

# Legality and legitimacy of exporting democracy

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## Abstract

The George W. Bush jr administration explicitly declared its aim to spread democracy militarily. Is such an intention legal under current international law, norms and institutions? If one proves it to be at odds with the criterion of legality – since it clearly contradicts one of the main pillars of the UN Charter, i.e. the principle of non-interference –, can it be justified with recourse to the concept of legitimacy? We offer some paradigmatic insights into the concepts of legality and legitimacy, mainly developed for the internal context. With the tools of political theory we try to investigate whether there is any room for a different interpretation about exporting democracy or any need to reform international law. Finally, we discuss the methods used for exporting democracy, so as to argue that the issue of its legality and legitimacy cannot be assessed without taking into consideration the means employed.

Keywords: legality, legitimacy, international law, democracy, cosmopolitan democracy, economic sanctions

## 1. Introduction

As already recalled by Richard Falk in this volume, the distinction between legality and legitimacy in international affairs re-emerged after the 1999 NATO-led war in Kosovo. The war was sanctioned by several multilateral institutions including NATO and the European Union, but lacked UN Security Council approval, due to the opposition of Russia and China. The motivation of the war was supposedly humanitarian, i.e. to prevent an ethnic cleansing of the Albanian Kosovars akin to that experienced by Bosnian Muslims in 1992-95. The intervention was an anomaly compared to the previous state of international wars, since NATO countries, and the militarily dominant United States, did not have a clear stake in the Balkans. As a result, an authoritative Independent Commission was established to assess whether the intervention, as well as the methods used, were justified.<sup>2</sup>

The Commission turned out to reach a general consensus on the basic distinction between legality and legitimacy. Actually, the NATO intervention was considered to be illegal under current international law since what happened in Kosovo was under the jurisdiction of a sovereign state, but legitimate in terms of its aim to prevent an imminent humanitarian calamity<sup>3</sup>. The difference was somehow associated to two different disciplines: within positive international law there was nothing

that could justify the Kosovo intervention. But inasmuch as international politics was concerned, what can or cannot be considered legitimate is much more subjective.

In a few short years, the international climate has changed considerably; President Bill Clinton vacated the White House to George Bush Jr. The change of incumbent has implied a shift away from the philosophy of multilateralism to that of a “coalition of the willing”. The main outcome has been the Iraq war, justified with a mixture of arguments including the supposed presence of weapons of mass destruction, humanitarian willingness to remove a despot from power - even the declared intention to impose a regime change - and finally, to facilitate the building of democratic institutions. Similar arguments were used to justify the invasion of Afghanistan.

As we know, the Iraq invasion was not authorized by the UN Security Council. But in comparison with the Kosovo case, the number of countries opposed to the invasion was considerably higher, including not only China and Russia, but also France, Germany and several other SC elected members. Neither NATO nor the European Union provided authorization to the coalition of the willing assembled by George Bush and Tony Blair. The front of democratic countries was much more divided than in the Kosovo case. It was therefore very difficult to claim any legality for such an operation, which in fact implied a return in international relations to the state of nature. And, unsurprisingly, the distinction between legality and legitimacy has not been used again to defend this war, nor an independent commission established to assess its validity.

But in spite of these basic differences, it is worth investigating whether the distinction between legality and legitimacy can be of any use in assessing the project to export democracy. Western democratic countries dominate today’s world politically, economically and also militarily. And for the first time since the end of World War II, some of their leaders explicitly declare their aim to spread democracy, albeit militarily, in all countries of the world. Is such an intention legal under current international law, norms and institutions? If these intentions should be considered illegal since they clearly contradict one of the main pillars of the UN Charter – non-interference – is it useful to again use the category of legitimacy or should we stick to sole concept of legality? These are the issues to be addressed in this chapter. We address these issues with the tools of political theory and, although we take for granted the current state of international law, we also try to investigate if there any room for a different interpretation or any need to reform international law.

In the next section we sketch some paradigmatic views of the concepts of legality and legitimacy, mainly developed for the internal context. We then discuss some of the characteristics of the ‘good’ that is intended to be exported, namely democracy. The fourth section addresses the crucial issue, namely the methods used for such an adventure; in fact, we argue that the issue of legality and legitimacy cannot be assessed without discussing the means employed.<sup>4</sup> Finally we focus on different ways for exporting democracy and draw conclusions.

## 2. Preliminary considerations on the legitimacy/legality issue

### 2.1 The concept of legality

The concept of legality recalls that of law: an action or a decision is considered legal when it complies with a positive rule belonging to a legal system. Within domestic organizations, a legal system is composed of different general types of rule: rules regulating private conduct, rules imposing duties, rules conferring powers, rules of judgment, rules for changing the rules. Owing to the complexity of modern legal systems and to the intricate logic of regulations themselves, the endeavours to reduce these different types of rule to a single one (e.g. a sovereign's command) have generally tended to underestimate decisive features of law, which are highly relevant for grasping how the legal machinery works. Therefore, in the wake of the failure of such attempts to catch the 'real' essence of law, jurists and legal philosophers resolved to recognize that the central government is neither the sole nor the ultimate source of law. But, when focusing on the international legal system, most of them are still inclined to depict it as primitive and rudimentary, as a *law-like* system, that is, a weak mechanism of control which reveals only few analogies with the domestic ones. In this view, H.L.A. Hart warned: "International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions". It is perfectly clear to everyone that it is this deviation of international and primitive legal orders "from the standard case which makes their classification appear questionable. There is no mystery about this."<sup>5</sup>

Nonetheless, in the last decades these formalist tenets are been brought into question by virtue of both theoretical developments (such as the rediscovery of legal pluralism) and factual reasons (the rise of the international legal regime). On the one hand, the difficulties in outlining precisely and unquestionably the main features of the legal system compels us to recognize, as Raz underlines, that the "general traits which mark a system as a legal one are several and each of them admits, in principle, of various degrees. In typical instances of legal systems all these traits are manifested to a very high degree. But it is possible to find systems in which all or some are present only to a lesser degree or in which one or two are absent altogether. It would be arbitrary and pointless to try and fix a precise borderline between normative systems which are legal systems and those which are not. When faced with borderline cases it is best to admit their problematic credentials, to enumerate their similarities and dissimilarities to typical cases, and leave it at that."<sup>6</sup> In addition, many interesting studies on legal pluralism have proven under several aspects the fallacies and the abstractness of the monist and state-centred conceptions of law and legality.<sup>7</sup> On the other hand, the progressions of international political and legal bodies make the international charters no longer dead papers but the body of a positive (i.e. gradually but increasingly adopted by international courts as bases for their deliberations) though embryonic suprastatal statute.<sup>8</sup>

Comparing the international normative system to a state of nature has served more often than not as an excuse for patent illegal behaviours and acts of mere force. Nowadays such behaviours may no longer lurk in the folds of uncertainty, since precise standards of legality are being outlined for assessing the actions of states and individuals.

## 2.2 The concept of legitimacy

We turn now to the question of legitimacy, which immediately appears as even more complicated. There is no general definition for it, nor does it necessarily refer to positive law. Legitimacy is intertwined with morality and ethics, since it is often seen as a justification for political and legal power. As Falk points out, “there exists a bewilderingly diverse set of uses of legitimacy in contemporary commentary on world order that marks the historical moment as one of contested conceptual and normative boundaries.”<sup>9</sup> In our opinion, the confusion about legitimacy is an inescapable characteristic of the whole modern political theory and practice. In order to account as tidily as possible for the multifaceted and controversial meanings of legitimacy, we can single out four general understandings of it and of its connections with legality.

- a) Legitimacy *after* legality: an act or a decision is legitimate when it complies with a legal procedure; there is no legitimacy without positive laws defining procedures.
- b) Legitimacy *along with* legality: the substance of the legal system is to be consistent with the diffused conceptions of the social parties; that is, law/legality has to adapt itself to the key values and to the basic ideals of the political community.
- c) Legitimacy *before* legality: constitutions and/or governments have to embody the *interest* of the majority, to such an extent that law is what the majority considers to be legitimate; legality is a by-product.
- d) The elucidation of the previous approaches allows us to outline a fourth conception, which attempts to embed the good points of the first two and, in addition, to underline the indispensable connection between legitimacy and democratic participation.

The first approach reduces legitimacy to legality: *the former comes from the latter, in that there is no legitimacy before legal criteria on whose basis acts or decisions can be declared as legitimate*. An easy example is that of Leviathan: in the state of nature it is to be considered as legitimate everything that enables human beings to save their lives. There is no previous *ius* but the one which allows individuals to do anything which, in their own judgment and reason, they will conceive to be the aptest means for preserving their lives. Only the establishment of a sovereign – which is entrusted by all with the task to create the law – fixes those criteria of legality which allow people to understand whether something is legitimate or not.

The second approach considers both legitimacy to be the source of legality and legality to be the cradle of legitimacy within a bordered community. They come to be complementary concepts. On the one hand, *a stable legal framework enables a citizenry to display and highlight its basic values, needs, requirements, wills, interests*: political power is legitimately exercised insofar as it creates the legal conditions in which people can freely elaborate and express those instances which public institutions have to pursue. On the other hand, *the legitimate will of the citizenry cannot override those basic legal principles and rights which permit each individual to remain free and to escape from the dominance of majority*. This is the notion that has generally inspired the enactment of the twentieth-century’s constitutions.

The difference between the first and the second approach lies in the *degree of formality*: while the first is interested in the mere form of law – to the extent that whichever legal form is able to

design criteria of legitimacy (as some paradoxes of legal positivism show) and that legal criteria may sometimes assess as fully legitimate highly immoral laws<sup>10</sup> – the second pretends law to reflect the key values of the parties within civil society. Such a difference is radicalized in the third approach, according to which *legality is nothing but the product of a communitarian form of life*. To make a graspable example, in Carl Schmitt's view, the legitimate regent embodies the idea of national unity and reproduces it through a concrete homologation of the people, which can be attained by means of a decision, or rather, by the actual exercise of its power to distinguish the enemy from the friend and to unify the friend against the enemy.<sup>11</sup> Here legitimacy stems from the action of a sovereign who establishes conditions of legality. As a consequence, the form of law always needs a concrete decision along with a concrete order, which reflect the basic unit of people.

Although these different conceptions have been advocated by several eminent scholars in the last centuries, we maintain that they all are more or less flawed. In particular, they disregard a fruitful link with the notion of *democratic participation*, which allows us to outline a fourth concept of legitimacy. Such a notion is able to integrate the first's concern about formality with the second's reference to the substance of people's interests and needs.<sup>12</sup> Briefly and in Habermasian terms,<sup>13</sup> we could say that just those rules are to be considered legitimate that are the result of discourses in which every affected person has had the possibility to take part and have a say.<sup>14</sup>

With respect to the legal form, the fourth conception follows the first approach, in as much as it does not consider material matters (i.e. values, beliefs, history, culture, ethnicity, religion) as an inescapable basis for the validity of the law; in other words, legitimacy is linked only to a free, open, and inclusive participation and such a participation demands no prerequisite except for the responsibility to accept the consequences of the discourses along with the willingness to contribute by providing the indispensable resources for implementing their outcomes. Radical and exclusive positivists are right in stating that the effectiveness of the legal form does not depend on its material substance (to put it otherwise, it may be as attractive as untrue the Augustine's saying, *pour cause* quoted by Aquinas, "Non videtur esse lex, quae iusta non fuerit"); at the same time, they cannot pretend legitimacy to be reduced to a mere consequence of its effectiveness. Legitimacy is an *external standpoint* that is not connected to a private or transient moral point of view – which may vary (and actually does) throughout history – but is tied to a process, or better, to an activity engaged in by those who are affected by the consequences of the norms of the legal system (to put it otherwise, if we want law to be not only effective but also legitimate, law must reject the ultrapositivist Hobbesian principle "Auctoritas non veritas facit legem" along with the Ulpianian "Quod principi placuit, legis habet vigorem," no matter who is the *auctoritas* or the *princeps*).

With respect to the substance of legislation, the conception we advocate follows the second approach, since the activity of political institutions can be deemed legitimate only insofar as it takes into due account the outcomes of the *discourses among citizens*. Nevertheless, legality places some legal constraints to the effective power of discursive exchanges: they are not a Rousseauian general will with the unlimited constituting power to write again and again the rules of the game. Some rule is inherently tied to the concept of legitimacy itself, that is, the possibility for every affected persons

to take part and have a say; rules that open indisputable spaces of liberties, which only allow individuals to remain (and to understand themselves) as qualified and autonomous authors of laws.

In sum, we realize that legality and legitimacy are highly intertwined as soon as we understand that they are structurally connected to democratic participation, which only establishes criteria of legitimacy and ultimately justifies the enforcement of laws.

### 2.3 Legality/legitimacy at the international level

So far we have mainly focused on domestic politics. It would be quite naive to use the domestic analogy and to apply the above mentioned concepts to international politics. Yet, the account of the legality/legitimacy issue within territorially bounded communities highlights the general difference between the two concepts. We wanted to show that, regardless of the sphere of application, legality is a stable (although variable over time and space) criterion for assessing the conduct of social actors, while legitimacy is a highly contested concept; in particular, when separated from democratic participation, the concept of legitimacy risks being totally exposed to ideological and self-concerned manipulation. This is the reason why we assess that, while international legality is a fruitful (although fallible and always improvable) criterion for assessing the conduct of international actors, international legitimacy is hardly usable in the field of suprastatal relations. This does not mean that international legitimacy is a vacuum or nonsense; this merely emphasizes that the current situation cannot assure suitable conditions for defining criteria of international legitimacy, or rather, that democratic legitimacy imposes some specific requirements which the present suprastatal politics cannot fulfil. Therefore, from a suprastatal standpoint, while the assessment of the act of an international player as legal or illegal rests on a reasonable degree of certainty, the assessment of the same action as legitimate or illegitimate could be quite ambiguous and raise many doubts. In fact, such an act could be understood as legitimate or not in relation to the concept of legitimate one holds, or rather, it could be differently described and evaluated according to the various concepts of legitimacy we singled out above. For instance, a military action could be presented as legitimate because it is aimed at defending international legality (*sub a.*), or because it is meant to safeguard the internal sovereignty of a self-determining community against the undue pressures of an external actor (*sub b.*), or because it is part of a broader clash of civilizations in which a deadly enemy is about to colonize our territories and annihilate our Western way of life (*sub c.*). In sum, each one of the three conceptions of legitimacy may be, in principle, used for justifying a military action.

On the contrary, by referring to the current international regulations we would be able to judge such an action as legal or illegal, regardless the actor's good or bad intentions. Therefore, we must commit ourselves to clarify and reinforce, following precise standards, the international regulations.

Needless to say, the present focus on legitimacy and legality is strictly related to the specific problem of exporting democracy. In fact, although we will defend here the reliability of international legality *contra* the pliable legitimacy claims, sometimes the limits imposed by the criterion of legality may be justifiably brought into question or even suspended – such as, for

instance, in case of genocide, war crimes, ethnic cleansing, and crimes against humanity, which may be legally justified by the law of those who undertake such criminal activities (see Falk XXX). Thus, the conclusion that adherence to legality is preferable to some questionable appeal to legitimacy does not imply that legality is an indisputable criterion no matter what its application may bring about. This conclusion, on the contrary, implies that legitimacy is an ambiguous notion which can hardly justify the forcible export of democracy.

In the next pages, we will take up the case of exporting democracy by showing that it is completely meaningless to pretend an act of force, even if aimed at exporting democracy, to be legitimate: not only and not just because it is an act of force, but because it represents an *inconsistent concept*. In the light of our account of legality/legitimacy issue, we will show that the increasingly popular concept of exporting democracy is highly deficient and that it is thoroughly meaningless to assess that a military action is aimed at exporting democracy.

### 3. What are exporters exporting?

Before proceeding, it is worth clarifying what in the discussion about exporting democracy is usually taken for granted, i.e. the nature and the meaning of the matter of exportation. Democracy is not just a regime; it is also a political process requiring socio-historical developments and human efforts. Following Beetham and Bobbio, we describe democracy as a *non-violent* regime in which *equal citizens* regularly *control* (or have the theoretical possibility to control) the activities of their governments; therefore, the main features of democracy appear to be *non-violence*, *popular control*, and *political equality*.<sup>15</sup>

Non-violence expresses the *pre-existing will* of the political parties to take turns at governing without the need for violence. Political parties must be interpreted in the broad sense and may be made up of social, ethnic and religious groups that live side by side in the same political community. Even more than a requirement, non-violence is therefore a prerequisite. It is the rule of law that regulates the procedures of political interchange between decision-makers and citizens.

In addition, democracy is characterized by the fact that governmental actions are constantly under public scrutiny. The actions undertaken are subjected to the people's control both at the time of decision-making and throughout the administrative action. In other words, both decisions and decision-makers are under control. This means that political action must be authorized and accountable and, in order to allow popular control, it must be shaped by transparent rules. This obliges the administration to *respond to people's needs, wants, requirements, and interests*. In this way, at least to some extent, decision-makers' actions can be ideally considered to be coincident with the interests of citizenry: accountability of and control over governmental actions are basic foundations for the principle of representation.

Finally, the principle of equality demands that all members of the community have the same rights, foremost among them the right to participate in political life. All members must be able to contribute, directly or indirectly, to the process of making appointments to public office and to be appointees. For this to be possible the political community must guarantee equal chances for

everyone to satisfy those basic requirements which are the precondition for participating in political activities.

Obviously, democracy has not yet attained its goals, nor can it, as it is on an interminable journey shrouded in uncertainty. Democracy's great vitality lies precisely in its ability to set itself new goals and critically evaluate what has been achieved. A democracy that does not progress by virtue of the work performed by its institutions is already defunct. Democracy is essentially progressive, while different political systems, such as autocracy, oligarchy or anarchy all relegate the task of innovating to outside the dialogical debate.

This 'political-process definition' is preferable to others owing to its emphasizing two main characters of democracy: the ongoing activity of self-criticism undertaken by each sincerely democratic organization and the link between people's self-commitment and democratization (social awareness, political struggles, willingness to participate, mutual solidarity, fair competition, etc.). These basic characters make us aware of two facts: on the one hand, that democracy has to entail inherently an unquenchable tendency to self-suspicion, i.e. it has to remain permanently willing to unmask the 'false consciousness' which induces ancient democracies to judge themselves as perfect democracies (where the adjective 'perfect', according to its Latin root, comes to mean both excellent and thoroughly accomplished); on the other hand, that democracy depends on the *political dispositions of individuals*. And actually, while it is only to be expected that all individuals wish to survive, it cannot be taken for granted that they wish to participate in the management of public affairs or even that, if asked, they would spontaneously choose a democratic organization.

Let us briefly analyze these two kinds of problems, which can be rendered into two basic questions concerning the exporter and the importer:

1. Who is legitimate to judge the exporter's degree of democracy?
2. Is the exporter going to meet the real requirements of the importer? That is to say, will the importer have the real freedom to choose its form of government?

The first question refers to the *way of assessing* the political regime not only of the importer, but also of the exporter. In fact, it would be necessary to perform at least an independent assessment to establish whether the former actually needs a change of regime and whether the latter is in a position to propose an alternative regime. Notoriously, the criteria for assessing democratic regimes are highly controversial and consolidated democracies are reluctant to accept external assessments. At the international level, the would-be exporter of democracy should rely on the opinion expressed by existing institutions or third party organizations.

The second question is related to the willingness to sound out the intentions of the affected community with regard to a democratic regime. A democracy exporting agent acting in good faith should in other words give priority to the importer's reasons rather than his own. Otherwise, one of those typical cases arises that, in Robespierre's words, reflects the "mania to make peoples happy against their will." As a matter of fact, a democratic regime inescapably needs a civil humus on which and along with which democratic institutions can grow and thrive: if we want to prevent regime change from being perceived as a mere shift from an authoritarian regime to another, the

new institutions should adapt themselves to the citizens' theoretical and practical conceptions and, at the same time, the citizens' theoretical and practical conceptions should at least to some extent shape the new political institutions.

It should be borne in mind that societies undergoing democratic exportation are seldom composed of a despotic monarch and an oppressed people. Each action of exporting democracy at least involves many parties, such as: parties holding political power; parties which benefit from the political state of things; parties which have little or no political influence but are not interested in regime change; excluded and/or oppressed parties which are able to put up some resistance; excluded and/or oppressed parties which are not able to put up any resistance; other governments and/or trans- and inter-national organizations which are interested in regime change. Although this list does not pretend to be exhaustive, it reminds us that each society is multifaceted and that it is necessary not only to assess the intentions of outside agents carrying out an intervention, but also those of the parties that compose the whole political community where it is intended to intervene and the possible interference of outside supporters of the status quo. This problem is strictly related to the intention to give the population *freedom of choice* regarding their form of government.

Paradoxically, it is anti-democratic to want to export democracy without allowing the affected people to decide which organizational form they prefer. Exporting democracy actually means giving people the chance to decide which organizational form to apply. This may sound like a typical communitarian stance, according to which any single society has to produce its own institutions, given that the different moral doctrines underpinning the different societies are reciprocally incommensurable. Even though we are very far from endorsing such a tenet, it is necessary to underscore two undeniable facts: the need for historical developments and the fruitfulness of pluralism. Among the political developments of Western societies, it was the distinction between the *foro interno* and the *foro externo* that paved the way for democracy: the modern secular governments only pretended the external behaviour of citizens to comply with statal positive norms, and it left them to maintain privately their inner beliefs. That represented an enabling condition for pluralism to spread, so as to sanction definitely the separation between the internal beliefs and the external behaviour of democratic citizens.<sup>16</sup>

#### 4. Means, ends, and the path for democracy

After sketching the general difficulties which affect the concept of exporting democracy, we are now ready to analyze the different export strategies according to the chosen means and to declared ends. As already stressed in the introductory section, there is nothing in the current corpus of international law that allows using coercive means to export democracy.<sup>17</sup> But from the perspective of political theory, it is equally important to compare the consistency of the current status of international law with the aims of democratization. Basically, we can distinguish between coercive and persuasive strategies, which we name the 'stick' and the 'carrot'.

##### 4.1 The stick strategy

The means of coercion *par excellence* for exporting democracy is war, as in Afghanistan and in Iraq. In this case, the means (war) is clearly in conflict with the end (democracy). The violent means represented by war does not involve despots alone but inevitably ends up by affecting also the individuals that are expected to benefit from the regime change. The use of such means is the least suitable for effectively promoting a regime based on non-violence and for protecting their interests. Rather than establishing a ruling class alternative to the one in power, a war of aggression creates a vacuum and only aggravates local conflicts. Also in the case in which an explicit will is expressed by public opinion to have a democratic government, this does not mean that the same public opinion will be willing to accept a military invasion. Let us take the case of Panama in May 1989 when, after losing the elections, Manuel Noriega and his regime refused to hand over power. Although the Panama citizens had expressed their desire to have a different government, they feared the risks of an armed intervention by the United States to overthrow Noriega.<sup>18</sup> This was a classic case in which the population would have preferred external help of the non violent kind, for instance, a naval blockade.

But as well as representing a clear-cut contradiction between means and ends, historical experience shows that only in rare cases can a democratic regime be set up using external military means. What happened in Germany, Japan and Italy in 1945 represents a unique experience that is unlikely to be repeated – and, besides, we must reckon that in these countries liberal and social-democratic traditions were at work long before the establishment of totalitarian regimes. A survey by the Carnegie Endowment for International Peace dedicated to US involvement in military operations abroad in the 20<sup>th</sup> century indicates that only rarely was the result obtained the exportation of democracy.<sup>19</sup> In the first half of the 20<sup>th</sup> century, these failures involved countries that were neighbours of the United States and apparently easy to control, such as Panama (1903-1936), Nicaragua (1909-1933), Haiti (1915-1934), the Dominican Republic (1916-1924) and a good three times Cuba (1898-1902, 1906-1909 and 1917-1922).

Other military occupations, such as in Korea in the 1950s and South Vietnam and Cambodia in the 1960s and 1970s, were dictated mainly by the intention to block communist expansion, and the strategy of democratization was not even attempted. Since the end of the Cold War, the US administration has not achieved any lasting success even in Haiti. After World War II the only cases of clear-cut success have been Panama (1989) and Grenada (1983), two small states closely linked to the US economy and society and, in the case of Panama, a heavy price was paid.<sup>20</sup>

Even more discouraging is the record of the two old European colonial powers, France and Great Britain. In their case, military interventions abroad were almost never dictated by the explicit intention of favouring democratic forces, but followed the traditional power logic. According to Peceny and Pickering<sup>21</sup>, French and British interventions after World War II almost always led to a reduced political liberalization and to the support of the existing regimes, even when they were oppressive. The current failures in Afghanistan and in Iraq actually have numerous precedents. How can such disappointing results be accounted for?

One of the first ingredients that seem to be missing in the attempt to export democracy militarily is the determination of the exporters, who are more often inclined to promote reliable and faithful regimes than to allow the self-organization of peoples. But the strongest reasons for concluding that military exportation cannot be successful rely on the nature of democracy itself. Exporters might at least accomplish two different operations, which both are hardly able to establish a process of democratization. On the one hand, the exporter could succeed in stabilizing a legal system, or rather, in enacting a series of compulsory norms enforceable by an administrative apparatus. That would be a condition of legality similar to the first approach we sketched above. Yet, in this case we will have no guarantee that the underpinning concept of legality will really correspond to the political conceptions diffused among individuals and groups; therefore, such a legal system could be perceived as an unwelcome imposition from above, just like the previous regime. The imposed legal institutions, probably mimicking the exporter's domestic ones, would be considered by the importers as totally unrelated to their inner convictions, needs, requirements, and interests.<sup>22</sup> On the other hand, the exporter could succeed in creating the condition for self-determination of people. Nonetheless, more often than not self-determination fails to promote democracy and turns out to facilitate the affirmation of the powerful groups and elites. Hence, exporter always runs the risk of realizing the conditions for the third kind of legitimacy, in which new actors replace the old ones and establish a new form of despotism, even under the "legitimizing" aegis of the exporter.

In conclusion, the stick strategy is likely to be:

- illegal as regards international law, since, as recent occurrences have shown, it is difficult to provide dependable reasons for waging 'democratic' war;
- illegitimate as regards international consensus and practices, since it is always questioned and contrasted by the other actors of the international arena;
- illegal as regards domestic law – i.e. the functioning law of the challenged regime – since it is an attempt to change the system by using means that do not belong to it;
- illegitimate as regards domestic consensus and practices, since it is not the result of internal struggles and commitments and it hardly reflects the political view of people.

In addition, it should be noted that the external threats are often capable of unifying the threatened internal parties, which could perceive the exporter as a mere self-interested aggressor, with the end result of decreasing internal pluralism, that is, as we said above, one of the few successful paths to democracy.

Finally, the stick strategy exerts negative consequences on the exporter's internal situation. In war each state is compelled to forego some of its own freedom. The citizens are sent to war, civil freedoms are reduced, the relative weight of the strong powers (army, secret service, security apparatus) increases at the expense of transparency and control. Democracies that are perpetually at war develop chronic diseases. The United States and Great Britain, which have been involved in a never-ending series of high and low intensity conflicts since the end of World War II, have so far resisted incredibly well in preserving their own democratic system at home. But not even these two

states have been able to avoid sacrificing part of their own democratic institutions on the altar of national interest. In the state of necessity produced by war, acts of torture and the killing of unarmed prisoners have been committed and justified, which are all acts that would never have been tolerated by public opinion in peacetime conditions. As a matter of fact, exporting democracy by military means also signifies reducing it on the home front.

#### 4.2 The carrot strategy

Must it therefore be concluded that nothing can be done to export democracy outside one's borders and the only useful thing that democratic countries can do is to perfect their own political system so much so that other people will want to imitate them? There is no reason to be so sceptical. If democratic states contributed to the creation and expansion of institutional avenues in which individuals can freely elaborate and express (autonomously and cooperatively) their requirements and needs, they would concretely help the latter develop suitable and feasible conditions for influencing governmental activities and for increasing the spaces of liberty. In fact, the error implicit in the mania to export democracy refers both to choice of the means and to the design of the end. Means and ends should be consistent as far as possible with the intimate *ratio* of exporting democracy, namely, as we argued above, to start or facilitate a twofold process. On the one hand, a *top-down* change, that means a progressive amendment of governmental institutions towards general standards of non-violence, accountability, and political equality, by virtue of which political establishment would or at least should go forward to a much clearer distinction between the control of lives and the regulation of behaviours. On the other hand, a *bottom-up* transformation, i.e. an indispensable diffusion and stabilization of ideas such as equality, freedom, reciprocity, and likewise, within the general political culture and the inner conceptions of individuals.

If the end is exporting this kind of democracy – thought of as an ongoing and incessant process – what instruments are therefore available to the democratic states?

The first and most obvious instrument is linked to economic, social, political and cultural incentives. The present-day domination of the West is so widespread that, if their priority is truly to expand democracy, they ought to commit more resources to it. But we are far from moving in this direction: in 2005, the United States defence appropriation amounted to more than 4 per cent of the Gross Domestic Product, and that of the European Union countries to more than 2 per cent. In view of this military expenditure, considering the present international scenario, it is quite euphemistic to call it 'defence' expenditure, since only the small change is dedicated to official development aid: currently only 0.1 per cent of the US GDP and 0.3 per cent of that of the European Union.<sup>23</sup> And only a small proportion of these funds are explicitly earmarked for encouraging democracy.

But the carrot does not consist solely of economic aid. Economic aid can be effective, but may also be perceived as a form of imposition by a rich and powerful state on a small and weak one. Logically, the most convincing way of exporting democracy is to have it transmitted by the citizens of the democratic countries: opening up direct channels between themselves and the citizens of the authoritarian countries.<sup>24</sup>

The difference between the ‘stick’ and the ‘carrot’ approaches also concerns the players involved. In the case of the stick strategy, the promoters are mainly the governments, which use the coercive instruments of the state against the despotic government but also against the civilian population. Since war does not allow singling out among the population, both the supporters and the opponents of the despotic government are likely to suffer the consequences of the war. The carrot strategy, on the contrary, requires that both the government and the public opinion of democratic countries take an active role, while the (limited) damages inflicted to the nation run by a despotic government might be much better tuned in order to target the policies and the actions which violate human rights.

Professional and cultural associations and other forms of transnational organization play an important role in connecting citizens. During the years of the Cold War, these channels proved fundamental in supporting the opposition in the eastern bloc countries and in forming an alternative ruling class.<sup>25</sup> The incumbent regimes have often difficulties to isolate entirely their society from international economic, social, cultural and technological exchanges. If there is a widespread support for a regime change, this will also be played by non-governmental actors which, in turn, may provide financial, political and social support to opposition. The existence of non governmental channels may itself be considered an excellent indicator of the feasibility of exporting democracy: the civil society in the democratic countries had numerous contacts with the eastern European countries during the years of the Iron Curtain despite control and repression. Nothing comparable exists today between Afghan and Iraqi citizens and those of the occupying countries.

The political power of global civil society is often politically weak and easy to counter: the leaders of the opposition that maintain personal contacts are often placed under surveillance and are the first to be subjected to repression. The governments in power are capable of brushing off for decades all requests for political liberalization, as we learn from the case of Burma and the persecution suffered by the opposition leader Aung San Suu Kyi, even in the face of a pressing international solidarity campaign. And yet, one must not discount the political importance of these channels. At least they demonstrate to the oppressed inhabitants of authoritarian regimes the existence of political societies that express solidarity for their aspirations. Without them, it would never have been possible for Vaclav Havel, Nelson Mandela and Lech Wałęsa to be transformed from political prisoners to heads of state.

An alliance among progressive civil societies is certainly not easy to achieve. Both in democratic and non-democratic states, civil society is often a mixture of progressive and conservative tendencies.<sup>26</sup> But it is reasonable to expect that the citizens of democratic states have a larger degree of fidelity to their own institutions than the citizens of non-democratic states. In such conditions, which may exist today in Burma, it is possible that an alliance between internal civil society, external civil society, also fostered by state diplomacy, may effectively obtain a regime change and lead to democratic governance. But not in all countries of the world is there a uniform civil society predisposed to democratize. Take the case of a theocratic regime with neither pluralism nor rule of law, but which nonetheless is vastly supported by the majority of the population. The

civil society of democratic states can usefully ally with the few democratic tendencies repressed by the theocratic regime, but it is unlikely, at least in the short run, that this internal-external alliance will be in the position to generate a peaceful and stable regime change.

We wish also to stress that using persuasive means has also the positive effect of reinforcing, rather than weakening, democracy in the exporting countries. Involving civil society in the foreign policy choices, for example by directing trade, tourism and economic aid flows towards countries that respect human rights and where self-government prevails, helps the populations of democratic countries to pursue the values underlying their own social contract. If the citizens themselves become ambassadors for their own political system and plead its cause abroad, they themselves become defenders of the democratic values.

It is equally important to offer countries that might choose democracy the chance of joining the club of democratic states on equal terms, rather than establish a clear-cut hierarchy in which a state deems it can export its own system instead of allowing different states to participate in a political union in which the various systems are compared and reinforced. If democracy can be defined as a journey, some peoples could benefit from travelling together. Such a conviction mirrors two specific and differing approaches which we will explain in the next section.

In conclusion, the carrot strategy is likely to be:

- legal as regards international law, as it does not infringe any international prescription about the use of aggressive means;<sup>27</sup>
- legitimate as regards international consensus and practices, since it is ideally aimed at creating an open, free, and inclusive international environment;
- legal as regards domestic law – i.e. the functioning law of the challenged regime – since it tries to make it change from within;
- legitimate as regards domestic consensus and practices, since it endeavours to create the conditions for people to elaborate their need and requirements and induce them to claim an increasing involvement in the political organization of their society.

#### 4.3 In between the stick and the carrot: economic sanctions

There is a third category to be considered, namely economic sanctions. On the one hand, sanctions use an amount of violence much more limited than war. On the other hand, sanctions do not provide an incentive but rather a punishment. In this sense, economic sanctions can be considered genuinely in the middle between the stick and the carrot strategies.

Within the UN Charter, sanctions are included in Chapter VII, art. 41, and therefore they are recognized as a coercive measure. There is, therefore, a basic distinction between sanctions that are authorized by the SC and have a collective nature (such as the sanctions against South Africa during apartheid) from unauthorized and unilateral sanctions (such as those of the United States against Cuba, which have been repeatedly condemned by the UN General Assembly). While the first conform to international law and can be imposed also through coercive methods, the second have

no legal status. In the case of economic sanctions, considerations about their legitimacy and legality are generally less significant than those about their effectiveness.

Of course, there is a basic difference between ‘sanctions’, as defined for example in Chapter VII of the UN Charter, which could be applied only when there are threats to international peace and security, and the policies that can be inscribed in the term ‘isolation’, which could be defined as policies adopted to discourage contacts with the leadership of selected countries. Under the current international law, sanctions could not be applied under Chapter VII to promote democracy unless the promotion of democracy is functional to prevent threats to peace and security. A case could be represented when a country is risking a civil war among ethnic countries and a neighboring country may be also involved in terms of refugee flows or military participation. In such a case, sanctions might be used to induce the leaders of the country to share power among the various ethnic groups, in other words to employ democratic methods. Cases of use of sanctions as methods to foster democracy have seldom been used. It is much more flexible the application of ‘isolation’ policies. No country is required to exchange cultural, social or sport visits with other countries if they feel that their internal regime is unlawful. These policies of isolation are not regulated by international law.

With the lens of political theory, there is another basic difference to be made: sanctions can be divided between those that are strongly supported by the population and those which, on the contrary, are promoted by the governments but not by the people. The support received by the population seems to be the crucial element to assess their effect in terms of democracy promotion. Sanctions generally tend to create a strong divide among peoples: on the one hand, the coalition of nations that apply them and on the other hand the ‘culprit’ nation. Very often, the effect of the sanctions is to reinforce the popular support for the undemocratic government since they generate the “rally round the flag” effect. As Thakur underscores, “in contrast to war, sanctions shift the burden of harm solely to civilians [...]. They inflict pain on ordinary citizens while imposing questionable costs on leaders who are often enriched and strengthened on the back of their impoverished and oppressed people by law of perverse consequences.”<sup>28</sup> Paradoxically, sanctions might make the people with a despotic government less willing to struggle for democracy.

It would be useful to refine new forms of sanctions, making them “smarter” in order to target the individuals or collective groups that most oppose to the development of democracy.<sup>29</sup> An important attempt in this direction in the way the international community lead by the United States and the European Union, is handling the political case in Myanmar, a country where a government has been removed through unlawful means. In this case, the international community can rightly assume that the population is willing to be ruled democratically and has even expressed a preference for a specific political party. In spite of this, smart sanctions have not yet proven to be particularly effective in restoring the elected government into power.

## 5. Different approaches, different results

Our argument that democracy cannot be exported militarily does not imply that democracy is a form of government specific to a few enlightened populations. On the contrary, we agree with those that argue that all people of the earth can grasp benefits of democracy and that democracy can be built from scratch even in countries with low economic and social resources. In particular, we are persuaded that democracy helps achieve a better quality of life and that economic and social backwardness should not be considered an insurmountable obstacle to its development. Nonetheless, we endeavoured to show that democracy-building requires an endogenous social fabric that nurtures democratic values and procedures. This is why the above mentioned ‘carrot strategy’ requires a multiple approach involving economic and cultural cooperation, not only with governments but above all with the societal parties, i.e. with the real persons and groups which compose the peculiar *humus* of a country.

The European Union is a champion in this kind of operations. In the last decades, it played a pivotal role in Eastern Europe, by enhancing the vitality of many active social and political movements. So far, the EU has included countries relatively likely to embrace democratic faith and institutions. European countries in the South and in the East already had a high level of social capital and good political infrastructures. The specific traits of the EU approach are the following. On the one hand, it employs not a *military* but a *civilian* power.<sup>30</sup> People would laugh if anybody in Brussels threatened to “shock and awe.” Actually, the fact that the EU has so many different voices also implies that no single nation can fully dominate the others. On the other hand, what makes the EU so appealing for those living in non-democratic countries is *political dignity*. As soon as a new member is accepted, it enjoys all the privileges of the oldest members of the club. For instance, if Turkey ever joins the EU, it will get a number of parliamentarians equal to France, Italy, and the United Kingdom. Therefore, a basic principle of European ensemble is that each member has equal dignity.

Moreover, the process of European integration requires interactions at a variety of institutional and social levels. It is not just an inter-governmental process, but it involves citizens, companies, professionals, students, and so on. The top-down process manages to be effective only because it is matched by a net of bottom-to-bottom relationships.

The invasion of Iraq has made the Bush American administration (along with the Blair administration) the champion of democratization through military force. The rhetoric used is also the opposite from that of Brussels. Rather than discuss, negotiate, and reconcile, American leaders have spoken in messianic terms. The top members of the US administration have praised liberty and democracy much more than any EU bureaucrat has ever done – and at the same time contributed to the killing of an unknown number of civilians. It is surprising how effective the power of rhetoric is, and there is no doubt that many of those who voted to re-elect Bush in 2004 were influenced by his words rather than his actions.

Let us mention the attempt to address Iraqi civil conflict through free elections. Since the different religious communities do not trust each other, fair and free elections simply replicate the statistics of religious and ethnic division. But the different communities trust the occupation troops

even less. They have very good reasons to be suspicious about the intentions of the invaders, given the long history of misconduct by Western powers. Iraq is a colonial creation; in the 1980s, it was used as a tool to contain Iran in one of the dirtiest wars of the twentieth century. One million Iraqis died in this war, while the West was silent. Thanks to Western support, Saddam Hussein managed to reinforce his domestic power. After Saddam invaded Kuwait, most civilian infrastructure in Iraq was destroyed by Western bombing; the only institution that managed to survive almost untouched was the Republican Guard, which immediately was used to repress internal opposition. Twelve years of Western sanctions kept the Iraqi people hostage to their own tyrant without any possibility of rebellion. How could be expected that ordinary Iraqi citizens would trust an Anglo-American army to build a regime able to serve their interests? Here we can draw a pragmatic lesson on exporting democracy: the population of the target country should have a prior trusting relationship with the invaders. If it has none, the outcome is more likely to be insurgency or civil war than democratic development.

## 6. Conclusions: institutional reforms, democratic ideals and the human rights system.

The analysis made in the present chapter has revealed that the specific form of democratic government can only be imported, that is, it needs to be formed starting from a suitable *endogenous political framework*. This not only highlights the unfeasibility of military exportation of democracy, but also shows the inconsistency of the concept itself. A serious conceptual analysis, along with a review of the main historical experiences, confirms that the cases of successful spreading of democracy were carried out by means of persuasion, incentives and international collaboration. This is one of those cases in which there is no dilemma regarding the choice of means and ends: the end of democracy is attained only when coherent means are adopted.

This is the reason why it is meaningless to claim a military attempt of exporting democracy (even granting that democracy is the real purpose and not a mere cover for private aims) to be legal or legitimate. Chapters VI-VIII of the United Nations Charter definitively rule out the possibility of waging war (whether for establishing democracy or not) without a Security Council resolution. In addition, no sound concept of legitimacy can be evoked for justifying a unilateral use of violence.

Yet, it seems equally meaningless to pretend a peaceful attempt to export democracy is legal or legitimate. In fact, peacefully exporting democracy is not a single action or a well-defined strategy. It is an ongoing endeavour to involve individuals, groups, and communities in the process of outlining and revising international regulations, to cooperate with them, to persuade their governments to align with international human rights standards; in a word, to create suitable conditions in which citizenries may develop democratic ideals, dispositions, and practices. It does not bring about any problem with either legality (since it infringes no rule) or legitimacy (since it needs to advance no particular conception of legitimacy other than that of inclusive participation).

If so, it may be wondered why we are dwelling upon the legality/legitimacy issue in relation to the case of exporting democracy. By following the thread of our argument, the conceptual

scheme of legality/legitimacy seems to have nothing significant to say about exporting democracy: the use of force turns out to be both illegal and illegitimate, while peaceful activities cannot be defined as either illegal or illegitimate. However, such a conclusion would be at best naïve and unsatisfactory. On the contrary, the case of exporting democracy sheds light on the dangerous fact that, nowadays, democracy and the defence of its values are being increasingly used as a rationale for breaching international laws.

As we showed above, the vocabulary of legitimacy is overexploited for justifying military actions of *pre-emptive defence*, with the result of weakening international legality and democratic governance; the word “democracy,” associated with unilateral actions of *regime change*, is often used to cover violence (whether military or symbolic) with a self-legitimizing aura; the shadow of terrorism is bandied about in attempts to reshape the norms regulating international power and the use of force. Such challenges to international legal rules on war and military intervention, as Bartholomew underlines, pursue the aim of reshaping international regulations and to “constitute rule/law unilaterally and ‘mono-logically’;” in this view, affected persons, groups, and communities are treated as mere “addressees of legal obligation”<sup>31</sup>, and not as qualified authors of it.

Still, if our arguments are aimed at showing that it is highly misleading and even dangerous to claim the strategy of pre-emptive defence and regime change to be legitimate, it is worth addressing some considerations about the precise content of what we named the ‘carrot strategy’. Such a method of spreading democracy cannot merely rely on the endogenous forces of a society (as if it sufficed to finance and encourage the groups of civil society in order to reach a democratic regime). What it is required above all is the *peaceful enhancement and revision of international regulations*, that is, what we consider as the only way to settle conflicts and to make supranational democracy thrive. In fact, our theses do not aim to make a defence for the principle of non-intervention: peacefully spreading democracy suggests the proper pathway both for *amending international legality* (conceived of as a cooperative process of fixing legal standards, equally binding on individuals, peoples and states) and for *defining sound criteria of international legitimacy* (conceived of as a procedural and cooperative corrective to international legality, since it invites to understand that legal standards are to be fixed by way of cooperation between their addressees).

To explain what ought to be achieved in making the international legal regime more effective and for fixing dependable criteria of international legitimacy, let us distinguish two levels:

1. the lofty level of institutions,
2. the grassroots level of consciousness.

The first level is related to the possible and necessary revision of the international legal regime. Just to mention two examples, think of the management of humanitarian intervention and the uneven use of sanctions, either of which are likely to have contradictory and undemocratic consequences. On the one hand, the politics of humanitarian intervention, which today tend to be interpreted as ‘responsibility to protect,’ increasingly risks recalling the Schmittian deciding sovereign: “International administrations – Orford writes – adopt an authoritarian model of governance in which democratic participation is suspended until political order and economic

integration are secured. [...] They oversee the implementation of corporatist model in which the economy is liberalised and protection of the rights and investments of corporations are given priority in the new political order.”<sup>32</sup> On the other hand, the use of sanctions, originally thought of as a way to prevent war and its tragic outcomes, sometimes not only fails to achieve its aims – namely, a progressive weakening of despots – but paradoxically reinforces despots and damages their citizenries. More generally, international law still embodies undemocratic features, such as the executive’s comprehensive power in international affairs, the scarce or null popular mediation for the enactment of treaties, the asymmetrical application of the principle of non-intervention, the strategic application or misapplication of the principle of self-determination.<sup>33</sup>

Exporting democracy with arms reveals itself as a way of weakening legality at both the domestic and the international level. The recent cases of unilateral adoption of war with the aim of international security and pacification did not meet with a satisfactory reinforcement of legal definitions of the new forms of war, self-defence, terrorism, etc. As a consequence, the idea of legitimacy, associated to it and dissociated from legality, turns out to represent a battering ram for destabilizing and altering the international legal regime. The way suggested by a careful analysis of legitimacy and democracy is that of cooperating in order to revise the international order and make it more effective. This lesson is fully compliant with the cosmopolitan view, according to which conflicts end up reinforcing authoritarian regimes, while an international system based on peace and collaboration makes life difficult for dictators and encourages the internal opposition required for an effective political democratization. The basic guidelines for doing this within cosmopolitan projects are the following: both individuals and states should have their own representatives in the global sphere; together with their citizenship of the state, individuals should also acquire a cosmopolitan citizenship; this envisages a minimal list of rights and duties vis-à-vis constituting cosmopolitan institutions; internal state sovereignty would be limited by global constitutional rules; external state sovereignty would be replaced by a global constitutionalism; member states should accept the compulsory jurisdiction of the international courts; cosmopolitan institutions could resolve to accept citizens also representing states that do not intend to participate.<sup>34</sup> All of these reforms would be able to link the revision of international legal parameters to a sound condition of legitimacy, i.e. a situation in which all the addressees of laws are involved in order to deliberate about those rules which will impinge on them.

Yet, such goals cannot be attained unless the addressees of reforms are convinced of their desirability and fairness: we have to go down to the grassroots level of consciousness. As Susan Marks stresses, “proposals for institutional reform become ideological if they are not accompanied by moves to ground the reform at the level of consciousness.”<sup>35</sup> Exporting democracy, *pace* its fierce advocates, causes democracy to be seen as a product of exportation, as something which comes from outside and does not fit with either the convictions or the needs of the importer. In contrast with that, what we name the ‘carrot strategy’ is precisely aimed at making citizens feel an active part of a broad process. The cosmopolitan democratic project is not only directed towards institutional reform; it is primarily interested in popular participation and rights protection. It is

designed to overcome progressively the conditions of political, social, and economic marginalization which prevent people from being authors of the laws to which they are subject.

Today the international legal regime is still far from assuring concrete opportunities and effective protection for individuals and groups. What is more, it is menaced by its own structural inability to face urgent problems, which Chinkin portrays as follows: “The difficulties in securing agreement on change to the legal regime – as epitomised in the failure to secure reform of the SC, failure to agree on a definition of terrorist acts, ambiguous and equivocal SC decision-making – all undermine the legitimacy of the international system. Legitimacy is also undermined by the manipulation of international law in pursuit of an imperialist, neo-liberal agenda.”<sup>36</sup> The tendency to return to an international state of nature dismisses as worthless the coincidence between authors and addressees of laws – with the end result of ‘privatizing’ the concept of legitimacy – while the rhetoric of protection and pre-emptive defence is emptying out the real meaning of human rights.

The veracity of this frame is proven not only by the misleading use of exporting democracy, but also by the limited progression of human rights as a system of effective and enforceable rights. More than half a century after its enactment, the human rights regime still suffers from the burdens highlighted by Hannah Arendt<sup>37</sup>, whose sharp (and explicitly Burkean) observations induce us to believe that such rights should progressively provide their bearers with *actionable instruments of self-defence along with the ability/possibility to design their own destiny*. They must not remain the rights of those who have no right, rights which are actionable by well-intentioned third parties only in case of oppression of right-bearers. The human rights regime has to become part of a stronger legal regime, a cosmopolitan rule of law capable of creating the status of *homo juridicus*, according to which human beings are equal as long as they share a common legal framework. This framework should embody some enforceable means of coercion, with the task of ensuring the respect of human rights *before* their violation. Nonetheless, this top-down process, as we have often recalled, requires a bottom-up diffusion of democratic ideals and practices among populations, whose voice should become more and more pressing.

No legitimacy exists without participation, and no legal system (whether effective or not) is legitimate without legitimacy: therefore, spreading democracy, in the way we addressed above, also means contributing to enlarging the basis for legitimating the international legal system and to enhance its functioning in order to establish a condition of legitimate legality for each single human being.

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2. Independent International Commission on Kosovo, *The Kosovo Report*.

3. See Falk, "Legality and legitimacy."

4. Of course, there is a basic difference between 'sanctions', as defined for example in Chapter VI of the UN Charter, which could be applied only when there are threats to international peace and security, and the policies that can be inscribed in the term 'isolation', which could be defined as policies adopted to discourage contacts with the leadership of selected countries. Under the current international law, sanctions could not be applied under Chapter VI to promote democracy unless the promotion of democracy is functional to prevent threats to peace and security. A case could be represented when a country is risking a civil war among ethnic countries and a neighboring country may be also involved in terms of refugee flows or military participation. In such a case, sanctions might be used to induce the leaders of the country to share power among the various ethnic groups, in other words to employ democratic methods. Cases of use of sanctions as methods to foster democracy have seldom been used. It is much more flexible the application of 'isolation' policies. No country is required to exchange cultural, social or sport visits with other countries if they feel that their internal regime is unlawful. These policies of isolation are not regulated by international law.

5. Hart, *The Concept of Law*, 3-4.

6. Raz, *Practical Norms and Reasons*, 150.

7. For an analysis about the fruitfulness of the noble tradition of *legal pluralism* in domestic and international affairs, see Mariano Croce, *Sfere di dominio*, Chap. III.

8. As Allen Buchanan argues against the positivistic skepticism: "There is a complex, highly normativized conception of what counts as customary international law, including not only the requirement of *opinio juris* (that to count as custom state behavior in conformity with a norm must be thought to be legally required or legally permissible), but also the idea of peremptory norms (*jus cogens*), which have a status similar to that of constitutional law in determining the

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validity of other norms. The international legal system also includes norms governing the interpretation and validity of treaties (in part codified in the Vienna Convention on Treaties). Once these complexities are appreciated, the assertion that international law is a primitive legal system or a proto-legal system looks rather dubious” (Buchanan, *Justice, Legitimacy, and Self-Determination*, 31).

9. Falk, “Legality and Legitimacy: Creative Tension and/or Geopolitical Gambit,”

10. In advocating the coherence of positivist analysis of law, the Danish jurist Alf Ross incisively affirms that, according to the scientific nature of legal theory, law is to be studied in its objective features and not in relation to moral standards; as a consequence, it makes no sense to judge Nazi racial laws or laws on polygamy as immoral; accordingly, they are part of an effective legal order and that comes to prove that law can take whichever form without losing its effectiveness.

11. On Schmitt’s idea of legitimacy, see the sharp observations in Orford, “The Responsibility to Protect as a Theory of the State,” 20-21.

12. Obviously, the third approach represents a dangerous degeneration of the second, in that it considers legality as strictly dependent upon the affirmation of a peculiar worldview. As we will show below, this is precisely the risk connected to exporting democracy.

13. See, for instance, “Remarks on Legitimation through Human Rights,” in Habermas, *The Postnational Constellation*.

14. As Amy Bartholomew rightly shows, the core tenet of Habermas’ political proposal is the coincidence between authors and addressees of laws: “The key insight of a Habermasian conception of deliberative democratic legitimating is that those who are the addressees of law must also be able to understand themselves, in some sense, as its authors” (Bartholomew, “Legality/legitimacy: Problems and Prospect for Legality under American Empire,” 13). Indeed, Habermas’ stress on this coincidence explains why legitimacy and legality are to be seen as two coins of the same political-deliberative process.

15. See Beetham, *Democracy and Human Rights*, chapter 1; Bobbio, *The Future of Democracy*, chapter 1. For a discussion, see Archibugi, *The Global Commonwealth of Citizens*, chapter 2.

16. As a matter of fact, the distinction between ‘private’ and ‘public’ is essential to the development of democracy and to the mitigation of governmental power: as Orford shows about Schmitt’s conception of state power, the German jurist traces back the being “soulless” of the modern state precisely to Hobbes’s distinction between *foro interno* and *foro externo*: “Schmitt argued that the state could not retain its legitimacy if private interests were able to develop in the civil real and eventually oppose to state” (Orford, “The Responsibility to Protect as a Theory of the State,” 17).

17. Franck, “The Emerging Right to Democratic Governance”, has argued in favour of a right to democratic governance, but this does not imply that other states have the faculty to use force to impose this right. For contrasting opinions, see the essays in Fox and Roth, *Democratic Governance and International Law*.

18. Cf. Gilboa, “The Panama Invasion Revisited: Lessons for the Use of Force in the Post Cold War Era.” It is estimated that the United States intervention cost the lives of 500 to 5000 Panama inhabitants and 23 US soldiers.

19. Pei, Minxin and Kasper, Sara, *Lessons from the Past: The American Record on Nation Building*

20. Cf. Pei and Kasper, *Lessons from the Past*. The studies by Meernik, “United States Military Intervention and the Promotion of Democracy;” Hermann and Kegley, “The U.S. Use of Military Intervention to Promote Democracy: Evaluating the Record;” and Von Hippel, *Democracy by Force*. They all confirm the negative outcome regarding democratization of the majority of US military interventions.

21. Pickering and Peceny, “Forging Democracy at Gunpoint.”

22. And, at any rate, convictions cannot be induced with the force, in spite of what Virgil Starkwell’s father in *Take the Money and Run* seems to believe when he proudly keeps on saying he “tried to beat God” into his son.

23. World Bank, *World Development Indicators*.

24. See Urbinati, *I confini della democrazia*.

25. See, for instance, Kaldor, *Europe from Below*.

26. For a disenchanted analysis, see Kaldor and Kostovicova, “Global Civil Society and Illiberal Regimes” and Ishkanian, “Democracy Promotion and Civil Society.”

27. It may also help revise or even overcome some excessive limit imposed by the principle of non-interference, which recently some countries still embracing death penalty have evoked against external pressure to start considering human life as an unquestionable and untouchable good.

28. Thakur, “Law, Legitimacy and United Nations,” 6.

29. For a review, see Tostensen and Bull, “Are Smart Sanctions Feasible?,” 399-403.

30. See Mario Telò, *Europe: Civilian Power?*

31. Bartholomew “Legality/legitimacy: Problems and Prospect for Legality under American Empire,” 4, 5.

32. Orford, “The Responsibility to Protect as a Theory of the State,” 32.

33. Crawford, “Democracy and International Law,” 117-119.

34. To understand the cosmopolitan project beyond this concise sketch, see Archibugi, *The Global Commonwealth of Citizens*; Held, *Global Covenant*.

35. Marks, *The Riddle of All Constitutions*, 106.

36. Christine Chinkin, “Rethinking Legality/Legitimacy after the Iraq War,” 18.

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37. See the chapter entitled “The Decline of the Nation-state and the End of Human Rights” in Arendt, *The Origins of Totalitarianism*.