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Book Review: Democratic Accountability and the Use of Force in International Law

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DEMOCRATIC ACCOUNTABILITY AND THE USE OF FORCE IN INTERNATIONAL LAW by Charlotte Ku and Harold K. Jacobsons, eds., New York: Cambridge University Press, 2002, 440 pp. –

The regulation of the use of force abroad by states and non-state actors is, and has always been, one of the most important issues in international legal and political discourse. From the very beginning of every state system that humans have established in various parts of our globe, the regulation of the transnational use of force has occupied a prominent place in the minds of internationalist scholars and policy-makers. In the post-1945 global era, several attempts have been made (albeit with modest success) to severely circumscribe the ability of states to use military force across international boundaries. To this end, the UN Charter¹ has placed severe international legal constraints on the ability of states to use military force against each other. That constitutional document has also attempted to impose a measure of international accountability on the use of force by states.

A state's decision to use force must receive the prior authorization of the UN Security Council, except when the relevant state is entitled within the narrow strictures imposed by law to defend itself individually or collectively against an armed attack. Yet, the UN Security Council is hardly an embodiment of international society. As importantly, international law has not traditionally required that governments obtain the prior authorization of their own citizens before using military force abroad. Where this kind of stricture exists at all, it is imposed domestically, in a constitution, a lesser legal document, or in a combination of the two. In this regard, the strictures imposed by the weight of domestic public opinion are sometimes important as well.

International and domestic constraints on a state's ability to use force transnationally tend to increase in relevance as a state's democratic characteristics deepen. It is within democratic states that these constraints have the best chance to succeed. Scholarly investigation of the ways in which these strictures have actually functioned in the democratic states that have most frequently used force under international auspices is thus deserving of some priority. That is the valuable task that the authors and editors of *Democratic Accountability*² set out to undertake. The editors and authors of this edited volume have organized their contributions around a number of important questions: To what extent do international and domestic legal/political factors actually constrain the ability of democratic states to use force abroad under

¹ Charter of United Nations, 26 June 1945, Can. T.S. 1945 No. 7.

² Charlotte Ku & Harold K. Jacobson, eds., *Democratic Accountability and the Use of Force in International Law* (New York: Cambridge University Press, 2002) [*Democratic Accountability*].

international auspices? In what measure has democratic accountability been exacted on such states? How has such accountability been secured so far in the democracies that have used force in this way? Or has democratic accountability really ever been secured in any of these states?

A welcome addition to the internationalist legal and political science literature, this edited collection treats a key problem at a key historical moment. For, as important as the securing of international and domestic democratic accountability for the use of military force abroad has always been, that task seems even more important in this post-9/11 moment, when the urge among the more powerful states to use force without (or with very little) international or domestic legality and accountability has become heightened.

The book is edited and authored by a group of eminent and emerging scholars, many of who are the leading experts in this general area of inquiry, and all of who are certainly conversant with the more specific sub-issues that they deal with in their various chapters. For instance, Lori Fisler Damrosch (on the constitution/international law interface),³ Fen Osler Hampson (on the Canadian experience),⁴ Ramesh Thakur and Dipankar Banerjee (on India's contributions),⁵ Georg Nolte (on the unique German case),⁶ and Michael Glennon (on the USA experience)⁷ are some of the most established experts on the particular subjects that they write about.

The fifteen chapters of this book are well organized into six parts. Its scholarly contribution is enhanced by the inclusion of two useful appendices and a well-developed index. Part I is composed entirely of chapter 1 of the book. This chapter (which is co-authored by the co-editors of the volume) introduces the topic and, in the words of its co-authors, broaches the issues.⁸ It does so with competence, and develops the conceptual framework around which the rest of the book is organized. At the outset, the chapter poses the central problem that is grappled within the volume: the ways in which accountability has been, and can be, exacted on the executive branch of

³ Lori F. Damrosch, "The interface of national constitutional systems with international law and institutions on using military forces: changing trends in executive and legislative powers" in Ku & Jacobson, *supra* note 2 at 39.

⁴ Fen Osler Hampson, "Canada: committed contributor of ideas and forces, but with growing doubts and problems" in Ku & Jacobson, *supra* note 2 at 127.

⁵ Ramesh Thakur & Dipankar Banerjee, "India: democratic, poor, internationalist" in Ku & Jacobson, *supra* note 2 at 176.

⁶ Georg Nolte, "Germany: ensuring political legitimacy for the use of military forces by requiring constitutional accountability" in Ku & Jacobson, *supra* note 2 at 231.

⁷ Michael J. Glennon, "The United States: democracy, hegemony, and accountability" in Ku & Jacobson, *supra* note 2 at 323.

⁸ Ku & Jacobson, *supra* note 2 at 1.

government in the democratic states that have used force under international auspices. Following that, it proceeds to show that this problem is especially significant now that decisions to use force under international auspices are largely made in international institutions that are far removed from “the representative structures that democratic governments have relied upon to provide accountability.”⁹ As importantly, it is in this chapter that the decision to focus the book on only nine countries is justified by the editors.

Part II, which focuses on the relevant domestic and international contexts, is composed of chapters 2-5. Lori Fisler Damrosch begins chapter 2 by offering an overview of the trends during the period between the 17th - 20th centuries regarding the constitutional control of the decision to use force, focusing primarily on western societies. The central point that she makes in the chapter is that although throughout (western) history, struggles between the executive and legislative branches over the exercise of power to deploy military force abroad have raged in all the relevant societies, the current trend among democracies the world over has been toward the total or partial constitutional restriction and circumscription of the executive branch’s ability to deploy such military force. In chapter 3, Karen Mingst demonstrates the centrality of political culture, political relationships and societal influences to the constitution and interpretation of the legal structures that seek to demarcate the use of force function between the executive and the legislature, and to provide a measure of democratic accountability, within democratic states.

In chapter 4, Edwin M. Smith offers an analytical overview of the development of the present global collective security system, from the League of Nations era to the current UN order. He concludes with a *most measured* endorsement of UN-centred multilateralism in the deployment of military force around the world under international auspices. His endorsement of UN centrality to such deployments is quite measured because he also offers a limited endorsement of the use of force by other multilateral coalitions (even without UN approval) in the interest of “efficiency and effectiveness”.¹⁰

In chapter 5, Robert Siekmann offers an analysis of the interlocking legal regimes applicable to the military forces that are deployed to conflict zones under international auspices. One of the more interesting issues that he deals with is the question of legal responsibility of UN peace support troops to respect international humanitarian law (IHL). He concludes that while the UN has traditionally maintained that it is only bound by the “principles and spirit” of IHL, its current recognition of its legal duty to abide by the “fundamental

⁹ *Ibid.* at 4.

¹⁰ Edwin M. Smith, “Collective security, peacekeeping, and ad hoc multilateralism” in Ku & Jacobson, *supra* note 2, 81 at 102.

principles and rules” of IHL is a much better stance, given the benefits of such compliance not only to UN troops themselves but also to the more humane conduct of such hostilities.¹¹

Part III, dealing with the experience of the traditional peacekeeping nations, is comprised of chapters 6-8. In chapter 6, Fen Hampson examines the Canadian experience as it concerns the book’s central problem. He notes that while nothing in the Canadian Constitution *requires* the executive to seek parliamentary approval for its decisions to deploy military force abroad, in practice Parliament is consulted in some way. He shows that while Canada’s self-image as a foremost peacekeeping nation has framed the public and governmental debates about the use of force abroad and rendered it relatively easy for the executive to send troops abroad under international auspices, revelations that Canadian peacekeepers tortured and killed a teenager in Somalia led to increased public and institutional demands for greater parliamentary oversight over all aspects of national defence, including peacekeeping.¹² In his view, the trend in Canada is in that direction.

The major point that is made in chapter 7, which is co-authored by Knut Nustead and Henrik Thune, is, in the context of this book, a somewhat unique one. The authors are of the view that the key issue in Norway has not been so much the securement of democratic accountability (either in a legal or a political sense) as it has been the twin quest of Norwegian society to “toe the line internationally” and establish a national political “consensus”.¹³ As such, in the past when the international consensus was much more in favour of non-interference in the internal affairs of states, a national consensus was developed around Norwegian participation in UN action as an important exception to the sovereignty principle. In their view, now that that international paradigm has to some extent been modified, Norway’s domestic political consensus has (despite a large dissenting minority) also shifted in that direction. Participation in international military operations is now also measured by the extent to which it is likely to advance human rights. It is as a result of this paradigm-shift that Norwegian participation in military operations that are not sanctioned by the UN has become far more possible since the early 1990s.

In chapter 8, Ramesh Thakur and Dipankar Banerjee offer an analysis of the motivations, conditions precedent to, and nature of, India’s remarkable contributions to international peacekeeping. The inclusion of this chapter is

¹¹ Robert C. R. Siekmann, “The legal responsibility of military personnel” in Ku & Jacobson, *supra* note 2, 104 at 122.

¹² Hampson, *supra* note 4 at 144.

¹³ Knut G. Nustad & Henrik Thune, “Norway: political consensus and the problem of accountability” in Ku & Jacobson, *supra* note 2, 154 at 155.

most appropriate. India is after all the world's largest contributor of troops to international peacekeeping. What is more, this chapter stands out as the only one in the book that focuses on a developing country and the post-colonial experience. A central argument that is advanced in this chapter is that as a parliamentary democracy, India's Constitution and laws vest the power to deploy military force abroad in an executive branch that is subject to the general control of parliament. However, the authors also note that, in practice, parliament usually acts with the executive to a large extent, and that a consensus about the virtues of participating in UN peacekeeping exists among the Indian elite because of a mix of "idealism" (a commitment to multilateralism) and "pragmatic calculations" (pursuit of national interests).¹⁴

Part IV, dealing with the experience of Japan and Germany, two of the axis powers that were defeated in world war II, and which were occupied for some time after by some of the victorious allied powers, is comprised of chapters 9-10. The key point that both Akiho Shibata and Georg Nolte make in chapters 9 and 10, respectively, is that in each case, the relevant country has slowly overcome its post-World War II legal and popular renunciation of the use of force abroad, whether or not under international auspices. It appears, however, that the rate at which this extreme reluctance to use force abroad was overcome was much faster in Germany than in Japan.¹⁵ Another important difference in the experience of the two countries is that while in Japan the power to use force under international auspices is, in practice, firmly in the hands of the executive (subject to intense debate in the *Diet* and the usual processes of parliamentary control over executive action), in Germany the *Bundestag* seems to be the key (although not the only) decision-maker in this respect.¹⁶ Another key difference is that while the German political consensus has allowed it to participate in a few cases in international military activities that are launched without UN approval, Japan's domestic laws and its political consensus prohibit it from participation in such operations.¹⁷ What is more, Japan cannot participate in UN *enforcement* actions, as opposed to the more traditional peacekeeping.

Part V, which focuses on the experience of all the permanent members of the UN Security Council with the exception of China, is made up of chapters 11-14. The key point that Bakhtiyar Tuzmukhmedov makes in chapter 11 is that although there was initially a gap in the domestic legal and political

¹⁴ Thakur & Banerjee, *supra* note 5 at 188.

¹⁵ Akiho Shibata, "Japan: moderate commitment within legal strictures" in Ku & Jacobson, *supra* note 2, 207 at 210.

¹⁶ Nolte, *supra* note 6 at 234.

¹⁷ Shibata, *supra* note 15 at 212.

regime governing the deployment of Russian troops abroad under international auspices, that situation has now been replaced at a formal level by a regime that empowers parliament to authorize such deployments. In practice, an executive-legislative tug of war, in which the executive has the upper hand by a large measure, continues to rage.

In chapter 12, Yves Boyer, Serge Sur, and Olivier Fleurence map France's growing involvement in UN peacekeeping, its emphasis on the UN Security Council as the unique source of legitimacy for the use of force under international auspices, and the French Presidency's authority (virtually unfettered in practice) to deploy French military forces in support of international operations. This is remarkable given the existence in France of an executive branch that is headed jointly by a President and a Prime Minister, and the fact that these two officials sometimes come from opposing political and ideological camps. The chief constraining influences on this presidential prerogative seem to be the legislature's power over the state's budget and the general desire of the government to act as much as it can in accordance with the weight of public opinion.

In chapter 13, Nigel White skilfully develops the point that the UK system of legislative control over the executive's power to deploy British forces abroad under international auspices is "quite weak".¹⁸ There is no requirement that parliament's prior approval be obtained before such deployments occur. Although the government usually subjects its decisions on such deployments to debate, such debates are circumscribed because they are usually introduced through non-amendable motions of adjournment. In practice, all that a parliament that opposes a particular decision to deploy force can really do in Britain is to subsequently pass judgement on the decision through the usual parliamentary means.

Michael Glennon's incisive treatment, in chapter 14, of the U.S.'s experience in the present respect is remarkable for its conclusion that despite the Constitution's attempt to demarcate the war-making power between the Presidency and Congress, and despite the Congressional assertion of its authority via the passage of the War Powers Resolution of 1973, only very rarely in that country's 200 year history has the U.S. President deployed military force abroad with prior Congressional authorization. Another important insight that is offered in this chapter is that the trend in the U.S. has been toward less (and not more) Presidential accountability to Congress with regard to the use of force abroad.

The book is concluded in Part VI, which is comprised of only the concluding chapter. Here the co-editors of the volume attempt to synthesize the evidence that is collected, analyzed and presented in the rest of the book.

¹⁸ Nigel White, "The United Kingdom: increasing commitment requires greater parliamentary involvement" in Ku & Jacobson, *supra* note 2, 300 at 319.

They argue that both formal (constitutional and statutory) and informal (public and media opinion) processes for the securement of democratic accountability with respect to decisions to use force abroad are already in place (to varying degrees of effectiveness) in the nine countries that the book focuses on. They also contend that while the UN Security Council is a key source of international legitimacy for the decisions of democratic states to use force abroad, the lack of democracy, representativeness, and transparency in the council needs to be addressed adequately if it is to discharge its intended functions with a much higher degree of global acclaim and success. To their mind, what exists today is a mixed interlocking system of democratic accountability that relies on both international and domestic mechanisms and processes.¹⁹

Overall, many points can be made in favour of the book. For one, it is a very well written and edited collection. The language used is clear, concise and to the point. The book is also very well structured and organized. It is of the genre of edited volumes that are organized around a broad theme with a full scholarly apparatus. This has allowed the volume to be coherent and the constituent chapters to be both interconnected and complementary. This will likely enhance the reader's experience of the book. More substantively, the book does, to a large extent, fill the gap in the literature that it set out to eliminate. It should soon be regarded as the leading book on the mechanisms of accountability for the decisions made by democratic states to use force under the auspices of international institutions. The sub-themes of the book allow it to fulfil its projected function, and contribute in this way to existing knowledge. As importantly, all of the chapters go beyond description to offer very valuable conceptual analyses and insights. Almost all of the essays contained in the volume are conceptually sophisticated, and all of them are of the type that most scholars and practitioners in this area will find useful.

It is possible, however, to be critical of the book on a number of scores, some more important than others. The decision of the co-editors to exclude a consideration of the Chinese experience deserves a more explicit and fuller explanation than was offered in the book. The reader is virtually forced to *infer* that the exclusion of this very important state, a permanent member of the UN Security Council, was either because it was not considered a democracy by the co-editors of the volume, or perhaps because its role in UN peacekeeping operations to date was not considered by the co-editors to be significant. Given China's military and political status in the world, and the fact that it has participated in at least ten UN Peacekeeping operations to date this matter should not have been so lightly treated. Readers would have benefited from a more detailed explanation of the exact reason for its

¹⁹ *Supra* note 2.

exclusion from the volume. The more likely reason of the two seems to be that the co-editors did not consider China to be a democracy. This reason will strike many readers as understandable. Yet, viewed from either perspective, the validity and coherence of this reason stands significantly challenged by the enthusiastic inclusion of Russia, a country in respect of which the Vice Chair of its own State, Duma, was quoted in this same book on Russia as having famously concluded in recent times that “Russia is not yet used to a parliament ... Functions of our parliament are limited. It *cannot control the executive*”.²⁰ What then is the substantive difference (in the relevant respect) between the governmental regimes in the two countries?

Similarly, given the choice made by the co-editors of the volume to focus on those democracies that have made a major contribution to international peacekeeping operations, it is difficult to see why a chapter on the Nigerian experience was not included in the book. It cannot be because Nigeria is not a democracy. At the very minimum, Nigeria has been a democracy since 1999. It was also a democracy between 1960-1966 and 1979-1983. Indeed most knowledgeable scholars will realize that in all three eras, its democratic credentials were much more credible than Russia’s has ever been. At the very least, Nigeria’s democratic credentials in those three eras, one of them current, was not any less credible than Russia’s.

What is more, Nigeria’s exclusion from the volume cannot also be justified on the basis that Nigeria has not played a major role in international peacekeeping operations. It certainly has, and sometimes at a *key* level. It was a *key* member of the UN force in the Congo in the 1960s (during its first republic). It has also been a key member of the UN forces in Sierra Leone and Liberia. Indeed, in terms of the sub-regional (that is international) peacekeeping operations that have preceded UN involvement in the last two countries, Nigeria has contributed almost all of the troops and money required. Nigeria is Africa’s key peacekeeping nation and one of the important contributors to UN peacekeeping. The only viable explanation for this omission could be that informal conversations on the framework of the project began in 1995 when Nigeria was still under military rule. Yet, since the book was planned in 1998 and must have been written over the three years that followed, and since it was published in 2002, the editors did have a chance to remedy this significant deficiency, or explain it away at the very least. What is more, although it clearly does deserve inclusion on the merits, Nigeria’s inclusion would have also helped ameliorate the seeming west-centric feel of the book.

As importantly, with the exception of Siekmann,²¹ almost all the authors of this volume do not pay appreciable attention to the question of the *direct*

²⁰ *Supra* note 2 at 279 [emphasis added].

²¹ Siekmann, *supra* note 11.

democratic accountability of the states that use force abroad *to the populations of the states in which they have injected their troops*. When states claim to use force in order to provide peace and democracy to a foreign people, how are they to be accountable to those foreign people for their decision? Should they be so accountable? While this issue has always been a critical one in international legal and political discourse, it has been rendered much more salient by the current situation in Iraq.

Somewhat less significantly, to the extent that the polling information on which Michael Glennon relies to conclude that support for U.S. participation in UN peacekeeping is high among the U.S. public, that this public shows a preference for multilateral over unilateral action by the U.S., and that the U.S. public does not desire their country to become the world's policeman is based on pre-9/11 polling, a reader may have some doubts about its continuing validity.²² It would have been better to base his conclusion on post-9/11 polling data. This deficiency might, however, be explained by showing that the book went to press either before 9/11 or too soon afterwards to be able to access such data. This explanation was not offered though.

Despite the criticisms that have been levelled against a few aspects of the book, it is on the whole an extremely useful collection, written by a star-studded scholarly ensemble. It is a must read for every serious scholar and practitioner in this area of inquiry, whether in the legal or political science disciplines. Its editors and authors deserve our thanks (posthumously in Harold K. Jacobson's case) for their vision, insight and industry in putting together this informative and thought-provoking addition to the literature.

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²² Michael J. Glennon, "The United States: democracy, hegemony, and accountability" in Ku & Jacobson, *supra* note 2 at 323.

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