

Discussion on the Democratic Value Orientation of International Law

WANG Jiabing^{[a],*}

^[a] Wuhan University, Institute of International Law, Wuhan, Hubei, China.

* Corresponding author.

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Abstract

Since the end of the Cold War, democratic values have become one of the core values of international law. In the current international law, the democracy as the value of international law is not yet become the legal norms of international law. The implementation of democratic values of international law should respect the sovereign value as a prerequisite and subordinate to the values of peace.

Key words: International law; Democracy; Value orientation; Sovereign; Peace

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INTRODUCTION

Traditional international law is not concerned in democracy – about this topic of government organizational form. International law is considered as incompatible with democracy. International law belongs to the legal field, while democracy belongs to the political field; International law is the legal system which adjusts the relationship between countries. It cannot interference the domestic jurisdiction matters essentially. And, government organizational form is considered purely as country's internal affairs, which belongs to the scope of domestic law. According to the sovereign equality of

states and the principle of non-interference in each other's internal affairs, a state also has no right to imposed their own form of government upon other states. Therefore, just as Grotius said, "The Advantages and disadvantages compared between this or that form of government should not be embodied in the law of nations." Oppenheim also said for sure, "Each country has its own ability for judgment, adopting any form of government and changing the form of government." In 1986 the Nicaragua case in International Court of Justice, International Court of Justice also clearly pointed out that, it does not exist any required specifications related to the form of government in the customary international law. Therefore, before the end of the Cold War, the word "democracy" rarely appears in the discourse of western international law scholar. International law is generally indifferent to the concept of democracy.

However, the international situation has undergone great changes since the end of the Cold War. Western countries generally consider the end of the Cold War as the victory of liberal democracy. Some countries discarded the original political system and replaced with the western "liberal democracy" system. And, American scholar Fukuyama published "The End of History" in 1992, this book more sensational pointed out that, along with the end of the Cold War and history has come to an end. The end of history is free and democratic society. Of course, we can disagree some of the scholars has the overtones of view with strong ideological, but we cannot ignore the western so-called "third tide of democracy" bringing profound impact to international law. Although the democratic governance requirements are not yet rose to the legal norms of international law, from the present point of view, at least the values of democracy has become one of the value orientation of contemporary international law.

1. THE PERFORMANCE OF THE VALUE ORIENTATION OF CONTEMPORARY INTERNATIONAL LAW

1.1 Relevant Documents of United Nations and Practices of Democratic Promotion

1.1.1 Relevant Documents of United Nations

After the end of the Cold War, United Nations major institutions (General Assembly and the Commission on Human Rights) both express their views on the method of strengthening the democracy. Under the close cooperation with United Nations, it has convened five general assembly of new democratic regimes or restores democratic regimes. Since 1988, each year there is at least one resolution related to democracy which adopted by the general assembly. As in 1988, UN General Assembly adopted item entitled “Enhancing the effectiveness of periodic and genuine elections principle” and it pointed out that, periodic and genuine elections are the essential elements of long-term efforts to protect the rights and interests of the governed. Also, the practice has proved that the right of everyone to participate in the government of their country is the key factor of all the personal enjoyment including a variety of other human rights such as political, economic, social and cultural rights and fundamental freedoms; And as in 1995 UN General Assembly adopted item entitled “Support by the United Nations System of the efforts of Governments to promote and consolidate new or restored democracies” (U.N.Doc. A/50/133) and the resolution pointed out that, encouraged the secretary continue to strengthen the ability of United Nations, to respond effectively to the requirements of the Member States and provide a coherent, adequate assistance to support their efforts to achieve the goal of democratization, to encourage Member States to promote democratization, and special efforts to identify possible steps, to support the efforts of governments to promote and consolidate new democracies or restore democracies.

Since the 1990s, the outcome of the major United Nations conferences and summit meetings and the internationally agreed goals reached by these meetings, including millennium development goals, which are all touched the issue of democracy. In 2000, World leaders promised in “Millennium Declaration”, “We will spare no effort to promote democracy and strengthen the rule of law, and respect for all internationally recognized human rights and fundamental freedoms, including the right to development. Therefore, we are determined to strengthen the capacity of all our countries, in order to fulfill the principles and practices of democracy, and respect for human rights including the rights of minorities.” At the World Summit held in September 2005, Member States reaffirmed that, “democracy is a universal value based on the freely expressed will of

people to determine their political, economic, social and cultural systems and their full participation in all aspects of their lives.”, “Commitment to support democracy. In order to do this, strengthening all countries to implement the principles of democracy and the practical ability, and determination to strengthen the ability of United Nations to provide assistance for Member States.” At that summit, governments renewed their commitment to support democracy, and welcomed the establishment of a Democracy Fund at the United Nations. Most of the funds of Democracy Fund will be allocated to local civil society and used for strengthening the voice of civil society organizations, promotion of human rights and encourage all groups to participate into various projects of democratic process. Summit outcome document also emphasized that, “democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing,” and pointed out that “while democracies share common features, there is no single model of democracy.” Member States reaffirmed this commitment in the resolution of A/RES/62/7 at the general assembly in 2007.

1.1.2 Practices of Democratic Promotion

Democratic activities support by UN is executed through the United Nations Development Programme (UNDP), United Nations Democracy Fund and Office of the High Commissioner for Human Rights and other organizations. These activities with the United Nations are inseparable from promotion of human rights development and peace and security work, including: assisting parliaments and strengthening the checks and balances of local government structure in decentralized local, so that the democracy can be thrived; assisting to strengthen the fairness and effectiveness of national human rights mechanisms and judicial system, so that the opportunity of human rights, rule of law and access to justice can be promoted; support for elections and long-term support to electoral management bodies; promotion of women’s political empowerment. The annual United Nations through UNDP alone has the provision of \$ 1.5 billion for assisting the democratic process all over the world; The United Nations has become one of the institutions that provided most technical cooperation in the aspects of global democracy and good governance.

Specific to the area of electoral assistance, United Nations provide electoral assistance via many institutional sector, and it is strictly controlled by the general assembly. In order to ensure these periodic and genuine elections principles be complied with, deputy secretary general of political affairs provide advice to the Secretary-General on the electoral affairs. Electoral assistance division of the department of political affairs performs coordination on the electoral assistance provided by UN to ensure consistency, response and high efficiency. Electoral assistance requests proposed by Member States to UN

which have an average of 24 each year. In addition to the electoral assistance division, some United Nations agencies also provide assistance, including United Nations Development Programme (UNDP), Department of Peacekeeping Operations, United Nations Volunteers, United Nations Development Fund for Women, United Nations Office for Project Services, United Nations Democracy Fund and United Nations Department of Economic and Social Affairs. For example, UNDP spend an average of \$ 228 million each year in about 45 countries, for building a sustainable electoral management capacity and encouraging more people to participation in the electoral process, especially women and other underrepresented groups, and the coordination of the electoral process donations and donors. So far, UN has provided election consulting and assistance for 90 countries, including monitoring the election results. Also, it always engaged in this work in its historical decisive moment.

In November 2007, UN general assembly adopted a resolution, declared that September 15 of each year as the International Day of Democracy, to promote countries around the world promoting and consolidating democracy, and to strengthen international cooperation for this purpose.

1.2 Relevant Legal Documents and Practice of Regional International Organizations

1.2.1 Organization of American States (OAS)

In the 28th special session of the Organization of American States (OAS) in June 2001, 34 foreign ministers of the participants unanimously adopted the historic document, "Inter-American Democratic Charter". "Inter-American Democratic Charter" officially becomes an action guide of OAS to promote the western hemisphere democracy. "Inter-American Democratic Charter" expounded the "democratic concept" of OAS, and pointed out that "the people of American countries enjoy democracy, the government has an obligation to promote and defend democracy. Democracy is the basic elements of American people's social, political and economic development." Therefore, OAS only accepts democratic countries as its members. "Inter-American Democratic Charter" pointed out that effective operation of representative democracy is the foundation of Member States legal system and constitutionalism. Inter-American citizens should strengthen and deepen the representative democracy via enduring, ethical and responsible cooperation under the legal status of national constitutions. "Charter" has done the detailed provisions for how the OAS should adopt measures to strengthen and protect democratic institutions. Measures taken procedure is that, when the Member States democratic system is illegal interrupted or facing a crisis, it can ask the Permanent Council or Secretary-General of OAS for help. At this time, the Secretary-General of OAS should

proceed immediately to investigate the matter. After that, the results should be reported to the regular council to execute collective assessment, so that the necessary actions can be taken. These actions include convening a special session to solve the problem, providing policy advice, setting up a special working group, etc. In the case of particularly serious, the membership of member state will be canceled and implemented the appropriate collective sanctions to force it to restore democracy.

As early as in June 1990, secretariat of OAS set up under the UPD, the Unit for the Promotion of Democracy. An important task of the agency is that provides electoral assistance to Member States and send election observation mission. Stationing "democracy and electoral observation mission" for Member States is an important initiative of OAS in the democracy promotion process. On February 25, 1990, according to the initiatives of the Contadora Group and Ace Plath Agreement (also known as Arias Plan), OAS and UN jointly supervise the Nicaragua election. The experience of Nicaragua is the watershed of international election observation in the history. This is the first time in history that supervises the election of a sovereign state from UN, OAS and Numerous non-governmental organizations systematically. During 1990-2000, OAS has sent 52 delegations to 18 Member States, it has performed effective supervision for democratic elections in Member States. It also played a positive role in promoting the legality and impartiality of election.

1.2.2 European Union

The provisions of section 49 "European Union Treaty" in 1992, only the European countries are in line with the criteria listed in article 6, paragraph 1 can join the EU, and this paragraph includes the requirement that government should adopt liberal democracies. Moreover, even if countries join the EU, they are still bound by the democratic standards. Article 7 of the "European Union Treaty" stipulates the control mechanisms that Member States are in violation of Article 6, paragraph 1. According to the provisions of Article 7, paragraph 2, after the consent of European Parliament, European Commission consult with the Summit of Member States, it needs unanimous vote to make the resolution that a member state is serious and persistent breaches of Article 6, paragraph 1. After this resolution is made, council of ministers can adopt qualified majority vote, it may decide that suspend certain rights of membership of the Member States according to Article 7, paragraph 3, such as voting rights.

On 16 December 1991, conference of foreign ministers of the Member States of the European Union delivered a declaration entitled "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union". In particular, the "adherence to the rule of law, democracy and human rights" is as the primary condition of formal recognition; for the recognition of the new countries from

former Yugoslavia decomposition, European Community even set up the Arbitration Commission for specific assessment of whether the intended establishment of the new nations complies with the above criteria. It can clearly be seen, democratic standards is becoming one of the criteria that the EU recognition for the new national and a new government.

2. THE DEMOCRACY AS THE VALUE OF INTERNATIONAL LAW HAS NOT YET BECOME THE INTERNATIONAL LEGAL NORMS

As described above, democracy has become an important value orientation of international law, then with respect to peace and security, human rights and other international law value simultaneously is the status of the legal norms of the international law. Whether democratic value orientation of international law has the same properties? That is whether international law formed a clear form of government, governance modes that limited the legal norms, and whether democracy has entered the scope of the legal norms of the international law?

On that issue, the western “democratic governance school of thought” headed by Thomas Frank believes that, the state must be carried out democratic governance which has become the legal norms international law. Thomas Frank is the earliest western scholar who researches on “international law and democratic governance” issues. In 1992, he issued a article of “The Emerging Right to Democratic Governance” in 1992#1 of American Journal of International Law, this article pioneered the issues study of “International law and democratic governance” in the first of its kind. Frank proposed that, a “democratic governance norms” (or a “the right to access democratic governance”) is emerging on international law. The so-called “democratic governance norms” refers to international law required that countries must be carried out the legal norms of democratic governance, while the right to access democratic governance refers to citizens of all nationalities have the rights of democratic governance from participating in political activities. After this point was proposed, it is endorsed and responded by many international law scholars, they also have articles to express their views one after another, it can even say that it forms a school of thought of “the norms of democratic governance” in a short time. And based on their difference of argumentation on arisen due of “democratic governance norms”, that they also can be divided into two branches, one is represented by Frank, they believe that the worldwide liberal democratic system achieved a decisive victory. Liberal democratic consensus has appeared in the world, while “democratic governance norms” is the inevitable requirements and results of all the

development; Another one is represented by Anne-Marie Slaughter and Fernando R. Teson, they start from the relevance of democracy and peace, and they believe that due to no wars between democratic countries, therefore, in order to achieve world peace, it must establish the status of “democratic governance norms”.

At the same time that “norm theory of democratic governance” is widely accepted by the western international jurisprudence, it also appears many voices of doubt. Some scholars believe that the evidence of “norm theory of democratic governance” is not sufficient. It is doubtful that whether international law has appeared democratic governance norms. Corresponding with the two branches of democratic norms theory, A direction of the doubt is pointing to the so-called “Liberal democratic consensus has appeared in the world”, another direction is pointing to the doubt of “democratic peace theory”. Thomas Carothers (Vice president of the Research Department of the Carnegie Endowment for International Peace) believes that, the so-called argument of “Liberal democratic consensus has appeared in the world” is not established. The facts are that, many nation-states are not democratic and do not think of it as the ideal. Brad R. Roth (Professor at Arizona State University in the United States) also believes that, liberal democratic legitimacy rooted in the general international law is lack of basis, democratic governance norm is a norms that has not yet been universally accepted. Brad R. Roth pointed out that, “democratic peace theory” did not consider the phenomenon of internal conflict, democracy is not possible to prevent civil war. Now, most of the armed conflicts are in the form of a civil war, the harm caused are more severe than war between nations, it can affect more people life.

For the possible consequences from the implementation of the norms of democratic governance, Thomas Carothers believes that, due to the norm theory of democratic governance is based on whether the country implement the liberal democratic system. It puts the world which divides into two camps: democratic national camp and non-democratic countries camp. This division is same with the “civilized nations” and “barbaric countries”, christianity and pagan countries in the history. It opens the door for “an evil action in the name of good faith”. And the real terms in the norm theory of democratic governance is that Western wants to implement their own system into the whole world, this will further intensify the western and non-Western opposition. On the use of economic sanctions to enforce democratic governance norms, it will bring a mid and short-term disaster to ordinary people, it causes serious long-term damage to social and economic infrastructure in developing countries. In terms of military intervention may still be used as a means of implementation, Brad R. Roth pointed out that, this is a view that a sophistry logic of establishing

peace via undermining peace. Actually, it can only bring an endless war, it makes the international law to become a plaything of the powerful countries. Martti Koskenniemi (Professor at the University of Helsinki in Finland) believes that, norm theory of democratic governance may incur resurgence of imperialism.

The author agrees with the doubt on the “democratic governance norms”. View from the current related international documents of democratic governance, mainly are United Nations General Assembly, the United Nations Commission on Human Rights adopted resolutions which are not legally binding. As well as regional legal documents of EU, OAS and other regional international organizations, do not currently exist legally binding universal international treaty. Only by these non-legally binding resolutions from UN and the regional legal documents from some regional international organizations, it is not conclusive that international law has formed limited legal norms on the form of government and governance. Moreover, until now, although there is a consensus that democracy is the core value of international law, it does not exist a consensus in democratic governance that is an international legal norm or the rights of democratic governance in the international law, that is there is no *opinio juris*. Therefore, it is also unable to reach the conclusion of democratic governance is an international customary law.

3. THE STATUS OF DEMOCRATIC VALUES IN THE VALUE SYSTEM OF INTERNATIONAL LAW

The value system of international law including which specific values, although international academic exist different views, it generally believe that peace, human rights, sovereignty, and all mankind common interests is the core value of international law pursuit. As the new member of the value system of international law, what is the relation existed between the values of democracy and other values.

At first, implementation of democratic values should be based on respect for sovereignty value as prerequisite. Although UN make the promotion of democracy as one of its important objectives, whether it is in the relevant resolutions or the practice of democracy promotion in UN, its constantly follow the principle of respect for national sovereignty. The 55th meeting of the United Nations Commission on Human Rights on March 23 2012 reaffirmed that, although democracies have some common characteristics, it does not exist a single model of democracy. Also, democracy does not belong to any country or region, sovereignty and self-determination must be given due respect. Commission on Human Rights also point out that countries are the defenders of democracy, human rights, good governance and the

rule of law, it has their full responsibilities. Calls upon all States continue their efforts to adopt recommend ways of strengthening the rule of law and promotion of democracy. United Nations General Assembly resolution 62/7 also pointed out that, “although democracies have some common characteristics, it does not exist a single model of democracy”, also “democracy does not belong to any country or region”. Actually, the ideal of democracy rooted in philosophy and traditional in many parts of the world. The organization has never tried to export or promote democratic model of a particular country or region. A/RES/62/7 resolution at United Nations General Assembly on November 8, 2007 pointed out that, the United Nations encourage governments to strengthen domestic aims to promote and consolidate democracy program, including this purpose with reference to a variety of innovative approaches and best practices, expanding bilateral, regional and international cooperation. That resolution actually pointed out the matters of national democratic is within the governments sovereignty. In the report of UN Secretary-General at 64th session of the United Nations General Assembly in 2007, “Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization”, the report clearly stated that: “United Nations electoral assistance is provided only at the request of Member States, in conformity with the principle of the sovereign equality of States and the realization that there is no single electoral methodology or system that is appropriate for all countries.” UN Secretary-General also pointed out that, democratic transition and consolidation of democracy’s main responsibility should be undertaken by the various forces in the national social, no matter how much external assistance still cannot create democracy. In practice, United Nations provides electoral assistance via many institutions departments, and it is strictly controlled by the general assembly. Electoral assistance comply with the principle of national sovereignty and elections belong to the principle of domestic affairs. In order to ensure these principles are complied with, deputy secretary-general of political affairs provides advice to secretary-general on electoral affairs.

Secondly, democratic values should be subordinated to the values of peace. International peace and security is the premise and foundation of the development of country and people. The maintenance of international peace and security is the primary and fundamental value of international law. In the international community for ensuring international peace and security, national sovereignty and human rights can be achieved. The preamble of “Charter of the United Nations” clearly expressed the purpose of the establishment of the United Nations as, “to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind”, “to unite our strength to

maintain international peace and security”, which show that, the most important value that international law pursuit is the international peace. Peace is the primary and most fundamental values of the international law, this means that the democratic values cannot be override above the value of peace, it cannot force to implement and export democracy. Exporting democracy by force will make the international community peace and security that the international law pursue for being without any protection. In order to maintain international peace, article 2, paragraph 4 of “Charter of the United Nations” provides that, all Member States in their international relations shall not use force or the threat of force, or in any other manner inconsistent with the purposes of the United Nations, to infringe on the territorial integrity and political independence of any Member State or country. According to the Charter of the United Nations, only in two cases that the use of force is legitimate for a State: The first one is that, the self-defense when being an armed attack; the second one is that, UN Security Council to use or authorize the use of force. While the Council to take or authorize the use of force should be based on the following conditions: concluding that the international community exists the behaviors of threat to the peace, breach of the peace, armed aggression; Taken the “provisional measures” to prevent the deterioration of above situation; To prevent the above behaviors, it has been exhausted of the methods and means, including economic sanctions and except the use of armed force. Obviously, according to the existing international law, only when a state against another aggression or threatens of the state, undermining international peace, they can have the legitimate use of force. UN Security Council has ever been use of force against a state due to a state adopted a non-democratic form of government to threat and undermine international peace. Contrary, the United Nations expressed clearly that opposed to use of force against the promotion of democracy. In the International Day of Democracy on 15 Sep. 2012, UN Secretary-General Ban Ki-moon delivered a speech and pointed out that, “democracy cannot be exported or imposed from abroad; it must be generated by the will of the people and nurtured by a strong and active civil society.” He also stressed that, for all efforts to support democracy, the United Nations does not seek to output or promote any particular national or regional democratic models. Similarly, countries also cannot exercise “preventive self-defense” due to the reason of the authoritarian countries constituting a threat to peace. Although there is a dispute of international jurisprudence on the “right of preventive self-defense” after the commencement of “The Charter of the United Nations” whether still is a customary international law, it is no objection that the exercise of “right of preventive self-defense must follow the” standard of “necessity and proportionality”, “the necessity

of self-defense must be imperative, overriding, without any other choices, without any time to consider.....” While, taken direct military intervention to authoritarian state is clearly inconsistent with the standard of necessity. It is because the so-called authoritarian state threat to peace is that a threat in a theoretical sense, which is not a “imminent threat”, therefore, according to the “democratic peace theory” that defines authoritarian state as threat to peace, and then its practice of preventive self-defense to take force for regime change which also does not comply with international law. In short, under the existing framework of international law, although there are exceptions of the principle of the use of force prohibition, exporting democracy by force is not within the scope of the exception, exporting democracy by force undermines international peace and security. The democracy that international law pursue for cannot be obtained by the method of undermining peace, the democratic values of international law should be subject to the value of peace of international law.

Finally, the value of democratic values and human rights, peace, sovereignty is interdependent and mutually reinforcing. When democratic values have better promotion and Implementation, it will strengthen the progressive forces of the international community, it will also cause the international peace and security with greater protection; Democratic society will also get the best protection of the human rights; Likewise, a peace and greater improvement of human rights international community will also cause a more smoothly democracy implementation. The consolidation of democracy requires the promotion and protection of all human rights, including civil rights, political rights as well as economic, social and cultural rights. Including the part of development of the right to a universal and inalienable basic human rights as provisions in the declaration on the right to development.

CONCLUSION

In the international community since the Cold War, international law has significant changes in a number of aspects, including many international organizations within the United Nations will make democratic values as its core value. The respected and pursuit of democratic values has become an important development trend of international law. But so far, democracy is merely as the scope of the value of international law, democracy has not yet to become the legal norms of international law. Therefore, in terms of other values of international law with both the nature of legal norms, democratic values should be subordinated to the sovereignty value, peace value. The pursuit of the international law of democracy should build on the basis of respecting national sovereignty and compliance with the prohibition of the use of force.

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