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A RIGHT TO DEMOCRACY IN INTERNATIONAL LAW: ITS IMPLICATIONS FOR ASIA

SAME VARAYUDEJ*

I. INTRODUCTION

International law has traditionally been neutral towards the concept of an entitlement to democracy.¹ As a result of ideological tensions during the Cold War, the international legal engagement with such a concept remained elusive and uncertain. In this period, the relationship between international law and the concept of democracy attracted very little attention among international legal scholars. The demise of communism at the end of the Cold War has, however, placed liberal democracy – as the sole legitimate system of government – back on the international agenda.

This paper will first look at the traditional concept of sovereignty and the undemocratic features of traditional international law. It will then dis-

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1. The term 'democracy' literally means "rule by people." Democratic governance denotes: effective participation, voting equality, rule of law, separation of powers, and individual rights. There are at least three competing models of democracy: liberal democracy, deliberative democracy and cosmopolitan democracy. For liberal democracy, see Amartya Sen, *Democracy as a Universal Value* 10 JOURNAL OF DEMOCRACY 3 (1999) and KATHERINE FIERLBECK, GLOBALIZING DEMOCRACY 87-118 (1998). On deliberative democracy, see Jurgen Habermas, *Three Normative Models of Democracy*, in DEMOCRACY AND DIFFERENCE 21-30 (S. Benhabib ed., 1996); Seyla Benhabib, *Towards a Deliberative Model of Democratic Legitimacy*, in DEMOCRACY AND DIFFERENCE 67-94 (S Benhabib ed., 1996). On cosmopolitan democracy, see DAVID HELD, DEMOCRACY AND THE GLOBAL ORDER: FROM THE MODERN STATE TO COSMOPOLITAN GOVERNANCE 3-27 (1995).

2 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

cuss the development of democratic governance in the United Nations and regional international organisations, as well as the pro-democratic interventions in international law. Moreover, the paper will critically analyse the recent claims by prominent international legal scholars that a “right to democracy” is now emerging in international law and that all communities are entitled to democratic rules of governance. It will then consider whether, and to what extent, the notion of democratic entitlement has crystallised into a customary rule of international law. The paper will finally assess the implications of the right to democracy on Asian cultural and social values. The aim of this paper is not to provide any definitive answers, but to raise some questions relevant to future debate on the emergence of democratic entitlement.

II. THE TRADITIONAL CONCEPT OF SOVEREIGNTY AND UNDEMOCRATIC CHARACTER OF INTERNATIONAL LAW

A. TRADITIONAL CONCEPT OF SOVEREIGNTY

Under the positivist consent theory, international law is a system of rules which sovereign States accepted or consented to be binding on them through conventional or customary law.² From this perspective, international law is traditionally based on the principle of equality of sovereign States, which gives a sovereign State an exclusive right to exercise powers with respect to its territory, citizens and resources. International law, as a law of coordination, thus prohibits any external patronising or intervention in equal, independent States. This non-intervention principle - a correlative duty to the rights of sovereignty - is enshrined in Article 2(7) of the UN Charter, which states that the Charter gives no competence to the UN, or to the UN Members, to intervene in matters that are essentially under the national jurisdiction of a State.³ According to Article 2(7) of the UN Charter, States are not authorized to impose democracy by forcible means, since the choice on a constitutional model is clearly a matter which is essentially within the national jurisdiction. Thus, any attempt by democratic States to impose by force a democratic model on

2. In its judgment in the *Lotus* case, [1927] PCIJ, ser. A, no. 10, at 19, the Permanent Court of International Justice made the famous observation that:

[t]he rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to achieve a common aims. Restriction upon independent States therefore cannot be presumed.

3. See also, the prohibition to intervene in the *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, annex to UNGA Res. 2625 (XXV) of 24 October 1970.

so-called “non-democratic” States would be in violation of the principles of sovereign equality and non-intervention.

This is exactly the point that the International Court of Justice (ICJ) made in the *Nicaragua (Merits)* case.⁴ In that case, the ICJ considered and then rejected the United States’ argument that there was a right of intervention, with or without armed force, in support of “political or moral values” of an internal opposition in another State.⁵ The Court also rejected the finding of the United States Congress that Nicaragua had taken a “significant step towards establishing a totalitarian Communist dictatorship,” and went on to hold that the adherence by Nicaragua to a particular form of government “does not constitute a violation of customary international law,” because, in the Court’s view, there was no right of intervention by a State against another on the ground that the latter had chosen a “particular ideology or political system.”⁶

The principles of sovereign equality and non-intervention in domestic affairs thus constitute significant obstacles to the development of the principle of democracy into the corpus of international law. As will be discussed in detail below, despite the rights of sovereignty and the duty of non-intervention, it has been argued that these principles are not absolute. In fact there are a number of events, which are indicative of a shift in the relationship between the concept of State sovereignty and non-intervention on the one hand, and human rights and humanitarian intervention (including pro-democratic intervention) on the other hand.

B. UNDEMOCRATIC CHARACTERISTICS OF INTERNATIONAL LAW

The characteristics of traditional international law - based the concept of sovereignty and sovereign equality - have been described as fundamentally “undemocratic” As James Crawford, a prominent international lawyer, rightly observed,⁷ international law presumes that:

(1) the executive has comprehensive power in agreeing to rules of international law which could affect individual rights without their knowledge or consent;⁸

4. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v U.S.) (Merits)* [1986] ICJ Reports 14.

5. *Id.*, at 108.

6. *Id.*, at 133.

7. James Crawford, *Democracy and International Law*, 64 BRITISH Y.B. INT’L L., 113, 117-119 (1994).

8. *See, eg.*, Vienna Convention on the Law of Treaties, (opened for signature 23 May 1969), 1155 U.N.T.S. 331, art. 7(2)(a).

4 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

(2) decisions resulting from democratic processes are not acceptable reasons for any failure to comply with international obligations;⁹

(3) individuals have no legal standing or procedural rights under international law;

(4) the principle of non-intervention protects both democratic and non-democratic regimes;

(5) the principle of self-determination can not change the established territorial boundaries (*uti possidetis juris*);

(6) a successor government is bound by the acts of its predecessor irrespective of the latter's legitimacy or constitutionality.¹⁰

In addition, traditional international law did not concern itself with the democratic character of sovereign States since democratic governance was not a criterion of statehood.¹¹ Nor did the UN Charter require its members to adopt a model of democratic governance.¹² Similarly, the UN Security Council does not operate on the democratic principle, given the fact that the five permanent members of the Council have a veto right over non-procedural decisions,¹³ including those relating to admission of a State to membership,¹⁴ enforcement measures under Chapter VII of the UN Charter¹⁵ and reforms of the Security Council.¹⁶ The exclusive character of the permanent members' veto power has recently been a subject of debate concerning the reform of the Security Council. This veto power is regarded as "an anathema to any notion of democracy"¹⁷ since it

9. *Id.*, arts. 27 and 46.

10. *Tinoco Arbitration* 1 R.I.A.A. 369 (1923).

11. Montevideo Convention on Rights and Duties of States 1933, 165 L.N.T.S. 19 (1934). Articles of the Convention set out the following criteria for statehood: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States. There are some who suggest that these criteria have been supplemented by the requirements that statehood must be achieved in accordance with the principle of self-determination and the fundamental human rights norms outlawing apartheid or racist policies. See D. J. HARRIS, *CASES AND MATERIALS IN INTERNATIONAL LAW* 99 (6th ed, 2004), citing cases of the Southern Rhodesia declaring its independence in 1965 and the Union of South Africa granting independence to the Transkei, the homeland of the Xhosa people, in 1976.

12. See UN Charter, art. 4, which provides: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter..."

13. *Id.*, art. 27(3).

14. *Id.*, art. 4.

15. *Id.*, arts. 39, 41 and 42.

16. *Id.*, art. 109(2).

17. Statement by Chuchai Kasemsarn, Thailand's representative to the UN, UNGA 56th Sess., 35th plenary meeting, UN Press Release GA/9944 (31/10/2001).

is inconsistent with “the principles of equal rights and self-determination of peoples” enunciated in Article 2(1) of the Charter.¹⁸

These “undemocratic” features are embedded in the body of international law because, as Crawford points out, the international legal system “seeks to advance at the same time a range of partly incompatible goals,” such as the maintenance of international peace and security, the principles of non-use of force, the principles of non-intervention in matters within domestic jurisdiction of any State, respect for human rights and self-determination of peoples, and security of international agreements.¹⁹ In doing so, international law aims to apply these principles to States on a universal basis, irrespective of whether their political systems are democratic.²⁰

This does not mean, however, that international law opposes the notion of democracy. It means simply that “international law does not generally address domestic constitutional issues.”²¹ From the historical perspective, especially during the Cold War, international law was to remain neutral, *vis-à-vis* the internal character of any political model, since the latter was within the domain of politics and domestic law, rather the domain of international law.²² After the collapse of the communist regimes in Eastern Europe and the Soviet Union between 1989 and 1991, the neutral position of international law, *vis-à-vis* a State’s internal form of government, appears to have shifted away from the traditional concept of State sovereignty – sovereignty that resides with States regardless of their constitutional arrangement – and towards a concept of popular sovereignty based on popular consent of citizens.²³

Globalisation also has a significant impact upon traditional international law and the concept of national sovereignty through global economic integration in trade and investment.²⁴ For instance, through trade liberalisation and foreign direct investment, multinational corporations have increasingly gained political negotiation power and privileges extracted

18. HANS KOCHLER, *DEMOCRACY AND THE INTERNATIONAL RULE OF LAW: PROPOSITIONS FOR AN ALTERNATIVE WORLD ORDER* 90 (1995).

19. *Id.* art. 1, stating these incompatible principles are the purpose of the United Nations.

20. James Crawford, *Democracy in International Law – A Reprise*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 114, 115 (G. H. Fox & B. R. Roth eds., 2000).

21. American Law Institute, *Restatement (Third) of the Foreign Relations Law of the United States*, § 203, comment e. (1987).

22. Jan Wouters, Bart De Meester and Cedric Ryngaert, *Democracy and International Law 5* (Working Paper No. 5, 2004) <<http://www.law.kuleuven.ac.be/iir/nl/wp/WP/WPLirg5.pdf>>.

23. Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 20, at 49.

24. On this topic, see Jagdish Bhagwati, *Globalisation, Sovereignty, and Democracy*, in *DEMOCRACY’S VICTORY AND CRISIS* 263 (1997).

6 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII]

from the developing countries.²⁵ Regulation of global problems, such as global warming, international terrorism, drug trafficking, weapons of mass destruction and serious human rights violations, have now expanded beyond the national jurisdiction of a State.²⁶

III. DEVELOPMENT OF DEMOCRATIC GOVERNANCE IN THE UNITED NATIONS AND REGIONAL INTERNATIONAL ORGANISATIONS

With the end of the Cold War in the early 1990s, a clear victory for liberal democracy was proclaimed as the dominant ideology in the world.²⁷ The triumph of democracy implied a demise of Communism, Fascism and other ideological anti-democratic forces. This “victory” for liberal democracy in turn led some international scholars to believe that there is a right to democracy in international human rights law, and the existence of democracy as an influential principle in many areas of public international law.²⁸ Since then, there has been a great deal of debate regarding the relationship of democracy and international law among international lawyers and political scientists.²⁹

A. SHIFT IN THE CONCEPT OF SOVEREIGNTY

After the Cold War, the international agenda for ensuring human rights, such as democratic entitlement, has gained momentum given that there appears to be an increasing awareness of the interdependence among societies as well as of the interconnection of global challenges. This awareness has led to a more integrated approach of solving global challenges concerning international peace and security, global warming, hu-

25. JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* 67-73 (2003).

26. For ethical and legal issues surrounding globalisation, see PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALISATION* (2002).

27. See F. FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (London: Hamilton, 1992). On the definition of democracy, Fukuyama concluded that “[a] country is democratic if it grants its people the right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage.” *Id.*, 43. But see S. Marks, *The End of History? Reflections on Some International Theses*, 8 *EUR. J. INT’L L.* 449, 454 (1997), who pointed out that Fukuyama’s definition of democracy “fails to consider the diversity of values and beliefs that contributes to producing divergent understandings of the meaning of liberalism and democracy, and of their interrelation. Liberal democracy cannot spell the end of ideological struggle because it is itself the subject of ideological contestation, and will continue to be so.”

28. T. Franck, *The Emerging Right to Democratic Governance*, 86 *A.J.I.L.* 46 (1992); A.M. Slaughter, *International Law in a World of Liberal States*, 6 *EUR. J. INT’L L.* 503 (1995).

29. Franck, *supra* note 28, at 46; Fox, *supra* note 23, at 48-90; James Crawford, *Democracy and the Body of International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW*, *supra* note 20, at 91-120; Roland Rich, *Bringing Democracy into International Law*, 12(3) *J. DEMOCRACY* 20-34 (2001).

man rights and governance.³⁰ It appears that States are now expected to comply with basic democratic standards because there appears to be widespread support in the international community of interdependent nations for ensuring the protection of fundamental human rights. This support is derived primarily from the actions of international organizations together with individuals and non-governmental organizations calling for greater participation in the governance processes that impact peoples' lives.³¹

This development has led some American scholars to argue that there is a shift from the traditional principles of sovereignty and non-intervention in favour of human rights, including a right to democratic governance, and humanitarian intervention. Some went even further in asserting that international law allows a powerful nation to unilaterally liberate a people from a despotic government in another State.³²

Thomas Franck is the first prominent international lawyer to elucidate the idea that democratic governance has evolved from moral prescription into an international legal norm.³³ According to Frank, three recent occurrences are positive indications of the emergent right to governance: first, the failure of the August 1991 attempted coup in the former Soviet Union; second, the UN General Assembly Resolution of October 11, 1991 to restore Jean Bertrand Aristide, the then-ousted Haitian President; and third, the proliferation of more than 110 States in late 1991 committed to "open, multiparty, secret-ballot elections with a universal franchise," even though some of them are democratic in form rather than in substance.³⁴

Since 1992, there is a good deal of support in the literature for bringing the concept of democracy into international law.³⁵ There is, however, a

30. Miguel González Marcos, *Living Short of Paradise*, in PRESENTATION OF THE FINDINGS OF THE LITERATURE REVIEW 2-3 (2004). <http://www.boell.de/downloads/verfassung/miguel_gonzales_marcos_3.pdf> (last visited 20 Dec. 2005).

31. D. Held, *Cosmopolitan Democracy and the Global Order: Reflections on the 200th Anniversary of Kant's "Perpetual Peace"* 20 ALTERNATIVES 427 (1995); L. Diamond, *Promoting Democracy in the 1990s: Actors and Instruments, Issues and Imperatives* 29 (Report to the Carnegie Commission, 1995).

32. See discussion on pro-democratic intervention in sub-section C below.

33. Franck, *supra* note 28, at 46.

34. *Id.*, at 46-47, cited in Makua Wa Mutua, *Politics and Human Rights: An Essential Symbiosis*, in THE ROLE OF LAW IN INTERNATIONAL POLITICS 165 (2000).

35. See Franck, *supra* note 28, at 46 and *Legitimacy and the Democratic Entitlement*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 20, at 25; Gregory H. Fox, *The Right to Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, at 48; Roland Rich, *supra* note 29, at 20; R Burchill, *International Law of Democracy and the Constitutional Future of the EU: Contributions and Expectations* (Queen's Papers on Europeanisation No. 3/2003) 2-3.

8 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

good deal of skepticism in accepting that the concept of democratic governance has emerged as a right in international law or that democratic governance is the most suited form of ordering society.³⁶ In the next section, the paper will identify the development of a right to democratic governance through the practices in of the United Nations and regional institutions.

B. THE DEVELOPMENT OF DEMOCRATIC GOVERNANCE THROUGH PRACTICES IN THE UNITED NATIONS AND REGIONAL ORGANISATIONS

The foundation of a right to democratic governance has long been set out in human rights instruments, particularly the International Covenant on Civil and Political Rights (ICCPR) which provides in Article 25 that every citizen has the right to take part in the conduct of public affairs, directly or through freely chosen representatives.³⁷ In addition, the Universal Declaration on Human Rights of 1948 also provides, in Article 21, that “the will of the people shall be the basis of the authority of government.”³⁸ The language of Article 25 of the ICCPR can be found at a regional level in Article 3 of Protocol I of the European Convention on Human Rights,³⁹ and in Article 23 of the America Convention on Human Rights.⁴⁰ However, during the Cold War confrontation, Article 25 of the ICCPR was not given its ordinary and natural meaning, and single-party states were able to put on electoral displays that they claimed met the standards set in the Covenant.

It was not until 1996 that the United Nations Human Rights Committee, a body of experts established by the ICCPR, adopted General Comment 25, which elaborated on the rights enshrined in Article 25. The General Comment's interpretation of Article 25 represents a considerable strengthening of the democratic ideal; applied correctly, its provisions would ensure free and fair elections. It requires freedom of expression, assembly, and association (paragraph 12); enshrines non-discrimination with respect to the citizen's right to vote (paragraph 3); rejects any condi-

36. See Brad R. Roth, *Evaluating Democratic Progress*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 20, at 493; Susan Marks, *International Law, Democracy and The End of History*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, at 532; Russell A. Miller, *Self-Determination in International Law and the Demise of Democracy?* 41 COLUM. J. TRANSNAT'L L' 601 (2003).

37. 999 U.N.T.S. 171. As of 24 November 2004, there are 154 parties to the ICCPR.

38. UNGA Res. 217A(III), 10 December 1948.

39. *European Convention on Human Rights* (ECHR), Protocol I, opened for signature 20 March 1952, 213 U.N.T.S. 262.

40. *American Convention on Human Rights*, opened for signature 22 November 1969 (AMR), (1970) 9 ILM 673.

tion of eligibility to vote or stand for office based on political affiliation (paragraph 15); calls for voters to be free to support or oppose the government without undue influence or coercion of any kind (paragraph 19); and requires states reporting under the Covenant to explain how the different political views in the community are represented in elected bodies (paragraph 22). The General Comment provides a jurisprudence that gives teeth to the Covenant's obligation to hold "genuine periodic elections." It establishes a checklist that, if followed, will result in a functioning electoral democracy and, if combined with adherence to the other obligations in the basic human rights treaties, a functioning liberal democracy.⁴¹

In the same year, the right to democracy gained extra momentum when UN Secretary-General Boutros Boutros-Ghali submitted *An Agenda for Democratization* to the General Assembly. Boutros-Ghali was convinced that a *right* to democracy existed and intended, through the *Agenda*, to clarify the *opinio juris* which is required to have a new customary international norm established.⁴² In the *Agenda for Democratization*, Boutros-Ghali pointed out that the purpose and principles of the United Nations were to promote democracy and that the non-intervention principle of Article 2(7) of the Charter does not aim to enforce national models of democracy, but rather to provide support and advice to nations concerning democratization.⁴³

In 1999, the UN Commission on Human Rights adopted a resolution entitled "A Right to Democracy."⁴⁴ The resolution itself was adopted unanimously, but its title was the object of fierce debate. A Cuban proposal to remove the "Right to Democracy" from the title was only narrowly rejected by the majority with 28 votes for, 12 against and 13 abstentions. In their opposition to the "Right to Democracy," developing countries in particular expressed fear of foreign intervention into domestic affairs. For example, the Indian delegate pointed out that "a form of government rising from the people...[cannot] be proposed from outside," and Pakistan expressed concerns that the "Right to Democracy" might be used to validate foreign occupation. Criticising the term "Right to Democracy" as "premature and not balanced," China insisted that, taking into account the disparate historical backgrounds, different forms of de-

41. Rich, *supra* note 21, at 23.

42. B. Boutros-Ghali, *An Agenda for Democratization*, Supplement to the Reports A/50/332 and A/51/512 on Democratization, 17 December 1996, § 18; cited in Wouters, et al., *supra* note 12, at 9.

43. *Id.*, § 41.

44. UN Doc. E/CN.4/1999/L.55/Rev.2.

10 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

mocracy are possible.⁴⁵ The resistance to the title of the resolution clearly indicated that there was no agreement on a right to democracy at the international level.

While the provisions of the cited international instruments promoted certain aspects of the concept of democratic governance, they did not necessarily entail an emergence of a right to democracy in general international law because sovereignty and non-intervention into domestic affairs were emphasised in all such instruments.

C. PRO-DEMOCRATIC INTERVENTION IN INTERNATIONAL LAW

Political debate in the past decade seems to have revolved around the questions of whether people have a right to democracy and, if so, whether democracy may be imposed from outside. This theory of "pro-democratic intervention" thus poses significant problems under general international law, which prohibits the use of force in international relations, except in the case of self-defence under Article 51 of the UN Charter or after authorization by the Security Council pursuant to Chapter VII of the UN Charter.

In favour of pro-democratic intervention, W. Michael Reisman argues that under modern international law, popular sovereignty has trumped State sovereignty. Reisman argues that a right to democracy pierces sovereignty's abstract veil and vests true sovereignty in the citizens of a State.⁴⁶ Similarly, Anthony D'Amato contends that international law is about people and not about States.⁴⁷ The proponents of this view often cite the invasions of Grenada and Panama as examples.

Regarding the Grenada invasion, the United States did not rely on an expanded view of self-defence, new interpretations of Article 2(4) of the UN Charter, or a broad doctrine of humanitarian intervention. Instead, the United States acted upon the invitation of the Governor-General of Grenada, upon a request to intervene from the Organization of Eastern Caribbean States, and for the protection of nationals.⁴⁸ Yet, this pro-democratic intervention failed to gain support from most international legal commentators.⁴⁹ Nor was it supported by State practice, since it is

45. Commission on Human Rights, press notice, HR/CN/99/61, 27 April 1999.

46. See W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2 (4)* 78 A.J.I.L. 642, 645 (1984).

47. See A. D'Amato, *U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists? The Invasion of Panama was a Lawful Response to Tyranny* 84 A.J.I.L. 516 (1990).

48. Wouters, et al., *supra* note 12, at 27.

49. See M. Byers and S. Chesterman, "You the People": *Pro-democratic Intervention in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW, *supra* note 20, at 259-292.

clear that pro-democratic intervention would be in violation of the fundamental principles of international law as enshrined in Articles 2 (4) and 2 (7) of the UN Charter.

As for the Panama invasion, the United States again relied officially on other legal justifications, such as the protection of American nationals under Article 51 of the UN Charter; the fight against drug trafficking; and the protection of the integrity of the Panama Canal Treaty. Yet their list of justifications, also features – although not in the first place - support of democracy. The pro-democratic intervention was immediately opposed by an international community united in the UN General Assembly, which condemned the intervention in Panama as “a flagrant violation of international law and of the independence, sovereignty and territorial integrity of States,” thereby explicitly referring to Article 2(4) of the UN Charter.⁵⁰

Another example which has been used to support pro-democratic intervention is the Haiti invasion. In 1993, the Security Council imposed an economic embargo on Haiti, after its democratically elected President Aristide was overthrown by a military junta in 1991. The Council deplored that, “despite the efforts of the international community, the legitimate Government of President Jean-Bertrand Aristide ha[d] not been reinstated.” The Council was also concerned “that the persistence of this situation contribute[d] to a climate of fear of persecution and economic dislocation which could increase the number of Haitians seeking refuge in neighbouring Member States.”

After the embargo failed to force the coup leaders to step down, the Security Council authorized the UN Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership and the prompt return of the legitimately elected President. A force, mainly consisting of United States troops, acted upon the UN mandate and re-instated President Aristide. While successful, it remains arguable whether or not the Haiti intervention set a determinative precedent for pro-democratic intervention, since the Security Council appears to have listed the action in its resolutions as a case of humanitarian rather than pro-democratic intervention.⁵¹

The conflicts in Afghanistan and more recently Iraq have focused attention yet again on the foreign policies of powerful States, especially the

50. UNGA Res. 44/240 (1989).

51. Wouters, et al., *supra* notes 12, at 30.

12 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

U.S., to effect *regime change* in dictatorial or undemocratic states by armed intervention. Little attention has, however, been given to the fact that – whatever the positive aspects of the removal of the regimes of the Taliban in Afghanistan and Saddam Hussein in Iraq – bringing about a regime change in another country violates a basic norm of international relations. This norm of non-intervention protects the right of peoples to determine their own political system without external interference. As W. Michael Reisman points out, the idea of intervention to liberate people from a despotic government is “almost always a bad idea.”⁵² Most commentators have agreed that “it is neither right nor practical to use foreign military force in order to create conditions for local democratic development.”⁵³ Ghia Nodia argues that:

- It is not right to impose democracy by armed force, because doing so undermines the international political order and may serve as a pretext for interventions motivated by selfish interests.
- It is not practical because democracy emerges as a result of the internal societal and political developments: democracy is about choice and freedom, and these cannot be imposed.⁵⁴

In light of the history of forcible interventions, pro-democratic intervention, unilaterally or collectively, is likely to entail failure for the intervening States.

IV. ASIAN VALUES AND DEMOCRACY

Inherent to the debate over “Asian values” is the cultural relativity theory which argues that social actions must be evaluated according to standard which underline a particular culture, and that no standards of a society can be implanted successfully beyond cross-cultural boundaries. As a corollary of this theory, “societies which embrace a common cultural heritage can be said to have evolved discrete systems of political and social arrangements distinct from - and sometimes in opposition to or in conflict with - the rest of the world.”⁵⁵ The concept of “Asian values” thus implies that “the social, economic and political characteristics of

52. W. Michael Reisman, *The Manley O. Hudson Lecture: Why Regime Change is (Almost Always) a Bad Idea*, 98 A.J.I.L. 516 (2004).

53. Ghia Nodia, *Democratic Promotion*, in 3 TOWARDS A DEMOCRATIC RESPONSE 22-23 (Club de Madrid Series on Democracy and Terrorism, 2005), <<http://www.safe-democracy.org/docs/CdM-Series-on-Terrorism-Vol-3.pdf>> (last visited on 20 December 2005).

54. *Id.*

55. Takashi Inoguchi & Edward Newman, “Asian Values” and Democracy in Asia, Proceedings of a Conference held on 28 March 1997 at Hamamatsu, Shizuoka, Japan. <<http://www.unu.edu/unupress/asian-values.html>> (last visited on 20 December 2005).

certain Asian countries are based upon a shared value system which is identifiable and distinct and which transcends national, religious and ideological differences.”⁵⁶ “Asian values” generally refer to Confucianism, respects for elders, emphasis on order and social harmony, group orientation, and the collective interests of the society and State.⁵⁷

Relying on these cultural relativity arguments, a number of Asian politicians, including Lee Kuan Yew, argued that Asians traditionally value the precepts of discipline, not political freedom, and thus the attitude to democracy must inevitably be much more skeptical in these countries. In his view, Western-style democracy is not applicable to East Asia.⁵⁸ Lee Kuan Yew outlines “the fundamental difference between Western concepts of society and government and East Asian concepts” by explaining, “when I say East Asians, I mean Korea, Japan, China, Vietnam, as distinct from Southeast Asia, which is a mix between the Sinic and the Indian, though Indian culture itself emphasizes similar values.”⁵⁹

Amartya Sen, a former noble prize winner, took Lee Kuan Yew to the task in his famous article published in 1999.⁶⁰ Sen argued that contrary to the general thesis of contrast between the West and Asia, which concentrates on the countries to the east of Thailand, there is in fact diversity throughout Asia, and it is a mistake to claim that the rest of Asia is rather “similar.” Sen also pointed out that:

[e]ven East Asia itself, however, is remarkably diverse, with many variations to be found not only among Japan, China, Korea, and other countries of the region, but also *within* each country. Confucius is the standard author quoted in interpreting Asian values, but he is not the only intellectual influence in these countries (in Japan, China, and Korea for example, there are very old and very widespread Buddhist traditions, powerful for over a millennium and a half.⁶¹

Sen concluded that “[t]he monolithic interpretation of Asian values as hostile to democracy and political rights does not bear critical scrutiny.”⁶²

56. *Id.*

57. ALICE TAY (ED.), EAST ASIA – HUMAN RIGHTS, NATION-BUILDING, TRADE 14-15 (1999).

58. *Id.* at 14.

59. Fareed Zakaria, *Culture is Destiny: A Conversation with Lee Kuan Yew*, 73 FOREIGN AFFAIRS 113 (March-April 1994).

60. Sen, *supra* note 1, at 3-17.

61. *Id.* at 14.

62. *Id.* at 15.

14 ANNUAL SURVEY OF INT'L & COMP. LAW [Vol. XII

Similarly, in his speech on *Dynamism of Democracy in Asia*,⁶³ Roland Rich contends that:

The error in the Asian Values argument was to translate different values to mean that Asians should have a different set of rights and a different form of governance. Universal rights deal with basic issues that flow from one's inherent dignity as a human being and they sit very comfortably with different cultural traits around the world. One of those universal values is everybody's right to participate in decisions that affect them as articulated in Article 21 of the Universal Declaration of Human Rights and from it flows the basic reasoning for democratic forms of government.

Robert Dahl, a prominent political theorist, points out, however, that "[e]ven if the United States and other democratic countries were to pursue policies more favourable to the evolution of democracy in non-democratic countries, however, changes in the essential conditions would be slow" since change depends on prior conditions, including cultural factors, and that "the root of sub-cultural conflicts are usually too deep to be eradicated by outside intervention."⁶⁴ In these non-democratic countries, political and military leaders accustomed to using force to achieve their political ends are unlikely to give up their powers in the name of democracy, and this is what exactly happened in authoritarian States such as Myanmar.

V. CONCLUSION

While international law appears to have embraced the idea of democracy, it has not yet articulated a detailed normative framework or an extensive body of practical rules defining the meaning of democracy. A major problem with the notion of democratic governance is that no legal definition of 'democracy' has been generally agreed upon in State practice or in any international document. This leaves it subject to a variety of interpretations, depending upon the persons providing the definition and

63. ROLAND RICH, DYNAMISM OF DEMOCRACY IN ASIA (2002) <http://www.cdi.anu.edu.au/asia_pacific/asia_downloads/Asia-PDemo_speech_Aug02.doc> (last visited on 16 September 2005). This speech is drawn from his chapter entitled *Democracy in the Balance*, in Julian Weiss' TIGERS' ROAR- ASIA'S RECOVERY AND ITS IMPACT (2001).

64. ROBERT DAHL, DEMOCRACY AND ITS CRITICS 317 (1989).

the context in which they are speaking. This makes democracy an “essentially contested concept.”⁶⁵

At this stage of development, the right to democracy has been supported by the scant and inconsistent practice of powerful states and the very tentative articulation of such a right in international instruments on human rights since 1966.⁶⁶ The proponents of the right to democratic governance often use the concept of “democratic peace” to demonstrate the support of the existence, or the emergence, of a right to democratic governance in international law. The premise is based upon a consequentiality theory which argues that democracy is desirable because democratic States are less likely to wage war. It is a very persuasive thesis but, in terms of customary international law, there is no evidence that support for peace implicitly provides the *raison d'être* for the existence of a right to democracy. Nor is there any evidence in State practice to support a right to use force to promote democracy or to liberate a people from a despotic government.

It should be noted that while democracy is perhaps the most desirable mode of governance, there are still some flaws in the concept. Some common and persistent misconceptions need to be addressed. As David Beetham observed,⁶⁷ the majority rule is not always or necessarily desirable if it leaves a minority out of the equation of governance. Democratic entitlement, as a part of human rights, should guarantee the protection of the rights of both the majority and minority. This is the aim of the ICCPR and other instruments. Democracy should be regarded as a device or guiding principle for resolving political conflict, but it is far from perfect. For this reason, special institutional arrangements may be needed to protect the rights of minorities and ensure them a due share in political and public office. Thus, diversity of societies in terms of socio-economic development will require different democratic arrangements to fit their own circumstances, if democratic principles are to be effectively realised. These arrangements can be seen as different forms of power-sharing which also guarantee that minorities participate in the polity. It should also be noted that since democracy has historically been associated with a market economy, the free market and trade liberalisation can adversely impact on human rights and democracy in developing countries due to their lack of appropriate social and economic structures,

65. T. BALL AND R. DAGGER, POLITICAL IDEOLOGIES AND THE DEMOCRATIC IDEAL 22-23 (1991); K. Bollen, *Political Democracy: Conceptual and Measurement Traps*, in DEFINING AND MEASURING DEMOCRACY 5 (D. Beetham, ed., 1994).

66. Crawford, *supra* note 20, at 115-116.

67. See Report of the High Commissioner for Human Rights submitted in accordance with Commission Resolution 2001/41, UN Doc. E/CN.4/2003/59 (27 January 2003).

technology, and resources to compete with the developed countries on an equal footing in international trade.

The concept of democracy as a universal entitlement has increasingly received acceptance in the United Nations. At the recent 2005 World Summit, the United Nations General Assembly reiterated 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."⁶⁸ In renewing its commitment to support democracy, the Assembly adopted a decision to establish a "Democracy Fund,"⁶⁹ which could provide valuable aid to developing nations to promote and consolidate democratic political systems, human rights and the rule of law.

However, the idea of democracy should not be imposed on the peoples of developing countries externally by powerful nations. In order for the conception of democratic governance to take root and flourish, the democratization process must derive from the grass-root level of the society itself. Governments of powerful countries need to accept the fact that democracy and its traditions can not successfully established overnight. As Makau Wa Mutua observed in the context of Africa:

The argument by current reformers that Africa merely needs a liberal democratic, rule-of-law state to be freed from despotism is mistaken. The narrow transplantation of the narrow formulation of Western liberalism cannot adequately respond to the historical reality and the political and social needs of Africa. The sacralization of the individual and the supremacy of jurisprudence of individual rights in organized political and social society is not a natural, 'transhistorical,' or universal phenomenon, applicable to all societies, without regard to time and place.⁷⁰

Promoting democracy through external intervention may also have a negative impact on the global environment for democratization in developing countries in Asia and other parts of the world, especially when such a promotion has been perceived as a policy of Western cultural im-

68. UN GAOR Doc. A/60/L.1 (15 September 2005) 31 [135]. To put a qualification on the idea of democratic governance, the General Assembly reaffirmed that "while democracies share common features, there is not single model of democracy," and emphasized "the necessity of due respect for sovereignty and the right for self-determination."

69. *Id.* at [136]. The idea of establishing 'Democratic Loan Guarantee Fund' as a way for achieving democracy was also advocated by THOMAS POGGE, *WORLD POVERTY AND HUMAN RIGHTS* 158-160 (2002).

70. Makau wa Mutua, *The Banjul Charter and the African Cultural Fingerprint: An Evaluation of Language of Duties*, 35 VA. J. INT'L L. 339, 341 (1995).

perialism. It is well established that fundamental human rights norms, including the principle of self-determination and rules concerning protection from slavery and racial discrimination, transcend cultural values and are binding *erga omnes*.⁷¹ But the degree of cognisance and development of the notion of democratic entitlement may be conditioned by cultural factors.

Finally, even if one could argue that a right to democratic governance may be emerging as a new category of human rights, this right is unlikely to prevail over the *jus cogens* norm enshrined in Article 2(4) of the UN Charter. Those who have supported the right of pro-democratic intervention need to establish not only that a right to democratic entitlement is now accepted as a rule of customary international law by the international community as a whole, but also that a right to democratic governance will necessarily entail the right of a State or 'coalition of the willing' to use force to establish, maintain or restore a democratic regime in another State.⁷² State practice and *opinio juris* support neither of these claims.

71. *Barcelona Traction, Light and Power Co. Case* [1970] ICJ Reports 3, [33]-[34]; *East Timor Case* [1995] ICJ Reports 90, 102.

72. See CHRISTIAN GRAY, *INTERNATIONAL LAW AND THE USE OF FORCE* 39 (2000); Christian Pippan, "Regime Change" through Armed Intervention?: *Democratic Legitimacy and the Use of Force in International Law* (29 April 2003) <www.jeanmonnetprogram.org/fellowsforum/pippan_paper.rtf> (last visited on 20 December 2005).

