Part I

Introduction

1   Broaching the issues

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The attacks on the World Trade Center in New York and the Pentagon in the Washington, DC area on September 11, 2001 were a sobering reminder that the use of force to destroy is still very much a part of life. The instruments of war may have changed and the field of battle been redefined, but the use of force to change the existing political order cannot yet be relegated to history. For the United States, September 11 was a further reminder of one of the principal functions of government – protection of its citizens. For the world, this event added the dimension of states waging war against a non-state enemy. Applying traditional methods and means to fighting a global but non-state threat and attack will engage lawyers, analysts, and policy makers for some time.

International responses to September 11 showed how the world had changed since 1941, the last time the United States was attacked from abroad on its territory. In 2001, the United Nations Security Council invoked Chapter VII and the North Atlantic Council took action under Article 5 to authorize US measures to counter a threat to the peace and restore stability to the North Atlantic area. The US government paid close attention to the reactions, not only of its own citizens, but of a diverse global public opinion, to the attacks and its response to them. Almost immediately, officials around the world began to think about how the United Nations could contribute to nation-building and post-conflict reconstruction. All of these elements – non-state actors, global public opinion, international institutions – will play major roles in the political order of the early twenty-first century.

Since the end of the Second World War, states have sought to limit their right to use military force unilaterally and to establish ways in which military forces could be used for collective purposes under the auspices of international institutions. This book is about both of these trends, but especially about a question that has largely been ignored in the literature on using military forces under the auspices of international institutions: how to ensure democratic accountability. The gap in the literature is striking, because establishing and maintaining democratic accountability in the

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use of military forces has been a major aspect of the historical development of modern democratic governments. When democracies unilaterally used their military forces in the twentieth century, for example, when French forces were embroiled in Algeria and US forces were enmeshed in Vietnam, accountability was an issue.

Establishing the monopoly of coercion was a crucial feature of the creation of modern states. Ensuring that there would be accountability to citizens for the use of military forces was a central component of the struggle to establish democratic forms of government. But now decisions about the uses of military forces are made in international institutions far from the representative structures that democratic governments have relied upon to provide accountability. Giving international institutions authority to deploy military forces is a matter that has historically provoked heated debate in the United States and other democracies. How is democratic accountability maintained in these cases?

The failure to examine issues of democratic accountability when military forces are used under the auspices of international institutions may stem from several sources. When plans to give international institutions the authority to use military forces were first conceived, their advocates thought that the threat to use force would deter potential aggressors, or that peaceful settlement or sanctions would cause an aggressor to pull back. They did not focus on issues arising out of the actual use of military forces.

Traditionally, political theorists regarded democracy as a system of governance within a state's territorial limits, while international law assumed that international problems were fundamentally different from domestic ones and not susceptible to the same democratic processes and institutions of governance. However, experience with the uses of military forces under the auspices of international institutions since the Second World War shows otherwise. Enhancing democratic accountability will ultimately be crucial for the effective operation of international institutions, because democracies are the major military powers of the early twenty-first century.

The North Atlantic Treaty Organization (NATO)'s Operation Allied Force in Kosovo in 1999 brought into sharp relief several fundamental issues. What justifies intervention in an intra-state conflict? Is authorization by the United Nations Security Council (UNSC) essential for general acceptance of the legitimacy of the use of military forces? Is the authorization of a body such as the North Atlantic Council (NAC) sufficient for those countries taking part in the operation? How do non-NATO members see such actions? When do national legislatures have to take specific action to authorize participation of their country's military forces

in international operations? To whom are military commanders responsible? What laws govern the conduct of military personnel participating in such operations? What is the individual responsibility of officials who make decisions about using military forces under the auspices of international institutions, and of military personnel who take part in international operations? Practice in these areas has outpaced scholarly analysis and understanding of the issues involved, especially with the prospect of establishing an International Criminal Court following adoption of its Statute in 1998. With the Statute's entry into force in July 2002, the ICC is expected to become operational in 2003.[1]

This book is a step toward filling this gap in the literature. It first specifies the problem, concentrating on the experience of nine democracies – Canada, France, Germany, India, Japan, Norway, Russia, the United Kingdom, and the United States. Each has some form of democratic government, though all fall short of fully meeting abstract criteria for democracy. The historic route taken by each country to establish democratic institutions has varied, and this is a factor in understanding the requirements and operation of democratic accountability in each of the nine cases. Russia is the most recent democracy of the nine.

All nine countries have contributed military forces to operations conducted under the auspices of international institutions, although Germany and Japan joined the ranks of contributing countries only in the 1990s, and Japan's contribution has been restricted. The participation of most or all of them is essential to any large-scale military operation in the opening decades of the twenty-first century.

This chapter first explores the concept of democratic accountability, and next examines how the founders of contemporary international institutions thought they would be involved in using military forces. Drawing on the history of how international institutions actually have been involved, a typology of uses of military forces is created. The issues of democratic accountability that have arisen when military forces have been used under the auspices of international institutions are discussed, and these issues are grouped under broad headings. Using the typology of military forces and the list of democratic accountability issues, a matrix that provides a framework for analyzing the experiences of the nine countries is created, and it is demonstrated why these nine countries provide a good sample for analyzing the issues. Finally, the detailed analyses that follow are introduced.

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[1] See Final Act of the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, UN Doc. A/CONF. 183/10 (1998).

Tenets of democracy: participation in decision-making and accountability

Democracy is a term used to describe both a set of ideals and historical and contemporary political systems. As an ideal, democracy involves two basic principles, the rule of law and majority rule. The rule of law means that political authority is exercised according to predetermined law.[2] In the sense in which this term is used in this book, it is sometimes referred to as constitutionalism, a principle designed to prevent the arbitrary and capricious exercise of authority. Concern for the rule of law is especially acute with respect to the use of coercive power. Majority rule is a principle for decision-making. When there is disagreement about policy or a course of action, the disagreement is settled by voting, and the votes of the majority prevail.[3] Majority rule respects human equality. It may be preferred as a principle for settling disagreements for this reason, or simply because of the difficulty of gaining widespread acceptance for any other principle.

Conflicts arise in the application of the two basic principles of democracy. Rigid adherence to an unchanging rule of law can frustrate majority rule. Ensuring that there are modalities for changing the basic constitutional law is essential to successful democratic systems. At the same time, because majority rule can conflict with the rule of law, democratic ideals generally involve some limits on it – for instance, the protection of basic human rights and minority views.

Starting with Aristotle, political theorists elaborated democratic ideals and designed institutions to promote them. For 200 years, states have developed and tried to perfect such institutions. The modern movement to achieve democratic ideals in governance dates at least from Magna Carta (1215), and includes the Petition of Rights (1628), the United States Bill of Rights (1789), and the French National Assembly's Declaration of the Rights of Man and Citizen (1789).

The movement to realize democratic ideals gained strength and momentum in the second half of the twentieth century, beginning with the UN General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948. The Declaration proclaims human equality and forbids discrimination. It includes the rights of freedom of information, association, assembly, participation, speech, and movement. It calls for periodic elections. It specifies civil rights that are to be protected.

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[2] Vernon Bogdanor (ed.), *The Blackwell Encyclopaedia of Political Science* (Oxford, Basil Blackwell, 1991), pp. 547–8.
[3] *Ibid.*, pp. 350–1.

The broad provisions of the Declaration were subsequently incorporated into the legally binding International Covenants on Civil and Political Rights and Economic and Social Rights, to which more than 140 states were parties in 2001.

Beyond these UN instruments, democratic ideals were embodied in a number of other important international documents after the Second World War. They included the European Convention on Human Rights and its Protocols, the 1975 Helsinki Final Act of the Conference on Security and Cooperation in Europe (CSCE), the American Convention on Human Rights, and the African Charter on Human and Peoples' Rights. The Charter of Paris for a New Europe, adopted by the CSCE in 1990, was an important step in the movement toward the realization of democratic ideals. It contained an almost textbook-like definition of democracy: "Democratic Government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law."[4]

Modern states embody a number of institutional variations that have been developed to achieve democratic ideals. The institutions and practices of democracy are an evolving phenomenon, and all states fall short of fully meeting democratic ideals. Only in the twentieth century did they begin to allow all adults, regardless of gender, race, or financial means, to participate in political life. Most modern polities involve large numbers of individuals, and democratic participation is only possible through representation. To ensure that representatives are responsive to public wishes, they are chosen in periodic elections based on universal adult suffrage. Elections are an important means to ensure democratic accountability.

Although some states had some democratic characteristics for centuries, the development of democratic governments is a product of the twentieth century. The trend accelerated sharply with the fall of the Berlin Wall in 1989 and the collapse of communism in the Soviet Union in 1991. In 1987, there were fewer than 70 democratic states; by 2000, 120 states had governments that by broad criteria could be called democratic.[5] In 2000, democracies constituted almost 60 percent of the states in the world, and included more than 60 percent of the world's population. The trend toward democracy was one of the most prominent developments of the late twentieth century.

[4] Cited in American Society of International Law (1991) 30 *International Legal Materials* 190.
[5] Roger Kaplan (ed.), "The Comparative Survey of Freedom: 2000, Freedom around the World" (2001) 28 *Freedom Review* 1.

In June 2000, the foreign ministers of more than 100 democratic states participated in the World Forum on Democracy, in Warsaw, Poland, a non-governmental conference convened by Freedom House. In the Warsaw Declaration, "Toward a Community of Democracies," they agreed to respect and uphold two core democratic principles of particular relevance to this study:

- that the legislature be duly elected and transparent and accountable to the people;
- that civilian, democratic control over the military be established and preserved.[6]

The researchers of this study expect that the increase in the number of democracies will broaden the use of domestic democratic procedures in decisions to deploy and use military forces. This will, in turn, have an effect on the way in which international institutions meet the demands placed upon them to deal with threats to the peace, but also lead to demands that they themselves become democratically accountable.

In all democratic states, elected representatives make policies that affect individual lives. Formal arrangements for making these decisions broadly divide into two types, parliamentary and presidential systems. In the former, executive and legislative authority is fused, and while parliamentary assent is necessary for the adoption of laws, this frequently is assured through disciplined political parties comprising the government majority or coalition. In the latter, legislative assent is much more problematic. In both types of systems, however, ultimate accountability is assured through regular elections. Voters choose individuals or parties on the basis of expectations about the decisions that they will make in office, and they can remove from office those with whose decisions they do not agree.

Efforts to realize democratic ideals have taken place primarily within the context of territorially defined states and smaller political units, such as municipalities. Political theorists have given relatively little thought to the impact on democratic accountability when important state functions are shared with international institutions. But ensuring that their decision-making accords with democratic tenets becomes increasingly important as international institutions gain authority. The legitimacy of international decisions and their acceptance by the citizens of democratic (and to some degree all) states depend on it.

The principle of the rule of law exists in international law, created through treaties and custom, as domestic law is created through legislation

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[6] "Final Warsaw Declaration: Toward a Community of Democracies," Warsaw, Poland (June 27, 2000) at the US Department of State's website, www.state.gov/www/global.

and practice. Determining whether individual, institutional, and state be-
havior is in accord with international law is no more problematic than
determining whether individual and collective behavior is in accord with
domestic law. In both systems, laws are not always followed, but violations
of the law do not imply that it does not exist.

Majority rule was, however, not a principle of classical international
law. Intergovernmental international institutions are associations of states.
Because of the doctrine of sovereign equality of states, decisions in such
international institutions historically required unanimity. Gradually, some
organizations, such as the European Union (EU), have introduced major-
ity voting for some decisions, but they remain the exception to the rule.
Most international institutions are still comprised of states, a sizeable
number of which are not democracies.

The historically undemocratic character of international relations and
international law exacerbates the task of realizing the tenet of majority
rule in international institutions. International law assumes that: (1) the
executive undertakes and manages a state's international commitments;
(2) decisions that emerge from domestic democratic processes are not
acceptable reasons for failure to comply with international obligations;
and (3) the powers of a government "to bind a state for the future
seem to be virtually unlimited."[7] When international institutions and
the law they generated were geared to coordinating state actions, with
limited direct effect on individual citizens, democratic accountability
concerns were minimal. As international law and institutions have broad-
ened and deepened their spheres of competence, and substantial member
state resources have been required to carry out their decisions, this has
changed.

To become democratic, international institutions will most likely re-
quire new concepts and experience with the implementation of those
concepts. As the research team explore the application of majority rule
to international institutions, we should not think only in terms of analo-
gies with political systems currently existing within states. Lessons drawn
from states' experience may not be directly applicable to international
institutions.

The work of Robert A. Dahl may be particularly helpful in concep-
tualizing the issues facing international institutions. According to Dahl,
"a key characteristic of democracy is the continuing responsiveness of
the government to the preferences of its citizens, considered as political

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[7] James Crawford, "Democracy and International Law" (1994) 64 *The British Yearbook of
International Law* 118.

equals."[8] He identified five criteria[9] of a democratic polity:

Effective participation: All members must have equal and effective opportunities for making their views known before a policy is adopted.
Voting equality: Every member must have an equal and effective opportunity to vote, and all votes must be counted as equal.
Enlightened understanding: Each member must have equal and effective opportunities for learning about relevant alternative policies and their likely consequences.
Control of the agenda: Members must have the exclusive opportunity to decide how and, if they choose, what matters are to be placed on the agenda; policies are always open to change.
Inclusion of adults: Adult permanent residents exercise fully the rights implied by the first four criteria.

It is relatively easy to apply Dahl's criteria to decision-making within small groups of people. Applying them to large populous states is more complicated, because representative, rather than direct, democracy becomes involved and raises issues about the relationship between representatives and constituents. Applying them to international institutions is even more difficult. The criteria nevertheless provide guidelines for evaluating the democratic accountability of institutions at all levels. The task of this book is to see if these criteria are met when military forces are used under the auspices of international institutions and, if so, how well.

Dahl was pessimistic that international institutions can provide citizens with opportunities for "political participation, influence, and control roughly equivalent in effectiveness to those already existing in democratic countries." He was also skeptical that citizens could become as concerned and informed about decisions taken in international institutions as they are about those made by their own government. He doubted that an appropriate scheme for representation could be created that would give equal weight to each individual without creating a situation in which smaller democracies with particular interests and problems would be constantly outvoted by more populous countries. In international institutions, "bargaining, hierarchy, and markets determine the outcomes. Except to ratify the results, democratic processes hardly play a role."[10]

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[8] Robert A. Dahl, *Polyarchy: Participation and Opposition* (New Haven, CT, Yale University Press, 1971), p. 1.
[9] Robert A. Dahl, *On Democracy* (New Haven, CT, Yale University Press, 1998), pp. 37–8.
[10] *Ibid.*, p. 115; also Robert A. Dahl, "Can International Organizations be Democratic? A Skeptic's View," in Ian Shapiro and Casiano Hacker-Cordón (eds.), *Democracy's Edges* (Cambridge, Cambridge University Press, 1999), pp. 19–36.

Not all democratic theorists are as pessimistic as Dahl. Some argue that the growth and increasing influence of non-governmental organizations (NGOs) and transnational associations and movements have infused elements of democracy into international negotiations and institutions. They suggest that the role of NGOs should be enhanced to make international institutions more democratic.

David Held is one democratic theorist who acknowledges that existing international institutions fall short of meeting democratic criteria, but he is hopeful that "cosmopolitan democracy" can be established through the transformation of these institutions.[11] Held would: "Seek the creation of an effective transnational legislative and executive, at regional and global levels, bound by and operating within the terms of the basic democratic law."[12] He would make international institutions more transparent, extensively use referenda, and create an assembly of democratic nations as an adjunct to the UN General Assembly. Held's is a program of reform, however, not a description of existing institutions.

Most analysts agree with Robert O. Keohane's assessment that a "democratic deficit" exists in many important contemporary international institutions.[13] A significant literature has developed about the "democratic deficit" in the European Union and how to deal with it.[14] Since the EU may become a federal state, suggested reforms often resemble institutions and procedures within such states as the Federal Republic of Germany.

Global and regional intergovernmental institutions are significantly different from the EU. Universal-membership international institutions such as the UN include important states that do not have democratic governments, but whose cooperation is essential to solving global problems. The world has not yet discovered how to ensure that decisions made under international auspices incorporate tenets of accountability applied within democratic states.

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[11] See Daniele Archibugi and David Held (eds.), *Cosmopolitan Democracy: An Agenda for a New World Order* (Cambridge, MA, Polity Press, 1995); David Held, *Democracy and the Global Order: From the Modern State to Cosmopolitan Governance* (Stanford, Stanford University Press, 1995); and David Held, "The Transformation of Political Community: Rethinking Democracy in the Context of Globalization" in Shapiro and Hacker-Cordón (eds.), *Democracy's Edges*, pp. 113–26.

[12] Held, *Democracy and the Global Order*, p. 272.

[13] Robert O. Keohane, "International Institutions: Can Interdependence Work?" (1998) 110 *Foreign Policy* 82–96.

[14] See Eric Stein, "International Integration and Democracy: No Love at First Sight" (2001) 95(3) *American Journal of International Law* 489–534 and Joseph Weiler, *The Constitution of Europe: Do the New Clothes have an Emperor? And Other Essays on European Integration* (Cambridge, Cambridge University Press, 1999).