

DEMOCRATIC GOVERNANCE AND
INTERNATIONAL LAW,
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REVIEWED BY

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I

The Revolutions of 1989 are now more than twelve years in the past. Pundits and academics have spent much of the subsequent period proposing new paradigms for the current era. International legal experts, not surprisingly, have also joined the fray. The book under review, *Democratic Governance and International Law*, represents one of the more provocative outgrowths of this intellectual exercise.

As argued by the book's editors, the post-cold war period has yielded a group of scholars who identify "a democratic entitlement" as an emerging principle of international law. As stated by the editors, the thesis suggests that "whereas intrusive political, economic and military measures would previously have been excluded as violative of international law, they may now be included on the menu of lawful options for foreign powers seeking – collectively or perhaps even unilaterally – to implement democratization in a recalcitrant state" (p. 12). This potentially far-reaching thesis is thoroughly examined in *Democratic Governance and International Law* through a rich collection of essays that not only describe the arguments underlying the democratic entitlement school and the implications derived therefrom, but also offer cogent criticisms of the notion of a democratic entitlement.

Given the diverse nature of the collection, this book review cannot adequately critique each of the chapters. Instead, after providing a brief overview of the book's different sections, I will discuss several issues where I can offer a personal perspective. Specifically, I will comment on aspects of key elections in the 1980s, which laid the basis for the emergence of the democratic entitlement described in the volume. I will then discuss the implications of events in Bosnia, particularly developments leading up to the September 1996 elections, which unfortunately are given short shrift in this volume. Lastly, I will reflect upon the relationship between the development

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of the new "democratic entitlement" school and policy making circa 2001.

II

The introductory chapter does a superb job of outlining the book's central argument (which I will elaborate below), and the scope and consequences of the democratic entitlement thesis. The editors acknowledge that even adherents of a "democratic entitlement characterize it as an 'emerging' right" and concede that "expediency will ever undermine consistency in efforts to promote democracy" (p.13). The editors are also fair in summarizing many of the misgivings that scholars have expressed regarding the democratic entitlement, and indeed many of these skeptical views are included in this volume. The editors close their Introduction by offering their perspective on the importance of addressing the democratic entitlement directly as a legal, as opposed to a strictly policy, question, a point that I will return to in the last section of this review.

Following the Introduction, the editors open the collection with Thomas Franck's seminal article, which first appeared in a slightly different form in 1992 and which made the initial case for recognizing an emerging right of a democratic entitlement. Gregory Fox then follows with an elaboration on the arguments set forth in the Franck article and James Crawford provides a more general assessment of the right to democracy in the body of international legal doctrine.

In the second section of the collection, Sean Murphy examines the impact of the democratic entitlement on contemporary state recognition practice. Steve Schnably reviews the groundbreaking experience of the Inter-American system, including both political and juridical organs, in developing and addressing issues raised by the notion of a democratic entitlement. Lastly, Anne-Marie Slaughter describes the emergence of a transgovernmental order, with particular emphasis on the role that nongovernmental organizations (NGOs) in democratic states play in the current constellation of international relations.

The third section is the most provocative, dealing with democracy and the use of force. W. Michael Riesman argues that human rights considerations have introduced many variables into the determination of lawfulness regarding the use of force, suggesting that in appropriate circumstances "externally motivated actions aimed at removing an unpopular government" may be legally justifiable. (p. 257-58). Riesman's views are challenged by Michael Byers and Simon Chesterman. David Wipman then discusses the intriguing notion of "treaties of guarantee," whereby a state would authorize an intervention by one or more states in the event that the

democratic order is disrupted. Brad Roth, relying on traditional principles of international law, argues that such a treaty would be void from the outset. The last piece in this section by John Owen is a lengthy exploration of the idea of a democratic or liberal peace, where like-minded states do not, as a general matter, engage in external conflicts.

The fourth section shifts the focus to the content of the democratic entitlement. Fox and George Nolte examine whether contemporary international law and practice permit states to proscribe participation in electoral events or other political activities by parties whose purported goal is the undermining of the democratic order. Their conclusion accepting such proscriptions, albeit in highly circumscribed instances, is challenged in short essays by Martti Koskenniemi and Brad Roth, which is then followed by a Fox-Nolte rejoinder. The last chapter in this section is a very balanced essay by Steve Ratner exploring the potential tensions between stabilizing a democratic order and holding accountable those responsible for serious human rights abuses.

The last group of essays, authored respectively by Roth, Jan Knippers Black and Susan Marks, provide critical assessments of the democratic entitlement school. The three essays in this section emphasize the need to recognize that "democratization," at least as conventionally defined, is not the final piece in the puzzle for ensuring a more just or peaceful world, and other social and economic considerations must not be ignored.

The book's chapters are generally well-written, but the nature of this type of collection dictates a good deal of repetition, resulting in a tome that will be difficult for all but the most serious students of the subject to wade through. In addition, the book is written for a legal oriented, academic audience, with many of the essays having previously been published in law reviews and consequently footnote heavy. Hopefully, the excellent introductory chapter, written by co-editors Fox and Roth, will be read by a more widespread audience as the questions they discuss are of considerable importance to contemporary policymakers.

III

The central argument underlying the democratic entitlement school can be summarized as follows. The post-World War I period saw an emphasis on the principle of self-determination, which thus established a theoretical basis for individual choice as a basis for regime legitimacy. In the aftermath of World War II, more generalized human rights instruments were adopted, including a specific right of political participation. Article 21 of the Universal Declaration of Human Rights, typical of many such provisions,

acknowledged, *inter alia*, the right of citizens to participate in the conduct of public affairs and to vote and be elected in periodic and genuine elections. For a variety of reasons, the right of political participation as a core principle of international relations and as a key human rights precept was ignored or de-emphasized during much of the cold war era by most governments, intergovernmental organizations, human rights activists and academic scholars. However, with the November 1989 fall of the Berlin Wall and the virtually simultaneous end of the decolonization period marked by the transition process in Namibia, the international community began proactively promoting democratization within sovereign states in a range of circumstances, dramatically breaking with the previous hesitancy to avoid, at all costs, even appearing to intervene in the internal affairs of another state.

The lead-up to the 1990 elections in Nicaragua is duly recognized as a ground-breaking event in this evolution and is so cited by several of the authors in this volume. For the first time, the United Nations agreed to monitor elections in a sovereign state, as part of an effort to bolster the Central American peace process, which had been initiated a couple of years earlier. Moreover, the type of monitoring operation organized by the United Nations, and in parallel by the Organization of American States (OAS), went well beyond previous OAS practices of sending two or three notables to be present in a country on election day. Rather, the UN and OAS monitors were present for more than six months prior to the elections, evaluated all aspects of the electoral process, played a proactive role in facilitating agreement with respect to the electoral rules and, ultimately, helped ensure acceptance of the electoral results by the contesting political parties. The perceived success of this experience opened the gates for more active UN and regional organization involvement in electoral processes and democracy promotion more generally.

The UN and OAS involvement in the Nicaraguan elections was followed later the same year by a similar experience in Haiti. This time, the justification of contributing to the peaceful resolution of an on-going conflict was absent and the potentially far-reaching implications of sending election monitors to a sovereign country simply at the request of a government planning elections were well-understood by the Security Council members at the time. Moreover, when the Haitian government was overthrown in a 1991 coup, the UN participation in the previous year's election contributed to the decision by the international community to take unprecedented action, first in adopting sanctions and ultimately in authorizing use of force, to roll back the coup and restore the elected government to Haiti.

Several other contemporary events also contribute to academic recognition of an emerging right of democratic entitlement. These events

include the United Nations' extensive involvement in post-conflict elections in Cambodia, Angola and Mozambique, the establishment of an Electoral Assistance Unit at the United Nations, a spate of UN resolutions and Secretary-General pronouncements that emphasize the importance of democracy in contemporary international affairs, and the 1998 Security Council commendation of ECOWAS for taking action to reverse a coup in Sierra Leone. On the regional scene, the OAS and Organization of Cooperation and Security in Europe (OSCE) have been equally active: establishing democracy units; approving far-reaching, pro-democracy resolutions; sending election monitors to member states upon their request; and drawing attention to, and in some cases condemning, unfair elections. African and Asian nations have also demonstrated their appreciation of the role of the international community in the democracy promotion field by repeatedly calling upon the UN Electoral Assistance Unit to provide technical assistance regarding election matters, which were viewed as quintessentially of solely domestic concern prior to 1990.

This recitation of the historical record, with some changes in relative emphasis regarding specific post-1990 events, provides the basis for the identification of an emerging right of democratic entitlement and for the implications that flow from such a right. I strongly endorse the notion that there has been a dramatic change during the past decade in recognition of a right of political participation by governments and non-state actors, and in allowing international organizations to become directly involved in promoting democratic development, through election monitoring, technical assistance in support of electoral process and more general efforts to further incipient democratization processes. However, the authors of this volume do a disservice to the historical record and to an appreciation of what led to this dramatic shift in attitudes by beginning their recitations with the UN decision to monitor the 1990 Nicaraguan election.

Specifically, there is little reference to several dramatic events of the 1980s, which laid the basis for the transformations that were to follow. For example, the 1986 election in the Philippines, the 1988 plebiscite in Chile, the 1989 Senate elections in Poland, and the cumulative consequences of elections in different parts of the world created the policy environment in which a consensus regarding international organization involvement in elections could emerge. In each of these countries, there was an initial decision by pro-democracy activists to challenge an incumbent dictatorship through elections, notwithstanding concerns regarding the uneven playing field and the possibility for electoral manipulation. Rather than campaign on the basis of ideology, broad coalitions were formed to challenge the regime. The democratic activists participating in the elections, particularly in the

Philippines and Chile, appreciated the different roles that the international community could play in supporting their efforts and encouraged the presence of international election monitors and the provision of other assistance from abroad. Lastly, there was a good deal of communication from one region to another regarding organizing tactics, contributing to the rapid spread of both a democratization ethos and to an acceptance of international involvement, albeit by international NGOs and not until later by intergovernmental organizations, in the monitoring of elections.

These events deserve further analysis by those purporting to identify an emerging right of democratic entitlement. They reflect the reality that international law develops not only through UN resolutions or the sponsoring of missions, areas where international legal scholars feel comfortable exploring, but also develops as a result of actions by diverse states and non-state actors, who share a common attitude or approach for addressing a problem and work together or in parallel in order to ensure that the problem ultimately receives the attention that it deserves. Thus, the notion that elections could serve as a potentially transformational event in a country's history and that such elections deserved international support and encouragement emerged from these experiences in the 1980s, with little or no involvement of international organizations and few references to UN resolutions. Appropriately, and in retrospect, within a few years of these events, the UN and regional organizations were prepared to accommodate the doctrinal and practical changes, and to dedicate significant resources, in support of a broad right of democratic political participation.

IV

Bosnia provides a cautionary example for those excited by the prospects for a new world order represented by appreciation of, if not respect for, the democratic entitlement. On the one hand, the Dayton Peace Accords emphasized the role of electoral participation as an essential element of the agreement and, in fact, since the signing of the Accords in 1995 there have been a series of elections organized by the OSCE. On the other hand, the elections have not contributed to establishment of functioning multi-ethnic governmental institutions, as hoped for by the drafters of the Accords. The peace holds, but it is attributable, in large measure, to the continued presence of an international military force, rather than a meaningful reconciliation among the ethnic groups within the country.

I had the privilege to serve as an adviser to the OSCE team responsible for organizing the first post-Dayton elections in Bosnia in 1996. Despite the reservations of some (including myself), the framers of the

Accords viewed the expeditious occurrence of national and local elections as critical to the success of the peace process in the region. They were convinced that a focus on elections would help stabilize the overall political situation in the different parts of Bosnia, encourage the rapid resettlement of refugees and displaced persons, and provide for a new generation of democratic leaders.

I will not detail here the challenges posed by organizing elections in a post-conflict environment, where much of the country's infrastructure had been destroyed, more than half the population were either refugees outside the country or displaced persons living away from their homes within the country, and where majorities of the various ethnic groups barely deigned to interact with each other, much less shared a commitment to organizing elections in a cooperative manner. Rather, I will highlight two issues that faced the Provisional Election Commission (PEC) in the course of preparing for the elections for they bear on some of the themes developed in the various chapters of the volume under review.

The Dayton Accords authorized the establishment of a PEC chaired by the head of the OSCE Mission in Bosnia and included other international members and representatives of the different ethnic communities in Bosnia. Hence, the head of the OSCE Mission asked the leaders of the three major ethnic groups each to designate a representative for the PEC, who would join with three international members chosen by OSCE member states and himself to form the PEC. However, to avoid endless stalemates, the Dayton Accords provided the chair of the PEC with the authority to break deadlocks within the PEC, a power that the PEC chair interpreted quite liberally.

One major issue that emerged in the immediate planning for the elections related to the place where the votes of displaced persons should be assigned. The three options facing the PEC were: a) insist that the displaced persons vote where they now lived but where they had few long-term ties; b) permit them to vote via an absentee ballot mechanism, which would in effect allow them to vote in the jurisdiction where they once lived; or c) insist that they vote in person where they chose and facilitate their travel to their former homes on election day, if they so chose. The PEC (and their international advisers) agonized over the appropriate choice. No one wanted to be seen as legitimating ethnic cleansing, which would be the consequence if the displaced could only vote where they now lived or where no accommodation would be made for them to travel to their former homes on election day. On the other hand, the challenges associated with organizing an absentee ballot system for displaced persons or election day travel arrangements was also viewed as fraught with dangers. The PEC ultimately chose the third option. Although there were few election day problems, the process certainly did not

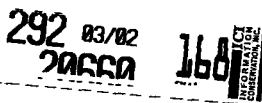
lead to the outcome sought by the framers of the Accords, whereby those who had been forcibly displaced would return to their former homes and reestablish their right to participate actively in local affairs.

A second issue that divided the PEC concerned the continued participation in the election of the political party associated with former Bosnian Serb leader Radovan Karadvic. (Karadvic was already barred from a leadership role because he was under indictment by the War Crimes Tribunal at the Hague). There was concern that the exclusion of the party would disenfranchise a significant portion of the Bosnian Serb population and, more practically, give them less of a stake in maintaining the peace by implementing the Accords. On the other hand, allowing the party to participate without disassociating from Karadvic would undermine a key goal assigned to the elections, namely installing a group of Bosnian Serb leaders committed to implementing the Accords. Again, after much deliberating, the PEC decided to condition the party's participation in the electoral process to their formally distancing the party from Karadvic by designating a new party leader to replace Karadvic and by not using Karadvic's name or picture in campaign materials. The party complied and still contested the elections quite successfully.

What was striking about both these decisions and others, which were made under the auspices of an intergovernmental organization, was the lack of reference accorded to international legal principles. Some attention was paid to Bosnian law, but the predominant factor considered by the decision makers and, in effect, accepted by all concerned was the impact of the decision on implementation of the Dayton Accords and the maintenance of the peace. While I did not necessarily agree with the precise decision adopted in each case, I did concur with the general approach whereby policy imperatives proved paramount. Such a development should not be surprising, considering the stakes involved for the international community, which had troops on the ground and which was funding a major reconstruction effort, but it is contrary to the impression suggested by a simplistic reading of this book.

V

This brings me to my final reflection. The significance of the emerging right of democratic entitlement is not merely an employment program for election experts and those interested in monitoring elections. Rather, according to advocates of a democratic entitlement (myself included), two identifiable broad goals emanate from adherence to the right: a more peaceful world and a more just world.



The first goal derives from the liberal peace thesis, which, as elaborated most pointedly in the Owen essay in this volume, postulates that democratic countries do not fight wars against one another. In rough terms, the thesis suggests that as more countries become democratic, the number of wars are less likely to erupt. The second goal derives from the notion that holds that democracies are more likely to be generally respectful of human rights and to better provide for the well-being of their citizens.

Admittedly, both arguments have been challenged, including by several authors in this collection, at the theoretical level and by highlighting counterfactual examples. Events that occurred after several of the essays were published, I fear, provide even more obvious counterfactual examples. Nonetheless, the prospects of even moving appreciably closer to a more peaceful and just world is enough to justify close scrutiny of the overall thesis and to develop practical responses for encouraging and enhancing the democratization process. These responses require acknowledgement of not only the important work of intergovernmental organizations such as the UN, but of a broad range of domestic and international NGOs, which regularly network on issues pertaining to democratization strategies, human rights protection, and the relationship between these objectives and other recognized social and economic development goals.

In the end, I remain skeptical that reference to international law principles, as emphasized in the closing remarks of the Introduction chapter (p. 22) and several of the other essays in this volume, will lead the way in promoting acceptance of the underlying argument in favor of a democratic entitlement. Rather, particularly in a period of dynamic change, legal rules will remain malleable and subject to interpretations that are often dictated by specific policy interests of particular powers. To the extent that international legal scholars document trends and encourage reflection among policymakers regarding the future development of interstate relations, including the role of a democratic entitlement, their efforts are well-appreciated. However, we should recognize that, at this point in contemporary history (i.e., before *The End of History* announced by Fukuyama and discussed by several of the authors in this volume), the trends identified mostly reflect policy determinations, rather than adhere to principle, and that we have a long way to go before the democratic entitlement becomes irreversibly internalized within the decision-making processes of the vast majority of countries or intergovernmental organizations.