

Imagined Consent: Democratic Liberalism in International Legal Theory

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Certain forms of consensus are so essential to community life that they reestablish themselves despite every attempt to shake them. At most they are reestablished in a more dogmatic or, I would say, more fanatical way...the majority (to defend the ideological bases of consent) would become fanatical...

(Umberto Eco, *Travels in Hyperreality* (1987), p 177)

I. Introduction

The idea of an imaginary social contract has animated liberal thinkers for centuries. From places as mythical and disparate as the state of nature and the original position, humans have been projected into compacts in the name of justice, democracy or order.¹ In international law too, consent is imagined in order to provide normative justification for the projects of three distinct, yet distinctively, liberal schools. These I call secular or classical² liberalism (mostly associated with positivism) and, its more recent radical variants, Kantian liberalism and democratic governance. In this article I want to focus on the latter

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1 See eg Rawls J, *A Theory of Justice* (1971); Rousseau JJ, *The Social Contract* (1762); Hobbes T, *Leviathan* (1651).

2 I have used the term "classical" to describe what has been the prevailing statist creed in international law. However, there is some confusion over the meaning of this term. James Watson contrasts the classical position with the modern view which he criticises for adopting "autonomous modes of reasoning and sources" when, for example, suggesting that the General Assembly can create international law or that States can be bound without their consent. See Watson, "State Consent and the Sources of International Obligation" (1992) 86 *American Society of International Law Proceedings* 108. On the other hand, Martti Koskenniemi associates modernism with statism and positivism, and the classical approach with natural law. See Koskenniemi, "The Normative Force of Habit: International Custom and Social Theory" (1990) 1 *Finnish Yearbook of International Law* 77 at 77-89. Finally, Nigel Purvis uses the term classical to describe all pre-Charter reasoning about international law and claims that this classical period is characterised by a dialogue between positivism and naturalism. See Purvis, "Critical Legal Studies in Public International Law" (1991) 32 *Harvard International Law Journal* 81.

two movements but place all three in the context of wider trends in international legal theory.

To this end, I first suggest a typology for understanding the various theoretical accounts of the nature of international law (Section II). The purpose of this section is to show how alternative theories of international law might have prompted or motivated the attempt to reshape liberalism through democracy. As part of this typology, I then describe, in more detail, the familiar classical liberal approach to international law and some of its principal failings (Section III). Finally, I consider two versions of the democratic liberal approach: Kantian liberalism represented here by Ferdinand Tesón, and democratic governance represented by Thomas Franck and reflect, fairly broadly, on some difficulties with these schools (Section III and IV). I will argue that neither enterprise is capable of sustaining a universal or coherent vision of normative renewal. Kantian liberalism fails to convince that its elevation of the individual as the primary normative actor in international law is any more than a romanticised preference for the current, flawed constitutional forms of liberal government. Thomas Frank's idea of democratic governance is a bold synthesis of the democratic and classical traditions in a norm which restates the Kantian position that individual consent is a prerequisite for State legitimacy, but argues that this principle of legitimacy will be enforced through the emergence of a community expectation that States should be democratic. However, the dynamics of individual consent imagined in the democratic component of his work are insubstantial and excessively technical while the principles of international law from which it is derived are incomplete and illusory.

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When the world is in flux, theory excites the critical mind. The end of the Cold War and the onset of the various postmodern disorders have brought in their wake a renaissance in thinking about the role of international law and lawyers in shaping a new normative order for global society.³ The imminence of the 21st century has given these thoughts a millennial significance. Some legal scholars, notably Richard Falk, have suggested that the State system itself is crumbling and that changes of revolutionary magnitude are occurring.⁴ Falk goes on to argue that legal scholarship must undergo a comparable transformation to maintain its dynamism and relevance in these times.⁵

Whether the international system born at Westphalia survives the present convulsions is inevitably questionable. Nevertheless, this latter argument of Falk's at least has some merit and certainly in recent years the traditional

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- 3 Most notable in this regard have been the book length studies by Allott P, *Eunomia: New Order for New World* (1990); and Koskenniemi M, *From Apology to Utopia: The Structure of International Legal Argument* (1989). For a general bibliography of these self-styled new approaches see Kennedy and Tennant, "New Approaches to International Law: A Bibliography" (1994) 35 *Harvard International Law Journal* 417 at 431-60.
- 4 See Falk R, *Revitalizing International Law* (1989).
- 5 *Ibid*, at 21-26.

debates about the nature of international law have given way to a series of new challenges from cognate disciplines. Poststructuralism, for example, has found the perfect host in the ascending and descending rhetorical patterns of international lawyering and the self-contradictions of international law.⁶ Drawing on poststructural methodology, the rhetorical school (or new stream) has invented an historiography of international law in which scholars vie to provide the most convincing demolition of traditional histories of the discipline.⁷

Some feminists have suggested accounts of international law which critique its basic premises⁸ as well as question the distribution of primary goods in the international system and the exclusion of women from leading roles within it.⁹ Even international relations theorists, long disdainful,¹⁰ have renewed their interest in the legal regime.¹¹ Meanwhile, writers adopting more traditional or classical approaches are being forced to respond to these sharp incursions into their territories.¹² This has had the beneficial effect of introducing into international law more vigorous debates and engendering a livelier intellectual environment. Ultimately, however, the dominant descriptive theories of international law remain liberal in character and, while some of the new approaches mentioned so far will be discussed here, the focus of this article is three peculiarly liberal explanations of international law.

6 See particularly Koskenniemi, n 3 above: a book-length analysis of these ultimately self-refuting patterns of argumentation.

7 The most readable exponent of this school is Nigel Purvis. See Purvis, n 2 above. See also Kennedy, "Primitive Legal Scholarship" (1986) 27 *Harvard International Law Journal* 1.

8 See eg Charlesworth, "The Public/Private Distinction and the Right to Development in International Law" (1992) 12 *Aust YBIL* 190; Charlesworth and Chinkin, "The Gender of Jus Cogens" (1993) 15(1) *Human Rights Quarterly* 63; Knop, "Re/Statements: Feminism and State Sovereignty in International Law" (1993) 3 *Transnational Law and Contemporary Problems* 293.

9 Charlesworth, Chinkin and Wright, "Feminist Approaches to International Law" (1991) 85 *American Journal of International Law* 613.

10 I refer here to the dominant realist tradition in international relations (see n 17 below). Much of the alternative international relations literature is relevant to international legal theory and has remained relatively untapped by international legal scholars. These approaches range from regime theory (notably Keohane R, *After Hegemony* (1984)) to work on the institutional socialisation of rules (Haas E, *When Knowledge is Power* (1990)) to Hedley Bull's study of justice and order (Bull H, *The Anarchical Society* (1977)).

11 The most notable contribution to this debate has come from Anne-Marie Slaughter Burley. See Slaughter Burley, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205. See also Abbot, "International Law and International Relations Theory: Building Bridges" (1992) 86 *American Society of International Law Proceedings* 167.

12 See eg Tesón, "Feminism and International Law: A Reply" (1993) 33 *Virginia Journal of International Law* 647; Higgins R, *Problems and Process* (1993); McDougal, "McDougal's Jurisprudence: Utility, Influence, Controversy" (1985) 79 *American Society of International Law Proceedings* 266 at 283-86, 288.

II. A Typology

In summary, there appears to be at least five plausible, contemporary approaches to an understanding of international law.¹³ However, these five categories I have sketched below should be approached with some caution for three obvious and interrelated reasons. First, the brevity of the descriptions necessarily militates against complete understanding of the various perspectives. Second, there are the inevitable overlappings, contradictions and simplifications that are the mark of all attempted categorisations. Third, most international lawyers fit rather uneasily (if at all) into categories. Indeed one might say that the predominant view of international law today is an open-textured, quasi-sociological, eclectic, interdependence approach which complicates and leavens the statism with which it cannot entirely break.

(a) Democratic liberalism: Kantian liberalism and democratic governance

This school provides a focus for the rest of this essay so these comments, necessarily, will be brief. According to Ferdinand Tesón, the philosophical roots of democratic liberalism can be traced back to Kant who first envisaged an international society of democratic States acting in the interests of their citizenries.¹⁴ On this view of international law, only democratic States belong to the society of nations while the rest are consigned to the state of nature. The cosmopolitan society of nations is thus, in evolutionary terms, a moral improvement on the Hobbesian State of international relations. In this society there is the possibility of constructing more than simply a law of minimum world order.

The liberalism of Thomas Franck also belongs to this school but represents a more conservative, consensual approach to the construction of norms premised on some version of democracy. The statecraft of American Presidents Woodrow Wilson (especially) and Jimmy Carter is an example of the practice of democratic liberalism in international politics emphasising the possibilities of universal humanitarian progress and the institutional implementation of common values and principles by like-minded democratic States.¹⁵

13 This list merely provides a framework for understanding recent movements and should not be taken to be either definitive or exhaustive. It excludes some views of international law eg, the description of international relations that denies international law's existence altogether or the sharp objections to the current system made by scholars from the developing world or from indigenous perspectives (see eg Sathirathai, "An Understanding of the Relationship Between Legal Discourse and Third World Countries" (1984) 25 (2) *Harvard International Law Journal* at 395). Equally, the Marxist contribution to international legal theory, while small, should not be dismissed (see eg Chimni B, *International Law and World Order: A Critique of Contemporary Approaches* (1993), p 211).

14 Tesón, "The Kantian Theory of International Law" (1992) 92 *Columbia Law Review* 53 at 54–55.

15 Both Wilson and Carter became disillusioned of the possibilities of upholding these values on a global scale and both became infected with realist tendencies by the end of their presidencies.

(b) The Grotian or solidarist school

The Grotian approach to international law assumes the existence of a more inclusive international society of States, individuals and non-State communities each contributing to, and sharing in, global governance.¹⁶ The idea of international society has been elaborated on by a number of scholars and there is a great deal of disagreement as to what exactly such a society entails.¹⁷ The Grotian school has occasionally encompassed theoretical positions ranging from harsh pragmatism to visionary idealism.¹⁸ However, while acknowledging the unstable nature of this category, it appears that it can be contrasted with the Kantian approach to international law in the sense that individuals are not considered the sole or even primary subjects of law, and with the realist perspective in that Grotians reject secret diplomacy, the balance of power and unbridled national egotism.

Grotians posit an international civil society in which there is moral solidarity among a wide variety of actors and institutions and a willingness to take action against those that threaten these values and interests. Accordingly, the United Nations collective security model, the objective treaty regime and the notion of universalisable values (*jus cogens*, *erga omnes*) are features of the Grotian model at work in the present international system.¹⁹

However, the Grotian approach (and here we do diverge considerably from Grotius himself) has also been described as revolutionary since several of its central premises issue radical challenges to the current system. According to Martin Wight, the Grotians also argue that the international system is inadequate and illegitimate and that it must inevitably be dismantled in a revolutionary transformation.²⁰ It is this latter aspect of the Grotian system that provides the animus for much of Richard Falk's work and purports to accommodate the various radical critiques of the existing framework.

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- 16 The most significant recent volume on Grotian approaches to international law and international relations is Bull H, Kingsbury B and Roberts A, *Hugo Grotius and International Relations* (1990). See also Yasuaki O (ed), *A Normative Approach to War* (1993); especially Yasuaki, "Introduction", p 1; and Tadashi, "Grotius's Method", p 32. Grotius's own great contribution to international law is, of course, *De jure belli ac pacis* (1625). For a general account of Grotian international law see Lauterpacht, "The Grotian Tradition in International Law" (1946) *British Year Book of International Law* 15.
- 17 Some scholars argue, for example, that Grotius excluded institutions from his view of international law. See Lauterpacht, *ibid*.
- 18 It is remarkable that Richard Falk and Hedley Bull can belong to the same school of international law/relations. See Bull, n 10 above; Falk, n 4 above. Perhaps the most visionary of the idealists is the English scholar Philip Allott whose *Eunomia* (n 3 above) is a dense but ambitious work of imagination.
- 19 See eg Security Council Resolutions: 660 SC Res 660, UN SCOR, 45th Sess, 2932d mtg, UN Doc SC Res 660 (1990) and SC Res 678, SC Res 678, UN SCOR, 45th Sess, 2963d mtg, UN Doc SC Res 678 (1990) 689; Vienna Convention on the Law of Treaties, article 63.
- 20 See Wight, "An Anatomy of International Thought" (1987) 13 *Review of International Studies* 221.

Finally, of course, Grotius has long been associated with the natural law movement in international law.²¹ For Grotians belonging to this naturalist stream, the values of the international system can (or should) be found in the conscience of humankind or the deeper values of universal reason. It is this form of solidarism which found expression at Nuremburg and was revived in the just war debate over the Gulf Crisis. Indeed, implicit in this system of values is the idea of individual responsibility for international crimes which is again enjoying community support.²²

(c) Feminist currents in international legal theory

International law has proved curiously impervious to feminist theory until relatively recently. While other disciplines and indeed other areas of the law have been subjected to feminist critique for many years, the first major feminist contribution to international law occurred fairly belatedly. Interestingly, much of the writing from this perspective has had an Australian provenance.²³

The self-declared agenda of this Australian school is to expose the ideological underpinnings of an international legal system holding itself out as rational, objective and neutral. In this sense, at least, the feminist project has much in common with that of the rhetorical school.²⁴ However, there are two important differences between feminist and poststructural critiques of international law. The first is methodological. While the new stream seeks to reveal the rhetorical manoeuvrings behind international legal scholarship and law-making by focusing on these writings and instruments and the dualities contained within them, feminists are concerned to show the absence of (women's) voices and experiences from these texts and institutions of international law. Second, and more significantly, there is within the feminist movement a commitment to moral value which distinguishes it from most of the poststructural writings and certainly from the statist orientation of contemporary positivism. This value is, of course, universal gender equality. Feminist writings

21 Though perhaps Vitoria is regarded as the truer exponent of natural law thinking in international legal theory. See Vitoria F, *De indis et de jure belli reflectiones* (1557).

22 The differences between positivists and Grotians on these issues and the question of *jus cogens* are sharply delineated in Weil, "Towards a Relative Normativity in International Law?" (1983) 77 *American Journal of International Law* 413.

23 This particular feminist approach is the focus of this section. See eg Chinkin, "A Gendered Perspective to the International Use of Force" (1992) 12 *Aust YBIL* 279; Gardham, "A Feminist Analysis of Certain Aspects of International Humanitarian Law" (1992) 12 *Aust YBIL* 265. Charlesworth, "Subversive Trends in the Jurisprudence of International Law" (1992) *Proceedings, International Law Weekend ANU* 80. Note, however, that feminist international jurisprudence is beginning to fracture into a number of different and not always compatible approaches. These are not necessarily represented in this discussion. For a fuller treatment of these varying strategies see the work of Karen Engle eg, Engle, "After the Collapse of the Public/Private Distinction: Strategising Women's Rights" in Dallmeyer D (ed), *Reconceiving Reality: Women and International Law* (1993), p 143.

24 See Charlesworth, *ibid*, p 86.

in international law thus possess an explicitly prescriptive, political and moral dimension. This attachment to value is at odds with a great deal of scholarship which seeks comfort in analyses of a descriptive or relativistic nature.

Thus the early feminist writings in this area have possessed a distinctly Grotian flavour.²⁵ They have been somewhat revolutionary and have assumed certain shared values that are deserving of protection in international law but are not being nurtured within the current system. This is not to say that feminist universalism has not been challenged by other feminisms nor that it has not been acknowledged in these early writings. Nonetheless, the feminist contribution to international law is likely to be perceived as an attempt to redeem the international legal process through global normative change.

Where feminism differs from solidarism (apart from the difference in values) is in the different methodologies employed. While Grotian scholars tend to think in abstractions, historical transformations and international societies, much feminist theory is committed to building a normative regime from below. This would, in contrast to the Grotian project, involve by-passing the State altogether (seen as patriarchal) and deriving principles and rules (at least partly) from the lived experiences of women.²⁶ The fundamental difficulty facing feminist readings of international law would seem to lie in reconciling the apparent particularism of this focus on experience with the implicit universalism of international law itself.²⁷

(d) The new stream (or rhetorical) school

David Kennedy introduced the term “new stream” into the vocabulary of international law as a way of describing a group of scholars who had absorbed the lessons of the critical legal studies movement and applied the stratagems and

25 Martin Wight categorises international thought as consisting of realists, rationalists and revolutionists. It seems clear that feminists writing as international lawyers belong to this latter group. See Wight, n 20 above, at 221.

26 Marilyn Waring makes the point that treaty action is unlikely to help given that treaties tend to be made by the brothers and uncles of the leaders of nation-States. The patriarchal State remains unrepresentative and there is no real consent. Waring, “Gender and International Law: Women and the Right to Development” (1992) 12 *Aust YBIL* 177; Hilary Charlesworth and Christine Chinkin, meanwhile assert, that:

[T]he utter failure of the “liberal” international legal system in responding to the global phenomenon of oppression of women should indeed make us question its foundations. Patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of that system and is constantly reinforced by it.

Charlesworth and Chinkin, “Introduction to Symposium on Feminist Inquiries into International Law” (1993) 3(2) *Transnational Law and Contemporary Problems* i at iv. Karen Knop adopts a slightly different approach suggesting that the State can be conceived or personified in a number of different ways not all of which are necessarily prejudicial to women. See Knop, n 8 above, at 332–44.

27 This problem is likely to remain acute because feminists are sceptical about deriving norms from notions of individualism. Tesón’s normative individualism evades (but does not avoid) this apparent dichotomy by presupposing the existence of a universal individual.

insights of poststructuralist theory to the discipline of international law.²⁸ The leading new stream scholars are Martti Koskenniemi,²⁹ Kennedy³⁰ and Anthony Carty.³¹ Recently, their views have come under criticism from fellow sceptics such as Scobbie,³² feminists such as Charlesworth³³ and from those who wish to recuperate the liberal project (for example, Dencho Georgiev).³⁴

The problem with defining this school is that one seems doomed to invoke a raft of fashionable phrases and ideas which collectively give the impression of progressive or radical activity, but hardly suggests a persuasive methodology or distinctive analytical approach. Thus, new stream tends towards critiques that are variously (self) characterised as postcolonial, non-hierarchical, transdisciplinary, anti-foundational or subaltern.

Three features seem salient for the purpose of this discussion. First, there is a fascination with the rhetoric or form of international law; for example, how its history is presented, what this says about the discipline, how its categories of argument are constructed and what is left out and why? Second, there is a rejection of simple theories of consent but usually a refusal to discover or propose another single social phenomenon as the essential basis of social life in the postmodern world. Kennedy seems typical of this school though Koskenniemi less so because of his continued commitment to the liberal State system despite his scepticism about the explanatory force of theories based on consent.³⁵ Third, there is a concern for the redistributive consequences of the flight from politics implicit in the partial autonomy of international legal argument. Koskenniemi's postmodernism lies in his argument for contextualised decision-making, more open politics and individualised rather than rule-based solutions.

Kennedy and Koskenniemi are two of the best-known members though each pursues a different line of inquiry. Kennedy examines the formal sources and internal logic of international law (its rhetoric and structure) and suggests that legal scholarship is at best, self-referential. For Kennedy, the whole intellectual enterprise is philosophically unstable and therefore defensive, stylised and repetitive. International law survives, not because of its coherence or its capacity

28 Kennedy, "A New Stream of International Law Scholarship" (1988) 7 *Wisconsin International Law Journal* 1; Landauer, "International Legal Structures" (Book Review) (1989) 30 *Harvard International Law Journal* 1.

29 Koskenniemi, n 3 above; Koskenniemi, n 2 above.

30 Kennedy, "The Sources of International Law" (1987) 2 *American University Journal of International Law and Policy* 1.

31 Carty A, *The Decay of International Law* (1986).

32 Scobbie, "Towards the Elimination of International Law: Some Radical Scepticism About Sceptical Radicalism" (1990) *British Year Book of International Law* 346.

33 Charlesworth, n 23 above.

34 Georgiev, "Politics or Rule Law: Deconstruction and Legitimacy in International Law" (1993) 4 *European Journal of International Law* 1.

35 See Koskenniemi, "The Future of Statehood" (1991) 32 *Harvard Journal of Law and Politics* 397.

to resolve disputes but simply because sufficient numbers of commentators and practitioners accept its existence.³⁶ It is rich in (and as) rhetoric.

According to Koskenniemi, international legal argument is structured around a series of endlessly deferred and irresolvable oppositions.³⁷ These are themselves dependent on a deeper contradiction underlying international law itself. International law must satisfy the realist demand for concreteness (that is, rules with legitimacy dependent on State support) and the naturalist demand for a normative system that regulates State behaviour from above. These two tendencies manifest themselves as apologetic (the creation of rules that simply countenance and reflect State practice and do not seek to modify it) or utopian (the drafting of principles and ideals which reflect scholarly or non-State prejudices but have little hope of gaining State support). In common with the critical legal studies project generally, the deconstruction of these patterns of argument is designed to prove that international law cannot escape international politics and retreat into objectivity. The rule of law cannot exist in international politics despite the best intentions of international lawyers. International law is either too close to State practice (therefore reflecting exactly the political predilections of States) or too far from State practice (therefore reliant on the politicised foundations of subjective natural justices).

For Koskenniemi, the answer is to make explicit the political nature of international legal argument instead of resolving disputes using the self-defeating and inappropriate language of rules and principles.³⁸ This would have the merit of contextualising legal argument and opening it up to previously excluded voices.

The new stream, then, share a commitment to developing a social theory of international law. Accordingly, the autonomy, stability and uniqueness of international law is denied and its social and historical embeddedness is emphasised. In this vein, Anthony Carty advocates a cultural anthropology of international law in order to confront the crisis of identity currently suffered by the discipline.³⁹ On a more ambitious note, some critical scholars condemn the amoral and detached nature of international society as presently constituted and would have it replaced by a more engaged, porous and “boundaryless” community.⁴⁰ Perhaps most importantly for present purposes, the new stream critique of classical liberalism has, to an extent, inspired the democratic liberal response that is the subject of much of this article.

36 Kennedy, n 28 above, at 4–7, 47.

37 Koskenniemi, n 3 above.

38 Famously, Koskenniemi makes the point in *ibid.*, p 48, that “International law is singularly useless as a means of justifying or criticising international behaviour”.

39 See Carty, “Social Theory and the ‘Vanishing’ of International Law: A Review Article” (1992) 41 *International and Comparative Law Quarterly* 930.

40 Philip Allott is probably a critical scholar in this regard. Indeed feminists like Jean Elshtain and Grotians like Richard Falk must surely be represented on this spectrum. See Elshtain, “Sovereign God, Sovereign State, Sovereign Self” (1991) 66 *Notre Dame Law Review* 1355 at 1375–78 (though also, like Koskenniemi, warning against abandoning the State altogether and allowing a collapse into authoritarianism). See Falk, n 4 above.

(e) Classical liberalism(s)

Of the five schools described here, the dominant theory of international society was, until recently, classical liberalism. This school is hospitable to both the Lockean strand of liberal thought,⁴¹ (the focus of this section) and the Hobbesian realism of a pre-contractual state of nature or minimal world order. Its preferred methodology in international law was positivism.⁴² Traditionally, most international lawyers were, by definition, Lockeans, emphasising the possibilities of international diplomatic intercourse and the creation of rules through the extended practice of all or most States in the international community.

Realists, on the other hand, assume that international relations is marked by the unmediated pursuit of national self-interest.⁴³ For some realists,⁴⁴ international relations is in a permanent state of deferred warfare in which there can be no such thing as international society because there are no shared values and few shared long-term interests. International law has a negligible role in this realist universe.⁴⁵ Machiavelli inaugurated this scholarly tradition with "The Prince"⁴⁶ while latter-day statesmen, such as Henry Kissinger and Richard Nixon, vigorously practised it in the international arena. Significantly, Nixon,

41 Emphasising the notions of consent and social contract and premised on the assumption that humans are social and cooperative. See Locke J, *The Second Treatise of Government* (ed Carpenter 1924).

42 See Oppenheim, "The Science of International Law: It's Task and Method" (1908) 2 *American Journal of International Law* 313. See also Kelsen H, *General Theory of Law and State* (1945). See also Danilenko G, *Law-Making in the International Community* (1993) for a contemporary defence of positivism in international law. For a modified classicism see D'Amato A, *The Concept of Custom in International Law* (1971). For a critique of Danilenko's position see Alvarez, "Nihilism Postponed, Positivism Regained" (1994) 15 *Michigan Journal of International Law* 747 at 784.

43 These references are to the classical realists rather than the alter structural and institutional neo-realists. For a fuller examination of these sub-categories see Slaughter Burley, n 11 above, pp 216–20.

44 This realism should be distinguished from the self-styled "realistic jurisprudence" of international legal positivists such as James Watson. This is really more accurately characterised as voluntarism. While positivism/voluntarism and realism are by no means incompatible, positivism is a theory of sources while realism is a theory of behaviour. See Watson, "A Realistic Jurisprudence of International Law" (1980) 30 *Year Book of World Affairs* 265.

45 See eg Dean Acheson's comment that "the second rule is...to keep our own purposes perfectly straight...and not get them mixed up with legal quibbles": Acheson, "Crisis in Asia—An Examination of US Foreign Policy" in Morgenthau H, *In Defence of National Interest* (1951), p 262. For a more modified realism see Morgenthau H, *Politics Among Nations: The Struggle for Power and Peace*, 1st ed (1946). Morgenthau, "Positivism, Functionalism and International Law" (1940) 34 *American Journal of International Law* 260. Morgenthau, in common with many realists, was particularly concerned with international law's inability to restrain or regulate power—the key phenomenon in international relations.

46 Machiavelli N, *The Prince* (ed 1985).

with Hobbesian candour, titled his book about the long peace following the World War II, "The Real War".⁴⁷

Ultimately classical liberalism appears to be simply one form of liberal theory mapped onto international society. International legal regulation is based on the ideas of consent (representativeness), liberty and equality. However, where domestic liberal theory appeals to a conception of the individual as a bearer of rights and a democratic actor, classical liberalism substitutes the State for the individual and posits the nation-State as the free and equal object and subject of international law.

The parallels are instructive. The State, like the individual in liberal theory, possesses a zone of private action into which the law cannot intervene. The right to privacy of individuals is converted into a State's immunity from interference (that is, domestic jurisdiction).⁴⁸ The controversy surrounding official involvement in domestic or family matters in local jurisdictions is mirrored in international law by the ambivalence felt by most States about increased United Nations involvement in States' internal affairs.

Similarly, the taboo on violence in domestic law is replicated by use of force jurisprudence in international law. Even in the most libertarian of international orders, harm to the independent State is regarded as intolerable just as the prevention of harm to the autonomous individual has been the first rationale of most liberal States and conceptions of the State from Hobbes to Hart.⁴⁹

At the level of moral theory, the most revealing parallel between the liberal theory of the individual and that of the State in international relations occurs in the discussion and construction of origins. "Man" in the state of nature is replaced by States in a state of nature. In both constructions, the individual State or human is vulnerable, aggressive and free. Societies, international and national, are designed to mitigate the vulnerability, restrain violence and maintain freedom. This is a particular view of the state of nature and the nature of States which has been accepted as complete and remains highly influential.⁵⁰

However, perhaps the defining political, as opposed to moral, idea of liberalism is that of the consensual or representative polity. This is the institution which embodies the various claims of the individual and which

47 Nixon RM, *The Real War* (1980).

48 See article 2(7) of the United Nations Charter.

49 According to Hart, a major purpose of the State is to prevent human beings inflicting arbitrary violence on one another. See Hart HLA, *The Concept of Law* (1961). For liberal international lawyers, one of the primary purposes of the State system is to prevent illegal uses of force. However, in both cases, these rationales are incomplete. Both the municipal and international legal systems regularly apply sanctions against violence that threatens the legal order but not against violence *per se*. Feminists have suggested that the private/public division in international law replicates and reinforces the division of public and private life in domestic law. See eg Charlesworth, n 8 above.

50 The classic expression of this doctrine is found in the *Lotus* case where the PCIJ stated that "[T]he rules of law binding upon States therefore emanate from their own free will...restrictions upon the independence of States cannot therefore be presumed." (1932) PCIJ, Series A, No 10.

mediates between the impossible desirability of unanimity and the undesirable possibility of anarchy. The notion of the consensual polity rests on the ideal of representativeness in the domestic life of nations. Responsible government, parliamentary sovereignty and the distribution of powers are manifestations of this political creed. In the international society of nations, consent replaces representativeness as the prevailing liberal metaphor. Classical liberals are committed to the idea that international law is a creation of the general will of States expressed through their collective consent.⁵¹ Indeed for positivists, the formation of norms can only occur through more or less unanimous State consent.⁵² Paradoxically, the most anarchical of societies (the international one) is also the society in which law can only be created through near unanimity.

Where liberal theorists suggest a fictitious social contract between citizenry and State in constitutional theory, classical liberals demand an actual covenant between the law and the States in international society. The classical liberals seem to have escaped reliance on metaphor. For positivists, the empirical fact of State behaviour is a reliable indicator of law and provides a complete normative basis for that law.

Critique

The classical liberal theory of international law has been severely deflated by four critiques. These are the moral, social, doctrinal and democratic critiques. Democratic liberalism has arisen as a response to this final set of objections to classical liberalism.

The social and moral critiques have been described (though not accepted as valid) by Koskenniemi.⁵³ The social critique of classical State-centred liberalism derives its force from the sociological fact of interdependence and the withering away of the State. According to this view, States no longer exist in their pure form. They have either devolved political sovereignty to supra-national institutions (North American Free Trade Agreement, the European Community), lost political sovereignty to sub-State groups (self-determination, regionalism, devolution) or witnessed the disappearance of their economic sovereignty into the transnational corporate markets. In addition to all this, the social critique notes that States are incapable of meeting their own environmental, ecological and security needs without a level of cooperation that threatens the whole notion of autonomous statehood upon which classical liberalism is premised.

The moral critique focuses on the oppressive nature of States and draws on the growing human rights field to argue that States have suffered an ethical disengagement from human beings and cultural communities. On this view State egotism is a morally indefensible foundation for international society because it appears to sanction some forms of inter-State violence and is neglectful of intra-

51 Ibid.

52 See Watson, n 2 above, and Weil, n 22 above.

53 See Koskenniemi, n 35 above.

State abuses of human rights and community values. For these reasons, the State must be either abandoned or heavily modified.⁵⁴

Doctrinally, too, there are many difficulties with the raw positivism or voluntarism of classical international legal theory not least its crippling self-referential and circular theory of sources.⁵⁵ However, as a liberal theory of consent, it suffers from a single major failing. The consent of States is real enough in practice (though extremely difficult to decipher at times) but the States themselves, as conduits of representativeness, are largely imagined. This critique of both the current State system and classical liberalism, questions the democratic credentials of the large majority of States which make up the international order.

III. Democratic Liberalism

Democratic liberalism in international legal theory is an attempt to meet this important objection to classical liberal theory by transplanting a richer and more substantive liberalism onto international society. In the process, the individual assumes her place as a primary actor in international legal life. Consent in this way works at two levels. States remain primary in the sphere of international law-making. Their consent is vital to the creation of international law.⁵⁶ However, the link between State and individual is reasserted through the democratic process. Individuals must give consent to governments in order that they can possess the formal credentials of statehood. Consent thus becomes a threshold requirement for law-making at the two levels of inter-State and intra-State legitimacy.⁵⁷ This rhetorical manoeuvre has obvious attractions. It appears to combine the stability and predictability of classical liberalism or voluntarism (State consent) with a new source of State legitimacy based on a deeper democratic or individualistic tradition (popular consent).

To varying degrees, the "New Haven" approach, the Kantian model and the democratic governance standard are all variations on this theme of democratic liberalism. They each share in common a desire to reposition the individual in international law as subject. Each draws on a vein of democratic theory and justification stretching back to Kant and recalling the decisive motifs of American constitutionalism. In each case, a self-conscious response to the aridities of positivism and classical liberalism, has resulted in an appeal to the international legal community to discard formalism and relativism by developing a political morality of international law with liberal democracy at the apex. To this extent, these schools represent an attempt to revive the liberal project.

54 This position is the inspiration for recent works by Carty, n 31 above; and esp Allott, n 3 above.

55 See eg Koskenniemi, n 2 above, at 1.

56 Though there are important differences between various strands of democratic liberalism with Franck emphasising the State and Tesón the individual. See generally below.

57 There are stronger (more individualistic) (Tesón) and weaker (more statist) (Franck) versions of this approach discussed in the remainder of the essay.

The "New Haven" model (or Yale school) has been discussed and critiqued at great length elsewhere.⁵⁸ Its practitioners are a group of men and women who wish to invest the international legal process with an interdisciplinary mentality. First phase, New Haven originated by Harold Lasswell and Myres McDougal was a curious mixture of American legal realism and European psycho-social theory.⁵⁹ Its more recent versions have featured scholars like Michael Reisman and Richard Falk who have expunged most of the arcane language of the McDougal/Lasswell school and have sought to bring these ideas into the mainstream.⁶⁰ They have mostly succeeded to the extent that the New Haven approach is widely regarded as the second school of international legal jurisprudence in the US and the most significant antithesis to classical liberalism. The New Haven approach is marked by its anti-positivism. International law is to be judged by its ability to meet the demands of a general right to human dignity and not according to its general acceptance by States.

However the New Haven ground has now been captured by the two approaches I wish to focus on for the purpose of this article. These are Kantian liberalism and democratic liberalism.⁶¹

(a) A Kantian view: Tesón

Ferdinand Tesón has developed his idea of a Kantian⁶² international law over a number of articles and critiques.⁶³ The major philosophical premise of Kantian liberalism is normative individualism. On this conception of law, the protection of individual human rights is regarded as the central aspiration of a normative regime.⁶⁴ In Tesón's view, justice is not just possible in the international legal system but mandated. The just community, whether international or domestic, is the purpose of all social life and juridical arrangement. A just community is one in which individual human flourishing is valued above stability or order. For

58 See eg Trimble, "International Law, World Order and Critical Legal Studies" (1990) 42 *Stanford Law Review* 811.

59 See eg McDougal M and Associates, *Studies in World Public Order* (1960); McDougal, Lasswell and Reisman, "Theories About International Law: Prologue to a Configurative Jurisprudence" (1968) 8 *Virginia Journal of International Law* 188.

60 See eg Falk, "The Status of Law in International Society", n 4 above. The leading British scholar associated with this approach is Rosalyn Higgins whose concern with process, choices and authoritative decision-making, in her recently published book, place her firmly in the Yale camp. Interestingly, she also provides something of a rejoinder to the new stream critique in the first chapter of her book. See Higgins, n 12 above, at 1-16, esp 7-11.

61 It is quite clear that W Michael Reisman occupies positions across this spectrum. His article, "Sovereignty and Human Rights in Contemporary International Law" (1990) 84 *American Journal of International Law* 866, is really an embryonic attempt to develop a theory of democratic liberalism.

62 This approach is associated variously with the cosmopolitan and humanitarian approach to international law.

63 Tesón, n 14 above; n 12 above; Tesón F, *Humanitarian Intervention: An Enquiry into Law and Morality* (1988).

64 See Tesón, n 14 above, at 54.

Tesón, as for Kant, the liberal-democratic State is the only polity capable of advancing this conception of justice.⁶⁵

Closely associated with this assumption is the belief that liberal-democratic States are peace-loving and committed to the rule of law. The prescription arising from this is the principle that only liberal-democratic States should be admitted to the family of nations.

Tesón credits Kant with enormous prescience. In various places throughout his article, Kant is described as the theoretical inspiration for the system of international institutions,⁶⁶ the visionary who predicted the ascendancy of human rights⁶⁷ and the first philosopher to perceive a link between "arbitrary government at home and aggressive behaviour abroad".⁶⁸ Kant's moral theory of international rights is set out in "Perpetual Peace", a pamphlet designed to influence international diplomacy of the 18th Century. In this study, Kant outlines the conditions for a liberal-cosmopolitan world community dedicated to peace and underwritten by a commitment to individual liberty.⁶⁹ Accordingly, the basic principles of international governance are as follows:

- (1) The civil Constitution of every nation should be republican.⁷⁰
- (2) [International Law] shall be based on a federation of free States.⁷¹

There is a necessary connection between the requirements of peace and the maintenance of a system which guarantees individual liberty. This is because representative democracies ("republican States") are most likely to observe human rights standards and least inclined to engage in hostilities.

Tesón offers an explanation for this and a great deal of empirical evidence. Representative democracies are founded on the consent of individuals. There is, therefore, presumed consent between the government and the people. In common with other contractarian theorists, Tesón argues that humans are rational, free and peaceable. When these traits are reflected in the formation of the Constitution, governments will inherit or derive these attributes from the citizenry. When governments are despotic, autocratic or authoritarian the State will display contempt for individual autonomy in the domestic sphere and will act in an irrational manner internationally. The key to restraint in the international sphere is the moderating influence of public opinion. The force of public opinion is supplemented by a free press and protected by a Bill of Rights while the separation of powers ensures that a system of checks and balances mitigates the tendency of executive government to act rashly, unilaterally or

65 This can be compared with the similar position adopted by Rawls in his essay, "The Law of Peoples" in Shute S and Hurley S (eds), *On Human Rights*, Amnesty Oxford Lectures (1993).

66 Tesón, n 14 above, at 100

67 *Ibid*, at 102.

68 *Ibid*, at 56.

69 Kant, "To Perpetual Peace: A Philosophical Sketch" [1795] in Reiss H (ed), *Kant: Political Writings* (1970).

70 Tesón, n 14 above, at 62. As Tesón remarks we would, today, describe these polities as constitutional democracies.

71 *Ibid*, at 57.

belligerently. Self-governing States are disinclined to go to war because the effects of war are felt by the people who when represented in the decision-making process will seek to avoid the privations associated with their role in the war. Finally, liberal States, in favouring a global free market, have invested too much in peace to risk it all in war. For Tesón, the free exchange of goods and persons has the dual effect of spreading common ideas and pacifying the international culture through rational communication.

(b) The right to democratic governance: Franck

Democratic liberals of the non-Kantian persuasion have a slightly different agenda. Liberated by the end of the Cold War and emboldened by the liberal triumphalism of commentators such as Francis Fukuyama,⁷² the new democratic liberals have sought to encapsulate the *zeitgeist* in the phrase "a right to democratic governance". The containment strategies of classical liberalism have been replaced by a series of evangelical flourishes in the name of universal democracy. The old positivism based on the consent of States has been replaced and extended by a theory of international law based on the dual consent of States *and* individuals.

In modern international law the idea of a right to democratic governance can be traced back to Woodrow Wilson's idealism at the end of the Great War in 1918. The failure of Wilson's system and the onset of the hot and cold wars of the latter half of the 20th Century effectively entombed the idea of universal democracy until 1991. In its place came the harsh realism of international politics reflected in Machiavellian statecraft from Dulles to Kissinger, and given theoretical underpinning by thinkers such as Hans Morgenthau⁷³ and Kenneth Waltz.⁷⁴ International lawyers faced with a choice between the rock of irrelevant idealism and the hard place of a realistic jurisprudence based on positivism and statism, tended to choose the latter.

The internal lives of States were not the concern of these scholars who, with the exception of a few human rights experts, were instead busy constructing a minimum world order with stability at the centre. International law, in this period of classical liberalism, was the law *between* States. It regulated their extra-territorial affairs, prohibited transborder use of force and provided for a process of diplomatic intercourse. The authority and legitimacy of international law was derivable from State consent. What States agreed to was law, what they refused to agree to was not law. The legitimacy of law was based on consent but the legitimacy of the States themselves was founded on effectiveness. In this way, governments represented regardless of representativeness. A social contract existed between States and the system, but this was not extended to a compact between the State and its citizens despite the best efforts of human rights lawyers. Indeed, it is arguable that the single most important legal text extant in this period was article 2(7) of the United Nations Charter.

72 Fukuyama F, *The End of History and the Last Man* (1992).

73 See Morgenthau references, n 45 above.

74 Waltz K, *Man, the State and War* (1959).

Those who support a norm of democratic governance ask us to envisage international law as the law *of*, as well as between, States. This would be an international standard of internal governance which would have direct effect *within* States.

Professor Thomas Franck was the first international lawyer to fully explicate the idea of democratic governance in a provocative and engaging article for the *American Journal of International Law* entitled "The Emerging Right to Democratic Governance", and this article will remain the focus of these comments.⁷⁵ It was Franck who, three years before, had argued in another article that justice could play no role in international law because States were the relevant actors in international relations and States were not and could not be just.⁷⁶ Franck's conversion seems to have arisen out of a number of developments.

First, there had been the conclusion of the Cold War and the greater receptiveness of the States of Eastern and Central Europe to Western liberalism. Second, there was the self-belief and exceptionalism manifested in the United States during the Reagan and Bush years. This exceptionalism encouraged the belief that United States democratic values were universal values or at the very least that the American democratic tradition could be exported. Third, there was the news of "the end of history" conveyed to us by Francis Fukuyama and accompanied by a considerable amount of empirical evidence to suggest that democratic liberalism was on the point of eliminating all its ideological competitors.⁷⁷

Drawing inspiration from these developments, Frank argued that State consent had been supplemented by the need for individual or democratic consent in international law.⁷⁸ The social contract is revived and a theory of dual consent is propounded. In this way, legitimacy is no longer a matter of effectiveness but rather of democratic will.

Ultimately, Franck seems to want it both ways. Unlike Tesón, he is unprepared to renounce the commitment to State consent completely and focus

75 See eg Franck, "The Emerging Right to Democratic Governance" (1992) 86 *American Journal of International Law* 46. The themes in Franck's work have been adopted and expanded in a number of articles. See eg Halperin, "Guaranteeing Democracy" (1993) 91 *Foreign Policy* 105 (arguing that a series of constitutional guarantees should be put in place within the UN system to ensure support for States willing to hold democratic elections. Further arguing that this international guarantee clause should include a promise to defend republican government); Fox, "The Right to Political Participation in International Law" (1992) 17(2) *Yale Journal of International Law* 539 (arguing that a series of treaties have now created a human right to participate in the political process and that international law is now based on the sovereignty of States and people). See Fox, "The Right to Political Participation in International Law" (1992) 86 *American Society of International Law Proceedings* 249; Steiner, "Political Participation as a Human Right" (1988) 1 *Harvard Human Rights Yearbook* 77.

76 Franck, "Is Justice Relevant to the International Legal System?" (1989) 64 *Notre Dame Law Review* 945.

77 Fukuyama, n 72 above.

78 Franck, n 75 above, at 46-49.

exclusively on normative individualism. How, then, does he reconcile the apparent conflict between a system based on State consent and one based on individual consent? In essence, Franck merges the two ideas of consent and imagines a world in which States *themselves* consent to a new norm of international law that demands the consent of the citizens for State legitimacy. In his words, "increasingly, governments recognise that their legitimacy depends on meeting a normative expectation of the community of states".⁷⁹ Democratic entitlement becomes foundational not because individuals are central actors (Tesón) but because States deem them to be so (Franck). It appears that there would be no individual consent without prior State consent. Therefore, the pragmatics of classical positivism remain prior to any moral theory of individual liberty. Franck's democratic entitlement is reliant on a happy and global coincidence between governed and government. Tesón's normative individualism is the basis of international law regardless of whether States possess this democratic tendency or not. Tesón's liberalism has therefore abrogated the covenant between States and international law much more thoroughly than Franck's.

IV. Imagined Consent: Some Reflections

There are some significant difficulties with both the Kantian and democratic liberal approaches.

(a) Kantian liberalism revisited

Tesón's more radical Kantianism is often characterised as cosmopolitanism.⁸⁰ However, the term cosmopolitan must surely be a misnomer in this context implying as it does a plurality of values, cultures and systems. This is the antithesis of Tesón's position which imposes a pattern of conformity on all the States of the world. The community of nations as it now stands, revels in its heterogeneity. There is no test for membership at the United Nations.⁸¹ All States, no matter what their internal constitutions, are equal members of the

79 Ibid, at 46.

80 See eg Nardin, "Realism, Cosmopolitanism and the Rule of Law" (1987) 81 *American Society of International Law Proceedings* 415 at 416; Tesón, n 14 above, at 102.

81 Article 4(1) of the UN Charter states:

Membership in the United Nations is open to all other peace-loving States which accept the obligations contained in the present Charter, and, in the judgement of the Organization, are willing and able to carry out these obligations.

However, this condition has never consistently been applied by the two bodies invested with determining membership, ie the Security Council and the General Assembly. Indeed in the *Conditions of Admission of a State to Membership in the United Nations* case the ICJ made it clear that a member State was "not juridically entitled to make its consent to the admission dependent on conditions not expressly provided [by article 4(1)] ICJ Rep 1948, p 56. Tesón, of course, advocates an amendment to this provision to bring it in line with the Kantian prescriptions, *ibid*, at 100.

United Nations.⁸² The exclusion of States for failing to meet democratic standards might be regarded as a retrograde step by relatively new nation-States whose independence was achieved recently. The Kantian theory in effect trades in one liberal ideal (the equality of States) for another (the representativeness of government).

Over 30 years ago, Martin Wight offered us an historical reminder that:

the principle that members of international society should be doctrinally uniform can be used by ideologists of more than one kind.⁸³

Wight was discussing Kant's "Perpetual Peace" but he noted that there are a number of ways to perpetuate peace. Metternich's "Holy Alliance" is one, and nuclear deterrence, another.

Exporting democracy too, has a habit of proving counter-productive or, worse, can be a disguise for action in pursuit of suspect ideological ends. Tesón's idea of an exclusive company of democratic States finds expression in the term "rogue State" which has been used to justify interventions in Nicaragua, Panama, Grenada, Libya, Iran, Iraq and Chile. North Korea is the latest in a line of these enemies of international society. The ease with which States are demonised by opposing them to an idealised international society must stand as a warning to Kantians as well as Grotians.⁸⁴

The mechanics of exclusion, too, may prove beyond the United Nations and/or world community should the Kantian view prevail. Terms such as minimum world order, democratic governance and general respect for human rights lack even a core meaning in the international order. There is certainly no supranational body capable of making the sort of determinations and authoritative interpretations that such a norm would surely require. The United Nations has on several occasions debated a resolution calling for expulsion of a member. On none of these occasions was there any attempt to infuse the

82 See eg article 2(1), United Nations Charter.

83 Wight, n 20 above, at 225. Tesón diverges from Frank *et al* here. For Tesón, States can be divided into two categories depending on their capacity to conform to the liberal ideal. It is remarkable how similar this taxonomy is to the one developed by James Lorimer, the Scottish commonsense international law jurist, who described a world composed of civilised States, semi-savage States and savage States. Indeed both Lorimer and Tesón would seek to exclude the vast majority of nations from the international community on the basis of their inability to meet certain moral postulates. See Lorimer J, *The Institutes of the Law of Nations* (1883), vol 1, pp 101–02 where he states:

as a political phenomenon, humanity, in its present condition, divides itself into concentric zones...that of civilized humanity, that of barbarous humanity, and that of savage humanity.

Those not belonging to the first two groups are described as "the residue of mankind" and are not entitled to jural recognition in Lorimer's system. See further similarities between Lorimer, Tesón and Rawls, in Rawls, n 65 above.

84 See eg D'Amato, "The Invasion of Panama was a Lawful Response to Tyranny" (1990) 84 *American Journal of International Law* 516.

admission process with a standardised, principled approach to membership.⁸⁵ There is no reason to suggest that politicised, *ad hoc* decisions would not also be the mark of a new admissions procedure to exclude undemocratic States.

At an empirical level, the Kantian theory is unsatisfactory. Norman Angell said in 1910 that a major world war between States was impossible given the global conditions of capitalism and democracy.⁸⁶ There is something of this optimism in Tesón's work. Certainly both he and Kant share the unproven assumption that democratic nations do not go to war but I would like to focus on the reasons Tesón gives for this apparent tendency because it seems to be the key to Tesón's understanding about how democratic States are actually governed.

For Tesón, a democracy is a political system in which "individual rights are honoured and rulers are appointed by the people".⁸⁷ What Tesón never specifies is how these two standards inevitably give rise to full participatory democracy that is the continuing involvement of an informed electorate in the decision-making of their elected representatives. Instead there is excessive reliance on the form of representative democracy over the substance of participatory democracy. This is most clearly reflected in Tesón's arguments about the tendency of democracies to abjure war.

According to Tesón, the two constitutional principles promoting this tendency are the separation of powers and freedom of the press. The first ensures that decisions to go to war cannot be made by an "all-powerful sovereign" with scant regard for the effects on his people. The second permits the citizenry a voice in the foreign and domestic policy of the nation. Together they "create a system of mutual controls and relative diffusion of power that complicates and encumbers governmental decisions about war".⁸⁸

There are of course severe shortcomings in such a theory of democracy because it neglects two important features of life in the post-liberal State. One is the concentration of power, the other is the concentration of information. Governmental decisions about war are the very decisions which are often *not* encumbered by reference to public opinion in constitutional democracies. In relatively few of the major constitutional democracies does the legislature have a substantial role in making war. The executive has accrued more and more power through the years by recourse to national security arguments. Even in cases where elected representatives are given a role in the Constitution, methods are found to circumvent these checks and balances.⁸⁹ The history of the 20th Century is in some respects a narrative in which young men and women are sent to their deaths by often democratic governments either against their will (for

85 The work of the Badinter Commission can hardly be regarded as a success in this area given its confused jurisprudence and rather formal requirements for the "observance" of human rights.

86 Angell N, *The Great Illusion: A Study of the Relation of Military Power to National Advantage* (1910).

87 Tesón, n 14 above, at 61.

88 *Ibid*, at 75.

89 See eg Walsh L, *Iran-Contra: The Final Report* (1994).

example, the Vietnam War) or under the spell of the crudest of propaganda (for example, World War I).

Meanwhile, the role of the free press in such cases has been well-documented in several studies arising out of the Gulf War.⁹⁰ It is now generally accepted that in the Gulf War, the media were denied access to important material about the conduct of the war and were reluctant to explore alternative political strategies during the war. Tesón's blithe promise of a fully-educated, involved citizenry acting as a check on governmental action is not borne out from the experience of the Vietnam War or the Gulf War far less the vicious colonial wars fought by republican governments from Algeria to Malaysia during the era of decolonisation. Indeed, even if citizens in democracies were given a true republican education it is doubtful if "therefore war will appear to them as the evil that every rational person knows it is".⁹¹ Noam Chomsky, for example, has cast doubt on the presupposition that there is any connection between higher education and critical thinking arguing that education can be an inculcation of ideological values rather than critical faculties.⁹² There are further unsupported assumptions (for example, that individuals themselves are not warlike) that seem to contradict a great deal of psychological evidence.

In conclusion, Tesón seems to have placed too much faith in the constitutional forms of liberal governance while averting his critical gaze from the political and social contexts in which these forms are given meaning.

(b) The right to democratic governance: Some problems

The difficulties with Professor Frank's right to democratic governance can be grouped into two. These relate first, to the substantive, political problems with the whole notion of democratic governance and second, to his use of a series of largely indeterminate and formless international legal principles to support an argument for the emergence of the right to democratic governance and to provide sources for the right.

The first group of objections question the legitimacy, both legal and political, of the norm. These have been considered in great detail elsewhere and so will be mentioned only briefly here.⁹³ In this category, there are three significant problems with the idea of democratic governance.

90 See eg MacArthur J, *Second Front: Censorship and Propaganda in the Gulf War* (1992); Draper, "The True History of the Gulf War", *New York Times Review of Books* (30 January 1992); Dennis EE et al, *The Media at War: The Press and the Persian Gulf Conflict* (1991).

91 Tesón, n 14 above, at 75.

92 See eg Chomsky N, *Necessary Illusions* (1987). There are further unsupported assumptions (eg that individuals themselves are not warlike) that seem to contradict a great deal of historical evidence. See Ignatieff M, *Blood and Belonging: Journeys into the New Nationalism* (1994), for a contrary perspective on the "rationality" of war.

93 For a series of reservations as to the durability and sustainability of the norm on the ground see eg Carothers, "Empirical Perspectives on the Emerging Norm of Democracy" (1992) 86 *American Society of International Law Proceedings* 261. For a more conceptual critique see Otto, "Challenging the 'New World Order':

First, there is the inadequacy of the empirical evidence for the purported ascendancy of the democratic impulse. This evidence has come mostly from Central America, Central Europe and South America as well as the Iberian Peninsula. Leaving aside the issue of whether democracy has really been entrenched in some of these regions, there is the additional failing of the norm that it has not taken root in large parts of Asia and Africa.⁹⁴ This is different from saying that States in this region are undemocratic (though this may be the case). Rather the problem is that the whole notion of electoral and contractual democracy is alien to some of these cultures who may well practice their own forms of participation that are not recognisably democratic. This is equally a problem with indigenous societies and minorities. The democratic norm imposed on indigenous cultures is often perceived by them as a form of neo-colonialism.

A second, associated, problem lies in excessively formalistic and narrow conception of the right as elaborated by Franck. There is little consideration of the economic conditions and cultural contexts which make democracy meaningful. Nor is there any regard for the savage effects decades of repression have had on the democratic consciousness. One wonders whether traumatised electorates in El Salvador, Angola, Mozambique, Guatemala, Argentina and Nicaragua are capable of enjoying the norm of democratic governance to any realistic extent.⁹⁵

Third, there is the conflict between this norm of legitimacy and other more basic and dispositive values within the international system with the concomitant impossibility of enforcing this right to democracy while remaining committed to the current international legal regime. Ultimately, democratic liberalism comes into serious conflict with the fundamentals of international law. The 1970 Declaration on Friendly Relations, for example, contains the following provision: "Every state has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by any other state".⁹⁶ The norm of democracy, while not as exclusive or monotheistic as Kantian republicanism, nevertheless carries with it the beginnings of a world community in which some States are more formally equal than others.

International Law, Global Governance and the Possibilities for Women" (1993) 3 *Transnational Law and Contemporary Problems* 371; Otto, "Popular Perspectives on the Global Promotion of Democracy and the Role of International Law" (1994) *Australian and New Zealand Society of International Law Proceedings* 159.

94 Indeed the most progressive African leaders are beginning to question whether democracy is worth aspiring to on the continent. See, "Southern Africa's old front line ponders it's future in mainstream", *New York Times* (21 November 1994), p 1; where President Chiluba of Zambia is quoted as saying "Maybe Africa was not cut out for Western-style democracy...maybe the one-party state is the way to go after all".

95 See Farer, "Elections, Democracy and Human Rights: Towards Union" (1989) *Human Rights Quarterly* 504.

96 General Assembly Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, GA Res 2625 (XXV), 24 October 1970.

However, a more serious set of objections to the norm is that it relies on a pair of international legal principles which lack the determinacy and content that Franck himself regards as threshold requirements for the emergence of new norms.⁹⁷ These are the right to self-determination and the right to free expression.

Any potential role self-determination may have had in promoting a norm of democratic governance has been diminished by two interpretive trends. The first trend has been towards conservative and statist definitions of the principle.⁹⁸ This process reached its apogee during the period when self-determination came to be identified exclusively with decolonisation. In effect, self-determination has most assiduously served the same State system it pretends to assail. A more recent, second, trend has involved the misappropriation of the label. The elasticity of self-determination, throughout history, has both ensured its longevity but diminished its legitimacy.⁹⁹ It has had to be capable of surviving inconsistent application, absorbing anomalies and, ultimately, satisfying powerful strategic and political interests and realities without compromising its revolutionary appeal. In this latter role, it has frequently flattered to deceive and in the process has evolved into an open-textured, highly manipulable, and indiscriminately employed slogan. It vests a tainted respectability in all those who use it, but is (at the same time) deprived of clarity and the possibility of legal content.¹⁰⁰ The most startling recent examples of this are the claims to self-determination and a white homeland or *volkstadt* made by elements of the white minority in South Africa and the comparably disingenuous assertions of a right to self-determination by the Bosnian Serbs. Meanwhile, the various attempts by the European Community and United Nations to give substance to the norm have been exercises in practical futility and theoretical inconsistency.¹⁰¹

97 Franck T, *The Power of Legitimacy Among Nations* (1990); Franck, "Legitimacy in the International System" (1988) 82 *American Journal of International Law* 705.

98 For example, the salt-water or blue-water test which limited the application of the norm to those entities which had been colonised by European powers.

99 See eg Pomerance M, *Self-Determination in Law and Practice* (1982).

100 One scholar even argues that self-determination is "unworthy of the appellation of a rule of law"; Verzijl, *International Law in Historical Perspective* (1968), p 325: quoted in Hannum, "Rethinking Self-Determination" (1993) 34 *Virginia Journal of International Law* 1 at 31.

101 See eg, a book length critique of UN practice by Pomerance, n 99 above. See also, *Conference on Yugoslavia Arbitration Commissions*, Opinions on Questions arising from the dissolution of Yugoslavia, 11 January, 4 July, (1992) 31 *ILM* 1488. See especially, Opinion No 1 at 1494, and Opinion No 2 at 1497. For a general overview of theoretical problems associated with self-determination see Berman, "Sovereignty in Abeyance: Self-Determination and International Law" (1988) *Wisconsin International Law Journal* 7(1) at 51.

Clearly then, self-determination at present lacks both definition and applicability,¹⁰² and has yet to be salvaged from “its descent into incoherence”.¹⁰³

Free speech doctrine in international law is in a similar state lacking the determinacy and coherence that Franck deems necessary for founding a legitimate and mature rule of international law.¹⁰⁴ The incoherence of free speech stems from the extremely open-textured and heavily qualified nature of the right as laid out in article 19 of the International Covenant on Civil and Political Rights (ICCPR).¹⁰⁵ Here we have a rather illiberal and potentially anti-democratic enunciation of the free speech principle. The core right to speak freely on political matters is hedged to such an extent that it ceases to exist in any meaningful sense.¹⁰⁶ The right guaranteed in article 19 bears little resemblance to the libertarian version of free expression prevalent in many Western States, notably the United States.

Problems related to the indeterminacy of the rule spring from the absence of any authoritative pronouncements on what article 19 actually protects. Indeed, the protection of free expression is disappointingly weak in international human rights law being less well-developed internationally than in many domestic systems. This lacuna is hardly filled by reference to the work of the Human Rights Committee.¹⁰⁷ Dominic McGoldrick, whom Franck quotes in support of his thesis,¹⁰⁸ stated at the conclusion of his analysis of article 19:

The fundamental norms within article 19 remain undefined and largely undeveloped. It appears unlikely that the work of the Human Rights Committee will redress the disappointing record of the United Nations concerning freedom of expression.¹⁰⁹

Even if one agrees with Franck that a right to free expression is crystallising in international law it is unlikely to be one as closely linked to the democratic process as he imagines. The conceptual leap from free expression as the human right to criticise government without suffering harm to free expression as the right to participate fully in the democratic affairs of the State is not one the international community seems inclined to make. Indeed while the first, much

102 See Simpson, “New Developments in the Law of Self-Determination” (1991) *Proceedings, International Law Weekend ANU* 69. This is not to deny its talismanic appeal to National Liberation Movements and unrepresented people.

103 See Franck, “Legitimacy in the International System”, n 75 above.

104 *Ibid.*

105 ICCPR (16 December 1966), 999 UNTS 171, (1967) 6 ILM 368.

106 Article 19(3) reads, in part:

It [the right to free expression] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and as necessary:

(a) For respect of the right or reputation of others;

(b) For the protection of national security...of public order (*ordre public*), or of public health or morals.

107 Franck, n 75 above, at 62–63.

108 *Ibid.*, at 61.

109 McGoldrick D, *The Human Rights Committee: Its Role in the Development of the International Covenant on Civil and Political Rights* (1991), p 471.

weaker and diluted, version of the right remains controversial, it is unlikely that the more sophisticated and deeper right will attain normative standing in international law. The examples given by Franck, again from the work of the Human Rights Committee, seem almost forlorn in their isolation.¹¹⁰ The Committee has never been a staunch advocate of free expression preferring to give States a margin of appreciation when evaluating the effect of speech. This approach is perhaps exemplified in the *Hertzberg* case¹¹¹ where the Committee found that the Finnish Broadcasting Authority could invoke parts of article 19 as a justification for banning the transmission of homosexual ideas and material on radio and television.¹¹²

Ultimately, Professor Franck has provided us with a stimulating and challenging account of the possibilities of universalising democratic governance. However, his claim that this norm is now a global entitlement cannot be maintained in the face of the inchoate and ambiguous nature of the legal standards upon which it is said to rest namely: the principle of free expression and the norm of self-determination.

V. Conclusion

This article has examined some of the ways in which consent (of States and individuals) is deployed in liberal international legal reasoning. Consent in the case of classical positivism is imagined in at least two senses. First, States often do not actively consent to the formation of norms but are, in the vast majority of cases, deemed to have consented.¹¹³ This is particularly so for new States and in the case of norms of *jus cogens*. Second, this consent is not derived from the consent of the individuals on whose behalf governments rule and States purport to act since the majority of States remain unrepresentative.

In an attempt to cure this defect in classical theory, democratic liberals have proposed either reinstating the individual at the centre of international society (Tesón) or have suggested a democratic entitlement norm (Franck). Normative individualism, the basis of Kantian liberalism, is an attractive idea but the relationship between the constitutional mechanics that undergird it and the world order outcomes sought is a tenuous and underdeveloped one. In addition to this, Kantian liberalism proposes an unequal international society of outsiders and insiders in which those citizens on the peripheries of the republican society are condemned to exist in a lawless state of nature.

Meanwhile, the norm of democratic governance rests on the consent of States and the consent of individuals, but depends on a theory of legitimacy which continues to implicitly prioritise the State. The purported existence of a

110 Franck, n 75 above, at 60.

111 *Hertzberg and others v Finland*, UN Doc A/35 40, 176.

112 When the committee charged with drafting the ICCPR convened to write article 19 they originally published a list that included no less than 26 possible limitations on the right to free expression. See Bossuyt MJ, *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987), p 375.

113 This particular critique is not the focus of this article.

democratic governance norm is not evidence of a renewed commitment to the individual in the doctrine of international law, but is a product of historical and potentially ephemeral forces in the ideology of consent.

In at least two senses, consent is imagined to provide a foundation for the norm. First, the vast majority of States have not consented to the establishment of this norm in their practice. The principles from which the norm is derived are themselves either inconsistent or indeterminate. Second, and most critically, the consent of the governed in the prevailing theories of democratic entitlement is a predominantly artificial and formalistic construct. The conditions of economic choice and fully realised civil society based on genuine consent are neither required nor mandated by the democratic entitlement norm. Instead, it is satisfied to rely on the rhetorical forms (representation, imagined consent) and technical contingencies (elections, qualified free speech rights) of a highly specific, partial and superficial notion of democracy.