International Law, Democratic Governance and September the 11th

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SPECIAL FORUM ISSUE: THE WORLD WE (INTERNATIONAL LAWYERS) ARE IN: LAW AND POLITICS ONE YEAR AFTER 9/11. [1] It seems to be beyond any reasonable doubt that the events of 11th September 2001, and the subsequent responses thereto, will have profound and far-reaching effects on the discipline of public international law. What seems equally certain is that international lawyers in general, and particularly those schooled in the "European" approach to the discipline, will view these developments with varying degrees of gloom. (1) In this article, however, I want to suggest that, in one small but fundamentally important area, the terrorist attacks may arguably have a positive effect on the progressive development of international legal norms. [2] The status of the concept of "democracy" within international law was the subject of a small but important field of study during the 1990s. That it began after the collapse of the Soviet Union and the publication of Fukuyama's "end of History" thesis is certainly no coincidence. The purpose of this article is to critically analyse the work of certain scholars in favour of a "right" to democratic governance, and to situate that criticism within the broader framework of disciplinary responses to radically changed political realities. In doing so, the scholarship is divided into two main groups: descriptive and normative, and taken as exemplified by the works of two theorists, Thomas Franck and Anne-Marie Slaughter. (2) It will then proceed to a necessarily speculative analysis and normative evaluation of the potential effects of the terrorist attacks on the US on the future development of the debate on democratic governance in international law. **I. The Descriptive Dimension: The Existence of a Right of Democratic Governance in International Law** [3] The seminal work on the emergence of a norm of, or a human right to, democratic governance, from the standpoint of formal international law, is an article written by Thomas Franck in 1992. (3) In order to carry out an investigation into the legitimacy of the postulated right to democratic governance, Franck identifies four "indicators": pedigree, determinacy, coherence, and adherence, and uses these as a methodological lens through which to study what he considers to be the legislative "building blocks" of the right: self determination, freedom of expression, and electoral rights. (4) However, in subsequent works both by himself and others such as Fox, the attention focuses more sharply on electoral rights as the proper and sufficient normative commitment through which to advance the democratic norm thesis. (5) The argument essentially is as follows: international law now recognises only one legitimate way to ensure that a people's rights to self-determination and free expression have been respected: through genuine and periodic elections. (6) [4] The prevalent current approach amongst supporters of the proposed norm is, roughly speaking, twofold. Firstly, it is argued, the "liberal revolution" of the 1990's, which saw a number of States professing a commitment to the principle of holding free and fair elections (conforming loosely to a thin liberal model), provides us with sufficient evidence of State practice and *opinio juris* to assert that international law now recognises such elections as the sole legitimate method of making manifest the "consent of the governed", and thus the concrete expression of the right to self-determination. This argument is further supported with reference to an impressive number of other "soft" legal sources that, although not formally binding, do, when taken together, give further weight to the *opinio juris* requirement. For example, repeated references are made to numerous General Assembly resolutions either affirming the link between democratic governance and respect for other fundamental human rights, or calling for immediate democratisation in countries where the appropriate institutions and practices are perceived to be lacking. Furthermore, extensive studies of the practice of regional bodies such as the European Union and the Organisation of American States are carried out in order to provide still more evidence of the global trend. (7) Perhaps most striking, however, at first glance at least, is the recent (1999) resolution of the Commission on Human Rights, boldly entitled "Promotion of the Right to Democracy". [5] Certainly, all of these disparate sources of soft law present a reasonable argument of the *prima facie* existence, or at least the emergence, of a right to democratic governance. However, the problem of the content of such a right that existed before the end of cold war is not answered by such proclamations, and it is in response to this problem, of "determinacy", that a second broad approach can be identified; an examination of the expansion of international monitoring of elections as a means of validating their outcomes. [6] That there has been a radical increase in instances of such monitoring cannot really be doubted. The crucial question then becomes one whether there has been developed a canon of norms concerning what it is that makes these elections "free and fair" and therefore valid; or, to use Franck's terminology, whether the international rules governing the recognition of democratic processes themselves display "the indices of legitimacy". (8) Fox answers this question with a straightforward "yes". In order to do this, he carries out an analysis of several instances of election monitoring, performed both at the level of the UN and various regional organisations, and pertaining to both the breakdown of colonial system and the more recent examples in the post colonial world such as Nicaragua and Haiti. Drawing attention to the high level of repetition of relevant standards applied in each situation, he concludes: "What constitutes a "free and fair" election is now a rather mundane question, one virtually devoid of ideological or serious interpretive ambiguities." (9) Fox then proceeds to formulate an argument about the normative intersection of the two bodies of law based on the law of treaty interpretation, in particular Article 31(1) of the Vienna Convention. He asserts that, as the terms of treaties should be given their "ordinary meaning", the standardisation of the rules on election monitoring at an international level should be taken to represent this meaning, as they represent international consensus on this issue. Such an argument seems plausible, not least because it finds precedents in

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other areas of international law, for example international environmental law. In that field, it is not uncommon to find just this kind of hard law/soft law symbiosis, wherein vague terms contained in treaties are subsequently fleshed out by the consensual acceptance of (initially) non-binding rules and regulations. [7] Despite the apparent strength of many of these arguments, they are in no way immune to criticism. The first pertains to Franck's methodology itself: in looking for the emergence and crystallisation of a norm into a rule of custom by means solely of an investigation into its legitimacy, or "compliance pull" (10), there is a sense in which he assumes the existence of that which he seeks to demonstrate. An examination of whether a rule is more or less legitimate only makes sense if the existence of the rule is taken for granted, and it could thus be argued that Franck's conclusions are undermined by a selective bias in the evidence he produces to support his propositions, occasioned by uncritical acceptance of a contestable premise. (11) [8] Furthermore, the evidence itself adduced in support of the right does not portray the whole picture. Roth, for example, has argued that the above arguments are premised upon a "wishful reading" (12) of the relevant evidence, and instead cites the fact that almost all of it contains reservations on the bold proclamations that reaffirm well-founded principles of non-intervention, and the "essence" of domestic jurisdiction. (13) The General Assembly will often pass, with similar majorities, resolutions which, if the preferred interpretation of the democratic entitlement school is the correct one, appear contradictory; one affirming the role of elections in ascertaining the will of the people, and another reaffirming that no one political system can fit all States, each system being subject to historical, political, cultural and religious factors. (14) A case in point is the superficially striking resolution of the Commission on Human Rights on the "promotion of the right to democracy"; the title, for example, was the subject of a separate vote, which was passed with a much less impressive majority. The term "right to democracy" is mentioned nowhere in the text (15) and several States expressed real doubts about the legal status of such a right. (16) [9] In much the same vein, Roth attacks what I have identified as the second approach of the democratic entitlement school, namely the use of election monitoring norm standardisation to flesh out the meaning of the right to political participation. In so doing, he cites a 1994 General Assembly resolution, passed despite no votes from most liberal states, emphasising strongly the exceptional character of election monitoring. He argues persuasively that this illustrates that the majority of states view monitoring standards as applicable only to specified countries in exceptional circumstances, and thus cannot be used to demonstrate international consensus on a normative content of the right to political participation. (17) [10] Roth's argumentation, although persuasive, is not, however, entirely unproblematic. For example, one major question mark remains over the nature of the strong link that he postulates between the proposed right and governmental illegitimacy. In viewing much of the debate through the lens of governmental legitimacy, the question he often poses is, "does international law mandate non-recognition of governments who were not elected in liberal-democratic election?" There is a danger that this distorts his view, in that although there can be no doubt that a right to democratic governance would speak directly to the legitimacy of regimes, the extent to which failure to comply would mandate the application of the essentially political sanction of non-recognition is less clear; it is doubtful whether decisions concerning the recognition of governments is one that can be exhausted by legal argumentation alone. As Roth himself acknowledges (18), non-recognition may be entirely counterproductive; a people may not always be best protected by refusing those in *de facto* control of them any degree of membership of the international legal order. Roth therefore understands General Assembly resolutions demanding that governments democratise as proof of international acceptance of their sovereignty. This, however, may be regarded as question begging: on what grounds was the demand to democratise based in the first place? [11] Taking all of this into consideration, it remains difficult to be certain about the exact status of "democracy" in contemporary international law. Roth's arguments, despite their failings, seem powerful enough to assert that it is still too early to maintain that it has crystallised into a norm of customary law; to leave the analysis at that point would, however, be reductive. There is an impressive amount of evidence and practice that simply cannot be ignored, even if one agrees with Marks' observation that describing the right as "emerging" is unhelpful, as it implies a teleological process that is in some sense irreversible, and that makes unwarranted assumptions about the location of the *telos*. Perhaps all that can be said, with any degree of certainty, is that democracy has acquired special status and some legal significance in the international arena. As Crawford notes, "References to democracy, which a generation or even a decade ago would have been regarded as political and extralegal, are entering into the justification of legal decision-making in a new way." (19) **II. The Normative Dimension: The Desirability of a Right to Democratic Governance in International Law** [12] Given the insufficiency, outlined above, of the more traditional approach to international law preferred by authors such as Franck and Fox in giving normative force to the concept of democracy in contemporary international law, several authors have turned to other methodologies in order to achieve the same goal. These approaches vary, but seem to have one thing in common: the acceptance, and the utilisation, of Immanuel Kant's notion of "perpetual peace" that would come about between a "league of liberal States". The most developed of the theories of this group is typified by the "inter-disciplinary" work of Anne-Marie Slaughter, and her version of liberal international relations theory. Envisaged as a direct challenge to the once-dominant Realist school in the field of international political science, it postulates a new method of understanding the way in which State preferences are formed, and the way in which these preferences interact to produce the political and legal outcomes in international life. The central tenet of this approach, and one which distinguishes it from all others in this area, is that it mandates a distinction between different types of States: liberal and non-liberal States are viewed as qualitatively different. Liberal States, it is asserted, do not wage war on one another. (20) [13] Slaughter is keen to present her work as empirical, scientific, non-normative: "liberal international relations theory applies to all States". (21) To a certain extent, this is true; her

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methods of understanding the preference-generating processes, and the interaction of these preferences on a global scale, may well be of considerable use in understanding the international sphere as it exists today. However, the relative merits of her work as political science, as empirical description, are of little relevance to my arguments in this essay. Of considerably more importance are the ways in which she abandons this standpoint, and allows herself to be drawn into the arena of normative prescription. That she does so is clear: from the very outset, she states that she is not merely trying to provide us with a better tool for deciphering the world as it exists now, but rather with an entire "blueprint for the international architecture of the 21st century". (22) [14] As the problems attached to the ways in which Slaughter attempts to generate normative prescriptions from her ostensibly purely explanatory approach to international relations have already been analysed at some length (23), I propose to do no more than to briefly outline one of them here. Slaughter asserts that relations between liberal States are characterised by *disaggregated* sovereignty, whereby the State is split up into each of its political institutions, which then interact (amicably) with their counterparts in other like-minded States. (24) She may then be correct to assert that a potentially fruitful line of interdisciplinary research would be to attempt to identify those norms governing such interaction. However, in asserting that this empirical "fact" mandates the disaggregation of the norm of sovereignty itself, she is clearly making a normative prescription about what international legal order *should* look like, rather than explaining what it is. This is readily evident when, in justifying her thought experiment of hypothesising a "world of liberal States", she suggests that it may be desirable to apply the norms that she generates to relations between liberal and non-liberal States, in order to avoid "sacrificing the principle of universality" (25), arguably the very principle which her empirical political science mandates abandoning from the outset. [15] Those theorists basing themselves on liberal international theory are thus in need of a normative foundation upon which to base their project. They find this, along with others who share their general normative approach, such as Fernando Tesón (26), in the work of Immanuel Kant and his notion of a "liberal peace", and in the work of contemporary scholars in the field of political science who have attempted to verify these claims empirically, in particular Michael Doyle. (27) The coherence of this body of work, therefore, is fundamental to the validity of the normative project of these liberal internationalists; it is, however, striking that none of them engage directly with the scientific debate upon which they ground their prescriptions, preferring instead to refer to it as relatively accepted empirical "fact", with, in some cases, passing references to the fact that it is "not uncontested". [16] The basis of Doyle's argument is that one can verify by means of empirical study the claim that liberal States are disinclined to go to war against each other. It is important at this point to note that Doyle is dealing with Kant's idea of a *liberal* peace, not merely a *democratic* one. Therefore, the criteria to be used in defining the basic units of this scientific research are: formal democracy; a market economy based on private property rights; respect for other civil and political rights; and a separate judicial system committed to the rule of law. (28) Interestingly, these criteria are adopted wholesale and explicitly from Doyle by Slaughter in her exposition of her own thesis. (29) On this basis, Doyle examines the history of violent conflict between liberal States, beginning at the end of the 18th century, and concludes that "a liberal zone of peace, a pacific union, has been maintained and has expanded despite numerous particular conflicts of economic and strategic interest." (30) [17] There are, however, numerous possible and powerful critiques of this. Some, for example, point out that the results of the empirical studies are necessarily insufficient to support the proposed hypothesis, in that there have simply not been enough liberal States in existence for a sufficiently long period of time to provide conclusive statistical validation of the claims. Arguments of this sort are further bolstered by the observation that, contrary to Realist assumptions, States, liberal or otherwise, are not in a perpetual state of war; it is, in fact, a relatively rare occurrence for *any* State to engage in active hostilities with another. (31) Another point of weakness relates to the definition of the basic "units" of the empirical study, i.e. the selection of which are to count as "liberal" States for its purposes. The First World War provides an interesting and illustrative example of this argument: in many respects, Imperial Germany was just as "liberal" as Britain was in 1914. (32) Doyle himself acknowledges this difficulty, and, in order to rescue his hypothesis, is forced to argue that although Germany was internally liberal in this period, it was still governed in an essentially authoritarian manner concerning its external, State-to-State relations. (33) This explanation, however, seems a little contrived, particularly upon realisation of the fact that French and British foreign policy at the time was not subject to full democratic scrutiny. (34) [18] Another criticism, related to the last, pertains once again to the definition of "liberal" to be used in constructing the study. Given the normative content of the theories that purport to rely upon the phenomenon of the "liberal peace", the disparity between the propositions contained in them and the States whose activities form the basis of the thesis is at best curious. For example, Doyle begins his empirical study with the United States and France after their respective revolutions at the end of the 18th century, during which period the former actively encouraged slavery, and neither had even pretensions to a truly universal suffrage. Furthermore, from this perspective, Britain "becomes" liberal in 1832; a proposition that is likely to confuse most of British history, who are taught that the 1832 Reform Act represented the first, and extremely limited, step in a process of democratisation and liberalisation that would last for well over a century (and, many would argue, is far from complete). This criticism has a two-fold effect: firstly, if accepted, it reduces time-scale and scope of any empirical study of the liberal Peace to the period after 1945 for a much-reduced number of basic units; this has severe consequences for the scientific validity of any statistical evidence that may result. Secondly, and perhaps more importantly, it reaffirms the impression that "liberal" is only ever, and no more than, the position reached by developed Western States at any given point in history. It seems doubtful that Slaughter or Tesón would consider as liberal any modern State that promotes slavery or refuses universal suffrage; that their normative theorising is based upon empirical research that uses States who

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did just that must have serious effects on the coherence of their theories. This failing, however, is perhaps not surprising; it seems to be fully in accord with Susan Marks' observation that, throughout the work in this area of international law, one can detect a celebratory tone that posits a "we", who have reached our goal, and a "they", who still have some distance to travel. (35) It seems simply that our "goal" advances at the same rate as "we" do. **V. Disciplinary Rapprochement and Democratic Governance** [19] As already noted, the end of the Cold War signalled a radical change in prevailing political realities in the international arena, to which legal scholarship has had to respond. In two recent articles, David Kennedy has analysed the historical developments within the American tradition of international law, and the ways in which some methodological approaches have been incorporated into the mainstream at some times, and marginalised at others. (36) Using the opposition between rule-fidelity and rule-scepticism, he argues that, prior to 1989, public international lawyers have normally been only of peripheral importance in their ability to influence American actions in the international sphere due to the fact that mainstream scholarship within that discipline maintained an essentially rule-based approach to law; an approach that was not only largely ignored by those formulating foreign policy, but also at odds with prevailing understandings of law more generally. (37) This marginalisation of the legalistic approach was not constant; the emergence of the "Columbia School" in the 1960s is an example of an essentially rule-based internationalism gaining widespread influence. As Kennedy notes, however, this period was characterised by the fact that "American political interests seemed to overlap with both cosmopolitan and international legalism"; (38) as soon as this was no longer the case, rule-based approaches to international affairs were once more forced to the periphery. [20] It is clear that the project of promoting a legalistic understanding of international life gained renewed impetus after the collapse of the Soviet Union; U.S. interests were once again understood as being best served by the promulgation and enforcement of international norms. The result was that previous differences within the discipline of public international law became blurred and a large degree of consensus formed around a common project: The inheritors of the old Yale School became indistinguishable from the liberal inheritors of legal process, international economic law specialists joined neo-Kantians to celebrate the Washington Consensus and an emerging right to democratic self-governance. (39) The result of such a shift can be regarded as obscuring the distinction drawn by Koskenniemi between "utopian" and "apologetic" approaches to international legal argumentation. Whereas the former posits a formally valid law, free from the corruption of power politics, from which the actions of States can be criticised, the latter argues that this renders international law irrelevant to the conduct of foreign affairs, and instead sees the existence of law primarily in what States actually do. (40) The fact of the (temporary) coincidence between American policy and the international rule of law conflates these two standpoints, and the international legal framework begins to resemble what Vagts has recently characterised as "hegemonic international law", based on the understanding that "it can be convenient for the hegemon to have a body of law to work with, provided that it is suitably adapted." (41) [21] In what ways, then, is the post-1989 disciplinary consensus reflected in the work of those scholars who advocate the proposed right to democratic governance? As argued above, neither of the methods of analysis outlined in this article seems to be sufficient to justify the propositions that they seek to uphold; proponents of each have thus made use of this temporary disciplinary consensus in order to render their claims more persuasive. This seems to have happened on at least two levels. The first is somewhat superficial, although none the less important for that; it concerns those occasions where jurists, ostensibly analysing the debate from one of the methodological perspectives outlined above, make explicit reference to factors more relevant to the other in support of their propositions. There is not the space here to provide an exhaustive list of all of the examples of this; rather, I propose to concentrate on the two scholars whose work I have taken to typify the two main approaches to the debate. [22] In seeking to demonstrate the legitimacy of his proposed right, Franck himself makes use of the notion of the "democratic peace", which he suggests affirms the proper place of the right within the recognised hierarchy of international law, the "right to peace" being regarded as paramount. It is, however, difficult to argue that the democratic peace thesis can support the existence, or emergence, of the right to democratic governance in terms of a traditional approach to norm identification; it is simply not evident that respect for the norm of peace implicitly mandates a right to democratic governance. Furthermore, such an argument may be a mischaracterisation of the "fundamental norm" of the international legal order. As noted above, international law has, since 1945 at least, been concerned with preventing aggression in a world of politically diverse States; it is doubtful, however, whether the content of this norm can simply be reduced to the maxim of "peace at all costs". (42) Franck thus introduces an overtly normative element into his work by making use of the democratic peace thesis, which, furthermore, has important implications for the content of the right whose existence he asserts. The term "democratic" in connection with this theory is a misnomer; the political science, and Kant's work itself, is predominantly concerned with the *liberal* peace. If this theory is to be supportive of Franck's conclusions, therefore, he must import those aspects of liberalism that are explicitly present in the work of Slaughter and Doyle, namely civil rights, the rule of law, and a market economy. This mitigates against Franck's assertion that he is proposing an "unambitious" but generally acceptable concept of democracy for use in the emerging "right". (43) [23] A similar point can be made in connection with the work of Fox and Nolte on "intolerant democracies", (44) in which they argue that democracies are entitled to impose restrictions upon, and thus effectively remove from the field of choice, certain "anti-democratic" parties. This position leads them to support the Algerian *coup d'Etat*, in which the election of such a party was forcibly overturned. Roth has illustrated the problem with this approach: if democracy is something *more* than simply the right to vote, as it must be in order to support this thesis, then it must presuppose a *substantive* image of democracy; such an image, however, is at odds with the claim that

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international law has accepted a right to *procedural* democracy, which is all that a positivistic approach to norm identification can support. The conflation of description and prescription here is apparent: in order to preclude the electoral success of one set of substantive values, Fox and Nolte must have recourse to substantive values of their own. As Roth notes, if the overturning of the expression of popular will in Algeria is to be supported, "there had better be a more compelling argument for democracy than that it enables people to choose". (45) Such an argument is, however, as Franck and Fox seem prepared to admit, outwith the bounds of that which can be reasonably said to form the international consensus if the democratic entitlement is to be regarded as law. [24] On the other side, Slaughter, in certain instances, also "borrows" arguments from the more traditional approach to international law in order to support her own conclusions. For example, she notes that her theory, according to which a distinction between liberal and non-liberal States is mandatory, is supported by the work of Franck on the "emerging" right to democratic governance; indeed, argues that it represents the first step in the process that will turn her normative model into an empirical reality. (46) Furthermore, in attempting to justify her "thought experiment" of postulating a "world of liberal States", she notes that "a growing part of the world *is* composed of liberal States", (47) echoing an argument often used by those such as Franck and Fox when suggesting the development of *opinio juris* in this area. In this way, she masks, to some extent at least, the normative dimension of her model; although she admits that a "world of liberal States" is manifestly not the world in which we currently live, she contends that norm-generation on the basis of a hypothesis that postulates its existence can and should go ahead, and cites the "developments" in traditional international law, identified by Franck and others, in support of this. [25] Perhaps more illustrative of the point that I want to make here, however, is the second, deeper level of conflation between rule-based and policy-based approaches that the disciplinary *rapprochement* has enabled. The works of Franck and Slaughter can again be taken as illustrative of this, this time in terms of their respective methodologies and overall projects. As argued above, Franck's work seems to belong within the more traditional approach to international law; it is therefore not surprising that he urges the recognition of a legal norm, to which all States are subject regardless of practice, and which is capable of triggering sanctions in the event of noncompliance. In this respect, it would be regarded as "utopian" in Koskenniemi's terminology. However, Franck's method of determining the existence of a right through an examination of it's compliance pull means that he places an unusually high level of emphasis on what States actually do: if a norm is law because it is complied with, then principle and practice become, if not coterminous, then inextricably interlinked; this, in turn, undermines the claim normally made in scholarship of this sort to some degree of independence of international law from political reality. [26] Slaughter's work, on the other hand, and despite her protestations to the contrary, is prescriptive; it concerns not what law is, but what it should be. Again, then, it is only to be expected that her methodology would eschew most of the tools provided up until now by the discipline that she claims to represent; those approaching international law from a policy perspective rarely have much use for the essentially positivistic means of norm-identification. Her aim, however, perhaps sits a little uneasily with what has been until now understood as the goal of the law-as-policy, or "apologetic", approach; there can be no doubt that Slaughter is proposing a strong normative framework that will generate substantive rules that are binding on all States (and other transnational actors), and that would therefore be, in some sense, independent of, and indifferent to, actual political reality. The point here is that the respective methods and goals of the two general approaches seem to mix, obfuscating the distinction between "apology" and "utopia", and facilitating the "borrowing" of aspects of one approach by another at the more superficial level outlined above. Koskenniemi captures this argument nicely when he notes that: "... neither studying law as an instrument for external purposes (power) nor examining its legitimacy pull provides any significant room for the concept of validity. And inasmuch as *that* concept gets thrown away, nothing is left of law but a servile instrument for power (of what works) to realise its objectives (of what should work)." (48) [27] Thus far, I have suggested that attempts to introduce democratic governance as a legally relevant category in international law can be broadly understood as adopting one of two general approaches; a descriptive and a normative one. I have sought to illustrate that neither is, on the basis of its own theoretical arsenal, capable of formulating persuasive arguments for the proposals that it seeks to support, and, furthermore, that scholars have made use of arguments and techniques not strictly relevant to their own avowed intellectual standpoints (and not theoretically sound in themselves) in order to bolster their claims. In this sense, the disciplinary *rapprochement* that characterised the U.S. mainstream in the 1990's has conspired to render the notion of "democratic governance" in international law something of an "emerging" *fait accompli*. Though there is not the space to go into any detail here, it is important to note that many authors have raised powerful objections to the content of the concept of "democracy" that informs this debate. Concerns such as the "thin" nature of this concept, its potential to legitimise corrupt regimes, its marginalisation of economic, social and cultural rights, its propensity to encourage rather than prevent international conflict, and the possibility of neo-liberal imperialism, (49) all identify serious weaknesses with the current state of affairs quite apart from the theoretical problems that I have tried to outline here. It is undoubtedly the case that the image of "democracy" used in the work examined here corresponds to a thin, liberal model; (50) it also seems likely that, to some extent at least, the peculiarities of the disciplinary *rapprochement* have been responsible for this development. The model has to appear abstract, neutral, in order to support the claim that it enjoys wide support in practice and *opinio juris*; and yet limited substantive elements must be allowed in order to justify reliance on the "liberal peace thesis", and the project of promoting liberalism worldwide more generally. The inevitable result is that "democracy" begins to adopt the characteristics of classical, minimalistic, liberal theories; a model which has long since been stripped of its claim to be apolitically representing a natural human state. And thus the disciplinary

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consensus ensured that legal considerations once again played a prominent role in the formation of American foreign policy, by providing those responsible for the latter's formation with a law they could "use", given, of course, that it had been suitably "adapted". **VI. Disciplinary Rapprochement and September the 11th** [28] I now turn, belatedly, to the question of 11th of September, and the potential effects that the events of that day, and the responses to them, may have on the future development of the debate surrounding the status of "democracy" in international law. Many of these observations will, of course, be speculative in nature, it being far too early to predict with any degree of certainty what actions States will take, let alone the scholarly responses to them. However, if the argument of this article is accepted, namely that "democratic governance" has achieved such a prominent status in international legal discourse in large part because of an intra-disciplinary truce made possible by the end of the Cold War, the terrorist attacks on the Twin Towers and the Pentagon could have serious repercussions for the debate under review here. As Kennedy notes, "The Achilles heel of the current consensus within the field is… the fact that within the United Statesean legal tradition neither political opposition to liberalism nor methodological critiques of legalism have gone away. The relationship between cosmopolitanism and national interest, between expertise and politics, between policy and fidelity to rules – all remain as unstable internationally as nationally." (51) [29] It seems decidedly likely that this vulnerable consensus will be put to the test by the events of 11th of September in a number of different ways. Firstly, and perhaps most obviously, is the decoupling of immediate U.S. policy goals from a liberal international legalism. If those in charge of formulating American foreign policy no longer see the national interest as inextricably linked with the project of promoting this version of democracy across the globe, then the work in this field will lose much of its prominence, by losing one of its already shaky theoretical supports. It is interesting to note in this context that very little of the work produced by international legal scholars in direct response to September the 11th mentions the promotion of democracy or the right to democratic governance. The recent responses of both Franck and Slaughter to the tragedy are striking in this regard. (52) Furthermore, those few pieces that do explicitly recommend continuing the drive to spread liberal democracy throughout the world have tended to do so within the general context of lamenting the thoroughly illiberal conduct of the U.S., both domestically and internationally, in the last few months. (53) [30] This is far from conclusive, certainly, but it may be suggestive of a general trend. A brief investigation of some of the initial responses of Western governments to the terrorist attacks is also instructive in this regard. For example, a joint declaration by EU Heads of State noted that these were attacks on all "open, democratic, multicultural and tolerant societies" and committed the EU to "defend justice and democracy at a global level". (54) The OAS urged its members to "combat threats to peace, democracy and hemispheric security", (55) while the joint US-EU Ministerial Statement on Combating Terrorism makes no mention of democracy other than the need to protect citizens of such systems from terrorist attacks. (56) Again, it is impossible to draw any convincing conclusions from these observations; however, the rhetorical tone seems clear enough. Democracy is no longer being promoted, it is being defended; it is on the back foot. [31] Another example of this trend is the fact that non-democratic regimes have been welcomed into the international coalition against terrorism. Such a move was undoubtedly wise from the point of view of ensuring a minimal international backlash to any action taken, yet it serves once again to illustrate the tensions between US policy and a universal human right to democratic governance, or the promotion of a "world of liberal States", that have come about since 11th of September. Furthermore, such action represents a severe blow to those scholars who have claimed that the practice and *opinio juris* of the international community was moving towards acceptance of the proposed right. States such as Pakistan, which were subject to heavy pressure to democratise prior to the terrorist attacks, were not only tolerated by the US as being strategically vital, but actively embraced back into the international community, with Bush pledging over a billion dollars worth of aid. Despite the problems with breach of a right to democratic governance directly and inevitably to non-recognition of that government, such active support of plainly illiberal regimes must have serious consequences for the legitimacy of any such "right". [32] The events of 11th of September may also have an interesting effect on the validity of the already-unconvincing liberal peace thesis. It has already become commonplace to assert that our understanding of who can commit, and what can constitute, an "armed attack" for the purposes of international law will have to be rethought. Slaughter herself advocates this, and suggests using a "principle of civilian inviolability" in order to effect this change so that acts of terrorism can constitute such an attack, and thus trigger the right to self-defence. This means that acts of terrorism become acts against international peace, and thus, presumably, have to be subsumed within the general framework of the liberal peace. At first glance, this should present no problem: consider the following quote from Madeline Albright: "We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capacities while at the same time promoting democracy and human rights." (57) This statement may be problematic in two regards. Firstly, Hoffmann has recently argued that terrorism can and should be understood as a reaction against various forms of political and economic globalisation. From this standpoint, the very act of *promoting* democracy, particularly the liberal-capitalist model that informs most of mainstream American thinking, can in and of itself encourage terrorism that is, in part, a reaction against invasive US policies and the perceived threat to local cultures posed by market homogenisation. (58) More curious, however, and certainly more controversial, is the claim that problems of terrorism (and thus international conflict) may be exacerbated by the act of promoting *democracy*. It is by no means self-evident that democratic governance and freedom from the scourge of terrorism go hand in hand; indeed, one recent study has even suggested that the two go together. Based on a comparison of terrorist activities in different categories of States, the authors reach the strong and surprising conclusion that more acts of terrorism are committed in stable democracies than anywhere else. Nor, they are keen

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to stress, should this be interpreted simply as non-citizens taking advantage of democracy's open nature; in the period under study, terrorist acts were more likely to be carried out by citizens of stable democracies than by those of any other category of State. (59) Doubtless, this study can and will be criticised on a number of different levels; nonetheless, there is now a case to answer, particularly for those, such as Slaughter, who would at once defend the liberal peace, and extend the definition of international attacks to terrorist acts. Is there something "about the internal dynamics of democracies that make the use of terror tactics attractive to their own citizens"? (60) **VII. Conclusions** [33] As noted above, considerations of this type are at the moment essentially speculative; I hope, however, that the foregoing has been sufficient to suggest that the current disciplinary consensus that exists around the concept of democracy within the American mainstream of international legal scholarship will be severely tested by the political realities of the world post-September 11th, and that, as a result, the normative content of that concept may not develop in the direction that it seemed to be during the 1990's. The "thin" liberal image common to the work of almost all advocates of this project (61) was in large part a result of the intra-disciplinary truce that was made possible by the collapse of the Cold War. As the sole superpower, American interests were seen as best served by an international legal commitment to formal liberal democracy, and, perhaps, by international legalism more generally. It may well be that this is no longer the case: the responses by the U.S. to the terrorist attacks suggest that the promotion of democracy is no longer of prime concern to US policy-makers, and furthermore, have called into question basic aspects of both strands of scholarship that had advocated that it should be. Whether this is the beginning of a renewed flight from legalism by the US Government, it is still too early to say, but, if so, it will represent a serious setback for the "liberal millenarian" (62) proponents of democratic governance. [34] So what is to be made of this situation, if indeed the challenge to prevailing thought in the US mainstream is a real and powerful one? It would be difficult to overestimate the potential importance of a right to democratic governance in international law. Not only would it represent a radical change in the discipline's very *raison d'être*, but, as it would speak to the legitimacy of governments, and thus the possibility of subjecthood, it would become, in some important sense, one of the fundamental norms of the international legal system; it would lay down the basic rules and principles to be followed before a State could even begin playing the game. There is thus a sense in which such a right, if accepted, would begin to function as the meta-conceptual framework through which all rights would be viewed and thus understood; the content of the right, i.e. what is to count as "democratic" for the purposes of international law, would have profound ramifications upon the way in which human rights discourse in general can be legitimately perceived. Those rights that are already recognised as extant would inevitably be ordered into some sort of hierarchy, and the importance of the "umbrella" right to democracy, outlined above, has the potential to render this ordering increasingly immune to challenge. Furthermore, a restrictive understanding of democracy, such as the one generally advanced at the moment by advocates of this thesis, will have a limiting effect on attempts to progressively reinvigorate the rights, not to mention the possible creation of new ones. It is perhaps these considerations that Susan Marks had in mind when developing her idea of a "principle of democratic inclusion", according to which democracy would not function as a right, but rather as a general norm to guide behaviour which would remain relatively open as regards questions of normative hierarchy; (64) it may have been fears of this sort that led Koskenniemi to criticise the proposed right as "suspect as a neocolonial strategy" . (65) [35] In this article, I have sought to illustrate the theoretical weaknesses and confusion present in much of the work in this area, and to locate this within a broader framework of global political change and disciplinary responses thereto. Given the potential importance of a right to democratic governance, the temptation to draw conclusions or normative prescriptions from such an unsure base must be resisted; the powerful normative critiques of the substantive conclusions of those who do so, offered by authors such as Roth, Marks, and Koskenniemi, further confirm this. If the rhetoric is to be believed, then the right to self-determination is of fundamental importance to human dignity. It must represent a meaningful choice as to self-government, not simply the mechanical installation of procedures designed to legitimate government by others; the thin, formal, liberal image of "democracy" currently favoured within certain American academic circles falls into the latter category. (66) Such a conclusion must be resisted all the more if, as is the case at present, its theoretical foundations rest on an incoherent mixture of selective positivistic analysis, highly contestable political science, and the essentially uncritical acceptance of a 200 year-old political theory. It is in this sense that I want to suggest, tentatively, that the events of 11th September may have a positive impact on the development of public international law; it may upset the disciplinary truce that has enabled the rise to prominence of an insufficiently nuanced understanding of "democratic governance", and allow a constructive voice to critical standpoints that circumstance may otherwise have marginalised. Whether "democracy" can be conceptualised in a way that is at once sufficiently nuanced and legally relevant, however, remains to be seen; this is just one of many important questions that can, and must, now be asked.

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(1) See e.g. Cassese, "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law" 12 *EJIL* (2001), 993; Charney, "The Use of Force Against Terrorism and International Law" 95 *AJIL* (2001) 835-839.

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(2) I am following loosely here the classification made by Susan Marks. See Marks, *The Riddle of All Constitutions* (2000).

(3) Franck, "The Emerging Right to Democratic Governance", 86 *AJIL* (1992) 46.

(4) *Ibid* at 51-52.

(5) See generally: Franck, "Democracy as a Human Right", in Henkin and Hargrove (eds.) *Human Rights: An Agenda for the Next Century* (1994) 73; Fox, "The Right to Political Participation in International Law" 17 *YJIntL* (1992) 539; Fox "Remarks" in "Implementing Democratization: What Role For International Organizations?" 91 *ProcASIL* (1997) 356; and, a recent adaptation of an earlier work, Franck, "Legitimacy and the Democratic Entitlement" in Fox and Roth (eds.) *Democratic Governance and International Law* (2000) 25.

(6) See e.g. Fox, "The Right to Political Participation in International Law", in Fox and Roth (eds.) *Democratic Governance and International Law* (2000) 48, at 49.

(7) See e.g. Franck, *supra* n.3 at 65-69; Fox, *supra* n.6, at 59-69.

(8) Franck, "Legitimacy and the Democratic Entitlement" in Fox and Roth (eds.) *supra* n.5, at 31.

(9) Fox, *supra* n.6, at 83-84.

(10) *Ibid*

(11) Koskenniemi seems to make a similar point to this when he notes that such an approach leaves no theoretical space for the concept of validity, something that is vital to legal analysis if the object of study is to retain its distinctive "image" as law. See Koskenniemi, "Carl Schmitt, Hans Morgenthau, and the Image of Law in International Relations" in Byers (ed.) *The Role of Law in International Politics* (2000) 17, at 33.

(12) Roth, *Governmental Illegitimacy in International Law* (1999) at 231.

(13) Fox and Roth, "Introduction: The Spread of Liberal Democracy and its Implications for International Law" in Fox and Roth (eds.) *Democratic Governance and International Law* (2000) 1, at 13.

(14) See e.g. G.A.Res 45/150 (1990) (129-8-9), para.3.; G.A. Res. 45/151 (1990) (111-29-11),

(15) See Fox and Roth, *supra* n. 13, at 3. The separate vote drew 12 "nays" and 13 abstentions.

(16) See generally Crawford, "Democracy in International Law – A Reprise" in Fox and Roth (eds.) *Democratic Governance and International Law* (2000) 114, at 116-117.

(17) *Ibid.*, at 342. The resolution in question is G.A.Res. 49/180 (1994) (97-57-14)

(18) Roth, "Popular Sovereignty: The Illusive Norm" 91 *ProcASIL* (1997) 363, at 365-366.

(19) Crawford, "Democracy and the Body of International Law" in Fox and Roth (eds.) *Democratic Governance and International Law* (2000), 91, at 102.

(20) See generally: Slaughter, "International Law and International Relations Theory: A Dual Agenda" 92 *AJIL* (1992) 205; Slaughter, "International Law in a World of Liberal States" 6 *EJIL* (1995) 503.

(21) Slaughter, "International Law in a World of Liberal States" 6 *EJIL* (1995) 503, at 509.

(22) Slaughter, "The Real New World Order", 76 *Foreign Affairs* (Sept./Oct. 1997) 183, at 197.

(23) See Reus-Smit, "The Strange Death of Liberal International Theory" 12 *EJIL* (2001) 573.

(24) Slaughter, *supra* n.22, at 515. For a cautionary note on the interaction of these disaggregated institutions, and on other aspects of Slaughter empirical premises, see Alvarez, "Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory", *EJIL* (2001) Vol. 12 No. 2, 183.

(25) Slaughter, *supra* n.22, at 516.

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(26) See e.g. Tesón, *A Philosophy of International Law* (1998). For a critique see Patrick Capps, "The Kantian Project in Modern International Legal Theory" 12 *EJIL* (2001), 1003.
(27) See Doyle, "Kant, Liberal Legacies, and Foreign Affairs" in Brown *et al.* (eds.) *Debating the Democratic Peace* (1996), 3.

(28) *Ibid.* at 21.

(29) Slaughter, *supra* n.22, at 509.

(30) Doyle, *supra* n.27, at 10.

(31) See e.g. Layne, "Kant or Cant: The Myth of the Democratic Peace" in Brown *et al* (eds.) *supra* n.27, at 191.

(32) *Ibid.* at 193.

(33) Doyle, *supra* n.27, at 13.

(34) Layne, *supra* n.31, at 194-195.

(35) Marks, "The 'Emerging Norm': Conceptualizing 'Democratic Governance'" 91 *ProcASIL* (1997) 372, at 374.

(36) Kennedy, "The Disciplines of International Law and Policy" 12 *Leiden JIntL* (1999), 9; Kennedy, "When Renewal Repeats: Thinking Against the Box" 32 *NYU J IntL &Pol* (2000), 335.

(37) Kennedy, "The Disciplines of International Law and Policy" 12 *Leiden JIntL* (1999), 9 at 25-34.

(38) *Ibid.* at 32.

(30) *Ibid.* at 33.
(40) See generally Koskenniemi, *From Apology to Utopia* (1989); Koskenniemi, "The Politics of International Law" 1 *EJIL* (1990), 4.

(41) Vagts, "Hegemonic International Law" 95 *American Journal of International Law* (2001) 843, at 845.

(42) See e.g. Richard Falk's review of Marks, *The Riddle of All Constitutions* in 96 *AJIL* (2002) 264, at 266.

(43) Franck, *supra* n.5, at 75.

(44) Fox and Nolte, "Intolerant Democracies", 36 *HarvILJ* (1995) 1.

(45) Roth, *supra* n.18, at 368.

(46) Slaughter, *supra* n.22, at 538.

(47) *Ibid.* at 514.

(48) Koskenniemi, *supra* n.11, at 33.

(49) See generally Marks, *supra* n.2; Roth, *supra* n.12; and Koskenniemi, *supra* n.11.

(50) Marks, *supra* n. 35, at 375.

(51) Kennedy, *supra* n.36, at 33.

(52) See Franck, "Terrorism and the Right of Self-Defense" 95 *AJIL* (2001), 839; Slaughter and Burke-White, "An International Constitutional Moment" 43 *HarvILJ* (2002), 1.

(53) See e.g. Koh, "The Spirit of the Laws" 43 *HarvILJ* (2002), 23.

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(56) http://ue.eu.int/newsroom/loadDoc.asp?max=1&bid=109&did=68701&grp=3772&lang=1

(57) Albright, quoted in Koh, *supra* n.53, at 50.

(58) See Hoffmann, "Clash of Globalizations" 81 *Foreign Affairs* (2002), 104, at 102.

(59) Eubank and Weinberg, "Terrorism and Democracy: Perpetrators and Victims" 13 *Terrorism and Political Violence* (2001) 155.

(60) *Ibid.* at 161.

(61) Marks, *supra* n.35, at 373.

(62) *Ibid.*

(63) See generally Marks, *supra* n.2.

(64) *Ibid.* at 102ff.

(65) Koskenniemi, "Whose Intolerance, Which Democracy?" in Fox and Roth (eds.) *Democratic Governance and International Law* (2000) 436, at 440. For similar arguments, see Roth, "Democratic Intolerance: Observations on Fox and Nolte"; and Roth, "Evaluating Democratic Progress" in the same volume.

(66) Marks, *supra* n.35, at 373.

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