to self-determination must be government that has the support of the relevant people and in this sense, represent them (Crawford, 2007, p. 334).

But this proposition does not explain who constitutes 'the people'. The question is raised in an acute form, for example, in the case of the 1998 Nouméa Accord in New Caledonia, which was a response to a movement among the Kanak population for independence from France. Are the New Caledonian people simply the Indigenous population (which comprises about 44 per cent of the population), or do they include permanent and temporary residents of French origin? The Accord provides for a vote by 'the populations concerned' to decide the final status of the islands at a date to be fixed between 2014–2018, implying that there may be a voting system somewhat different to one vote one value (Crawford, 2007, p. 334, n 18).

Does all this add up to a human right to democracy? The assertion of such a right has divided international lawyers and is often presented at the outer edge of plausibility. As we have seen, international instruments at the global level provide a rickety structure for such a right. Nevertheless, the longstanding wariness of international lawyers about explicitly endorsing democracy as an international norm dissipated somewhat after the ending of the Cold War as part of the more general global pause in contestation over the value of democracy. In particular, international lawyers based in the United States began to articulate a right to democracy in international law.

In an influential article written early in the post-Cold War euphoria, Thomas Franck (1992) identified an 'emerging right to democratic governance' protected by 'collective international processes', based on what appeared to be the renaissance of electoral democracies and the increase of election monitoring by international institutions. He reflected on the contemporary tumult within the Soviet Union and the strong international reaction to the overthrow of President Aristide in Haiti in September 1991, observing a 'cosmic, but unmysterious, change' in the preparedness of governments to argue for a democratic entitlement (Franck, 1992, p. 47). But Franck's account of the content of the

right to democratic governance was limited: it was essentially a right to participation in elections, rather than to any particular political form or to any larger suite of human rights.

Some international lawyers have developed stronger claims about a human right to democracy. Thus Christina Cerna (1995), and Gregory Fox and Georg Nolte (1995) have argued that the legitimacy of governments should be assessed by international rather than national criteria, that the international requirement is of democratic government and that individuals everywhere have a right to democratic government (see also Steiner, 1988, 2008). Similarly, Steven Wheatley (2005) has contended that creating and sustaining democracy is an international legal obligation, enabling the international community to scrutinise the substance and processes of a state's political system. He has also suggested that international law endorses a form of Habermas' deliberative democracy – a system that engages citizens in active deliberation and allows broad participation in politics, resulting in consensus positions – as opposed to what he terms 'aggregative' democracy – a form of democracy that is focused on competitive elections (Wheatley, 2005, 2010).

Andrew Clapham and Susan Marks (2005, p. 68) have described the relationship of human rights and democracy as one of 'mutual dependence', but not one that can be expressed in terms of a human right to democracy. They chronicle problems of recognition of a right to democracy: the ambiguity of state practice supporting such a right; the troubling implications of a right to democracy in supporting 'the imperial project of remaking the world to suit the most powerful'; the potential for such a right to conflate democracy with simply regular elections; and the implication that national politics is the primary site for democracy, marginalising other arenas of collective decision-making, such as international and local arenas (Clapham and Marks, 2005, pp. 68–9). Henry Steiner (2008) takes a similar approach in depicting human rights and democracy as intertwined, as 'two sides of the same coin', yet resists the definition of a human right to democracy.

Steiner's hesitations rest on a distinction between human rights as a question of law and democracy as a question of politics: in this sense the problem of a human right to democracy is one of incompatible categories, despite their parallel evolution and histories. He regards human rights as having a much richer texture and systematic quality reflected in legal principles; while democracy belongs in the realm of contestation and politics (Steiner, 1988). This account does not however acknowledge the intensely political function of

human rights law. Its regulative capacity derives from the provision of an authoritative vocabulary of critique of institutional power as well as standards by which power can be held accountable (Koskenniemi, 2011).

Democracy as a technology of peace

Democracy-building has now become a standard technology in international relations to respond to conflict. Democracy-building appears on the agenda when a 'fragile', 'failing', 'failed', 'rogue', 'weak' or 'post-conflict' state is on the horizon. These terms echo the language of the League of Nations' Covenant – those peoples who are unable to cope with 'the strenuous conditions of the modern world' (art. 18). They not only justify intervention but demarcate outsiders and 'others', who are quite distinct from 'our' successful, strong democracies. As Nehal Bhuta (2009) has pointed out, the idea that democracy can be introduced and nurtured by the international community provides a plausible exit from a trouble spot: once the institutions of democracy are in place, it appears safe to leave government in local hands, whatever the realities. Most democracy-promotion and democracy-building projects take place in the non-Western world under the supervision of Western states or Western-dominated institutions. When democratisation is on the agenda, international organisations tend to translate democracy into a checklist of processes and institutions such as elections, political parties, human rights, rule of law, legislative and judicial institutions, and free markets. Similarly, conceptions of democracy advanced internationally tend to mimic the governance structures of the proposers. They are generally technical and procedural and do not attend to local contexts.

International lawyers have only recently begun to pay attention to state-building and democratisation. There is lively discussion of the legality of the enterprise when it is conducted in the aftermath of an invasion, such as in the case of Iraq in 2003 (see e.g. Fox, 2008; Stahn and Kleffner, 2008). But, as a discipline, international law has tended to assume that there are few legal issues in democratisation if the affected state has agreed to an international presence (see e.g. Farer 2004).

The evidence suggests however that the practice of democracy-building as an international response to conflict has been a flawed enterprise. First, a preoccupation with

elections has become a feature of the international democracy-promotion industry in post-conflict societies. Its attractions are easy to understand: elections pass political and financial responsibility from an international intervener to local groups and allow a respectable departure; elections can also legitimise a flawed international intervention (Korhonen, 2003).

The centrality of elections to democracy can be challenged, however, when viewed in the context of specific democracy-building exercises. For example, in East Timor, the focus of UNTAET's work was the first multi-party election in 2002. The election quickly became the dominant symbol of democracy, although in East Timor an election was an alien concept because of the local unitary and hierarchical idea of political power (Hohe, 2004). The association of elections with democratic transition in Iraq also proved inaccurate. The electoral process did not create conditions of equality between citizens and equality of access to public life and decision-making. James Dobbins (2004) has observed of Iraq that '[e]lections in conditions of insecurity tend to polarize rather than unite societies ... The winners typically are not centrist figures or moderate reformers but militant leaders who appeal to their constituents' most basic religious, ethnic and tribal identities'. The consequences in Iraq of such divisiveness have been brutal.

A second feature of democracy-building projects is that they tend to nurture some centres of power and to neglect others. For example, these projects have advantaged existing elites and reinforced the marginalisation of women in public life. In East Timor, independence has empowered a largely male cadre of resistance fighters, allowing the reassertion of traditional masculinities (Braithwaite *et al.*, 2012; Graydon, 2009). And the forms of democracy introduced in Iraq under Western sponsorship have privileged particular forms of religiously-charged masculinity. The post-invasion Constitution accords 25 per cent of legislative seats to women, but this has had little effect on government as political leaders have failed to include women in cabinet positions. Some Saddam-era reforms, such as equal treatment of women in the law relating to divorce and child custody, have been rescinded, to be replaced by religiously-based laws. The violence and insecurity of daily life in Iraq has caused many women to leave the workforce, and has also resulted in an increase in domestic violence (Beaumont, 2013; United Nations Assistance Mission for Iraq, 2013).

Third, democracy-building is often viewed as a project of nurturing internationally-oriented groups who can administer locally but who also are sympathetic to integrating the country into the global economic system (Chimni, 2005). In contrast to the fear of communism that affected the post-Second World War experiments in democracy, post-Cold War democracy-building has been guided by neo-liberal values. This has involved assigning limited powers to the state and assuming the benign regulatory power of the free market (Lacher, 2007). The aim of democracy appears as creating the form of advanced capitalist societies, reducing state intervention in economic life and the liberalisation of trade and capital. The Bretton Woods institutions in particular have treated democracy promotion as, in Béatrice Hibou's (2002, p. 174) words, 'simply a technical and supplementary element, only mobilised to reinforce the prevailing economic catechism of export-oriented free markets with little state intervention'. The linkage of democracy-building to the 'war against terror', sparked by the events of 11 September 2001, has also limited the horizons of democracy-building, giving much greater emphasis to increasing military and police forces than to ensuring public participation in government.

Overall, the restricted ideas of democracy that have informed much democracy-building have curtailed its promise. The focus has been on quick exits and building institutions familiar to Western democracies, while ignoring local forms of accountability and participation. The effect has been to shore up existing dispensations of power and privilege. These problems were tacitly acknowledged in United Nations Secretary-General Ban Ki Moon's 'Guidance Note on Democracy', issued in October 2009.⁴

The Guidance Note on Democracy offers a more detailed and direct account of international practice than Secretary-General Boutros-Ghali's 1996 *Agenda for Democratization*, discussed above. It commits the United Nations to 'principled, coherent and consistent action in support of democracy' (Guidance Note of the Secretary-General on Democracy, 2009, p. 1). The Note ties democracy to the rule of law, defined as a system of accountability to laws that are 'publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards' (p. 7). Democracy is described ambitiously in the Note as 'ultimately a means to achieve international peace and security, economic and social progress and development, and respect for human rights' (p. 2). The Guidance Note goes beyond the context of post-conflict

democracy-building and sets out generally applicable principles, identifying a 'triple challenge' for democratic practice that covers all United Nations members: building or restoring democracies, preserving democracies and enhancing the quality of democracies (p. 1).

The aim of the Guidance Note on Democracy is to articulate the United Nations framework for democracy 'based on universal principles, norms and standards, emphasizing the internationally agreed normative content' (p. 1). The normative content identified in the Note is however rather elusive. To some extent, the Note attempts to retrofit democracy into the sparse language of the Charter of the United Nations, claiming that 'democratic principles are woven throughout the normative fabric of the United Nations' (p. 2). In support of this reading, the Note points to the opening words of the Charter, 'We the peoples' and later general references to human rights as well as referring to the rather thin democratic language of the Universal Declaration of Human Rights, reviewed above.

While emphasising the mantra that 'there is no single model of democracy', and that it is 'rooted in philosophies and traditions from many parts of the world', the Guidance Note offers what it terms a 'holistic' understanding of democracy, promising to transcend an intriguing set of dichotomies. It claims to encompass 'the procedural and the substantive; formal institutions and informal processes; majorities and minorities; men and women; governments and civil society; the political and the economic; at the national and the local levels' (p. 2). The Note however compiles references to democracy in United Nations documents rather integrating or extending them. It invokes the language of self-determination by declaring that 'democracy is a universal value based on the freely expressed will of people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives' (pp. 2, 5).

The Note recognises accountability and transparency as elements of democracy (pp. 5, 7). It refers also to the protection of human rights, although it gives prominence only to civil and political rights, such as freedom of opinion, expression, association and assembly. The Note endorses both the importance of free and fair elections and political parties to democracy as well as opportunities for public deliberation outside the election context (pp. 5–6).

The most striking aspect of the Guidance Note is its formulation of principles for effective democracy assistance, which has the air of an extended institutional *mea culpa* (pp. 3–4; OECD Principles for Good International Engagement in Fragile States and Situations, 4 April 2007). It calls for ‘a proactive approach’ to both immediate and structural threats to democracy and identifies in particular internal threats to democracy such as abuse of state power, corruption and structural discrimination and inequality, as well as unconstitutional changes of government. The Note evokes the Hippocratic oath in elaborating the principle of ‘do no harm’, referring to the international community’s encouragement of ‘ill-timed, and in particular premature elections ... in fragile societies’ which ‘have sometimes entrenched undemocratic, nationalist or extremist groups in power’. It refers to past practices of ‘[i]ll-conceived and poorly conceptualized programmes, and the promotion of inappropriate foreign models’ (Guidance Note of the Secretary-General on Democracy, 2009, p. 3).

The Note specifies the principle of upholding local ownership of democracy, through integrating local norms and processes ‘to the extent possible’, but it does not offer a resolution of potential conflicts of such norms with international principles. The Guidance Note’s acknowledgement of the significance of local ownership, and the need for local actors to explicitly request international assistance, also raises the question of who qualifies as ‘local actors’. Must this be a representative group or, as is often the case, can an elite cadre of men qualify? The Note implies the latter is inadequate and gives some prominence to broadening participation in democracy-building, identifying the familiar United Nations capacious categories of marginalised groups such as women, minorities, indigenous peoples, youth, displaced persons and the poor. Another significant ‘guiding principle’ for international democracy promotion in this respect is the call to address the effects of legal, economic and social discrimination against women.

The Note’s ‘Guiding Principles’ for international democracy assistance conclude by emphasising the long-term nature of democracy-building and caution against impatience with slow transitions. They also warn against over-investment in state institutions and call for a comprehensive approach that supports the growth of a strong civil society. Overall the principles represent a significant advance in thinking about democracy at the international level compared, for example, to the United Nations’ Human Rights Committee’s General

Comment on Article 25 of the International Covenant on Civil and Political Rights, discussed above, which hewed closely to the electoral focus of that provision. The Guidance Note also offers a more nuanced account of democracy than presented in the Commission on Human Rights' resolutions on a right to democracy, which were cast in general terms and assumed that national government was the only site for democracy (UN Doc. E/CN.4/RES/1999/57, 27 April 1999).

Conclusions

The language of democracy has become global although the practice of democracy remains fragile. The notion of democratisation beyond borders – of relations between states – has been invoked by the global South to challenge the economic, military and political power of the global North. By contrast, the promotion of national and local democracy has become a Northern project, tied to specific institutional forms and practices, particularly elections. International lawyers tend to downplay the relevance of law to global democracy, but emphasise its contribution to the development of democracy within states. For example, Jean d'Aspremont (2008, p. 13) has argued from cases of post-conflict democratisation that there is a 'march toward a universal community of democratic states'. He has also elaborated a principle of 'democratic standstill' by which he means that coups against democratic governments are not accepted internationally. D'Aspremont (2011, p. 554) situates these developments as contributing to an international customary obligation to 'consider the adoption of the main characteristics of a democratic regime' (Marks, 2011).⁵

The assumption that legal principles can bring about political and social change risks what Gunther Frankenberg (1985, p. 445) identifies as legocentrism – where 'law is treated as ... the natural path to the ideal ... conflict resolutions and ultimately to social order guaranteeing peace and harmony'. International law however can only be one element in encouraging democracy. It is a strand in a fabric of regulation, where the strength of each strand by itself may be rather weak (Braithwaite, 2012). The strength of the fabric as a whole, as well as its design, comes from the process of weaving multiple strands together, as warp and woof. We can think of the democratic fabric as including economic,

sociological, cultural, historical and legal threads. By themselves each set would have little impact, but woven together they make the fabric more resilient.

In this context, the power of international law lies in its capacity to articulate emancipatory potential, for example though 'the regulative idea of universal community, independent of particular interests or desires' (Koskeniemi, 2007, p. 30). Such an ideal can challenge accounts of democracy as basically a technical process. One way to draw on the idea of a universal community contained in the international legal tradition is to focus on what we might want democracy for. The basic impulse for democracy, I suggest, is accountability for the use of power and the prevention of its arbitrary exercise (Braithwaite, 1997). A mechanism to counter the aggregation of power in a single entity is the republican commitment to the dispersal or separation of powers. This goes beyond the familiar constitutional principle of the tripartite separation of legislative, executive and judicial powers, extending to the independence of the media and civil society from governmental influence so that they can hold the executive to account. In practice, achieving the separation of powers will always involve a struggle to ensure both that separated powers have the capacity to perform their respective functions, and that 'no one centre of power is so dominant that it can crush any other separated power without the other separated powers mobilising to defeat that domination from the centre' (Braithwaite *et al.*, 2012, p. 128). Another condition to enhance accountability and diminish the potential for arbitrary exercise of political power is that of participation: the idea that all members of a polity are 'considered both author of the laws and subject to them' (Benhabib, 2005).

The protection of human rights is critical to these two democratic processes. First, human rights provide a check on the exercise of political power by defining limits to it that reflect conditions of lives of dignity and value. Second, human rights offer a basis to insist that people have some equality in participation in decision-making, for example, rights to freedom of assembly, belief, speech, non-discrimination and to basic needs. Protection of these rights would ensure that opportunities for participation are not confined to those with greater status, resources and power.

Susan Marks has proposed a conception of democracy that captures these ideas, drawing on the work of David Beetham (1999). On Marks' account, democracy should be understood as self-rule on the basis of equality between citizens, resting on principles of

popular control and political equality (Clapham and Marks, 2005; Marks, 2003). This entails popular participation in and control over decisions, and equality of respect and voice between citizens in the exercise of that control. Marks' reference to citizens may limit the context of the definition, while Carol Gould (2013, p. 292) has cast a similar idea more broadly: 'Democracy is ... a form of decision-making involving equal rights of participation among the members of a given community or institution'. This formulation is useful in analysing democracy beyond borders. It foregrounds the promise of participation inherent in the concept of democracy, which has ensured its galvanising power over many centuries. At the same time, it reduces the significance of particular institutions – such as legislatures, political parties and electoral rules – as necessary for democracy (Buchstein and Jörke, 2007).

The idea of inclusion at the centre of Marks' and Gould's accounts reaches beyond institutional forms of democracy to emphasise the 'enlarge[ment of] opportunities for popular participation in political processes and [to] end social practices that systematically marginalize some citizens while empowering others' (Marks, 2003, p. 109). On this account, actions are democratic if they are the product of collective decision-making by politically equal participants. In other words, opportunities for political engagement are critical. Marks' notion of democracy makes central the notion of self-government, rather than the legitimization of government by others. These concepts are inherent, even if under-theorised, in the idea of self-determination in international law.

International law should support a substantive definition of democracy tied to values, such as the accountability of political power and the creation of conditions of equality between participants in decisions. Such a notion of democracy draws attention to the quality of decision-making more than formal institutions and processes.⁶ It challenges the international consensus that elections are central for the creation of democracy at a domestic level, suggesting that elections should not be rushed, particularly following a period of violent conflict, and that energy should be devoted to public conversations about major social issues.

Understanding the goal of democracy as accountability for and prevention of the arbitrary use of power also indicates the futility of devising formulas for democracy, or associating democracy with a fixed set of institutions, in the manner, for example, of

Freedom House (2013) which assigns a numerical weighting to the observance of certain civil and political rights in particular countries. This type of exercise gives a quasi-scientific air to a contestable assessment of issues such as the level of freedom from domination of political choices. It also positions people as spectators of political debates, rather than as active participants in them. The notion of self-government by equal participants, in contrast, gives prominence to identifying and strengthening local practices and institutions that enhance self-government and responding to social and economic inequalities as they affect the capacity to access to political power (Marks, 2003). For example, it would draw attention to the substantive conditions of participation and the way that private power affects the capacity to participate in politics. This distortion has been well-documented in the case of the muffling of women's voices through traditions of discrimination and through violence against them. A conception of democracy as self-government on the basis of equality also raises questions about the relationship between participation and representation, specifically the accountability of representatives (Phillips, 1991, 1993). At a broader level, this version of democracy poses a challenge to the idea of state sovereignty preserved in many areas of international law because the idea of a magisterial, decisive sovereign does not sit easily with the principles of separation of power and equality of participation.

Democracy has become an international product, spruiked by international institutions and political leaders, deliverable through a series of actions and programmes. This development has mischaracterised the nature of democracy, which is more accurately understood as a constant journey, with inevitable setbacks, missteps and dead ends, allowing both democratic and undemocratic practices to co-exist at the local, national and international levels.

Progress towards democracy will always be tentative and insecure and it relies on debate, discussion and experimentation. International law needs to develop a richer and less programmatic understanding of democracy than that in current use. If the purpose of democracy is to increase accountability for the use of power, it must adapt both to the workings of international institutions as well as to local circumstances, focusing less on formal manifestations and processes and more on how relationships of power are managed.

Notes

1. This elision is also evident in para. 6 (i) which refers to 'the principle of equitable regional and gender-balanced representation in the composition of the staff of the United Nations system'.
2. Unlike the HRC resolutions, the Independent Expert has suggested that 'the emergence of a democratic international order would be advanced by the participation of a growing number of States which implement democratic principles domestically.' See UN Doc. A/HRC/21/45, para. 41 (2 August 2012).
3. Similar resolutions were adopted in 2005 and 2007.
4. 'Guidance Notes' are a device to identify principles and policies to guide United Nations action in various fields, based on international law and practice. They are however considered 'internal' documents, a status marked by the lack of an official United Nations document number. The Secretary-General has issued Guidance Notes on a range of topics including rule of law assistance (2008), justice for children (2008), constitution-making processes (2009), transitional justice (2010), statelessness (2011), racial discrimination and protection of minorities (2013) and effective use and development of national capacity in post-conflict contexts (2013).
5. d'Aspremont (2011, pp. 559–565), however, has suggested that a range of recent factors, such as the growth of non-democratic super-powers and the impact of the 2007–2010 economic crisis, have undermined the consolidation of such a principle.
6. This approach is reflected in the European Commission's *Programming Guide for Strategy Papers*, December 2008, http://ec.europa.eu/development/icenter/repository/F20_human_rights_en.pdf: 'For the purposes of mainstreaming 'democracy' into the Community's development cooperation and external assistance, the understanding of democracy should be that of a system of political governance whose decision-making power is subject to the controlling influence of citizens who are considered political equals. A democratic political system is inclusive, participatory, representative, accountable, transparent and responsive to citizens' aspirations and expectations'.

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GRAPHICAL TOC

If the purpose of democracy is to increase accountability for the use of power, it must adapt both to the workings of international institutions as well as to local circumstances, focusing less on formal manifestations and processes and more on how relationships of power are managed.