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# The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala

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# THE SANTIAGO COMMITMENT AS A CALL TO DEMOCRACY IN THE UNITED STATES: EVALUATING THE OAS ROLE IN HAITI, PERU, AND GUATEMALA

STEPHEN J. SCHNABLY\*

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The description of events in this Article is complete as of October 15, 1994.

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## I. INTRODUCTION

Ending a period in which elected civilian governments had become virtually the norm throughout the Americas, coups in Haiti and Peru during 1991 and 1992 presaged difficult times for democracy and human rights.<sup>1</sup> Coup attempts in Venezuela in 1992 and 1993,<sup>2</sup> the imposition of emergency measures and

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1. See, e.g., THE ASPEN INSTITUTE, CONVERGENCE AND COMMUNITY: THE AMERICAS IN 1993 24 (1992); ROBERT A. PASTOR, WHIRLPOOL: U.S. FOREIGN POLICY TOWARD LATIN AMERICA AND THE CARIBBEAN 288 (1992); Kenneth Freed and William R. Long, *Recession, Corruption Fuel Latin Coup Jitters*, L.A. TIMES, Dec. 15, 1992, at 6; Andres Oppenheimer, *Events in Peru Spread Fear in Latin America*, MIAMI HERALD, Apr. 7, 1992, at 10A; Caleb Rossiter, *Peru Without Tears; Democracy Isn't Dead — It Never Lived*, WASH. POST, Apr. 12, 1992, at C1; Les Whittington, *The Haiti Effect: Venezuela Coup Try May Have Been Fallout from What Happened to Aristide*, THE GAZETTE (MONTREAL), Feb. 5, 1992, at A9. See also Don Bohning, *Haiti and Peru Testing Newfound Resolve of OAS*, MIAMI HERALD, May 17, 1992, at 12A; Christopher Madison, *U.S.-Latin Tango*, 24 NAT'L J. 1408 (June 13, 1992); Robin Wright, *Poverty's Shadow Haunting New Democracies*, L.A. TIMES, Feb. 25, 1992, at 1.

Many Latin American politicians drew a similar lesson. See Oscar Arias Sanchez, *Halting the Reversal of Democracy*, CHRISTIAN SCI. MONITOR, Sept. 9, 1992, at 19 (statement of former President of Costa Rica) ("Recent events in Haiti, Peru, Panama, and Brazil serve as a warning."); *Venezuela Presidential Address on National Unity Following Coup Attempt*, BBC Summary of World Broadcasts, Feb. 10, 1992, available in LEXIS, Nexis Library, NEWS File (speech by Carlos Andrés Perez) ("Now more than ever, we are able to understand our energetic position on Haiti").

2. A coup attempt in Venezuela nearly succeeded in February 1992. See Andres Oppenheimer, *At Least 56 Die in Abortive Rebellion*, MIAMI HERALD, Feb. 5, 1992, at 1A; *Venezuela Crushes Army Coup Attempt*, N.Y. TIMES, Feb. 5, 1992, at A6. The OAS condemned the coup attempt, see Support for the Democratic Government of Venezuela, C.P. Res. 576 (887/92), OAS Permanent Council, OEA/ser.G, OAS Doc. CP/RES. 576 (887/92) ((1992), see also OAS Resolution on Support for the Democratic Government of the Republic of Venezuela, A.G. Res. 2906/92, OAS General Assembly, OAS Doc. AG/doc.2906/92 (1992), reprinted in FOREIGN POL'Y BULL., July-Aug. 1992, at 84, and sent the Chairman of the Permanent Council and the Secretary General to Venezuela after the coup attempt was put down. See *Venezuela Presidential Address on National Unity Following Coup Attempt*, supra note 1. Almost as disturbing as the coup attempt itself, President Carlos Andres Perez suspended key constitutional rights for a brief period after the coup. Andres Oppenheimer, *Venezuela Suspends Key Rights*, MIAMI HERALD, Feb. 5, 1992, at 1A. For an analysis of the background of the coup attempt and its aftermath, including the popularity of the attempted coup's instigators, see Joseph Ricciardi, *Venezuela: The Military's Wake-Up Call*, NACLA REP. ON THE AMERICAS, July 1992, at 7.

In November 1992, a second and more bloody coup attempt occurred in Venezuela. It was notable for its failure to gain popular support, in contrast with the first. See James Brooke, *Venezuelan Chief Rules Out Resigning*, N.Y. TIMES, Nov. 30, 1992, at A6; *Caracas Derails Coup by Air Force Units*, N.Y. TIMES, Nov. 28, 1992, § 1, at 3; Andres Oppenheimer, *Rebels Mount More Attacks in Venezuela*, MIAMI HER-



the suspension of liberties there in mid-1994,<sup>3</sup> and the recurrent hints of coups elsewhere in Latin America<sup>4</sup> contributed to the sense of instability. To make matters worse, Peruvian President Alberto Fujimori's "autogolpe" (*i.e.*, self-coup) and the February 1992 attempted coup in Venezuela won significant domestic support,<sup>5</sup> as did the suspension of civil liberties in Venezuela in June 1994.<sup>6</sup>

These developments make clear that representative democracy has neither fully captured the popular imagination nor found solid institutional grounding in many Latin American and

ALD, Nov. 29, 1992, at 1A.

In early December 1993, there were rumors of a third coup attempt in Venezuela as the country elected a new President and Congress. See James Brooke, *Venezuelans, Coup Weary and Still on Edge, Await Elections*, N.Y. TIMES, Sept. 8, 1993, at A4; *Coup Rumours Back in Circulation*, LATIN AM. WKLY. REP., 12 Aug. 1993, at 365. The U.S. government threatened economic sanctions in the event of a coup. See Andres Oppenheimer, *Clinton Acts to Avert Coup in Venezuela*, MIAMI HERALD, Dec. 4, 1993, at 22A.

3. On June 27, 1994, in an action that drew comparisons to Fujimori's coup, see *A Caudillo in Caracas?*, MIAMI HERALD, July 28, 1994, at 20A; *Financial Emergency Accelerates Caldera's Move Away from Free Market*, LATIN AM. WKLY. REP., 14 July 1994, at 301. President Rafael Caldera's new government suspended civil liberties, including the right to travel abroad, the right to freedom from arbitrary search and seizure, and the right to property, as part of an emergency economic program. When the Venezuelan Congress voted nearly a month later to restore many of the freedoms, see *Congress Votes to Restore Rights in Venezuela*, MIAMI HERALD, July 22, 1994, at 12A, the government reinstated the suspension of liberties the next day, see *Constitutional Rights Restored, Erased in 1 Day*, MIAMI HERALD, July 23, 1994, at 16A; *Venezuela Suspends Some Major Freedoms*, N.Y. TIMES, July 23, 1994, at 3.

4. In February 1992, a group of officers threatened a coup in Honduras, promising that, unlike the coup leaders in Venezuela, they would succeed if they tried. See Tim Johnson, *Honduran Troops Threaten Coup in Letter Against General*, MIAMI HERALD, Feb. 25, 1992, at 10A. See also *Honduras Awakes to Find Tanks and Heavy Guns Out on the Streets*, LATIN AM. WKLY. REP., 11 Mar. 1993, at 109.

Later in 1992, Paraguay also suffered rumors of possible coups as it prepared for its first real presidential election since the fall of General Alfredo Stroessner. See Katherine Ellison, *Paraguay's Voters Are Nervous on Eve of First Free Election*, MIAMI HERALD, May 8, 1993, at 1A.

5. For a discussion of the Peruvian coup, see *infra* part III.B; on the popularity of the first Venezuelan coup attempt, see Ricciardi, *supra* note 2. The term autogolpe refers to the fact that the president overthrew the government, rather than being toppled by the military. See, e.g., *The 'Self-Coup' That Rocked Peru*, NEWSWEEK, Apr. 20, 1992, at 43.

6. See *'Financial Emergency' Accelerates Caldera's Move Away from Free Market*, LATIN AM. WKLY. REP., 14 July 1994, at 301 (government's popularity soared "when the police used their new emergency powers to begin rounding up bankers, businessmen, academics, retired officers and other alleged anti-government 'conspirators'").

Caribbean countries, long racked by severe inequalities of income and wealth and histories of military coups.<sup>7</sup> Although the failure of the 1993 autogolpe in Guatemala gives reason to believe that democracy is more than a passing phenomenon in Latin America,<sup>8</sup> there remain real grounds for concern about the prospects for democracy and human rights in this hemisphere.

If democracy faces grave difficulties in Latin America and the Caribbean, it is also widely perceived to be in serious trouble in the United States. One sign of disaffection in a democracy is a turn toward political outsiders who promise to sweep away existing barriers to popular decision-making, as if one leader could solve the nation's problems simply by doing the people's bidding. In Peru, an outsider gained the presidency on a tide of popular disgust with the country's political institutions and parties.<sup>9</sup> Fujimori turned out to have a highly authoritarian bent that led him to cast those institutions aside, and together with them, Peru's twelve-year old representative democracy.<sup>10</sup> In the U.S., the Perot phenomenon, born of a similarly profound contempt for politics as usual, temporarily threatened to throw the 1992 presidential race into disarray.<sup>11</sup> A political novice if not quite

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7. See generally Keith Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1, 21-22, 28-30 (1990).

8. See generally *infra* part III.C.

9. See *The Outsiders Who Got In*, ECONOMIST, July 7, 1990, at 44 (noting trend toward election of outsiders in Latin American countries facing severe economic difficulties and consequent dissatisfaction with democracy). Also at work was popular fear of Mario Vargas Llosa's conservative austerity plans, which Fujimori denounced vigorously during the campaign and adopted soon after taking office. See *infra* part IV.B.1. Other factors were involved as well, including race and religion, see Jeffrey Klaiber, *Fujimori: Race and Religion in Peru*, AMERICA, Sept. 15, 1990, at 133 and ironically, Vargas Llosa's temperament, which some people interpreted as "authoritarian," see Julio Ortega, *Por Qué No Votaré por Vargas Llosa*, 3 NUEVO TEXTO CRÍTICO 225 (1990).

10. See, e.g., Fernando Rospigliosi, *El Síndrome de la Renovación*, DEBATE, June-Aug. 1992, at 47 (presenting popularity of autogolpe as the culmination of widespread voter dissatisfaction with traditional party politics).

11. At one point considered a serious factor in the 1992 presidential race, Perot's impact was widely discounted when he reentered the race on October 1, 1992. See R.W. Apple Jr., *Back In, Without as Big a Splash*, N.Y. TIMES, Oct. 2, 1992, at A1. Although he did not throw the election into the House of Representatives, as many people had thought at one time might happen, see, e.g., Martin Tolchin, *The Constitution: And If Perot Produces a Deadlock? The House Will Decide*, N.Y. TIMES, May 10, 1992, at 18, he did attract 19% of the popular vote. See *The Vote for President: State by State*, N.Y. TIMES, Nov. 5, 1992, at B1.

the outsider he made himself out to be, Perot carried enough hints of authoritarianism to inspire comparisons to Fujimori.<sup>12</sup>

It would be easy to make too much of the comparison. The conditions in Peru are, after all, very different from those in the U.S. Nevertheless, there is a connection and not a mere parallel between the problems of democracy in the U.S. and in Latin America. The connection can be drawn in two steps. The first step is to make the reasonable assumption — as I will in this Article — that the outlook for democracy throughout the Americas depends, at least in part, on developing an effective regional mechanism to protect democracy and human rights. In turn, the full and committed participation of the U.S. is essential to the creation of such a mechanism, because the U.S. is far and away the most powerful member of the Organization of American States (OAS).<sup>13</sup> The second step is to claim — more controver-

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12. See, e.g., Allan Gerson, *Constitutionalist or a New Caudillo?*, WASH. TIMES, June 21, 1992, at B3; Estela Herrera, *Peru to Perot: A Suicidal Leap*, L.A. TIMES, May 28, 1992, at B7; John McQuaid, *When Voters Flock to a Perceived Outsider Candidate*, NEW ORLEANS TIMES PICAYUNE, June 9, 1992, at B7. Cf. *With Perot Out of the Race, Fascination Slips Away*, N.Y. TIMES, Aug. 2, 1992, at 4 (noting that comparison was drawn in Latin America as well). On allegations of Perot's authoritarian tendencies, see, e.g., R.W. Apple, *The 1992 Campaign: Perot in the Glare of Presidential Scrutiny*, N.Y. TIMES, June 25, 1992, at A27 (Perot alleged to have authoritarian tendencies). See also Michael Kelly, *The Center of Attention*, N.Y. TIMES, Oct. 2, 1992, at A1, A11 ("In terms that revealed the startling degree to which he regards himself as the embodiment of national sentiment, Mr. Perot described an America in which one man, himself, represented the sacred will of the people, a will that was precisely known to himself, and that had been corrupted and ignored by the Government and the two major parties.").

Significantly, like Perot, Fujimori was presented as making the traditional political spectrum irrelevant. See Julio Ortega, *A Vote for Equality*, WORLD PRESS REV., Aug. 1990, at 38. Like Perot, Fujimori spoke scornfully of Congress, and championed plebiscites as a way of having "democracy without intermediaries." Andres Oppenheimer, *Fujimori Style Coming Close to Mob Rule*, MIAMI HERALD, Apr. 27, 1992, at 12A. See also Statement by Peruvian Foreign Minister Augusto Blacker Miller, Apr. 13, 1992, reprinted in FOREIGN POL'Y BULL., May-June 1992, at 69, 70 ("[T]he government of emergency and national reconstruction led by President Fujimori has decided through direct consultation of the people to approve the transitory measures. These mechanisms, like a plebiscite or referendum, constitute norms for resolving extreme political or juridical crises by democratic means."); Howard W. French, *Peruvian, in Appeal at O.A.S. Meeting, Pledges Democratic Rule*, N.Y. TIMES, May 19, 1992, at A6; *Peru: Fujimori Outlines to OAS His Plans for a Return to Constitutionality*, BBC Summary of World Broadcasts, May 20, available in LEXIS, Nexis Library, NEWS File (reproducing speech). Cf. *Perot's TV Town Hall Is His 23-Year-Old Dream*, ST. LOUIS POST DISPATCH, June 7, 1992, at 7A (concerning his plan for an "electronic town hall" to implement pure democracy).

13. To make that observation is not to claim that the U.S. can simply dictate what the OAS does. But it seems impossible to deny that the U.S. is the most im-

sially — that sufficient U.S. commitment to a regional mechanism for promoting democracy and human rights in the Americas is unlikely to be forthcoming without greater democracy within the U.S. itself.

Recent developments make this a propitious time for considering the United States' commitment to such a mechanism. In June 1991, the OAS adopted the grandly named "Santiago Commitment to Democracy and the Renewal of the Inter-American System," and formally moved closer to a more activist and even interventionist posture toward military coups in member states than it has ever taken in the past. The coups in Haiti, Peru, and Guatemala since October 1991 have continually tested that new posture. To date, however, the Santiago Commitment has re-

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portant actor in the Western hemisphere, able to act unilaterally when it so chooses (as in the invasions of Panama and Grenada), and that it carries great weight within the OAS. See JEROME SLATER, *THE OAS AND UNITED STATES FOREIGN POLICY* 279 (1967):

In what sense can OAS action be considered truly collective? The United States plays the key role in most OAS actions, providing leadership, logistical services, economic pressures, and, when necessary, military force. Still, the importance of the Latin American contribution should not be underestimated: the Latin Americans provide political and diplomatic skills for negotiating, conciliating, and mediating; but most of all, they provide legitimacy. Collective action requiring economic and military sanctions may be essentially United States action, but it is action given an all-important symbolic multilateral character by the authorization of the OAS.

See also Richard J. Bloomfield, *The Inter-American System: Does It Have a Future?*, in *THE FUTURE OF THE INTER-AMERICAN SYSTEM* 3, 4 (Tom J. Farer ed., 1979) ("While the provisions of the treaties that form the legal framework of the System in appearance apply with equal force to all the members, the enormous disparity in power between the United States and the rest of the members means that in fact many of the responsibilities and commitments contained in the treaties and resolutions could only be undertaken by the United States."). Cf. Jonathan Miller, *The Latin American Reformer's Stake in U.S. Human Rights Policy*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY* 155 (Irwin P. Stotzky ed., 1993) (arguing that U.S. commitment to Inter-American system is necessary to give human rights law sufficient prestige and authority to support democracy and human rights in Latin American countries).

To clarify: U.S. policy is a key factor in regional efforts to foster democracy and human rights, but it is certainly not the only factor. Nor would I argue that regional efforts to promote democracy are the only important factors in any given country's path to democracy. Other countries throughout the hemisphere have their own particular social, political, and economic histories that are of profound importance to their own prospects for democracy. My aim in this article, then, is to point out a prerequisite for developing a strong regional mechanism, not to posit a sufficient condition for ensuring that democracy and human rights will prevail throughout the hemisphere.

ceived no sustained analysis.<sup>14</sup>

The more interventionist approach began to take shape on June 4, 1991, when OAS members met in Santiago, Chile, and announced a commitment to both "[s]trengthening representative democracy" and "[p]romoting the observance and defense of human rights" throughout the region.<sup>15</sup> With the OAS's long history of insistence on the principle of non-intervention<sup>16</sup> (occasioned in no small part by the United States' own long history of unilateral intervention),<sup>17</sup> that aspect of the Santiago Commitment is significant in itself.<sup>18</sup> Equally remarkable, the Santiago

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14. Tom Farer's thoughtful analysis of the current status and future prospects of collective efforts to defend democracy represents a useful first step in that direction, which I discuss in part IV.C. below. See Tom J. Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect*, 15 HUM. RTS. Q. 716 (1993). However, his exclusive focus on what I call the "first track" — reforming international and hemispheric mechanisms — ultimately proves inadequate. See *infra* part IV.C.

15. The Santiago Commitment to Democracy and the Renewal of the Inter-American System, OAS 3d plenary sess., June 4, 1991, paras. b, c [hereinafter *The Santiago Commitment*].

The Santiago Commitment followed another noteworthy development — the creation in June 1990 of the OAS Unit for Democracy. See Unit for Democratic Development, A.G. Res. 1063 (XX-0/90), OAS General Assembly, OAE/ser.P/XX.O.2, at 109, OAS Doc. AG/RES. 1063 (XX-0/90) (1990). See "We Live in a Transformed Hemisphere," COHA's WASH. REP. ON THE HEMISPHERE, Nov. 6, 1993, at 2 (interview with Executive Coordinator of Unit). So far, however, the Unit has accomplished little. See CONVERGENCE AND COMMUNITY: THE AMERICAS IN 1993, *supra* note 1, at 33 ("The Unit currently lacks even a rudimentary fact-finding and analytic capacity."). For a recent summary of its activities, see Note of the Secretary General to the General Assembly, OAS, June 1993, at 15; see also Erskine Sandiford, *Preserving and Strengthening Democracy*, NORTH-SOUTH, Apr.-May 1994, at 7, (noting the Unit's creation in 1993 of a "Democracy Forum" to promote discussion of democracy).

16. That insistence has been enshrined in the OAS Charter as it now stands. See Charter of the Organization of American States, arts. 18-20, April 30, 1948, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, as amended by Protocol of Buenos Aires, Feb. 27, 1967, 21 U.S.T. 607, T.I.A.S. No. 6847, 721 U.N.T.S. 324 [hereinafter *OAS Charter*]. But it can also be seen in treaties pre-dating the OAS Charter. See Christopher C. Joyner, *International Law, in INTERVENTION IN THE 1980S: U.S. FOREIGN POLICY IN THE THIRD WORLD* 191, 192-93 (Peter J. Schraeder ed., 1989) [hereinafter *INTERVENTION*].

17. See, e.g., JENNY PEARCE, *UNDER THE EAGLE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE CARIBBEAN* (1982); Ted Galen Carpenter, *Direct Military Intervention, in INTERVENTION, supra* note 16, at 131. On the OAS Charter as a reaction to that history of intervention, see, e.g., Tom J. Farer, *The Changing Context of Inter-American Relations, in THE FUTURE OF THE INTER-AMERICAN SYSTEM, supra* note 13, at xv, xvii-xviii.

18. Cf., e.g., Diane Bartz, *The OAS: A Reborn Force in the Hemisphere?*, NACLA REP. ON THE AMERICAS, July 1992, at 10 (Santiago Commitment gives hope that "the OAS has finally found an effective diplomatic voice"); Clara Germani, *OAS*

*Displays New Vitality in Bid to Restore Haiti's Ousted Leader*, CHRISTIAN SCI. MONITOR, Nov. 20, 1991, at 1 ("The OAS's quick and continued resolve to seek reinstatement of President Aristide stems from the organization's 'Santiago Commitment to Democracy and the Renewal of the Inter-American System.'). A number of observers had previously called on the OAS to take a more active role in protecting and promoting democracy throughout Latin America. See, e.g., Tom J. Farer, *A Multilateral Arrangement to Secure Democracy*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM 115 (Robert A. Pastor ed., 1989); The Columbia University/New York University Consortium, Larman C. Wilson, *Military Rule and the Hopes for Democracy in Haiti: The Limits of U.S. Foreign Policy*, Conf. Paper No. 22, at 24 (n.d.).

How sharp the break is can be judged by the response of OAS members in the past to suggestions that the OAS commit itself to restore democracy and human rights in the event of a coup. Various proposals for such a commitment were made shortly after World War II and when the OAS Charter was drawn up, and were overwhelmingly rejected. See SLATER, *supra* note 13, at 240-45; see also JOHN C. DREIER, THE ORGANIZATION OF AMERICAN STATES AND THE HEMISPHERE CRISIS 94-95 (1962). A 1962 proposal somewhat similar to the Santiago Commitment and trigger mechanism discussed below went nowhere, see *infra* text accompanying notes 20-22. Slater, *supra*, at 245-50. See also PASTOR, *supra* note 1, at 187-88 (President Wilson proposed "a 'Pan American Liberty Pact.' Some thirteen nations in the hemisphere expressed interest in the idea, but Mexico, Argentina, and Chile successfully blocked the initiative by redefining the issue from a question of how to support democracy to how to stop U.S. intervention in Latin America's internal affairs.") (footnote omitted). See generally LAWRENCE J. LEBLANC, THE OAS AND THE PROMOTION AND PROTECTION OF HUMAN RIGHTS 11 (1977) ("Whenever a choice has to be made between the two, the American states have placed more emphasis on the principle of 'non-intervention' than on human rights.); LARS SCHOULTZ, HUMAN RIGHTS AND UNITED STATES POLICY TOWARD LATIN AMERICA 133 (1981) ("There was never a question [in the 1970s] about the possibility of the OAS punishing an individual member, for most Latin American governments have always considered the level of respect for human rights an internal political matter"); Bryce Wood, *Human Rights in the Inter-American System*, in THE FUTURE OF THE INTER-AMERICAN SYSTEM, *supra* note 13, at 119, 139 ("In the OAS, collective intervention or sanctions of any kind are probably illegal and certainly impracticable if their intent is to cause members' governments to change their policies toward the protection of human rights."). Cf. PASTOR, *supra* note 1, at 287-88 ("The OAS has been stymied for much of its existence by an inherent contradiction between its two core principles, representative democracy and nonintervention. Almost every major crisis in the hemisphere — civil wars, farcical elections, human rights abuses — has involved a clash of these principles, and the OAS has been left with its hands tied as these problems festered or the United States intervened . . .").

On the other hand, it should be noted that the OAS has previously made efforts to define what constitutes representative democracy, though without any particular enforcement mechanism. See Dinah Shelton, *Representative Democracy and Human Rights in the Western Hemisphere*, 12 HUM. RTS. L.J. 353 (1991).

It should also be noted that the OAS has not applied the principle of non-intervention consistently. For instance, it decided to exclude the Cuban government after the revolution because of its dislike of that government. See LEBLANC, *supra*, at 11-12; Exclusion of the Present Government of Cuba from Participation in the Inter-American System, M.R.E. Res. VI, OAS Meeting of Consultation of Ministers of Foreign Affairs, 8th mtg., OEA/ser.F/II.8, OAS Doc. 68, O.14 (1992), reprinted in THOMAS BUERGENTHAL ET AL., PROTECTING HUMAN RIGHTS IN THE AMERICAS: SELECTED PROBLEMS 80 (3d ed. 1990).

Commitment is a sweeping document, asserting that respect for democracy and human rights must be strengthened by the reduction of poverty and economic and social inequalities, the promotion of trade and technology transfers, and the protection of the environment in the name of "sustainable development."<sup>19</sup>

Among the Santiago Commitment's notable implementation measures<sup>20</sup> is the call to adopt "efficacious, timely, and expeditious procedures to ensure the promotion and defense of representative democracy."<sup>21</sup> On June 5, 1991, the General Assembly approved a resolution entitled "Representative Democracy," in which the member states created a specific trigger mechanism for reacting collectively to military coups: The OAS Secretary-General must implement a process by which the OAS will respond within ten days to "any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's members states."<sup>22</sup>

The Santiago Commitment will be complemented by the Charter of the OAS if an amendment proposed by the OAS General Assembly in December 1992 is approved. The amendment, part of the Protocol of Washington, proposes that a state "whose democratically constituted government has been overthrown by force may be suspended" from participation in the OAS by a vote of two-thirds of the member states in a special session of the General Assembly.<sup>23</sup> Another proposed amendment would com-

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19. See The Santiago Commitment *supra* note 15, paras. a, d, e, f. See also OAS Declares "War on Poverty," COHA'S WASH. REP. ON THE HEMISPHERE, May 16, 1994, at 4 (noting OAS's adoption in February 1993 of plan to combat poverty through development).

20. See, e.g., The Santiago Commitment *supra* note 15, para. c (calling for the promotion of human rights through "specific existing agencies"). The main agencies are the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights.

21. *Id.* at 3.

22. Representative Democracy, A.G. Res. 1080 (XXI-0/91), OEA/ser.P, OAS Doc. AG/RES.1080 (XXI-0/91) (1991).

Specifically, within ten days of the coup, the Permanent Council is to be called together for an immediate meeting to examine the situation, and to convene an ad hoc meeting either of the OAS General Assembly or of the Ministers of Foreign Affairs. *Id.*, para. 1. It is then up to Ministers of Foreign Affairs or the General Assembly to "look into the events collectively and adopt any decisions deemed appropriate, in accordance with the Charter and international law." *Id.*, para. 2.

23. See Texts Approved by the General Assembly at its Sixteenth Special Ses-

mit the OAS to the elimination of "extreme poverty" on the ground that it "constitutes an obstacle to the full democratic development of the peoples of the hemisphere."<sup>24</sup> To date five member states, including the United States, have ratified the amendments.<sup>25</sup>

Most obviously, the Santiago Commitment and proposed Charter amendments can be seen as evidence of an emerging right to democracy,<sup>26</sup> and of a corresponding weakening of the OAS' prohibition against intervention in states' domestic affairs.<sup>27</sup> I want to focus on a different aspect, however, which I

sion in Connection with the Amendments to the Charter of the Organization, OEA/Ser.P, OAS Doc. AG/doc.11 (XVI-E/92) (1992) (proposing Article 8 bis) [hereinafter Texts Approved by the General Assembly at its Sixteenth Special Session].

The vote was 30-1, with two abstentions. Mexico cast the sole dissenting vote on the ground that the proposed amendment constituted an unwarranted rejection of the principle of non-intervention into states' domestic affairs. See *Americas: OAS May Suspend Non-Democratic Members*, INTER PRESS SERVICE, Dec. 15, 1992, available in LEXIS, Nexis Library, WIRES File. *Latin America: New Pact Proposed to Defend Democracy*, INTER PRESS SERVICE, Dec. 13, 1992, available in LEXIS, Nexis Library, WIRES File. *Mexico Reaffirms Opposition to OAS "Interventionism,"* NOTIMEX MEXICAN NEWS SERVICE, Dec. 15, 1992.

24. See Texts Approved by the General Assembly at its Sixteenth Special Session in Connection with the Amendments to the Charter of the Organization, *supra* note 23 (proposing new Article 2(g)); see also *id.* (proposing new Article 3(f) and modifications to Articles 33 and 116).

25. See Heidi V. Jiménez, *Introductory Note*, 33 I.L.M. 981, 983 (1994). On the United States' ratification, see Marian Nash (Leich), *Contemporary Practice of the United States Relating to International Law: Organization of American States*, 88 AM. J. INT'L L. 719 (1994).

26. See Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 65-66, 73-74 (1992) (citing Santiago Commitment); *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law*, PROCEEDINGS OF 86TH MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW, Apr. 1-4, 1992, at 249, 257, 259 [hereinafter AM. SOC'Y OF INT'L L.] (remarks by Claudio Grossman) (same). See also Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 541 n.8, 585-86 (1992) (citing creation of Unit for Democratic Development and OAS response to Haiti coup). Cf. Declaration of the Ibero-American Conference, July 24, 1992, para. 1, at 2 ("Reafirmamos nuestro compromiso con la democracia representativa, el respeto a los derechos humanos y las libertades fundamentales como pilares que son de nuestra comunidad" [We reaffirm our commitment to representative democracy, respect for human rights and fundamental freedoms as the pillars of our community]).

For a critique of Franck's thesis, see Thomas Carothers, *Empirical Perspectives on the Emerging Norm of Democracy in International Law*, AM. SOC'Y OF INT'L L., April 1-4, 1992, *supra* at 249, 261.

27. See Morton Halperin, *Guaranteeing Democracy*, FOREIGN AFF., Summer 1993, at 105, 112-13 (citing Santiago Commitment); David J. Scheffer, *Toward a Modern Doctrine of Humanitarian Intervention*, 23 U. TOLEDO L. REV. 253, 279 (1992). To be sure, the Santiago Commitment calls for its aims to be achieved "with-



approach by appraising the significance of the Santiago Commitment in terms of two central problems of human rights law — problems that (in different ways) undermine respect for democracy and human rights both in the U.S. and throughout the rest of the Americas.

International human rights law has long been plagued by two problems.<sup>28</sup> One is a lack of effectiveness. The norms proclaimed in the Universal Declaration of Human Rights<sup>29</sup> are ignored throughout much of the world. People are tortured or disappeared every day, and countless others live in worsening poverty marked by hunger and disease.<sup>30</sup> International human rights law has had some effectiveness, but there is a dishearteningly wide gap between the depth and scope of the problems and the degree of effectiveness it has attained.<sup>31</sup>

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in the framework of respect for the principles of self-determination and non-intervention." See *The Santiago Commitment*, *supra* note 15, at 2. But there is no question that it marks a significant departure from previous understandings of what those principles mean.

The Santiago Commitment and the proposed Charter amendments reflect a more general trend toward accepting the notion that intervention into other states' affairs to protect democracy or human rights is permissible. For a useful discussion of the current status and political context of the principle of nonintervention and its relationship to human rights law, see Kelly Kate Pease & David P. Forsythe, *Human Rights, Humanitarian Intervention, and World Politics*, 15 HUM. RTS. Q. 290 (1993). The most notable new example is the ongoing creation of human rights mechanisms under the auspices of the Organization for Security and Cooperation in Europe (OSCE). The Copenhagen Document not only states that there is a basic human right to an elected government conforming to the rule of law, see Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe, paras. 1, 2, 5, 7, June 29, 1990, reprinted in 29 I.L.M. 1305 (1990), but also states that participating states are obliged to protect freely elected governments "against the activities of persons, groups or organizations that engage in or refuse to renounce terrorism or violence aimed at overthrow of that order or of that of another participating state," *id.*, para. 6. At least one commentator has read this provision to authorize unilateral intervention against a military regime that overthrows an elected government. See Malvina Halberstam, *The Copenhagen Document: Intervention in Support of Democracy*, 34 HARV. INT'L L.J. 163 (1993). On the OSCE, see generally, e.g., THE HUMAN DIMENSION OF THE HELSINKI PROCESS: THE VIENNA FOLLOW-UP MEETING AND ITS AFTERMATH (A. Bloed and P. van Dijk eds., 1991); FROM HELSINKI TO VIENNA: BASIC DOCUMENTS OF THE HELSINKI PROCESS (A. Bloed ed., 1990); Thomas Buergethal, *The OSCE Rights System*, 25 GEO. WASH. J. INT'L L. & ECON. 333 (1991).

28. See *infra* part II.

29. G.A. Res. 217(III) A, U.N. GAOR, 3d sess. (Dec. 10, 1948).

30. See generally, e.g., AMNESTY INTERNATIONAL, AMNESTY INTERNATIONAL REP. 1994 (1994).

31. See, e.g., Seymour J. Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 AM U. J. INT'L L. & POL'Y 67, 70-72 (1986);

The other limitation is a problem of perspective. Human rights law has often shown a tendency to focus on individual violations, and to conceive of systematic violations simply as large numbers of individual violations. What is lost from that perspective is a sense of how the underlying causes might be addressed to prevent the violations from arising in the first place. In Argentina, for example, a serious attack on the human rights problems created by the "dirty war" — torture and disappearances being two of the more prominent among them — required the downfall of the military regime, not increased resort to the courts to vindicate the right not to be arbitrarily detained, tortured, and murdered.<sup>32</sup>

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Paul Sieghart, *International Human Rights Law: Some Current Problems*, in HUMAN RIGHTS FOR THE 1990S: LEGAL, POLITICAL AND ETHICAL ISSUES 24, 32 (Robert Blackburn & John Taylor eds., 1991) (noting that while international human rights law has had some impact, "[a]s a matter of empirical fact, gross and persistent violations of human rights continue to be perpetrated all over the world, in countries of almost every political or economic complexion, and almost every stage of development"); Fernando R. Tesón, *International Human Rights and Cultural Relativism*, 25 VA. J. INT'L L. 869, 875-76 (1985) ("While some encouraging steps are being taken, mainly in regional settings, there is no doubt that the lack of centralized, compulsive judicial machinery represents a major weakness of current international human rights law.").

32. See Frederick E. Snyder, *State of Siege and Rule of Law in Argentina: The Politics and Rhetoric of Vindication*, 15 LAW. AM. 503, 518-19 (1984) (footnote omitted):

The convoluted process of human rights litigation, leading as it does in Argentina to the publication of judicial opinions in cases [in which the courts granted particular petitions for habeas corpus against the military regime] . . . has had the effect of generating a discourse of rationality, a language of reasonableness, as a tool for the portrayal analysis of the government behavior during the state of siege . . . . The formal outcome of these cases has turned on such issues as the "sufficiency" of the facts offered by the state as evidence "justifying" the detention of a prisoner, the "connection" between a particular prisoner, the "causes" of the emergency and the government's "conduct" in arresting the person. The implication here is that the behavior of the junta and its subordinate officials is susceptible to a mode of description that includes such terms as "reasonableness" and "rational." . . .

From the junta's perspective, it matters not whether the government "wins" or "loses" one case or another. It will always find a way to disregard or neutralize the effects of a really threatening decision . . . . What is important is that it appears to be an actual player in the game of legal rhetoric, a partner with court, petitioner and legal analysis in the search for legality and justification. Legal process has thus been singularly important in the mobilization of state terror in that it has enabled the junta to address society not only through the amplifier at the rally, the proclamation in the newspaper, the rifle butt on the street, and the electrode in the torture chamber, but through a vocabulary of

The causes of these two problems are many, but one has been the tendency to concentrate on the development of specialized adjudicative institutions as the primary means of implementing human rights norms. One measure of the growth of human rights law is the rise of adjudicative bodies in the Inter-American and European systems of human rights and the creation of U.N. and treaty-based bodies for considering individual complaints of human rights violations. These bodies, which generally attempt to operate with some independence from states, have had real but limited effectiveness, and have shown some tendency to focus on individual violations.<sup>33</sup>

The proclamation of the Santiago Commitment and its trigger mechanism signals the possibility of a marked shift in emphasis that may address the two problems of human rights law. The Santiago Commitment and trigger mechanism, together with the proposed Charter amendments, present the prospect of the direct commitment of states to, and involvement in, the protection of democracy. Since states generally have been more effective actors than international adjudicative bodies, the Santiago Commitment provides the potential for a more effective mechanism for protecting democracy. Further, bringing "democracy" to the fore raises the possibility of a more systemic focus than human rights discourse has typically manifested — particularly if one accepts the relatively expansive notion of democracy that the Santiago Commitment can be read to embrace.

While the creation of a regional mechanism that directly involves states in the protection of democracy thus carries real

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reason and right as well. It is for this reason that the junta in Argentina . . . preserves the courts intact during the administration of a state of siege.

See also IAIN GUEST, BEHIND THE DISAPPEARANCES: ARGENTINA'S DIRTY WAR AGAINST HUMAN RIGHTS AND THE UNITED NATIONS 25-26 (1990); Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 111-13 (1989).

Of course, returning a country to democratic government does not necessarily preclude human rights abuses. Peru is an example of a country that has had worse problems of torture and disappearances under an elected government than the preceding dictatorship. See Angela Cornell and Kenneth Roberts, *Democracy, Counterinsurgency, and Human Rights: The Case of Peru*, 12 HUM. RTS. Q. 529 (1990). Since the institution of a civilian government in Guatemala in 1986, serious human rights problems have continued almost unabated, and — even after the installation of a human rights activist as president — the military is largely independent of civilian control. See generally *infra* part III.C.

33. See *infra* part II.

advantages, there is a darker side as well. In conducting their foreign policy, whether individually or collectively, states tend to view the aim of protecting democracy and human rights as one of a number of interests, to be compromised and even discarded if other perceived interests will be served thereby. It seems unlikely that states will maintain the kind of commitment to democracy and human rights that one might reasonably (if not always realistically) expect from relatively apolitical bodies like the Inter-American Commission and Court. Inevitably, direct state involvement in protecting democracy and human rights offers a Faustian bargain, promising greater effectiveness but threatening manipulation and undue compromise.

The record of the OAS's implementation of the Santiago Commitment over the first three years exemplifies the dilemma. On the one hand, the OAS's record reveals an array of weapons — diplomatic pressure, trade embargoes, aid cut-offs, even military intervention — all being brought to bear on the restoration of democracy and the protection of human rights in Haiti, Peru, and Guatemala.<sup>34</sup> Without the direct state involvement that the Santiago Commitment entails, it is unlikely that significant international pressure would have been exerted on the regimes in those countries. This pressure has had a real effect, with Guatemala providing an almost textbook example of how the mechanism can quickly be brought to bear to protect a constitutional government.

On the other hand, whether democracy has really been preserved in the three countries is more difficult to gauge. Even the full restoration of constitutional government in Guatemala does not guarantee that the underlying barriers to democracy there — severe social and economic inequality and a military largely out of the civilian government's control — will be surmounted. Furthermore, the OAS' response to the coups in Haiti and Peru was half-hearted at best, and manipulative at worst. Thus, while the Santiago Commitment has helped move the preservation of democracy in the Americas onto the regional agenda, it has also placed the agenda in the hands of political actors that do not hesitate to misuse it.

Responses to the Faustian nature of the bargain can proceed along either or both of two tracks. The first track accepts the

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34. See *infra* part III.

terms of the tradeoff and works within it. That is, there may well be ways to take advantage of the power of direct state involvement while curbing the tendency of states to favor other perceived interests over the promotion of democracy and human rights. For example, the Santiago Commitment might be modified to provide for an automatic, escalating series of sanctions against newly installed military regimes, thereby restricting the ability of the OAS member states to give little more than lip service to the goal of restoring an elected leader whose policies they dislike.<sup>35</sup>

Since there are likely to be severe limits on any effort to confine the tendency of states to undercut democracy and human rights in their foreign policy even as they claim to promote those goals, it would also be worthwhile to begin thinking about a second track, one that has heretofore received much less attention. We might begin to focus on what fundamental reforms it would take to change the terms of the tradeoff between effective, direct state involvement and the manipulation and undue compromise that involvement brings. With such a change in terms, states might take the protection of human rights and democracy elsewhere more seriously in the first place.

It is this second track that I would like to explore, tentatively, in the context of U.S. foreign policy. Granted that the U.S. will always have a fair degree of discretion in conducting its foreign policy, how might we make the government more committed to using that discretion to promote democracy and human rights in foreign policy? Perhaps, chastened by the willingness of the U.S. to violate the human rights of the Haitian refugees<sup>36</sup> — not to mention the alacrity with which it has supported systematic human rights violators like the Nicaraguan contras and the Salvadoran army<sup>37</sup> — we might ask more modestly, how might we make the U.S. less likely to support or engage in massive violations of human rights elsewhere?

One powerful basis for mobilizing domestic pressure on U.S. foreign policy came to the fore in the Haiti crisis — as it did with respect to South Africa. The Congressional Black Caucus and other groups of African-Americans, reacting to the implicit

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35. See *infra* part IV.C.

36. See *infra* part IV.A.2.

37. See *infra* part V.A.1.

racism in U.S. policy toward Haitian refugees, placed real pressure on the Clinton Administration to seek Aristide's return.<sup>38</sup> More generally with the continuing emphasis on multiculturalism domestically, it seems quite likely that a politics based on racial, ethnic, and religious identities will play a significant role in shaping domestic pressure on U.S. foreign policy for the foreseeable future.

The desirability of this prospect is harder to gauge. If Haiti and South Africa display its good side, the rabid anti-communism and intolerance of much of the political leadership of the Cuban exile community in Miami clearly preclude simple assertions that identity politics and a concern for human rights will always go hand in hand.<sup>39</sup> In any event, identity politics pro-

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38. See, e.g., John M. Goshko, *Groups Call U.S. Haitian Policy a 'Disaster'*, WASH. POST, Apr. 10, 1994, at A26; John M. Goshko, *U.S. To Seek Full Embargo Against Haiti*, WASH. POST, Apr. 22, 1994, at A1; Steven A. Holmes, *With Persuasion and Muscle, Black Caucus Reshapes Haiti Policy*, N.Y. TIMES, July 14, 1994, at A10; Christopher Marquis, *Legislators Prod U.S. on Haiti*, MIAMI HERALD, Jan. 16, 1994, at 1A (denouncing U.S. interdiction program as racist "In a string of fiery speeches at a political conference convoked by Aristide in Miami, the U.S. lawmakers equated Haitians' struggle to reimpose civilian, democratic rule in their homeland with their own civil rights battle in the United States."); Pezzullo *Unleashed, But Not Without a Parthian Shot*, COHA'S WASH. REP. ON THE HEMISPHERE, May 16, 1994, at 3.

There is, of course, a very real sense in which politics is always racial. The differential treatment of Cuban and Haitian refugees was not somehow racially neutral until African-Americans began to protest it. What changed was that the racial element in U.S. foreign policy towards Haiti became explicit, and was subjected to challenge. Cf. Tony Pugh, *Lawmakers Urge New U.S. Policy*, MIAMI HERALD, Mar. 19, 1994, at 1A (according to a U.S. Congressman supporting Haiti bill proposed by Congressional Black Caucus, the legislation "will attempt to alter the administration's 'race-driven' policy with one that's colorblind"). Similarly, the question of military intervention had a significant racial undercurrent. See Sam Howe Verhovek, *Support for Troops But Policy in Dispute*, N.Y. TIMES, Sept. 17, 1994, at A6 (noting concern by many African-Americans that U.S. hesitation to use military intervention in Haiti, in contrast to Grenada and Panama, stemmed from fact that Haiti's population is black).

39. See generally AMERICAS WATCH AND FUND FOR FREE EXPRESSION, DANGEROUS DIALOGUE: ATTACKS ON FREEDOM OF EXPRESSION IN MIAMI'S CUBAN EXILE COMMUNITY (1992) [hereinafter AMERICAS WATCH CUBAN EXILE REPORT]. See also Manny García and Charles Strouse, *Alonso: Ban Pro-Castro Protests*, MIAMI HERALD, Mar. 19, 1993, at 1B ("Pro-Castro groups that clashed with anti-communists outside Radio Mambí shouldn't be allowed to demonstrate again in Miami, [City] Commissioner Miriam Alonso declared Thursday."); Magda Montiel Davis, *Cubans Must Be Sensitive . . . to Freedom to Share Views*, MIAMI HERALD, Apr. 14, 1993, at 15A; Lisandro Perez, *'Threat of Violence' Builds Here as Castro Holds On*, MIAMI HERALD, Apr. 15, 1993, at 22A. Ironically, the exile community provides an example of a group with an unusually high degree of interest in foreign policy. See Cynthia Corzo, *More Now Favor Armed Invasion of Cuba*, MIAMI HERALD, July 10, 1993, at 4B

vide an insufficient basis for the second track. Such a politics is likely to be too narrowly focused, too episodic, and too long in having an effect.

For that reason, I would like to focus in this Article on a more general approach. If there were greater democracy in the U.S., the consequent increase in democratic constraint over foreign policy might well change the terms of the Faustian bargain in a way that would favor protection of democracy and human rights abroad. Greater democracy at home would increase the prospects for democracy abroad, to the extent that the latter depends on effective U.S. participation in international mechanisms to promote democracy and human rights.<sup>40</sup>

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(76% of Cuban-Americans polled in Miami area survey said that they "would not vote for a local candidate — even if they agreed with his views on local issues — if the candidate favors negotiations with Cuba").

40. A brief example may help clarify what I mean in claiming that the problems of effectiveness and perspective not only have parallels abroad and at home, but also are causally related.

Particularly during the 1980s, the U.S. focused almost exclusively on the holding of elections in Central American countries as a way of establishing democracy there. *See generally, e.g.*, EDWARD S. HERMAN & FRANK BRODHEAD, DEMONSTRATION ELECTIONS: U.S.-STAGED ELECTIONS IN THE DOMINICAN REPUBLIC, VIETNAM, AND EL SALVADOR (1984); Susanne Jonas, *Elections and Transitions: The Guatemalan and Nicaraguan Cases*, in ELECTIONS AND DEMOCRACY IN CENTRAL AMERICA 126 (John A. Booth & Mitchell A. Seligson eds., 1989); The Washington Office on Latin America Conference, U.S. ELECTORAL ASSISTANCE AND DEMOCRATIC DEVELOPMENT: CHILE, NICARAGUA AND PANAMA, Jan. 19, 1990. On the Clinton Administration's advocacy of democracy, see Holly Burkhalter & Juan Mendez, *Force-Feeding Freedom*, THE RECORDER, July 22, 1993, at 9. The focus was rather disingenuous, partly because the U.S. often attempted to affect the outcomes as well as the processes and (when that failed) simply rejected outcomes it disliked, *see* Edward S. Herman, *The United States Versus Human Rights in the Third World*, 4 HARV. HUM. RTS. J. 85, 98-103 (1991), but also because the policy was offered in response to criticism of the U.S.'s support for human rights violators like the Salvadoran military. *Cf.* AMERICAS WATCH & LAWYERS COMMITTEE FOR INTERNATIONAL HUMAN RIGHTS, ELECTION 1984: DUVALIER STYLE (1984) ("In 1983, the Reagan Administration placed increasing emphasis on elections as a crucial indicator of a country's respect for the fundamental human rights of its citizens. Regrettably, this emphasis was sometimes accompanied by reduced concern for traditional human rights indicators, such as respect for the right to life, freedom from arbitrary detention, humane treatment of prisoners, and freedom to express one's views.")

Our own conception of democracy internally is, as I discuss below, a predominantly electoral one. *See infra* part V. There is more than a parallel at work here between the emphasis on the electoral process at home and abroad. The Reagan Administration was able to pursue a policy that resulted in supporting façades of civilian governments unable to exercise real control over armies that committed massive human rights violations in part because a purely electoral conception of democracy had a certain resonance with the American public, and in part because — for reasons related to the narrowness of our own conception of democracy, *see id.*

That assertion in turn raises the question of how to make the U.S. more democratic. In that endeavor, two considerations are likely to be basic — the integration of economic and social rights into our own conception of human rights, which has focused mainly on civil and political rights, and an expansion of our notion of the proper domain of the democratic ideal to include work and areas of life currently viewed as private. Strikingly, these prescriptions are similar to what is needed for the Santiago Commitment to work throughout the rest of the Americas. Thus, without denying that there are major differences between the U.S. and Latin America, we should not overlook the fundamental similarity between what is needed for more democracy in the U.S. and what is needed to promote it abroad.

Fully describing the kinds of changes that would be needed to improve democracy within the U.S. would be a huge undertaking. I wish only to make the point that, given the great importance of the U.S. in this hemisphere, the prospects for democracy at home will have a strong influence on how well any regional mechanism like the Santiago Commitment performs over the long term. A recognition of the connection has been absent for too long from the agenda of human rights advocates in the U.S.<sup>41</sup>

In part II, I will lay out in more detail what I have called the problems of effectiveness and perspective. Part III will re-

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— it faced only very weak democratic constraints on its formulation of foreign policy. Cf. Thomas Carothers, *The Reagan Years: The 1980s*, in EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA 90, 117-18 (Abraham F. Lowenthal ed., 1991) ("The formalistic, institution-oriented view of democracy was not a peculiarity of U.S. foreign policy officials of the 1980s. It is a recurring phenomenon in U.S. foreign policy and has its roots in the extension abroad of certain aspects of the U.S. national experience with democracy.")

41. Admittedly, human rights activists have not been entirely unaware of the need to consider human rights within the U.S. as well around the world. See, e.g., Aryeh Neier, *Global Human Rights Work Includes the U.S. Too*, HUM. R. WATCH Q. NEWS., Summer 1992, at 1. For example, Americas Watch recently issued a report on the restraints on freedom of speech that anti-Castro zealots have imposed on Miami's politics. See AMERICAS WATCH CUBAN EXILE REPORT, *supra* note 39.

Nevertheless, two key factors have generally been missing from the focus on the U.S. The first is a recognition of the need to revitalize democracy within the U.S. as a way of promoting human rights abroad — by tempering the United States' otherwise rather consistent tendency to engage in policies that violate democracy and human rights in other countries. The second is an understanding of the ways in which that task requires an expanded conception — here and abroad — of what respect for democracy and human rights entails.



count the OAS's implementation of the Santiago Commitment in response to the coups in Haiti, Peru, and Guatemala. I will lay out the events in those countries, and the reaction of the U.S., the OAS, and the U.N. in some detail in order to set the stage for arguing, in part IV.A., that the effectiveness of the Santiago Commitment has to a large degree been undermined by the absence of a political will to enforce it. It might be possible to refine the Santiago Commitment to force member states to take their commitment more seriously — that is, to follow the first track. As I will argue in part IV.B, however, the absence of an adequate perspective on constitutionalism and its relation to democracy and human rights might well undermine that task. Part V will explore the alternative track of deepening our own democracy as a way of giving the U.S. (and so the OAS) the political will to support democracy throughout the region.

## II. THE PROBLEMS OF EFFECTIVENESS AND PERSPECTIVE

The problems of effectiveness and perspective appear strikingly in the activities most characteristic of human rights lawyers: litigation and adjudication of cases challenging violations of human rights. Much of the global effort at institution building in the field of human rights has gone into the creation of bodies to hear individual complaints — for example, the Human Rights Committee,<sup>42</sup> the Committee on the Elimination of Racial Discrimination,<sup>43</sup> and the Committee against Torture.<sup>44</sup> On a regional level, the European system is typically considered the most advanced, the Inter-American system as less developed,

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42. International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 28, 999 U.N.T.S. 171; International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, Optional Protocol, art. 1, 999 U.N.T.S. 171.

43. International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, art. 14, 660 U.N.T.S. 195.

44. International Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, Dec. 10, 1984, art. 22, 23 I.L.M. 1027 (1984), *as modified*, 24 I.L.M. 535 (1985).

There is some reason to doubt that such bodies will ever reach the level of effectiveness of regional institutions. See, e.g., Paul Sieghart, *International Human Rights Law: Some Current Problems*, in HUMAN RIGHTS FOR THE 1990S: LEGAL, POLITICAL AND ETHICAL ISSUES 24, 36 (Robert Blackburn & John Taylor eds., 1991) (“[E]ffective implementation is only likely to be accepted at a regional level, where nations share a common culture and are willing to trust jurists, commissioners, and judges brought up in that culture to scrutinize complaints brought against them by individuals, and to assess their performance in the field of human rights.”).

and the African system as barely in its beginning stages. This perception suggests how closely "implementation" tends to be identified with adjudication, for adjudication is most developed in the European system, less so in the American system, and not at all in the African system.<sup>45</sup>

These adjudicative bodies have two distinctive aspects. First, they tend to hold states at arms-length. The members of these bodies serve in their capacity as individuals, not as representatives of their governments.<sup>46</sup> Their mission is to be independent of states, not to take orders from them. Second, their procedures are invoked by individuals to address particular cases of violations of human rights.<sup>47</sup> To be sure, these bodies are not limited exclusively to individual cases,<sup>48</sup> but individual

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45. See generally, e.g., Thomas Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1, 15-17 (1988); Burns Weston, et al., *Regional Human Rights Regimes: A Comparison and an Appraisal*, 20 VAND. J. TRANS. L. 585 (1987); Hector Fix Zamudio, *A Global Survey of Governmental Institutions to Protect Civil and Political Rights*, 13 DENV. INT'L L. 17 (1983).

46. See International Covenant on Civil and Political Rights, *supra* note 42, art. 28(3) [Human Rights Committee]; International Convention on the Elimination of All Forms of Racial Discrimination, *supra* note 43, art. 12(2) [Committee on the Elimination of Racial Discrimination]; International Convention Against Torture and Other Cruel, Inhuman, and Degrading Treatment or Punishment, *supra* note 44, art. 17(1), [Committee against Torture]; European Convention on Human Rights, Nov. 4, 1950, art. 23, 213 U.N.T.S. 221 (European Commission on Human Rights); American Convention on Human Rights, Nov. 22, 1969, art. 36(1), 9 I.L.M. 673 (Inter-Am. C.H.R.). In contrast, the individuals on the U.N. Human Rights Commission, which is not an adjudicative body, serve as representatives of their governments. See TOLLEY, *infra* note 50, at 10-11.

Of course, the extent to which individual members of human rights bodies are truly independent of their governments varies in practice. See, e.g., DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE: ITS ROLE IN THE DEVELOPMENT OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS* 44-45 (1991) (noting that membership of Human Rights Committee has included "former cabinet and government ministers, members of Parliament, former ambassadors, and senior governmental representatives") (footnotes omitted); Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 189-91 (1992) (disclaimers by judges of pressures by national governments on them).

47. See generally M.E. TARDU, *HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM* (1985).

48. Fact-finding and reporting on the general situation of human rights in particular countries represent a significant part of the Inter-American Commission's work. See, e.g., *Report on the Situation of Human Rights in Haiti*, Inter-Am. C.H.R., OEA Ser.L/V/II.85, doc. 9 rev. (1994) [hereinafter 1994 *Inter-Am. C.H.R. Report on Haiti*]. In addition, the U.N. Commission on Human Rights has made a number of studies of human rights violations in Haiti. See, e.g., *Report on the Situation of Hu-*

cases form the bulk of their work. It is also true that there are other bodies that take a more systemic approach,<sup>49</sup> but apart from the U.N. Human Rights Commission,<sup>50</sup> they tend to have a limited profile and have little direct impact.<sup>51</sup>

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*man Rights in Haiti Submitted by Mr. Marco Tulio Bruni Celli, Special Rapporteur in Accordance with Commission Resolution 1993/68, U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1994/55 (1994) [hereinafter 1994 Bruni Celli Report]; Report on the Situation of Human Rights in Haiti Submitted by Mr. Marco Tulio Bruni Celli, Special Rapporteur, in Accordance with Commission Resolution 1992/77, U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1993/47 (1993) [hereinafter 1993 Bruni Celli Report]; Report on the Human Rights Situation in Haiti Submitted by Marco Tulio Bruni Celli, Independent Expert, in accordance with Commission on Human Rights Resolution 1991/77, U.N. ESCOR, Comm'n on Hum. Rts., U.N. Doc. E/CN.4/1992/50 (1992) [hereinafter 1992 Bruni Celli Report].*

The U.N. has also developed "theme procedures" that provide both for individual communications and country-wide studies of particular problems, like disappearances. On the theme procedures, see generally M.T. Kaminga, *The Thematic Procedures of the U.N. Commission on Human Rights*, 34 NETHERLANDS INT'L L. REV. 299 (1987). The Working Group on Enforced or Involuntary Disappearances, for example, has visited Peru, in addition to receiving communications from individuals, see *Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Report on the Visit to Peru by two Members of the Working Group on Enforced or Involuntary Disappearances (17-22 June 1985)*, U.N. ESCOR, Comm'n on Hum. Rts., 42nd Sess., Provisional Agenda Item 10(c), U.N. Doc. E/CN.4/1986/18/Add.1 (1986); *Report of the Working Group on Enforced or Involuntary Disappearances, Addendum: Report on a Second Visit to Peru by two Members of the Working Group on Enforced or Involuntary Disappearances (3-10 October 1986)*, U.N. ESCOR, Comm'n on Hum. Rts., 43rd Sess., Provisional Agenda Item 10(c), U.N. Doc. E/CN.4/1987/15/Add.1 (1986), and the Special Rapporteur on Torture has visited Peru, see *Report by the Special Rapporteur, Mr. P. Kooijmans, pursuant to Commission on Human Rights Resolution 1988/32*, U.N. ESCOR, Comm'n on Hum. Rts., 45th Sess., Provisional Agenda Item 10(c), U.N. Doc. E/CN.4/1989/15 (1989).

49. That is true of the U.N. Committee on Economic, Social, and Cultural Rights, for example, which does not hear individual petitions, but rather monitors state implementation of their obligations under the ESC Covenant. See *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, arts. 16, 17, 993 U.N.T.S. 3. See generally Philip Alston & Bruno Simma, *First Session of the U.N. Committee on Economic, Social and Cultural Rights*, 81 AM. J. INT'L L. 747 (1987); Philip Alston & Bruno Simma, *Second Session of the U.N. Committee on Economic, Social and Cultural Rights*, 82 AM. J. INT'L L. 603 (1988). Similarly, one function of the Human Rights Committee is to monitor state implementation of the International Covenant on Civil and Political Rights. *International Covenant on Civil and Political Rights*, *supra* note 42, art. 40.

50. See generally, e.g., HOWARD TOLLEY, JR., *THE U.N. COMMISSION ON HUMAN RIGHTS* (1987).

51. For evaluations of the U.N.'s record in the human rights area, see THE UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL (Philip Alston ed., 1992); Douglas Lee Donoho, *The Role of Human Rights in Global Security Issues: A Normative and Institutional Critique*, 14 MICH. J. INT'L L. 827 (1993). Of course, even the question of how to go about appraising the U.N.'s record is a difficult one. See Philip Alston, *Critical Appraisal of the U.N. Human Rights Regime*, in THE

These characteristics — distance from governments and a focus on individual cases — give adjudicative bodies real strengths, and more than justify the effort that has gone into creating and developing them. Rhetoric aside, the real commitment of many states to opposing human rights violations abroad is limited.<sup>52</sup> Thus, it is crucial that scrutiny of violations be initiated by non-state actors, *i.e.*, individuals and nongovernmental organizations, and that claims of violations be heard by bodies composed of members not directly beholden to any government. Adjudicative bodies may also give victims or relatives some kind of official vindication,<sup>53</sup> and they may have a deterrent effect. The process of litigation and determination of responsibility at the international level could possibly contribute to bolstering the rule of law and the development of a legal culture in places where it has been lacking. Finally, because it focuses on specific violations, adjudication provides the invaluable exercise of working out extremely general human rights norms in concrete contexts.

But these characteristics also give independent adjudicative bodies real weaknesses, and clearly call for efforts at implementation that go beyond adjudication. Because they are separated from governments, many states tend to regard them as peripheral. For example, states that are set firmly upon a course of action that systematically involves human rights violations may

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UNITED NATIONS AND HUMAN RIGHTS: A CRITICAL APPRAISAL, *supra*, at 1.

52. See, *e.g.*, AMNESTY INTERNATIONAL, AMNESTY INT'L REP. 1994, at 1 (1994) (“[I]t is the governments who are guilty of [victimizing human rights activists] . . . that are often among the loudest in declaring their support for human rights.”); Susan Benesch, *Haiti Rights Monitors Still Stuck in Dominican Hotel*, MIAMI HERALD, Sept. 12, 1994, at 10A (noting that OAS/U.N. human rights mission in Haiti “suffered from less-than-enthusiastic support from its own side, perhaps since some U.N. and OAS member states feared that similar observer missions could eventually tread on their own soil”). On the United States’ own commitment, see *infra* part V.

53. After the Inter-American Court rendered money judgments against Honduras holding it responsible for disappearances, the Honduran government paid part of the judgment rendered by the Court. See *Interpretation of the Compensatory Damages Judgment in the Velásquez Rodríguez Case*, Aug. 17, 1990, reprinted in 12 HUM. RTS. L.J. 14 (1991); *Velásquez Rodríguez Case*, 7 Inter-Am. Ct. H.R. (ser. C) (1989) [Compensatory Damages, Judgement of July 21, 1989]; *Velásquez Rodríguez Case*, Inter-Am. Ct. H.R. (ser. C) (1988) [Judgment of July 28, 1988], reprinted in 28 I.L.M. 294 (1989); *Godínez Cruz Case*, Judgement, Inter-Am. Ct. H.R. (ser. C), No. 5 (1989). On Honduras’ reaction, see Lynda E. Frost, *The Evolution of the Inter-American Court of Human Rights: Reflections of Present and Former Judges*, 14 HUM. RTS. Q. 171, 192-93 (1992); *Report to the House of Delegates*, 1992 A.B.A. SEC. INT’L L. & PRAC.

conclude that resolutions of the Inter-American Commission can be ignored without significant cost, as Peru seems to have done in recent years.<sup>54</sup> Moreover, while no hard and fast rule is possible, condemnations by states or state-dominated bodies generally tend to garner more publicity than condemnations by international adjudicative bodies. It is hard to imagine, for example, that simple condemnation of the coups in Haiti, Peru, and Guatemala by the Inter-American Commission would have garnered the publicity that attended the OAS's condemnation. Further, the U.N. Commission on Human Rights, in which members are states, has greater "enforcement" power by way of publicity and political pressure than does the Human Rights Committee, whose members serve in their individual capacity.<sup>55</sup> Finally, the adjudicatory method makes it easy to focus on individual cases rather than on the structural and systemic factors leading to human rights violations.<sup>56</sup>

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54. For example, the Commission's 1990-1991 Annual Report describes 51 cases concerning allegations of human rights violations by Peru. See Inter-Am. C.H.R. 251-426, OEA/Ser.L/V/II.79, doc. 12 rev. 1, (1991). In all those cases, the Commission asked the government of Peru to comment on a petition or supply information; in 50 out of the 51 cases, the government simply failed to respond. (The one case in which it did respond concerned expropriation of certain banks. Case 10,169, Inter-Am. C.H.R. 423, OEA/Ser.L/V/II.79, doc. 12 rev. 1, (1991)). In the four Peruvian cases documented in the 1992-1993 Annual Report, Peru gave either no reply or virtually pro forma replies. See *Report on the Situation of Human Rights in Peru*, Inter-Am. C.H.R. 110-41, OEA/Ser.L/V/II.83, doc. 14 corr. 1 (1993) [hereinafter 1993 Inter-Am. C.H.R. Report on Peru]. On the problem of enforcement, see generally, e.g., MOWER, *infra* note 439, at 82-83. The New York City Bar has documented the Commission's own failure to require Peru to meet deadlines in a timely fashion. See *The Inter-American Commission on Human Rights: A Promise Unfulfilled* 16, A-4 to A-8 (A Report by the Committee on International Human Rights of the Association of the Bar of the City of New York, Feb. 1993).

55. Even then, it is hard to be enthusiastic about a record of effectiveness that amounts to an "unquantifiable something." See TOLLEY, *supra* note 50, at 211 ("The first twenty years of serious enforcement efforts have gravely disappointed those seeking effective implementation measures. Although its direct contributions have not been substantial, the Commission has nevertheless added an unquantifiable something to attempts to secure compliance.").

56. Of course, adjudication does not necessarily overlook the systemic element. The Inter-American Commission's resolution regarding the fairness of elections in the Mexican states of Chihuahua and Durango show that systemic issues can be addressed in the context of cases. See Inter-Am. C.H.R. 97, OEA/Ser.L/V/II.77, doc. 7 rev. 1 (1990). In addition, the U.S. experience of "complex enforcement," see, e.g., Book Note, *Complex Enforcement: Unconstitutional Prison Conditions*, 94 HARV. L. REV. 626 (1981); Lewis Sargentich, *Complex Enforcement* (Mar. 1978) (unpublished manuscript on file with the Harvard Law School Library), shows that courts can at least attempt to address themselves to institutions as a whole, rather than only to particular violations. See also ROBERTO MANGABEIRA UNGER, FALSE NECESSITY: ANTI-

The Santiago Commitment and the trigger mechanism have features that could address the two problems characteristic of human rights law. They may imply a shift of focus in the Inter-American system from the Inter-American Commission on Human Rights and the Inter-American Court to government-dominated bodies. The shift could come about because action by the OAS member states carries more political weight than do the resolutions and judgments of the Commission and the Court.<sup>57</sup> Focusing attention on promoting democracy could also help shift attention away from an exclusive focus on individual instances of human rights violations to the broader systemic issues.<sup>58</sup>

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NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY 530-35, 629 (1987) ("destabilization rights"). Nevertheless, there has been a strong tendency for human rights law, particularly insofar as it focuses on adjudication, to overlook the systemic context. See Ken Anderson and Richard Anderson, *Limitations of the Liberal-Legal Model of International Human Rights: Six Lessons from El Salvador*, TELOS, Spring 1985, at 91.

57. If a member state ignores the recommendations contained in a resolution issued by the Commission, the Commission may report the resolution and the member state's inaction to the OAS General Assembly. See American Convention on Human Rights, Nov. 22, 1992, art. 51, para. 3, 144 U.N.T.S. 144, 157; Inter-Am. C.H.R., Regulations, art. 48, para. 2 (1987), reprinted in ORGANIZATION OF AMERICAN STATES, BASIC DOCUMENTS PERTAINING TO HUMAN RIGHTS IN THE INTER-AMERICAN SYSTEM, at 93, OEA/ser.L.V/II.71 doc. 6 rev. 1 (1988). However, this action seems to have relatively little political impact.

58. I do not mean to argue that the Santiago Commitment implies that "democracy" will displace human rights as the primary concern; the Santiago Commitment, after all, speaks of both. That raises the question of the relation between the two. While democratic governments are probably less likely to violate human rights, see, e.g., Anthony D'Amato, *Nicaragua and International Law: The "Academic" and the "Real,"* 79 AMER. J. INT'L L. 657 (1985), it seems clear that the two are not necessarily the same. The apparent electoral victory of the fundamentalists in Algeria was widely cited as an example of their divergence. See, e.g., Jim Hoagland, *Washington's Algerian Dilemma*, WASH. POST, Feb. 6, 1992, at A27. The indications that former dictator and notorious human rights abuser General Efraim Ríos Montt may be poised to make a strong run for Guatemala's presidency in November 1995 make the same point. See *infra* part III.C. And one would have to be extremely optimistic to assert that even a fully representative government, elected under conditions far more favorable to democratic participation than our own electoral system currently presents, could never oppress a minority or otherwise violate human rights.

At the same time, for my purposes here the relationship is simpler. As I will argue in part V, a more democratic form of governance in the U.S. (a goal that would require fuller respect for economic and social rights as well as civil and political rights) would likely produce a foreign policy on the part of the U.S. that was less adverse to *both* democracy and human rights throughout the region. There is no reason to believe that greater democratic control of U.S. foreign policy would produce a foreign policy that supported democracy throughout the Americas but not human rights (or *vice versa*). Consequently, I do not attempt here an exhaustive discussion of the relationship between democracy and human rights.

There are dangers in such a shift, as well as potential benefits. The benefits are precisely those factors that give the Santiago Commitment and trigger mechanism its greater weight: The publicity and power that would attend action by the member states acting collectively could lend their efforts greater effectiveness than adjudicative bodies enjoy. One danger, however, is that governments will often either not be particularly concerned about human rights in other member states or will view the protection of human rights elsewhere as one of a number of concerns, to be compromised in light of other state interests.<sup>59</sup> Of equal concern, there is a potential problem of perspective. When states undertake to promote democracy abroad, they will necessarily find many ways to manipulate the concern for their own foreign policy aims.<sup>60</sup> The responses of the OAS and the U.S. (together with the U.N.) to the coups in Haiti, Peru, and Guatemala show the problems and the potential of the new mechanism.

### III. TESTING THE SANTIAGO COMMITMENT

#### A. *Haiti*

##### 1. The Coup and the Initial Reaction

A coup in Haiti on September 29, 1991, put the new mechanism to its first test.<sup>61</sup> The Haitian military ousted President Jean-Bertrand Aristide, who had been elected by a landslide in December 1990.<sup>62</sup> As required by Resolution 1080, an ad hoc meeting of the Permanent Council was called the next day.<sup>63</sup>

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59. See *infra* part IV.A.

60. See *infra* part IV.B.

61. See U.S. DEP'T OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1991, at 633 (1992) [hereinafter U.S. DEP'T OF ST. HUM. RTS. REP. FOR 1991]; *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1; *Haitian Army Seizes Power in Bloody Coup*, CHI. TRIB., Oct. 1, 1991, at 3. The best overviews of the coup and its aftermath (particularly with regard to the United States' reaction) are by PAUL FARMER, *THE USES OF HAITI* 177-224 (1994), and Kim Ives, *The Unmaking of a President*, NACLA REP. ON THE AMERICAS, Jan.-Feb. 1994, at 16. See also 1993 *Bruni Celli Report*, *supra* note 48, at 24-36.

62. See Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency*, N.Y. TIMES, Dec. 18, 1990, at A1. For an insightful account of the context of Aristide's victory, see Robert E. Maguire, *The Peasantry and Political Change in Haiti*, CARIBBEAN AFF., Apr.-June 1991, at 1.

63. Among the organs of the OAS are the General Assembly, the Meeting of

The Permanent Council condemned the coup and convened an ad hoc meeting of the Consultation of Ministers of Foreign Affairs on October 3, 1991.<sup>64</sup>

At their October 3, 1991, meeting, the Foreign Ministers heard an appeal by President Aristide, after which they reiterated the Permanent Council's censure of the coup as illegal.<sup>65</sup>

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Consultation of Ministers of Foreign Affairs, the Permanent Council, and the Secretariat. See OAS Charter, *supra* note 16, art. 51(a), (b), (c), (f). The General Assembly and Secretariat have functions generally similar to their counterparts in the U.N. See OAS Charter, *id.*, ch. XI, XIX.

The Consultation of Ministers of Foreign Affairs meets "to consider problems of an urgent nature and of common interest to the American States." *Id.*, art. 59; see generally, *id.*, ch. XII. For example, it is required to meet "without delay" in the event of "an armed attack within the territory of an American State or within the region of security delimited by treaties in force." *Id.*, art. 63.

The Permanent Council is composed of one representative from each member state and "exercises broad functions in relation to the maintenance of peace and security and facilitating the peaceful settlement of disputes among the Organization's member states." SCOTT DAVIDSON, *THE INTER-AMERICAN COURT OF HUMAN RIGHTS* 10 (1992) (citing OAS Charter, art. 81).

For additional descriptions of these OAS organs, see generally M. MARGARET BALL, *THE OAS IN TRANSITION* 87-94, 99-132, 133-70, 171-214, 256-311 (1969); DAVIDSON, *supra*, at 8-12; O. CARLOS STOETZER, *THE ORGANIZATION OF AMERICAN STATES* (2d ed. 1993).

64. Permanent Council of the Organization of American States, Res. 567, Sept. 30, 1991, reprinted in *FOREIGN POL'Y BULL.*, Nov.-Dec. 1991, at 61. For a description of the early OAS reaction to the coup, see 1994 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 48, at 9-10.

65. Support to the Democratic Government of Haiti, M.R.E. Res. 1/91, OAS Permanent Council, OEA/ser.F/V.1, OAS Doc. MRE/RES. 1/91 (1991), reprinted in *FOREIGN POL'Y BULL.*, Nov.-Dec. 1991, at 62. The OAS Foreign Ministers were not the only ones to condemn the coup. The Inter-American Commission on Human Rights issued a press release on October 1 condemning the coup. See 1992 *Bruni Celli Report*, *supra* note 48, at 25.

The U.N. General Assembly condemned the coup as the "attempted illegal replacement of the constitutional President of Haiti" and held the military regime to be "unacceptable." The Situation of Democracy and Human Rights in Haiti, U.N. GAOR, 46th Sess., Agenda Item 145, at 2, paras. 1, 2, U.N. Doc. No. A/46/L.8/Rev.1 (1991). On the basis of that resolution, the U.N. Secretary General later rejected the credentials of the envoy sent by the de facto government under Marc Bazin. 1993 *Bruni Celli Report*, *supra* note 48, at 33.

Aristide had hoped for immediate Security Council condemnation as well, see Terry Atlas, *U.S., OAS Allies tell Haiti Junta, 'Give Up,'* CHICAGO TRIBUNE, Oct. 4, 1991, at 9, but, according to the U.S. State Department, China was concerned about the precedent that might be set and blocked any such action. See Pamela Constable, *OAS Ponders a Diplomatic Push in Haiti*, BOSTON GLOBE, Oct. 3, 1991, at 1; Johanna Neuman, *Bush Ponders Next Move for Haiti*, USA TODAY, Oct. 3, 1991, at 4A. The Security Council met only informally, citing the "principle of non-interference in the internal affairs of Member States," and heard an appeal for assistance by Aristide. See Provisional Verbatim Record of the Three Thousand and Eleventh



In accordance with their denunciation, they decided "[t]o recognize the representatives designated by the constitutional Government of President Jean-Bertrand Aristide as the only legitimate representatives of the Government of Haiti to the organs, agencies, and entities of the system."<sup>66</sup> They also recommended a suspension of all diplomatic relations with the military government, an end to economic and military aid to Haiti, and a break in all commercial ties.<sup>67</sup> In response, the U.S. issued orders

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Meeting, U.N. SCOR, 3011th mtg., at 4-10, U.N. Doc. S/PV.3011 (1991) (reproducing speech by President Aristide). See also 1993 *Bruni Celli Report*, *supra* note 48, at 26.

In addition, on March 5, 1992, at the next meeting of the U.N. Commission on Human Rights after the coup, the Commission condemned "the overthrow of the constitutionally elected President . . . and the use of violence and military coercion and the subsequent deterioration of the situation of human rights in that country." 1993 *Bruni Celli Report*, *supra* note 48, at 4 (quoting from paragraph 2 of the March 5, 1992 resolution). A month later, the Chairman of the Commission appointed as its special rapporteur Marco Tulio Bruni Celli, chairman of the Inter-American Commission on Human Rights. *Id.* at 6, 8.

66. Support to the Democratic Government of Haiti, *supra* note 65. The Ministers also asked the Inter-American Commission to "take immediately all measures within its competence to protect and defend human rights in Haiti and to report thereon to the Permanent Council." *Id.*, para. 3.

67. *Id.*, paras. 5, 6, 9. The resolution could even be read as threatening military intervention against the coup leaders. *Id.*, para. 10 (reserving possibility of taking "any additional measures" in conformance with the OAS Charter and international law "that may be necessary and appropriate to ensure" the reinstatement of President Aristide. Cf. S.C. Res. 678, U.N. SCOR, 2963rd mtg., para. 2, U.N. Doc. S/RES/678 (1990) (authorizing member states to use "all necessary means to uphold and implement resolution 660," which condemned Iraq's invasion of Kuwait), *reprinted in* 29 I.L.M. 1560 (1990). See also Andrew Alexander, *OAS Mission Seeks to Undo Haitian Coup; U.S. Hints at Force if Diplomacy Fails to Restore Aristide to Power*, ATLANTA J. & CONST., Oct. 4, 1991, at A1.

The early calls for armed intervention, however, met with mixed receptions from Latin American governments. See *Profile: Lawrence Chewing Fabrega*, WASH. REP. ON THE HEMISPHERE, July 29, 1992, at 2 (interview with Panamanian ambassador to OAS) (calling for "an inter-American Peacekeeping Force" to "restore and preserve democracy in Haiti," because "dialogue and negotiation in Haiti will [not] resolve the political situation" there); Christopher Marquis, *Embargo Has an Even Chance of Aiding Aristide, U.S. Says*, MIAMI HERALD, Nov. 1, 1991, at 29A (quoting U.S. Assistant Secretary of State as saying that some OAS nations would support armed intervention, while others would not); Heraldo Munoz, *Haiti and Beyond*, MIAMI HERALD, Mar. 1, 1992, at 6C (article by Chile's ambassador to OAS) (opposing military intervention into Haiti). See generally PASTOR, *supra* note 1, at 282 (In response to Haiti coup, OAS "[m]embers even debated the use of an inter-American peace force. The leaders of Venezuela, Jamaica, and Argentina were in favor, with Mexico, Brazil, and Chile opposed.").

Aristide himself rejected the idea early on, see Barbara Crossette, *Haiti's Ousted Leader to Seek Support in U.S.*, N.Y. TIMES, Mar. 10, 1992, at 5; Thomas L. Friedman, *Haiti's Coup: Test Case for Bush's New World Order*, N.Y. TIMES, Oct. 4,

freezing the assets of the Haitian government and the leaders of the coup,<sup>68</sup> and banning the export of military or police goods to Haiti.<sup>69</sup>

At the request of the Ministers, the OAS Secretary-General led a delegation on October 4, 1991, to Haiti to inform the military rulers of the OAS's demand that they relinquish power.<sup>70</sup> Not surprisingly, the military rejected the demand, and on October 8, 1991, the OAS Foreign Ministers reiterated their previous resolution and urged "the Member states to proceed immediately to freeze the assets of the Haitian State and to impose a trade embargo on Haiti, except for humanitarian aid."<sup>71</sup> The U.S. then imposed an embargo on trade with Haiti.<sup>72</sup> Latin and North American governments followed suit.<sup>73</sup>

Thus, the diplomatic reaction of the OAS and the U.S. to the coup was to all appearances vigorous and forceful. There followed a series of diplomatic efforts that turned out to stretch over the next year and a half. Until the U.N. imposed a worldwide embargo on oil and arms shipments to Haiti in June 1993, however, those efforts accomplished virtually nothing.<sup>74</sup> Shortly

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1991, at A8; Christopher Marquis, *Embargo Has an Even Chance of Aiding Aristide*, U.S. SAYS, MIAMI HERALD, Nov. 1, 1991, at 29A.

68. Exec. Order No. 12,775, Prohibiting Certain Transactions with Respect to Haiti, 56 Fed. Reg. 50,641 (1991). The final version of the Executive Order was published in 57 Fed. Reg. 10,820 (1992), 31 C.F.R. 580. For a comprehensive official account of U.S. sanctions throughout the crisis, see Letter from President Clinton to the Speaker of the House of Representatives and the President of the Senate, Oct. 13, 1994, reprinted in U.S. NEWSWIRE, Oct. 14, 1994, available in LEXIS, Nexis Library, NEWS File.

69. See Suspension of Munitions Export Licenses to Haiti, 56 Fed. Reg. 50,968 (1991).

70. "Support to the Democratic Government of Haiti," *supra* note 65, para. 2; 1993 Bruni Celli Report, *supra* note 48, at 24-25.

71. Support for Democracy in Haiti, M.R.E. Res. 2/91, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/Ser.F/V.1, para. I.4, OAS Doc. MRE/RES 2/91 (1991), reprinted in FOREIGN POL'Y BULL., Nov.-Dec. 1991, at 65. They also agreed to send a mission to Haiti to facilitate the reestablishment of constitutional democracy, as soon as the security of the mission could be guaranteed. *Id.*, para. II.1.

72. Exec. Order No. 12,779, Prohibiting Certain Orders with Respect to Haiti, 56 Fed. Reg. 55,975 (1991). See *Rich Haitians May Face Freeze on Assets*, MIAMI HERALD, Nov. 2, 1991, at 5A; *U.S. Will Impose a Trade Ban on Haiti*, N.Y. TIMES, Oct. 30, 1991, at A3. The final version of the Executive Order was published in 57 Fed. Reg. 10,820 (1992), 31 C.F.R. 580.

73. Don Bohning, *Haitian Says Embargo Will Bring Refugee Flood to U.S.*, MIAMI HERALD, Nov. 1, 1991, at 29A (Venezuela); *Canada Embargoes Haitian Trade*, MIAMI HERALD, Nov. 5, 1991, at 6A (Canada).

74. See *infra* part III.A.2.

after the embargo was imposed, the Governors Island Agreement was reached, which provided for Aristide's return by October 30, 1993. That accord collapsed in October 1993 due to the military's intransigence.<sup>75</sup> Over the next several months, the U.S. attempted to impose a new settlement on terms even less favorable to Aristide. Domestic U.S. reaction, however, forced the Administration to seek a tightening of economic sanctions in May 1994, and, in July 1994, to obtain Security Council authorization for military intervention.<sup>76</sup>

## 2. The First Attempts to Negotiate a Settlement

OAS envoy Augusto Ramirez Ocampo and the U.S. worked together in November and December 1991 to guide negotiations.<sup>77</sup> On February 23, 1992, Aristide and representatives of the Haitian parliament signed the "Protocol of Washington."<sup>78</sup> It called for Aristide's eventual reinstatement as President — but without setting a date for his return — and for a new Prime Minister to run the affairs of state during his absence.<sup>79</sup>

The Protocol of Washington also provided for a general amnesty except for "common criminals."<sup>80</sup> Reflecting its decision early on to press Aristide for a broad amnesty, the U.S. read the phrase to include General Raoul Cédras, head of the army (and

75. See *infra* part III.A.3.

76. See *infra* part III.A.4.

77. See 1994 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 48, at 45.

78. *Protocole entre le Président Jean-Bertrand Aristide et la Commission parlementaire de négociation en vue de trouver une solution définitive à la crise haïtienne*, Feb. 23, 1992, reprinted in *Annexe I to Lettre datée du 10 mars 1992, adressée au Secrétaire général par le Représentant permanent d'Haiti auprès de l'Organisation des Nations Unies*, A/46/891, S/23691, Mar. 11, 1992, ("Protocol of Washington"), and reprinted in *English in 1993 Bruni Celli Report*, *supra* note 48, Annex I, and in *Report on the Situation of Human Rights in Haiti*, *Inter-Am. C.H.R.* 52, OEA/Ser.L/V/II.83, doc. 18 (1993) [hereinafter 1993 *Inter-Am. C.H.R. Report on Haiti*]. (To avoid confusion, it should be noted that this "Protocol of Washington" is a different document from that mentioned in part I, which provides for an amendment to the OAS Charter.)

79. See *Protocole D'Accord Entre le President Jean Bertrand Aristide, et le Premier Ministre Designe, Rene Theodore, sous les Auspices de L'Organisation des Etats Americains (OEA)*, Feb. 25, 1992 [hereinafter "Protocol of Feb. 25"], reprinted in *English in 1993 Bruni Celli Report*, *supra* note 48, Annex II, and in *Organization of American States, Report on the Situation of Human Rights in Haiti*, OEA/Ser.L/V/II.83, Doc. 18 (Mar. 9, 1993), at 55.

80. Protocol of Washington, Art. V.1 ("une amnistie générale, hormis les criminels de droit commun").

ironically, the man in charge of Aristide's security during the 1990 election campaign).<sup>81</sup> When Aristide affirmed that as a "common criminal" Cédras could not stay on as leader of the military, and should be subject to trial,<sup>82</sup> a number of diplomats close to the OAS mission publicly expressed impatience with Aristide<sup>83</sup> and described Cédras as a "moderate" and a "positive force."<sup>84</sup>

The Protocol of Washington quickly failed due to the

81. See *Haiti's Military Assumes Power After Troops Arrest the President*, N.Y. TIMES, Oct. 1, 1991, at A1.

82. See Barbara Crossette, *Ousted Haitian Signs Accord for Return*, N.Y. TIMES, Feb. 26, 1992, at A3; Howard W. French, *Haiti Pact Signers Choose Own Meaning*, N.Y. TIMES, Feb. 27, 1992, at A6; Christopher Marquis, *Aristide Vows Not to Return Until Army is Ousted*, MIAMI HERALD, Jan. 21, 1992, at 11A; Christopher Marquis, *Disagreements Hinder Pact to Return Aristide to Haiti*, MIAMI HERALD, Feb. 25, 1992, at 11A; Kenneth Roth, *Haiti and Clinton*, N.Y. REV. BOOKS, Mar. 4, 1993, at 54, 54. Aristide seems to have rested his position on the reference in the Constitution of 1987 to his power to "grant amnesty only for political matters as stipulated by law." HAITI CONST. art. 147, reprinted in *English in 7 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD* 7, 34 (Albert P. Blaustein & Gisbert H. Flanz eds., 1987) [hereinafter 7 CONSTITUTIONS]. See Michael Tarr, *Amnesty Dispute Could Prolong Haiti's Crisis*, MIAMI HERALD, Apr. 9, 1993, at 4A.

83. Howard W. French, *Rights Groups Oppose Proposed Amnesty in Haiti*, N.Y. TIMES, Apr. 16, 1993, at A7; Christopher Marquis, *Haiti Accord Must Stand, Diplomats Say*, MIAMI HERALD, Feb. 26, 1992, at 1A.

84. See Christopher Marquis, *Aristide Vows Not to Return Until Army is Ousted*, MIAMI HERALD, Jan. 21, 1992, at 11A. For a later revival of the same canard, see Lawrence E. Harrison, *Cambodia a Model for Pacifying Haiti*, MIAMI HERALD, Oct. 24, 1993, at 1M ("By Haitian standards, Gen. Cédras is more professional than most.").

There were many reports that the coup was initiated not by Cédras, but by Col. Joseph Michel François, head of the police force in Port-au-Prince, which was part of the military, and that François was behind much of the violence after the coup. See, e.g., Mike McQueen, *Haiti's 'Historic Moment' of Hope*, MIAMI HERALD, July 5, 1993, at 1A. See also Don Bohning, *Controlling the Armed Forces*, MIAMI HERALD, Sept. 20, 1993, at 8A; Howard W. French, *Haiti's Feared Police Chief Emerges From the Shadows*, N.Y. TIMES, Sept. 9, 1993, at A8; Howard W. French, *Haiti Police Chief Poses Hurdle to Aristide's Return*, N.Y. TIMES, Oct. 5, 1993, at A14; Harold Maass, *Police Chief Relishes Role as Enforcer*, MIAMI HERALD, Oct. 20, 1993, at 12A. Thereafter, reports emerged that yet another individual, Brigadier General Philippe Biamby, was the real power in the military. See Don Bohning, *Little-Known Officer Wields Big Clout from the Shadows*, MIAMI HERALD, Oct. 31, 1993, at 1A. By the end of the military's reign, attention was focused on all three individuals. See, e.g., Christopher Marquis & Don Bohning, *Did Clinton Give Away Too Much? Some Think So*, MIAMI HERALD, Sept. 20, 1994, at 6A.

What these varying reports show, of course, is precisely that the problems with the Haitian military did not arise from any particular individual, but were systemic. See Don Bohning & John Donnelly, *The Enforcers*, MIAMI HERALD, Oct. 17, 1993, at 1A (quoting a "Haitian citizen") ("even if you remove François, you don't remove the system").

military's intransigence. On March 6, 1992, the military-appointed president, Joseph Nerette, announced that the Protocol of Washington was illegal,<sup>85</sup> and Parliament subsequently failed to approve it.<sup>86</sup> Two months later, "negotiations" that effectively excluded Aristide supporters led to parliamentary approval of an alternative to the Protocol of Washington. Not surprisingly, the "Villa d'Acceuil Tripartite Agreement"<sup>87</sup> failed to provide for Aristide's eventual return. Instead, Nerette was to resign and leave the presidency vacant.<sup>88</sup> Marc Bazin, a former World Bank economist and finance minister under the Duvalier regime who had run a distant second in the 1990 presidential elections, was named prime minister.<sup>89</sup>

The OAS Foreign Ministers immediately declared their rejection of the Tripartite Agreement.<sup>90</sup> They also urged member states "to deny access to port facilities to any vessel that does not abide by the embargo and to ensure that air transport is not used to carry goods in violation thereof."<sup>91</sup> The U.S. then announced that it would prohibit ships that had violated the em-

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85. *Haiti's President Won't Step Down*, MIAMI HERALD, Mar. 7, 1992, at 6A. See generally 1993 Bruni Celli Report, *supra* note 48.

86. *OAS Must Set Haiti Free*, MIAMI HERALD, Mar. 27, 1992, at 20A; Don Bohning, *Hopes Fade for Haiti Accord*, MIAMI HERALD, Mar. 19, 1992, at 24A. In addition, the Haitian Supreme Court ruled the Protocol unconstitutional. See *Haiti: The Pendulum Swings Away from Solution of Political Crisis*, INTER PRESS SERVICE, Apr. 21, 1993, available in LEXIS, Nexis Library, WIRES File; J.P. Slavin, *Court Rejects Pact for Aristide's Return*, WASH. POST, Mar. 28, 1992, at A16.

87. 1993 Bruni Celli Report, *supra* note 48.

88. *Chamber Plan Offers Aristide No Guarantee*, MIAMI HERALD, May 21, 1992, at 27A; J.P. Slavin, *Haiti Plans for Form New Government*, MIAMI HERALD, May 22, 1992, at 20A.

89. Howard W. French, *Rival of Haiti's Ousted President Is Installed as the Prime Minister*, N.Y. TIMES, June 20, 1992, at 3. See also *Deputies Ratify Aristide Rival as Haiti's New Prime Minister*, MIAMI HERALD, June 11, 1992, at 23A; Lee Hockstader, *Premier Nominated in Haiti; Police Break Up Funeral*, WASH. POST, June 3, 1992, at A23.

90. Restoration of Democracy in Haiti, M.R.E. Res. 3/92, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.1, para. 2, OAS Doc. MRE/RES.3/92 (1992), reprinted in FOREIGN POL'Y BULL., July-Aug. 1992, at 82.

In addition, both Aristide and OAS Secretary General Joao Clemente Baena Soares announced their rejection of the Tripartite Agreement. *Bazin's Appointment Illegal, Aristide Says*, MIAMI HERALD, June 19, 1992, at 6A; Barbara Crossette, *Exiled Haiti Leader Chides U.S. on Response to Coup*, N.Y. TIMES, June 4, 1992, at A10. See also Don Bohning, *U.S. Frustrated Over Inability to Reverse Haiti Coup*, MIAMI HERALD, May 17, 1992, at 11A (noting Aristide's continued support of the Protocol).

91. Restoration of Democracy in Haiti, *supra* note 90, paras. 5.a, 5.e.

bargo from entering U.S. ports.<sup>92</sup>

In reality, the rejection of the Tripartite Agreement was far from unequivocal. There appears to have been no real enforcement of the U.S. order barring ships that had violated the embargo.<sup>93</sup> Indeed, the Bush Administration apparently pushed Aristide to negotiate with Bazin, even threatening to lift the embargo if the two did not come to terms.<sup>94</sup> Subsequently the OAS pressured Aristide to the same end.<sup>95</sup> In response, Aristide

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92. See *Bush Backs OAS in Denying Port Entry to Violators of Embargo*, BNA INT'L TRADE DAILY, May 29, 1992; Statement on Denying Use of United States Ports to Vessels Trading with Haiti, 28 WEEKLY COMP. PRES. DOC. 941, (June 1, 1992).

93. See generally David Adams, *Embargo Fails to Seal Off Haiti*, S.F. CHRON., Mar. 18, 1993, at A14; Kenneth Freed, *In Haiti, Slipping Through Embargo's Net*, L.A. TIMES, July 12, 1992, at A5.

By contrast, the U.S. did tighten the "embargo" on refugees. On May 23, 1992, President Bush issued his "Kennebunkport Order" calling for the interdiction of all Haitian refugees at sea and their forcible return without any attempt to determine whether they were political refugees. Exec. Order No. 12,807, 57 Fed. Reg. 23,133 (1992). See *Haitian Centers Council, Inc. v. McNary*, 969 F.2d 1350, 1352-53 (2d. Cir. 1992), *rev'd sub nom. Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993).

94. On the threat to lift the embargo, see Christopher Marquis, *Make Deal, U.S. Tells Aristide*, MIAMI HERALD, July 25, 1992, at 8A. On pressure to negotiate with Bazin, see *Help Unseat Bazin, Aristide Asks U.S.*, MIAMI HERALD, June 25, 1992, at 20A (quoting Aristide as saying that "[officially]" he had not been pressured by the U.S. to negotiate); Howard W. French, *U.S. Presses Ousted Haitian Chief to Negotiate a Return from Exile*, N.Y. TIMES, June 27, 1992, at 2; Christopher Marquis, *U.S. to Aristide: Negotiate*, MIAMI HERALD, June 24, 1992, at 1A. See also Amy Wilentz, *Haitian Muddle*, 254 NATION 880, 881 (1992) ("Haitian newspapers also claim that [U.S.] Ambassador Adams meets frequently with Gen. Raoul Cédras, who heads the Haitian Army and who helped mastermind the coup against Aristide."). Calls for tempering the Administration's once unconditional support for Aristide's return were not confined to the Administration. See Robert G. Torricelli, *Two Steps Away from the Haitian Abyss*, MIAMI HERALD, July 3, 1992, at 19A (chairman of the House Foreign Affairs Subcommittee on Western Hemisphere Affairs) (advocating that Administration "work with the Bazin government") ("[W]e must start to envision at least an interim political solution without Aristide."). Conservative opinion, never favorable to Aristide, became more openly hostile. See *Hasta La Vista, Fidel*, MIAMI HERALD, July 8, 1992, at 13A ("The return of Aristide would certainly not create democracy on that troubled island; the most likely outcome would be a dictatorship with a leftist taint") (reprinting editorial from New York Post); Christopher Madison, *U.S.-Latin Tango*, 24 NAT'L J. 1408 (1992) (quoting remark by Elliott Abrams, Assistant Secretary of State for Inter-American Affairs in the Reagan Administration, "They have mishandled [Haiti policy] . . . very, very badly,' Abrams said. 'It's terrible to make it U.S. policy to destroy the Haitian economy, then to send the refugees back. The error they made was in backing Aristide and defining him as democratic.'").

95. See J.P. Slavin, *Haiti Agrees to Allow Team of Observers*, MIAMI HERALD, Sept. 10, 1992, at 28A (statement by Haitian foreign minister that OAS Secretary General is "prepared to evaluate the consequences of the embargo and the possibility

initiated negotiations, mediated by the OAS, between a panel of his supporters and representatives of Bazin.<sup>96</sup> The talks resulted in an agreement to send eighteen OAS "democracy monitors" in September 1992 to Haiti, but, confined to Port-au-Prince, the monitors proved largely ineffective.<sup>97</sup>

The OAS Foreign Ministers' meeting in December 1992 gave renewed hope for settlement prospects. The Ministers went beyond the by-now familiar ritual of condemning the regime and calling for stricter enforcement of the embargo,<sup>98</sup> and sought the involvement of the U.N.<sup>99</sup> The U.N. and the OAS together

of modifying the embargo" once OAS democracy monitors arrive in Haiti).

96. See 1993 *Bruni Celli Report*, *supra* note 48, at 31-32; Barbara Crossette, *Haiti Arrests 150 Intercepted by U.S.*, N.Y. TIMES, Aug. 15, 1992, at 3; Haitian Factions Hold Talks in Washington, N.Y. TIMES, Sept. 2, 1992, at A7; Christopher Marquis, *Aristide Names Panel to Discuss Haiti Solution*, MIAMI HERALD, July 8, 1992, at 6A; OAS Team, *Haitians to Try to Solve Crisis*, MIAMI HERALD, Aug. 19, 1992, at 5A; Marjorie Valbrun, *Aristide Set to Negotiate his Return*, MIAMI HERALD, July 4, 1992, at 1B.

The action was taken as part of the "Florida Declaration," a document signed by Aristide and forty-four of his supporters. See 1993 *Bruni Celli Report*, *supra* note 48, at 31; 1993 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 78, at 7. Aristide had earlier named a Presidential Commission which in April 1992 had set out conditions for a negotiated return to power. See *Commission Presidentielle, Propositions pour une sortie de la crise haïtienne*, Apr. 10, 1992, reprinted in CARIBBEAN CONFERENCE OF CHURCHES & WORLD COUNCIL OF CHURCHES, "RESTORE OUR STOLEN VOTE!" (Nov. 26-Dec. 1, 1992), at Annex 4.

97. See Note of the Secretary General to the General Assembly, OAS, June 1993, at 7. See also Barbara Crossette, *Gains Are Reported in Talks on Haiti*, N.Y. TIMES, Sept. 7, 1992, at 1, 5; *Haiti Agrees to O.A.S. Observers on Rights*, N.Y. TIMES, Sept. 14, 1992, at A8; Christopher Marquis, *Ex-Jamaican Chief May Try to Broker End to Haiti Crisis*, MIAMI HERALD, Sept. 17, 1992, at 20A; J.P. Slavin, *Haiti Agrees to Allow Team of Observers*, MIAMI HERALD, Sept. 10, 1992, at 28A. See also U.S. DEPT OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1992, at 421 (1993) [hereinafter U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992]. Aristide reportedly supported a much larger mission of 500 monitors, but the army would not permit Bazin to agree to anything so extensive. See 1993 *Bruni Celli Report*, *supra* note 48, at 32; Slavin, *supra*.

The OAS had first approved the idea of sending such monitors in its resolution of Oct. 8, 1991. See *Support for Democracy in Haiti*, *supra* note 71, para. II.1. The U.S. began to press the idea seriously in June 1992. See Christopher Marquis, *U.S. Favors Security Unit in Haiti*, MIAMI HERALD, June 9, 1992, at 12A.

On the ineffectiveness of the monitors, see 1993 *Bruni Celli Report*, *supra* note 48, at 32-33; Kim Ives, *The Unmaking of a President*, NACLA REP. ON THE AMERICAS, Jan.-Feb. 1994, at 16, 23; Don Bohning, *Haiti Observers a Glimmer of Hope*, MIAMI HERALD, Feb. 18, 1993, at 20A; *U.N. Human Rights Team Lands in Haiti*, MIAMI HERALD, Feb. 15, 1993, at 1A.

98. Reinstatement of Democracy in Haiti, M.R.E. Res. 4/94, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.1, preamble, para. 2, OAS Doc. MRE/RES. 4/92 corr. 1 (1992).

99. *Id.*, para. 3. Earlier, on November 10, 1992, the Permanent Council had

appointed a Special Joint Envoy, Dante Caputo, to help facilitate an accord between Aristide and the military.<sup>100</sup>

Following its familiar pattern of frustrating negotiations while seeming to go along with them, the military called an election for the Senate under the auspices of the Electoral Council. Elections were conducted on January 18, 1993, with a low turnout because Aristide supporters, recognizing them as a sham, boycotted them. As a result, thirteen new members opposing Aristide joined the Parliament.<sup>101</sup> Both the U.N. General Assembly and the OAS condemned the elections.<sup>102</sup>

The OAS's decision to involve the U.N. — a decision that over time led to the near eclipse of the OAS on the public stage — apparently reflected a somewhat heightened commitment on the part of the incoming Clinton Administration to achieve a settlement.<sup>103</sup> To be sure, the break was far from complete: President Clinton fully embraced the Bush Administration's policy of interdicting and summarily returning Haitian refugees.<sup>104</sup> But in January 1993 the U.S. sent a Marine Corps general to Haiti to warn the Haitian military that Aristide must return.<sup>105</sup> In February 1993 forty U.N. human rights observers

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urged the U.N. to become involved in OAS efforts to find a solution, see Resolution, CP/RES.594, 923/92, and two weeks later the U.N. General Assembly approved a resolution directing the U.N. Secretary General to "take the necessary measures in order to assist, in cooperation with the Organization of American States, in the solution of the Haitian crisis." G.A. Res. 47/20, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/20, (1992). See 1993 Bruni Celli Report, *supra* note 48, at 33.

100. Christopher Marquis, *Clinton, Bush Aides Back Haiti Efforts*, MIAMI HERALD, Jan. 7, 1993, at 21A. By April 1993, he had made five trips to Haiti. See David Haskel, *U.S. Talking Again of Sanctions on Haiti*, REUTER, Apr. 21, 1993, available in LEXIS, Nexis Library, NEWS File.

101. See 1993 Report on the Situation of Human Rights in Haiti, *supra* note 78, at 8-10; *Voters Boycott Election Shunned Internationally*, MIAMI HERALD, Jan. 18, 1993, at 4A.

102. G.A. Res. 47/20, *supra* note 99, at 2; C.P. Res. 923, OAS Permanent Council, OAS Doc. CP/DEC. 8 (927/93).

103. See, e.g., Ben Barber, *Clinton's Foreign Policy Brings New Emphasis to Human Rights*, CHRISTIAN SCI. MONITOR, Apr. 15, 1993, at 2.

104. Pamela Constable, *Clinton, in Reversal, Backs Bush on Haiti*, BOSTON GLOBE, Mar. 3, 1993, at 1; Christopher Marquis, *Clinton Hopeful of Haiti Solution*, MIAMI HERALD, Jan. 15, 1993, at 1A.

105. Howard W. French, *A U.S. General Warns Haiti's Military Leaders*, N.Y. TIMES, Jan. 9, 1993, at 6. See also "President-Elect Clinton's Radio Broadcast to the Haitian People, January 14, 1993," reprinted in FOREIGN POLY BULL., Mar.-Apr. 1993, at 133, (commitment by President Clinton to "work with . . . President Aristide to bring democracy back" to Haiti).



arrived in Haiti with the promise of more to come.<sup>106</sup> In March 1993, President Clinton appointed Lawrence Pezzullo as a special adviser on Haiti.<sup>107</sup>

With the sense of greater commitment on the Clinton Administration's part, negotiations in late March and early April 1993 appeared to come close to achieving a settlement.<sup>108</sup> Setting a pattern for later agreements, the Clinton Administration expected a political settlement involving the lifting of the embargo, installation of a "compromise" Prime Minister, Aristide's

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106. See Don Bohning, *Haiti Observers a Glimmer of Hope*, MIAMI HERALD, Feb. 18, 1993, at 20A; Don Bohning, *New Script, New Hope for Haiti*, MIAMI HERALD, Feb. 21, 1993, at 18A; Michael Tarr, *Aristide Loyalists Take Heart in OAS Presence*, MIAMI HERALD, Apr. 6, 1993, at 8A; U.N. Human Rights Team Lands in Haiti, MIAMI HERALD, Feb. 15, 1993, at 1A.

By April, over one hundred monitors were in place throughout Haiti, with plans for 260 by the end of June. See Howard W. French, *In an Edgy Haitian Town, Civil Rights Monitors Ease the Fear a Bit*, N.Y. TIMES, Apr. 9, 1993, at A3; Christopher Marquis, *Haiti's Junta Wants a Deal, Envoys Think*, MIAMI HERALD, Apr. 22, 1993, at 22A; Michael Tarr, *Haiti Observers Find 'Grave' Rights Abuses by Armed Forces*, MIAMI HERALD, May 6, 1993, at 15A; Michael Tarr, *We'd Fight U.N. Force, Haitian Generals Warn*, MIAMI HERALD, May 14, 1993, at 19A.

The extent to which the monitors actually helped reduce violence by the army is unclear. See *Observer Team Has First Taste of Action*, LATIN AM. WKLY. REP., Mar. 11, 1993, at 119 (recounting incident where observers saved critic of military from attack by plainclothes security personnel); NAT'L LAB. COMM. REP., HAITI AFTER THE COUP: SWEATSHOP OR REAL DEVELOPMENT 8 (June 1993) [hereinafter HAITI AFTER THE COUP]; *Haitian Soldiers Break Up Pro-Aristide Demonstration*, MIAMI HERALD, May 13, 1993, at 18A; Michael Tarr, *Haiti Observers Find 'Grave' Rights Abuses by Armed Forces*, MIAMI HERALD, May 6, 1993, at 15A; Amy Wilentz, *Exile's Return?*, 256 NATION 580 (1993) ("Although some 160 U.N. and O.A.S. monitors are deployed in Haiti, summary arrest, torture and extrajudicial execution are commonplace."). See generally Garry Pierre-Pierre, *Rights Monitors Are Pulled Out of Haiti*, N.Y. TIMES, Oct. 16, 1993, at 4. Between the military's Spring 1993 rejection of a settlement and the signing of the Governors Island Agreement in July 1993, the effectiveness of the monitors in restraining abuses seems to have weakened. See Douglas Farah, *Repression Still Rife in Rural Haiti*, WASH. POST, May 30, 1993, A37, at A45. And they seem to have been largely helpless to stop the wave of repression that followed the signing of the Governors Island Agreement, see *infra* text accompanying notes 142-145.

107. Don Bohning, *U.S. Names Special Haiti Adviser*, MIAMI HERALD, Mar. 12, 1993, at 7A. See also Gwen Ifill, *Haitian is Offered Clinton's Support on an End to Exile*, N.Y. TIMES, Mar. 17, 1993, at A1. That same month, the U.N. Commission on Human Rights condemned the regime and its human rights abuses. See *Human Rights: Haiti, Iraq Condemned by U.N.*, INTER PRESS SERVICE, Mar. 11, 1993, available in LEXIS, Nexis Library, WIRES File.

108. General Cédras made a speech on April 7th that was interpreted as showing a willingness to reach an agreement. See Kenneth Blackman, *Haiti: The Pendulum Swings Away from Solution of Political Crisis*, INTER PRESS SERVICE, Apr. 21, 1993, available in LEXIS, Nexis Library, WIRES File.

return within two to six months, and the institution of a large aid program for Haiti.<sup>109</sup> Another key aspect of the expected settlement was the establishment of an international police force to keep the peace in Haiti.<sup>110</sup> The most difficult issue was resolved by Aristide's apparent acceptance of an amnesty for military leaders.<sup>111</sup>

In the end, however, the Spring 1993 negotiations revealed

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109. See *Envoy Back in Haiti with Plan for Changes*, MIAMI HERALD, Apr. 14, 1993, at 12A; Howard W. French, *A Balancing Act for Haiti*, N.Y. TIMES, Apr. 2, 1993, at A7; Howard W. French, *Haiti's Ruling Elite Face 'Decisive Moment'*, N.Y. TIMES, Mar. 31, 1993, at A4; Howard W. French, *Talks Are Set On the Details of Haiti Pact*, N.Y. TIMES, Apr. 1, 1993, at A3; Howard W. French, *Talks on Haiti Shift the Focus to Aid*, N.Y. TIMES, Mar. 30, 1993, at A3; Christopher Marquis, *Assistance Tied to Aristide's Return*, MIAMI HERALD, Apr. 14, 1993, at 1A; Christopher Marquis, *Clinton: Peacekeepers May Be Needed in Haiti After a Settlement*, MIAMI HERALD, Apr. 24, 1993, at 20A.

110. Howard W. French, *U.S. to Push for a U.N. Police Force of 500 for Haiti*, N.Y. TIMES, May 10, 1993, at A3; *500 Foreign Police Readied for Haiti*, N.Y. TIMES, May 19, 1993, at A3.

111. See Howard W. French, *Offer of Amnesty Removes Obstacle to Accord in Haiti*, N.Y. TIMES, Apr. 14, 1993, at A1. Aristide had earlier indicated his acceptance of a limited amnesty. See Jean-Bertrand Aristide, *A Safe Harbor for Haiti*, WASH. POST, Jan. 10, 1993, at C1; Roth, *Haiti and Clinton*, *supra* note 82. It appears that Aristide resolved any constitutional questions about his power to grant amnesty, see *supra* note 72, by promising that he would grant amnesty for political crimes, and not interfere with a decision by the legislature to grant a broad amnesty. See *Haiti: Diplomatic Efforts to Resolve Crisis Collapse*, NOTISUR, Apr. 21, 1993. He also apparently contemplated an amnesty that would shield military leaders from criminal prosecution but not from civil suits by victims of human rights abuses. See Howard W. French, *Diplomats, and Aristide, See an End to Haiti Impasse*, N.Y. TIMES, Apr. 30, 1993, at A3. Throughout the crisis, Aristide was under intense pressure from his supporters not to agree to anything so sweeping. Michael Tarr, *Amnesty Dispute Could Prolong Haiti's Crisis*, MIAMI HERALD, Apr. 9, 1993, at 4A.

There were also reports that the amnesty might be accompanied by the creation of a "Truth Commission" like the one in El Salvador, although, ironically, it would be the returned Aristide government that would be expected to pay compensation for the human rights violations thereby documented. Amy Wilentz, *Exile's Return?*, 256 NATION 580, 580 (1993). The idea of the Truth Commission was mentioned in the press reports leading up to the Governors Island Agreement, see Howard W. French, *Haiti's Military Leaders Reported Unyielding at Talks*, N.Y. TIMES, June 29, 1993, at 3, but that agreement contained no express reference to any such commission. See *Agreement Between President Jean-Bertrand Aristide and General Raoul Cédras*, July 3, 1993 [hereinafter *Governors Island Agreement*], reprinted in *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 22, at 2-3, U.N. Doc. A/47/975 (1993). A Truth Commission was still being considered as late as August 1993, see Ian Johnstone and Mark LeVine, *Lessons From El Salvador*, CHRISTIAN SCI. MONITOR, Aug. 10, 1993, but nothing appears to have been formalized with regard to it. The issue apparently still remained open at the time of the U.S. intervention in September 1994. See *infra* part IV.A.4.

only that the military was simply unwilling to cede power in the absence of additional pressure. When the Joint Envoy formally presented a settlement plan on April 14, 1993,<sup>112</sup> the military failed to accept it.<sup>113</sup> A short time thereafter, on April 23, 1993, the U.N. General Assembly approved the creation of a Joint U.N./OAS human rights monitoring force (known formally as the "International Civilian Mission to Haiti," or MICIVIH),<sup>114</sup> but without the application of additional pressure, negotiations stalled.

### 3. The Governors Island Agreement

Nearly two months of empty threats and relatively weak actions by the U.S. and the OAS followed the military's rejection of the April settlement plan.<sup>115</sup> Finally, on June 16, 1993, in

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112. Don Bohning, *Haiti Talks Once More at Crossroads*, MIAMI HERALD, Apr. 15, 1993, at 20A; *Envoy Back in Haiti with Plan for Changes*, MIAMI HERALD, Apr. 14, 1993, at 12A.

113. See Don Bohning, *U.N. Envoy Leaves Haiti; Crisis Persists*, MIAMI HERALD, Apr. 17, 1993, at 9A; Howard W. French, *Haiti Army Leaders Reject Offer of Amnesty by Exiled President*, N.Y. TIMES, Apr. 17, 1993, at A1. Whether the rejection was definitive is unclear. See Christopher Marquis, *Haiti's Junta Wants a Deal, Envoys Think*, MIAMI HERALD, Apr. 22, 1993, at 22A.

After Caputo left, Bazin presented his own plan, which involved negotiations among "the most important political blocs in parliament." Speech given by Marc Louis Bazin in Port-au-Prince on April 20, 1993, reproduced in *Haiti: Prime Minister Criticises U.N. Envoy's Plan; Urges Parliament to Consider His Plan*, BBC Summary of World Broadcasts, Apr. 22, 1993, available in LEXIS, Nexis Library, NEWS File. Given Bazin's marginalization, however, see *infra* notes 506-507, his efforts never had any likelihood of accomplishing anything.

114. G.A. Res. 47/20 B, U.N. GAOR, 47th Sess., U.N. Doc. A/RES/47/20 B (1993). The mandate was extended on July 8, 1994. G.A. Res. 48/27 B, U.N. GAOR, 48th Sess., U.N. Doc. A/RES/48/27 B (1994).

115. In an attempt to pressure it to go along with the April 1993 settlement, the U.S. threatened Haiti with a tightening of the embargo — particularly to keep out oil and also to stop goods crossing the boundary with the Dominican Republic — together with related actions like freezing the assets of the junta and its supporters, cancelling their U.S. visas, and ending commercial air flights between Haiti and the U.S. See *Diplomat: Haiti's Junta Was Pressured*, MIAMI HERALD, Apr. 23, 1993, at 24A; Howard W. French, *Haiti Army Leaders Reject Offer of Amnesty by Exiled President*, N.Y. TIMES, Apr. 17, 1993, at A1; Howard W. French, *U.S. Prepares to Get Tough With Haiti's Generals*, N.Y. TIMES, Apr. 21, 1993, at A7; *Haiti: U.S. Still confident of Military's Agreement*, INTER PRESS SERVICE, Apr. 22, 1993, available in LEXIS, Nexis Library, WIRES File.

On June 4, 1993, the U.S. froze the assets of more than 80 supporters of the military regime and prohibited them from entering the U.S. See *Statement on Sanctions Against Haiti*, June 4, 1993, 29 WEEKLY COMP. PRES. DOC. 1029 (June 7,

response to U.S. urging, the U.N. Security Council imposed an embargo prohibiting the shipment to Haiti of "petroleum or petroleum products or arms and related *material* of all types, including weapons and ammunition, military vehicles and equipment, police equipment and spare parts."<sup>116</sup> In addition, the Security Council required all states to freeze Haitian government funds in their territories.<sup>117</sup> The resolution provided that it would take effect one week later, on June 23, 1993, unless the Secretary General suspended the embargo in recognition of sufficient progress in negotiations to restore Aristide to the presidency.<sup>118</sup>

The imminence of the U.N. embargo appeared to have a galvanizing effect on the army.<sup>119</sup> Negotiations began on Gover-

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1993); *Proclamation 6569 of June 3, 1993*, 58 Fed. Reg. 31,897 (1993) (prohibiting entry into U.S. by "Haitian nationals who formulate, implement, or benefit from policies that impede the progress of the negotiations designed to restore constitutional government to Haiti, and the immediate families of such persons"); see also Exec. Order 12,853, 58 Fed. Reg. 35,843 (1993) (freezing U.S. assets of supporters of regime and implementing U.N. trade embargo); 58 Fed. Reg. 40,043 (1993) (listing individuals and entities whose U.S. assets are frozen). See generally Christopher Marquis, *Aristide, Army Foe to Meet*, MIAMI HERALD, June 23, 1993, at 1A; Christopher Marquis, *U.S. Freezes Assets of Haiti Coup Backers*, MIAMI HERALD, June 5, 1993, at 1A; Andres Oppenheimer & Christopher Marquis, *Big Guns to Enforce Embargo*, MIAMI HERALD, Oct. 16, 1993, at 1A.

Two days later, meeting in Managua, Nicaragua, the OAS Foreign Ministers called for a suspension of commercial flights to Haiti and a tighter crackdown on oil shipments in cooperation with the U.N. See Support for the Haitian People, M.R.E. Res. 5/93, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.1, OAS Doc. MRE/RES. 5/93 corr.1 (1993). See also John Otis, *Tighten Haiti Embargo*, OAS Urges, MIAMI HERALD, June 7, 1993, at 9A.

116. See S.C. Res. 841, U.N. SCOR, 3238th mtg., at 3, para. 5, U.N. Doc. S/RES/841 (1993), reprinted in 32 I.L.M. 1206, 1208 (1993). See also Christopher Marquis, *U.N. Slaps Sweeping Sanctions on Haiti*, MIAMI HERALD, June 17, 1993, at 1A. The final resolution was weaker than the draft; at Brazil's urging, a clause was deleted that would have effectively authorized the U.S. to stop and search vessels bound for Haitian ports. Howard W. French, *U.N. Approves Ban On Shipments of Oil To Haitian Military*, N.Y. TIMES, June 17, 1993, at A1. Despite reports that the deletion might cause the army to believe that it could continue to hold out, see Howard W. French, *Diplomats Say Oil Embargo May Not Sway Haiti's Military Rulers*, N.Y. TIMES, June 20, 1993, at 4, it seems not to have made any difference in the end, see Howard W. French, *Haiti's Military Chief Agrees to Meet With Ousted Leader*, N.Y. TIMES, June 23, 1993, at A4.

117. See S.C. Res. 841, *supra* note 116, at 3, para. 8.

118. *Id.* at 2, para. 3.

119. Shortly before the oil embargo was scheduled to take effect, Cédras offered to meet with Aristide, hoping thereby to head off the sanctions. See *I'll Meet Aristide, Haiti General Says*, MIAMI HERALD, June 22, 1993, at 16A; Christopher Marquis, *Aristide, Army Foe to Meet*, MIAMI HERALD, June 23, 1993, at 1A. Aristide

nors Island in New York on June 27 and lasted until July 3, 1993. They culminated in the signing of an agreement on July 3, 1993, largely along the lines of the original Protocol of Washington, though with some important additions.<sup>120</sup> The Joint Envoy negotiated principally with Cédras,<sup>121</sup> and then, after securing Cédras' agreement, presented Aristide with a *fait accompli*.<sup>122</sup> Although Aristide hesitated at first, he was left with virtually no choice but to accept the Envoy's plan.<sup>123</sup>

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quickly accepted the offer, Christopher Marquis, *Aristide, Army Foe to Meet*, MIAMI HERALD, June 23, 1993, at 1A, but the U.S. imposed sanctions as scheduled. Exec. Order No. 12,853, 58 Fed. Reg. 35,843 (1993).

120. See *Governors Island Agreement*, *supra* note 111. See also Howard W. French, *Haitian Military Is Said to Accept Plan to End Crisis*, N.Y. TIMES, July 3, 1993, at 1.

121. See Howard W. French, *Haiti's Military Leaders Reported Unyielding at Talks*, N.Y. TIMES, June 29, 1993, at A3 ("For Father Aristide's delegation, the two days of talks have consisted of long hours of waiting, usually with little information before the end of the day."); Howard W. French, *Haiti Negotiations in New York Reported to Reach a Critical Stage*, N.Y. TIMES, July 1, 1993, at A5; Christopher Marquis, *Haiti Talks: Distrust and Hope*, MIAMI HERALD, June 28, 1993, 1A, at 5A ("Caputo focused his energies on Cédras Sunday, spending at least six hours with the general throughout the day, in comparison with a one-hour morning session with Aristide.").

122. Christopher Marquis, *Aristide Balks at Haiti Plan*, MIAMI HERALD, July 3, 1993, at 1A ("The message [to Aristide] from [U.N. Secretary General] Boutros-Ghali was: 'Don't think any more, Mr. President, just sign,' said one senior diplomat."); Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour*, N.Y. TIMES, Aug. 3, 1993, at A1, A5 (reporting statement as "Don't examine it, just sign it."). Similarly, Secretary of State Warren Christopher was quoted as saying that it would be "highly desirable that President Aristide agree" to the plan accepted by the military. Howard W. French, *Haitian Military Is Said to Accept Plan to End Crisis*, N.Y. TIMES, July 3, 1993, at 1. The Joint Envoy pronounced himself "fed up" with Aristide, see Howard W. French, *Military Chief Signs Accord to End Haitian Crisis*, N.Y. TIMES, July 4, 1993, at 9, and diplomats were quoted as saying that rather than secure more favorable settlement terms, Aristide would just "have to trust the international negotiators' guarantees of 'constant monitoring and verification' of compliance," Howard W. French, *Haitian Military Is Said to Accept Plan to End Crisis*, N.Y. TIMES, July 3, 1993, at A1. Apparently in an effort to increase the pressure on Aristide, the White House pointedly announced that it was unfreezing some of the suspended aid in an effort "to support negotiations to restore democracy to Haiti." See *United States Resumes Aid to Haiti*, AGENCE FRANCE PRESSE, July 2, 1993, available in LEXIS, Nexis Library, NEWS File; White House Statement on Sanctions Against Haiti, U.S. NEWSWIRE, July 1, 1993. Aristide may have even been threatened with a lifting of the oil embargo if he did not sign the agreement. See *Continuing Violence in Haiti*, COHA'S WASH. REP. ON THE HEMISPHERE, Oct. 3, 1992, at 4.

123. Christopher Marquis, *Aristide Balks at Haiti Plan*, MIAMI HERALD, July 3, 1993, at 1A. As a Haitian labor leader put it,

When Aristide tried to negotiate changes, he was told the accord was non-negotiable. When he wanted time to consult with his team, scores of U.S. officials and others put on the pressure. When coup leader Lt. Gen.

Under the Governors Island Agreement, Aristide agreed to name a prime minister who would be subject to confirmation by Parliament,<sup>124</sup> after which the embargo would be suspended.<sup>125</sup> President Aristide would not, however, return to Haiti until October 30, 1993.<sup>126</sup> Shortly before his return, Cédras would retire from the high command in favor of an Aristide appointee, who would then appoint new members of the high command.<sup>127</sup> Members who served under Cédras would be allowed to remain in the military, though posted outside Haiti,<sup>128</sup> and full amnesty would be granted to the coup leaders and supporters.<sup>129</sup> An international police force would be stationed in Haiti and other steps would be taken to "modernize" the army.<sup>130</sup> The Agreement also gave Aristide the right to appoint a new chief of police for a reorganized police force for Port-au-Prince, which would no longer be part of the military.<sup>131</sup>

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Raoul Cédras signed the accord and left the island, it was the press — not the diplomats — who informed Aristide.

Cajuste Lexiuste, *Painful Experience Sends a Message: Don't Rush to Lift Haiti Sanctions*, MIAMI HERALD, Aug. 20, 1993, at 19A.

124. Governors Island Agreement, *supra* note 111, paras. 2, 3. It was understood that, as in the earlier Protocol of Washington, Aristide would name a "consensus" prime minister. In addition, the confirmation of the prime minister would not take place until the matter of the election of the new members to the Parliament in sham elections conducted by the military in January 1993 had been resolved.

125. The Agreement provided that the U.N. sanctions and OAS sanctions would be suspended on the initiative of the respective Secretary Generals of the two organizations immediately after the new Prime Minister "is confirmed and assumes office." Governors Island Agreement, *supra* note 111, para. 4, but it was understood that the suspension would be terminated if the Secretary General reported to the Security Council that the Agreement was being violated before Aristide returned. *The Situation of Democracy and Human Rights in Haiti: Report of the Secretary General*, *supra* note 111, para. 10. The embargo was to be permanently rescinded when Aristide returned to Haiti on October 30th. *Id.* para. 12.

126. Governors Island Agreement, *supra* note 111, para. 9.

127. *Id.* para. 8. Although not publicly reported at the time, it was later publicly revealed that Cédras had agreed on October 15, 1993, as the date for his resignation. See, e.g., Andres Oppenheimer & John Donnelly, *Haitians, Foreigners Flee Capital*, MIAMI HERALD, Oct. 17, 1993, at 1A (quoting Joint Envoy) (at time of Governors Island Agreement, Cédras "committed himself to resign Oct. 15 without any previous condition").

128. Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour*, N.Y. TIMES, Aug. 3, 1993, at A1, A5.

129. The Agreement provided that the amnesty would be granted by the President "within the framework of Article 147 of the National Constitution and implementation of the other instruments which may be adopted by the Parliament on this question." Governors Island Agreement, *supra* note 124, para. 6.

130. *Id.*, para. 5.

131. *Id.*, para. 8.

One aim of that provision was to ease out Col. Joseph Michel François, widely reputed to be a moving force behind the coup.<sup>132</sup> Finally, in connection with the Agreement, an international aid program amounting to \$1 billion over five years would be instituted.<sup>133</sup>

The military treated the Governors Island Agreement with defiance and foot-dragging. Despite this, Aristide and members of the Parliament took the first step toward implementing the Governors Island Agreement on July 17, 1993, when they signed the New York Pact, which called for an end to human rights violations in Haiti, the immediate release of all political prisoners, and the establishment of a Compensation Commission for victims of the coup.<sup>134</sup> It also set out steps for the removal of the members of Parliament who had taken office after the January 1993 elections.<sup>135</sup> A little over a week later, Aristide nominated Robert Malval, a businessman who had supported Aristide throughout his presidency, to be prime minister.<sup>136</sup>

The new cabinet was finally confirmed on August 25, 1993, after Aristide's allies overcame the military's insistence on lifting sanctions before Malval's confirmation, which would have sabotaged the process.<sup>137</sup> On August 27, 1993, the Security

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132. See *supra* note 84.

133. See Howard W. French, *Restoring Stability to Haiti Is Seen as the Next Big Test*, N.Y. TIMES, July 5, 1993, at 4.

134. New York Pact, para. 2, reprinted in 1994 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 48, at 168-70.

135. *Id.*, para. 4(viii). Technically, the agreement did not definitively remove them from the Parliament, leaving that decision in the hands of a reconstituted "Conciliation Commission." *Haiti Moves to Restore Aristide*, MIAMI HERALD, July 18, 1993, at 1A. See generally HAITI CONST. art. 206, reprinted in English in 7 CONSTITUTIONS, *supra* note 82. But it did provide that they would not sit until the Commission had acted, New York Pact, para. 6, and the Joint Envoy reportedly assured Aristide that the embargo would not be lifted if they remained in the Parliament. See *Haiti Moves to Restore Aristide*, MIAMI HERALD, July 18, 1993, at 1A.

The New York Pact also called for implementation of other portions of the Governors Island Agreement, including the nomination of a new prime minister, the passage of laws to establish a civilian police force, and a grant of amnesty to coup participants. New York Pact, paras. 3, 4.

136. *Aristide, in a Letter, Nominates His Premier*, N.Y. TIMES, July 26, 1993, at A3; Harold Maass, *Aristide Goes with Compromise*, MIAMI HERALD, July 27, 1993, at 10A. Malval agreed on the condition that he be replaced by a new prime minister by December 15, 1993. Howard W. French, *Reluctant Politician Dives Into Haiti's 'Hot Water'*, N.Y. TIMES, Aug. 4, 1993, at A4.

137. Malval was not actually sworn in until August 30, 1993, at the Haitian embassy in Washington, D.C., and his cabinet was sworn in three days later. See

Council decided that the U.N. sanctions should be "suspended with immediate effect" but would be lifted "definitively" only when the Governors Island Accord had been fully carried out.<sup>138</sup> That same day, the OAS suspended its sanctions as well.<sup>139</sup>

The Malval government never managed to assert effective control. Even its attempts to stem the barrage of anti-Aristide propaganda dominating the state-run radio and television<sup>140</sup> met with failure.<sup>141</sup> Moreover, the military began a campaign

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Harold Maass, *Haitian Premier Swears in New Cabinet*, MIAMI HERALD, Sept. 3, 1993, at 16A; *Premier Vows to Help Heal Haiti's Torment*, MIAMI HERALD, Aug. 31, 1993, at 1A.

On the problems encountered in securing Malval's confirmation, see *Aristide Ally Picked in Senate*, MIAMI HERALD, Aug. 11, 1993, at 7A; Michael Tarr, *Haiti's Political Settlement Hits New Snag in Parliament*, MIAMI HERALD, Aug. 12, 1993, at 15A; *U.S. Fears Haiti Peace Plan Losing Steam*, MIAMI HERALD, Aug. 5, 1993, at 20A. Not surprisingly, Aristide allies feared that if sanctions were lifted before the entire Malval government were in place, his opponents could simply refuse to confirm the government.

138. S.C. Res. 861, U.N. SCOR, 3271st mtg., at 1-2, U.N. Doc. S/RES/861 (1993). See Frank J. Prial, *U.N. Lifts Haitian Oil Embargo As Junta Prepares to Step Aside*, N.Y. TIMES, Aug. 28, 1993, at A1; *White House Hails Suspension of U.N. Embargo Against Haiti*, MIAMI HERALD, Aug. 28, 1993, at 18A. See also Christopher Marquis, *Haiti's Isolation Nearing End*, MIAMI HERALD, Aug. 27, 1993, at 1A; Frank J. Prial, *U.N. Chief Asks for End to Haitian Oil Embargo*, N.Y. TIMES, Aug. 27, 1993, at A7; Michael Tarr, *Embargoes on Haiti Set To Be Lifted*, WASH. POST, Aug. 27, 1993, at A27.

139. *White House Hails Suspension of U.N. Embargo Against Haiti*, MIAMI HERALD, Aug. 28, 1993, at 18A. See also *Address by Robert Malval, Haitian Prime Minister, to the Organization of American States (OAS)*, FED. INFO. NEWS SERVICE, Aug. 30, 1993, available in LEXIS, Nexis Library, NEWS File (quoting introduction to Address by Chair of Permanent Council and noting recommendation to Ministers of Foreign Affairs on Aug. 26, 1993, that embargo be suspended); 58 Fed. Reg. 54,024 (1993) (noting announcement by OAS Secretary General).

140. See *New Haiti Government Starts to Act*, MIAMI HERALD, Sept. 4, 1993, at 20A.

141. It was not until a month after its first attempt to assert control that the Malval government was actually able to install its own directors to control broadcast programming. Until then anti-Aristide propaganda continued to dominate the airwaves. See Howard W. French, *Democracy's Opponents Continue Unrest in Haiti*, N.Y. TIMES, Oct. 6, 1993, at A9; Harold Maass & Don Bohning, *Aristide's Premier Takes Over State Media; Gunmen Rampage*, MIAMI HERALD, Oct. 6, 1993, at 4A. But even by October 24th, as the date for Aristide's return approached, it was clear that the Malval government was not really in control of television and radio broadcasting. See Tim Johnson, *Premier Tries to Run Haiti from Shadows*, MIAMI HERALD, Oct. 25, 1993, at 1A. See also Larry Rohter, *In Port-au-Prince, the Signs Of Invasion Are in the Air*, N.Y. TIMES, Sept. 15, 1994, at A6.

More generally, throughout the entire "transition" period the Malval government seems never to have gained more than what Malval himself called "moral



of intimidation and terror towards members of the government and other high-profile supporters of Aristide a little over a week after Malval was sworn in.<sup>142</sup> The Security Council ignored Aristide's call for sanctions to be reimposed,<sup>143</sup> and the killings — by no means limited to prominent supporters of Aristide — continued unabated.<sup>144</sup> Indeed, the violence was simply a continuation of the earlier brutality that had marked the entire period of military rule since Aristide's overthrow.<sup>145</sup>

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authority." See Andres Oppenheimer & Christopher Marquis, *Big Guns to Enforce Embargo*, MIAMI HERALD, Oct. 16, 1993, at 1A. See also Tim Johnson, *Premier Tries to Run Haiti from Shadows*, MIAMI HERALD, Oct. 25, 1993, at 1A.

142. See generally Don Bohning, *Murder, Mayhem on Rise in Haiti as Aristide Prepares to Return*, MIAMI HERALD, Sept. 18, 1993, at 1A (quoting head of Joint U.N./OAS human rights observer mission).

For example, on September 8th, Evans Paul, an Aristide supporter and mayor of Port-au-Prince, came out of hiding to be formally reinstated as mayor. Fifty "attachés" — plainclothes thugs under the control of the army and the police — attacked Paul's entourage and went on the rampage in the streets nearby, killing five people. See Don Bohning, *Haitian Probing Violence Quits in Fear of Thugs*, MIAMI HERALD, Sept. 15, 1993, at 7A; *Haiti: City Hall Death Toll Hits 5, Mayor Says*, MIAMI HERALD, Sept. 10, 1993, at 12A; Harold Maass, *Return to Haiti Prompts Melee*, MIAMI HERALD, Sept. 9, 1993, at 14A; *Violence at City Hall*, N.Y. TIMES, Sept. 9, 1993, at A8. Shortly thereafter, the prosecutor investigating the incident resigned when he became the target of death threats. Bohning, *supra*, at 7A; *Head of Haitian Rights Inquiry Quits After Threats*, N.Y. TIMES, Sept. 15, 1993, at A4.

Three days later, attachés dragged Antoine Izmerly, a prominent business supporter of Aristide, out of a church memorial service and killed him. PAUL FARMER, *THE USES OF HAITI* 214-15 (1994); *Haitians Fear Anti-Aristide Violence Will Grow*, N.Y. TIMES, Sept. 13, 1993, at A7; Harold Maass, *Key Aristide Backer Slain*, MIAMI HERALD, Sept. 12, 1993, at 1A. The U.N./OAS observer mission blamed the military for the killing. *Report Ties Haitian Army to Killing*, MIAMI HERALD, Nov. 30, 1993, at 8A. On September 17th, attachés threatened Malval himself. *Thugs Threaten Haitian Prime Minister*, MIAMI HERALD, Sept. 18, 1993, at 12A.

Paul was attacked a second time on October 5th. See Howard W. French, *Democracy's Opponents Continue Unrest in Haiti*, N.Y. TIMES, Oct. 6, 1993, at A9; Howard W. French, *First U.N. Troops Arrive in Haiti; Anti-Aristide Violence Intensifies*, N.Y. TIMES, Oct. 7, 1993, at A1; Harold Maass & Don Bohning, *Aristide's Premier Takes Over State Media; Gunmen Rampage*, MIAMI HERALD, Oct. 6, 1993, at 4A.

On the attachés, see Don Bohning & John Donnelly, *The Enforcers*, MIAMI HERALD, Oct. 17, 1993, at 1A. Reports of their numbers varied wildly, with some estimates as high as 20,000 or even 30,000. *Id.*

143. *U.S. Insists Plan to Restore Aristide Remains on Track*, MIAMI HERALD, Sept. 22, 1993, at 24A. See also Steven A. Holmes, *Aristide Seeks the Removal of Army and Police Chiefs*, N.Y. TIMES, Sept. 22, 1993, at A3 (noting that Aristide personally supported reimposition of sanctions).

144. See, e.g., Don Bohning, *Murder, Mayhem on Rise in Haiti as Aristide Prepares to Return*, MIAMI HERALD, Sept. 18, 1993, at 1A; Howard W. French, *Haiti in Turmoil as It Awaits Aristide*, N.Y. TIMES, Sept. 22, 1993, at A3.

145. See Cajuste Lexiuste, *Painful Experience Sends a Message: Don't Rush to*

On September 23, 1993, the Security Council formally voted to send an aid mission of approximately twelve to thirteen hundred members to Haiti, following up on plans made earlier to implement the Governors Island Agreement.<sup>146</sup> The mission (known in U.N. jargon as "UNMIH" for U.N. Mission in Haiti) included 567 police trainers principally from France, Canada, and the Caribbean; their task was the training of a new police force which, as noted above, would now be separate from the military.<sup>147</sup> The new Justice Minister Guy Malary would control the police force after Lt. Col. François (its head at the time) was forced out.<sup>148</sup> Before the plan could be carried out, the Haitian Parliament had to enact legislation providing for the separation of the police force from the Haitian military.<sup>149</sup> In addition, the U.S. would contribute about 60 military advisers and about 600 military troops, mostly construction engineers, whose stated task would be to retrain the 7,000-member Haitian army in road building and other civil engineering endeavors.<sup>150</sup> The United States repeatedly emphasized that the U.S. troops and foreign police monitors would be unarmed or lightly armed at best<sup>151</sup> and would have no mandate to protect Haitians from

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*Lift Haiti Sanctions*, MIAMI HERALD, Aug. 20, 1993, at 19A (noting that at least 3,000 people had been killed); *infra* part IV.A.1.

146. S.C. Res. 867, U.N. SCOR, 3282nd mtg., U.N. Doc. S/RES/867 (1993). See also Paul Lewis, *U.N. Council Unanimously Votes To Send New Peace Force to Haiti*, N.Y. TIMES, Sept. 24, 1993, at A6; *U.N. Wants Units in Haiti Fast*, MIAMI HERALD, Sept. 24, 1993, at 5A.

147. S.C. Res. 867, *supra* note 146, at paras. 2-4. See also Paul Lewis, *U.N. Council Unanimously Votes To Send New Peace Force to Haiti*, N.Y. TIMES, Sept. 24, 1993, at A6; Christopher Marquis, *U.S. Sending Troops to Haiti for U.N. Nation-Building Plan*, MIAMI HERALD, Sept. 28, 1993, at 28A; Frank J. Prial, *U.N. Lifts Haitian Oil Embargo As Junta Prepares to Step Aside*, N.Y. TIMES, Aug. 28, 1993, at A1; *U.N. Advance Mission Will Head to Haiti to Help Reform Police*, MIAMI HERALD, Sept. 1, 1993, at 12A.

148. See *U.N. Ready to Reform Haitian Police Force*, MIAMI HERALD, Sept. 26, 1993, at 29A.

149. See, e.g., Howard W. French, *Premier in Haiti Meets Army Chief*, N.Y. TIMES, Oct. 26, 1993, at A7; Tim Johnson, *Envoy Issues an Appeal for Help in Haiti*, MIAMI HERALD, Oct. 26, 1993, at 1A.

150. See Steven A. Holmes, *U.N. Force to Rely on Haitians to Keep Order*, N.Y. TIMES, Oct. 1, 1993, at A4; *U.S. Planning to Send 600 Troops to Haiti*, N.Y. TIMES, Sept. 29, 1993, at A7.

The 60 advisers apparently were to be Haitians trained to provide personal security for Aristide. *State Department Trains Haitian's Security Guards*, MIAMI HERALD, Oct. 2, 1993, at 21A.

151. See Howard W. French, *Protesters Force a Retreat by Diplomats*, N.Y. TIMES, Oct. 12, 1993, at A1 (noting that only some of the U.S. military troops would be armed); Steven A. Holmes, *U.N. Force to Rely on Haitians to Keep Order*, N.Y.

violence — to the point where they should “run the other way” if they saw anything potentially dangerous.<sup>152</sup>

In early October, Aristide issued an amnesty, giving immunity from prosecution for those who committed political crimes between September 29, 1991 (the date of the coup) and July 3, 1993 (the date the Governors Island Agreement was signed).<sup>153</sup> The first thirty-one U.N. troops arrived on October 7,<sup>154</sup> with some diplomats discounting the army and the attachés as “cowards.”<sup>155</sup> Although it had been anticipated at the end of August that the mission would be fully deployed by mid-October,<sup>156</sup> the U.N. now planned that only about 330 troops would be in place by that time or shortly thereafter.<sup>157</sup> The next day press re-

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TIMES, Oct. 1, 1993, at A4; Christopher Marquis, *U.S. Sending Troops to Haiti for U.N. Nation-Building Plan*, MIAMI HERALD, Sept. 28, 1993, at 28A; *U.N. Ready to Reform Haitian Police*, MIAMI HERALD, Sept. 26, 1993, at 29A (noting that all 567 police monitors would be unarmed).

152. Howard W. French, *Protesters Force a Retreat by Diplomats*, N.Y. TIMES, Oct. 12, 1993, at A1. Similarly, U.S. envoy Pezzullo said that if U.S. soldiers saw Haitian soldiers or attachés attack a civilian, their instructions were simply to “move away.” Christopher Marquis, *U.S. Troops Bound for Haiti Told: Don't Fight*, MIAMI HERALD, Sept. 30, 1993, at 1A. See also Christopher Marquis, *U.S. Sending Troops to Haiti for U.N. Nation-Building Plan*, MIAMI HERALD, Sept. 28, 1993, at 28A; Peter Slevin, *U.N. Is at a Crossroads in its Peacekeeping Role*, MIAMI HERALD, Oct. 10, 1993, at 4M (quoting a “diplomat to the United Nations” that U.N. troops in Haiti “don't aim to force Haiti to do anything”). At least one “official” was skeptical of the limitations the emphasis on non-use of force created. See Steven A. Holmes, *U.N. Force to Rely on Haitians to Keep Order*, N.Y. TIMES, Oct. 1, 1993, at A4 (U.N. forces “have a narrow mandate to be there and rub off on the police and the army, who magically by osmosis are supposed to behave themselves; to conduct themselves more professionally.”).

153. See *Haiti: Army Shows Support for Fired Chief Justice*, MIAMI HERALD, Oct. 5, 1993, at 6A. See also John Donnelly, *Cédras Says He Will Quit - Maybe*, MIAMI HERALD, Oct. 14, 1993, at 1A; Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1.

154. Don Bohning & Harold Maass, *More Forces from U.N. Enter Haiti*, MIAMI HERALD, Oct. 7, 1993, at 16A; Howard W. French, *First U.N. Troops Arrive in Haiti; Anti-Aristide Violence Intensifies*, N.Y. TIMES, Oct. 7, 1993, at A1.

155. Howard W. French, *First U.N. Troops Arrive in Haiti; Anti-Aristide Violence Intensifies*, N.Y. TIMES, Oct. 7, 1993, at A1.

156. Christopher Marquis, *U.S. Troops Bound for Haiti Told: Don't Fight*, MIAMI HERALD, Sept. 30, 1993, at 1A.

157. One hundred of these would be the police monitors. See *U.N. Ready to Reform Haitian Police*, MIAMI HERALD, Sept. 26, 1993, at 29A (noting that 100 monitors were expected to be in place by October 20, to be followed later by 100 more). The remainder would consist of U.S. military advisers and military construction engineers. Indeed, as of October 7, 1993, only 200 members of the planned 567 police force had even been recruited.

ports emerged that the Pentagon was opposed to sending troops to Haiti, particularly in light of recent events in Somalia.<sup>158</sup>

A turning point was reached when, on October 11, 1993, a mob organized by the army prevented the *U.S.S. Harlan County* from docking at Port-au-Prince. The ship was attempting to bring the second installment of 200 U.S. troops and 25 Canadian military trainers to Haiti.<sup>159</sup> That same day, members of the U.N./OAS human rights observer team, there since February,<sup>160</sup> were stopped at gunpoint outside Port-au-Prince.<sup>161</sup> On October 11, the Security Council warned the Haitian military that sanctions could be renewed if the troops were not permitted to land,<sup>162</sup> but the army was unrelenting and, on October 12, the *Harlan County* left Haitian waters.<sup>163</sup>

The OAS Permanent Council condemned the Haitian military,<sup>164</sup> and the U.S. immediately pressed for a reimposition of the U.N. and OAS sanctions.<sup>165</sup> The U.N. Security Council voted on October 13 to terminate the suspension of sanctions effective at midnight on October 18.<sup>166</sup> That same day the OAS Per-

158. Howard W. French, *Deepening Pessimism in Haiti*, N.Y. TIMES, Oct. 9, 1993, at A4; Elaine Sciolino, *Pentagon and State Dept. at Odds Over Sending of Soldiers to Haiti*, N.Y. TIMES, Oct. 8, 1993, at A1. See also Michael R. Gordon, *Pentagon Had Warned Against Haiti*, N.Y. TIMES, Oct. 15, 1993, at A4.

159. See Don Bohning et al., *Mob to Americans: 'Go Home!'*, MIAMI HERALD, Oct. 12, 1993, at 1A; Howard W. French, *Haitians Block Landing of U.S. Forces*, N.Y. TIMES, Oct. 12, 1993, at A1 (the mob also attacked the car of U.S. Chargé d'Affaires Vicki Huddleston).

160. See *supra* note 106.

161. Howard W. French, *Haitians Block Landing of U.S. Forces*, N.Y. TIMES, Oct. 12, 1993, at A1.

162. Note by the President of the Security Council, U.N. SCOR, 3289th mtg., U.N. Doc. S/26567 (1993). See Steven A. Holmes, *U.S. Delaying Dispatch of Troops to Help Haiti*, N.Y. TIMES, Oct. 12, 1993, at A4; Christopher Marquis & Robert A. Rankin, *Let Troops Land or Face U.N. Action, Haiti Told*, MIAMI HERALD, Oct. 12, 1993, at 6A.

163. John Donnelly & Harold Maass, *U.S. Ship Retreats from Haiti*, MIAMI HERALD, Oct. 13, 1993, at 1A; Steven A. Holmes, *Bid to Restore Haiti's Leader Is Derailed*, N.Y. TIMES, Oct. 13, 1993, at A4.

164. See *OAS Council Condemns Haitian Mob Action*, REUTER, Oct. 12, 1993, available in LEXIS, Nexis Library, NEWS File.

165. See Christopher Marquis, et al., *Clinton: Renew U.N. Sanctions*, MIAMI HERALD, Oct. 13, 1993, at 10A (U.N. sanctions); Christopher Marquis, *Haiti Sanctions Renewed*, MIAMI HERALD, Oct. 14, 1993, at 1A (OAS sanctions).

166. S.C. Res. 873, U.N. SCOR, 3291st mtg., U.N. Doc. S/RES/873 (1993). See Paul Lewis, *U.N. Again Imposes Sanctions on Haiti After Pact Fails*, N.Y. TIMES, Oct. 14, 1993, at A1; Christopher Marquis, *Haiti Sanctions Renewed*, MIAMI HERALD, Oct. 14, 1993, at 1A.

manent Council warned that the suspension of the OAS sanctions would also be terminated if the military failed to comply with the Governors Island Agreement.<sup>167</sup>

In response, Cédras held a press conference announcing conditions for his resignation. One was that Parliament enact an amnesty law.<sup>168</sup> Aristide's decree granting amnesty was, Cédras said, insufficient<sup>169</sup> — a position that U.N. and U.S. officials rejected.<sup>170</sup> Cédras also insisted that U.S. military troops carry nothing more powerful than pistols, and complained that Aristide had failed to name a "consensus" government.<sup>171</sup>

The next day, October 14, Justice Minister Guy Malary was gunned down.<sup>172</sup> At the time, Malary had been involved in efforts to remove Supreme Court Chief Justice Emil Jonassaint, a military supporter whose judicial position made him next in line for the presidency.<sup>173</sup> Other cabinet ministers received death

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167. See *OAS Condemns Intimidation of Diplomats; Warns of New Sanctions*, BBC Summary of World Broadcasts, Oct. 15, 1993, available in LEXIS, Nexis Library, NEWS File; Howard W. French, *U.S. Tells Haiti How to Remove Trade Embargo*, N.Y. TIMES, Oct. 21, 1993, at A4.

168. John Donnelly, *Cédras Says He Will Quit - Maybe*, MIAMI HERALD, Oct. 14, 1993, at 1A.

169. *Id.*

170. See Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1 ("United States and United Nations diplomats both rejected General Cédras' demands, saying that a limited amnesty decreed by Father Aristide earlier this month was all that the negotiated agreements required.")

171. Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1. See also John Donnelly, *Cédras Says He Will Quit - Maybe*, MIAMI HERALD, Oct. 14, 1993, at 1A. Cédras' complaint overlooked the fact that the "few conservative politicians willing to consider Mr. Malval's offers [to consider joining the cabinet] . . . do not support the diplomatic effort to reinstate Father Aristide as President and would not be cooperative." Howard W. French, *As U.S. Warships Begin Arriving, Haiti General Is Refusing to Budge*, N.Y. TIMES, Oct. 18, 1993, at A1.

172. John Donnelly & Harold Maass, *Aristide Aide Assassinated*, MIAMI HERALD, Oct. 15, 1993, at 1A; Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1. See also Don Bohning, *Little-Known Officer Wields Big Clout from the Shadows*, MIAMI HERALD, Oct. 31, 1993, at 1A (speculating as to precisely who ordered Malary's assassination); Howard W. French, *Haiti Capital Calm as Streets Empty*, N.Y. TIMES, Oct. 19, 1993, at A4.

173. Malary also would have been in charge of the new police force to be created after its separation from the army. Howard W. French, *Democracy's Opponents Continue Unrest in Haiti*, N.Y. TIMES, Oct. 6, 1993, at A9; Howard W. French, *Haiti Capital Calm as Streets Empty*, N.Y. TIMES, Oct. 19, 1993, at A4; Howard W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep*

threats,<sup>174</sup> and the entire U.N./OAS human rights observer mission was evacuated,<sup>175</sup> together with the police monitors who had already arrived.<sup>176</sup> Apparently hoping to put some pressure on Cédras, President Clinton ordered six U.S. warships to head to Haiti to help enforce the U.N. embargo if it entered into force.<sup>177</sup>

Not surprisingly, October 15th came and went without Cédras' resignation.<sup>178</sup> Indeed, Cédras himself pronounced the Governors Island Agreement "at a dead end."<sup>179</sup> On October 16, the Security Council authorized a naval cordon around Haiti.<sup>180</sup> The U.N. embargo took effect on October 18th,<sup>181</sup> with the support of the OAS.<sup>182</sup> On October 25, the Security Council warned the military that it would consider an embargo extending beyond oil and arms if the Governors Island Agreement were not implemented.<sup>183</sup>

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*Peace*, N.Y. TIMES, Oct. 15, 1993, at A1; *Haiti: Army Shows Support for Fired Chief Justice*, MIAMI HERALD, Oct. 5, 1993, at 6A; *Slain Official Was Lawyer*, N.Y. TIMES, Oct. 15, 1993, at A5.

174. John Donnelly & Harold Maass, *Aristide Aide Assassinated*, MIAMI HERALD, Oct. 15, 1993, at 1A.

175. *Id.*; Andres Oppenheimer & Christopher Marquis, *Big Guns to Enforce Embargo*, MIAMI HERALD, Oct. 16, 1993, at 1A; Garry Pierre-Pierre, *Rights Monitors Are Pulled Out of Haiti*, N.Y. TIMES, Oct. 16, 1993, at A4. The weekend that the U.N. mission withdrew turned out to be one of the bloodiest in many months, as attachés went on the rampage. See Harold Maass, *Violence Stalking Haiti Slums*, MIAMI HERALD, Oct. 24, 1993, at 1A.

176. John Donnelly & Harold Maass, *Aristide Aide Assassinated*, MIAMI HERALD, Oct. 15, 1993, at 1A; Harold W. French, *Haiti Justice Minister Slain in Defiance of U.S. Warning to Military to Keep Peace*, N.Y. TIMES, Oct. 15, 1993, at A1.

177. R.W. Apple, Jr., *President Orders Six U.S. Warships for Haiti Patrol*, N.Y. TIMES, Oct. 16, 1993, at A1; Andres Oppenheimer & Christopher Marquis, *Big Guns to Enforce Embargo*, MIAMI HERALD, Oct. 16, 1993, at 1A.

178. See Howard W. French, *Tension Is Rising as Haiti Military Tightens Its Grip*, N.Y. TIMES, Oct. 17, 1993, at A1.

179. Paul Lewis, *U.N. Backs Use of Ships to Enforce Haiti Embargo*, N.Y. TIMES, Oct. 17, 1993, at 11.

180. S.C. Res. 875, U.N. SCOR, 3293rd mtg., at 2, para. 1, U.N. Doc. S/Res/875 (1993) (authorizing member states to "halt inward maritime shipping as necessary" to enforce embargo). See Paul Lewis, *U.N. Backs Use of Ships to Enforce Haiti Embargo*, N.Y. TIMES, Oct. 17, 1993, at 11; Andres Oppenheimer & John Donnelly, *Haitians, Foreigners Flee Capital*, MIAMI HERALD, Oct. 17, 1993, at 1A.

181. See Exec. Order No. 12,872, 58 Fed. Reg. 54,029 (1993) (implementing embargo in the U.S.).

182. See *OAS Backs U.N. Embargo of Haiti*, REUTER, Oct. 18, 1993, available in LEXIS, Nexis Library, NEWS File.

183. Note by the President of the Security Council, U.N. SCOR, 3298th mtg., U.N. Doc. S/26633 (1993).

The Security Council's swift response to Cédras' failure to resign did not, however, put implementation of the Governors Island Agreement back on track. Instead, any chance that Aristide might return collapsed as the U.S. sent mixed signals to the Haitian military over the next two weeks. The U.S. froze the U.S. assets of 41 individuals and 34 organizations "obstructing the restoration of democracy in Haiti."<sup>184</sup> It also imposed a ban on October 19, 1993, on U.S. trade with Haiti, invoking the OAS embargo which (unlike the U.N. embargo) covered all trade rather than just oil and military goods.<sup>185</sup> To ensure enforcement and to make the warships more visible, President Clinton ordered U.S. warships to move within three miles of Haiti's coast.<sup>186</sup> Some officials pointedly hinted at the possibility of using force to restore Aristide,<sup>187</sup> and public reports began to appear about drug trafficking by the Haitian military.<sup>188</sup> Presi-

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184. On October 18, 1993, President Clinton signed an executive order freezing the U.S. assets of and denying visas to military leaders and their supporters. See *Clinton Acts to Block Trade with Haiti*, 10 BNA INT'L TRADE REP. 1756 (1993); Exec. Order No. 12,872, 58 Fed. Reg. 54,024 (1993) (amending 31 C.F.R. 580); 58 Fed. Reg. 54,029 (1993). Christopher Marquis, *U.S. Blocks Assets of Aristide Opponents*, MIAMI HERALD, Oct. 23, 1993, at 24A. The 41 individuals and 34 organizations were listed by the Treasury on November 1, 1993. See 58 Fed. Reg. 58,480 (1993).

185. See 58 Fed. Reg. 54,024 (1993) (amending 31 C.F.R. 580); *supra* text accompanying note 71. See also David Hancock, *Customs Expects Traders to Take Trade Ban Seriously*, MIAMI HERALD, Oct. 20, 1993, at 13A; Andres Oppenheimer & Christopher Marquis, *Clinton Tightens Haiti Sanctions*, MIAMI HERALD, Oct. 20, 1993, at 1A.

186. Andres Oppenheimer & Christopher Marquis, *Clinton Tightens Haiti Sanctions*, MIAMI HERALD, Oct. 20, 1993, at 1A.

187. U.S. Ambassador to the United Nations Madeleine Albright stated on October 18 that "[w]e have not ruled out anything. We are concerned about protecting American lives and restoring democracy." *U.S. Not Ruling Out Use of Force, Ambassador Says*, MIAMI HERALD, Oct. 18, 1993, at 6A. See also Steven A. Holmes, *Clinton Says He Still Supports Yeltsin Despite Shift on the Elections*, N.Y. TIMES, Nov. 8, 1993, at A6 (later refusal by Clinton to rule out use of force in Haiti). That same day, however, Secretary of Defense Les Aspin said that "[t]he current mood of the nation would indicate that we be less likely to be doing these missions rather than more likely." Christopher Marquis, *Haiti Scrambles U.S. Political Scene*, MIAMI HERALD, Oct. 19, 1993, at 1A.

188. While plausible, the timing of the reports could easily be read as a further threat of military intervention in light of the U.S. invasion of Panama following General Manuel Antonio Noriega's indictment for drug trafficking. See Bob Graham, *What Should U.S. Do About Haiti? Rescue It!*, MIAMI HERALD, Oct. 20, 1993, at 15A (reference by U.S. Senator); Paul Lewis, *Exiled President Asks Full Embargo Be Placed on Haiti*, N.Y. TIMES, Oct. 29, 1993, at A1; Christopher Marquis, *Haiti's Fate Affects U.S. Interests in Numerous Ways*, MIAMI HERALD, Oct. 22, 1993, at 20A (reference by members of Congress); See also *Continuing Violence in Haiti*, COHA'S WASH. REP. ON THE AMERICAS, Oct. 3, 1993, at 4. But see Jeff Leen, *Sources: Re-*

dent Clinton reiterated his personal support for Aristide's return on a number of occasions.<sup>189</sup>

On the other hand, conservatives in the U.S. attempted to limit the President's power to commit troops to Haiti.<sup>190</sup> Ultimately, Congress backed down<sup>191</sup> (as it usually has in such matters<sup>192</sup>). But the congressional debate provided an opportunity for conservative U.S. critics of Aristide, most prominently Senator Jesse Helms, to portray him as a "psychopath" and a "human rights abuser who controls Haiti through his blood-thirsty mobs."<sup>193</sup> In that endeavor, the conservatives were aided by the active efforts of the CIA, which leaked a psychological profile of Aristide prepared under the Bush Administration.<sup>194</sup> The profile depicted Aristide as undemocratic and mentally unstable, and falsely stated that he had sought treatment for depression in Canada.<sup>195</sup> In that same period, while avoiding any

*ports on Haiti Drug Trafficking Unfounded*, MIAMI HERALD, Oct. 29, 1993, at 16A; Joseph B. Treaster, *Drug Flow Through Haiti Sharply Cut by Embargo*, N.Y. TIMES, Nov. 4, 1993, at A6.

189. See Steven Greenhouse, *Clinton Defends Aristide*, N.Y. TIMES, Oct. 24, 1993, at A13.

190. See Adam Clymer, *Foreign Policy Tug-of-War: Latest in a Long String of Battles*, N.Y. TIMES, Oct. 19, 1993, at A4; Thomas L. Friedman, *Clinton Vows to Fight Congress On His Power to Use the Military*, N.Y. TIMES, Oct. 19, 1993, at A1; Thomas L. Friedman, *Dole to Offer Bill to Limit the Role of G.I.'s in Haiti*, N.Y. TIMES, Oct. 18, 1993, at A1; Christopher Marquis, *Haiti Scrambles U.S. Political Scene*, MIAMI HERALD, Oct. 19, 1993, at 1A.

191. David Hess, *Senate Rejects Challenge to Clinton Foreign Policy*, MIAMI HERALD, Oct. 20, 1993, at 13A; Clifford Krauss, *Dole Concedes to Clinton in Fight Over Right to Send Troops to Haiti*, N.Y. TIMES, Oct. 21, 1993, at A4; Clifford Krauss, *Dole Tries to Rein in a President But Slips*, N.Y. TIMES, Oct. 22, 1993, at A10; *Senate, Clinton Reach Compromise on Foreign Policy Decision-Making*, MIAMI HERALD, Oct. 21, 1993, at 15A; *Senate Votes Against Restrictions on Clinton Foreign Policy*, MIAMI HERALD, Oct. 22, 1993, at 20A.

192. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* 48-49 (1993).

193. 139 CONG. REC. S13,979 (daily ed. Oct. 20, 1993).

194. See Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour*, N.Y. TIMES, Aug. 3, 1993, at A1, A5.

195. 139 CONG. REC. S13,979 (daily ed. Oct. 20, 1993) (remarks of Sen. Helms noting that: "[his] associates recently received a CIA briefing on President Aristide"). See Steven A. Holmes, *Administration Is Fighting Itself On Haiti Policy*, N.Y. TIMES, Oct. 23, 1993, at 1; Christopher Marquis, *Aristide Calls Claims of Depression 'Garbage'*, MIAMI HERALD, Oct. 23, 1993, at 1A; Christopher Marquis, *CIA Report on Aristide Was False*, MIAMI HERALD, Dec. 2, 1993, at 1A. See also *CIA Report on Aristide Called Into Question*, MIAMI HERALD, Oct. 30, 1993, at 28; *U.S. Rejects Report on Aristide 'Instability'*, N.Y. TIMES, Oct. 31, 1993, at 8.

It was also publicly revealed at the same time that in 1987-1988, the CIA had attempted to undercut Aristide's call for a boycott of the sham elections con-



vigorous effort to rein in the CIA,<sup>196</sup> the Clinton Administration began pressing Aristide to "broaden" his cabinet to include conservatives,<sup>197</sup> echoing demands that the Haitian military and right-wing Duvalierists associated with it had been making at least since early October.<sup>198</sup>

As the October 30th deadline for Aristide's return approached, efforts to reach a settlement on the Haitian political scene were fruitless. The attempt to pass a law separating the police from the military bogged down in the legislature as it became entangled in Cédras' demand that the amnesty be enacted as a statute.<sup>199</sup> In late October, the military rushed to

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ducted by the military by proposing to funnel money to some individual candidates. The Senate Intelligence Committee refused to approve the scheme. See Jim Mann, *CIA's Aid Plan Would Have Undercut Aristide in '87-'88*, L.A. TIMES, Oct. 31, 1993, at A1. On Aristide's position on those elections, see *id.*; *infra* part IV.B.1.

It was publicly revealed shortly thereafter that key figures in the Haitian military had been on the CIA payroll "from the mid-1980's at least until the 1991 coup." Tim Weiner, *Key Haiti Leaders Said To Have Been in the CIA's Pay*, N.Y. TIMES, Nov. 1, 1993, at A1. See also Stephen Engelberg et. al., *C.I.A. Formed Haitian Unit Later Tied to Narcotics Trade*, N.Y. TIMES, Nov. 14, 1993, at 1.

Finally, in September 1994, the U.S. acknowledged that Emmanuel Constant, the head of FRAPH (the public front for the attachés), had been on the U.S. payroll — even at the time that he led the mob efforts to turn back the *Harlan County*. See Allain Nairn, *Behind Haiti's Parliamentaries*, 259 NATION 458 (1994); Allain Nairn, *He's Our S.O.B.*, 259 NATION 481 (1994); Stephen Engleberg, *A Haitian Leader of Parliamentaries Was Paid by the C.I.A.*, N.Y. TIMES, Oct. 8, 1994, at 1; Christopher Marquis, *Chief of Haitian Thugs Reportedly Paid by U.S.*, MIAMI HERALD, Oct. 7, 1994, at 1A; R. Jeffrey Smith, *CIA Informer in Haiti Had '2 Lives'*, WASH. POST, Oct. 8, 1994, at A8.

196. Christopher Marquis, *Clinton Goal to Return Aristide to Power Under by Aides*, MIAMI HERALD, Nov. 4, 1993, at 19A.

197. Thomas L. Friedman, *Envoys Press Aristide*, N.Y. TIMES, Oct. 21, 1993, at A4; Christopher Marquis & Andres Oppenheimer, *U.S. Pushes for Changes in Haiti's Cabinet*, MIAMI HERALD, Oct. 21, 1993, at 1A. The Clinton Administration renewed its call a week later. See Steven A. Holmes, *U.S. Advisers Weigh French Plan for a Total Embargo on Haiti*, N.Y. TIMES, Oct. 28, 1993, at A7.

198. Don Bohning, *Strike's Aim: Keeping Aristide Away*, MIAMI HERALD, Oct. 8, 1993, at 1A.

199. See Don Bohning, *Amid Gloom, a Glimmer of Optimism*, MIAMI HERALD, Oct. 25, 1993, at 1A; Howard W. French, *Alliance by Anti-Aristide Forces and Flight by Fearful Lawmakers May Doom Pact*, N.Y. TIMES, Oct. 27, 1993, at A7; Howard W. French, *Premier in Haiti Meets Army Chief*, N.Y. TIMES, Oct. 26, 1993, at A7; Howard W. French, *U.S. Withdraws Troop Ship From Haiti*, N.Y. TIMES, Oct. 13, 1993, at A4; Harold Maass & Tim Johnson, *Haitian Deal Stalls Due to No Quorum*, MIAMI HERALD, Oct. 27, 1993, at 10A; Garry Pierre-Pierre, *After Talks, Haitian Aides Hope for a Break in the Impasse*, N.Y. TIMES, Oct. 25, 1993, at A3. See also Howard W. French, *U.S. Withdraws Troop Ship From Haiti*, N.Y. TIMES, Oct. 13, 1993, at A4; Garry Pierre-Pierre, *Amid Strife, Parliament In a Struggle With Itself*, N.Y. TIMES, Oct. 31, 1993, at 8.

complete construction of a road to the Dominican Republic, which would make evading the sanctions much easier.<sup>200</sup>

By October 28th, when Aristide addressed the U.N. General Assembly, it was already clear that he would not be returning on the 30th.<sup>201</sup> Aristide called for a total embargo on Haiti, rather than the limited U.N. embargo on oil and military equipment already in place,<sup>202</sup> as the only way to bring about compliance with the Governors Island Agreement. Although France circulated a draft resolution calling for such a total embargo,<sup>203</sup> U.S. officials indicated their preference for what they called a more targeted approach aimed at the military and its elite supporters.<sup>204</sup>

Aristide's failure to return on October 30th was duly condemned by the Security Council.<sup>205</sup> The Joint Envoy made few inconclusive efforts over the next several days to engage the military in further talks,<sup>206</sup> but the undertaking came to a sputtering halt on November 5, 1993, when no representative of the military even bothered to show up for a new round of negoti-

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200. Howard W. French, *New Haiti Road Could Be Anti-Embargo Lifeline*, N.Y. TIMES, Oct. 28, 1993, at A1.

201. R.W. Apple, Jr., *U.S. Concludes Aristide Can't Return by Deadline*, N.Y. TIMES, Oct. 27, 1993, at A1.

202. Paul Lewis, *Exiled President Asks Full Embargo Be Placed on Haiti*, N.Y. TIMES, Oct. 29, 1993, at A1; Christopher Marquis & Paul Anderson, *Aristide Urges 'Complete Blockade'*, MIAMI HERALD, Oct. 29, 1993, at 1A.

203. Steven A. Holmes, *U.S. Advisers Weigh French Plan for a Total Embargo on Haiti*, N.Y. TIMES, Oct. 28, 1993, at A7.

204. See R.W. Apple, Jr., *In Shift, U.S. Plans to Limit Penalties to Rulers in Haiti*, N.Y. TIMES, Nov. 2, 1993, at A1; Christopher Marquis, *What Next for U.S. on Haiti? The Options Aren't Good*, MIAMI HERALD, Oct. 30, 1993, at 28A. The idea was to limit further international sanctions to measures such as freezing the assets all over the world of Haitian military leaders and other members of the elite. The U.S. asked other countries, including France, Switzerland, Britain, and the Dominican Republic, to order such freezes unilaterally. *Id.* But see Garry Pierre-Pierre, *Effort to Save Haitian Accord Fails as Military Shuns Talks*, N.Y. TIMES, Nov. 6, 1993, at 1 ("Such a recourse has its limitations because many of the military leaders and their supporters are believed to have already moved whatever assets they have under other names.").

205. See Paul Lewis, *Haitian Military Condemned by U.N.*, N.Y. TIMES, Oct. 31, 1993, at 8; *U.N. Council Blasts Haitian Military*, MIAMI HERALD, Oct. 31, 1993, at 24A.

206. See John Donnelly, *New Round of Talks Tentatively Set*, MIAMI HERALD, Nov. 4, 1993, at 19A; Tim Johnson, *Haitian Army Snubs U.N. Request to Revive Talks*, MIAMI HERALD, Nov. 2, 1993, at 10A; *Military Chiefs Seem to OK Talks*, MIAMI HERALD, Nov. 5, 1993, at 18A; Garry Pierre-Pierre, *Haitian Talks End on a Hopeful Note*, N.Y. TIMES, Nov. 4, 1993, at A6.

ations that the Joint Envoy had scheduled.<sup>207</sup>

#### 4. Settlement Efforts and U.S. Intervention After the Collapse of the Governors Island Agreement

In late November 1993, emissaries from the "Four Friends" (the U.S., Canada, France, and Venezuela) met with Cédras and told him that if he did not step down by January 15, 1994, existing sanctions would be greatly tightened.<sup>208</sup> Despite the military's obvious intransigence — Cédras did not step down — the main efforts of the United States and the U.N./OAS envoy from November 1993 to May 1994 were directed at pressuring Aristide to go along with one of several variants of the Governors Island Agreement, all of which were even more favorable to the military than the Governors Island Agreement itself. As President Clinton came under increasing domestic pressure, however, the U.S. changed course in May 1994 and, driven by the refugee crisis, secured U.N. authorization for the use of force — authorization that was used in September 1994.

The first variant of the Governors Island Agreement was a plan by Prime Minister Malval to hold a conference in Haiti attended by the military, Aristide's government, members of parliament, and other groups.<sup>209</sup> The U.S. gave strong support to Malval's initiative.<sup>210</sup> The Clinton Administration publicly advised Aristide to share power with military officers "who have not been part of any oppression,"<sup>211</sup> pressed him to "broaden" his cabinet to include pro-military figures,<sup>212</sup> and even publicly

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207. Garry Pierre-Pierre, *Effort to Save Haitian Accord Fails as Military Shuns Talks*, N.Y. TIMES, Nov. 6, 1993, at 1.

208. See Howard French, *Haitians vs. U.S.*, N.Y. TIMES, Apr. 1, 1994, at A4.

209. Steven A. Holmes, *Premier of Haiti Is Seeking Talks To End Impasse*, N.Y. TIMES, Dec. 7, 1993, at A3; Christopher Marquis, *Malval Seeks to Launch Dialogue to Restore Aristide*, MIAMI HERALD, Dec. 7, 1993, at 18A; Christopher Marquis, *Premier Asks Aristide for More Flexibility to Start New Talks*, MIAMI HERALD, Dec. 3, 1993, at 23A; *Military Now More Flexible, Prime Minister Says*, MIAMI HERALD, Dec. 4, 1993, at 22A. Malval's conference would have included the U.N./OAS Joint Envoy, but only as an observer. Don Bohning, *Saving Haiti: The Odds Are Long and Time Is Short*, MIAMI HERALD, Dec. 12, 1993, at 4M.

210. Christopher Marquis, *Premier Asks Aristide for More Flexibility to Start New Talks*, MIAMI HERALD, Dec. 3, 1993, at 23A. See also *Haitian Planning to Press Vatican*, N.Y. TIMES, Dec. 8, 1993, at A4.

211. *Clinton Adviser Urges Sharing Power with Some in the Haitian Military*, MIAMI HERALD, Dec. 8, 1993, at 12A (quoting Lawrence Pezzullo).

212. See *Aristide's Plight: Out of Sight Out of Mind*, COHA'S WASH. REP. ON

rebuked its own chief human rights officer for suggesting that the Administration reconsider its refugee interdiction policy.<sup>213</sup>

On December 15, 1993, however, Malval announced his resignation as Prime Minister and cancelled plans for the conference. Aristide had been reluctant to see the conference go forward for security reasons and because the conference appeared likely to weaken the terms even of the Governors Island Agreement. That could result in what one observer deemed a "soft coup"<sup>214</sup> by Malval, whom the U.S. had given some indications of favoring over Aristide.<sup>215</sup> The U.S. publicly blamed Aristide for the failure of the conference to take place.<sup>216</sup> In early Janu-

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THE AMERICAS, Dec. 14, 1993, at 3:

The Administration has been suggesting that Aristide's cabinet be expanded so it will include some pro-military figures as a confidence-building measure. But as now constituted, the cabinet already reflects all, even vaguely, democratic tendencies on the island. In fact, Louis Dejoie, Aristide's commerce minister and sworn adversary, is touting the idea that Aristide should be declared incapacitated, with a prime minister ruling in his stead until the end of his term in February, 1996.

213. See Steven A. Holmes, *Rebuking Aide, U.S. Says Haiti Policy Stands*, N.Y. TIMES, Dec. 16, 1993, at A6; *U.S.-Haitian Policy Review Urged*, MIAMI HERALD, Dec. 15, 1993, at 21A.

214. *Aristide's Plight: Out of Sight Out of Mind*, COHA'S WASH. REP. ON THE AMERICAS, Dec. 14, 1993, at 3 ("Washington is ecstatic that the myth that constructive moves are being made on Haiti by Haitians is given credence [by the conference], but what the U.S. and Malval actually have done is to stage a soft coup."); Howard W. French, *Premier of Haiti Criticizes Aristide*, N.Y. TIMES, Dec. 20, 1993, at A1 ("Aides to Father Aristide have said privately that the exiled President had grown distrustful because he suspected that Washington and diplomats at the United Nations were positioning Malval to somehow supersede him").

215. Steven Greenhouse, *U.S. Aides Say They Support Aristide*, N.Y. TIMES, Jan. 7, 1994, at A9 ("some [U.S.] officials have not hidden their preference for Robert Malval" over Aristide). It also appeared that Malval blamed the U.S. for failing to make a sufficient commitment to the success of the talks. Christopher Marquis, *Hope Dealt a New Blow in Haiti*, MIAMI HERALD, Dec. 16, 1993, at 1A.

216. Steven A. Holmes, *U.S. Disenchanted with Haitian Chief*, N.Y. TIMES, Dec. 18, 1993, at 6.

In response, Aristide announced his own conference in Miami in January 1994 to address the problems of the Haitian refugees, a topic of some embarrassment to the Clinton Administration. Christopher Marquis, *Clinton Vows to Reassess Haiti Policy*, MIAMI HERALD, Jan. 7, 1994, at 1A. Representatives of the Haitian military, along with members of the parliament and labor and refugee groups, were invited to attend, but in the end the military sent no delegates. *Aristide Agrees to Have Army at Meeting*, MIAMI HERALD, Jan. 8, 1994, at 20A; Steven Greenhouse, *U.S. Sees a Ray of Hope in Haiti Talks*, N.Y. TIMES, Jan. 14, 1994, at A5; Christopher Marquis, *Aristide Convenes Talks in Miami Amid Controversy*, MIAMI HERALD, Jan. 14, 1994, at 20A; Christopher Marquis, *Legislators Prod U.S. on Haiti*, MIAMI HERALD, Jan. 16, 1994, at 1A. The conference made a number of recommendations to Aristide — including the termination of the 1981 agreement between the U.S. and

ary 1994 President Clinton stated that Aristide's "own prospects are clouded," and said the U.S. would have to "think through and reassess" its approach to Haiti.<sup>217</sup>

As diplomatic efforts ground to a halt once again, there was some talk in late January of transforming the OAS trade embargo into a worldwide one.<sup>218</sup> The joint U.N./OAS observer mission sent thirty members back to Haiti, the first to be stationed there since they withdrew in October 1993.<sup>219</sup> The regime responded defiantly. In early February, Aristide's opponents chose as speaker of the Senate one of the members elected in the sham elections of January 1993.<sup>220</sup>

Efforts to pressure the military, however, were put aside in mid-February 1994 when Aristide was presented with a new plan, hailed by the U.N./OAS envoy as a "significant development."<sup>221</sup> Supposedly negotiated in Haiti by political leaders there from both sides, it called for Aristide to name a new prime minister, for the parliament to enact an amnesty, and for Cédras to retire and François to be transferred to another position. It called for no specific date for Aristide's return.<sup>222</sup>

Seeing no real hope in this newest plan, Aristide refused to go along with it.<sup>223</sup> Again the U.S. publicly blamed Aristide, re-

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Haiti on which the U.S. based its interdiction program, and an endorsement of international military intervention or the training of a Haitian expatriate army. Howard W. French, *Aristide Seeking to Rally Support*, N.Y. TIMES, Jan. 18, 1994, at A6; Christopher Marquis, *Aristide Makes Plea for Unity as Miami Conference Ends*, MIAMI HERALD, Jan. 17, 1994, at 8A.

217. Christopher Marquis, *Clinton Vows to Reassess Haiti Policy*, MIAMI HERALD, Jan. 7, 1994, at 1A. See also Steven Greenhouse, *U.S. Aides Say They Support Aristide*, N.Y. TIMES, Jan. 7, 1994, at A9. The next day, high administration officials went out of their way to state that U.S. support for Aristide had not changed. *Id.*

218. Steven Greenhouse, *Despite Hurting Poor, U.S. to Seek Tougher Embargo Against Haiti*, N.Y. TIMES, Feb. 5, 1994, at 1; Christopher Marquis, *U.S. Seeks Tougher Sanctions for Haiti*, MIAMI HERALD, Jan. 26, 1994, at 1A; *U.S., France Prepare Trade Embargo Proposal*, MIAMI HERALD, Jan. 27, 1993, at 22A.

219. Harold Maass, *Rights Monitors Return to Haiti*, MIAMI HERALD, Jan. 28, 1994, at 8A; Christopher Marquis, *U.S. Seeks Tougher Sanctions for Haiti*, MIAMI HERALD, Jan. 26, 1994, at 1A. See also Susan Benesch, *Rights Monitors: Rebuffed, Repressed But Back in Haiti*, MIAMI HERALD, Mar. 16, 1994, at 6A.

220. *Rightists Tighten Grip on Haiti*, MIAMI HERALD, Feb. 6, 1994, at 23A.

221. *U.N. Aide Defends Plan*, N.Y. TIMES, Feb. 23, 1994, at A5. See also Christopher Marquis, *A New Try at Haiti Solution*, MIAMI HERALD, Feb. 14, 1994, at 1A (calling plan a "milestone").

222. *Id.*; see also *US & U.N. Put Heat on Aristide*, LATIN AM. WKLY. REP., 3 Mar. 1994, at 94.

223. *Aristide Rejects U.S. Appeal to Appoint New Premier*, MIAMI HERALD, Feb.

buking him as "intransigent."<sup>224</sup> The U.N. also pressured him to accept the plan.<sup>225</sup> Although Aristide did agree to meet in Washington with the Haitian politicians backing the plan,<sup>226</sup> in the end he still refused to accept it.<sup>227</sup> Shortly thereafter, Congressional hearings revealed that the plan, far from having been developed in Haiti, had been drafted by the U.S. State Department back in December 1993. The U.S. had even paid for the travel expenses of the Haitian politicians who had come to Washington to present it to Aristide.<sup>228</sup>

In mid-March 1994, the Congressional Black Caucus launched a new effort to pressure the Clinton Administration to change its policy on Haiti and the refugees.<sup>229</sup> The first response of the Clinton Administration was mild: The State Department's December 1993 plan was modified to provide that the amnesty for military officers, the resignation of Cédras, and the confirmation of a new Prime Minister would all take place on a single day. Once again, there was no definite date for Aristide's return.<sup>230</sup> Once again, Aristide rejected the plan.

In the meantime, reports of political terror, including the use of rape as a weapon of political intimidation, were growing in Haiti.<sup>231</sup> There were also increasing signs of the military's

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16, 1994, at 8A; Steven Greenhouse, *Aristide Rejects a U.S. Plan to Name a Haitian Premier*, N.Y. TIMES, Feb. 16, 1994, at A7.

224. Howard W. French, *U.S. Tells Aristide to Bend on Plan*, N.Y. TIMES, Feb. 23, 1994, at A1. See also *Aristide Balks at U.S.-Backed Haitian Democracy Plan*, MIAMI HERALD, Feb. 15, 1994, at 8A.

225. *Aristide Unbending in Talks With U.N. Chief*, N.Y. TIMES, Mar. 6, 1994, at 8.

226. *Aristide Relents, Will See Haitian Lawmakers*, MIAMI HERALD, Feb. 18, 1994, at 12A.

227. Christopher Marquis, *Aristide Rejects Settlement With Military Rulers*, MIAMI HERALD, Feb. 25, 1994, at 14A.

228. See Christopher Marquis, *'Haitian' Proposal Was Made in U.S.A.*, MIAMI HERALD, Mar. 9, 1994, at 4A; *The State Department's Haiti Parliamentary Plan*, COHA'S WASH. REP. ON THE HEMISPHERE, Mar. 7, 1994, at 3.

229. *An Urgent Message to President Clinton*, N.Y. TIMES, Mar. 23, 1994, at A11 (political advertisement); *Black Caucus Urges Tougher Haiti Policy*, N.Y. TIMES, Mar. 23, 1994, at A4; Christopher Marquis, *Clinton, Caucus at Odds*, MIAMI HERALD, Mar. 24, 1994, at 18A; Tony Pugh, *Lawmakers Urge New U.S. Policy*, MIAMI HERALD, Mar. 19, 1994, at 1A.

230. Steven Greenhouse, *Aristide Is Cool to U.S. Shift*, N.Y. TIMES, Mar. 30, 1994; Steven Greenhouse, *U.S. Again Shifts Its Haiti Policy, Seeking Concessions by Military*, N.Y. TIMES, Mar. 27, 1994, at A1.

231. E.g., Susan Benesch, *A Grisly Message in Haiti*, MIAMI HERALD, Mar. 27, 1994, at 1A; Howard W. French, *A Rising Tide of Political Terror Leaves Hundreds*

confidence; its supporters in the Senate sought to have the presidency declared vacant.<sup>232</sup> On March 4, 1994, amidst public indications that the Clinton Administration itself had given up on his return,<sup>233</sup> Aristide formally gave the U.S. six months' notice of his cancellation of the U.S.-Haitian agreement on which the U.S. based its policy of interdicting Haitian refugees.<sup>234</sup> The Clinton Administration came under significant pressure to change its policy.<sup>235</sup>

On April 26, 1994, the Clinton Administration forced Lawrence Pezzullo to resign as its Special Envoy for Haiti matters<sup>236</sup> and replaced him soon thereafter with William Gray, III, President of the United Negro College Fund and a former member of Congress.<sup>237</sup> On April 29, 1994, the U.S. announced that it would ask the Security Council to impose a full embargo on Haiti.<sup>238</sup> On May 6, 1994, the Security Council imposed a

*Dead in Haiti*, N.Y. TIMES, Apr. 2, 1994, at 1; Harold Maass, *Latest Tool of Terror in Haiti: Rape*, MIAMI HERALD, Apr. 13, 1994, at 1A; Harold Maass, *More Haitians Set Sail to Flee Island Conditions*, MIAMI HERALD, May 20, 1994, at 20A; Harold Maass, *Observers: Terror is Worsening*, MIAMI HERALD, Apr. 13, 1994, at 12A; U.N. *Denounces Haitian Paramilitary Group's Terror Campaign*, MIAMI HERALD, Apr. 1, 1994, at 7A; U.N.-OAS *Report Tells of Abductions, Deaths*, MIAMI HERALD, Apr. 9, 1994, at 12A.

232. *Anti-Aristide Senators Seek Presidential Ballot*, MIAMI HERALD, Apr. 11, 1994, at 10A; *Senate Votes to Pick New President*, LATIN AM. WKLY. REP., Apr. 21, 1994, at 159. The next month the lower house took steps to create an emergency government. *Haitian Legislators Isolating Aristide*, MIAMI HERALD, May 5, 1994, at 24A.

233. Steven Greenhouse, *Haiti Policy in Standoff*, N.Y. TIMES, Apr. 7, 1994, at A6.

234. Steven Greenhouse, *Aristide to End Pact That Lets U.S. Stop Boats*, N.Y. TIMES, Apr. 8, 1994, at A4.

235. *E.g.*, DeNeen L. Brown, *A Rising Tide of Activism on Haiti*, WASH. POST, Apr. 30, 1994, at B1; *Congressman Calls for Invasion of Haiti to Arrest Army Leaders*, MIAMI HERALD, Apr. 15, 1994, at 20A; Steven Greenhouse, *Clinton Policy Toward Haiti Comes Under Growing Fire*, N.Y. TIMES, Apr. 15, 1994, at 2; Avis Thomas-Lester, *3,000 March to Protest Clinton Haiti Policy*, WASH. POST, May 1, 1994, at B3.

236. *Haiti Envoy Ousted as U.S. Prepares to Get Tougher*, MIAMI HERALD, Apr. 27, 1994, at 10A; Tim Weiner, *Clinton Forces Out U.S. Envoy to Haiti to Display Resolve*, N.Y. TIMES, Apr. 27, 1994, at A1.

237. Gwen Ifill, *President Names Black Democrat as Haitian Envoy*, N.Y. TIMES, May 9, 1994, at A1; Robert Rankin, *Clinton Picks a Point Man for New Haiti Policy*, MIAMI HERALD, May 9, 1994, at 1A (Gray was to serve for 130 days as an unpaid official while maintaining his position as head of the Fund).

238. *Clamp Total Embargo on Haiti, U.S. Urges United Nations*, MIAMI HERALD, Apr. 30, 1994, at 10A. *See also* Paul Lewis, *U.S. Expects Haiti to Face New Pressure by the U.N.*, N.Y. TIMES, Apr. 29, 1994, at A6.

full trade embargo on Haiti, effective midnight May 21, 1994, essentially converting the OAS embargo into a worldwide one.<sup>239</sup> The Resolution also immediately banned non-scheduled airline flights (to target drug trafficking)<sup>240</sup> and urged member states to freeze the assets of members of the Haitian military.<sup>241</sup> Furthermore, it also ordered all states not to grant entry visas to top military leaders and their civilian supporters.<sup>242</sup>

The purpose of the two-week delay was to give the military one final chance to step down. Instead, on May 11, 1994, its supporters in the Haitian parliament formally declared the presidency vacant and named Emile Jonassaint interim president.<sup>243</sup> The move was immediately denounced by the U.S. and the OAS foreign ministers meeting in Washington, D.C.<sup>244</sup> In late July the military government made plans to hold new elections for president later in the year.<sup>245</sup>

The U.N. embargo went into effect as scheduled on May 21, 1994.<sup>246</sup> Over the next month, further tightening took place. On June 7, 1994, the OAS Foreign Ministers meeting in Belem do Para, Brazil, approved a resolution urging all members to ban commercial flights to and from Haiti, and to ban all financial transactions with Haiti.<sup>247</sup> On June 10, 1994, the U.S. did

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239. S.C. Res. 917, U.N. SCOR, 3376th mtg., paras. 5, 6, U.N. Doc. S/RES/917 (1994). See Paul Lewis, *Tougher Embargo Against Haiti Voted by U.N. Security Council*, N.Y. TIMES, May 7, 1994, at 1; Julia Preston, *Embargo on Haiti Toughened*, MIAMI HERALD, May 7, 1994, at 1A.

240. S.C. Res. 917, *supra* note 239, para. 2.

241. *Id.*, para. 4.

242. *Id.*, para. 3.

243. Susan Benesch and Christopher Marquis, *A New 'President' in Haiti*, MIAMI HERALD, May 12, 1994, at 1A; Douglas Jehl, *Haitian Legislators Name a Provisional President*, N.Y. TIMES, May 12, 1994, at A1; Harold Maass, *A Half Century of Drifting In and Out of Politics*, MIAMI HERALD, May 12, 1994, at 11A. See also *New Authorities Move into Their Offices*, MIAMI HERALD, May 18, 1994, at 12A; Michael Norton, *Haitian May Opt to Rule by Decree*, MIAMI HERALD, May 16, 1994, at 8A.

244. See Susan Benesch and Christopher Marquis, *A New 'President' in Haiti*, MIAMI HERALD, May 12, 1994, at 1A.

245. See *Haiti Regime Begins Organizing Elections*, MIAMI HERALD, July 27, 1994, at 12A; Larry Rohter, *Haiti Plans Ballot Likely to Yield a Replacement for Aristide*, N.Y. TIMES, July 27, 1994, at A3.

246. In the U.S., the embargo was implemented by Exec. Order No. 12,914 — Prohibiting Certain Transactions With Respect to Haiti, 59 Fed. Reg. 24,339 (1994), and by Exec. Order No. 12,917 — Prohibiting Certain Transactions With Respect to Haiti, reprinted in 30 WEEKLY COMP. PRES. DOC. 1147 (May 21, 1994).

247. See *OAS Tightens Squeeze On Haiti But Opposes Armed Invasion*, MIAMI



just that, with the ban on financial transactions taking effect immediately and the travel ban two weeks later.<sup>248</sup> The ban on financial transactions was tightened on June 21, 1994.<sup>249</sup> The military government responded by instituting a "state of emergency" on June 12, 1994,<sup>250</sup> and ordering the OAS/U.N. human rights observers to leave a month later on July 11, 1994.<sup>251</sup> Although the Security Council formally denounced the expulsion, the monitors left on July 13.<sup>252</sup>

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HERALD, June 8, 1994, at 3A.

248. Exec. Order 12,920 (1994) — Prohibiting Certain Transactions With Respect to Haiti, *reprinted in* 30 WEEKLY COMP. PRES. DOC. 1261 (June 10, 1994) (banning "[a]ny payment or transfer of funds or other financial or investment assets or credits to Haiti from or through the United States, or to or through the United States from Haiti," with specified exceptions); Memorandum on Haiti, June 10, 1994 (instructing Secretary of Transportation to ban commercial flights between Haiti and U.S. effective midnight June 24), *reprinted in* 30 WEEKLY COMP. PRES. DOC. 1264 (June 10, 1994). See Steven Greenhouse, *U.S. Bars Flights and Money Deals with the Haitians*, N.Y. TIMES, June 11, 1994, at 1; Christopher Marquis, *Haitian Flights to Halt in 2 Weeks*, MIAMI HERALD, June 11, 1994, at 1A. The order did permit Haitians in the U.S. to remit as much as \$50 per month to relatives not in the military. Christopher Marquis, *Haitian Flights to Halt in 2 Weeks*, MIAMI HERALD, June 11, 1994, at 1A. The U.S. also announced an increase in its aid program to feed the poor in Haiti. *Id.*

Canada and the Netherlands issued similar orders regarding commercial air travel. *Id.* Flights between Haiti and France continued for the time being, see Andres Viglucci and Yves Colon, *The Door To Haiti Slams Shut*, MIAMI HERALD, June 25, 1994, at 1A, but ended on July 30. Susan Benesch, *Today's Last French Flight Out Leaves Haiti Increasingly Isolated*, MIAMI HERALD, July 30, 1994, at 22A. With the end of Air France's flights, there were no more commercial flights out of the country, and with guards at the border with the Dominican Republic demanding bribes, *id.*, no reliable way to leave the country at all.

249. Exec. Order No. 12,922 — Blocking Property of Certain Haitian Nationals, *reprinted in* 30 WEEKLY COMP. PRES. DOC. 1321 (June 21, 1994). See Douglas Jehl, *Clinton Panel Urges Blocking Haitians' Bank Accounts*, N.Y. TIMES, June 22, 1994, at A2; Christopher Marquis, *Clinton Freezes U.S. Assets of Haitians in Homeland*, MIAMI HERALD, June 23, 1994, at 16A.

250. Susan Benesch, *'An Act of Defiance' in Haiti*, MIAMI HERALD, June 13, 1994, at 1A; *Haiti Declares an Emergency*, N.Y. TIMES, June 13, 1994, at A4.

251. See Susan Benesch and Christopher Marquis, *Haiti Orders Rights Team to Go Home*, MIAMI HERALD, July 12, 1994, at 1A; Garry Pierre-Pierre, *Haiti Orders U.N. to Remove Staff Monitoring Rights*, N.Y. TIMES, July 12, 1994, at A1. The mission had earlier suspended its activities after criticism by the military. See *Mission Closed Down*, N.Y. TIMES, July 7, 1994, at A7; *Rights Clinton Aide: Regime Must Get Out by End of the Year*, MIAMI HERALD, July 7, 1994, at 1A.

252. Note by the President of the Security Council, U.N. SCOR, U.N. Doc. S/PRST/1994/32 (1994) (statement by Security Council denouncing the expulsion as "provocative behavior that directly affects the peace and security of the region," language that hints at the possible future authorization of military force). See *The Last Line Out*, N.Y. TIMES, July 13, 1994, at A2. On the departure of the monitors, see Susan Benesch, *Haitians Are Left 'Alone to Their Fate'*, MIAMI HERALD, July 13,

In the meantime, the Clinton Administration made a significant change in its refugee policy. On May 8, 1994, the U.S. announced that instead of interdicting Haitian refugees and summarily repatriating them all, as it had been doing since the Kennebunkport Order,<sup>253</sup> it would now give them hearings on board U.S. ships or at other sites in the Caribbean.<sup>254</sup> Over the next two months, the number of those fleeing Haiti skyrocketed.<sup>255</sup> In part the increase in the number of boat people may have reflected the perception that the chances of being granted asylum had improved,<sup>256</sup> in part, it may have reflected the increasing brutality of the regime. With several thousand fleeing each day in early July,<sup>257</sup> the U.S. attempted to stem

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1994, at 1A.

253. See *supra* part III.A.2.

254. Gwen Ifill, *Clinton Grants Haitian Exiles Hearings at Sea*, N.Y. TIMES, May 8, 1994, at 1; Christopher Marquis, *A Change in Haiti Policy*, MIAMI HERALD, May 8, 1994 at 1A. The U.S. did not put the new policy into effect until June 16, 1994. See Christopher Marquis, *U.S. Shortens Haiti Sanctions Timetable*, MIAMI HERALD, July 2, 1994, at 1A. Jamaica and the British dependency of the Turks and Caicos Islands agreed to serve as processing points, and the U.S. sought other locations. Steven Greenhouse, *Islands to Let U.S. Process Haiti Refugees*, N.Y. TIMES, June 4, 1994, at 4; Tim Johnson, *A Grand Mission for Gran Turk*, MIAMI HERALD, July 10, 1994, at 18A; Christopher Marquis, *Jamaica OKs Screening Site for Haitians*, MIAMI HERALD, June 1, 1994. The U.S. also reopened the processing site at Guantanamo. Eric Schmitt, *Tents for Haitians Rise Again at Guantanamo*, N.Y. TIMES, July 2, 1994, at 1. Whether such hearings could adequately protect the rights of refugees was open to question. See Lizette Alvarez, *In Belly of a Ship, U.S. Gives Haitians Assembly-Line Justice*, MIAMI HERALD, July 1, 1994, at 1A; Michael R. Gordon, *In Policy Shift, U.S. Will Admit No Haitians at Sea*, N.Y. TIMES, July 6, 1994, at A1; Andres Viglucci, *U.S. Speeds Up Repatriation of Refugees at Guantanamo*, MIAMI HERALD, July 13, 1994, at 8A; see also Fernando Chang-Muy, *U.S. Mistreats Refugees*, MIAMI HERALD, July 22, 1994, at 19A. However, advocates initially regarded the change as significant. Karen De Witt, *Hunger Strike on Haiti: Partial Victory at Least*, N.Y. TIMES, May 5, 1994, at A4.

255. See Eric Schmitt, *Tents for Haitians Rise Again at Guantanamo*, N.Y. TIMES, July 2, 1994, at 5 (chart). In June and the first half of July 20,000 Haitians were interdicted. Susan Benesch, *Island Camp Deters Flight of Refugees*, MIAMI HERALD, July 16, 1994, at 20A. See also Michael R. Gordon, *Panama Refuses to Take Haitians; A Rebuff for U.S.*, N.Y. TIMES, July 8, 1994, at A1. See also *9 Days of Chaos: 13,689 Rescued*, MIAMI HERALD, July 10, 1994, at 1A; Garry Pierre-Pierre, *Opponents of Haiti's Military Urge Rights Monitors to Stay*, N.Y. TIMES, July 13, 1994, at A2.

256. The number of those who were granted admission to the U.S. to provide further evidence of their claims went from 5% to 33%. Lizette Alvarez, *In Belly of a Ship, U.S. Gives Haitians Assembly-Line Justice*, MIAMI HERALD, July 1, 1994, at 1A; Michael R. Gordon, *In Policy Shift, U.S. Will Admit No Haitians at Sea*, N.Y. TIMES, July 6, 1994, at A1; Steven Greenhouse, *U.S. Is Urged to Allow in More Haitians*, N.Y. TIMES, May 11, 1994, at A9.

257. For example, on July 4, 1994, the Coast Guard interdicted 3,247 Haitians.

the tide by announcing that any Haitians who qualified for asylum would not be admitted to the U.S. but would be kept indefinitely in Panama<sup>258</sup> or at other sites in the Caribbean.<sup>259</sup> A sharp drop in the number of Haitians fleeing Haiti soon eased the United States' immediate predicament.<sup>260</sup>

Nevertheless, the refugee crisis seems to have impelled the U.S. to begin to lay the public groundwork for a possible military invasion.<sup>261</sup> The campaign took various forms: semi-official threats to invade;<sup>262</sup> efforts by the U.S. to assemble a Latin

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Garry Pierre-Pierre, *Drownings of Haitians Rise As Island Exodus Continues*, N.Y. TIMES, July 6, 1994, at A4.

258. Tim Johnson, *Panama Will Shelter Some Haitians*, MIAMI HERALD, July 5, 1994, at 1A.

259. Lizette Alvarez and Christopher Marquis, *Processing of Haitians on Ship Ends*, MIAMI HERALD, July 7, 1994, at 1A; Michael R. Gordon, *In Policy Shift, U.S. Will Admit No Haitians at Sea*, N.Y. TIMES, July 6, 1994, at A1; Garry Pierre-Pierre, *Drownings of Haitians Rise As Island Exodus Continues*, N.Y. TIMES, July 6, 1994, at A4. See also *U.S. Warns Refugees by Radio*, N.Y. TIMES, July 7, 1994, at A7.

Several days after first agreeing to the arrangement, Panama withdrew its offer. *A Rebuff for U.S.*, N.Y. TIMES, July 8, 1994, at A1; Michael R. Gordon, *Panama Refuses to Take Haitians*; Tim Johnson and Christopher Marquis, *Panama Withdraws Offer to Shelter 10,000 Haitians*, MIAMI HERALD, July 8, 1994, at 1A; Larry Rohter, *No Choice But to Withdraw Offer, Panamanian Says*, N.Y. TIMES, July 8, 1994, at A6. Shortly after that, the president-elect of Panama stated that he would permit the housing of refugees there once he took office on September 1, 1994. See Christopher Marquis, *New Panamanian Reversal*, MIAMI HERALD, July 11, 1994, at 1A.

260. For example, only 242 were intercepted on July 9, and 398 on July 10. Christopher Marquis, *New Panamanian Reversal*, MIAMI HERALD, July 11, 1994, at 1A. See also *All Set Up, But There's No One to Process*, MIAMI HERALD, July 28, 1994, at 12A; Susan Benesch, *Island Camp Deters Flight of Refugees*, MIAMI HERALD, July 16, 1994, at 20A; Larry Rohter, *Number of Haitians Fleeing by Sea Drops Off Abruptly*, N.Y. TIMES, July 20, 1994, at A3; Eric Schmitt, *U.S. Making Moves for Haiti Action*, N.Y. TIMES, July 15, 1994, at A1.

261. The prospect of a U.S. invasion heightened at times when the numbers of refugees was greatest, and seemed to recede whenever the immediate crisis in processing refugees eased. See Douglas Jehl, *Clinton Seeks U.N. Approval Of Any Plan to Invade Haiti*, N.Y. TIMES, July 22, 1994, at A1.

262. E.g., Tom Fiedler, *Topic A for Clinton: Haiti*, MIAMI HERALD, July 19, 1994, at 1A; Christopher Marquis, *U.S. Shortens Haiti Sanctions Timetable*, MIAMI HERALD, July 2, 1994, at 1A; Robert A. Rankin, *Clinton Again Makes Veiled Threat to Invade Haiti*, MIAMI HERALD, July 9, 1994, at 16A. But see, e.g., Elaine Sciolino, *Haiti Invasion Not Imminent, Envoy Says*, N.Y. TIMES, July 4, 1994, at A2.

The position of Congress was unclear. Some individual members called for an invasion. See, e.g., Susan Benesch, *Graham: Be Ready for Haiti Invasion*, MIAMI HERALD, June 20, 1994, at 8A; *Congressman Calls for Invasion of Haiti to Arrest Army Leaders*, MIAMI HERALD, Apr. 15, 1994, at 20A. On July 6, 1994, the Senate rejected a bill that would have required President Clinton to receive Congressional

American occupation force that would remain after the U.S. deposed the military rulers;<sup>263</sup> timely military exercises and maneuvers;<sup>264</sup> the establishment of a radio station to broadcast messages by Aristide;<sup>265</sup> and renewed public charges that Haitian military leaders were involved in drug trafficking.<sup>266</sup>

Finally, on July 31, 1994, at U.S. urging, the Security Council authorized military intervention by a multinational regional force.<sup>267</sup> The Security Council also increased the authorized

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approval before invading Haiti. See Elaine Sciolino, *Clinton's Haiti Problem: What Price Democracy?*, N.Y. TIMES, July 7, 1994, at A7. See also Eric Schmitt, *U.S. Making Moves for Haiti Action*, N.Y. TIMES, July 15, 1994, at A1 (noting Senate rejection of Republican proposal to create a commission to study the Haiti crisis).

But there was also sufficient antipathy in Congress towards Aristide that the Haitian military's own sense of confidence was bolstered. See *Clinton Aide: Haiti Invasion Would Be Legal*, MIAMI HERALD, July 18, 1994, at 8A (quoting Sen. Bob Dole, opposing invasion); Christopher Marquis, *Aristide Rejects Invasion as U.S. Leans Toward One*, MIAMI HERALD, July 13, 1994, at 12A (quoting Rep. Robert Torricelli) (invasion would be "extreme mistake" because it would make U.S. responsible for "whatever retribution he [Aristide] takes against his opponents"). Rep. Bill Richardson met with Cédras in Haiti. See Susan Benesch, *Quit — Or Else Invasion Likely, Cédras Told*, MIAMI HERALD, July 20, 1994, at 12A; Larry Rohter, *Number of Haitians Fleeing by Sea Drops Off Abruptly*, N.Y. TIMES, July 20, 1994, at A3. He sympathetically pronounced Cédras a misunderstood man. See *Haiti's Monstrous 'Spin'*, MIAMI HERALD, July 30, 1994, at 34A; Christopher Marquis, *Fumbling of Haiti Policy Fortifies Regime*, MIAMI HERALD, July 28, 1994, at 12A.

In addition, there was no clear public support for an invasion. See, e.g., Garry Pierre-Pierre, *Haiti Orders U.N. to Remove Staff Monitoring Rights*, N.Y. TIMES, July 12, 1994, at A1.

263. See Andres Viglucci and Christopher Marquis, *368 Haitians Get a Chance at Asylum*, MIAMI HERALD, July 15, 1994, at 1A.

264. Tom Post et al., *Getting Ready*, NEWSWEEK, July 25, 1994, at 16; Michael R. Gordon, *U.S. Troops Stage Military Exercise with Eye on Haiti*, N.Y. TIMES, July 7, 1994, at A1; Tim Johnson, *Sending a Message to Haiti's Rulers*, MIAMI HERALD, July 16, 1994, at 1A. See also Brigid Schulte, *State-of-the-Art Ship Sent to Join U.S. Force Off Haiti*, MIAMI HERALD, July 12, 1994, at 8A.

265. Larry Rohter, *Aristide Calls for Reconciliation on His Own Radio Station*, N.Y. TIMES, July 16, 1994, at 4. See also Peter Slevin, *U.S.-Funded Radio Station Joins Array of Broadcasters*, MIAMI HERALD, July 9, 1994, at 16A.

266. See Tim Weiner, *2 Haiti Leaders Are Focus of Drug Inquiry*, N.Y. TIMES, July 23, 1994, at 3. But see David Lyons and Christopher Marquis, *Haiti Military's Drug Ties Questioned*, MIAMI HERALD, June 10, 1994, at 1A. For a description of the use of drug indictments as an instrument of diplomacy, see Weiner, *supra* ("an indictment might help persuade members of the Haitian junta to find refuge in another country, far from the long arm of American law").

267. S.C. Res. 940, U.N. SCOR, 3413th mtg., para. 4, U.N. Doc. S/RES/940 (1994) (invoking Chapter VII of the U.N. Charter) (authorizing formation of "multinational force under unified command and control" to "use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement"); *id.*, para. 12 (inviting all states, "in particular those in the region, to provide appropriate support"). See Richard D. Lyons, *U.N. Autho-*

size of the police mission it had originally created in September 1993 from approximately 1,200 members to 6,000.<sup>268</sup>

During the next month and a half there was still some uncertainty over whether the U.S. would in fact undertake military intervention. The continuing brutal repression in Haiti led to increasing pressure to go beyond sanctions.<sup>269</sup> But Congressional support for military intervention was uncertain at best,<sup>270</sup> popular opinion appeared to be opposed to an invasion,<sup>271</sup> and other foreign policy matters — most notably the Cuban refugee crisis — temporarily diverted the Administration's attention.<sup>272</sup>

*rizes Invasion of Haiti To Be Led by U.S.*, N.Y. TIMES, Aug. 1, 1994, at A1; Christopher Marquis, *U.N. Opens Door for Invasion*, MIAMI HERALD, Aug. 1, 1994, at 1A. See also Eric Schmitt, *U.S. Decision on Invasion Is Said to Be Weeks Away*, N.Y. TIMES, Aug. 1, 1994, at A6. The vote was 12-0. Brazil and China abstained. Mexico and Venezuela (not on the Security Council) opposed the measure. See Christopher Marquis, *U.N. Opens Door for Invasion*, MIAMI HERALD, Aug. 1, 1994, at 1A.

268. S.C. Res. 940, *supra* note 267, para. 11. As part of the Governors Island Agreement, the Security Council had voted on September 23, 1993 to send a twelve to thirteen hundred member mission to police Haiti after the military left. See *infra* part IV.A.3. When its mandate expired 6 months later on March 23, 1994, the Security Council extended it until June 30, 1994. S.C. Res. 905, U.N. SCOR, 3352nd mtg., para. 2, U.N. Doc. S/RES/905 (1994). See *Haiti: Security Council Renews U.N. Mandate*, INTER PRESS SERVICE, Mar. 24, 1994, available in LEXIS, Nexis Library, WIRES File. On June 30, the Security Council extended the mandate of mission and decided to expand its size. S.C. Res. 933, U.N. SCOR, 3397th mtg. para. 1, U.N. Doc. S/RES/933 (1994). See Christopher Marquis, *U.S. Shortens Haiti Sanctions Timetable*, MIAMI HERALD, July 2, 1994, at 1A. On July 15, 1994, the U.N. Secretary General proposed that the Security Council authorize a peacekeeping force of up to 15,000 troops to occupy Haiti if the military stepped down. See Paul Lewis, *U.N. Proposes Peace Force*, N.Y. TIMES, July 16, 1994, at 4. In addition to expanding the size of the mission to 6,000, Resolution No. 940 extended its mandate by 6 months. S.C. Res. 940, *supra* note 267, paras. 9, 11.

269. One of the more prominent acts of repression was the murder of Rev. Jean-Marie Vincent, an Aristide supporter and prominent grass-roots leader, by paramilitary forces. See Rick Bragg, *Haitian Priest, Who Had Aided Aristide, Is Killed by Gunmen*, N.Y. TIMES, Aug. 30, 1994, at A1; Tim Johnson, *Priest with Ties to Aristide Slain*, MIAMI HERALD, Aug. 30, 1994, at 1A. See also Rick Bragg, *Slaying of Priest Heightens the Fear in Haiti*, N.Y. TIMES, Aug. 31, 1994 at A4.

270. See, e.g., Neil A. Lewis, *Aides Say Clinton Doesn't Need Vote in Congress to Invade Haiti*, N.Y. TIMES, Sept. 12, 1994, at A1; *Republicans Still Resisting Clinton on Haiti Invasion*, MIAMI HERALD, Sept. 12, 1994, at 1A; Eric Schmitt, *Legislators In U.S. Differ Over Haiti*, N.Y. TIMES, Sept. 1, 1994, at A6.

271. David E. Rosenbaum, *Democrats Hope to Avoid Embarrassing Vote on Haiti*, N.Y. TIMES, Sept. 14, 1994, at A6 (poll indicated that two-thirds of public questioned wisdom of invasion).

272. Don Bohning and Christopher Marquis, *U.S. to Haiti: You're Not Off Hook*, MIAMI HERALD, Aug. 31, 1994, at 1A.

In addition, regional support for military intervention was mixed. Brazil remained a consistent opponent of intervention, and Argentina a consistent supporter.

On September 15, 1994, President Clinton made a televised address bluntly informing the Haitian military that it must relinquish power or be forced out.<sup>273</sup> In one last effort to avoid an outright invasion, he asked former President Jimmy Carter, Senator Sam Nunn, and General Colin Powell to go to Haiti to negotiate the departure of the military.<sup>274</sup> On September 18, 1994, the Carter delegation reached an agreement under which U.S. forces would enter Haiti with the "close cooperation" of the Haitian military and police, under conditions of "mutual respect."<sup>275</sup> In addition, high ranking officers of the military were to retire upon the enactment by Parliament of "a general amnesty . . . , or [by] Oct. 15, whichever is earlier."<sup>276</sup> Finally, sanctions were to be "lifted without delay in accordance with relevant U.N. resolutions."<sup>277</sup>

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Other states, including Chile, Colombia, Ecuador, Mexico, Peru, and Venezuela, appeared disinclined to support military intervention. See James Brooke, *Latins Join in New Effort to get Haitian Leaders to Step Down*, N.Y. TIMES, Aug. 15, 1994, at A2; *Foreign Ministers Debate Haiti Intervention and Cuban Embargo*, BBC Summary of World Broadcasts, Sept. 10, 1994, available in LEXIS, Nexis Library, NEWS File; *Rio Summit Supports Peaceful Solution to Haiti Crisis*, Xinhua News Agency, Sept. 10, 1994, available in LEXIS, Nexis Library, NEWS File. On the other hand, neither the Latin American states collectively, nor the OAS itself, took any action to prevent a U.S. invasion. See *New OAS Chief Waffles on Haiti*, MIAMI HERALD, Sept. 16, 1994, at 17A; Andres Oppenheimer, *In Latin America, Few Object to a U.S. Invasion*, MIAMI HERALD, Sept. 18, 1994, at 20A.

273. Douglas Jehl, *Clinton Addresses Nation on Threat to Invade Haiti*; Christopher Marquis, *Clinton: 'Your Time Is Up,'* MIAMI HERALD, Sept. 16, 1994, at 1A; *Tells Dictators to Get Out*, N.Y. TIMES, Sept. 16, 1994, at A1.

274. Douglas Jehl, *Holding Off, Clinton Sends Carter, Nunn and Powell to Talk to Haitian Junta*, N.Y. TIMES, Sept. 17, 1994, at A1; Christopher Marquis, *A Final U.S. Reach for Peace*, MIAMI HERALD, Sept. 17, 1994, at 1A. Cédras had earlier suggested Carter as a mediator, and Carter had been raising the matter with Clinton for some time. See John M. Goshko, *Haiti Leader Foresees Invasion as Inevitable*, WASH. POST, Aug. 7, 1994, at A26; Elaine Sciolino et al., *On the Brink of War, a Tense Battle of Wills*, N.Y. TIMES, Sept. 20, 1994, at A1.

275. *What They Signed*, MIAMI HERALD, Sept. 19, 1994, at 8A (reproducing text of September 18th Agreement). See Susan Benesch et al., *Back from the Brink*, MIAMI HERALD, Sept. 19, 1994, at 1A.

276. *What They Signed*, MIAMI HERALD, Sept. 19, 1994, at 8A (reproducing text of September 18th Agreement). See also Steve Goldstein, *How Deal Was Made on Verge of War*, MIAMI HERALD, Sept. 20, 1994, at 7A; Elaine Sciolino et al., *On the Brink of War, a Tense Battle of Wills*, N.Y. TIMES, Sept. 20, 1994, at A1.

277. *What They Signed*, MIAMI HERALD, Sept. 19, 1994, at 8A (reproducing text of September 18th Agreement). In a speech to the U.N. on September 26, 1994, President Clinton announced that the U.S. would suspend all unilateral sanctions against Haiti "except those that affect the military leaders and their immediate supporters." See Christopher Marquis, *U.S. Lifts Haiti Sanctions*, MIAMI HERALD, Sept. 27, 1994, at 1A; *President's Words: Fight Between Hope and Fear*, N.Y. TIMES,

Some 2,000 U.S. troops entered Haiti the next day,<sup>278</sup> and by the second week of October approximately 20,000 U.S. troops had arrived.<sup>279</sup> The United States' assertion of power in Haiti during the transition period between September 19 and October 15 was in many ways gradual and uncertain.<sup>280</sup> On the one hand, for much of the transition period the U.S., pledged as it was to work in "close cooperation" with the Haitian military,<sup>281</sup> failed to take effective action to bring the Haitian army and its irregular allies under full control. In two instances, attachés murdered pro-Aristide demonstrators as U.S. forces passively observed.<sup>282</sup> The U.S. took some steps to disarm the military,

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Sept. 27, 1994, at A6 (excerpts of speech). See also Steven Greenhouse, *Lifting Sanctions on Haiti Will Take Up to 2 Weeks*, N.Y. TIMES, Sept. 27, 1994, at A5.

On September 29, 1994, the U.N. Security Council voted to terminate sanctions on the day after President Aristide returned to Haiti. S.C. Res. 944, U.N. SCOR, 3430th mtg., para. 4, U.N. Doc. S/RES/944 (1994).

On the OAS reaction, see James Brooke, *Latin America Breathes a Half-Sigh of Relief Over Haiti*, N.Y. TIMES, Sept. 20, 1994, at A7 (expression by OAS Secretary General of "deep satisfaction over the agreement, which assumes that political measures and diplomacy will prevail").

278. Larry Rohter, *2,000 U.S. Troops Land Without Opposition and Take Over Haiti's Ports and Airfields*, N.Y. TIMES, Sept. 20, 1994, at A1; Peter Slevin et al., *Troops Enter Haiti Without Firing a Shot*, MIAMI HERALD, Sept. 20, 1994, at 1A.

279. See Perry: *Haiti Showing 'Significant Progress'*, MIAMI HERALD, Oct. 9, 1994, at 23A.

280. Only in Cap-Haïtien, where a virtual revolution by the residents took place on September 24, 1994, did there appear to be a relatively clean transfer of power to the U.S. See Yves Colon & Peter Slevin, *Gunfire May Test U.S. Public Will*, MIAMI HERALD, Sept. 26, 1994, at 8A; Steven Greenhouse, *U.S. to Press Cédras to Speed Up Disarming of Allies, General Says*, N.Y. TIMES, Sept. 26, 1994, at A1; Eric Schmitt, *Haitian Crowds Loot Police Buildings*, N.Y. TIMES, Sept. 26, 1994, at A1. See also Susan Benesch, *Thank You, American Soldiers, for Saving Us*, MIAMI HERALD, Sept. 26, 1994, at 1A; *Marines Kill Nine Haitians*, MIAMI HERALD, Sept. 25, 1994, at 1A; Eric Schmitt, *Haiti City Is Calm, But Tense*, N.Y. TIMES, Sept. 27, 1994, at A5.

281. *What They Signed*, MIAMI HERALD, Sept. 19, 1994, at 8A (reproducing text of September 18th Agreement).

282. One such incident took place on September 20, 1994, see Yves Colon et al., *U.S. Troops Watch Helplessly As Police Attack Demonstrators*, MIAMI HERALD, Sept. 21, 1994, at 1A, after which the U.S. changed the rules of engagement of its soldiers to permit limited intervention in such cases. See Douglas Jehl, *Clinton Says U.S. Will Deter Abuses by Haiti Police*, N.Y. TIMES, Sept. 22, 1994, at A1; John Kifner, *Top U.S. Generals Warn Cédras to Halt Violence*, N.Y. TIMES, Sept. 22, 1994, at A8; John Kifner, *U.S. Troops Given Orders to Halt Haitian Beatings*, N.Y. TIMES, Sept. 23, 1994, at A1; Peter Slevin and Martin Merzer, *U.S. Takes Away All Big Guns From Army*, MIAMI HERALD, Sept. 23, 1994, at 1A, 14A (reprinting new rules of engagement).

A second incident occurred on September 30, when attachés killed a number of peaceful demonstrators commemorating the third anniversary of the coup. Susan

particularly of its heavy weaponry,<sup>283</sup> but its efforts to disarm the Haitian army's paramilitary allies were fairly mild. The main reasons appeared to be a fear that possible American casualties resulting from a thoroughgoing effort to disarm the paramilitaries would produce a political backlash in the U.S.,<sup>284</sup> and the United States' commitment under the September 18th Agreement to cooperate with rather than supersede the Haitian military and police.<sup>285</sup>

On the other hand, the U.S. did act decisively in late September to bar the members of Parliament elected in the January 1993 sham elections from taking part in the legislative deliberations over amnesty.<sup>286</sup> That action paved the way for Haiti's Parliament to approve a bill on October 7 giving Aristide the power to grant amnesty for political crimes, but apparently not human rights violations — a position that accorded with Aristide's own.<sup>287</sup> On October 10, 1994, General Cédras retired,<sup>288</sup> and three days later he left for exile in Panama.<sup>289</sup>

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Benesch et al., *Haiti March Turns Deadly: Attachés Fire on Crowd, Killing 4*, MIAMI HERALD, October 1, 1994, at 1A; John Kifner, *Pro-Junta Gunmen Fire on Rally in Haitian Capital*, N.Y. TIMES, Oct. 1, 1994, at 1. See also Michael R. Gordon, *The Decision Not to Be The Police Backfires*, N.Y. TIMES, Oct. 1, 1994, at 4; Garry Pierre-Pierre, *Village Mourns Marchers Mowed Down by Van*, N.Y. TIMES, Oct. 11, 1994, at A7.

283. Peter Slevin and Martin Merzer, *U.S. Takes Away All Big Guns From Army*, MIAMI HERALD, Sept. 23, 1994, at 1A, 14A.

284. Steven Greenhouse, *U.S. Forces to Widen Role In Curbing Haiti Violence*, N.Y. TIMES, Oct. 2, 1994, § 1, at 1.

285. John Kifner, *A U.S. Raid in Haiti Discovers Dancers, Not a Weapons Cache*, N.Y. TIMES, Oct. 3, 1994, at A1; John Kifner, *Search for Haiti Arms Yields a Sense of Security*, N.Y. TIMES, Oct. 9, 1994, § 1, at 3; Peter Slevin, *Disarming Haiti*, MIAMI HERALD, Oct 3, 1994, at 1A.

286. Larry Rohter, *U.S. to Bar Legislators From Amnesty Session*, N.Y. TIMES, Sept. 27, 1994, at A5.

287. See Susan Benesch, *Haitian Senators Approve Amnesty*, MIAMI HERALD, Oct. 8, 1994, at 1A; Larry Rohter, *Haitian Bill Doesn't Exempt Military From Prosecution*, N.Y. TIMES, Oct. 8, 1994, at 4. See also *Lower House Approves Amnesty Law*, MIAMI HERALD, Oct. 7, 1994, at 18A; Larry Rohter, *Haiti's Military May Not Avoid Criminal Trials*, N.Y. TIMES, Oct. 6, 1994, at A1. On Aristide's position, see Steven Greenhouse, *Exiled President Urges Quick Disarming Of Haitian Troops and Paramilitary Units*, N.Y. TIMES, Sept. 21, 1994, at A8.

288. Larry Rohter, *Army Commander in Haiti Resigns, Vowing to Leave*, N.Y. TIMES, Oct. 11, 1994, at A1; Peter Slevin, *Somber Cédras Steps Down to Chorus of Jeers*, MIAMI HERALD, Oct. 11, 1994, at 1A. General Biamby, the army chief of staff, also retired. *Id.* The other major figure in the military, chief of police Michel François, had fled to the Dominican Republic on October 4, 1994. Susan Benesch, *Dreaded Coup Leader First to Flee*, MIAMI HERALD, Oct. 5, 1994, at 1A; Larry Rohter, *Haiti's Military Power Structure Is Showing Signs of Falling Apart*, N.Y.



On October 15, 1994, Aristide returned to Haiti after three years of exile, marking a real triumph for the United States, the U.N., and the OAS.<sup>290</sup>

### B. Peru

Haiti presented a picture of an initial unequivocal condemnation followed by needlessly drawn out effort to reverse a coup. Peru, in contrast, revealed an organization uncertain how strongly and consistently to condemn a civilian-led rupture when the leader of the autogolpe bent slightly under pressure, but otherwise refused to back down.

On April 5, 1992, President Alberto Fujimori dissolved Congress, closed the courts, and suspended the Constitution, actions that appeared to exceed his powers as President.<sup>291</sup> He also

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TIMES, Oct. 5, 1994, at A1.

289. John Kifner, *Cédras Flies To an Exile In Panama*, N.Y. TIMES, Oct. 14, 1994, at A9.

290. John Kifner, *Aristide, in a Joyful Return, Urges Reconciliation in Haiti*, N.Y. TIMES, Oct. 16, 1994, at 1; Peter Slevin et al., *'Let Us Live in Peace,'* MIAMI HERALD, Oct. 16, 1994, at 1A.

In accordance with its earlier resolution, the Security Council lifted sanctions against Haiti. S.C. Res. 948, U.N. SCOR, 3437th mtg., para. 10, U.N. Doc. S/RES/948 (1994). See also *A New Seat of Power for Leader*, MIAMI HERALD, Oct. 16, 1994, at 19A.

In its Resolution of September 29, 1994, the U.N. Security Council urged the OAS to lift its own sanctions at the appropriate time. See S.C. Res. 944, *supra* note 277, para. 6. The OAS lifted the ban on flights and financial transactions on October 12, 1994. Note from Dr. Antonio Quiroga, President of the Ad Hoc Meeting of Ministers of Foreign Affairs (Haiti), Requesting Rescindment of the Measures Concerning the Suspension of Commercial Flights and International Financial Transactions with Haiti, OEA/ser.F/V.1, OAS Doc. MRE/INF. 53/94, (1994). See also *OAS Lifts Air, Finance Sanctions Against Haiti*, AGENCE FRANCE PRESSE, Oct. 12, 1994, available in LEXIS, Nexis Library, NEWS File. Two days later, it approved a lifting of all remaining sanctions against Haiti upon Aristide's return to office. Note from the President of the Ad Hoc Meeting of Ministers of Foreign Affairs (Haiti) Requesting the Lifting of All Measures Imposed Against Haiti as soon as the Constitutional President, Jean-Bertrand Aristide, Resumes Office, OEA/ser.F/V/1, OAS Doc. MRE/INF. 54/94, (1994).

291. See *Ley de Bases del Gobierno de Emergencia y Reconstrucción Nacional*, Decreto Ley 25418 (Peru), reprinted in *EL PERUANO*, Apr. 7, 1992, at 106163. See also Sam Dillon & Christopher Marquis, *Peruvian President to Rule by Decree, Backed by Army*, MIAMI HERALD, Apr. 7, 1992, at 1A; *Troops Surround Congress and Patrol Lima*, N.Y. TIMES, Apr. 7, 1992, at A1. See generally 1993 C.H.R. Report on Peru, *supra* note 54, at 16; AMERICAS WATCH, PERU: CIVIL SOCIETY AND DEMOCRACY UNDER FIRE (Aug. 1992) [hereinafter AMERICAS WATCH REPORT ON PERU]; Sam Dillon, *Fujimori Is Called Instigator of Takeover*, MIAMI HERALD, Apr. 10, 1992, at

briefly instituted media censorship, arrested some journalists and opponents of his regime,<sup>292</sup> and took steps to replace the members of the Supreme Court and other judges. He cited the need to fight drug trafficking, terrorism, and corruption in Congress and the courts.

The U.S. immediately denounced Fujimori's actions, demanded the release of those detained, suspended aid to Peru, and indicated that it would oppose any further loans from the World Bank, the Inter-American Development Bank, and the International Monetary Fund.<sup>293</sup> A little over a week later, the

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The Peruvian Constitution of 1979 gave the President the power to dissolve the Chamber of Deputies, see PERU CONST. art. 227, reprinted in 14 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD 13, 109 (A.P. Blaustein & G. H. Flanz eds., 1990) [hereinafter 14 CONSTITUTIONS]; but denied him the power to dissolve the Senate, *id.* art. 230, reprinted in 14 CONSTITUTIONS, *supra*, at 111. Moreover, it permitted him to dissolve the Chamber of Deputies only if it had denied a vote of confidence to or censured three of his cabinet members, *id.* art. 227, reprinted in 14 CONSTITUTIONS, *supra*, at 109. The Constitution also forbade the President to suspend the Chamber of Deputies during a state of emergency, *id.* art. 229, reprinted in 14 CONSTITUTIONS, *supra*, at 111. Finally, although it specified a procedure for amendments, *id.* art. 306, reprinted in 14 CONSTITUTIONS, *supra*, at 147, Fujimori did not follow those provisions. Nathaniel C. Nash, *Peruvians Backing Leader's Actions*, N.Y. TIMES, Apr. 9, 1992, at A3 (noting statement by Peruvian Foreign Minister that Fujimori had violated the Constitution).

292. See U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 478-79; Sam Dillon, *Leader's Decree Sets Goals in Peru*, MIAMI HERALD, Apr. 8, 1992, at 11A; Gustavo Gorriti, *Peru: A Democracy Kidnapped*, MIAMI HERALD, Apr. 19, 1992, at 6C; Sarah Kerr, *Fujimori's Plot: An Interview with Gustavo Gorriti*, N.Y. REV. BOOKS, June 25, 1992, at 18; Nathaniel C. Nash, *Peru Chief Orders New Mass Arrests*, N.Y. TIMES, Apr. 8, 1992, at A8; *Troops Surround Congress and Patrol Lima*, N.Y. TIMES, Apr. 7, 1992, at A1. See also Olufunmilayo B. Arewa & Susan O'Rourke, Note, *Country-Specific Legislation and Human Rights: The Case of Peru*, 5 HARV. HUM. RTS. J. 183, 185 (1992); James Brooke, *A Lethal Army of Insurgents Lima Could Not Stamp Out*, N.Y. TIMES, Apr. 7, 1992, at A1 (noting that "one-half of Peru's population of 22 million were living under states of siege even before" Fujimori's proclamation).

293. Barbara Crossette, *U.S., Condemning Fujimori, Cuts Aid to Peru*, N.Y. TIMES, Apr. 7, 1992, at A1; Sam Dillon & Christopher Marquis, *Peruvian President to Rule by Decree, Backed by Army*, MIAMI HERALD, Apr. 7, 1992, at 1A; Nathaniel C. Nash, *Peru Chief Orders New Mass Arrests*, N.Y. TIMES, Apr. 8, 1992, at A8; Thomas L. Friedman, *Bush Backs 'Outside Pressure' to End Peru's Crisis*, N.Y. TIMES, Apr. 11, 1992, at 3; Nathaniel C. Nash, *Peruvians Backing Leader's Actions*, N.Y. TIMES, Apr. 9, 1992, at A3.

Two days after the coup, the IADB suspended delivery of \$220 million in loans to Peru. Christopher Marquis, *Peru in Precarious Balance After Fujimori's Drastic Action*, MIAMI HERALD, Apr. 8, 1992, at 11A.

Germany suspended aid to Peru. Andres Oppenheimer, *Peru's Businessmen Have 2nd Thoughts*, MIAMI HERALD, Apr. 25, 1992, at 1A. Japan protested Fujimori's

U.S. cut off remaining military aid and withdrew a Green Beret unit that had been training Peruvian police in anti-drug tactics.<sup>294</sup> But the Bush Administration decided to oppose the imposition of sanctions, arguing that that would simply cripple Peru in its fight against drug traffickers and the guerrilla group Sendero Luminoso.<sup>295</sup>

On April 13, 1992, the OAS foreign ministers "strongly deplore[d]" the coup, and demanded that Peru show progress by May 23 toward the restoration of democracy.<sup>296</sup> The OAS also urged Peru to invite the Inter-American Commission on Human Rights for an on-site visit, and authorized a mission to Peru to express the OAS's demand that democracy be restored and human rights respected.<sup>297</sup>

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actions, see Ana Puga, *Peru's President Arrests Politicians, Labor Leaders*, HOUSTON CHRON., Apr. 8, 1992, at A1, but it did not immediately cut off aid. See Nathaniel C. Nash, *Washington Reacts Coolly To Peru Leader's Program*, N.Y. TIMES, Apr. 23, 1992, at A6; *Peru Asks Top LDP Official to Assess Democratic Efforts*, Japan Economic Newswire, June 30, 1992, available in DIALOG, File No. 612 (noting that Japan remains "the largest aid donor to Peru despite calls from other nations to withhold all nonhumanitarian aid to pressure Fujimori to restore democracy"). Instead, it tried "quiet diplomacy" with Fujimori to persuade him to set a schedule for a return to democracy, see Hsiao Takagi, *Japan Pursues Own Diplomacy on International Human Rights*, NIKKEI WKLY., Aug. 1, 1992, at 1, and seems never to have suspended its aid, see, e.g., *Peru President Seeks Further Japanese Assistance*, REUTERS, June 1, 1993.

294. Christopher Marquis, *Bush Pulls U.S. Unit from Peru*, MIAMI HERALD, Apr. 15, 1992, at 12A. Nevertheless, some U.S. military personnel remained in Peru. See Andres Oppenheimer, *Peruvians Fire on U.S. Plane*, MIAMI HERALD, Apr. 25, 1992, at 1A.

295. Thomas L. Friedman, *U.S. Is Shunning Sanctions Against Peru*, N.Y. TIMES, Apr. 14, 1992, at A7. On Sendero Luminoso, see generally THE SHINING PATH OF PERU (David Scott Palmer ed., 1992).

296. Support for the Restoration of Democracy in Peru, M.R.E. Res. 1/92, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.2, paras. 1, 8, OAS Doc. MRE/RES. 1/92 (1992). See also Secretary Baker's Statement at the Meeting of OAS Ministers of Foreign Affairs, Apr. 13, 1992, excerpted in FOREIGN POLY BULL., May-June 1992, at 71. For a description of the reaction of the OAS through May 1992, see 1993 *Inter-Am. C.H.R. Report on Peru*, supra note 54, at 13-15.

297. Support for the Restoration of Democracy in Peru, supra note 296, paras. 5, 6. See Christopher Marquis, *Peru Coup 'Deplored' by OAS*, MIAMI HERALD, Apr. 14, 1992, at A1. The delegation arrived on April 20 1992, see *OAS Mission Arrives to Promote Talks*, MIAMI HERALD, Apr. 21, 1992, at 8A, and left on April 23rd after making no progress, *OAS Delegation Leaves Without Solving Crisis*, MIAMI HERALD, Apr. 24, 1992, at 14A.

A second OAS mission visited Peru on May 4, 1992, *Fujimori Resists OAS Plea for Assembly*, MIAMI HERALD, May 5, 1992, at 9A, and the head of the mission made a third visit on May 16. *Head of OAS Mission Makes a Surprise Visit*, MIAMI HERALD, May 17, 1992, at 11A.

International condemnation appeared to have some effect. Although the autogolpe was popular domestically,<sup>298</sup> Fujimori soon released some detained opposition leaders and journalists,<sup>299</sup> and the Peruvian media appeared to be operating without restraint within several weeks after the coup.<sup>300</sup> Shortly before the planned arrival of the OAS mission, Fujimori called for a "national dialogue for peace and development" to begin May 1.<sup>301</sup> But he was not fully cooperative with the OAS. Pursuant to the Foreign Ministers' resolution, the Inter-American Commission on Human Rights made two visits to Peru.<sup>302</sup> On the second visit, which took place on May 11 and 12, 1992,<sup>303</sup> the government prevented the Commission from visiting a prison that had been retaken from Sendero Luminoso control,<sup>304</sup> and Fujimori became the first head of government ever to reject the Commission's request for a meeting.<sup>305</sup>

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298. One poll released two days after the autogolpe indicated 70% approval. Sam Dillon & Christopher Marquis, *Peruvian President to Rule by Decree, Backed by Army*, MIAMI HERALD, Apr. 7, 1992, at 1A; Sam Dillon, *Rival Party Called Target of Peruvian Crackdown; Poll Finds Public Backs President*, MIAMI HERALD, Apr. 9, 1992, at 1A; Nathaniel C. Nash, *Peruvians Backing Leader's Actions*, N.Y. TIMES, Apr. 9, 1992, at A3. See also Andres Oppenheimer, *Peru's Businessmen Have 2nd Thoughts*, MIAMI HERALD, Apr. 25, 1992, at 1A (noting that on April 7, business association had virtually endorsed coup). Polls released three weeks later indicated approval levels of 70% to 90%. Mary Powers, *In Peru, Polls Gain Prominence*, MIAMI HERALD, May 10, 1992, at 13A. 1. Several months later, his support was still running at about 60%. Christopher Marquis, *Peru Seeks Help to Quell Shining Path Guerrillas*, MIAMI HERALD, Aug. 8, 1992, at 14A.

299. See Christopher Marquis, *Peru Coup 'Deplored' by OAS*, MIAMI HERALD, Apr. 14, 1992, at A1.

300. Andres Oppenheimer, *Fujimori Relaxes Restraints on Press, But for How Long?*, MIAMI HERALD, May 1, 1992, at 6A.

301. James Brooke, *Peru Chief Asks for Dialogue but Foes Scoff*, N.Y. TIMES, Apr. 17, 1992, at A3.

302. The first took place on April 23 and 24, 1993. The report of the delegation is reproduced in 1993 *Inter-Am C.H.R. Report on Peru*, *supra* note 54 at 79-83.

303. *Police Station Bombed; OAS Delegation Arrives*, MIAMI HERALD, May 12, 1992, at 8A. The report of the delegation is reproduced in *Inter-Am. C.H.R. Report on Peru*, *supra* note 54, at 84-100.

304. *Id.* at 87, 95-96; see Nathaniel C. Nash, *Peru Routs Rebels in 4-Day Prison Fight*, N.Y. TIMES, May 11, 1992, at A3. See also AMERICAS WATCH REPORT ON PERU, *supra* note 291, at 9-12; U.S. DEP'T OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97 at 473-74.

305. 1993 *Inter-Am. C.H.R. Report on Peru*, *supra* note 54, at 87; see Fujimori *Fires Electoral Officials*, MIAMI HERALD, May 14, 1992, at 18A. The government also publicly attacked the impartiality of the Commission's Chairman. See *El Papelón de Blacker: El Gobierno Obstruye la Labor de la Comisión Interamericana de Derechos Humanos en el País*, CARETAS, Apr. 27, 1992, at 42.

At the same meeting in Nassau in May 1992, at which they addressed the situation in Haiti, the OAS foreign ministers also urged "the effective return of the representative democratic system [in Peru] as soon as possible, within the framework of respect of the principle of separation of powers and the rule of law, thus expediting the full reinstatement of international assistance and aid."<sup>306</sup> Fujimori made a personal appearance at the OAS meeting, and promised to convene an elected constituent assembly within months<sup>307</sup> — a promise elicited in part because Peru experienced significant economic pressure even in the absence of sanctions.<sup>308</sup> Persuaded by his promise, the Foreign Ministers declined once again to impose sanctions.<sup>309</sup> They

306. Democratic Reinstatement in Peru, M.R.E. Res. 2/92, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.2, para. 2, OAS Doc. MRE/RES. 2/92 (1992), reprinted in FOREIGN POLY BULL., July-Aug. 1992, at 83.

307. See *Peru: Fujimori Outlines to OAS His Plans for a Return to Constitutionality*, BBC Summary of World Broadcasts, May 20, 1992, available in LEXIS, Nexis Library, NEWS File (reproducing speech).

308. Estimates of the total amount of foreign aid cut off in response to Fujimori's coup ranged from perhaps \$700 million to as high as \$1.5 billion. See John McLaughlin, *Peru: Special Report on South America — New Regime Gets Chilly International Response — Torn Apart by Poverty*, Lloyd's List, July 1, 1992, available in LEXIS, Nexis Library, NEWS File (\$1.5 billion); Nathaniel C. Nash, *Washington Reacts Coolly To Peru Leader's Program*, N.Y. TIMES, Apr. 23, 1992, at A6 (\$1.3 billion); David Scott Palmer, *Peru, The Drug Business and Shining Path: Between Scylla And Charybdis?*, 34 J. INTER-AM. STUD. & WORLD AFF. 65, 79 n.3 (1992) (estimate of \$200-\$300 million in foreign economic assistance, \$500 million in credits, plus unspecified military aid). In addition, Peru suffered a run on the banks and its stock market declined sharply. See Andres Oppenheimer, *Peru's Businessmen Have 2nd Thoughts*, MIAMI HERALD, Apr. 25, 1992, at 1A.

As a New York Times writer put it:

While many Peruvian business executives were heartened by Mr. Fujimori's emergency decree, their euphoria gave way to sober reflection after nearly all international aid was cut off. A previously booming stock market has stalled. Hundreds of millions of dollars deposited in banks have been withdrawn from the country out of fear of instability. The banking system is in crisis, and foreign investment is at a standstill.

Nathaniel C. Nash, *Peru President's Crackdown on Dissent Brings No Peace*, N.Y. TIMES, May 18, 1992, at A4. See also Nathaniel C. Nash, *Latin Debt Accord Keeps Climbing Despite Accords*, N.Y. TIMES, Aug. 1, 1992, at 1 ("Peru's problems with drug trafficking and terrorism, plus the seizure of vast powers in April by President Alberto K. Fujimori, have resulted in a flight of capital and a freeze on debt negotiations."); Nathaniel C. Nash, *Peru Cuts Inflation; Joblessness Rises*, N.Y. TIMES, Sept. 28, 1992, at C2 (noting "unemployment and underemployment estimated at a combined 90% of the work force," though also stating that "[p]ublic opinion has not swung against President Fujimori" because of his crackdown on inflation and Sendero Luminoso).

309. Andres Oppenheimer, *OAS 'Takes Note' of Fujimori Promise*, MIAMI HERALD, May 20, 1992, at 10A.

did call on the Inter-American Commission to continue to monitor the human rights situation there, and made plans to monitor the elections to the constituent assembly that Fujimori had promised.<sup>310</sup>

The process of turning Fujimori's promise into the restoration of an elected government was not smooth.<sup>311</sup> Even now the legitimacy of its outcome is debatable. On August 22, 1992, Fujimori issued a decree to govern the terms of the "Democratic Constitutional Congress" to be elected in November 1992. Most notable was a provision denying the new Congress the power to nullify his decrees after the autogolpe.<sup>312</sup> Consistent with his attack on Peru's established parties, he also decreed that members of the new Congress could not run for re-election, thereby discouraging most of Peru's established politicians from running for Congress.<sup>313</sup> Fujimori's political fortunes were further boost-

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310. Democratic Reinstatement in Peru, *supra* note 306, paras. 5, 3. See U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 480.

311. Two months after the OAS meeting, Fujimori suspended mayoral elections in 1,700 towns, began to hedge on the rules that would govern the election of the constituent assembly, and postponed its date of election from October 18 to November 22. Sam Dillon, *Fujimori Seen Reneging on Democracy Pledge*, MIAMI HERALD, July 21, 1992, at 1A. At the end of July, he called for a "national dialogue" with all parties, and some talks did take place in August, but with little apparent effect. See *Democracy in Peru Remains in Limbo*, COHA'S WASH. REP. ON THE HEMISPHERE, Sept. 9, 1992, at 1.

312. Ley de Elecciones Para el Congreso Constituyente Democrático, Decreto Ley No. 25684, Tit. V (Aug. 20, 1992), reprinted in EL PERUANO, No. 4423, at 108735, 108744 (Aug. 22, 1992). See also Nathaniel C. Nash, *Rebel's Capture Gives a Big Push to Fujimori's Political Fortunes*, N.Y. TIMES, Sept. 18, 1992, at A4; Andres Oppenheimer, *Fujimori Plays Games as Peru Falls to Pieces*, MIAMI HERALD, Aug. 31, 1992, at 36A.

313. Ley de Elecciones Para el Congreso Constituyente Democrático, Decreto Ley No. 25684, Tit. V, Primera, (Aug. 20, 1992), reprinted in EL PERUANO, No. 4423, at 108735, 108744 (Aug. 22, 1992). See Andres Oppenheimer, *Fujimori Plays Games as Peru Falls to Pieces*, MIAMI HERALD, Aug. 31, 1992, at 36A ("Since most opposition parties want to move up the [next] election, [scheduled for 1995], this discourages participation of leading politicians in the upcoming race."). At an earlier point, Fujimori had announced that only those who promised not to run for office for the next ten years would be eligible to run for the constituent assembly. *Fujimori Sets Nov. 22 Election for Assembly to Revise Charter*, MIAMI HERALD, July 29, 1992, at 22A. See also James Brooke, *Peru's Chief, Vowing Democracy, Sets Date for a Revived Congress*, N.Y. TIMES, July 29, 1992, at A3. Fujimori had earlier announced other restrictions intended to cut out the established political parties. See *Peru: Fujimori Outlines to OAS His Plans for a Return to Constitutionality*, BBC Summary of World Broadcasts, May 20, 1992, available in LEXIS, Nexis Library, NEWS File (reproducing speech, excluding "closed slate" tickets chosen by "party bosses"). In the final decree issued in August, he achieved exclusion of regular politicians by prohibiting their re-election.

ed with the capture and life sentencing of Sendero's leader Abimael Guzmán.<sup>314</sup> With the two major parties boycotting the November election, Fujimori's candidates went on to win forty-four of the eighty seats in the Congress.<sup>315</sup> Charged with drawing up a new constitution, the Congress will serve as the legislature until July 28, 1995.<sup>316</sup>

Fujimori's efforts bore fruit in December 1992, when the OAS Foreign Ministers ended the monitoring of Peru they had

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314. See James Brooke, *Fugitive Leader of Maoist Rebels Is Captured by the Police in Peru*, N.Y. TIMES, Sept. 14, 1992, at A1; *Shining Path Head Gets Life Term*, MIAMI HERALD, Oct. 8, 1992, at 22A; Mary Speck, *Rebel's Bloody Rule Ends Meekly*, MIAMI HERALD, Sept. 14, 1992, at 1A. See also Christopher Marquis, *U.S. Happy With Peru Arrest; Insists on Democracy*, MIAMI HERALD, Sept. 15, 1992, at 10A.

On the effect of the capture on Peruvian politics, see Eduardo A. Gamarra, *What's Next for Troubled Peru?*, MIAMI HERALD, Sept. 20, 1992, at 6M; Nathaniel C. Nash, *Rebel's Capture Gives a Big Push to Fujimori's Political Fortunes*, N.Y. TIMES, Sept. 18, 1992, at A4. See also Alberto Fujimori, *Armed Forces Contributed to Peru Pacification*, NIKKEI WKLY., Dec. 21, 1992, at 7 (justifying the autogolpe by the capture and sentencing of Guzmán).

The Peruvian government has consistently used Sendero Luminoso as an excuse for violating human rights. Before the autogolpe, military officials had accused an international human rights delegation to Peru of acting as "international missiles of Sendero Luminoso." See Susana Cárdenas, *Few Surprises in Fujimori's Coup: Peru's President Has Not Performed Well on the Human Rights Front*, HUM. RTS. TRIB., Summer 1992 at 8; *id.* (noting similar comments of Minister of Justice). Cf. Enrique Bernaldes Ballesteros, *The Law and Its Effective Implementation in the Protection of Human Rights: The Situation in Peru*, 90 BULL. HUM. RTS. 8, (1991) (former Peruvian senator) ("Denouncing human rights violations was, for several years, a political weapon which was used effectively by terrorist groups at the international level . . . . [A]n attempt was made to utilize the well-earned prestige of non-governmental organizations working for human rights in order to foist upon the international community a slanted and one-sided picture of terrorist violence in Peru.").

315. John Crabtree, *The Peruvian Congressional Elections of 1992*, 12 ELECTORAL STUD. 264, 266 (1993). Fujimori's personal popularity thereafter remained high. See James Brooke, *Fujimori Sees a Peaceful, and a Prosperous, Peru*, N.Y. TIMES, Apr. 6, 1993, at A3; Adriana von Hagen, *Caged Terrorist Highlights Fujimori's Year of Success*, MIAMI HERALD, Apr. 5, 1993, at 8A (noting that Fujimori's personal approval rating remained at about 60% one year after the autogolpe). Indeed, a poll in January 1993 ranked "the interruption of constitutional government" at the bottom of respondents' concerns. See James Brooke, *Peru's Leader Clears a Path with Sharp Elbows*, N.Y. TIMES, Feb. 22, 1993, at A3.

316. Ley de Elecciones Para el Congreso Constituyente Democrático, Decreto Ley No. 25684, Tit. III, ch. 1, art. 137, Tit. III, ch. 3, art. 146 (Aug. 20, 1992), reprinted in EL PERUANO, No. 4423, at 108735, 108743-44 (Aug. 22, 1992). See also U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 471, 480.

Municipal elections were held in February 1993. See Sally Bowen, *Independents Win Seats But No Power: Fujimori Consolidates Grip on Peru's Institutions*, FIN. TIMES, Feb. 4, 1993, at 5.

begun in April 1992, stating that the election and installation of the Congress "formalize an important step in the process of restoring democratic institutional order in Peru."<sup>317</sup> Several months later, in March 1993, Peru was able to obtain a \$1.4 billion loan from the International Monetary Fund with U.S. help.<sup>318</sup> In June 1993, the U.S. indicated its willingness to consider renewing its own aid to Peru, conditioned on improvements in Peru's human rights record, but apart from making certain trade preferences available to Peru,<sup>319</sup> the Clinton Administration has not yet done so.<sup>320</sup>

Whether the OAS's optimism is justified is yet unclear. The new constitution was approved (although by a narrow margin) in a referendum on October 31, 1993.<sup>321</sup> It allows Fujimori to seek

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317. Restoration of Democracy in Peru, M.R.E. Res. 3/92, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.2, OAS Doc. MRE/RES.3/92 (1992). The Assembly was installed on December 30, 1992. See *Ley de Elecciones Para el Congreso Constituyente Democrático*, Decreto Ley No. 25684, Tit. III, ch. 3, art. 146 (Aug. 20, 1992), reprinted in *EL PERUANO*, No. 4423, at 108735, 108744 (Aug. 22, 1992).

Venezuela, which as noted earlier had suffered two coup attempts in 1992, see *supra* note 2, expressed "serious reservations" about the OAS's December 1992 resolution, particularly insofar as it equated the holding of elections with the return of democracy. See Christopher Marquis, *Pentagon and OAS Readmit Peru to Hemisphere's Democratic Club*, *MIAMI HERALD*, Dec. 15, 1992, at 14A.

318. *Foreign Aid to Peru Weak on Social Linkage*, COHA'S WASH. REP. ON THE HEMISPHERE, July 20, 1994, at 4; *U.S. Switches on Green Light for Peru*, *LATIN AM. WKLY. REP.*, 11 Mar. 1993, at 115; *Peru: Forgiven*, *ECONOMIST*, Mar. 6, 1993, at 50; Andres Oppenheimer, *World Seems to Have Accepted Fujimori's Coup*, *MIAMI HERALD*, Mar. 29, 1993, at 10A; Adriana von Hagen, *Peru Tries to Better Its Image Abroad*, *MIAMI HERALD*, Mar. 7, 1993, at 18A; *Peru Lines Up Loan*, *MIAMI HERALD*, Mar. 6, 1993, at 3C (noting U.S. decision to loan money to Peru after reassurances from Peru that it would work with Peruvian human rights groups); *U.S. to Assist in Big Loan to Peru*, *S.F. CHRON.*, Feb. 25, 1993, at A14; *U.S., Sensing Progress, Acts to Restart Peru Aid*, *N.Y. TIMES*, Feb. 25, 1993, at A6.

319. See *Clinton Announces Easing of Trade Rules*, *MIAMI HERALD*, Aug. 13, 1993, at 14A; Nathaniel C. Nash, *Grisly Find Again Rattles Peruvians*, *N.Y. TIMES*, Aug. 13, 1993, at A6. See also *El Salvador, Peru Cleared of Labor Accusations*, *INTER PRESS SERVICE*, July 5, 1994, available in *LEXIS*, Nexis Library, WIRES File.

320. In June 1993 the U.S. undertook an inter-agency review of whether to renew assistance to Peru. See Letter from Americas Watch, Washington Office on Latin America, and Lawyer's Committee for Human Rights, to Alexander Watson, Assistant Secretary of State for Latin America-Designate, June 23, 1993; *Soldiers Sentenced in Cantuta Case*, *LATIN AM. WKLY. REP.*, 3 Mar. 1994, at 86 (total of \$130 million in U.S. aid frozen since autogolpe).

321. See Mary Speck, *Peruvians OK New Constitution*, *MIAMI HERALD*, Nov. 1, 1993, at 9A. Although Fujimori enjoyed around a 70% personal popularity rating, the referendum was approved with no more than 55% of the vote and possibly less. See James Brooke, *Vote for a New Constitution Buttresses Peru's Leader*, *N.Y. TIMES*,



immediate reelection after his current term expires in 1995,<sup>322</sup> raising the prospect that his authoritarian rule will be extended another five years.<sup>323</sup> The new constitution also reinstates the death penalty for certain crimes,<sup>324</sup> a provision that violates Peru's obligations under the American Convention on Human Rights.<sup>325</sup> The new Congress is, in the words of one observer, a "docile legislature" unlikely to block Fujimori's "policies nor to exercise its prerogative in holding government ministers to account."<sup>326</sup> Fujimori personally seems to view his actions as a desirable model for the rest of Latin America.<sup>327</sup>

Nov. 1, 1993, at A4; Mary Speck, *Results of Peru Referendum Remain a Mystery Days Later*, MIAMI HERALD, Nov. 5, 1993, at 18A.

322. PERU CONST. (1993) art. 112.

323. The candidates include Fujimori himself, former U.N. Secretary General Javier Pérez de Cuéllar, Lima mayor Ricardo Belmont, and economist Alejandro Toledo. Fujimori's estranged wife Susana Higuchi declared her candidacy, but Congress quickly enacted a law that prohibited members of the President's family from running for the presidency. She challenged the law but without apparent success. See *Candidate Toledo Makes an Impact*, LATIN AM. WKLY. REP., 3 Nov. 1994, at 494; *Peruvian Presidential Hopefuls Launch Campaigns*, COHA'S WASH. REP. ON THE HEMISPHERE, Oct. 24, 1994, at 5.

324. See PERU CONST. (1993) art. 140.

325. See Nathaniel C. Nash, *Peru Is Expected to Extend Death Penalty to Terrorists*, N.Y. TIMES, Aug. 6, 1993, at A5; Mary Speck, *Peruvians OK New Constitution*, MIAMI HERALD, Nov. 1, 1993, at 9A. The Convention provides that where a state has earlier abolished the death penalty (as Peru had earlier done in most cases), it may not reinstate it. See American Convention on Human Rights, art. 4(3), OAS Treaty Series No. 36, at 1, OEA/Ser.L/V/II.23 doc. rev. 2 ("The death penalty shall not be reestablished in states that have abolished it.").

More generally, Peru's human rights record was dismal before the autogolpe and there is little reason to expect much change in that respect. For example, there is some indication that the number of disappearances and summary executions by the military may have declined. See Nathaniel C. Nash, *Grisly Find Again Rattles Peruvians*, N.Y. TIMES, Aug. 13, 1993, at A6. But see *Huallaga Offensive Causes Row with U.S.*, LATIN AM. WKLY. REP., 19 May 1994, at 208. But the number of civilians tried as "subversives" in military courts has increased sharply. See *Goldemberg Hails 'Pacification' Gains*, LATIN AM. WKLY. REP., 31 Mar. 1994, at 136; *Peru's Anti-Terrorism Actions Assailed*, MIAMI HERALD, Apr. 1, 1994, at 9A. There are also hundreds of thousands of internal refugees in Peru, displaced by the long war between the army and Sendero Luminoso. See Leslie Wirpsa, *Political Violence and Forced Internal Displacement in Colombia and Peru: An International Emergency*, HUM. RTS. WORKING PAPER (ILSA), May 1994, at 1.

326. Crabtree, *supra* note 315, at 267. See also Carla Anne Robbins, *Fujimori's Support for Yeltsin Accents Problem U.S. Faces in Supporting Peru*, WALL ST. J., Mar. 29, 1993, at A8 ("Mr. Fujimori has a long way to go before anyone, except Mr. Fujimori himself, would call him a democrat. The powers of the new Congress are circumscribed, and its members are clearly cowed by the president. There is no independent judiciary and no due process. The country's human rights performance remains abysmal."); James Brooke, *Peru's Leader Clears a Path with Sharp Elbows*, N.Y. TIMES, Feb. 22, 1993, at A3.

327. Andres Oppenheimer, *Fujimori: 'Democracy Is in Crisis'*, MIAMI HERALD,

Moreover, gains in security against attacks by Sendero Luminoso have been purchased at the cost of any real effort to build an independent judiciary. Fujimori followed up his earlier packing of the courts with a series of decrees that expand the government's power to charge individuals with disturbing public tranquility, cut back on habeas corpus and other remedies, and expand the military courts' jurisdiction.<sup>328</sup> Indeed, that the military remains a threat even to the more limited democracy Peru now enjoys became clear beyond doubt in April 1993. The army sent tanks into the streets of Lima in response to a very limited congressional inquiry into the military's role in the July 1992 disappearance of nine students and a professor from La Cantuta, a university near Lima.<sup>329</sup> In February 1994, Fujimori acceded to military pressure that some lower-level officers accused in the case be tried in a secret military trial, an action that relatives of the victims denounced as a cover-up.<sup>330</sup>

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June 20, 1994, at 8A.

328. See 1993 *Inter-Am. C.H.R. Report on Peru*, *supra* note 54, at 19-22.

329. See AMERICAS WATCH, PERU: ANATOMY OF A COVER-UP — THE DISAPPEARANCES AT LA CANTUTA (Sept. 27, 1993) [hereinafter AMERICAS WATCH REPORT ON DISAPPEARANCES AT LA CANTUTA]. Indeed, Robles accused Fujimori's own chief security adviser, Vladimiro Montesinos, of involvement in the slayings, as well as running an execution squad. See Gustavo Gorriti, *Fujimori Bypasses Democracy*, MIAMI HERALD, July 22, 1993, at 21A; Nathaniel C. Nash, *Fugitive General Accuses Peruvian Army, Saying Officers Run Hit Squad*, N.Y. TIMES, May 12, 1993, at A5; Mary Speck, *Campus Raid, Disappearances Haunt Peru*, MIAMI HERALD, June 10, 1993, at 1A; Sharon Stevenson, *Peru's Army Simmers with Discontent*, MIAMI HERALD, May 17, 1993, at 8A. See also OAS Asked to Assist in Massacre Investigation, INTER PRESS SERVICE, July 9, 1993, available in LEXIS, Nexis Library, WIRES File (same accusation by members of Peruvian Congress).

Montesinos has also been accused of covering up a massacre of Andean peasants in 1988. See Sam Dillon, *Peru Aide Linked to Cover-Up*, MIAMI HERALD, Aug. 10, 1992, at 1A; *Peru: Forgiven*, ECONOMIST, Mar. 6, 1993, at 50. See also Case 10,078, *Inter-Am. C.H.R. 18, OEA/ser.L/V/II.81, doc. 6 rev. 1* (1992). In another sign that Peruvian democracy is in danger, the courts ordered the director of the magazine *Caretas* to pay \$10,000 in damages for "defaming" Montesinos, barred the magazine from even mentioning Montesinos in the magazine, and prohibited the director from leaving the country. See 1993 *Inter-Am. C.H.R. Report on Peru*, *supra* note 54, at 200-202; *Editor Muzzled*, LATIN AM. WKLY. REP., 4 Feb. 1993, at 59. See also 1994 U.S. Dep't of St., Country Rep. on Hum. Rts. Prac. for 1993, at 529, 536 [hereinafter 1994 U.S. Dep't of St. Hum. Rts. Rep.] (noting intimidation of press); Sharon Stevenson, *Peru's Leaders Showing Signs of Thin Skins*, MIAMI HERALD, Feb. 15, 1993, at 14A.

330. 9 in *Peru Military Sentenced*, MIAMI HERALD, Feb. 23, 1994, at 14A; *Peru Cabinet Shuffled After Top Aide Resigns*, MIAMI HERALD, Feb. 18, 1994, at 12A; Adriana von Hagen, *Fujimori OKs Secret Military Trial*, MIAMI HERALD, Feb. 11, 1994, at 20A.

Apart from these institutional questions, the sharp rise in the number of poor under Fujimori's tenure<sup>331</sup> may bode ill for the prospects for democracy.<sup>332</sup> By many standard measures the economy has improved as a result of the government's austerity measures,<sup>333</sup> but there is no sign that the benefits have extended to the poor, who constitute the solid majority of Peru's population.<sup>334</sup> With so many factors uncertain —Fujimori's own continuation in office after the 1995 election, the overall state of the economy, and the condition of Peru's poor— it remains difficult to gauge how successful the autogolpe will turn out to be even on its own terms. The most that can be said is that that uncertainty did not stop the OAS from welcoming Peru back into the ranks of democracies.

### C. Guatemala

Guatemala suffered under a succession of military rulers and military dominated governments from 1954, when a CIA sponsored coup overthrew the elected Arbenz regime,<sup>335</sup> to 1986, when Vinicio Cerezo became the first elected president in

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331. See James Brooke, *Peru's Leader Clears a Path with Sharp Elbows*, N.Y. TIMES, Feb. 22, 1993, at A3 ("One cost of the attack on inflation has been a surge in the number of poor people during Mr. Fujimori's tenure, from 7 million in 1990 to 12 million today, out of a total population of 22 million, according to Government figures."); Efrain Gonzales de Olarte, *Peru's Economic Program under Fujimori*, J. INTERAM. STUD. & WORLD AFF., Summer 1993, at 66-67 ("In Lima, the real minimum wage and real salaries dropped by 40%."); *Peruvian Presidential Hopefuls Launch Campaigns*, COHA'S WASH. REP. ON THE HEMISPHERE, Oct. 24, 1994, at 5.

332. See generally part IV.B.1.a *infra*.

333. See *Candidate Toledo Makes an Impact*, LATIN AM. WKLY. REP., 3 Nov. 1994, at 494 (predicting 9.7% "growth rate" for 1994); *GATT Hails Results of Fujimori's Reforms*, LATIN AM. WKLY REP., 17 Feb. 1994, at 64 (GDP increased 6.8% in 1993; inflation for 1994 expected to be under 20%); *Good News Boosts Fujimori's Standing*, LATIN AM. WKLY. REP., 17 Mar. 1994, at 118 (GDP expected to grow by 4% in 1994). See also Matt Moffett, *Fujimori Has Tamed Terrorism and Inflation But Means Still Rankle*, WALL ST. J., Feb. 22, 1994, at A1.

334. James Brooke, *The Rebels Lose Leaders, But Give Peru No Peace*, N.Y. TIMES, Feb. 5, 1993, at A3; *Foreign Aid to Peru Weak on Social Linkage*, *supra* note 318.

335. See generally PIERO GLEJESES, *SHATTERED HOPE: THE GUATEMALAN REVOLUTION AND THE UNITED STATES, 1944-1954* (1991); SUSANNE JONAS, *THE BATTLE FOR GUATEMALA: REBELS, DEATH SQUADS, AND U.S. POWER* (1991); STEPHEN C. SCHLESINGER & STEPHEN KINZER, *BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA* (1982); SLATER, *supra* note 13, at 115-29. Cf. PAUL FARMER, *THE USES OF HAITI* 236-46 (1994) (coup against Arbenz similar to one against Aristide).

decades. Throughout most of that time, Guatemala also had a guerrilla insurgency, which the government continually fought with bloody repression.<sup>336</sup>

Since 1986 Guatemala has had a civilian democracy, but the government has had little control over the military, particularly in its continuing fight against the guerrillas. Indeed, Cerezo was so fearful of being deposed by the military during his five year presidency that he lost any thought of reigning it in, let alone pressing for social and economic reforms.<sup>337</sup> Not surprisingly, severe human rights abuses have continued to mark Guatemala notwithstanding the installation of the elected government in 1986.<sup>338</sup>

On May 25, 1993, Cerezo's successor, President Jorge Serrano Eloas, suspended the constitution, dissolved the Guatemalan Congress and Supreme Court, and instituted rule by decree.<sup>339</sup> He also attempted to detain the country's human rights ombudsman, Ramiro de León Carpio,<sup>340</sup> placed other political figures under house arrest, and instituted censorship of the press and electronic media.<sup>341</sup> As he took these steps, Serrano claimed that he would hold elections within sixty days for a

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336. See generally JONAS, *supra* note 335, at 64-71, 131-59. See also, e.g., Edward Orlebar, *Guatemala Tries to Weigh Justice in '82 Massacre*, MIAMI HERALD, May 5, 1994, at 24A.

337. See JAMES PAINTER, GUATEMALA: FALSE HOPE, FALSE FREEDOM 79-109 (1989); Jim Handy, *Insurgency and Counter-Insurgency in Guatemala*, in SOCIOLOGY OF "DEVELOPING SOCIETIES": CENTRAL AMERICA 112, 134-36 (Jan L. Flora & Edelberto Torres-Rivas eds., 1989).

338. See generally JONAS, *supra* note 335.

339. See Susan Berger, *Guatemala: Coup and Countercoup*, NACLA REP. ON THE AMERICAS, July-Aug. 1993, at 4; Tim Golden, *Guatemalan, Supported by Army, Disbands Congress and the Court*, N.Y. TIMES, May 26, 1993, at A3; Tod Robberson, *Guatemalan President Seizes Decree Power, Dissolves Congress*, WASH. POST, May 26, 1993, at A21. See also Informe de la Misión del Secretario General a Guatemala, Annex A (reproducing Decree). For useful overviews of the crisis, see HUMAN RIGHTS WATCH/AMERICAS, HUMAN RIGHTS IN GUATEMALA DURING PRESIDENT DE LEÓN CARPIO'S FIRST YEAR 3-4, 126-29 (1994) [hereinafter HUM. RTS. WATCH REP. ON GUATEMALA'S PRESIDENT]; William I. Robinson, *Guatemala's Failed Coup D'Etat: Has the Clinton Administration Passed the Test?*, NOTISUR, July 9, 1993.

340. The Guatemalan constitution provides for an Ombudsman (Procurador) of Human Rights. See GUAT. CONST. Tit. VI, ch. V, reprinted in 7 CONSTITUTIONS, *supra* note 82, at 148.

341. See Tim Golden, *Guatemalans Protest the President's Power Grab*, N.Y. TIMES, May 27, 1993, at A4; Tim Johnson, *Guatemala Leader: I'll Fight for Poor*, MIAMI HERALD, June 7, 1993, at 9A. See also Tim Golden, *Guatemala's Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A5.

constitutional assembly to draft a new constitution, although he quickly began to hedge on that promise.<sup>342</sup>

Serrano's actions triggered immediate domestic opposition, as demonstrators took to the streets and members of the legislature met secretly to condemn the coup.<sup>343</sup> International reaction was equally swift. The U.S. and other countries denounced the coup, which was widely compared to Fujimori's autogolpe.<sup>344</sup> The U.S. announced a suspension of aid to Guatemala<sup>345</sup> and threatened to withdraw certain trade preferences.<sup>346</sup> The EC and its member countries also suspended or threatened suspension of aid,<sup>347</sup> as did Japan.<sup>348</sup> Business groups in Guatemala's export sector were reportedly especially concerned about the threat from the EC and Japan, which would have had a large impact on Guatemala's exports.<sup>349</sup> The mili-

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342. Tim Golden, *Guatemalans Protest the President's Power Grab*, N.Y. TIMES, May 27, 1993, at A4.

343. See Tim Golden, *Guatemalans Protest the President's Power Grab*, N.Y. TIMES, May 27, 1993, at A4; Tim Golden, *Guatemalan's Power Grab Brings Street Protests*, N.Y. TIMES, May 28, 1993, at A5; Tim Golden, *Guatemala's Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A5; *Guatemala Offer Spurned*, WASH. POST, May 31, 1993, at A22.

344. See *Guatemala's Do-It-Yourself Coup*, N.Y. TIMES, May 27, 1993, at A10; Tod Robberson, *Guatemalan President Seizes Decree Power, Dissolves Congress*, WASH. POST, May 26, 1993, at A21. See also Henry Raymont, *The Seeds of Serrano's Coup Attempt*, MIAMI HERALD, June 6, 1993, at 5C (noting differences between the two autogolpes).

345. See Tim Golden, *Guatemalan's Power Grab Brings Street Protests*, N.Y. TIMES, May 28, 1993, at A5; Andres Oppenheimer, *European Clout Helped Defeat Guatemala Coup*, MIAMI HERALD, June 7, 1993, at 8A; *U.S. Freezes Aid to Guatemala*, WASH. POST, May 28, 1993, at A32.

346. See *Democracy "Suspended," Then Restored in Guatemala*, FOREIGN POLY BULL., July-Aug. 1993, at 68 (quoting State Department Statement, May 27, 1993) ("[u]nless democracy is restored in Guatemala, GSP benefits are likely to be withdrawn"); *id.* (quoting Secretary Warren Christopher's Statement to OAS Foreign Ministers Meeting on Guatemala, Washington, June 3, 1993, threatening withdrawal of preferences under Caribbean Basin Initiative); Tim Golden, *Guatemala's Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A5.

347. Germany suspended \$80 million in aid, and the EC threatened to suspend nearly \$50 million in aid. See *Washington's New Latin American Model*, *supra* note 345 at 5. Tim Golden, *Guatemalan's Power Grab Brings Street Protests*, N.Y. TIMES, May 28, 1993, at A5; Andres Oppenheimer, *European Clout Helped Defeat Guatemala Coup*, MIAMI HERALD, June 7, 1993, at 8A.

348. See *Washington's New Latin American Model*, *supra* note 345, at 5 (threat by Japan to suspend \$50 million in aid).

349. See Andres Oppenheimer, *European Clout Helped Defeat Guatemala Coup*, MIAMI HERALD, June 7, 1993, at 8A ("Guatemala's conservative business community panicked. Exporters, who have seen their sales to the United States and Europe soar thanks to trade preferences in recent years, joined leftists and human rights

tary, which had initially stated its public support for Serrano's actions,<sup>350</sup> began to distance itself from them.<sup>351</sup>

The OAS also took an urgent response. On May 25, 1993, the Permanent Council condemned the coup, and called for the immediate reestablishment of democratic institutions in Guatemala.<sup>352</sup> It sent the Secretary General to Guatemala to prepare a report to be presented at the next meeting of the Foreign Ministers, scheduled for June 3, 1993.<sup>353</sup>

On June 1, 1993, a week after Serrano seized power — and only two days before the OAS Foreign Ministers were scheduled to meet<sup>354</sup> — the military forced him from office.<sup>355</sup> The army acted under pressure from a coalition of civilian leaders that included human rights activists but was dominated by business leaders;<sup>356</sup> it was clear in the end, though, that it was the military that had made the ultimate decision that Serrano must resign.<sup>357</sup> Under the settlement originally reached, Vice President Gustavo Espina Salguero, who had supported Serrano's autogolpe, was to preside until Congress met, and then resign so that Congress could choose a new President. As part of the settlement, the civilian leaders agreed to purge the Congress of

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activists in denouncing the Serrano coup."). See also *Washington's New Latin American Model*, *supra* note 345, at 5; Tim Golden, *Guatemala's Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A5.

350. See Tim Golden, *Guatemalan, Supported by Army, Disbands Congress and the Court*, N.Y. TIMES, May 26, 1993, at A3.

351. See Tim Golden, *Guatemala's Counter-Coup: A Military About-Face*, N.Y. TIMES, June 3, 1993, at A3.

352. See *The Situation in Guatemala*, C.P. Res. 605 (945/93), OAS Permanent Council, OEA/ser.G, OAS Doc. CP/RES. 605 (945/93) corr.1 (1993).

353. *Id.* at 2-3.

354. Cf. Tim Golden, *Guatemala's Leader Is Pressed to Yield Power*, N.Y. TIMES, June 1, 1993, at A5 (diplomats involved in . . . [OAS Secretary-General João Baena Soares'] talks with the Government and its opponents said Mr. Soares made it clear that Guatemala could expect stinging censure from its neighbors on Thursday when foreign ministers of the organization's member states hold an emergency meeting in Washington to discuss the problems in Guatemala.").

355. See Tim Golden, *Guatemalan Who Grabbed Power Is Out*, N.Y. TIMES, June 2, 1993, at A6; Tim Johnson, *Power Grab Collapses*, MIAMI HERALD, June 2, 1993, at 1A.

356. See William I. Robinson, *Guatemala's Failed Coup D'Etat: Has the Clinton Administration Passed the Test?*, NOTISUR, July 9, 1993.

357. See Tim Golden, *Guatemalan Who Grabbed Power Is Out*, N.Y. TIMES, June 2, 1993, at A6; Tim Golden, *Guatemala's Counter-Coup: A Military About-Face*, N.Y. TIMES, June 3, 1993, at A3; *Guatemala Court Rejects Power Grab*, MIAMI HERALD, June 5, 1993, at 6A.

"corrupt" members.<sup>358</sup>

Instead, Espina announced the next day that he would now rightfully be the country's President, and the Defense Minister who had engineered Serrano's ouster initially backed him up.<sup>359</sup> The U.S. State Department was largely noncommittal over Espina's bid for power,<sup>360</sup> though it maintained its suspension of the boycott pending resolution of the crisis.<sup>361</sup> Amidst plans by Guatemala's Attorney General to bring criminal charges against Espina for his role in the coup, Espina's swearing in as President was delayed.<sup>362</sup>

On June 3, 1993, the OAS Foreign Ministers met in Washington, D.C. in accordance with the Permanent Council's decision the prior week. The Permanent Council condemned the May 25th coup, but took no action, instead keeping its meeting open and sending the Secretary General to Guatemala for a second report.<sup>363</sup> The next day, the Constitutional Court, Guatemala's highest judicial body in matters relating to the Constitution, ruled Espina ineligible for the presidency on account of his support for Serrano's coup.<sup>364</sup> Under heavy military pressure,

358. See Tim Golden, *Army Role Hinted as Guatemala Writhes Again*, N.Y. TIMES, June 4, 1993, at A5; Tim Johnson, *Guatemala Veep Says He's No. 1*, MIAMI HERALD, June 3, 1993, at 1A. As was the case in Peru, see *supra* part III.B, there were widespread charges of corruption against members of Congress and the Supreme Court even before Serrano's attempted coup. See Tim Golden, *Congress in Guatemala Resists a Purge by the President, Engaging in a Battle Royal*, N.Y. TIMES, Sept. 8, 1993, at A13.

359. See Tim Johnson, *Guatemala Veep Says He's No. 1*, MIAMI HERALD, June 3, 1993, at 1A.

360. *Id.* (quoting State Department pronouncement that the U.S. could not take sides in a constitutional dispute, but that "[o]ur understanding is that, with the presidency having been vacated by former President Serrano, Vice President Espina has, according to the constitution, now assumed the presidency."); Christopher Marquis, *Confusion Reigns at OAS over Guatemala*, MIAMI HERALD, June 4, 1993, at 10A (quoting State Department spokesman, "[t]he United States is not in a position to intervene in that constitutional dispute.").

361. See *A Warning from the U.S.*, N.Y. TIMES, June 4, 1993, at A5; Christopher Marquis, *Confusion Reigns at OAS over Guatemala*, MIAMI HERALD, June 4, 1993, at 10A (quoting State Department spokesman, "[t]he United States is not in a position to intervene in that constitutional dispute.").

362. Tim Johnson, *Boycott Halts Swearing-In of Self-Declared President*, MIAMI HERALD, June 4, 1993, at 10A.

363. Restoration of Democracy in Guatemala, M.R.E. Res. 1/93, OAS Ad Hoc Meeting of Ministers of Foreign Affairs, OEA/ser.F/V.3, at 2,3, OAS Doc. MRE/RES.1/93 (1993).

364. See GUAT. CONST. arts. 268, 272, reprinted in 7 CONSTITUTIONS, *supra* note 82, at 147, 148. Cf. *id.* art. 186(a) (prohibiting individuals who take part in a coup

Espina abandoned his bid for the presidency.<sup>365</sup>

On June 6, 1993, the Congress chose the human rights ombudsman Ramiro de León Carpio as the new President.<sup>366</sup> The U.S. responded to de León's election by restoring its aid to Guatemala, as did Germany.<sup>367</sup> De León soon appointed a new Defense Minister, a General who was viewed as relatively moderate.<sup>368</sup> He proposed to conduct peace negotiations with guerrillas and engage in broad-based talks with various sectors of society on fundamental social and economic reforms.<sup>369</sup> In addition, he pursued efforts to force the return of Serrano and Espina (who had fled Guatemala) so that they could face charges growing out of the coup.<sup>370</sup>

De León's first year and a half in office has shown a mixed record. Lacking any political base in the Guatemalan legislature, he has consistently sought to restructure it and limit its powers in connection with the earlier pledge to purge Congress of corrupt members.<sup>371</sup> As of July 1993, the Instancia Nacional de Concenso (INC)<sup>372</sup> had identified twenty-four members of Con-

from running for the presidency), reprinted in 7 CONSTITUTIONS, *supra* note 82, at 138.

365. Tim Golden, *Guatemala Congress Meets To Choose a New President*, N.Y. TIMES, June 6, 1993, at 6. See *Guatemala Court Rejects Power Grab*, MIAMI HERALD, June 5, 1993, at 6A.

366. See Tim Johnson, *Guatemala Leader: I'll Fight for Poor*, MIAMI HERALD, June 7, 1993, at 9A.

367. *Guatemala*, MIAMI HERALD, July 22, 1993, at 18A (noting offer of U.S. AID to release \$80 million in aid backlog to show support for de León); *U.S. to Resume Guatemala Aid*, MIAMI HERALD, June 8, 1993, at 15A.

368. See *Guatemala: Germany Unfreezes Development Aid*, BBC Summary of World Broadcasts, July 3, 1993, available in, LEXIS, Nexis Library, NEWS File; Edward Orlebar, *Guatemalan Leader Riding High — For Now*, MIAMI HERALD, July 5, 1993, at 15A.

369. Tim Johnson, *Guatemalan Chief Shakes Up Army*, MIAMI HERALD, June 8, 1993, at 1A; Edward Orlebar, *Guatemalan Peace Talks Get New Boost*, MIAMI HERALD, July 19, 1993, at 8A. See also *Top Brass Accept Need for Changes*, CARIBBEAN & CENT. AM. REP., RC-93-07, Aug. 26, 1993, at 2 (noting plans to cut back on Guatemala military intelligence agency, as well as statements by defense minister that army will play a role in reforestation and other projects and respect human rights).

370. See *Envoys' Removal Tied to Extradition Process*, MIAMI HERALD, Aug. 13, 1993, at 14A. In fact, however, Serrano found exile in Panama. See *Ríos Montt Wins Congressional Poll Marred By 80% Abstention Rate*, LATIN AM. WKLY. REP., 25 Aug. 1994, at 373.

371. See *supra* text accompanying note 358.

372. The INC is the civilian coalition that had helped oust Serrano. See *De León to 'Enrich' His Peace Proposal*, LATIN AM. WKLY. REP., 26 Aug. 1993, at 393; *supra* text accompanying note 356. Its English equivalent is "National Forum of Consen-



gress to be purged; not surprisingly, those members resisted.<sup>373</sup> In August 1993, de León called upon all 116 members of the Congress to resign, together with the entire membership of the Supreme Court.<sup>374</sup> It appears that the aim of de León's plan was not to secure the actual resignations of all members of Congress, but to accomplish a "selective cleansing" of only sixteen members considered the worst offenders.<sup>375</sup>

The plan appears to have been popular,<sup>376</sup> to the point where de León felt comfortable in threatening to call his supporters to the streets to demonstrate in favor of the purge.<sup>377</sup> But at least forty of the deputies refused to go along with plan, including the sixteen targeted members.<sup>378</sup> With the issue un-

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sus." See Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4.

373. See *Cabinet Takes Shape at Snail's Pace*, LATIN AM. WKLY. REP., 1 July 1993, at 290.

374. *President Calls on Congress Deputies to Resign Following Constitutional Ruling*, BBC Summary of World Broadcasts, Aug. 28, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing speech of President de León of Aug. 27, 1993); Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4.

375. *'Cleansing' Issue Comes to a Head*, LATIN AM. WKLY. REP., 16 Sept. 1993, at 422; *'Cleansing' Issue Paralyzes Congress*, CARIBBEAN & CENT. AM. REP., 30 Sept. 1993, at 2; *Dwindling Support for the Referendum*, LATIN AM. WKLY. REP., 14 Oct. 1993, at 476; Tim Golden, *Congress in Guatemala Resists a Purge by the President, Engaging in a Battle Royal*, N.Y. TIMES, Sept. 8, 1993, at A13. See Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4. The plan appears to have been for all members to tender their resignations "pro forma" to INC, with the moral pressure of the actions of the 100 non-targeted members forcing the other 16 to go along. De León did, however, appear to want all members of the Supreme Court actually to resign.

376. *'Cleansing' Issue Comes to a Head*, LATIN AM. WKLY. REP., 16 Sept. 1993, at 422; Tim Golden, *Congress in Guatemala Resists a Purge by the President, Engaging in a Battle Royal*, N.Y. TIMES, Sept. 8, 1993, at A13.

377. *President Calls on Congress Deputies to Resign Following Constitutional Ruling*, BBC Summary of World Broadcasts, Aug. 28, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing speech of President de León of Aug. 27, 1993) (if Congress and Supreme Court do not heed call for resignations, "I will also call on the Guatemalan people to march peacefully for the people's dignity and sovereignty to exercise their constitutional right to legitimate resistance."); *De León on the "Self-Purge" of Congress; Occupation of Congress Building*, BBC Summary of World Broadcasts, Sept. 13, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing press conference of President de León of Sept. 10, 1993) (if purges fails to take place, one "possibility is a peaceful demonstration by the Guatemalan people to force the deputies and the magistrates to heed the call of the Guatemalan people").

378. See *'Cleansing' Issue Paralyzes Congress*, CARIBBEAN & CENT. AM. REP., 30 Sept. 1993, at 2; Tim Golden, *Congress in Guatemala Resists a Purge by the Presi-*

resolved by late September 1993, de León — following up on earlier warnings<sup>379</sup> — called for a referendum to be held on November 28, 1993, on whether all members of Congress and the Supreme Court should resign.<sup>380</sup> The referendum would not be binding, but would present a way to “morally force” legislators to resign.<sup>381</sup> De León also indicated an intention to propose constitutional reforms at the same time.<sup>382</sup> Later, after opposition members of Congress began considering reform proposals that would diminish his own power, he decided to postpone any reform proposals until after the issue of purging the legislature had been resolved.<sup>383</sup>

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*dent, Engaging in a Battle Royal*, N.Y. TIMES, Sept. 8, 1993, at A13 (giving number tendering resignations as 76); Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4; *President Calls on Congress Deputies to Resign Following Constitutional Ruling*, BBC Summary of World Broadcasts, Aug. 28, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing press conference of President de León of August 26, 1993).

Ironically, it appears that the minority bloc was now pressing for the actual resignations of all members as an alternative to selective cleansing, see *Dwindling Support for the Referendum*, LATIN AM. WKLY. REP., 14 Oct. 1993, at 476, presumably because they believed that that would never come about.

379. See *De León on the “Self-Purge” of Congress; Occupation of Congress Building*, BBC Summary of World Broadcasts, Sept. 13, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing press conference of President de León of September 10, 1993); *President Calls on Congress Deputies to Resign Following Constitutional Ruling*, BBC Summary of World Broadcasts, Aug. 28, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing speech of President de León of August 27, 1993); Michael Reid, *Guatemalan Congress Faces Dissolution*, THE GUARDIAN, Sept. 2, 1993, at 8.

380. See *Congressman Steps Up Discussions to Avoid Resigning*, UPI, Oct. 4, 1993, available in LEXIS, Nexis Library, UPI File; *De León Calls for Referendum on Purge of Congress and Judiciary*, BBC Summary of World Broadcasts, Sept. 29, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing speech of de León of Sept. 27, 1993). See also *Guatemala: President Ramiro de León Convoques National Referendum to Back Purge of Legislature & Judiciary*, NOTISUR, Oct. 15, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing proposed questions).

381. *President Calls on Congress Deputies to Resign Following Constitutional Ruling*, BBC Summary of World Broadcasts, Aug. 28, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing press conference of President de León of August 26, 1993). See also *Guatemalan Rebels Reject Peace Talks*, AGENCE FRANCE PRESSE, Oct. 14, 1993, available in LEXIS, Nexis Library, NEWS File.

382. See *De León Calls for Referendum on Purge of Congress and Judiciary*, BBC Summary of World Broadcasts, Sept. 29, 1993, available in LEXIS, Nexis Library, NEWS File (reproducing speech of de León of Sept. 27, 1993).

383. See *Reporters and Protesters Clash Outside Guatemalan Congress*, UPI, Oct. 28, 1993, available in LEXIS, Nexis Library, UPI File; *President Postpones Constitutional Reforms Until New Legislature Is Installed*, BBC Summary of World Broadcasts, Oct. 27, 1993, available in LEXIS, Nexis Library, NEWS File.

The Supreme Electoral Tribunal approved the referendum in early October,<sup>384</sup> but on October 13, 1993, the Supreme Court — one of the objects of the proposed referendum — provisionally suspended the referendum at the request of members of Congress opposed to it.<sup>385</sup> A number of legislators also attempted to initiate legal charges against de León that could result in his removal. Declaring the charges “legally groundless,” and calling them a subterfuge for avoiding the referendum, de León defiantly said that if Congress allowed them to proceed to trial “I will appeal to the people.”<sup>386</sup>

On November 11, 1993, however, the Constitutional Court granted a temporary injunction against holding the referendum.<sup>387</sup> Faced with this setback, and with an apparent turn in popular opinion against holding a referendum,<sup>388</sup> de León reached an agreement with Congress on November 16, 1993, to resolve the political crisis.<sup>389</sup> Under the compromise, to be put to a referendum, there were to be new legislative elections in 1994, with a new Supreme Court selected thereafter and the President’s term reduced from five years to four.<sup>390</sup> De León threatened that if the changes were not approved in the referendum, he would take “historic actions to comply with the people’s demand for a purge of Congress.”<sup>391</sup> In fact, they were ap-

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384. *Guatemala: President Ramiro de León Convokes National Referendum to Back Purge of Legislature & Judiciary*, NOTISUR, Oct. 15, 1993, available in LEXIS, Nexis Library, NEWS File (approval of Tribunal on October 3, 1993). See also GUAT. CONST. art. 173, reprinted in 7 CONSTITUTIONS, *supra* note 82, at 136.

385. *Court Ruling Blocks Referendum*, LATIN AM. WKLY. REP., 28 Oct. 1993, at 500; *Guatemala’s Congress Moves at Last — But Not as de León Wanted*, CARIBBEAN & CENT. AM. REP., 4 Nov. 1993, at 1; *Supreme Court Suspends de León’s Referendum on Purge of Congress*, *Supreme Court*, BBC Summary of World Broadcasts, Oct. 15, 1993, available in LEXIS, Nexis Library, NEWS File.

386. *President Accuses Congress and Supreme Court of “Plotting” to Impede Purge*, BBC Summary of World Broadcasts, Oct. 23, 1993, available in LEXIS, Nexis Library, NEWS File. See also *Reporters and Protesters Clash Outside Guatemalan Congress*, UPI, Oct. 28, 1993, available in LEXIS, Nexis Library, UPI File.

387. *Court Suspends Referendum*, LATIN AM. WKLY. REP., 25 Nov. 1993, at 551.

388. *Id.*

389. *Guatemala: President, Congress Break 11-Week Impasse*, MIAMI HERALD, Nov. 17, 1993, at 10A; Edward Orlebar, *Guatemalan President Has Failed to Deliver on Many Promises*, MIAMI HERALD, Dec. 18, 1993.

390. *Guatemala: President, Congress Break 11-Week Impasse*, MIAMI HERALD, Nov. 17, 1993, at 10A; Tim Johnson, *Guatemala Votes to Reform Politics*, MIAMI HERALD, Jan. 31, 1994, at 8A; Edward Orlebar, *Guatemalan President Has Failed to Deliver on Many Promises*, MIAMI HERALD, Dec. 18, 1993.

391. Tim Johnson, *Guatemala Votes to Reform Politics*, MIAMI HERALD, Jan. 31,

proved in the referendum on January 30, 1994, by 84 percent of those who voted, although nearly 80% of the electorate failed to turn out.<sup>392</sup>

Another source of instability, in addition to the infighting over the role of Congress, has been the rumors of coups that have plagued de León's term.<sup>393</sup> Moreover, in April 1994, de León raised the prospect of imposing a state of emergency after the president of the Constitutional Court was assassinated.<sup>394</sup> By then, his human rights record, and his ability to control the military, had come into question.<sup>395</sup> Some of the most severe human rights abuses stem from the civil defense patrols (formally known by the Orwellian title of "Voluntary Civilian Self-Defense Committees").<sup>396</sup> The patrols have been widely identified as persistent abusers of human rights in the countryside, and have also been denounced for their forced recruitment of indigent members.<sup>397</sup> In June 1993, the Inter-American Commis-

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1994, at 8A. *See id.* (noting that such "forceful language [was] oddly reminiscent of Serrano, who shut down Congress as part of his May 23 power grab," but also that the President stated publicly that the government would act within the framework of the laws).

392. *Id.*

393. *E.g.*, Attorney-General 'Uncovers Plot,' LATIN AM. WKLY. REP., 17 Mar. 1994, at 116; Tim Johnson, *Unrest Mars Guatemala's Path to Peace*, MIAMI HERALD, Apr. 11, 1994, at 10A; *More About Coups and Unrest in Army*, LATIN AM. WKLY. REP., 10 Mar. 1994, at 105.

394. *Guatemala Considers a State of Emergency*, MIAMI HERALD, Apr. 4, 1994, at 8A; *Guatemala Holding Off on State of Emergency*, MIAMI HERALD, Apr. 5, 1994, at 8A.

395. *See* Edward Evans, *Guatemalan President Runs Into Difficulties*, REUTER, Oct. 25, 1993, available in LEXIS, Nexis Library, NEWS File (quoting Rigoberta Menchu) ("I am very disappointed with his presidency so far. He has lost all credibility."); Tim Johnson, *Guatemala Losing Faith in Leader*, MIAMI HERALD, Feb. 17, 1994, at 1A; David Scanlan, *Guatemalans Disillusioned by President's Record*, CHRISTIAN SCI. MONITOR, June 10, 1994, at 6. *See also* Patrick Costello, *Army Hovers as Guatemala Stalls*, THE GUARDIAN, Sept. 9, 1993, at 11; Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4; *Guatemalan Rebels Reject Peace Talks*, AGENCE FRANCE PRESSE, Oct. 14, 1993, available in LEXIS, Nexis Library, NEWS File; Edward Orlebar, *Guatemalan President Has Failed to Deliver on Many Promises*, MIAMI HERALD, Dec. 18, 1993.

396. *See* HUM. RTS. WATCH REP. ON GUATAMALA'S PRESIDENT, *supra* note 339, at 11-17; U.S. DEP'T OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1993, at 448 (1994); *Surprise Support for Civil Defense Patrols*, COHA'S WASH. REP. ON THE HEMISPHERE, Oct. 18, 1993, at 4.

397. *See Fourth Report on the Situation of Human Rights in Guatemala*, Inter-Am. C.H.R. 53-61, OEA/Ser.L/V/II.83, doc. 16 (1993) [hereinafter 1993 Inter-Am. C.H.R. Report on Guatemala]. *See also* Jim Handy, *Guatemala: A Tenacious Despotism*, NACLA REP. ON THE AMERICAS, Dec. 1992, at 31-34; *Protesters Demanding*

sion recommended that the patrols be "immediately . . . disbanded."<sup>398</sup> Nevertheless, in September 1993 de León announced that they were necessary "to prevent the spread of subversion."<sup>399</sup> In March 1994, the U.N. Human Rights Commission denounced Guatemala for failing to improve its human rights situation.<sup>400</sup>

Nevertheless, on March 29, 1994, de León achieved a milestone by reaching an initial agreement with the help of the U.N. to end Guatemala's long guerrilla insurgency.<sup>401</sup> The agreement called for the demobilization of the guerrillas by the end of 1994 and included a commitment by the Government to end forced recruitment into the patrols.<sup>402</sup> On June 23, 1994, the Government agreed with the guerrillas to form a Truth Commission to investigate and report on the multitude of human rights violations committed in the past.<sup>403</sup> In early August 1994, however, the guerrillas suspended further talks, denouncing the government's failure to stop violating human rights.<sup>404</sup> For ex-

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*Dissolution of Civilian Self-Defence Patrols Occupy OAS HQ*, BBC Summary of World Broadcasts, Oct. 29, 1993, available in LEXIS, Nexis Library, NEWS File; Fabiana Frayssinet, *Guatemala: Civil Groups Occupy Congress and OAS Building*, INTER PRESS SERVICE, Oct. 27, 1993, available in LEXIS, Nexis Library, WIRES File; *Guatemalan Leader Pressured to Control Feared Civil Patrols*, MIAMI HERALD, June 30, 1993, at 14A. Cf. Edward Orlebar, *Fight to Ban Forced Military Recruitment Gaining in Guatemala*, MIAMI HERALD, Aug. 28, 1993, at 16A (noting effort by indigenous groups to make army service voluntary).

398. 1993 *Inter-Am. C.H.R. Report on Guatemala*, supra note 397, at 60.

399. See *Surprise Support for Civil Defense Patrols*, supra note 396; Tim Golden, *Guatemala Chief Demands That Congress Resign*, N.Y. TIMES, Sept. 1, 1993, at A4. De León repeated his position in March 1994. *De León Reshuffles the High Command*, LATIN AM. WKLY. REP., 3 Mar. 1994, at 92.

400. See generally *More Disappointments for Guatemala*, 14 COHA'S WASH. REP. ON THE HEMISPHERE, Mar. 25, 1994, at 5 (1994). For a summary of the activities of the Commission's independent expert on Guatemala, See HUM. RTS. WATCH REP. ON GUATAMALA'S PRESIDENT, supra note 339, at 117-20.

401. Tracy Wilkinson, *Warring Sides in Guatemala Agree on Human Rights Pact*, MIAMI HERALD, Apr. 1, 1994, at 7A.

402. Agreement between Government of the Republic of Guatemala and the Unidad Revolucionaria Nacional Guatemalteca, Mar. 29, 1994, reprinted in HUM. RTS. WATCH REP. ON GUATAMALA'S PRESIDENT, supra note 339, at 136, 138. See also *Calendar Agreed for Peace Process*, LATIN AM. WKLY. REP., 21 Apr. 1994, at 159.

403. Tim Johnson, *Guatemalans Take Crucial Peace Step*, MIAMI HERALD, June 24, 1994, at 18A; *Oslo Agreement on 'Truth Commission'*, LATIN AM. WKLY. REP., 7 July 1994, at 299. But see Edward Orlebar, *Violence on Rise in Guatemala*, MIAMI HERALD, Oct. 17, 1994, at 6A (noting that the agreement gives the Commission little power).

404. See *Guerrillas Condition Further Negotiations*, INTER PRESS SERVICE, Aug. 8, 1994, available in LEXIS, Nexis Library, WIRES File.

ample, in an apparent attempt to inhibit labor organizing, police officers attacked and killed agricultural workers engaging in a sit-down strike in late August.<sup>405</sup> By mid-October 1994, it was unclear when or even whether the U.N. would be able to send human rights monitors to Guatemala as contemplated in the June agreement.<sup>406</sup>

Congressional elections held on August 14, 1994, produced mixed results. In another apparent rebuke to the political system itself, almost 80 percent of the electorate did not vote.<sup>407</sup> Still worse, the party led by Efraín Ríos Montt, a right wing fundamentalist who served as military dictator in 1982-1983, won thirty-two seats out of the eighty in the legislature, making it the single largest force.<sup>408</sup> Because Ríos Montt's brief regime was notorious for its bloodiness, even in the context of Guatemala's long history of repressive regimes, human rights activists were especially alarmed.<sup>409</sup> A coalition of forces opposed to Ríos Montt was barely able to block him from becoming president of the Congress.<sup>410</sup> Still, he is widely expected to run for President in November 1995.<sup>411</sup> President de León gave an optimistic cast to the outcome of the legislative elections he had worked so hard to bring about, calling them "propitious to national reconciliation,"<sup>412</sup> but the future of democracy and

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405. See Edward Orlebar, *Violence on Rise in Guatemala*, MIAMI HERALD, Oct. 17, 1994, at 6A. The head of the local police was later dismissed on account of the incident. See *Ríos Montt Fails to Get Support*, CARIBBEAN & CENT. AM. REP., RC-94-08, Oct. 6, 1994, at 3.

406. See Edward Orlebar, *Violence on Rise in Guatemala*, MIAMI HERALD, Oct. 17, 1994, at 6A. See also *Ex-ruler Urges Reconciliation*, MIAMI HERALD, Aug. 20, 1994, at 18A (300 member mission contemplated by U.N.).

407. *Ríos Montt Wins Congressional Poll Marred By 80% Abstention Rate*, LATIN AM. WKLY. REP., 25 Aug. 1994, at 373. See also Edward Orlebar, *Once a Dictator, Guatemalan Now Wields Clout in Congress*, MIAMI HERALD, Aug. 18, 1994, at 18A.

408. *Ríos Montt Foiled in the Legislature*, LATIN AM. WKLY. REP., 29 Sept. 1994, at 441.

409. Edward Orlebar, *Once a Dictator, Guatemalan Now Wields Clout in Congress*, MIAMI HERALD, Aug. 18, 1994, at 18A.

410. *Ríos Montt Foiled in the Legislature*, LATIN AM. WKLY. REP., 29 Sept. 1994, at 441.

411. *Ex-Dictator Ríos Montt Staging Comeback*, COHA'S WASH. REP. ON THE HEMISPHERE, Sept. 23, 1994, at 5. The Guatemalan Constitution bars anyone who staged a coup from running for president. See GUAT. CONST. art. 186.a, reprinted in 7 CONSTITUTIONS, *supra* note 82, at 74. But Ríos Montt may use his success in the legislature to press for a repeal of that provision. See *Ex-Dictator Ríos Montt Staging Comeback*, COHA'S WASH. REP. ON THE HEMISPHERE, Sept. 23, 1994, at 5; Edward Orlebar, *Once a Dictator, Guatemalan Now Wields Clout in Congress*, MIAMI HERALD, Aug. 18, 1994, at 18A.

412. *Ríos Montt Foiled in the Legislature*, LATIN AM. WKLY. REP., 29 Sept. 1994,

human rights in Guatemala remains highly uncertain.

#### IV. EVALUATING THE OAS AND U.S. RESPONSES

The international community's response clearly had a significant impact on events in Haiti, Peru, and Guatemala, though in differing ways and with divergent results. In Peru, Fujimori largely succeeded in his aims, but was forced to hold elections earlier than he might otherwise have done. In Guatemala, Serrano was forced out of office and replaced by a human rights advocate who, ironically, soon sought the dismissal of all members of the Congress and the Supreme Court (though by very different means from Serrano's). The Haitian military proved the most defiant of all, holding out for three years before finally accepting an agreement that gave its top officers effective immunity for their crimes against humanity.

Despite the diversity of results, two common themes can be discerned. First, as I will argue in part IV.A., there was a lack of political will to make sanctions and other means of pressure effective. The threat of sanctions quickly produced dramatic results in the case of Guatemala, although pressure from European countries may have had the greatest effect.<sup>413</sup> Haiti and Peru, however, made clear that the OAS lacks the will to follow through with vigorous and effective enforcement measures against more recalcitrant instigators of coups.<sup>414</sup> The lack of political will in those cases stemmed less, I would argue, from a deficiency of commitment to constitutional government in general than from the United States' political judgments about Haiti and Peru.

Second, as I will argue in part IV.B., the OAS operates without a clear paradigm of what amounts to constitutional democracy. In the face of Fujimori's actions, which did not amount to a classic military coup and which were followed up relatively quickly by elections to a new legislative body, the tentativeness of the OAS reaction indicates uncertainty about what continuity of constitutional government requires. Without such a paradigm, the OAS and U.S. will always have room to

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at 441.

413. See *supra* part III.C.

414. The OAS has also been criticized for not reacting to the imposition of emergency measures in Venezuela in June 1994. See *A Caudillo in Caracas?*, MIAMI HERALD, July 28, 1994, at 20A.

manipulate their responses to coups.

Conceivably, these problems might be remedied by changes at the international level — that is, by changes along the first track. The Santiago Commitment could be refined to force the OAS to follow through more effectively and consistently on its condemnation of coups. And a more concrete paradigm of what amounts to constitutional government could be developed, limiting the ability of OAS members to be manipulative in their responses to coups. As I will argue in part IV.C., however, a program of action focusing exclusively on the first track is unlikely to be fully successful.

### A. *The Problem of Effectiveness*

#### 1. Economic Sanctions

International sanctions generally have a mixed record,<sup>415</sup> and the same is true of the first three years of experience with the Santiago Commitment. Economic sanctions are the strongest weapon available to the OAS short of outright force.<sup>416</sup> They made their greatest contribution to the restoration of constitutional government in the case of Guatemala. It took little more than the threat of trade sanctions and aid cut-offs to mobilize the business community to join a coalition of leftists, traditional politicians, indigenous groups, and human rights organizations opposing the autogolpe.<sup>417</sup> The opposition of the business community, in turn, is likely to have played an important role in

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415. See generally, e.g., 1 GARY CLYDE HUFBAUER ET AL., *ECONOMIC SANCTIONS RECONSIDERED* 91-115 (2d ed. 1990); THE UTILITY OF INTERNATIONAL ECONOMIC SANCTIONS (David Leyton-Brown ed., 1987); Kimberly A. Elliott, *Economic Sanctions, in INTERVENTION, supra* note 16, at 85; Peter Wallensteen, *Economic Sanctions: Ten Modern Cases and Three Important Lessons, in DILEMMAS OF ECONOMIC COERCION: SANCTIONS IN WORLD POLITICS* 87 (Miroslav Nincic & Peter Wallensteen eds., 1983).

Even in situations where sanctions were predicted to work, such as with Iraq before the Persian Gulf War in 1991, or are thought in retrospect to have worked, as with the Dominican Republic in 1960 — the first instance in which the OAS invoked economic sanctions — the U.S. has resorted to military force (Iraq) or CIA subversion (the Dominican Republic). See Maarten Smeets, *Economic Sanctions Against Iraq: The Ideal Case?*, 24 J. WORLD TRADE 105, 120 (1990) (arguing that Iraq was the ideal candidate for economic sanctions). On the Dominican Republic, see C. LLOYD BROWN-JOHN, *MULTILATERAL SANCTIONS IN INTERNATIONAL LAW: A COMPARATIVE ANALYSIS* 193-253, 364-67 (1975); MARGARET P. DOXEY, *INTERNATIONAL SANCTIONS IN CONTEMPORARY PERSPECTIVE* 57-59 (1987); 2 HUFBAUER, *supra*, at 182-87.

416. Military intervention is unlikely ever to be used against a larger country with more than a token military.

417. See *supra* part III.C.



persuading the military to reverse its initial support of Serrano's power play.

The experience of Guatemala indicates, then, that economic sanctions can be very effective against small countries where elites have a strong stake in export trade. The lesson is ironic. On the one hand, by undercutting a country's ability to feed itself and exacerbating inequalities in wealth and income, export-oriented development strategies often help undermine the economic conditions for democracy and human rights to take root.<sup>418</sup> On the other hand, by rendering the country more dependent on international trade, they may give the OAS greater leverage in countering military or civilian-led coups.

Because the instigator of its coup capitulated so quickly, Guatemala did not provide a test of the OAS's commitment to use sanctions to restore constitutional government in the face of more committed opposition. In dealing with both Peru and Haiti, in contrast, the OAS was put to a real test — and its performance was hardly reassuring. To be sure, its deficiencies stemmed in part from the limitations inherent in any regional approach. But even with the involvement of the U.N., what was most evident was the absence of political will to employ sanctions in an effective way.

As noted earlier, the OAS and the U.S. both condemned the Peruvian autogolpe in unequivocal terms, and a number of countries including the U.S. suspended aid to Peru.<sup>419</sup> But the most powerful weapon — the collective imposition of sanctions — was simply never deployed against Peru. It might be possible to argue that the decision in May 1992 not to call for sanctions was justified by Fujimori's personal appearance at the Foreign Ministers' meeting, at which he promised quick elections to an elected assembly.<sup>420</sup> By this account, the member states may have concluded that Fujimori had adequately signalled the seriousness of his intentions, and that there was no need to impose on Peru the kind of devastation that effective sanctions inevitably wreak on the target economy.<sup>421</sup>

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418. See *infra* part IV.B.1.

419. On the other hand, it is hard not to speculate that the OAS's failure to dislodge the Haitian military rulers gave some comfort to Fujimori and his advisers as they plotted their coup.

420. See *supra* part III.B.

421. By this interpretation, if Fujimori had failed at the May 1992 meeting to present a convincing program for returning Peru to constitutional government, the

This understanding of the OAS's response to events in Peru, though, seems inadequate in light of the OAS's rush to give its blessing in December 1992 to Peru's alleged return to democracy.<sup>422</sup> As noted earlier, that blessing hardly seems merited. It certainly does not inspire confidence that the OAS's failure in May 1992 to exert greater economic pressure on Peru reflected a trustworthy judgment about the right amount of pressure to exert.

However flawed its response to Peru, the OAS was at least straightforward in its decision not to impose sanctions. In the case of Haiti the OAS's inaction was less apparent from its formal resolutions. The appearance of embargoes was not matched by reality.<sup>423</sup> There are several reasons for the disjunction.

First, for nearly twenty-one months after the coup, neither the OAS nor the U.S. made any real effort to give the OAS embargo a stringency that might actually have a direct impact on the elite. For example, trade between the U.S. and Haiti actually increased between 1992 and 1993.<sup>424</sup> It is not surprising that the OAS Secretary General himself called the embargo "very leaky."<sup>425</sup> Europe undercut the embargo to a very real ex-

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OAS might have led to the imposition of sanctions.

422. See *supra* part III.B.

423. For a comprehensive account, see Sydney P. Freedberg and Rachel L. Swarns, *How U.S. Botched Embargo*, MIAMI HERALD, Oct. 23, 1994, at 1A.

424. See *US-Haitian Trade*, LATIN AM. WKLY. REP., 3 Mar. 1994, at 94.

The General Accounting Office produced reports in May and September 1992 detailing shipments of oil and a wide variety of other commodities to Haiti. See General Accounting Office, Letter to Hon. Edward M. Kennedy, Sept. 21, 1992 (B-248828); General Accounting Office, Letter to Hon. Edward M. Kennedy, May 27, 1992 (B-248828). See *Several Nations Ignoring Haiti Embargo, U.S. Finds*, WASH. POST, May 31, 1992, at A26. See also Don Bohning, *Haiti Parliament Faces Crucial Vote on Aristide, Critic*, MIAMI HERALD, Jan. 14, 1992, at 7A (noting arrival of petroleum tanker at Haiti on January 10, 1992); Jane Bussey, *Challenging the Embargo*, MIAMI HERALD, Aug. 9, 1992, at 1K; *Profile: Lawrence Chewing Fabrega*, COHA'S WASH. REP. ON THE HEMISPHERE, July 29, 1992, at 2 (interview with Panamanian ambassador to OAS) ("It is well-known that many parties are violating the embargo.").

The Dominican Republic, which shares the island of Hispaniola with Haiti, was reportedly a major violator of the embargo. See, e.g., COHA'S WASH. REP. ON THE HEMISPHERE, Aug. 12, 1992, at 8; *Dominican Candidate Seeks New Election*, MIAMI HERALD, May 20, 1994, at 21A; *Haiti Fuel Blast Probably Won't Worsen Shortage*, MIAMI HERALD, Feb. 14, 1994, at 9A; Elaine Sciolino, *Clinton's New Policy on Haiti Yields Little Progress So Far*, N.Y. TIMES, May 18, 1994, at A1. A telling statistic is that while exports of oil and other fuel products from the U.S. to Haiti ceased after the U.N. embargo, exports of oil and fuel products from the U.S. to the Dominican Republic increased by 96 times after the coup. See *Doubts on Efficacy of New Sanctions*, LATIN AM. WKLY. REP., 2 June 1994, at 231.

425. See *Very Leaky Haitian Embargo a Failure, Leader of OAS Concedes*, MI-

tent,<sup>426</sup> but the Bush Administration was unwilling to put any significant pressure on it to stop.<sup>427</sup> On the contrary, it took actions that made it less likely that the EC would ever voluntarily go along with the embargo.<sup>428</sup> Nor was the U.S. willing to risk

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AMI HERALD, Aug. 28, 1992, at 33A.

426. After initially condemning the coup and instituting sanctions against Haiti on October 3, 1991, *EEC/Haiti: "Friendship and Solidarity" Visit by Aristide*, European Information Service: European Report, Oct. 30, 1991, at § V, No. 1716, at 5 (the European Community lifted its embargo in February 1992); *EC Abandons Plan for Drastic Sanctions Against Haiti*, REUTER BUS. REP., Feb. 17, 1992. See also *Europe Responds to Latin American Coups*, COHA'S WASH. REP. ON THE HEMISPHERE, July 15, 1992, at 1, 7.

The EC justified its decision as mandated by its obligations under a trade and development convention between the EC and many former European colonies. See Fourth ACP-EEC Convention (Lomé IV), Dec. 15, 1989, 29 I.L.M. 809 (entered into force Sept. 1, 1991). On the Lomé Convention, see generally, e.g., Douglas E. Matthews, *Lomé IV and ACP/EEC Relations: Surviving the Lost Decade*, 22 CAL. W. INT'L L.J. 1 (1991-1992). The effect was to help the regime to keep itself supplied with oil and luxury goods. See Barbara Crossette, *Hamstrung Over Haiti*, N.Y. TIMES, May 19, 1992, at A6; *Europe Responds to Latin American Coups*, COHA'S WASH. REP. ON THE HEMISPHERE, *supra*; Stephen Fidler and Canute James, *EC Oil 'Breaking Embargo on Haiti'*, FIN. TIMES, Apr. 3, 1992, at 4 (shipments from "France, Britain Germany and other countries" mean that "there are more tankers in the harbour than they can unload", according to "senior state department official"); Herbert Gold, *Haiti's New and Old Rich*, N.Y. TIMES, Apr. 3, 1993, at 15.

427. See, e.g., Pamela Constable, *U.S. Hints at Tougher Sanctions Against Haiti*, BOSTON GLOBE, Feb. 6, 1993, at 1 (noting that the Bush administration and Latin American countries were reluctant to support "tougher US enforcement of the regional embargo, press European democracies to stop shipping oil to Haiti and cancel visas of prominent Haitians who backed the coup"); Stephen Fidler and Canute James, *EC Oil 'Breaking Embargo on Haiti'*, FIN. TIMES, Apr. 3, 1992, at 4 ("The US administration has complained to European Community governments that shipments of oil from Europe are undermining an embargo aimed at restoring President Jean-Bertrand Aristide to power in Haiti.").

428. During the same period that it refused to take measures to ensure the full effectiveness of the embargo, the Bush Administration (however reluctantly) agreed to support a tightening of the embargo on Cuba that angered Canada and European countries. The misnamed "Cuban Democracy Act of 1992," 22 U.S.C. §§ 6001-6010, authorizes the President to impose specified sanctions against other countries that provide assistance to Cuba, see *id.* § 6003(b), and to extend U.S. sanctions to foreign-incorporated subsidiaries of U.S. firms, see *id.* § 6005(a). See generally Jason S. Bell, *Violation of International Law and Doomed U.S. Policy: An Analysis of the Cuban Democracy Act*, 25 U. MIAMI INTER-AM L. REV. 77 (1993); Laura A. Donner, *Recent Development, The Cuban Democracy Act of 1992: Using Foreign Subsidiaries as Tools of Foreign Economic Policy*, 7 EMORY INT'L L. REV. 259 (1993). The latter provision was strongly opposed by the EC. See Julie Wolf, *EC Issues Report Criticizing the U.S. For Trade Barriers*, WALL ST. J., Apr. 16, 1993, at A12 (EC condemns Cuban Democracy Act as trade barrier); European Community Statement Opposing Cuban Democracy Act, Oct. 8, 1992, European Community News No. 38/92, reprinted in FOREIGN POL'Y BULL, Nov.-Dec. 1992, at 62 (denouncing extraterritoriality of the Act); 139 CONG. REC. E123, 103d Cong., 1st Sess., Jan. 21, 1993 (reproducing Euro-

the possible confrontations with Europe that might be entailed by a naval blockade to cut off Haiti's oil supply,<sup>429</sup> although it was quite willing to blockade Haiti to prevent political refugees from reaching the U.S.<sup>430</sup>

Indeed, far from being committed to the embargo, the United States' main action during the twenty-one month period prior to the first U.N. embargo of June 1993 was to ease trade restrictions with Haiti. In February 1992 — the same month in which the EC lifted its own brief embargo against Haiti — the U.S. announced that it had decided to "fine tune" the embargo by offering to grant licenses to assembly export plants on a case-by-case basis.<sup>431</sup> The purported aim was to target supporters of

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pean Parliament Resolution condemning the Act). The EC has officially deemed the Cuban Democracy Act a "trade barrier." See *EC Issues Report Criticizing the U.S. for Trade Barriers*, WALL ST. J., Apr. 16, 1993, at A12. The U.N. has also repeatedly condemned the embargo. See *Key U.S. Allies at U.N. Vote Against Cuba Embargo*, MIAMI HERALD, Nov. 4, 1993, at 22A (noting that U.N. has condemned embargo twice in two years); Stanley Meisler, *U.N. Vote Condemns Embargo Against Cuba*, L.A. TIMES, Oct. 27, 1994, at A12. Nevertheless, the Clinton Administration made clear its own support for the Cuban Democracy Act. See, e.g., Tom Fiedler, *Clinton: Cuba Embargo 'Right'*, MIAMI HERALD, Sept. 6, 1993, at 1A; Christopher Marquis, *Clinton Praises Cuban Exiles at Fete Marking Independence*, MIAMI HERALD, May 21, 1993, at 16A.

The significance of the Cuban Democracy Act was twofold. First, it showed that the Bush Administration's reluctance to press for a full embargo against Haiti could not be attributed to a general reluctance to anger European allies. Second, it seems quite likely that the U.S. confrontation with Europe over Cuba would have made it politically much more difficult for the U.S. to persuade Europe to go along with an OAS embargo against Haiti (which, unlike a U.N. embargo, might not be legally binding on the EC).

429. Barbara Crossette, *Hamstrung Over Haiti*, N.Y. TIMES, May 19, 1992, at A6. The Canadian Prime Minister called for such a blockade in December 1992. See *International Blockade of Haiti Is Urged*, MIAMI HERALD, Dec. 25, 1992, at 22A.

Such an action would not have been unprecedented. The Cuban Democracy Act of 1992, prohibits a vessel that has carried goods to or from Cuba from entering a U.S. port for six months. See 22 U.S.C. § 6005(b). A ship that enters a U.S. port in violation of the Act is subject to seizure. *Id.* § 6009; 50 U.S.C. App. § 16. The U.S. appears to have enforced such a prohibition. See Alexander Cockburn, *By Any Means Necessary*, 256 NATION 6 (1992) (noting enforcement pursuant to earlier executive order).

Moreover, the OAS did call for a tightening of the embargo in May 1992, urging member states to prohibit ships that deliver any goods to Haiti from calling at any OAS member country. Howard W. French, *Latin States Back Steps to Restore President in Haiti*, N.Y. TIMES, May 18, 1992, at A1; Andres Oppenheimer, *OAS Tightening Embargo on Haiti*, MIAMI HERALD, May 18, 1992, at 1A. A U.S. order to that effect (entered a month earlier) does not, however, appear to have been enforced. See *supra* text accompanying notes 93-94.

430. See *infra* part IV.A.2.

431. See BNA INT'L TRADE DAILY, Feb. 6, 1992, available in LEXIS, Nexis Li-

the military government and lessen suffering among the general population.<sup>432</sup> But it is hard to imagine how the Haitian military could have failed to view the easing of the embargo as a diplomatic signal that the U.S. was not serious about forcing it out.<sup>433</sup>

The Clinton Administration's approach to Haiti was notable mainly for its continuities with its predecessor. While it was quick to assert its intention to continue interdicting Haitian refugees, the Clinton Administration did not seek any U.N. sanctions or take other coercive measures like freezing the assets of top military leaders and their elite civilian supporters until six months after it took office. Through the Governors Island Agreement that (together with the U.N.) it imposed on Aristide, it insisted upon a rush to lift sanctions before he had returned to Haiti. With economic pressures eased from the end of August to mid-October 1993, the military had ample time to stockpile oil and other supplies, as well as to put its assets in a form less vulnerable to asset freezes.<sup>434</sup> Even after the Haitian military reneged on the Governors Island Agreement in October 1993, the Clinton Administration did not seek a complete worldwide embargo on all trade with Haiti, or vigorously pursue other measures targeted against the elite, until late April 1994. During that six-month period, it focused its energies on pressuring Aristide to accept a settlement even weaker than the Governors

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brary, BNAITD File. For a description of the export assembly industry, see JOSH DEWIND AND DAVID H. KINLEY III, *AIDING MIGRATION: THE IMPACT OF INTERNATIONAL DEVELOPMENT ASSISTANCE ON HAITI* 103-35 (1988).

432. Barbara Crossette, *U.S. Plans to Sharpen Focus of its Sanctions Against Haiti*, N.Y. TIMES, Feb. 5, 1992, at A10; *U.S. 'Fine-tunes' Embargo of Haiti*, MIAMI HERALD, Feb. 5, 1992, at 8A.

433. Cf. Elliott Abrams, *Policy Confronts Reality: Was the Resolution of the Haiti Crisis a Victory for Democracy or Just for Common Sense?*, NAT'L REV., Mar. 30, 1992 ("The embargo was 'modified' [in February 1992], which was a signal to Haiti's political actors that the United States had decided to back away from the French and Venezuelan embrace of Aristide."). That signal explains why opponents of the regime denounced the move as blunting the effort to restore democracy. Howard W. French, *Bravado Replaces Anxiety as Balance Tips for Supporters of Coup in Haiti*, N.Y. TIMES, Feb. 7, 1992, at A4; BNA INT'L TRADE DAILY, Feb. 6, 1992, available in LEXIS, Nexis Library, BNAITD File; see also Christopher Marquis & Don Bohning, *Haiti Faces Long Term Isolation*, MIAMI HERALD, Feb. 14, 1992, at 1A (noting predictions that Haiti may face "years of political isolation, deepening misery, simmering instability, and . . . international neglect").

434. Andres Oppenheimer, *Immediate Effect of Embargo Will Be Psychological*, MIAMI HERALD, Oct. 19, 1993, at 10A; Garry Pierre-Pierre, *Effort to Save Haitian Accord Fails as Military Shuns Talks*, N.Y. TIMES, Nov. 6, 1993, at 1.

Island Agreement. Finally, not until well over a year after the U.N. oil and arms embargo was imposed did the Clinton Administration take active efforts to address a major problem: the smuggling of fuel supplies across the border with the Dominican Republic.<sup>435</sup>

In short, whatever chances of success sanctions might have had if they had been imposed swiftly, broadly, and deeply, they were lost in a drawn-out saga in which Aristide seemed as much the target of pressure as the military rulers. This record speaks a lack of solid commitment to restoring democracy.

To be sure, another explanation is logically possible: a concern for the impact of the sanctions on Haiti's poor. There were, after all, valid grounds for fearing that the OAS and U.N. embargoes had harmful long-term effects on Haiti's poor, on its economic prospects, and on its environment.<sup>436</sup> Fuel prices increased even during the period of the leaky OAS embargo,<sup>437</sup>

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435. On the smuggling, see *supra* note 424. On August 1, 1994, the Dominican Republic agreed to permit U.S. military helicopters to patrol the border together with multinational observers. See *Dominican Republic Approves Border Watch*, MIAMI HERALD, Aug. 2, 1994, at 6A.

436. For example, a report released in November 1993 by the Harvard Center for Population and Development Studies estimated that sanctions were killing Haitian children at a rate of nearly 1,000 a month. See HARVARD CENTER FOR POPULATION AND DEVELOPMENT STUDIES, *SANCTIONS IN HAITI: CRISIS IN HUMANITARIAN ACTION 10* (1993). That assertion was later challenged by one of the groups that participated in the study. See Howard W. French, *Embargo's Effect on Haiti Debated*, N.Y. TIMES, Nov. 24, 1993, at A4; Howard W. French, *Study Says Haiti Sanctions Kill up to 1,000 Children a Month*, N.Y. TIMES, Nov. 9, 1993, at A1. See also *Hardship Stories May Be A Ploy of Haitian Military, U.S. Official Says*, MIAMI HERALD, Nov. 10, 1993, at 23A. Moreover, Haiti was already desperately poor before the embargo; it ranked last in the Western Hemisphere in a "human development index" created by the United Nations Development Program to measure education, life expectancy, and per capita income. See Mimi Whitefield, *Canadians Live Best, U.N. Says*, MIAMI HERALD, Apr. 24, 1992, at 10A.

In any event, there seems little doubt that the economic plight of Haiti's poor worsened after the coup, and that sanctions played a role in that. See, e.g., Don Bohning, *Haitians Starting to Snap Under Pressure of Daily Existence*, MIAMI HERALD, Nov. 21, 1993, at 1A; Douglas Farah, *Rural Haitians Reeling*, WASH. POST, Nov. 27, 1993, at A1; Howard W. French, *Sanctions on Haiti Hampering Effort to Feed the Poor*, N.Y. TIMES, Jan. 11, 1994, at A1; *How the Sanctions are Biting*, LATIN AM. WKLY. REP., Feb. 3, 1994, at 46. Even efforts to bring humanitarian aid to Haiti were at times hindered by the embargo; for example, the shortage of fuel made it difficult to deliver food and medicine. See *Aid Groups in Haiti Face Fuel Shortage*, MIAMI HERALD, Aug. 19, 1994, at 19A; John Donnelly, *Haitians Desperate for Food 'Are Praying for a Miracle'*, MIAMI HERALD, Jan. 20, 1994, at 1A; *Medicine Shipments in Haiti to End*, MIAMI HERALD, Jan. 19, 1994, at 8A.

437. J.P. Slavin, *Poorest Haitian Farmers Reap Little from Land*, MIAMI HERALD, Apr. 12, 1992, at 16A.

and prices increased still more after the U.N. embargo was imposed.<sup>438</sup>

The embargo also appears to have contributed to the further degradation of Haiti's environment.<sup>439</sup> Though the sale of propane was exempted from the U.N. embargo,<sup>440</sup> Haiti's remaining trees were stripped for charcoal, the sale of which became one of the few ways for poorer Haitians to make money.<sup>441</sup> There were indications that at least some of the assembly manufacturers that had earlier set up shop in Haiti, attracted by its cheap labor, left for the Dominican Republic and elsewhere.<sup>442</sup>

438. Susan Benesch, *Haiti's Capital Dimmed by Extensive Blackouts*, MIAMI HERALD, Mar. 24, 1994, at 18A; Yves Colon, *Haiti's Middle Class Becoming Poor*, MIAMI HERALD, June 27, 1994, at 9A. Even so, sufficient supplies made it into Haiti that fuel prices could decrease significantly during some periods. See *Signs of Rift at the Heart of the Regime*, LATIN AM. WKLY. REP., 30 June 1994, at 285.

439. Lizette Alvarez, *Embargo Choking Haiti's Poorest*, MIAMI HERALD, May 17, 1992, at 1A; *Aristide's Offer: A 'Vision of Democracy'*, N.Y. TIMES, Sept. 17, 1994, at A4; Don Bohning, *OAS Embargo Devastating Haiti's Economy, Ecology*, MIAMI HERALD, Jan. 19, 1992, at 15A; Jean-Michel Cousteau, *In Haiti, Ruined Environment Creates a New Kind of Refugee*, MIAMI HERALD, Dec. 16, 1991, at 17A; Howard W. French, *Plight of Haiti's Poor Brings Calls to Loosen the Embargo*, N.Y. TIMES, Aug. 5, 1992, at A3; Harold Maass, *Haiti Deforestation Spreads as Farmers Abandon Coffee*, MIAMI HERALD, May 13, 1993, at 19A; J.P. Slavin, *Poorest Haitian Farmers Reap Little from Land*, MIAMI HERALD, Apr. 12, 1992, at 16A.

Haiti's environmental problems are not new:

Haiti's environment has long suffered, owing in large part to the pattern of land ownership and the methods of cultivation of the peasants. With the increasing fragmentation of landholdings, the demographic pressure caused by the population increase, and the process of soil erosion caused by excessive deforestation, aggravated the living conditions of the peasants. In an attempt to cultivate more land, the peasants farm more and more hillside lands. The clearing and deforestation of these lands increase the process of soil erosion at the rate of 5% per year, and create a deficit of 1% to 2% per year of the arable land surface.

The Columbia University/New York University Consortium, Alex Dupuy, *Export Manufacture and Underdevelopment in Haiti*, Conference Paper No. 19, at 19 (n.d.). See also AMY WILENTZ, *THE RAINY SEASON: HAITI SINCE DUVALIER 243-91* (1989); Anthony V. Catanese, *Haiti's Refugees: Political, Economic, Environmental*, FIELD STAFF REP.: LATIN AMERICA, No. 17, at 4-6 (Universities Field Staff Int'l 1990-91); Harold Maass, *Haiti Deforestation Spreads as Farmers Abandon Coffee*, MIAMI HERALD, May 13, 1993, at 19A.

440. S.C. Res. 841, *supra* note 116, para. 7; S.C. Res. 917, *supra* note 239, para. 7(c). See Douglas Farah, *Aristide's Backers: Latest Plan Falls Short*, WASH. POST, May 2, 1994, at A1 (noting that exemption of propane was to discourage people from using trees for charcoal).

441. *E.g.*, Lizette Alvarez, *Embargo Choking Haiti's Poorest*, MIAMI HERALD, May 17, 1992, at 1A; Lee Hockstader, *Embargo Translates into Ecological Disaster for Haiti*, WASH. POST, May 31, 1992, at A1; *Rural Haiti Suffers from Embargo/Drought*, ALL THINGS CONSIDERED, NPR, June 10, 1992, available in LEXIS, Nexis Library, TRANSCRIPT File.

442. See Susan Benesch, *Firms Run Out of Hope, Cash*, MIAMI HERALD, Feb. 24,

Although these problems were real, there are three reasons for doubting that any genuine concern for the poor undergirded the long record of the OAS, the U.N., and the U.S. to press quickly for strong sanctions.<sup>443</sup> First, the embargo, opposed by

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1994, at 20A; Don Bohning, *Assembly Industry Falls Apart*, MIAMI HERALD, Mar. 16, 1992, at 12A; Don Bohning, *OAS Embargo Devastating Haiti's Economy, Ecology*, MIAMI HERALD, Jan. 19, 1992, at 15A (prediction by president of Association of Haitian Industrialists that "Haiti's assembly sector is 'finished'"); Andres Oppenheimer, *Haiti Embargo Prompts Business Exodus*, MIAMI HERALD, Mar. 12, 1992, at 20A; Jill Smolowe, *Bad to Worse*, TIME, Feb. 10, 1992, at 32.

443. The severe impact of the Cuban embargo on the people of Cuba has posed no problem for U.S. foreign policy, although, as noted above, see *supra* note 428, the U.N. has condemned it.

If there was such a concern on the United States' part with respect to Haiti, it marked an entirely new development in U.S. foreign policy. The U.S. has long intervened in Haitian affairs in a way that has undermined democracy and human rights there. The twenty years of armed American occupation "strengthened and assured the survival of many of . . . the worst features" of Haitian politics, BRENDA GAYLE PLUMMER, *HAITI AND THE UNITED STATES: THE PSYCHOLOGICAL MOMENT* 120 (1992), particularly in bequeathing to Haiti "one lasting legacy: a professional armed force with modern weapons," *id.* at 141; see also SIDNEY W. MINTZ, *CARIBBEAN TRANSFORMATIONS* 292-93 (1974). On the occupation, see generally HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI, 1915-1934* (1971); see also Malissa Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687, 693-96 (1993); Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AMER. J. INT'L L. 42, 67-68 (1993). That period, which came to an end on December 31, 1934, was followed by one of subtler intervention, a change based on the United States' "recognition that outright intervention would accomplish nothing, rather than on a realization that the occupation had been unjust and unproductive." PLUMMER, *supra*, at 140 (footnote omitted).

In the Duvalier era, relations between Haiti and the U.S. warmed and cooled at different times, but particularly with the Nixon administration, they improved, and the U.S. gave Haiti significant aid, mostly in the form of assistance to the military, *id.* at 194-95. See also DEWIND AND KINLEY, *supra* note 431, at 40-54. Moreover, although it had a role in easing "Baby Doc" Duvalier out of the country, the U.S. acted only when the Haitian people had precipitated a crisis and made his downfall virtually inevitable. See PLUMMER *supra*, at 207-9. The U.S. then rushed to provide military aid to the new regime of General Henri Namphy, showing little concern for the military's continuing human rights violations, and provided economic aid according to political criteria that favored the Namphy and Avril regimes and their supporters. For detailed critiques, see The Columbia University/New York University Consortium, Josh DeWind, *Economic Assistance and Democratization in Haiti*, Conference Paper No. 19 (n.d.); PLUMMER, *supra* at 218-37.

Thus it is not surprising that, as the Lawyers Committee for Human Rights put it in 1991:

[i]n the minds of many Haitians, the U.S. is closely linked to the Haitian military and, indirectly, to the acceptance of human rights abuses by the military high command. The Marines established the modern Haitian army during the U.S. occupation of Haiti from 1915-1934, and the United States has been a major source of military equipment ever since. More-



Haiti's elite,<sup>444</sup> consistently had strong support among Aristide supporters.<sup>445</sup> Aristide himself — who has solid support both within Haiti<sup>446</sup> and the Haitian community in the U.S.,<sup>447</sup> and who is, after all, Haiti's elected president — repeatedly called for the ineffective OAS embargo to be tightened and enforced,<sup>448</sup> and, after the Governors Island Agreement collapsed, called for the U.N. embargo to be expanded to include all goods.<sup>449</sup>

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over, many Haitian military personnel received training in the United States.

LAWYERS COMMITTEE FOR HUMAN RIGHTS, CRITIQUE: REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, at 104 (1991) [hereinafter 1990 LAWYERS COMMITTEE STATE DEPARTMENT HUMAN RIGHTS CRITIQUE]. See also PLUMMER, *supra*, at 224 ("Many Haitians held the United States directly responsible for sustaining the thirty-year [Duvalier] dictatorship and holding Haiti hostage to the cold war."). Aristide has written that it is not that members of the army are evil, but that they have been "trained . . . to work against the people . . . . Thus, in the Army itself, the soldiers are victims; they are not evil soldiers arrayed against civilians, but an Army arrayed against a people and against all of the children of the people." JEAN-BERTRAND ARISTIDE, *IN THE PARISH OF THE POOR: WRITINGS FROM HAITI* 59 (Amy Wilentz trans., 1990).

444. *E.g.*, *Haiti's Elite Rally in the Streets*, MIAMI HERALD, Nov. 12, 1991, at 8A.

445. Jill Smolowe, *Bad to Worse*, TIME, Feb. 10, 1992, at 32 ("'Titid gave us dignity and hope,' says a barefoot man, referring to Aristide by his popular nickname. 'Keep the embargo. We are ready to suffer if it means Titid will come back.'"); Howard W. French, *A Mettlesome City Keeps Aristide's Banner Flying*, N.Y. TIMES, Nov. 6, 1991, at A4; Howard W. French, *Plight of Haiti's Poor Brings Calls to Loosen the Embargo*, N.Y. TIMES, Aug. 5, 1992, at A3.

446. See, e.g., Rick Bragg, *Haiti's Poor Love Aristide, but Don't Expect Him*, N.Y. TIMES, Aug. 16, 1994, at A6; *Churchgoers Beaten, Arrested in Jeremie*, MIAMI HERALD, Mar. 1, 1993, at 8A; Douglas Farah, *Repression Still Rife in Rural Haiti*, WASH. POST, May 30, 1993, at A37, A45; Howard W. French, *A Mettlesome City Keeps Aristide Banner Flying*, N.Y. TIMES, Nov. 16, 1991, at A4. As Aristide put it, the "thirst for justice transcends even momentary economic hardship. It is for this reason that the poor of Haiti who suffer under the embargo support it the most. They support the embargo at great personal sacrifice because they know that this is the only way that justice will become a reality in our country." Jean-Bertrand Aristide, *The Role of the Judiciary in the Transition to Democracy*, in *TRANSITION TO DEMOCRACY IN LATIN AMERICA*, *supra* note 13, at 35, 36.

447. See Marjorie Valbrun, *Aristide's Visit Energizes Little Haiti*, MIAMI HERALD, July 3, 1992, at 1B.

448. See, e.g., Edward Holland, *Aristide: Renew Pressure*, MIAMI HERALD, Sept. 11, 1992, at 22A; Steven A. Holmes, *Haitian Leader Calls on Clinton to Set a Deadline for his Return*, N.Y. TIMES, Mar. 5, 1993, at A3; Marvin Howe, *Ousted Haiti Chief, With Dinkins, Calls for 'a Real Blockade' on Oil*, N.Y. TIMES, Apr. 25, 1992, at A4; Alina Matas, *Haitian Envoy: Step Up Pressure Against Army*, MIAMI HERALD, Feb. 10, 1992, at 1B. See also Christopher Marquis, *OAS Trying to Revive Haiti Talks*, MIAMI HERALD, Aug. 13, 1992, at 14A.

449. Paul Lewis, *Exiled President Asks Full Embargo Be Placed on Haiti*, N.Y. TIMES, Oct. 29, 1993, at A1; Christopher Marquis & Paul Anderson, *Aristide Urges*

Second, real concern for the poorest and most oppressed sectors of Haitian society would have mandated vigorous efforts to depose the military regime from the outset. Indeed, a number of related actions, like freezing the assets of the military and its supporters and denying them visas to the U.S., could have given the embargo immediate added impact *without* harming the poor; but these steps were taken only with extreme reluctance.<sup>450</sup> More fundamentally, for all the concern about the long-term damage the embargo might cause, every day the regime remained in power it inflicted long-term damage of a fundamental sort. By the time of the coup, "the peasantry had become organized to the extent that Haiti was identified as one of only a handful of countries in the world, where the scale of grassroots organizing ha[d] assumed an increasing national political importance."<sup>451</sup> After the coup, popular grassroots organizations that had helped promote development and provide literacy and other services to the poor suffered under the repression of the military and the local "sheriffs" or "section chiefs," whom the military regime restored to power and gave *carte blanche*.<sup>452</sup>

'Complete Blockade,' MIAMI HERALD, Oct. 29, 1993, at 1A. The call for a real embargo, not one that burdened the poor while allowing the elite and the military to escape relatively unscathed, was echoed by Aristide supporters in Haiti. See Susan Benesch, *Haitians Split Over Tighter Embargo*, MIAMI HERALD, May 4, 1994, at 13A.

450. A related point is that the economic benefits of a partially enforced embargo likely accrued to the elite, wealthy families who engaged in the smuggling to which only a partially enforced embargo could give rise. See HAITI AFTER THE COUP, *supra* note 106, at 10-18.

451. Robert E. Maguire, *The Peasantry and Political Change in Haiti*, CARIBBEAN AFF., Apr.-June 1991, at 1, 3.

452. See Kenneth Roth, *Haiti and Clinton*, *supra* note 82:

Since the coup, the principal target of political violence in Haiti has been the country's diverse civil society — the peasant associations, grassroots development projects, trade unions, student organizations, church groups, and radio stations that had sprung up after the fall of the Duvalier dictatorship in 1986, and were beginning to thrive during the eight months of Aristide's presidency. With few organized political parties in Haiti, these civic groups gave crucial support to Aristide. Following his overthrow, the army has crushed these organizations by means of intimidation, detention, beatings and murder. Virtually all forms of independent association have been banned.

See also 1993 Bruni Celli Report, *supra* note 48, at 20 ("The military viewed these grass-roots organizations, founded by the leaders of the Lavalas movement and composed of Aristide supporters, as the main obstacle to the consolidation of its power and thus as its main enemy. These organizations and, naturally, their actual members and potential supporters have been subjected to indiscriminate repression."); AMERICAS WATCH AND NATIONAL COALITION FOR HAITIAN REFUGEES, SILENCING A PEOPLE: THE DESTRUCTION OF CIVIL SOCIETY IN HAITI (1992) [hereinafter AMERICA'S

The aim of the regime was not simply to survive but to turn back the clock on the beginnings of popular mobilization that had marked the post-Duvalier era, so that, as one observer put it, "even if international pressure were to secure Aristide's return, he would have difficulty transforming his personal popularity into the organized support he would need to exert civilian authority over the army."<sup>453</sup>

Third, concerns in the Bush Administration over the possible destruction of the export assembly industry must be taken in context. It is true that, in a nation as desperately poor as Haiti, the loss of jobs, or indeed of an entire industry, cannot be taken lightly. But it is also true that the growth of the export assembly industry has represented a particular strategy of development, one whose severe limitations were apparent long before the embargo. The industry has provided only a limited number of unstable and low-paying jobs, has tended to increase the gap between the urban sector and its vastly bigger rural counterpart, and leaves its workers particularly vulnerable to the vicissitudes of the world economy.<sup>454</sup> It may well have led to an *increase* in

WATCH HAITIAN REFUGEE REPORT]; U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 424 ("Grassroots liberation theology organizations in the countryside remain a strong base of support for President Aristide. These groups and their leaders have been particular targets of the army."); AMERICAS WATCH, NATIONAL COALITION FOR HAITIAN REFUGEES, AND PHYSICIANS FOR HUMAN RIGHTS, RETURN TO THE DARKEST DAYS: HUMAN RIGHTS IN HAITI SINCE THE COUP 1 (1991) [hereinafter AMERICAS WATCH/PHYSICIANS FOR HUMAN RIGHTS REPORT] ("Not content simply to seize the reins of government, the army has embarked on a systematic and continuing campaign to stamp out the vibrant civil society that has taken root in Haiti since the fall of the Duvalier dictatorship nearly six years ago."); *Haiti: The Impact of the September 1991 Coup*, 4 INT'L J. REFUGEE L. 217, 220-21 (1992); Harold Maass, *Halt in Talks Has Brought Rise in Beatings, Arrests in Haiti*, MIAMI HERALD, June 3, 1993, at 10A; Harold Maass, *Haitian Self-Help Stalled by Coup*, MIAMI HERALD, July 30, 1992, at 16A.

On the return of the "section chiefs" after Aristide's abolition of the position, see 1993 *Bruni Celli Report*, *supra* note 48, at 22; AMERICAS WATCH HAITIAN REFUGEE REPORT, *supra*, at 9; Tim Johnson, *Haiti's Rural Sheriffs Rule Like Feudal Lords*, MIAMI HERALD, July 29, 1994, at 1A.

453. Roth, *Haiti and Clinton*, *supra* note 82.

Moreover, as Aristide has long preached, such popular, self-help movements are essential to improving the lot of Haiti's poor, so their destruction would hinder economic development as well as democracy. See ARISTIDE, IN THE PARISH OF THE POOR, *supra* note 443, at 13-16 (arguing that prospect of improvement in lives of Haiti's poor lie in grassroots "enlightened communities" like liberation theology groups, "youth groups and women's groups and associations of the unemployed," "unions and journalists' organizations," "human rights groups, professional confederations, and neighborhood vigilance brigades").

454. See MICHEL-ROLPH TROUILLOT, HAITI, STATE AGAINST NATION: THE ORIGINS

Haitian emigration.<sup>455</sup> And because the industry has depended so crucially on keeping wages at extremely low levels, which requires in turn the suppression of labor unions and pro-labor political parties, it gives the elite an even more strongly vested interest in political repression.<sup>456</sup> It is far from clear that Haiti's poor ever considered preservation of the assembly industry worth the sacrifice of what most of them appeared to regard as their only real prospect of democracy — the restoration of Aristide to the Presidency.

In short, it is hard to see this record as reflecting anything other than a lack of urgency (at best) about restoring Haiti's elected government. That lack of urgency stemmed from the United States' hostility to Aristide, which, as I will show in the next section, was most evident in the way it tended to present him as the problem, thus undercutting its condemnation of the coup.

## 2. International Condemnation

As a form of pressure, international condemnation pales in comparison with effective sanctions, but it can still have an impact by sending a military regime diplomatic signs of the international community's resolve. International condemnation was most straightforward in the case of Guatemala, where the U.S. and the OAS were unequivocal in their censure of the autogolpe. A principal reason for the directness of the rebuke was that, coming only a year after Fujimori's actions in Peru, Serrano's seizure of power in Guatemala raised the prospect of a

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AND LEGACY OF DUVALIERISM 209-216 (1990); PLUMMER, *supra* note 443, at 194; Barbara Briggs and Charles Kernaghan, *The U.S. Economic Agenda: A Sweatshop Model of Development*, NACLA REP. ON THE AMERICAS, July 1993, at 37; The Columbia University/New York University Consortium, Josh DeWind, Economic Assistance and Democratization in Haiti, Conference Paper No. 19, at 14-15 (n.d.); Dupuy, *supra* note 439, at 10-16; *The Underside of Paradise: The Failure of Foreign Assembly in Haiti*, THE HAITI BEAT, Washington Office on Haiti, Summer 1990, at 10; HAITI AFTER THE COUP, *supra* note 106.

455. See DEWIND & KINLEY, *supra* note 431, at 134-35, 142-44 (arguing that such a connection is likely).

456. One of the business community's objections to Aristide was his support of pay increases for workers, Pamela Constable, *Talks in Haiti Seen at Impasse*, BOSTON GLOBE, Oct. 5, 1991, at 1, which puts concerns about whether returning Aristide was worth the cost of the embargo in a different light.

The connection between low wages and repression is nicely set out in DEWIND & KINLEY, *supra* note 431, at 145-49, and in HAITI AFTER THE COUP, *supra* note 106, at 30, 36-41.

series of civilian-led coups. It would be a mistake, however, to conclude from the Guatemala experience that the OAS will always vigorously condemn any coup. The same forcefulness marked the OAS's initial condemnation of the coups in Haiti and Peru; yet in both cases, the condemnation turned out to be heavily qualified.

The OAS's decision to give its blessing to Fujimori's Plan in December 1992, together with its failure to impose sanctions in May 1992, partly undercut the initial condemnation of the autogolpe in Peru. At the December 1992 meeting, the OAS Foreign Ministers proclaimed the installation of the Democratic Constitutional Congress "an important step in the process of restoring democratic institutional order in Peru"<sup>457</sup> and ceased monitoring events there.<sup>458</sup> The action was widely seen as an acceptance of Fujimori's "restoration" of democracy.<sup>459</sup> Unlike Serrano, Fujimori retained his position and now presides over a government that he changed radically by extra-constitutional means, with apparent plans to prolong his own authoritarian rule.<sup>460</sup> Whatever force the OAS's initial condemnation may have had was completely dissipated—a fact that may well have encouraged Serrano to make his own bid for absolute power in Guatemala.<sup>461</sup>

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457. Restoration of Democracy in Peru, *supra* note 317, at 1.

458. *Id.* at para. 3 ("[W]ith the installation of the Democratic Constitutional Congress, this Ad Hoc Meeting of Ministers of Foreign Affairs will be closed"). The Ministers merely asked Peru to "keep the member states informed on the evolution of the process of restoration of democracy, through the Permanent Council." *Id.* at para. 1. The assembly was installed on December 30, 1992. See *supra* part III.B.

459. See, e.g., Christopher Marquis, *Pentagon and OAS Readmit Peru to Hemisphere's Democratic Club*, MIAMI HERALD, Dec. 15, 1992, at 14A; Andres Oppenheimer, *World Seems to Have Accepted Fujimori's Coup*, MIAMI HERALD, Mar. 29, 1993, at 10A.

460. See *supra* part III.B.

461. Cf. Daniel Morcate, *Paralytic OAS Ignores Infractions Against Democracy*, MIAMI HERALD, July 14, 1994, at 19A ("Had Guatemalans not resolutely rejected Serrano, the OAS would likely have forgiven him as it did Fujimori").

An earlier downplaying of human rights concerns took place on July 30, 1991, when, in an obvious attempt to evade congressional limitations on granting "anti-drug" aid to Peru, the administration certified that Peru was not engaged in consistent and gross violations of human rights. See International Narcotics Control Act of 1990, § 4(a), 22 U.S.C. § 2291 (1992) (requiring that administration certify that Peru is not involved in a "consistent pattern of gross violations of internationally recognized human rights" as precondition to aid); Arewa & O'Rourke, *supra* note 292, at 188. See also Holly Burkhalter, *Peru's Public Relations Coup on Capitol Hill*, CONN. L. TRIB., Sept. 30, 1991, at 22; Michael Isikoff, *U.S. Aid to Peru Tied to Cocaine Flow*, WASH. POST, Sept. 13, 1991, at A18; William R. Long, *In Peru, One*

In Peru, the formal condemnation of the autogolpe came to a sputtering end. By contrast, the OAS consistently maintained its formal denunciation of the Haitian military throughout the crisis. The diplomacy that attended the OAS's efforts to restore Aristide to the presidency, however, told another story, one that heavily undercut its condemnation of the coup. More specifically, the U.S., which dominated the OAS's settlement efforts (and later, the joint settlement efforts of the OAS and the U.N.), routinely played fast and loose with charges of human rights violations.<sup>462</sup> It was too harsh on Aristide, and too easy on the

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*Too Many Disappearances?*, L.A. TIMES, Aug. 25, 1991, at 18A. As one human rights advocate put it, "[t]he State Department's game-playing with issues of life and death in Peru is as repugnant as the Reagan administration's disinformation about human rights in Central America 10 years ago . . ." Burkhalter, *supra*.

The ploy was so blatant, and the reaction to it so strong, that it only drew further attention to the Peruvian military's terrible record of disappearances and arbitrary killings, and Congress froze the aid. See Long, *supra*, at 18A. Nevertheless, Congress later followed administration urgings and voted to allow its disbursement, though reducing the amount of military aid. See Palmer, *supra* note 308, at 74-75; Arewa & O'Rourke, *supra* note 292, at 190-91; *Congress OKs Giving Military Aid to Peru*, CHI. TRIB., Oct. 1, 1991, at 14C.

The sequence of events is even more ironic because Fujimori initially resisted increased anti-drug aid to the military, the centerpiece of the Bush Administration's "Andean Initiative," a \$2.2 billion anti-drug program aimed at cutting the supply of cocaine from Peru, Bolivia, and Colombia. See Arewa & O'Rourke, *supra* note 292, at 184 & n.7; Pamela Constable, *In Peru Doubts on U.S. Drug Aid*, BOSTON GLOBE, June 15, 1990, at 1; Pamela Constable, *Latin Drug Effort Revives Old Fears*, BOSTON GLOBE, June 16, 1990, at 1; Eugene Robinson, *U.S. Drug Effort Runs into Latin Resistance; New Peruvian Government Turns Down \$36 Million in Military Aid, Seeks Economic Help*, WASH. POST, Sept. 14, 1990, at A22. After Fujimori rejected the military aid in 1990, the U.S. virtually forced him to agree to it in May 1991 by making it a condition of economic aid. See Robert L. Jackson, *U.S., Peru Agree on Cocaine Battle Plan*, L.A. TIMES, May 16, 1991, at A7; Caleb Rossiter, *Peru Without Tears; Democracy Isn't Dead — It Never Lived*, WASH. POST, Apr. 12, 1992, at C1. For a more positive evaluation of the episode, see Palmer, *supra* note 308, at 72-74.

462. I will tend to speak interchangeably about what the U.S. did throughout the negotiations, on the one hand, and what the position of the OAS or the OAS and the U.N. was, on the other. While it was formally the OAS and later the OAS and the U.N., as well as the "Four Friends" (the U.S., Canada, Venezuela, and France) that conducted the negotiations, the U.S. was the key player throughout, largely determining the direction and vitality of the settlement efforts. One indication of that fact is that it was a change of administrations that gave new life to the settlement negotiations. See *supra* part III.A. Further, while the U.N.-OAS Joint Envoy appears to have worked closely with the Clinton Administration, the U.S. essentially ignored the Joint Envoy during the crucial period leading up to the military intervention. Confronted with the stark demonstration of his own dispensability, the Joint Envoy resigned. Calvin Sims, *Former U.N. Envoy Deplores Haiti Accord*, N.Y. TIMES, Sept. 22, 1994, at A10; Peter Slevin et al., *Troops Enter Haiti Without Firing a Shot*, MIAMI HERALD, Sept. 20, 1994, at 1A. I am not aware of any respect

military dictatorship that ousted him.

The harshness showed up soon after the coup. In the first days after the overthrow of Aristide there appeared to be unconditional support for returning him to office. The OAS resolutions described earlier, as well as the statements of the U.S. government and other OAS members, reflected that support. But within a week of the coup, a portrayal of *Aristide* as the human rights problem began to emerge, a portrayal the U.S. seemed anxious to foster.

The Haitian military claimed to the first OAS delegation in October 1991 that President Aristide had committed massive human rights violations during his time in office, and was attempting to create a new dictatorship.<sup>463</sup> The charge was apparently reiterated to the delegation by members of the legislature opposed to President Aristide who, like Cédras, also complained that Aristide had imperiously failed to work with the legislature.<sup>464</sup> The OAS delegation did not meet with grassroots

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in which U.S. policy regarding Haiti was seriously constrained or altered by its need to work through the OAS and the U.N.

A more difficult question is raised by ascribing positions to the U.S. based upon remarks by unidentified administration sources in newspaper articles. One could look exclusively to the official U.S. pronouncements, but that would be seriously misleading. When articles in major newspapers like the *New York Times* attributed criticisms of Aristide to unnamed high level State Department officials or diplomats, for example, the criticisms were likely "plants" rather than "leaks" — that is, conscious efforts by the officials and diplomats to make public criticisms of Aristide, but without the diplomatic embarrassment of attribution. It is no exaggeration to say that "[i]n its coverage of Haiti, the mainstream media have essentially functioned as the public-relations arm of the U.S. State Department." Catherine Orenstein, *Haiti in the Mainstream Press: Excesses and Omissions*, NACLA REP. ON THE AMERICAS, July-Aug. 1993, at 15. See also John L. Hess, *Haiti and The French Connection*, LIES OF OUR TIMES, Jan.-Feb. 1994, at 21. (In the Clinton Administration, to be sure, there were some signs of internal division. As noted in part III.A., the administration did nothing to stop the CIA from leading a campaign to portray Aristide as a demagogue and a psychopath, even while the President himself stated his support for Aristide).

463. Pamela Constable, *Haiti Senate to Name Aristide Replacement*, BOSTON GLOBE, Oct. 7, 1991, at 1; Pamela Constable, *Talks in Haiti Seen at Impasse*, BOSTON GLOBE, Oct. 5, 1991, at 1; Linda Diebel, *Haiti's Aristide Accused of Torture*, TORONTO STAR, Oct. 5, 1991, at A1; Howard W. French, *Haitian General Says Misdeeds Prompted the Coup*, N.Y. TIMES, Nov. 4, 1991, at A7. See also Barbara Crossette, *Accord to Resume Constitutional Rule in Haiti is Reported*, N.Y. TIMES, Nov. 11, 1991, at A1. Lee Hockstader, *Haiti's Army Chief Defends Overthrow; OAS Delegation Holds 2nd Day of Talks*, WASH. POST, Oct. 6, 1991, at A29. A similar set of charges was made to the Independent Expert appointed by the Commission on Human Rights when he visited Haiti in December 1991. See 1992 *Bruni Celli Report*, *supra* note 48, at 23-24.

464. See Kim Ives, *The Unmaking of a President*, NACLA REP. ON THE AMERI-

supporters of Aristide or human rights advocates, leaving quickly when the military threatened it.<sup>465</sup>

The charges against Aristide received wide publicity, at least in the North American news media,<sup>466</sup> with the U.S. taking great pains to lend the charges credence. It even strained to pin responsibility on Aristide for the murder of a political opponent during the coup, notwithstanding the unlikelihood of the charge.<sup>467</sup> The most frequently repeated charge against Aristide was that he sanctioned mob violence and "necklacing."<sup>468</sup>

CAS, Jan.-Feb. 1994, at 16-17 (noting circulation by U.S. officials of a notebook compiled by coup supporter detailing Aristide's alleged human rights violations); Pamela Constable, *Haiti Senate to Name Aristide Replacement*, BOSTON GLOBE, Oct. 7, 1991, at 1; Lee Hockstader, *Haiti's Army Chief Defends Overthrow: OAS Delegation Holds 2nd Day of Talks*, WASH. POST, Oct. 6, 1991, at A29.

465. Linda Diebel, *Haitians Urged to Resist Junta*, TORONTO STAR, Oct. 7, 1991, at A10; *Haitian Troops Threaten Assembly*, ST. LOUIS POST DISPATCH, Oct. 8, 1991, at 1A.

466. See *infra* notes 467-471. .

467. See *Military Chiefs Seem to OK Talks*, MIAMI HERALD, Nov. 5, 1993, at 18A (noting that Bush Administration "aggressively promoted reports that Aristide ordered Lafontant's murder"). Roger Lafontant, who had taken part in an earlier coup attempt intended to prevent Aristide's inauguration, was killed during the October coup. As Kenneth Roth makes clear, it does not make sense to accept Haitian army claims that Aristide ordered the murder:

[I]t hardly seems credible that a senior army commander would feel compelled to follow an obviously illegal order supposedly issued by a civilian leader who was then being overthrown by the army, and whose very life was at the time the subject [of] intense negotiations. Moreover, the army's leaders had their own reasons for wanting Lafontant dead, since he had a substantial following among right-wing military and paramilitary forces.

Roth, *Haiti and Clinton*, *supra* note 82. See also *Restoring Haiti's Democracy*, WASH. POST, Oct. 6, 1991, at C6 (denial of charge by Aristide). Senator Jesse Helms later revived the charge as part of his effort to smear Aristide as a "psychopath." See Christopher Marquis, *Aristide Calls Claims of Depression 'Garbage'*, MIAMI HERALD, Oct. 23, 1993, at 1A; *Military Chiefs Seem to OK Talks*, *supra* at 18A; Elaine Sciolino, *Christopher Spells Out New Priorities*, N.Y. TIMES, Nov. 5, 1993, at A5.

Apart from the CIA, the Clinton Administration's attitude toward the charge was ambivalent at best. Compare *Military Chiefs Seem to OK Talks*, *supra* at 18A (distancing itself from the charge); Elaine Sciolino, *Christopher Spells Out New Priorities*, N.Y. TIMES, Nov. 5, 1993, at A5, with Christopher Marquis, *Aristide Ouster Surprised CIA, Officials Say*, MIAMI HERALD, Dec. 15, 1993, at 1A ("U.S. officials say they still believe that Aristide was involved in the cover-up of the killing of five youths July 26, 1991, by an [sic] pro-Aristide appointee policeman, 2nd Lt. Richard Salomon and the jail-house murder of the arrested Lafontant on the night of the successful coup.").

468. More specifically, Aristide was accused of not doing enough to calm angry mobs intent on vigilante violence against former members of the Tonton Macoute, high officials of the Catholic Church, and other long-time supporters of the Duvalier regime. Aristide was also accused of seeming to approve of mob violence in a speech



This charge took on a life of its own. In a powerful illustration of the tendency of the media to follow the line laid down by the government, political commentators and others now often refer to Aristide as dictatorial or portray his human rights record as open to serious question.<sup>469</sup> In turn, the constant repetition of those charges appears to have had a significant impact on the public perception of Aristide, to the point where the perception of him as a dictator became a serious factor in under-

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he gave on September 28, 1991. See U.S. DEPT OF ST. HUM. RTS. REP. FOR 1991, *supra* note 61, at 634; AMERICAS WATCH AND NATIONAL COALITION FOR HAITIAN REFUGEES, HAITI: THE HUMAN RIGHTS RECORD OF THE ARISTIDE GOVERNMENT JUNE 1989-JUNE 1991 [hereinafter, AMERICAS WATCH ARISTIDE GOVERNMENT REPORT]; Amnesty International, Haiti: The Aristide Government's Human Rights Record 3 (1991); William J. Eaton, *Haitian Coup Chief Unswayed by 1st OAS Visit*, L.A. TIMES, Oct. 5, 1991, at A1; Howard W. French, *Envoys Arrive in Haiti to Seek an End to Coup*, N.Y. TIMES, Oct. 5, 1991, at 1; Howard W. French, *Meetings with Aristide Emphasize Human Rights*, N.Y. TIMES, June 7, 1992, at 3; *Haiti Coup Leader Sentenced to Life*, N.Y. TIMES, July 31, 1991, at A3; Lee Hockstader, *President-Elect Condone Vigilantism in Haiti*; *Aristide Laments Attacks on Religious Sites*, WASH. POST, Jan. 10, 1991, at A14; Ron Howell, *Icon Abroad With Enemies at Home*, NEWSDAY, Oct. 7, 1991, at 25 (asserting that Aristide approved of "necklacing" in speech on September 28, 1991); Michael Tarr, *President Praises People's Power in Macoute Trial*, REUTERS, Aug. 4, 1991; *cf.* 1992 Bruni Celli Report, *supra*, note 48, at 21 (concerning incident in which Aristide supporters are said to have threatened members of legislature with necklacing); *id.* at 36, 46 (asserting that Aristide wanted to replace conventional political institutions with direct democracy).

469. See, e.g., Elliott Abrams, *Policy Confronts Reality: Was the Resolution of the Haiti Crisis a Victory for Democracy or Just for Common Sense?*, NAT'L REV., Mar. 30, 1992, at 38 ("While Aristide was democratically elected, he did not rule as a democrat. He espoused and applauded mob violence against his political opponents, intimidating them, the press, the Church, and the parliament."); Douglas Farah, *Aristide's Backers: Latest Plan Falls Short*, WASH. POST, May 2, 1994, at A1; Lawrence E. Harrison, *Cambodia a Model for Pacifying Haiti*, MIAMI HERALD, Oct. 24, 1993, at 1M ("[P]resident Aristide's anti-democratic conduct while in office was a major contributor to his overthrow."); Joe Klein, *Elections Aren't Democracy*, NEWSWEEK, July 12, 1993, at 35 ("In Haiti, . . . [an election] brought to power an unstable populist, Jean-Bertrand Aristide, who was tossed by the military after he threatened to 'necklace' his opponents."); Christopher Marquis, *Aristide Rejects Invasion as U.S. Leans Toward One*, MIAMI HERALD, July 13, 1994, at 12A (quoting Rep. Robert Torricelli) (opposing invasion to restore Aristide for fear of "retribution he [would] take against his opponents"); Christopher Marquis, *Aristide's Second Chance*, MIAMI HERALD, Oct. 2, 1994, at 1A, 17A (quoting Dana Rohrabacher, R-Cal.) (Aristide "advocated burning to death his opponents"); Lally Weymouth, *Haiti vs. Aristide*, WASH. POST, Dec. 18, 1992, at A31 (characterizing Aristide as a radical anti-American leader who urged necklacing). Indeed, it is striking that commentators tended to repeat the charge without even claiming to verify its accuracy. See, e.g., Christopher Marquis and Don Bohning, *11th Hour Hagglng with Aristide*, MIAMI HERALD, Sept. 18, 1994, at 20A ("Whatever his firebrand past, his injudicious language about 'necklacing' opponents, his class warfare rhetoric — all that is history.") (emphasis added).

mining support for military intervention to restore him to power.<sup>470</sup>

While the charge of sanctioning necklacing (which Aristide has consistently denied<sup>471</sup>) cannot be absolutely proven or disproven, however, there are strong grounds for doubting it. Certainly, disinformation campaigns against Aristide are nothing new.<sup>472</sup> To some extent, the charge rests on an ambiguity of terminology regarding the burning of tires in the streets as a form of popular protest.<sup>473</sup> To some extent the charge also illustrates the depth of the elite's hatred of Aristide: Any story about necklacing, no matter how unlikely, must be true, precisely because Aristide is such a dangerous radical.<sup>474</sup> Finally, the charge may also rest on a willful misreading of both Aristide's

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470. For example, the day after President Clinton's September 15th speech telling the military to give up power, National Public Radio asked people whether they supported an invasion. A number of them remarked that the U.S. should not "back one killer for another killer" or that "Aristide was still a dictator." See *American Citizens Respond to President Clinton's Speech*, MORNING EDITION, Sept. 16, 1994, NPR, transcript available in LEXIS, Nexis Library, TRANSCRIPT file.

471. See JEAN-BERTRAND ARISTIDE, with CHRISTOPHE WARGNY, ARISTIDE: AN AUTOBIOGRAPHY 133 (Linda M. Maloney trans., 1993) ("I have often been criticized for the violence of the popular reaction and for the *dechoukajes*. I never encouraged them. They will disappear as soon as the roots of the violence have been *dechoukajes*, and when justice is done."); John M. Goshko, *Aristide, Bush Agree to Push Diplomacy in Haiti*, WASH. POST, Oct. 5, 1991, at A14 (denying specific charges).

472. See WILENTZ, *supra* note 439, at 114-15 (noting disinformation campaign against Aristide in summer of 1987 charging that he gave an army of young men crack and paid them to burn tires, throw Molotov cocktails, and assassinate people). See also Amy Wilentz, *Foreword*, to ARISTIDE, *supra* note 443, at xiii-xv.

473. In at least one instance in the past, the U.S. chose to interpret remarks by Aristide as advocating violence when he clearly was not. See WILENTZ, *supra* note 439, at 137 (recounting U.S. embassy official's characterization of Aristide's vow to "turn the streets red" with bonfires in tires at strike barricades as threat to make the streets run with blood); Jonathan Power, *If the Crisis in Haiti Is a Replay of 'The Comedians,' It Seems the Climax Is Yet to Come*, CHI. TRIB., Oct. 16, 1991, at 19 ("[I]t was very clear, at the time, that Aristide was advocating nothing more than the burning of old rubber tires in the street. They make a lot of smoke, and it's a cheaply dramatic way of letting everyone know there's a protest. It is a far cry from necklacing."). The Independent Expert on Haiti similarly seems to take for granted that any burning of tires in the streets was an implicit threat of necklacing. See 1992 *Bruni Celli Report*, *supra*, note 48, at 21 ("in the streets of Port-au-Prince, . . . used tyres were burnt as a symbol of death by 'necklacing.'").

474. For a revealing illustration, see Catherine S. Manegold, *Business Owners Fear Chaos at the Hands of Mobs When Aristide Returns*, N.Y. TIMES, Oct. 12, 1994, at A4 (noting popularity among Haitian elite of story that a burning tire was rolled into the room at the end of a meeting between businessmen and the government during Aristide's first period in office).

refusal to renounce popular self-defense against army terror<sup>475</sup> and his observation that frustrating all efforts to bring about peaceful change will, in the end, serve only to make violence more likely.<sup>476</sup>

The sources of the charge, moreover, do not give one confidence in it. There is no reason to trust the Haitian military and its elite supporters who were the initial source of the stories.<sup>477</sup>

475. See JEAN-BERTRAND ARISTIDE, with CHRISTOPHE WARGNY, *supra* note 471; Anne-Christine d'Adesky, *Aristide Popular with the Masses, Feared by Elite Haiti's Old Families, Generals Don't Trust the Illiterate Poor*, S.F. EXAMINER, Oct. 6, 1991, at A8 ("Aristide has repeatedly urged his followers against necklacing. But at the same time, he has defended the rights of the Haitian people 'to defend themselves against those who would kill them with guns'."). Tim McCarthy, *Aristide: The Man — and Message of a People*, NAT'L CATH. REP., Feb. 21, 1992, at 9, 11, insightfully places the issue of Aristide's remarks in the context of both his "revolutionary anger against the crooks and corrupters of his own country" and Haiti's own long history of violence.

476. Aristide has not been shy to point out that efforts by the elite to preserve every ounce of the fantastic economic and social privilege they have enjoyed in prior regimes could provoke a backlash:

On May 1, 1991, I warned against mad egoism and economic parasitism, and in severe tones, because they had refused the hand extended to them by the other social strata — they, who had taken refuge in a pathological submission to dictatorship. I had suggested an alliance between bourgeois capital and the revolutionary capital of *Lavalas*, in order that a new economic order might bloom . . . .

The bourgeoisie should have been able to understand that its own interest demanded some concessions. We had recreated 1789. Did they want, by their passive resistance, to push the hungry to demand more radical measures? "*Pèp la wonfle jodi-a li kapab gwonde demen*" ("the people that are snoring today can roar tomorrow")! Did the "patripockets" want to see a '93 follow '89? When the people grow impatient, they will not point the finger at the president or the leaders of *Lavalas*, but at those who are getting rich over their backs.

JEAN-BERTRAND ARISTIDE, with CHRISTOPHE WARGNY, *supra* note 471, at 139. It is not difficult to imagine members of the elite hearing such a statement as a threat of violence, but in substance it is no more a threat than are more conventionally phrased observations that frustrating all efforts to rectify extreme poverty or arbitrary violence makes a violent uprising more, not less, likely. See, e.g., Howard W. French, *Haitian Townspeople Tell of New Fear of Violence*, N.Y. TIMES, Mar. 1, 1993, at A3 (arbitrary violence at hands of military is pushing many Haitians to "speak of meting out justice on their own terms, hinting at violent revolt").

477. See Steven A. Holmes, *Administration Is Fighting Itself on Haiti Policy*, N.Y. TIMES, Oct. 23, 1993, at 1 ("According to . . . [Aristide's] backers and some Administration officials, the charges [that Aristide is mentally unstable] are based on second-hand reports and information supplied to intelligence officials by the same military that overthrew him."); Garry Pierre-Pierre, *Terror of Duvalier Years Is Haunting Haiti Again*, N.Y. TIMES, Oct. 18, 1993, at A6 (noting that Haitian political leaders intent on reviving Duvalierism "are sophisticated and have studied in the United States and Canada" and "have carefully cultivated lobbyists and politicians to feed doubts about Father Aristide"); Caribbean Conference of Churches & World

President Aristide represented their worst nightmare: a leader overwhelmingly elected by the least privileged of Haiti's society, committed in principle to serious steps to improve their lot.<sup>478</sup> The depiction of Aristide as a fanatic instigator of mob violence had great resonance for commentators and others who are hostile to notion of a mobilized populace placing pressure on elites. Further, the United States' adoption of the charge — and its consequent public statements that upon his return to office he must “publicly disavow human rights abuses and . . . work with Haiti's parliament”<sup>479</sup> — simply demonstrated its own hypocri-

Council of Churches, *Restore Our Stolen Vote!* 3 (26 Nov.-1 Dec. 1992) (noting that “small but influential group of religious leaders” in Haiti shows tendency “to emphasize and magnify the human foibles of President Aristide and to minimize the importance of the principle of democracy, while ignoring the indisputable and internationally-recognized constitutional legitimacy of the results of the electoral victory won by the Aristide government”).

478. See, e.g., AMY WILENTZ, *supra* note 439, at 112 (noting Haitian elite's extreme dislike of Aristide). Cf. JEAN-BERTRAND ARISTIDE, with CHRISTOPHE WARGNY, *supra* note 471, at 131 (noting denunciation of him, a week before the attempted coup by Lafontant in January 1991, by an Archbishop who had been closely associated with the Duvalier regime):

“Fear is sending a chill down the spines of many fathers and mothers of families,” he began. Civil liberties were about to disappear; we were heading for “an authoritarian political regime” with the installation of “a political police” and “a campaign of denunciation.” “Is socialist Bolshevism going to triumph?” The friend of the Duvaliers, the man who had officiated at Jean-Claude Duvalier's wedding, was fearful for our liberties!

479. A State Department spokesman said publicly on October 7, 1991, that the U.S. supported efforts by “all sides to support a solution that would contribute to constitutional democracy arrived at and approved by all sectors of Haitian society through a national dialogue,” a remark that some observers saw as suggesting some flexibility about Aristide's return. See *U.S. Backs Haiti's Aristide, Wants Human Rights Improvements*, REUTERS, Oct. 7, 1991, available in LEXIS, Nexis Library, NEWS File (citing “U.S. officials”). See also William J. Eaton, *Haitian Coup Chief Unswayed by 1st OAS Visit*, L.A. TIMES, Oct. 5, 1991, at A1 (suggestion by French ambassador to Haiti that support for Aristide's return to Haiti be conditioned on agreement to renounce violence by supporters); Clifford Krauss, *In Policy Shift, U.S. Criticizes Haitian on Rights Abuses*, N.Y. TIMES, Oct. 7, 1991, at A1 (U.S. “officials said they had concluded that Father Aristide must publicly disavow mob violence and work toward sharing power with the Parliament”). These statements, made in October 1991, were reiterated many times after that. See Howard W. French, *U.S. Presses Ousted Haitian Chief to Negotiate a Return from Exile*, N.Y. TIMES, June 27, 1992, at 2. Indeed, as noted earlier, see *supra* part III.A., the Clinton Administration publicly pressured Aristide to include more conservatives in his cabinet even as Prime Minister Malval was stating that he could find none who were willing to work to ensure Aristide's return to Haiti.

Even public statements of support were accompanied by obvious leaks of Administration “anger” and “antipathy” toward Aristide. See Howard W. French, *U.S. Keeps Eye on Haiti, but Action Is Scant*, N.Y. TIMES, Oct. 8, 1992, at A5. See also, e.g., Barbara Crossette, *Gains Are Reported in Talks on Haiti*, N.Y. TIMES, Sept. 7,

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Given these doubts about the charge of necklacing, what is most important is the context. In his short term in office, Aristide's human rights record was generally excellent, as human rights organizations reported.<sup>481</sup> In addition, Aristide

1992, at A5 ("The Administration has recently seemed lukewarm about Father Aristide."). In addition, conservative commentators and former U.S. officials made clear their distaste for Aristide. See Christopher Madison, *U.S.-Latin Tango*, NAT'L J., No. 24, June 13, 1992, at 1408. See also, e.g., Anna Husarska, *Both Sides Must Retreat*, MIAMI HERALD, Mar. 7, 1993, at 23A (calling for Aristide's symbolic return and immediate resignation as president); Lally Weymouth, *Haiti vs. Aristide*, WASH. POST, Dec. 18, 1992, at A31 (characterizing Aristide as radical anti-American leader who urged necklacing and Bazin as "an impressive man of moderate sensibility").

480. The United States' constant references to allegations about mob violence under Aristide stand in sharp contrast to its failure to make a vigorous condemnation of vigilante and mercenary violence elsewhere. It did not undertake a massive campaign against President Fujimori when, in June 1993, he recounted his own personal involvement in the psychological torture of a captured guerrilla soldier. See AMERICAS WATCH REPORT ON DISAPPEARANCES AT LA CANTUTA, *supra* note 329, at 3 n.2.

Similarly, the U.S. has shown little concern when the problem concerns an ally or the United States' own foreign policy actions. For example, the U.S. has never conditioned its support for Israel on an end to Israel's implicit encouragement of settler violence against Palestinians in the occupied territories, even though it blandly acknowledges the problem every year in its annual Country Reports. U.S. DEPT OF ST. HUM. RTS. REP. FOR 1993, *supra* note 396, at 1204, 1207; U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 1021; U.S. DEPT OF ST. HUM. RTS. REP. FOR 1991, *supra* note 61, at 1441; U.S. DEPT OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1990, at 1479 (1991); U.S. DEPT OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1989, at 1433 (1990). See also 1990 LAWYERS COMMITTEE STATE DEPARTMENT HUMAN RIGHTS CRITIQUE, *supra* note 443, at 138-39; HUMAN RIGHTS WATCH WORLD REPORT 1993, at 315 (1992). See also AL-HAQ, PUNISHING A NATION: HUMAN RIGHTS VIOLATIONS DURING THE PALESTINIAN UPRISING DECEMBER 1987-DECEMBER 1988, at 106-10 (1988); Carol Rosenberg, *Rise in Arab Violence Met by Surge in Settler Vigilantism*, MIAMI HERALD, Mar. 29, 1993, at 1A.

481. Human Rights Watch stated that during his tenure Aristide had: pressured generals who had controlled the army under previous abusive military regimes to retire; promoted officers believed to be committed to democracy; and dismissed or transferred to obscure posts others known for human rights violations.

President Aristide also abolished the corrupt and abusive system of rural section chiefs. He admitted reform-minded officers into the police force . . . . The seven months of the Aristide government also saw a notable decrease in the loss of lives in rural land conflicts, which in the past had been a source of some of the worst massacres, often at the hands of corrupt soldiers in league with large landowners. HUMAN RIGHTS WATCH, *supra* note 276, at 252. See also 1993 Bruni Celli Report, *supra* note 48, at 21 (noting Aristide's plans for legislative reforms, separation of police and army, elimination of section chiefs, institution of land reform, and prison management reform); AMERICAS WATCH ARISTIDE GOVERNMENT REPORT, *supra* note 468; Washington Office on Haiti Completes Analysis of Human Rights Violations, PR

preached a strategy of non-violent social change,<sup>482</sup> and called "*dechoukaj*" (uprooting)<sup>483</sup> "inexcusable" in the context of a democracy.<sup>484</sup> Finally, while no leader should be immune from human rights scrutiny, Aristide's record was so vastly superior to that of the regimes that preceded his presidency, as well as to that of the military junta that ousted him, that concerns about his human rights record seem fundamentally misplaced in the context of his right to return to office.<sup>485</sup>

If the U.S. was too harsh on Aristide's human rights record, it also showed a consistent tendency to play down the serious problem of human rights violations under the military regime. As many as 3,000 people died at the hands of the military since the coup, and perhaps 400,000 became internally displaced —

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Newswire Ass'n, Oct. 15, 1991 (noting report of human rights group concluding that "both fatal and nonfatal human rights violations have fallen sharply since Aristide's inauguration.").

482. See ARISTIDE WITH WARGNY, *supra* note 471, at 198-99.

483. On *dechoukaj*, see TROUILLOT, *supra* note 454, at 222:

The state was not alone in its use of violence [after the fall of Jean-Claude Duvalier in January 1986]. Popular calls for a *dechoukaj* (uprooting) of the former ruling team were followed by summary judgments and executions of Duvalierists openly carried out by a civilian mob. The *dechoukaj* also included the removal from office, by force or by popular demand, of known Duvalierists. But many observers and participants came to realize that this brand of popular "justice," which started in the few hours after Duvalier's departure and continued well into the hot months of July and August, touched only the small fry of the Duvalierist machine.

484. ARISTIDE WITH WARGNY, *supra* note 471, at 137 ("The habit of dictatorship had sometimes produced a kind of Macoutism in people's heads. Tolerance and freedom cannot be learned overnight. But the *dechoukaj*, although less and less frequent, was now inexcusable."). See also, e.g., John M. Goshko, *OAS Delegation Returns; Meeting Set*, WASH. POST, Oct. 7, 1991, at A13.

485. In its annual report on human rights throughout the world, Human Rights Watch deemed Aristide's record "flawed," in part because of military killings that took place under his regime, and in part because, it said, he "failed to use his tremendous moral influence to call for an end to . . . acts of intimidation, and in two speeches in August and September, publicly seemed to endorse such threats of violence." HUMAN RIGHTS WATCH, *supra* note 481, at 253. But it also noted that the military had a "disastrous record on human rights," *id.*, and that any flaws in Aristide's record "paled in light of the utter brutality and wholesale disregard for human rights and democratic institutions shown by the successor military regime," *id.* at 260. See also Kenneth Roth, *Haiti: The Shadows of Terror*, N.Y. REV. BOOKS, Mar. 26, 1992, at 62, 63 ("Aristide's use of threats of popular violence was clearly disturbing. But the army's suppression of human rights since his overthrow has been monstrous."). In its 1992 Country Report, the U.S. itself noted that "[a]lthough cases of arbitrary arrest and detention occurred during the Aristide presidency . . . they increased dramatically in the post-coup climate of crackdown and reprisal." U.S. DEPT OF ST. HUM. RTS. REP. FOR 1992, *supra* note 97, at 422-23.

refugees within their own country.<sup>486</sup> The U.S. seems to have played down the extent of violations in part to bolster its position that all Haitians seeking refuge in the U.S. were "economic" rather than "political" refugees, and so could be summarily returned to Haiti.<sup>487</sup> The interdiction policy—a breathtaking ex-

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486. Ministère des affaires sociales de la République d'Haïti, *DES CHAÎNES CONTRE LA LIBERTÉ 1* (1993). See also, e.g., Rick Bragg, *Occupation Dawns Quietly In Shadow of Ruling Junta*, N.Y. TIMES, Sept. 20, 1994, at A7. Some estimates were as high as 5,000 dead. Dan Coughlin, *Haiti: U.S. Police Trainers Eye Salvador Model*, INTER PRESS SERVICE, Oct. 7, 1994, available in LEXIS, Nexis Library, WIRES File. On abuses of human rights under the military regime, see 1994 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 48, at 67-133; 1993 *Bruni Celli Report*, *supra* note 48, at 8-24; *id.* at 9 ("Repression in the rural areas is particularly intense, and even possessing or circulating pictures of President Aristide can be a cause for arrest."); 1993 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 78, at 17-40. See also, e.g., AMERICAS WATCH HAITIAN REFUGEE REPORT, *supra* note 452, at 95, 119-24; AMERICAS WATCH/PHYSICIANS FOR HUMAN RIGHTS REPORT, *supra* note 452; HUMAN RIGHTS WATCH, *supra* note 481, at 253-58. Any open support of Aristide was particularly dangerous. See, e.g., Lawrence J. Smith, *Haiti: A Test Case for Hemispheric Peacekeeping*, CHRISTIAN SCI. MONITOR, June 16, 1992, at 19 ("Even slight support for deposed President Jean-Bertrand Aristide can be lethal."). Even the State Department noted in its Country Report that "[i]mmediately after the coup, Haitian troops engaged in random shootings and selected killings of residents in poor neighborhoods who were suspected pro-Aristide organization leaders," and that a "clandestine radio station threatened 98 known Aristide supporters with death on December 15." 1992 U.S. Dep't of St. Hum. Rts. Rep., *supra* note 468, at 635.

Also subject to repression were those seeking political asylum, see 1993 *Bruni Celli Report*, *supra* note 48, at 19; Susan Benesch, *A Cuba-Style Crackdown in Haiti*, MIAMI HERALD, May 31, 1993, at 1A; *Haitian Beaten Trying to Prove Risk*, MIAMI HERALD, July 16, 1992, at 12A, or returned by the U.S. after attempting to escape from Haiti, see Liz Balmaseda, *For These 3 Haitians, There Is Hope*, MIAMI HERALD, Sept. 12, 1992, at 1B; *Boat People Face Prosecution*, N.Y. TIMES, Oct. 30, 1993, at 5; Barbara Crossette, *Haiti Arrests 150 Intercepted by U.S.*, N.Y. TIMES, Aug. 15, 1992, at 3; Harold Maass, *Some Repatriated Haitian Refugees Subjected to Arbitrary Arrest, Torture*, MIAMI HERALD, June 18, 1993, at 22A; Andres Viglucci, *For Haitian Deserter, Odyssey Ends Happily*, MIAMI HERALD, Mar. 25, 1993, at 1A (account of one member of the military who fled persecution only to be interdicted at sea by the U.S. and summarily returned to Haiti, after which he applied for asylum at the U.S. Embassy in Port-au-Prince and was then jailed and threatened with death, being released only after the personal intervention of President Clinton). Nor was repression of those who flee Haiti a new phenomenon. See, e.g., Amnesty International, *Haiti*, AI Index AMR 36/02/85, at 10 (Mar. 1985); Lawyers Committee for International Human Rights, *Violations of Human Rights in Haiti*, June 1981-September 1982, at 49-54 (Nov. 1982).

487. Where the political structure of a country consigns large masses of people to grinding poverty, the distinction between economic and political reasons for seeking refuge begins to look untenable. See DEWIND & KINLEY, *supra* note 431, at 1-37; Note, *Political Legitimacy in the Law of Political Asylum*, 99 HARV. L. REV. 450, 459-464 (1985). But even adopting a narrow definition of "political," it is clear that Aristide supporters faced severe repression under the military regime. See *supra* note 486.

ercise in hypocrisy<sup>488</sup>— ignored the fact that the military regime's repressive crackdown on all progressive elements within Haiti clearly increased the flow of refugees. Many of the Haitians seeking sanctuary in the U.S. had suffered persecution at home, and had good reason to expect more danger when they were forcibly returned.<sup>489</sup> Yet even as refugees were risking their lives on rickety boats to leave Haiti,<sup>490</sup> the U.S. repeated-

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On the relation between the Administration's reluctance to criticize the military regime and its concern to avoid giving asylum to refugees, see HUMAN RIGHTS WATCH, *supra* note 481, at 263.

The Supreme Court ultimately upheld the Administration's interdiction policy. See *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993). The Court ruled that the policy violated neither domestic nor international law. Both the U.N. High Commissioner on Refugees and the Inter-American Commission contradicted the U.S. on the latter point. See Brief of Amicus Curiae U.N. High Commissioner for Refugees, *Sale v. Haitian Centers Council, Inc.*, 113 S. Ct. 2549 (1993) No. 92-343, reprinted in 6 INT'L J. REF. L. 85 (1994); U.N. High Commissioner for Refugees Responds to U.S. Supreme Court Decision in *Sale v. Haitian Centers Council*, 32 I.L.M. 1215 (1993); Petitioners Release Resolution of the Inter-American Commission on Human Rights concerning U.S. Program of Haitian Refugee Interdiction, 32 I.L.M. 1215 (1993). See generally Suzanne Gluck, Note, *Intercepting Refugees at Sea: An Analysis of the United States' Legal and Moral Obligations*, 61 FORDHAM L. REV. 865 (1993); Malissa Lennox, Note, *Refugees, Racism, and Reparations: A Critique of the United States' Haitian Immigration Policy*, 45 STAN. L. REV. 687 (1993).

488. The policy was presented as a humanitarian necessity designed to avoid encouraging Haitian refugees from risking their lives at sea on a dangerous journey to the U.S. See Lennox, *supra* note 487, at 706 n.151 (quoting President Bush) ("I don't want to have a policy that acts like a magnet to risk these peoples lives."); Pamela Constable, *Clinton, in Reversal, Backs Bush on Haiti*, BOSTON GLOBE, Mar. 3, 1993, at 1 (quoting President Clinton) (if U.S. did not have interdiction policy, "we would be consigning a very large number" of Haitians "to a death warrant"); White House Statement on Repatriation Policy, Mar. 2, 1993 (interdiction policy "is based on the President's conviction that it is necessary to avert a humanitarian tragedy that could result from a large boat exodus"), reprinted in FOREIGN POL'Y BULL., May-June 1993, at 64; Linda Greenhouse, *Court Is Asked to Back Haitians' Return*, N.Y. TIMES, Mar. 3, 1993, at A16. Yet by giving automatic asylum to anyone who makes it here from Cuba on a raft (while permitting relatively few Cubans to immigrate normally), the U.S. policy of automatic asylum for Cubans actively encourages them to undertake precisely the risks that it says it must prevent in the case of Haitians. See, e.g., Lizette Alvarez, *Cuban Rafter Arrivals Smash '93 Record*, MIAMI HERALD, June 28, 1994, at 1B; Susana Bellido & Alfonso Chardy, *Anxiety Rises Here Over the Fate of Cuban Rafters*, MIAMI HERALD, Mar. 27, 1993, at 1B. The policy was also hypocritical in another sense: The U.S. severely criticized Hong Kong's forced repatriation of Vietnamese boat people, without disagreeing with Hong Kong's claim that they were mostly "economic" refugees. Lennox, *supra* note 487, at 709-710.

489. Howard W. French, *Some Haitians Say Continuing Abuses Forced a 2d Flight*, N.Y. TIMES, Feb. 10, 1992, at A4. The Haitian government made a point of carefully fingerprinting all refugees who were returned before letting them go back to their homes. *Confused Haitians Begin Returning Home Under New U.S. Policy*, BALTIMORE SUN, May 27, 1992, at 4A. See also *supra* note 486.

490. See Don Bohning, *Lack of Hope, Repression Push Haitians Out to Sea*, MI-



ly denied that there was any serious human rights problem in Haiti.<sup>491</sup> Similarly, in May 1994, when the U.N./OAS human rights monitors were reporting an increase in political terror, including the use of rape, the U.S. embassy in Haiti was busy sending cables accusing Aristide supporters of exaggerating or fabricating the incidents.<sup>492</sup> The period coincided with another surge in refugees.<sup>493</sup>

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AMI HERALD, Nov. 25, 1992, at 7A; Don Bohning, *U.S. Cutter Returns 15 to Port-au-Prince*, MIAMI HERALD, Oct. 28, 1993, at 20A; Patrick Chauvel, *Voyage of the Doomed*, MIAMI HERALD, TROPIC MAGAZINE, Mar. 1, 1992, at 8. There were two different periods under the Bush Administration in which large numbers of Haitians attempted to flee Haiti — November 1991-January 1992, and May 1992. See, e.g., Lizette Alvarez, *New Surge of Haitians Strains Base*, MIAMI HERALD, May 16, 1992, at 1A; Lizette Alvarez, *U.S. Says Tent City About to Overflow*, MIAMI HERALD, Jan. 29, 1992, at 1A; Harold Maass, *Fear, Weather Cited as Factors in Exodus*, MIAMI HERALD, Jan. 30, 1992, at 17A.

491. See, e.g., United States Department of State, Office of Asylum Affairs, Bureau of Human Rights and Humanitarian Affairs, Current Situation in Haiti (reports issued on December 13, 1991, and Jan. 10, 1992) (claiming that "we have no reason to believe that mere identification of an individual as an Aristide supporter puts that individual at risk of mistreatment or abuse"); Aaron Epstein and Paul Anderson, *High Court Refuses to Stop Forced Return*, MIAMI HERALD, Feb. 25, 1992, at 1A. See also 1993 Bruni Celli Report, *supra* note 48, at 17. See generally Lennox, *supra* note 487, at 704-10. For a critique of the United States' claims that there was no persecution of returned Haitian refugees, see AMERICAS WATCH, HALF THE STORY: THE SKEWED U.S. MONITORING OF REPATRIATED HAITIAN REFUGEES (June 30, 1992).

The U.S. also manipulated the facts concerning the refugees in another respect, concocting a tale of tens of thousands of refugees waiting on the shores of Haiti in its effort to persuade the Eleventh Circuit to uphold its policy of intercepting Haitians at sea. See Lizette Alvarez, *20,000 Set to Sail From Haiti, Court Told*, MIAMI HERALD, Jan. 30, 1992, at 1A. In deposition, Bernard W. Aronson, the Assistant Secretary of State for Inter-American Affairs who had provided the affidavit supporting the 20,000 figure, admitted he had no basis for it. See IRWIN P. STOTZKY, IMMIGRATION LAW, HAITIAN REFUGEES, AND SUBSTANTIVE JUSTICE 48-50 (draft 1992).

The policy clearly "worked" from the Bush Administration's point of view. When it became clear that the Administration would refuse to admit virtually any refugees, the flow of Haitians dropped off sharply. Eric Schmitt, *As U.S. Folds Up Refugee Tents, Haitian Exodus Slows to a Trickle*, N.Y. TIMES, July 3, 1992, at A6.

492. Susan Benesch, *Embassy Had Disputed Human Rights Reports*, MIAMI HERALD, May 8, 1994, at 1A; Elaine Sciolino, *U.S. Embassy in Haiti Says Aristide Exaggerates Reports on Rights Abuses*, N.Y. TIMES, May 9, 1994 at A4. The period coincided with another surge in refugees. See Susan Benesch, *Island Camp Deters Flight of Refugees*, MIAMI HERALD, July 16, 1994, at 20A. See also Michael R. Gordon, *Panama Refuses to Take Haitians; A Rebuff for U.S.*, N.Y. TIMES, July 8, 1994, at A1; *9 Days of Chaos: 13,689 Rescued*, MIAMI HERALD, July 10, 1994, at 1A; Garry Pierre-Pierre, *Opponents of Haiti's Military Urge Rights Monitors to Stay*, N.Y. TIMES, July 13, 1994, at A2.

493. Susan Benesch, *Island Camp Deters Flight of Refugees*, MIAMI HERALD, July 16, 1994, at 20A. See also Michael R. Gordon, *Panama Refuses to Take Haitians; A Rebuff for U.S.*, N.Y. TIMES, July 8, 1994, at A1; *9 Days of Chaos: 13,689 Rescued*, MIAMI HERALD, July 10, 1994, at 1A; Garry Pierre-Pierre, *Opponents of Haiti's Mili-*

The two tendencies — to be too harsh on Aristide's human rights record, and too easy on the military's — came together in one of the most indefensible aspects of U.S. policy towards Haiti: the tendency to distort Aristide's desire to put military leaders on trial as a presenting a threat of "revenge" or "reprisals,"<sup>494</sup> thereby treating the greatest perpetrators of violence in Haiti as if they were its most important victims. In fact, what Aristide has consistently supported are trials of those who committed human rights violations and profited from corruption.<sup>495</sup> The mischaracterization of his position served a double purpose. It fit easily with (and in fact helped support) the depiction of Aristide as having sanctioned mob violence during his rule. And it laid the basis for pressing him — as the U.S. did right from the start, when it began its campaign against Aristide — to agree to amnesty for the military.<sup>496</sup>

### 3. The Absence of Political Will

The absence of a political will on the part of the OAS to maintain its initial reproofs in the face of recalcitrant opposition

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*tary Urge Rights Monitors to Stay*, N.Y. TIMES, July 13, 1994, at A2.

494. See, e.g., Howard W. French, *Talks on Haiti Shift the Focus to Aid*, N.Y. TIMES, Mar. 30, 1993, at A3 (speaking of settlement that includes Aristide's return and "internationally supported protection from reprisals for the deposed President's supporters and opponents").

495. During his exile, Aristide repeatedly called for the establishment of an independent judiciary precisely to provide for accountability. See Jean-Bertrand Aristide, *The Role of the Judiciary in the Transition to Democracy*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 13, at 35 ("[A] functioning independent judiciary is necessary . . . for the prosecution of those who have committed crimes against the Haitian people."). Cf. Amy Wilentz, *Exile's Return?*, 256 NATION 580, 580 (1993) ("Aristide has repeatedly counselled his partisans to settle their accounts peacefully, but no one knows if they will heed them."). The military had obvious reasons for fearing such a prospect, but with their long history of corruption the members of the elite also had much to lose. See WILENTZ, *supra* note 439, at 393 ("the Haitian ruling class is so small and has been corrupt and criminal for so long that its members are certain that the rule of law would destroy them").

496. See HUMAN RIGHTS WATCH, WORLD REPORT 1992, at 260 (1991). See also Linda Diebel, *U.S. Appears to Double-Deal During Coup*, TORONTO STAR, Oct. 13, 1991, at H2; Thomas L. Friedman, *The White House Refuses to Link Aristide's Return and Democracy*, N.Y. TIMES, Oct. 8, 1991, at A10; Clifford Krauss, *In Policy Shift, U.S. Criticizes Haitian on Rights Abuses*, N.Y. TIMES, Oct. 7, 1991, at A1; Christopher Marquis, *Embargo Has an Even Chance of Aiding Aristide*, U.S. SAYS, MIAMI HERALD, Nov. 1, 1991, at 29A (reporting that Assistant Secretary of State confirmed that the U.S. would require Aristide to "offer some assurances to supporters of the coup that they will not be targeted for revenge after Aristide is reinstated"); Roth, *Haiti and Clinton*, *supra* note 82.

— let alone enforce them by effective sanctions — can be traced to a certain degree of sympathy for the perpetrator in the case of Peru, and a pronounced hostility to the deposed leader in the case of Haiti. Both instances reveal the extent to which the member states' commitment to representative democracy remains heavily qualified by their political judgments.

The OAS's tepid response to the autogolpe in Peru seems to have reflected sympathy for his actions. As of April 1992, the Peruvian government faced major challenges in the form of Sendero Luminoso and a deteriorating economy, yet was saddled with an admittedly highly imperfect Congress and judiciary.<sup>497</sup> It was clear that the U.S. and other OAS members were unwilling publicly to condone Fujimori's seizure of power, but they also seem not to have been entirely convinced that his actions were unjustified.<sup>498</sup> The sense that Fujimori's actions might not merit complete condemnation undoubtedly was heightened by the ambiguous nature of his actions, particularly by contrast to Haiti. At the very least, Fujimori's seizure of power was not as destabilizing as Serrano's: It did not provoke immediate and broad opposition. The United States' general concern with promoting stability was not implicated strongly in Peru, at least in the short run.<sup>499</sup>

To be sure, if there were a clear and unequivocal guide to what constitutes respect for constitutional government, the temptation to limit the response to the Peruvian autogolpe to a mild reprimand might have been lessened; but, as I will argue

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497. Even critics of the autogolpe conceded that the judiciary, and to some extent the legislature, were open to serious criticism. See, e.g., Jo-Marie Burt, *Peru: Facade of Democracy Crumbles*, NACLA REP. ON THE AMERICAS, July 1992, at 3, 5; AMERICAS WATCH, PERU UNDER FIRE: HUMAN RIGHTS SINCE THE RETURN TO DEMOCRACY 25-27 (1992) [hereinafter AMERICAS WATCH REPORT ON PERUVIAN HUMAN RIGHTS].

498. See, e.g., Thomas L. Friedman, *U.S. Is Shunning Sanctions Against Peru*, N.Y. TIMES, Apr. 14, 1992, at A7.

499. See William I. Robinson, *Guatemala's Failed Coup D'état: Has the Clinton Administration Passed the Test?*, NOTISUR, July 9, 1993, available in LEXIS, Nexis Library, NEWS File:

Washington, as the hegemonic power in the hemisphere, faced a situation in which the rupture with constitutional order was a considerably larger threat in Guatemala than in Peru. Given that the motivation behind "promoting and defending democracy" is a cold calculation of the most expedient means of assuring stability in the Western hemisphere, Washington's commitment to authentic democracy clearly goes only so far as stability requires.

below, that is precisely what is lacking.<sup>500</sup> Only in 1993, when Serrano's bid for power in Guatemala showed that an autogolpe constitutes a dangerously attractive option for presidents, did the OAS appear to resolve to treat autogolpes as the full equivalent of coups. In the meantime, the OAS and the U.S. were willing to give Fujimori the benefit of the doubt.

In the case of Haiti, it seems clear that the failure to bring effective pressure on the military for so long was a direct result of the United States' dislike of Aristide — and even of the Bush Administration's preference for Marc Bazin, the failed presidential candidate whom the military selected as its prime minister after ousting Aristide. The U.S. had long been suspicious of Aristide,<sup>501</sup> who had always appeared likely to press for the sort of radical reforms that the U.S. has generally opposed throughout Latin America and the Caribbean.<sup>502</sup> The Bush

500. See *infra* part IV.B.2.

501. See *supra* part IV.A.2.

502. See Howard W. French, *Haitians Overwhelmingly Elect Populist Priest to the Presidency*, N.Y. TIMES, Dec. 18, 1990, at A1 ("in the space of only a few weeks Father Aristide rose to strong support, steadily campaigning on the themes of justice for victims of the 2-year Duvalier dictatorship, a radical reorganization of the economy to uplift the very poor, and a struggle to root out corruption"). It was his radicalism that earned him the dislike of the U.S. See WILENTZ, *supra* note 439, at 112 (noting that the "American Embassy hated him, because he held the United States and its economic system responsible for much of Haiti's economic woe"); *id.* at 137 (quoting U.S. embassy official as calling Aristide a "Marxist maniac" who would bring communism to Haiti); *id.* at 390. Cf. ARISTIDE WITH WARGNY, *supra* note 471, at 79 ("Reagan considered me a communist."). On the U.S. and reforms throughout Latin America and the Caribbean, see, e.g., The Columbia University/New York University Consortium, Alain Gilles, *Popular Movements and Political Development in Haiti*, Conf. Paper No. 21, at 17-20 (n.d.).

There was no love lost between Aristide and the U.S. before he assumed the presidency. See ARISTIDE, *supra* note 443, at 7 (lamenting that so many Haitians want to leave for the U.S. because "the land of snow has exploited my beloved country to such an extent that there is too little left here . . . to give my people comfort"); *id.* at 59 ("The evildoers have always used the Army against the people, as did the could country to our north when it occupied Haiti from 1915 to 1934."); WILENTZ, *supra*, at 330 (quoting Aristide) ("The Americans' plan for Haiti is a dream for the U.S., and . . . a nightmare for the Haitian people.").

Whether Aristide would have proven as radical in office as the U.S. feared is unclear. The U.S. pressured Aristide to adopt policies more favorable to free markets. Lauren Weiner, *Leery of Socialism, U.S. Doubles Aid to Haiti*, WASH. TIMES, Feb. 8, 1991, at A7 (noting effort by U.S. to sway Aristide from radical plans and toward a "deregulated, decentralized economy"). In exile, he went along with the appointment of a pro-business prime minister, Robert Malval, as a way of signalling a willingness to reach an accommodation with elements of the business community who were willing to break with the military. 1994 *Bruni Celli Report*, *supra* note 48, at 31; Kim Ives, *The Unmaking of a President*, NACLA REP. ON THE AMERICAS,

Jan.-Feb. 1994, at 16, 28.

Further, Aristide himself has called for free markets, though typically in conjunction with an emphasis on economic justice. See Speech by President Jean-Bertrand Aristide (asserting that "the mechanisms of the free market are indispensable to achieve a maximum economic growth," and citing Article 245 of the Haitian Constitution for the proposition that "[e]conomic liberty is guaranteed as long as it does not oppose social interests") (July 22, 1993), reproduced in Haiti Government/Business Partnership Conference, *Occasional Papers Series #142* (Latin American and Caribbean Center, Florida International University) (July 1993); Jean-Bertrand Aristide, *A Safe Harbor for Haiti*, WASH. POST, Jan. 10, 1993, at C1 ("Our commitment to free-market policies and equitable development was praised in July 1991 by Aaron Williams of the U.S. Agency for International Development, who said that we were committed 'to the formulation of a sound macroeconomic foundation upon which prospects for sustained equitable growth may be based.'"). See also Paul Lewis, *Exiled President Asks Full Embargo Be Placed on Haiti*, N.Y. TIMES, Oct. 29, 1993, at A1 (in speech before U.N. General Assembly, Aristide pledges to promote "synergy between the public and private sectors" and to follow "a judicious macroeconomic policy that will encourage the creation of productive and remunerative jobs" in a competitive economy).

One observer concluded:

[B]eneath the ominous rhetoric, most of Aristide's policies posed little immediate danger to the social order — much to the disappointment of his more radical followers. He proposed a higher minimum wage and more aggressive tax collection, both badly needed reforms. Once in office, he softened his anti-imperialistic rhetoric and began working closely with American diplomats. At the time of his ouster, he was negotiating with multilateral lenders to obtain desperately needed credits.

Pamela Constable, *Dateline Haiti: Caribbean Stalemate*, FOREIGN POL'Y BULL., Winter 1992-1993, at 175, 179. Aristide's efforts appeared to prove successful, as he raised pledges of around \$500 million in international grants and loans on favorable terms by the summer of 1991. See HAITI AFTER THE COUP, *supra* note 106, at 35-36; Jim Shahin, *Island of Hope*, AMERICAN WAY, Oct. 1, 1991, excerpted in HAITI: A LOOK AT THE REALITY (n.d., Quixote Center), at 6.

Most likely, Aristide was recognizing the reality that some form of accommodation had to be reached with the U.S. and international lenders. See ARISTIDE WITH WARGNY, *supra*, at 144 ("Governing is not the same thing as staking a claim: the president of all Haitians must necessarily take into account the new parameters that escape the militant fighter."); see *id.* at 179. His economic program thus mixed relatively radical and conventional approaches. He emphasized the development of rural cooperatives as a way of empowering peasants, increasing agricultural production, halting the degradation of the environment, and slowing migration to the cities. *Id.* at 150-51. But he also envisioned the development of some sectors (like tourism and the few large enterprises Haiti had) along more conventional lines, including the assurance of a "secure climate" for investors. *Id.* at 149-51. On Aristide's economic plans after his return to power, see Jean-Bertrand Aristide, *Haiti Emerges, Eyes Blinking, In the Sunlight of Democracy*, N.Y. TIMES, Oct. 16, 1994, at 15; Barbara Crossette, *Aristide Pledges to Follow Road of Reconciliation*, N.Y. TIMES, Oct. 5, 1994, at A1, A9; Don Bohning, *Aristide Blueprint Offers Broad Economic Reforms*, MIAMI HERALD, Aug. 26, 1994, at 24A.

Notwithstanding Aristide's ability to compromise, there may be some basis for the perception that Aristide will, in the end, be less accommodating to the U.S. than other more elite-oriented leaders might. It seems likely that his recognition of the historical debt the U.S. and European powers owe Haiti for their exploitation of it,

Administration's CIA even prepared a psychological profile of Aristide depicting him as subject to nervous breakdowns and disconnected from reality.<sup>503</sup> By contrast, it seems to have been happy with Marc Bazin, whom it favored in the 1990 presidential elections,<sup>504</sup> and whose installation by the military amounted to a convenient way of "correcting" their results.<sup>505</sup>

see ARISTIDE WITH WARGNY, *supra*, at 143, will lead him to press for a more favorable accommodation with the U.S. and international agencies than a more traditional Haitian leader would seek. See *id.* at 144 ("[M]y historical analysis remains the same.").

503. See Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour*, N.Y. TIMES, Aug. 3, 1993, at A1, A5.

504. See THE 1990 GENERAL ELECTIONS IN HAITI 48 (Council of Freely-Elected Heads of Government and National Democratic Institute for International Affairs 1991) (noting that Bazin was tagged as "the American candidate" during the election campaign); ARISTIDE WITH WARGNY, *supra* note 471, at 123; Selden Rodman, *First Test for Democracy*, NAT'L REV., Feb. 11, 1991, at 24. See also Pamela Constable, *For the US, No Choice But Optimism after Haiti Vote*, BOSTON GLOBE, Dec. 23, 1990, at 4; Canute James, *Haiti Edges Towards Credible Poll*, FIN. TIMES, Dec. 7, 1990, at 6; Kathie Klarreich, *Ex-Duvalier Official's Candidacy Casts Shadow on Haiti Election*, S.F. CHRON., Oct. 25, 1990, at A21. Cf. *High Abstention in Second-Round Polls; At Stake is Who Will be Aristide's Prime Minister*, LATIN AM. WKLY. REP., 31 Jan. 1991, at 10 (U.S. was reported in January 1991 to favor Bazin as prime minister under Aristide).

On Bazin's positions, see e.g., THE 1990 GENERAL ELECTIONS IN HAITI, *supra* at 44:

Bazin, based on his experience in international finance, promised that, if elected, he would be able to obtain substantial aid and investment from abroad to rebuild the Haitian economy. His program called for the promotion of Haitian exports and greater integration of Haiti into the U.S. market. Protectionist legislation, he argued, isolated Haiti within the region. Finally, Bazin stressed the need to eliminate the corrupt vestiges of Duvalierism in the public sector, while building an efficient infrastructure for the economy.

505. Indeed, Aristide's own comment about the failed 1987 election (which resulted in an army massacre) could be applied to the Bush administration's attitude toward the 1990 election:

Uncle Sam wanted elections that looked like elections — like Canada Dry: the smell, the taste, but not the reality. Namphy did better — or worse — than Reagan demanded. If the Americans could not tolerate the offense, it was because they wanted a responsible democracy led by people whom they could control, but disencumbered of the mafia scum.

ARISTIDE WITH WARGNY, *supra* note 471, at 87.

Beyond the general desire of the U.S. to see relatively complacent leaders in Latin American and Caribbean countries, there have been recurrent suspicions that the U.S. either had a hand in the coup that ousted Aristide or knew about it and did not try to prevent it. See Christopher Marquis, *Chief of Haitian Thugs Reportedly Paid by U.S.*, MIAMI HERALD, Oct. 7, 1994, at 1A, 18A (noting that two U.S. intelligence officers were at Haitian military headquarters at the time of the 1991 coup and were kept informed of events). See also, e.g., Howard W. French, *U.S. Envoy Lays Down His Burden*, N.Y. TIMES, Aug. 1, 1992, at 5; *An Interview With*

The Clinton administration viewed Bazin less favorably,<sup>506</sup> and when he proved insufficiently attentive to his own irrelevance, the military deposed him.<sup>507</sup> As the time of Aristide's scheduled return to Haiti under the Governors Island Agreement approached, however, the CIA publicized its profile of Aristide as a psychopath and demagogue. Whether the Clinton Administration simply failed to stop the CIA's campaign or encouraged it is irrelevant: One suspects that the Haitian military could only take the campaign as a sign that the U.S. was not serious about Aristide's return. The same is true of the Clinton Administration's apparent flirtation in December 1993 with the idea of a "soft coup" against Aristide in favor of Malval, and its public criticism of him in February 1994 for failing to accept a plan concocted by the State Department and publicly presented as emanating from Haiti.<sup>508</sup>

Finally, the Joint Envoy and U.S. officials made constant expressions of their dislike of Aristide's supposed rigidity and unreasonableness in the course of negotiations.<sup>509</sup> These char-

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*Ben Dupuy*, NACLA REP. ON THE AMERICAS, July-Aug. 1993, at 12-14. Those suspicions have doubtless been fueled by the perception, at least during the Bush Administration, that the U.S. was "putting its weight behind the man it would have preferred to run the country from the start" — Marc Bazin, THE ECONOMIST, Aug. 15, 1992, at 35.

506. See Pamela Constable, *U.S. Hints at Tougher Sanctions Against Haiti*, BOSTON GLOBE, Feb. 6, 1993, at 1 (after Bazin took hard line with U.N. envoy, who was harassed by demonstrators, "American diplomats expressed disgust with Bazin, suggesting his only goal is to remain in power"). See also *Haiti: U.S. Still Confident of Military's Agreement*, INTER PRESS SERVICE, Apr. 22, 1993, available in LEXIS, Nexis Library, WIRES File (quoting State Department official, "[w]e've never taken him [Bazin] seriously before, so why . . . should we now?"); Michael Tarr, *Haitian Blasts Envoy's 'Secret Machinations'*, MIAMI HERALD, Apr. 21, 1993, at 8A ("Bazin has become so politically isolated in recent months that U.N. mediators tend to consider him irrelevant."). The Joint Envoy did not bother to meet with Bazin during his trip to Haiti in April 1993. See *Haitian Prime Minister Criticizes U.N. Negotiations*, REUTERS, Apr. 20, 1993, available in LEXIS, Nexis Library, NEWS File.

507. The incident that triggered his downfall was his firing of cabinet ministers whom the military supported. See *Haiti's Bazin Faces Internal Challenge*, MIAMI HERALD, June 8, 1993, at 15A; *Haiti's Premier Quits After Four Ministers Refuse to Step Down*, N.Y. TIMES, June 9, 1993, at A4. That such impertinence should lead to his undoing is not surprising; what is more surprising is that seemingly respectable observers could actually have used Bazin's civilian status as the ground for a claim that Haiti did not have a military dictatorship after Aristide's overthrow. See Lawrence E. Harrison, *Voodoo Politics*, ATLANTIC MONTHLY, June 1993, at 101, 103.

508. See *supra* part III.A.4.

509. The remarks were made throughout the course of the negotiations, but particularly at points when Aristide resisted U.S. pressure — as when he tried to give a narrow interpretation to the Protocol of Washington's amnesty provisions, or when

acteristics arose from Aristide's failure simply to go along with the U.S. aim that he be as constrained and hemmed in as possible upon his return to Haiti.<sup>510</sup> That Aristide sought to avoid

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he indicated a desire to make up his own mind about accepting the Governors Island Agreement. See *supra* part III.A. See also, e.g., John Donnelly, *Talk, Signs of Uprising Stir in Troubled Haiti*, MIAMI HERALD, Jan. 17, 1994, at 1A ("The United Nations and State Department diplomats no longer conceal their anger at Aristide for refusing to negotiate new terms with the military rulers."); Howard W. French, *U.S. Tells Aristide to Bend on Plan*, N.Y. TIMES, Feb. 23, 1994, at A1. After he was forced to resign, the Clinton Administration's first special adviser on Haiti, Lawrence Pezzullo, made no secret of his hostility to Aristide. See Lawrence Pezzullo and David Pezzullo, *Washington's Haiti Gamble*, MIAMI HERALD, Sept. 18, 1994, at 1M.

510. See *infra* part IV.B (noting Aristide's hesitance to sign the Governors Island Agreement after it was presented to him as a *fait accompli*, particularly because it failed even to call for the removal from the military of all coup participants).

The Clinton and Bush Administrations, to be sure, were not alone in their one-sided treatment of Aristide. It was a consistent feature of the international community. For example, the Special Rapporteur appointed by the U.N. Commission on Human Rights criticized Aristide for publicly accusing the Haitian army of human rights violations at the March 1992 meeting of the U.N. Commission on Human Rights; such criticism, according to the Rapporteur, violated the Protocol of Washington. 1993 *Bruni Celli Report*, *supra* note 48, at 28. Cf. 1994 *Bruni Celli Report*, *supra* note 48, at 37 (blandly stating that "the parties" repudiated the Protocol). Contrary to the Special Rapporteur's assertion, however, nothing in the Protocol forbade Aristide from making such statements, and it is extraordinary that he should be criticized for pointing out the brutality of the regime before the Commission on Human Rights, of all places.

Similarly one-sided was the treatment accorded Aristide by the Inter-American Commission (whose Chairman was the U.N. Commission on Human Rights' Special Rapporteur). In its March 1993 report, it stated that the Protocol of Washington failed because:

the parties did not demonstrate a willingness to comply with them. In a television interview some days later, President Aristide reiterated that he was opposed to the amnesty for the military involved in the coup d'état and that the accords did not specify an exact date for his return.

1993 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 78, at 6. The most the Commission could bring itself to say about the role of the other actors was that parliament "was unable" to ratify the Protocol due to a lack of quorum, and that the Supreme Court had held it unconstitutional. See *id.* at 6; text accompanying notes 75-76; *supra* note 76. It failed to mention that it was Aristide's opponents who prevented the vote, and that the Supreme Court consisted of military appointees. The Commission's report a year later said essentially the same thing. See 1994 *Inter-Am. C.H.R. Report on Haiti*, *supra* note 48, at 45-46. More fundamentally, criticisms of Aristide's ambivalence about granting amnesty, and his attempt to interpret the Protocol in a way most favorable to his position, overlook the wrongfulness of forcing amnesty on Haiti in the first place — particularly the wrongfulness of insisting on it at the outset, before the full pressure of a meaningful embargo had been placed on the military.

Finally, the Joint Envoy criticized Aristide in late October 1993 for promising that a legislative amnesty would be enacted *after* the military surrendered power, asserting that that statement was somehow inconsistent with the Governors Island Agreement. See Paul Lewis, *Exiled President Asks Full Embargo Be Placed on Haiti*,



that outcome — to escape the kind of immobility that marked the presidency of Guatemala's Cerezo from 1986-1991<sup>511</sup> — apparently marked him as unreasonable.

In both cases, then, the lack of political will to press effectively for a full return to constitutional democracy can be traced to political judgments about the regimes at issue. Implementation of the Santiago Commitment seems likely to be plagued by this phenomenon in the future. However generally they may be committed to promoting representative government throughout the region, member states will be tempted to let their views of the displaced governments influence their response to coups.

### *B. The Problem of Perspective*

As we have seen, one promise of the Santiago Commitment — greater enforcement of norms of democracy and human rights through the direct involvement of states — is undermined to some extent by their tendency to press half-heartedly for the restoration of elected governments whose policies they dislike. The other promise — a more systemic perspective that allows one to look beyond individual human rights violations — also seems likely to be fulfilled only partially.

For reasons I will set out below, the Santiago Commitment may promote an exclusive emphasis on maintaining constitutional government without interruption. The problem with such a focus is twofold. First, continuity of constitutional government is not a sufficient condition for respect for democracy and human rights to take hold. Structural impediments to democracy, like vast inequalities of wealth and income, systematically reduce the likelihood of its long-term survival.<sup>512</sup>

This first objection may ask too much of the Santiago Commitment. Even if uninterrupted constitutional government is not by itself *sufficient* to sustain democracy, is it not a minimum, *necessary* condition for it to take root? Unfortunately, this reply faces the second problem. Assertions about the necessity of constitutional government cannot themselves tell us what the content of constitutionalism should be. Even the limited concern

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N.Y. TIMES, Oct. 29, 1993, at A1. Yet, as noted earlier, U.S. and U.N. officials had earlier stated that Aristide had already satisfied the Agreement by granting an amnesty by decree. See *supra* text accompanying notes 129, 170.

511. See *supra* part III.C.

512. See *infra* part IV.B.1.

with maintaining continuity of constitutional government remains open to manipulation, as the OAS experience with Haiti, Peru, and Guatemala shows.<sup>513</sup>

### 1. The Danger of Exclusive Emphasis on Constitutionalism

The Santiago Commitment, as noted earlier, seems to embody a capacious understanding of what respect for democracy and human rights entails. But almost by their nature, governments are more likely to feel threatened by and concerned about the possibility of disruption in continuity of constitutional government than about disrespect for democracy and human rights *per se*.<sup>514</sup> Governments that feel their own domestic position to be somewhat uncertain will respond to coups elsewhere with a greater sense of urgency than they typically manifest in response to human rights violations abroad.<sup>515</sup> Moreover, continuity of constitutional government may seem more readily observable than the fact that a government is fully representative or is observing the full range of human rights. Thus if the “trigger mechanism” and expulsion from participation in the OAS under the proposed Charter amendments remain the principal efforts at its implementation, there is a real possibility that the Santiago Commitment will focus on avoiding or repairing disruptions in constitutional government.

A full evaluation of the relationship between continuity of constitutional government and respect for democracy and human rights would be a huge undertaking. Here I wish only to high-

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513. See *infra* part IV.B.2.

514. As I argue in part IV.B.2 below, it is difficult to give concrete content to the phrase “constitutional government” in a way that preserves its generality across states. In using the phrase, then, I do not identify some essence of constitutional government. I use it only as shorthand for a formally elected, civilian government that appears to be operating regularly with courts, legislature, and an executive branch, as opposed to a government that is run or fairly openly dominated by the military. This situation reigned in virtually all members of the OAS when the Santiago Commitment was adopted in 1991. Paraguay’s long-time military dictator General Alfredo Stroessner had been overthrown in 1989, but an elected civilian president was not installed until 1993. See *Paraguay Inaugurates a Civilian President*, N.Y. TIMES, Aug. 16, 1993, at 7; Jan Knippers Black, *Almost Free, Almost Fair: Paraguay’s Ambiguous Election*, NACLA REP. ON THE AMERICAS, Sept.-Oct. 1993, at 26. On the ambiguous status of Cuba within the OAS, see LEBLANC, *supra* note 18, at 11-12.

515. Perhaps the major exception to this observation are cases where one state is concerned about treatment by another of an ethnic minority of the same “nationality” that forms the dominant group in the first state. Russia’s concern over the treatment of ethnic Russians in the former Soviet republics is one such example.

light two concerns. First, an exclusive focus on constitutional government would be highly problematic at best. There are many structural impediments to democracy in Latin American and Caribbean countries. Second, efforts to address those structural impediments will necessarily take human rights advocates into more controversial political areas than they have tended to venture.

*a. The Structural Impediments to Democracy*

One of the most important impediments is the extreme poverty, disease, and illiteracy to which many people in Latin American and Caribbean countries are condemned.<sup>516</sup> A major cause of these problems is economic: the highly inequitable distribution of land and wealth.<sup>517</sup> In Guatemala, for example, a small minority of the population owns most of the arable land, and the majority live in poverty and suffer from malnutrition. Since the CIA-sponsored coup in 1954, the military and business sectors have prevented any serious attempt at redistribution of land or income.<sup>518</sup> A related economic factor undermining the

516. However distinct their histories, illiteracy and lack of medical care remain a serious problem in Haiti, Peru, and Guatemala. Seventy-eight percent of the Haitian population is illiterate; in the rural areas the rate is 90%. See 1992 *Bruni Celli Report*, *supra* note 48, at 11. On health care, see *id.* ("the peasants, who account for 80 per cent of the population, receive virtually no medical care"). In the southern highlands of Peru, where land reform had the least effect, "poverty is at Fourth-World levels. People in the southern highlands earn little, die young, are mostly illiterate, and usually exist without basic human services." Cynthia McClintock, *Why Peasants Rebel: The Case of Peru's Sendero Luminoso*, 37 *WORLD POL.* 48, 59 (1984). Rates of illiteracy range from 6% in Lima to 53% in the poorest southern highlands. See Angela Cornell & Kenneth Roberts, *Democracy, Counterinsurgency, and Human Rights: The Case of Peru*, 12 *HUM. RTS. Q.* 529, 534 (1990). And in Guatemala, perhaps two-thirds of the population is illiterate, and it has one of the "poorest health records in Latin America." PAINTER, *supra* note 337, at 4.

517. See generally, e.g., TOM BARRY, *ROOTS OF REBELLION: LAND AND HUNGER IN CENTRAL AMERICA* (1987); CHARLES D. BROCKETT, *LAND, POWER, AND POVERTY: AGRARIAN TRANSFORMATION AND POLITICAL CONFLICT IN CENTRAL AMERICA* (1990); LISA NORTH, *BITTER GROUNDS: ROOTS OF REVOLT IN EL SALVADOR* (2d ed. 1985). See also notes 518-523 *infra*.

518. William Robinson describes Guatemala as

[O]ne of the most unjust, unequal, and violent societies in the world. About 87% of the population lives in poverty, and more than half in a state of indigence. Four out of every five Guatemalan children are malnourished, over 60% of the population is un- or underemployed, and 67% is illiterate. Barely 30% of the population has access to adequate health care and running water, while the mortality rate of 73.3 per thousand live births is one of the highest in the world.

At the roots of this impoverishment is an extremely unequal dis-

long run prospects for democracy is elite decisions to adopt export-oriented growth strategies that tie the country's economy to volatile fluctuations in the world market, often undermining the country's ability to feed its own people.<sup>519</sup> These economic

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tribution of wealth and one of the most backward patterns of land tenure in the hemisphere. The richest 20% of the population receives 55% of national income, compared to the poorest 20% with only 4.5%. Although 60% of the population labors in the agricultural sector, fewer than 2% of landowners own 65% of all arable land. At the other extreme, 78% of the rural population—composed overwhelmingly of the country's oppressed majority of Maya and other indigenous groups—subsists on just 10% of the land.

In a country where government revenue amounts to only 9% of GDP—one of the lowest rates in the world—the rightist business community has for decades vetoed any attempt, not only to redistribute wealth, but to minimally improve the government's revenue base through income and property taxes, which might allow the government to improve social conditions.

The neo-liberal structural adjustment program implemented by Serrano, under the supervision of the international lending agencies and the US Agency for International Development (AID), has only exacerbated these inequalities. Indeed, Serrano launched his abortive coup partially in response to an escalation of student and labor protests over a new package of austerity measures, including bus fare and utility rate hikes.

William I. Robinson, *Guatemala's Failed Coup D'État: Has the Clinton Administration Passed the Test?*, NOTISUR, July 9, 1993 available in LEXIS, Nexis Library, NEWS File. See also 1993 *Inter-Am. C.H.R. Report on Guatemala*, *supra* note 397, at 1-12; PAINTER, *supra* note 337, at 1-57; JONAS, *supra* note 335, at 75-113, 177-80. On the brutal repression of major challenges to the social and economic structure, see, e.g., Handy, *supra* note 337.

519. The distribution of wealth is closely tied into choice of strategies for development, if only at the very broad level that it tends to be wealthy elites who do the choosing. Typically, however, there are closer connections. Without attempting a full analysis of all paths to development, it may be useful to dwell briefly on the export model as an example of why "development" does not necessarily promise a better life for the poor majority.

For many of the smaller countries in Latin America and the Caribbean, one of the central factors driving the choice favoring export-oriented growth is the supposed inadequacy of domestic demand to support increased production. But the inadequacy of the domestic market need not be taken for granted. On the contrary, it owes much to the extreme concentration of wealth in such countries. If wealth were more equitably distributed, domestic demand would increase significantly, because poor people spend a higher percentage of their income than do the rich. See BROCKETT, *supra* note 517, at 188-91; DEWIND & KINLEY, *supra* note 431, at 161-64.

Instead of pressing for redistributive measures, international development agencies tend to promote the kind of export-oriented growth strategy that has proven so attractive to elites. In this model, agricultural and other production intended for domestic consumption is to be replaced by production for export. In the agricultural sector, this means replacing cultivation for subsistence and the local market with cultivation of export crops like coffee. In the industrial sector, it means abandoning "import-substitution" policies that foster domestic production for domestic con-

sumption with free trade policies that favor the growth of export-oriented industries like the assembly sector in Haiti. In theory, the increased activity in the industrial sector will employ many people who lose their livelihood in agriculture as large-scale cash-crop farms replace smaller subsistence plots. Moreover, the hard currency earned by production for export is supposed to enable the country to import the food that it no longer produces for itself. See generally JONAS, *supra* note 335, at 77-79 (Guatemala); BROCKETT, *supra* note 517; DEWIND & KINLEY, *supra* note 431. For a critique of such a strategy in another context, see GARY HAWES, *THE PHILIPPINE STATE AND THE MARCOS REGIME: THE POLITICS OF EXPORT* 131-33, 154-55 (1987).

Unfortunately, this strategy can easily turn out to be a recipe for immiserating the vast majority of the poor. In many Central American states, peasants have found themselves with lower wages and even *decreasing* food intakes over the last decade because of the decreasing domestic food production that accompanies this growth strategy in the agricultural sector. See PAINTER, *supra* note 337, at 8-23 (describing and criticizing the strategy in the context of Guatemala); JONAS, *supra* note 335, at 77-80 (same); BROCKETT, *supra* note 517, at 85 ("The spread of commercial agriculture and the rapid expansion of the share of land devoted to agricultural commodities aimed at foreign markets are fundamental causes of the continuing misery of many of the rural people in Central America."); see also *id.* at 76-85 (Central America). It also tends to encourage internal migration to cities that are unable to absorb the new population.

Of course, one must take into account the particular histories of each country. My argument is not that export oriented strategies are the only ones that can lead to hunger and starvation. Peruvian peasants seem to have faced major threats in the 1970s and 1980s to their ability to feed themselves, see Cynthia McClintock, *Why Peasants Rebel: The Case of Peru's Sendero Luminoso*, 37 *WORLD POL.* 48, 59-72 (1984), but Peru had pursued an import substitution policy at the time. See generally A. Javier Hamann & Carlos E. Paredes, *The Peruvian Economy: Characteristics and Trends*, in *PERU'S PATH TO RECOVERY: A PLAN FOR ECONOMIC STABILIZATION AND GROWTH* 41, 64-67 (Carlos E. Paredes & Jeffrey D. Sachs eds., 1991); Michael Painter, *The Political Economy of Food Production in Peru*, *STUD. IN COMP. DEV.*, at 34, 46, 48-50 (Winter 1983).

In Haiti, agricultural production was already declining when, at the urging of U.S. AID, the government adopted an export strategy. See DEWIND & KINLEY, *supra* note 431, at 75-102. AID predicted that peasants would lose income and suffer malnutrition in the transition from production of food for domestic markets to production of goods like coffee for export, see *id.* at 101. As part of the general strategy, moreover, the Haitian economy was opened to free trade, a move that allowed the importation of cheaper rice from Miami. That, in turn, threw many peasants out of work in the countryside. Unfortunately, because the export assembly sector was unable to provide sufficient employment, they were left with little or no work opportunities. See DEWIND & KINLEY, *supra* note 431, at 12-13 (noting the problem of "Miami rice") ("The opening up of the economy to international competition has undercut the livelihood of many Haitian farmers and provoked conflict between the farmers and urban populace."); *id.* at 75-102; Dupuy, *supra* note 439, at 20; Don Bohning, *Cheap Smuggled Rice Hurts Haitian Farmers but Illegal Imports Could Bolster Government Policy*, *MIAMI HERALD*, Feb. 16, 1987, at 17B.

The decline in Haiti's ability to feed itself might have mattered less if the country had been able to make up for it by a thriving export industry. But two factors undercut that expectation. First, its industry failed to provide adequate employment opportunities, depending crucially on below-subsistence wages. See *supra* part IV.A.1. Second, the endemic corruption in the Haitian government, combined with the need to give incentives to foreign investors, meant that the government

strategies are part of a larger approach to development, generally promoted by Western donor countries and international aid institutions like the International Monetary Fund (IMF), that emphasize eliminating trade barriers and sharply cutting back domestic social programs.<sup>520</sup>

To be sure, there are other impediments to democracy besides extreme inequality of wealth. The enduring division between the Europeanized core and the indigenous periphery, for example, has helped undermine the meaning of democracy for many Peruvians.<sup>521</sup> Nor is there a one-to-one relationship be-

realized practically no foreign exchange through taxation of additional imports and exports, and thus had no new resources available for domestic social programs, see DEWIND & KINLEY, *supra* note 431, at 125-34.

520. The dominant program prescribed today for developing countries tends to have certain typical features:

The neoliberal policy package includes free trade, privatization, access for foreign capital, elimination of government regulations, and reductions in social programs. The ideology is defined in terms of the primacy of growth, a belief in the dynamism of markets and the private sector, and an acceptance of inequalities.

Arthur MacEwan, *Alternatives to Free Trade: A Critique of the New Orthodoxy*, MONTHLY REV., Nov. 1992, at 26, 30. See also Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights — An Agenda for Change*, 15 HUM. RTS. Q. 751, 755-57 (1993). For critiques of the model of development and structural adjustment promoted by Western international aid agencies, see, e.g., *id.* at 763-66; JONAS, *supra* note 335, at 83-84, 226-33 (criticizing the neoliberal program in the context of Guatemala); INSTABILITY AND CHANGE IN THE WORLD ECONOMY (Arthur MacEwan and William K. Tabb eds., 1989); KATHY MCAFEE, STORM SIGNALS: STRUCTURAL ADJUSTMENT AND DEVELOPMENT ALTERNATIVES IN THE CARIBBEAN (1991); CHERYL PAYER, THE WORLD BANK: A CRITICAL ANALYSIS (1982); Christine Chinkin and Shelley Wright, *The Hunger Trap: Women, Food and Self-Determination*, 14 MICH. J. INT'L L. 262, 304-06 (1993); Vandiva Shiva, *Development as a New Project of Western Patriarchy*, in REWEAVING THE WORLD: THE EMERGENCE OF ECOFEMINISM 189 (Irene Diamond and Gloria Feman Orenstein eds., 1990). For a detailed critique of IMF structural adjustment policies in one context, see ROBIN BROAD, UNEQUAL ALLIANCE: THE WORLD BANK, THE INTERNATIONAL MONETARY FUND, AND THE PHILIPPINES (1988). For critiques of the effect of moves toward fair trade on developing countries, see *A Market Solution for the Americas?*, NACLA REP. ON THE AMERICAS, Feb. 1993, at 16. For a good discussion of some of the practical issues involved in implementing alternative forms of development, see JOHN FRIEDMANN, EMPOWERMENT: THE POLITICS OF ALTERNATIVE DEVELOPMENT 136-66 (1992).

521. See Cornell & Roberts, *supra* note 516, at 534-35. Cf. AMERICAS WATCH REPORT ON PERUVIAN HUMAN RIGHTS, *supra* note 497, at 4 ("The departments of Ayacucho, Apuromac, Huancavelica, where Sendero began, are among the poorest in Peru, with population that is predominantly Quechua-speaking, undernourished, illiterate, and historically ignored by the central government. The rise of Sendero in these areas had much to do with social and ethnic aspirations — even, notes one Peruvian analyst, with Andean peasants' concept of education as a means to control knowledge, the beginning of freedom from manipulation from whites.") (citing CARLOS IVÁN DEGREGORI, QUÉ DIFÍCIL ES SER DIOS: IDEOLOGÍA Y VIOLENCIA POLÍTICA EN

tween more equitable distribution of wealth and greater democracy.

Even so, the focus on the economic aspect does bring into relief the way that violations of economic and social rights tend to give rise to violations of civil and political rights, at least in an economy that concentrates vast wealth in an elite. If economic growth is seen to entail or depend upon the continued impoverishment of workers or peasants, any effort on their part to protect their own economic interests will always appear threatening to the whole political system. For example, because the export assembly industry in Haiti represents a mode of development premised on extremely low wages, its continuing vitality will always appear to elites to require repression of labor organizing. Similarly, where elites have adopted an export oriented development strategy for agriculture, peasant efforts to protect themselves from starvation will appear to threaten the system.<sup>522</sup> The result will be a powerful temptation for elites to view the military as the only sure defense against inevitable peasant and labor efforts to assert their own interests. That, in turn, will give elites a strong incentive not to bring the military under effective civilian control.<sup>523</sup>

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SENDERO LUMINOSO 10-19 (1989)). See also, e.g., Glen Caudill Dealy, *The Tradition of Monistic Democracy in Latin America*, 35 J. HIST. IDEAS 625 (1974), reprinted in *POLITICS AND SOCIAL CHANGE IN LATIN AMERICA: THE DISTINCT TRADITION* 71 (Howard J. Wirada ed., 1974) (Latin American political culture is distinct from liberal pluralist tradition); Irwin P. Stotzky & Carlos Nino, *The Difficulties of the Transition Process, in TRANSITION TO DEMOCRACY IN LATIN AMERICA*, supra note 13, at 3, 6 (Latin American cultures have insufficiently internalized "universal standards of achievement and competition necessary to an equitably functioning democracy").

Long institutionalized discrimination against the Indian majority in Guatemala has had a similar effect. PAINTER, supra note 520, at xvi-xvii. Even so, one suspects that extreme poverty and inequality exacerbate such non-economic problems.

522. Similar observations could be made about Guatemala. See JONAS, supra note 318, at 78 ("Because the export promotion strategy relied on keeping wages low, because it was not combined with any redistributive government social policy, and because it was oriented toward the world market rather than the growth of a domestic or regional consumer market, it was openly nonreformist — even antireformist."). See also NAT'L LAB. COMM. REP., WORKER RIGHTS AND THE NEW WORLD ORDER: EL SALVADOR, HONDURAS, GUATEMALA 39 (June 1991) [hereinafter NEW WORLD ORDER] (post-Arbenz military regime dissolved all labor unions; in ensuing decades most labor leaders were murdered, and by 1974 only 1.62 percent of workforce was organized).

523. Obviously, the connection is not a completely straightforward one, as the distinct histories of Central American countries show. See generally, e.g., Jan L. Flora & Edelberto Torres-Rivas, *Sociology of Developing Societies: Historical Bases of Insurgencies in Central America*, in *SOCIOLOGY OF "DEVELOPING SOCIETIES": CENTRAL*

Indeed, even in periods when there is no armed insurrection, an elected civilian government can have a constitution, conduct elections, and undergo changes in ruling parties or leaders without having the power or the political will to carry out significant reforms or reign in abuses by the military.<sup>524</sup> Peru and Guatemala before their autogolpes certainly proved that.<sup>525</sup> And as Aristide himself noted about the 1987 election in Haiti that ended in a massacre, "[t]he forces of order wanted us to vote so that it would appear to the outside world that we were a happy, peaceful democracy, and then the exploitation and corruption could go on just as before."<sup>526</sup>

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AMERICA 32 (Jan L. Flora & Edelberto Torres-Rivas eds., 1989) (discussing why El Salvador, Nicaragua, and Guatemala developed insurgencies, and Honduras and Costa Rica did not); BROCKETT, *supra* note 517 (explaining differential degrees of peasant mobilization in Central American states); ROBERT G. WILLIAMS, EXPORT AGRICULTURE AND THE CRISIS IN CENTRAL AMERICA 166-89 (1986). But it is real enough to give it a central place in the analysis.

524. See Robert H. Trudeau, *The Guatemalan Election of 1985: Prospects for Democracy*, in ELECTIONS AND DEMOCRACY IN CENTRAL AMERICA 93 (John A. Booth and Mitchell A. Seligson eds., 1989). See generally Tom J. Farer, *A Multilateral Arrangement to Secure Democracy*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM, *supra* note 18, at 115, 123-27 (noting that seemingly democratic governments and institutions may be little more than facades in some Latin American contexts). See also EDWARD S. HERMAN AND FRANK BRODHEAD, DEMONSTRATION ELECTIONS: U.S.-STAGED ELECTIONS IN THE DOMINICAN REPUBLIC, VIETNAM, AND EL SALVADOR (1984).

525. See, e.g., AMNESTY INTERNATIONAL, PERU: HUMAN RIGHTS IN A CLIMATE OF TERROR (1991) (AI Index: AMR 46/56/91); AMERICAS WATCH REPORT ON PERUVIAN HUMAN RIGHTS, *supra* note 497; Cornell & Roberts, *supra* note 516; Jeffrey Thielman, Note, *Peru's Failure to Make the Military Subservient to Civilian Law: The Absence of Prosecution After the 1988 Cayara Massacre*, 12 B.C. THIRD WORLD L.J. 433 (1992); *Disappearances in Colombia and Peru*, HUMAN RIGHTS WORKING PAPER, Sept. 1991, at 1; Cárdenas, *supra* note 314.

On Guatemala, see, e.g., PAINTER, *supra* note 337, at 58-59, 79-109 (1989); JONAS, *supra* note 318, at 161-75, 228-29; Ken Anderson and Jean-Marie Simon, *Permanent Counter-Insurgency in Guatemala*, TELOS No. 73, Fall 1987, at 9.

526. ARISTIDE, *supra* note 443, at 9-11.

The short life of the Manigat presidency (lasting only from his inauguration in February 1988 until his overthrow by his military sponsors in June 1988) provides strong evidence — as if any were needed — that a civilian ruler who owes his power to the military governs only at its sufferance. For a useful description of events in Haiti from the departure of Jean-Claude Duvalier in 1971 through the end of 1989, see Wilson, *supra* note 18. On Manigat's election, see *id.* at 10-16; PLUMMER, *supra* note 443, at 225-26. Aristide's verdict was pointed:

In January 1987 the voters . . . were paid agents of the dictatorship, and the man they "elected" was a puppet, a president with whom the United States said it could cooperate. But again, the Haitian authorities couldn't stand the change, and again the military marched in, this time to depose its own marionette.



The prospects for democracy and protection of human rights should not, therefore, rest solely on the protection of formal constitutional structures. It would be unfortunate if the status of human rights and democracy in Haiti, Peru, and Guatemala were to be the object of concerted regional attention only in the event of a coup. It would be equally unfortunate if simply restoring elected heads of government came to be regarded as sufficient to vindicate democracy. The trigger mechanism and suspension from the OAS should constitute only one element of a broader program focusing on the structural impediments to democracy.<sup>527</sup>

*b. The Controversial Nature of Efforts to Lessen the Impediments*

It is at precisely this point that the second difficulty arises. If taken seriously, attempts to lessen structural impediments to democracy will inevitably lead human rights advocates into controversial areas. The Santiago Commitment acknowledges the importance of fighting "extreme poverty" and of reducing foreign debt.<sup>528</sup> Similarly, the Protocol of Washington would make the fight against "extreme poverty" a treaty obligation.<sup>529</sup>

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ARISTIDE, *supra* note 443, at 11.

527. My concern is not that the U.S. or other states will adopt a formal position that constitutionalism is the only factor that counts in the building of democracy. The arguments for integrating Latin America into the world economy usually include a claim that doing so will improve its economic performance and so bolster the long-term prospects for democracy and human rights. See, e.g., Note of the Secretary General to the General Assembly, OAS, June 1993, at 21-22 ("The exercise of representative democracy prevails in the Americas today. This does not, however, guarantee the consolidation of democratic regimes . . . . [T]he institutional order must be strengthened through the promotion of integral development and the practice of social justice to thereby set the stage for the entrenchment and furthering of democracy in the hemisphere."). See also "We Live in a Transformed Hemisphere," COHA'S WASH. REP. ON THE HEMISPHERE, Nov. 6, 1993, at 2 (interview with Executive Coordinator of OAS Unit for the Promotion of Democracy) ("[d]emocracy takes many forms, but if it is obviously only a fraud and a facade for authoritarian government, then it would be up to the General Assembly or the Permanent Council to consider what action would be appropriate" pursuant to the Santiago Commitment and proposed Charter amendments). As I indicate below, I am less certain that the approach to development espoused by the U.S. and Western development agencies will have that effect; but my concern here is that even that minimal degree of attention to the issue will suffer if the focus on coups comes to be the primary concern as a practical matter.

528. The Santiago Commitment, *supra* note 15, paras. a, d.

529. See Texts Approved by the General Assembly at its Sixteenth Special Session, *supra* note 23 (proposing new Article 2(g)); see also *id.* (proposing new Article

Matching this political recognition of the importance of the economic conditions for democracy is an increasing tendency among human rights advocates to argue that development itself is a human right.<sup>530</sup> These declarations are easy to support, however, precisely because they are made at such a high level of generality.

Much that passes as development seems likely, upon closer examination, to give powerful reinforcement to the structural impediments described above. In my view, unless human rights advocates turn a more critical eye towards "development," their efforts may do little at best to bolster the long term prospects for democracy. For example, there is a real danger that the aid package promised for Haiti in connection with the Governors Island Agreement will, if implemented, promote the same export assembly industry that the U.S. and international lending agencies have hailed as Haiti's salvation, without adequately attacking the graft, political repression, and below-subsistence wages that have attended it.<sup>531</sup>

Moreover, when development is linked to austerity plans imposed by the IMF and major donor countries, its effects can devastate both the poor and the prospects for democracy. Reportedly, President Fujimori decided to implement an austerity pro-

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3(f) and modifications to Articles 33 and 116). The U.N. General Assembly has recognized a "right to development," though without the support of many western states and over the opposition of the U.S. See Declaration on the Right to Development, G.A. Res. 41/128, U.N. GAOR, 41st Sess., Supp. No. 53, at 186, U.N. Doc. A/41/53 (1986).

530. See, e.g., Philip Alston, *Making Space for New Human Rights: The Case of the Right to Development* 1 HARV. HUM. RTS. YB. 3 (1988); Héctor Gros Espiell, *The Right of Development as a Human Right*, 16 TEX. INT'L L.J. 189 (1981); Roland Y. Rich, *The Right to Development as an Emerging Human Right*, 23 VA. J. INT'L L. 287 (1983); Symposium: *Development as an Emerging Human Right*, 15 CAL. W. INT'L L.J. 429 (1985).

531. The history of the U.S. AID program to Haiti is not encouraging. AID vigorously opposed Aristide's efforts to raise the minimum wage to the equivalent of 37 U.S. cents an hour, see HAITI AFTER THE COUP, *supra* note 106, at 22. AID did not simply write policy papers opposing the effort and promoting a more "business oriented" climate; it gave funding to domestic groups in Haiti to hide the papers' provenance. See *id.* at 22-30. (The parallel to the State Department's manufacturing of a supposedly indigenous Haitian political compromise in December 1993, see *supra* text accompanying notes 221-228, is striking.) Of course, AID did so in the name of having "diverse internal interest groups" articulate policy positions, HAITI AFTER THE COUP, *supra* note 106, at 26 (quoting Haiti Macroeconomic Assessment, Staff Working Papers, US AID, Feb. 1991), but those groups were drawn exclusively from the business community. *Id.* That AID thereby ended up funding opposition to Aristide during his presidency should come as no surprise.

gram even more extreme than that suggested by his conservative opponent in the 1990 election — opposition to which played an important role in his election victory<sup>532</sup> — after the U.S. and Japan left him with virtually no choice in the matter.<sup>533</sup> That plan plunged the vast majority of Peru's population into poverty and did great damage to their belief in democracy.<sup>534</sup>

General statements about the need to fight poverty are, accordingly, inadequate. Any call for development to help foster the conditions of democracy must be more specific, and tackle admittedly controversial political questions of what sort of development will genuinely make life better for the majority of people in developing countries. Of course, these questions must be answered with a thorough attention to the particular circumstances of each country. Still, the undertaking should keep several general considerations in mind. I offer them not with the aim of prescribing a development program; that would be an considerable project, even limiting it to the three countries in question. Rather, I present them to give a sense of the kinds of controversial issues the Santiago Commitment requires human rights advocates to address.

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532. See *A Script That Went Wrong*, ECONOMIST, June 16, 1990, at 46; *Fujimori Winner in Peru*, MIAMI HERALD, June 11, 1990, at 1A ("Fujimori had positioned himself as the candidate of the poor, brown-skinned majority. He campaigned heavily in bleak shanty towns and fetid slums, criticizing the 'little white ones' — the Lima-based white ruling class — and asking Peruvians to vote for a 'President like you."); Holger Jensen, *Victory Amid Violence*, MACLEAN'S, June 25, 1990, at 16. On his adoption of austerity plans after his election, see Carol Graham, *Economic Austerity and the Peruvian Crisis: The Social Cost of Autocracy*, 13 SAIS REV. 45, 49 (1993); *A Shock for Peru*, MIAMI HERALD, Aug. 24, 1990, at 20A ("Only two weeks after taking office, Mr. Fujimori imposed an economic plan that resembles the measures advocated by Mr. Mario Vargas Llosa, his chief campaign opponent.").

533. See Graham, *supra* note 532, at 48-49; Gonzales, *supra* note 331, at 68 (noting that the program "was conceived in Washington rather than in Peru"); *id.* at 74.

534. See PERUVIAN NATIONAL HUMAN RIGHTS COORDINATING COMMITTEE REPORT, reprinted in 137 CONG. REC. S2,450 (daily ed. Feb. 28, 1991) (60% of population would need food aid upon implementation of its austerity program); Graham, *supra* note 532, at 50 ("The incidence of extreme poverty increased 49% from 1985 to 1990, and then climbed another 40% after August 1990 [when the "stabilization" program was introduced]. About seven million people, or at least every third Peruvian, were in the extreme poverty category, meaning that they were unable to meet basic nutritional needs."). See also Cynthia McClintock, *Theories of Revolution and the Case of Peru*, in THE SHINING PATH OF PERU, *supra* note 295, at 225, 233 (noting the damage that Fujimori did to Peruvians' faith in democracy by adopting immediately upon election the very program he had denounced as a candidate); *A Shock to the System*, TIME, Aug. 20, 1990, at 55 ("Many Peruvians said they felt betrayed by their new President.").

c. *A Framework for Addressing the Impediments*

Development programs for democracy and human rights must include both affirmative and negative features. The affirmative features would certainly vary from country to country, but it seems likely that they would typically need to include at least two aspects to make them compatible with democracy and human rights. The first is the promotion of an internal market. This need not be done entirely at the expense of any attempt to develop an export industry as well, but in the context of countries that have long suffered from extreme concentration of wealth, taking the absence of a significant internal market for granted is simply another way of taking extreme inequality for granted.<sup>535</sup> Any development program that aims to evade rather than address this problem is incompatible with the promotion of democracy and human rights. Addressing it may well require redistribution of land and income.<sup>536</sup> That in turn implies that

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535. See *supra* note 519.

536. The issue of redistribution of land may be most pressing in Guatemala, and somewhat less so in Haiti and Peru. As Susanne Jonas notes, "Guatemala's land distribution is the most unequal in Latin America. The largest 2 percent of Guatemala's farms cover 67 percent of usable land, while 80 percent of farms account for 10 percent of the land . . . Yet Guatemala is the only Central American country that has not adopted any land redistribution law. The 1985 Constitution made a major concession to the landed oligarchy by eliminating the reference in previous constitutions to the 'social function of property.'" JONAS, *supra* note 318, at 178.

Haiti's patterns of land ownership have a complicated history extending back to the earliest period of the new republic, when the extent to which the plantation system would survive the end of slavery was a key question. By and large, Haiti's mulatto elite preferred to keep the plantation system, while the peasants pressed for distribution of the land, seeing the plantation system as a continuation of slavery. Significant land redistribution did occur in nineteenth century Haiti, mainly as a political device to help ensure the loyalty of the peasantry in the event of an invasion by France. See TROUILLOT, *supra* note 454, at 44-50; Mats Lundahl, *Population Pressure and Agrarian Property Rights in Haiti*, in THE HAITIAN ECONOMY: MAN, LAND AND MARKETS 67, 70-76 (1983). There is, therefore, some basis for the common perception that Haiti is much more a nation of peasant landowners than many other countries in Latin America. See, e.g., *id.* at 71, 76; MINTZ, *supra* note 443, at 273; Anthony V. Catanese, *Haiti's Refugees: Political, Economic, Environmental*, FIELD STAFF REP.: LATIN AMERICA, No. 17 (Universities Field Staff Int'l 1990-91). Consequently, land appears more widely distributed in Haiti, though peasant landholdings are typically very small. See DEWIND & KINLEY, *supra* note 431, at 15.

To be sure, the extent to which landownership is concentrated in Haiti has been a matter of some controversy, see TROUILLOT, *supra*, at 76-77 (discussing claim by one Haitian economist that official statistics underestimated the extent to which land ownership is concentrated); DEWIND & KINLEY, *supra* note 431, at 52 (noting

the U.S. could play a positive role in securing the long-term conditions for democracy and human rights only if it actively pressed for such reforms — a prospect that U.S. hostility to Aristide's radicalism shows to be currently rather unlikely.

The other element of the affirmative side of development programs concerns the way in which they are instituted. If greater attention to economic rights (broadly conceived) is needed, that will not be sufficient for an expanded conception of democracy. The question cannot simply be one of the appropriate policies to be adopted and implemented by a government — even an elected one — with popular participation limited to choosing leaders and parties at particular intervals. Instead, popular, grassroots mobilization must be viewed as an integral part of a functioning democracy. No matter how carefully parliaments are fostered, elections monitored, and governmental powers restricted and balanced, democracy is not likely to take root — nor are human rights likely to be respected — in a society in which the daily experience of active collective participation in

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that U.S. AID had concluded in 1970s that concentration of land ownership was a problem in Haiti); ARISTIDE WITH WARGNY, *supra* note 471, at 57 (“Three-fourths of the land is owned by four percent of the population. Most of the hill-dwellers have nothing but a miserable patch of ground, a handkerchief, *mouchwa tèt*, on which they work themselves to death for nothing.”); 1992 Bruni Celli, *Report*, *supra* note 48, at 34. Further, land titles in Haiti are generally poorly documented, leaving many peasants insecure and vulnerable.

Even taking these qualifications into account, it appears that development of cooperative programs for Haiti's peasants would be at least as important as any program for redistributing land. See DEWIND & KINLEY, *supra* note 431, at 160-61. Haiti, moreover, has a long tradition of peasant cooperation on which it would be possible to build. See Mats Lundahl, *Co-operative Structures in the Haitian Economy*, in THE HAITIAN ECONOMY, *supra* note 536, at 211.

Historically, Peru has also had a highly unequal distribution of land, but it had an agrarian reform program under the Velasco regime, though the effects varied widely by region. See generally Susana Lastarria-Cornhiel, *Agrarian Reforms of the 1960s and 1970s in Peru*, in SEARCHING FOR AGRARIAN REFORM IN LATIN AMERICA 127 (William C. Thiesenhusen ed. 1989); Cristóbal Kay, *Achievements and Contradictions of the Peruvian Agrarian Reform*, 18 J. DEV. STUD. 141 (1982); Cynthia McClintock, *Why Peasants Rebel: The Case of Peru's Sendero Luminoso*, 37 WORLD POL. 48, 64-67 (1984). Even so, its effects varied widely by region; significantly, the southern highlands of Peru, the region in which peasants benefitted least from the land redistribution, is the area in which Sendero Luminoso has been strongest. See Cynthia McClintock, *supra* at 49, 55-56, 64-67 (concerning origins of Sendero Luminoso in Ayacucho department); David Scott Palmer, *Rebellion in Peru: The Origins and Evolution of Sendero Luminoso*, 18 COMP. POL. 127, 136-37 (1986) (same). See also Ronald H. Berg, *Peasant Responses to Shining Path in Andahuaylas*, in THE SHINING PATH OF PERU *supra* note 295, at 83 (discussing impact of obstructed land reform on Sendero's support in nearby Andahuaylas province).

the conditions of one's life is missing.<sup>537</sup>

Haiti in particular had developed a vibrant set of grassroots groups in the years after the fall of the Duvalier regime,<sup>538</sup> and, more than anything provided in its constitution, it was Haiti's "civil society" that provided its strongest claim to democracy. Protection of rights to organize labor unions is also critical. Otherwise, it will always be too easy to base industries on nothing other than below-subsistence wages, transforming development from the promise of a better life into an economic factor that virtually requires continuing political repression. Finally, real democracy must include thoroughgoing efforts to bring equality to oppressed groups, such as women.<sup>539</sup>

537. Cf. ARISTIDE AND WARGNY, *supra* note 471, at 126 ("I do not believe that liberal and parliamentary democracy is in itself the indispensable corollary, the sole result and unique end of the movement for human rights. The democracy to be built should be in the image of *Lavalas*: participatory, uncomplicated, and in permanent motion."); Jean-Bertrand Aristide, *Haiti Emerges, Eyes Blinking, In the Sunlight of Democracy*, N.Y. TIMES, Oct. 16, 1994, at 15 (referring to "civic and grass-roots groups that form the backbone of Haiti's democracy"). See also Sigrun I. Skogly, *Structural Adjustment and Development: Human Rights — An Agenda for Change*, 15 HUM. RTS. Q. 751, 763-66, 770-72, 775-77 (1993). For a thoughtful discussion of the difficulties confronting such an approach, see Gay Seidman, *Facing the New International Context of Development*, in GLOBAL VISIONS: BEYOND THE NEW WORLD ORDER 175, 182-85 (Jeremy Brecher et al. eds., 1993).

538. See AMERICAS WATCH HAITIAN REFUGEE REPORT, *supra* note 452, at 3-4 ("While many international observers of Haiti bemoan its lack of economic development, its civil society was remarkably advanced [before the coup] . . . [T]he strength of Haitian civil society lay in its breadth and diversity outside the narrow realm of electoral politics.").

539. The assembly industry, for example, provides an example of the gendered effect of many Western-style development projects, an impact that development agencies tend to ignore. As Trouillot notes, "women have long constituted the backbone of the Haitian marketing system for local food crops." TROUILLOT, *supra* note 454, at 215. See also MINTZ, *supra* note 443, at 274-75. The assembly industry has employed mostly women. The two may well be connected in the phenomenon of rising food prices:

No one has yet established any systematic correlation between the use of a largely female labor force by subcontracting bosses, and the decline in the production and distribution of foodstuffs in the course of the last few years. But even if it could be proven that *none* of the day laborers at the Delmas industrial park were directly taken from the food production network, the very idea of wages that were more than ten times the income of the average peasant certainly increased the rural exodus. The growth of the urban population in turn contributed to the rise of food prices, especially since agricultural production remained stagnant in the countryside and the increase in food prices had to affect all segments of the population as the proportion of imported foodstuffs increased.

TROUILLOT, *supra* at 215. Of course, whether development is in some general sense good or bad for women is a difficult question. Compare Vandiva Shiva, *Development*

As noted above, development programs must also have a "negative" feature. By this I mean that economic human rights need to be reconceived, not merely as rights of individuals or even peoples to subsistence levels of material support, but as collective rights protecting people against international trade rules and IMF-imposed restructurings, insofar as they condemn people to continual poverty.<sup>540</sup> Similarly, changes in labor laws meant to ensure further integration of local economies into the international capitalist system need to be critically evaluated to determine concretely whether and to what extent workers, peasants, and the poor will benefit in the short- and long-term. In short, human rights advocates need to think seriously about how people in developing countries might gain some form of protection against international pressures to steer development in directions that help undermine the long-term conditions for democracy and human rights. And human rights activists need to treat as central to their concerns *any* regional or international body that has an impact on these issues, not simply the Commission, the Court, and the OAS when it acts in response to a coup.<sup>541</sup>

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as a New Project of Western Patriarchy, in REWEAVING THE WORLD, *supra* note 520, at 189 with Valentine M. Moghadam, *Development and Women's Emancipation: Is There a Connection?*, 23 DEV. AND CHANGE 215 (1992). My point is simply that the tendency of the international community to impose a standard export-oriented development strategy upon third world countries inevitably risks doing more harm than good. Only a development strategy that works from the bottom up, encouraging for example the growth of women's organizations, can avoid that risk.

540. Practically speaking, that means, among other things, attempting to force international development and lending agencies to take human rights — broadly conceived — into account in their decisions, something they have traditionally resisted. See, e.g., Ibrahim F.I. Shihata, *The World Bank and Human Rights: An Analysis of the Legal Issues and the Record of Achievements*, 17 DENV. J. INT'L L. & POL'Y 39 (1988) (emphasizing "apolitical" character of World Bank). The project might also take the form of an attempt to develop a programmatic equivalent for the 1990s of the "New International Economic Order" (NIEO) that was advocated in the 1970s. On the NIEO and human rights, see generally, *The New International Economic Order and The Promotion of Human Rights*, U.N. ESCOR, Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, Study prepared by Raúl Ferrero, U.N. Doc. E/CN.4/Sub.2/1983/24/Rev. 1 (1986); Seymour J. Rubin, *Economic and Social Human Rights and the New International Economic Order*, 1 AM. U. J. INT'L L. & POL'Y 67 (1986).

541. Cf. Alston, *Making Space for New Human Rights: The Case of Right to Development*, 1 HARV. HUM. RTS. YB. 3, 15 (1988) (criticizing the "rigid separation between the work of the human rights organs [of intergovernmental organizations] (such as the Commission on Human Rights, in the case of the U.N.) and that of the development and financial agencies such as the World Bank, the United Nations Development Program and the International Monetary Fund"). I do not mean to imply that human rights groups have been *entirely* unconcerned with economic and

Plainly, these considerations would take human rights law and policy into new territory. It is one thing to oppose torture or arbitrary detention; although exclusive focus on those wrongs overlooks an entire branch of human rights law (economic and social rights) it does at least appear relatively neutral and universal. It is another thing to examine critically the kinds of development that improve people's lives, undercut the structural pressures for human rights violations, and make democracy meaningful to the majority. While such a broadening of focus would remedy the neglect of economic and social rights, it would also plunge human rights law and policy into controversial political issues, something human rights advocates have tended to avoid. But the Santiago Commitment makes them unavoidable — and rightly so.

## 2. The Danger of Manipulation of Constitutionalism

It seems clear, given the importance of other long-term structural factors, that an exclusive focus on constitutionalism would be mistaken. Continuity of constitutional government is plainly not sufficient for respect for democracy and human rights. But as noted earlier it might well be tempting to regard it as a *necessary* condition for respect for democracy and human rights. The temptation might be particularly strong in light of the difficult issues raised by any attempt to set out the sufficient conditions for democracy and respect for human rights.

Even this more modest assertion about the importance of constitutionalism is open to question. First, it is hard to see how the OAS has in fact adhered to any consistent model of constitutionalism. Second, and more important, it is difficult to see what a consistent model would be.

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social rights, or their interrelationship with civil and political rights. See HUMAN RIGHTS WATCH, *INDIVISIBLE HUMAN RIGHTS: THE RELATIONSHIP OF POLITICAL AND CIVIL RIGHTS TO SURVIVAL, SUBSISTENCE AND POVERTY* (1992). See also AMERICAS WATCH, *THE STRUGGLE FOR LAND IN BRAZIL: RURAL VIOLENCE CONTINUES* (1992) (arguing that large landowners' defense of their lands contributes to violence in Brazil). Similarly, Asia Watch petitioned the U.S. Trade Representative to find that Indonesia was violating the labor rights of workers, a finding that would have resulted in trade sanctions. See *Indonesia Says Misunderstandings Cause of Labor Problems*, UPI, Sept. 7, 1993, available in LEXIS, Nexis Library, UPI File; Charles P. Wallace, *Doing Business; New Shots Fired in Indonesia Trade War*, N.Y. TIMES, Sept. 22, 1992, at 2. Labor unions have also become concerned about the relationship between civil and political rights and rights of workers. See, e.g., NEW WORLD ORDER, *supra* note 522, at 37-47.



The OAS's own position regarding the coups in Peru and Guatemala illustrates the first point. The OAS has proclaimed both to be success stories. Yet the current president of Guatemala holds office in part because the military forced his predecessor Serrano from office.<sup>542</sup> While it is true that Serrano "resigned," it is equally obvious that he did so because the military told him to.<sup>543</sup> In the interim, as noted earlier, Guatemala's vice-president made a bid for power, and he was also forced out by the military.<sup>544</sup> Ironically, that move could be condemned as failing to heed the most basic lesson of constitutionalism.<sup>545</sup> After all, the Guatemala constitution appears to provide for the Vice President to become President when the latter office is vacant.<sup>546</sup> Yet it would be strange not to hail de León's accession to power as an important victory for democracy in Guatemala.

At least in the case of Guatemala, one could argue that the OAS's acceptance of extra-constitutional means to bring about democracy was proper because such means were used to disrupt constitutional government in the first place. The same cannot be said of Peru. Peru now has a significantly different (and more authoritarian) governmental structure, as well as a new constitution. Neither would have happened without the suspension of Congress and the courts — an action that Fujimori himself proclaimed to be at odds with the constitution in force at the time. Yet, in contrast to Guatemala, the perpetrator of the Peruvian autogolpe remains in office. Having bestowed its approval on Peru in December 1992, the OAS would be in a hard position to

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542. I say "in part" because the military reversed its initial support of Serrano in the face of broad domestic and international opposition to his coup. See Ramiro de León Carpio, *How Guatemala Rescued Democracy*, MIAMI HERALD, July 29, 1993, at 19A.

543. Any thought that Serrano might have acted voluntarily after realizing the error of his ways is hard to square with his reported last minute attempt to bribe legislators to support him. See Tim Golden, *Guatemalan Who Grabbed Power Is Out*, N.Y. TIMES, June 2, 1993, at A6.

544. See *supra* part III.C. The military, as noted earlier, acted after Guatemala's Constitutional Court ruled Espina ineligible for the presidency. See *Guatemala Court Rejects Power Grab*, MIAMI HERALD, June 5, 1993, at 6A. Once again, however, it seems clear that it was the military's decision to abandon Espina that was critical, and, given the formation of a broad coalition opposing Espina like the one that opposed Serrano, it seems likely that the military would have ended Espina's bid for power even in the absence of the Constitutional Court's ruling.

545. See *Solution in Constitution*, MIAMI HERALD, June 4, 1993, at 14A (arguing that Espina "rightly invoked his constitutional prerogative and assumed the presidency" after Serrano resigned).

546. See *supra* part III.C.

argue that adherence to constitutional requirements is always necessary.<sup>547</sup>

The OAS's position is nothing new. In calling for Somoza's overthrow in 1978,<sup>548</sup> the OAS itself recognized that revolution itself is clearly permissible in some circumstances. One might reply that the downfall of Somoza's military government did not bring the end of a *constitutional* government.<sup>549</sup> But is it clear *a priori* — that is, simply by reference to constitutionalism, without considering anything else — that a nonviolent and more limited form of "revolution" like the Peruvian autogolpe, which appears to have met with widespread initial approval by a populace thoroughly disillusioned with existing party politics,<sup>550</sup> would necessarily undermine the long-run prospects for democracy?

This last question shows why it would miss the mark to condemn the OAS for failing to take a consistent stand on adherence to constitutionalism. For even if constitutionalism were always necessary, it is not clear what adherence to it would require. The content of constitutionalism seems highly indeterminate, a fact that human rights advocates have not always

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547. It is also worth noting that, however incomplete, the land reform undertaken by the regime of General Juan Velasco Alvarado in the early 1970s may have been a positive factor with regard to Peru's long-term democratic prospects. As noted earlier, the region least touched by the land reform was the region in which Sendero turned out to be the strongest. See *supra* note 536.

Conversely, the failure of Corazon Aquino to effect land reform before the return to constitutional government may well have significantly weakened the Philippines' long-term prospects for democracy. See W. SCOTT THOMPSON, *THE PHILIPPINES IN CRISIS: DEVELOPMENT AND SECURITY IN THE AQUINO ERA, 1986-92*, at 24-26, 52-58 (1992). See also *id.* at 176 ("Even the goal of democracy was kept with more attention to form than substance; elections were held but nothing was done to prevent the large and substantial abuse of the system by an elite whose wealth had made possible the subversion of real democracy over the generations."); DAVID WURFEL, *FILIPINO POLITICS: DEVELOPMENT AND DECAY* 321-23, 338-39 (1988); Richard J. Kessler, *The Philippines*, in *INTERVENTION IN THE 1980S*, *supra* note 16, at 221, 231-32. For a relatively optimistic view of the long-term prospects for real democracy, see James B. Goodno, *Will Aquino's Failure Work to the Left's Advantage?*, in *CRITICAL DECADE: PROSPECTS FOR DEMOCRACY IN THE PHILIPPINES IN THE 1990S*, at 36 (Dolores Flamiano & Donald Goertzen eds., 1990).

548. See M.R.E. Res. II, OAS Meeting of Consultation of Ministers of Foreign Affairs, 17th mtg., OEA/ser.F/II.17, OAS Doc. 40/79 rev. 2 (1979) (calling for the "[i]mmediate and definitive replacement of the Somoza regime"), reprinted in *Report on the Situation of Human Rights in the Republic of Nicaragua*, Inter-Am. C.H.R. 2-3, OEA/Ser.L/V/II.53, doc. 25 (1981), and in THOMAS BUERGENTHAL ET AL., *supra* note 18, at 388.

549. Not, at any rate, in the sense in which I use the term. See *supra* note 514.

550. See *supra* notes 497, 534.

recognized in practice.

I do not make this observation to dismiss the issue of constitutional continuity. It cannot and should not be avoided. I simply wish to emphasize the second point: the impossibility of insisting resolutely on adherence to constitutionalism, particularly as straightforwardly gleaned from a text. General observations about constitutionalism will never suffice to build a constitutional order; in making the myriad concrete choices that that task requires, controversial political decisions will have to be made.

Consider three ideas that might seem key parts of constitutionalism: attention to an authoritative text; a government under the rule of law; and the maintenance of a balance of powers. Yet however incontestable these ideas may seem, they cannot in themselves specify in any concrete way how a government should function.

With regard to the first idea, the tendency of Latin American states emerging from dictatorships to include detailed, binding human rights provisions gives one indication of the importance attached to texts. That may easily translate into a view that constitutionalism requires straightforward readings of, and adherence to, the constitutional text. Thus, it has often been taken as obvious that President Aristide's term will expire five years after he took office in February 1991, because the Haitian constitution provides for a five year term. Indeed, the U.S. required Aristide to promise not to extend his term beyond February 1996.<sup>551</sup>

There has equally been a tendency to view it as obvious that Fujimori's actions were illegal: As noted earlier, the Peruvian constitution of 1979 appeared to deny the president the power to suspend the Senate or the judiciary, and to limit his power to suspend the Chamber of Deputies to certain specific circumstances.<sup>552</sup> A similar point can be made concerning Serrano's

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551. See Douglas Jehl, *Clinton Addresses Nation on Threat to Invade Haiti*, N.Y. TIMES, Sept. 16, 1994, at 1A, 5A. On the length of the president's term, see HAITI CONST. art. 134-1, reprinted in *English in 7 CONSTITUTIONS*, supra note 82.

552. See supra note 291. For an example of the tendency to view the analysis as virtually open-and-shut, see AMERICAS WATCH REPORT ON PERU, supra note 291, at 2 n.2 ( "President Fujimori's actions were clearly illegal under Peruvian law." ). For a similar analysis of the Haitian constitution, see Amy Wilentz, *Haiti's Usual Politics of the Absurd Now Enters Chaotic Realm of the Surreal*, L.A. TIMES, Oct. 13, 1991, at M2 (referring to post-coup actions of the legislature as "egregious violations" of the constitution).

actions. Following up on this line of reasoning, it could be argued, the perpetrators in both Guatemala and Peru confirmed this interpretation: Both, after all, stated that they were *suspending* the constitution.

All of these seemingly straightforward applications of the text, however, hide more than they reveal. Consider the length of Aristide's term. Haiti's Constitution does not provide for the military to force the President into exile and prevent him from carrying out his electoral mandate. The failure to extend Aristide's term beyond February 1996 rewards the military for its coup, arguably a far greater violation of the constitution than would be an extension of Aristide's term, if indeed that could be deemed a violation at all.

Nor is there any reason to suppose that all future dictators will announce their actions with the helpful guidance that Fujimori and Serrano provided when they called their actions a "suspension" of the constitution. It would not be implausible for an executive to claim a power to suspend the constitution consistent with the constitutional order. Indeed, Haiti had a more classic military coup, but even that did not stop the military from claiming that it acted to save the constitutional order from a dictator.<sup>553</sup> How easily could such assertions be rejected in light of our own constitutional history? Consider, for example, the enormous shifts that have taken place in the U.S. in the relation between presidential power and congressional authority,<sup>554</sup> or between the federal government's power and that of the states.<sup>555</sup> Or consider that the constitutional text appears

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553. See Linda Diebel, *Haiti's Aristide Accused of Torture*, TORONTO STAR, Oct. 5, 1991, at A1 (quoting a "senior military source") ("According to the Haitian constitution, the president of Haiti is just a nominal president. The real commander, the effective commander, is the commander and chief of the army. President Aristide never understood this."). One of the legislators who voted to replace Aristide after the coup proclaimed proudly that "[e]verything was done according to the constitution." Linda Diebel, *Sombre Haiti Gets a New Leader*, TORONTO STAR, Oct. 9, 1991, at A18 (quoting Louis Dejoie).

554. See, e.g., Louis Henkin, *Constitutionalism, Democracy and Foreign Affairs*, 67 IND. L.J. 879, 882 (1992) (noting that there has been a history of "presidential aggrandizement [in foreign affairs], with constitutional theory developing to justify it. That the Constitution explicitly grants the President little independent authority in foreign affairs has proved to be no obstacle to the growth of presidential power. Early presidents ceased to seek and cite constitutional sources for their authority.") (footnote omitted). See also LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 209-296 (2d ed. 1988).

555. See TRIBE, *supra* note 554, at §§ 5-20 to 5-22.

to require that treaties be submitted to the Senate for ratification, whereas in practice treaties and their equivalents are also entered into by the President alone, or by the President with the approval of both houses of Congress.<sup>556</sup> One could also look to doctrines like executive privilege,<sup>557</sup> or the President's sweeping power in foreign relations,<sup>558</sup> that are hardly obvious from the text of the Constitution, yet are still generally recognized to be part of it.<sup>559</sup>

These changes cannot be traced to some particular amendment or amendments to the Constitution. For that matter, are formal amendments even necessary? Perhaps amendments can be effected by popular mobilization at decisive moments, ratifying revisions in the constitutional structure that political leaders have self-consciously fashioned without using the formal procedures for amending the constitution.<sup>560</sup>

With regard to the second and third aspects of constitutionalism — the need for the rule of law and some form of balance of powers — we find the same ambiguities. These general notions can never come close to saying how to protect individual rights or hold government officials responsible for their actions. Nor do they tell us how powerful the legislature and the executive should be relative to each other, or precisely what means an executive may use to pressure the legislature. This indeterminacy opens the way for the U.S. and other OAS members to manipulate questions of constitutionalism for their own policy ends even as they purport merely to be building or restoring constitutional order.<sup>561</sup>

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556. *Id.* at §§ 4-5.

557. *See* *United States v. Nixon*, 418 U.S. 683, 703-13 (1974).

558. *See* *United States v. Curtiss-Wright Export Corporation*, 299 U.S. 304, 319-20 (1936).

559. For an incisive critique of the idea that there are any "easy cases" — *i.e.*, cases clearly decided by the plain constitutional text — see Anthony D'Amato, *Legal Theory: Aspects of Deconstruction: The "Easy Case" of the Underage President*, 85 NW. U. L. REV. 250 (1990).

560. This is the view that Bruce Ackerman sets out concerning the constitutional significance of the Reconstruction and New Deal eras. *See* BRUCE ACKERMAN, *WE THE PEOPLE* 44 (1991).

561. The term "manipulation" requires some explanation. I am not claiming that the U.S. has manipulated constitutionalism by departing from neutral, general principles of constitutional order for its own political purposes. Other than at some highly general level — a level too general to specify concrete institutional consequences — I doubt that such principles exist. One might, therefore, abandon the term "manipulation" and simply point out the respects in which the U.S. sought to impose its

First, in restoring constitutional order in Haiti, the U.S. has emphasized popular restraint, and ignored the need for accountability of government and military officials.<sup>562</sup> To be sure, there may well be a need for some form of restraint on popular sovereignty; the notion of the rule of law — in some tension with the ideal of majority rule — could be viewed as expressing this need.<sup>563</sup> But the U.S. has simply ignored what is arguably of equal importance in any constitutional order: some form of accountability on the part of government officials. The Haitian constitution, after all, guarantees the human rights of Haitians and provides for the government to be democratically elected.<sup>564</sup> If members of the Haitian military and other elite officials can violate these provisions with impunity, in what sense has constitutional order has been restored? Yet the U.S. has constantly presented the demand for justice — for accountability on the part of the coup leaders — as if it were necessarily a call for mob violence.<sup>565</sup>

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conservative policy preferences on Haiti in pressing for Aristide's return. What that approach would miss, though, is the sense in which U.S. policy was manipulative on its own terms. For example, in pressing Aristide to cede more power to the legislature on his return (as I will argue below), the U.S. did not proclaim a desire to move Haitian politics in a more conservative direction. Rather, it claimed to be acting on the need to create a constitutional order in Haiti. In that sense U.S. actions are manipulative.

562. For example, Major Louis Kernisan, a Defense Intelligence Agency official stationed in Haiti from 1989 to 1991, reportedly remarked before Aristide's return:

Popular uprising? Under the watchful eye of 6,000 or 7,000 international observers? I doubt it. This is only the kind of shit they've been able to get away with when there is nobody watching . . . They tried that before and it brought them two years of embargo and their little guy in golden exile in the States.

Allan Nairn, *The Eagle Is Landing*, 259 *NATION* 344, 345 (1994). One might be tempted to dismiss these remarks as the vulgar rantings of one man. But the U.S. has assigned Kernisan a major policy role in creating Haiti's new police force. See Dan Coughlin, *Haiti: U.S. Police Trainers Eye Salvador Model, Questions Mount*, INTER PRESS SERVICE, Oct. 7, 1994, available in LEXIS, Nexis Library, WIRES File.

563. For a useful discussion of the tension between the ideals of majority rule and the rule of law, see Frank I. Michelman, *Law's Republic*, 97 *YALE L.J.* 1493 (1988).

564. HAITI CONST. Tit. III, ch. 2 (Basic Rights), reprinted in *English in 7 CONSTITUTIONS*, *supra* note 82; *id.* art. 89 (election of House of Deputies); *id.* art. 94 (election of Senate); *id.* art. 134 (election of President).

565. Indeed, two days before Aristide's scheduled return to Haiti under the Governors Island Agreement, when the military's campaign of terror was at its height, U.S. officials were pressing Aristide for assurances that his return would "mark an era of reconciliation, not revenge." Thomas L. Friedman, *Clinton Says U.S. Is Firm on Haiti*, *N.Y. TIMES*, Oct. 29, 1993, at A4 (paraphrasing remarks of Clinton Administration officials). The U.S. posture on amnesty in Haiti stood in sharp contrast to

Ironically, what the U.S. posture overlooks is that trials of the military and its elite supporters could help institutionalize constitutional government.<sup>566</sup> They would show that a constitutional government can in fact respond meaningfully to deeply felt popular imperatives. Of course, no government could relieve overnight the severe problems of poverty, disease, illiteracy, and environmental degradation that plague Haiti. But it is far from clear that most Haitians expect instant resolution of those problems: That would be an odd thing for a people who overwhelmingly elected as president a man who promised no more than to "try to move [them] from destitution to poverty."<sup>567</sup> What they do appear to expect, however, is that the president they elected have the power to carry out reforms and programs that they strongly desire; and one action they strongly desire is for the elite rulers, civilian and military, who engaged in repression and corruption before and after the coup to be brought to justice.<sup>568</sup> As a supporter of Aristide put it, "[t]he essence of Lavalas is . . . a peaceful revolution to change society, and justice is a central part of that."<sup>569</sup>

its public insistence that perpetrators of war crimes in the former Yugoslavia not be given amnesty as part of a peace settlement. See Paul Lewis, *White House Is Admant on Balkan War Crimes*, N.Y. TIMES, Nov. 3, 1993, at A4.

566. Aristide himself has insightfully discussed the connection between democracy and the rule of law in the Haitian context. See Jean-Bertrand Aristide, *The Role of the Judiciary in the Transition to Democracy*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 13, at 35, 38-39.

567. See ARISTIDE WITH WARGNY, *supra* note 471 at 128:

Rarely did a candidate promise so little. Moral values? Yes. Commercial values? Very few. I never ceased disputing the value of believing in miracles. The candidate of *Lavalas* could not pull anything out of a magicians' hat. The leaders of the movement spread the message to everyone, sometimes with difficulty — we cannot do everything or provide everything tomorrow; we will simply try to move from destitution to poverty. "*Tet ansanm*" ("All together").

*Lavalas*' slogan — "justice, transparency [meaning openness in government and an end to corruption, *id.* at 148, 149], participation" — was consistent with this theme. *Id.* at 140.

568. Cf. Rosenn, *supra* note 7, at 27 (noting failure to develop independent judiciary with power to deal with executive abuses as one factor undermining constitutionalism in Latin America); Irwin P. Stotzky, *The Fragile Bloom of Democracy*, 44 U. MIAMI L. REV. 105, 108, 123-24 (1989) (same in context of Argentina). A closely related point is the need to cut back on the size of the militaries or even abolish them, as Costa Rica has done. A powerful military not only poses a consistent threat of a coup, but also tends to block accountability for its own human rights violations. See generally CONVERGENCE AND COMMUNITY: THE AMERICAS IN 1993, *supra* note 1, at 25-27.

569. See Michael Tarr, *Amnesty Dispute Could Prolong Haiti's Crisis*, MIAMI

Trials conducted by an independent judiciary would also provide an alternative to popular revenge. Without such trials, and the protection against the military they would provide, popular revenge will continue to appear to be the only form of protection from military oppression available to Haiti's politically mobilized poor. Indeed, its threat may have even saved Aristide's life in earlier periods.<sup>570</sup> To call for restraints on mob violence, and at same time to urge that high criminals go free — the U.S. position — could only give Haiti's poor the impression that respecting the processes of constitutional government necessarily means exposing themselves to physical danger. That will weaken the long term prospects for constitutional government.<sup>571</sup>

In short, one respect in which the U.S. manipulated the notion of constitutionalism was one-sidedly to invoke the idea of

HERALD, Apr. 9, 1993, at 4A (quoting Antoine Izmary). Aristide himself captured the relationship well when, at the height of the military repression immediately preceding his planned return on October 30, 1993, he rejected both revenge and impunity: "Today, we want to say 'no' to revenge, 'no' to injustice, 'no' to impunity." Christopher Marquis & Andres Oppenheimer, *U.S. Pushes for Changes in Haiti's Cabinet*, MIAMI HERALD, Oct. 21, 1993, at 1A.

570. See ARISTIDE WITH WARGNY, *supra* note 471 at 95. Aristide's life was not the only one endangered, of course. As the October 30, 1993 date for Aristide's originally planned return approached, the sense of physical danger to ordinary people was almost palpable. See, e.g., Harold Maass, *Haiti's Terror Hits Quiet Village*, MIAMI HERALD, Oct. 27, 1993, at 10A (quoting grass roots political activist in hiding) ("The police and the army in Haiti have to change. If Oct. 30 arrives and Aristide does not come back, you might as well just bury us alive. The attachés have a saying, 'The 30th is for you, but the 31st is for us.'").

571. Establishing the rule of law would also seem to have concrete economic benefits, even from the point of view of Western models of economic development. The rampant corruption in Haiti has meant that "[t]he few large enterprises in the country were often found to be suffering from waste and mismanagement, and from a poor use of their resources; the most profitable had often been the prey or the milk cows of social parasites who had little interest in development or reinvestment." ARISTIDE WITH WARGNY, *supra* note 471 at 149. See also DEWIND & KINLEY, *supra* note 431, at 63 (noting that lack of public savings, a result of massive government corruption, impeded development in Haiti). Restoration of democracy would also help the economy in the countryside. See AMERICAS WATCH HAITIAN REFUGEE REPORT, *supra* note 452, at 27:

A large number of foreign nongovernmental organizations sponsor popular efforts to improve agricultural methods, rebuild livestock populations, promote reforestation, dig wells, and develop farming collectives in Haiti. Throughout the country, we spoke to peasants about these efforts which, despite their generally non-political nature, have now been destroyed by government troops and their plainclothes allies. As a result, many foreign technicians have left the country, local organizers remain in hiding, tools and pigs have been stolen, crops have been razed, and fields lie fallow.



popular restraint without considering either the origins of mob justice or the harm wrought by granting impunity to coup leaders. The second respect in which the U.S. manipulated the idea of constitutional government was to impose a condition that Aristide agree to work more closely with the legislature. In part this appeared to refer to substance—that he adopt policies more in line with what the legislature would want. It also referred to more “procedural” matters—that is, that he draw members of the government more broadly than from his own party, Lavalas,<sup>572</sup> and that he prevent or discourage his supporters from mobilizing to pressure the Parliament.

Granted, there is no denying the force of concerns that any president may end up as an authoritarian leader, given Haiti's history. It also seems clear that the creation of the office of prime minister in the 1987 Constitution was intended to help avoid the near-absolute concentration of power in one man that marked the Duvalier era.<sup>573</sup> And a government subject to the rule of law cannot function if it is intimidated by mob death threats.<sup>574</sup>

At the same time, it was a very different matter to make

572. One manifestation of these demands was the constant pressure on him to choose a “consensus” prime minister. See *supra* part III.A. On the composition of his government, see Howard W. French, *Reluctant Politician Dives Into Haiti's 'Hot Water'*, N.Y. TIMES, Aug. 4, 1993, at A4 (noting “a common perception . . . among diplomats that Father Aristide has again drawn too heavily upon members of close sympathizers of his political movement, known as Lavalas”). Similarly, at the Miami conference called by Aristide in January 1994, Clinton Administration advisor Lawrence Pezzullo stressed the need for “Haitians . . . to put together a political coalition capable of dominating parliament.” Christopher Marquis, *Aristide Makes Plea for Unity as Miami Conference Ends*, MIAMI HERALD, Jan. 17, 1994, at 8A. He made no mention of the physical violence and terror the army and attachés directed specifically at members of Parliament every time they attempted to meet in the days leading up to October 30, 1993. See *supra* part III.A.

573. See HAITI CONST. arts. 133-54, reprinted in 7 CONSTITUTIONS, *supra* note 82, at 32-35 (powers of president); *id.* arts. 158-65 (powers of prime minister), reprinted in 7 CONSTITUTIONS, *supra* note 82, at 35-36. See also THE NEW CONSTITUTION OF HAITI: NOVEMBER 2, 1987: THE TEST BEGINS 6 (Report Prepared by Nicholas N. Kittrie & James R. Sevick, 1987) (“The new constitution has a bipolar conception of power; power is placed in the hands of both a president and a prime minister.”).

574. See Tim McCarthy, *Aristide: The Man — And Message of a People*, NAT'L CATH. REP., Feb. 21, 1992, at 9, 11:

In August [1991], parliament was debating the censure of Aristide's prime minister, René Preval. An angry crowd surrounded the building and threatened lawmakers with Pere Lebrun (death by hanging a burning tire around the victim's neck). Parliament backed down.

See also note 468 *supra*.

Aristide's return to power dependent upon a particular configuration of the internal balance of power between the executive branch and the legislature. There is no "presidency" or "legislature" in Haiti in the meaningful sense of long-established institutions with particular histories and relationships between them; democratic institutions were in the process of being created from scratch at the time the coup took place.<sup>575</sup> As noted earlier, struggles for power between different branches of government can exist even in long-established democracies, as the experience of the U.S. itself shows. At the outset, matters are inevitably even more fluid, and no one balance of power between the executive and the legislature can be labelled the only democratic one. The same could be said of Guatemala. De León's continuing struggles with the legislature and his attempts to reform the courts provide a clear sign of the kind of institutional fluidity that particularly marks the early stages of any effort to establish a constitutional government.

Consequently, it is not clear on what basis the United States conditions could legitimately be imposed on Aristide. They certainly do not rest on a general preference for strengthening legislatures at the expense of executives. It appears that the U.S. would have supported Fujimori's autogolpe in Peru, if only it had been preceded by a referendum or plebiscite.<sup>576</sup> When Guatemala's Vice President Espina — a collabo-

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575. For an account of the struggles between Aristide and the legislature, see 1992 *Bruni Celli Report*, *supra* note 48.

576. See Thomas L. Friedman, *Peru and the U.S.: What Course to Take?*, N.Y. TIMES, Apr. 15, 1992, at A6. Similarly, the U.S. promoted the idea of a "constitutional coup" by then-President Eduardo Frei of Chile, by which he would simply proclaim himself president for six more years in order to block Salvador Allende's accession to the presidency. See SENATE SELECT COMM. TO STUDY GOVERNMENTAL OPERATIONS WITH RESPECT TO INTELLIGENCE ACTIVITIES, ALLEGED ASSASSINATION PLOTS INVOLVING FOREIGN LEADERS, S. REP. NO. 465, 94th Cong., 1st Sess. 225, 233-34 (1975) [hereinafter ASSASSINATION PLOTS].

The U.S. also consistently supported President Yeltsin in his confrontations with the Russian parliament. See, e.g., Steven Erlanger, *Compromise Empowers the People and, More Important, Yeltsin*, N.Y. TIMES, Dec. 14, 1992, at A6; Steven Erlanger, *Yeltsin Rebuffed in Procedural Votes As Russian Congress Opens Session*, N.Y. TIMES, Apr. 7, 1992, at A4; Elaine Sciolino, *U.S. Supports Move By Russian Leader To Break Deadlock*, N.Y. TIMES, Sept. 22, 1993, at A1. Interestingly, when Yeltsin threatened in March 1993 to rule by decree, see Celestine Bohlen, *Yeltsin, Defying Congress, Claims Emergency Powers; Calls April 25 Referendum*, N.Y. TIMES, Mar. 21, 1993, at 1; Keith Bradsher, *Clinton Supports Yeltsin Strongly and Says the Summit Is Still On*, N.Y. TIMES, Mar. 21, 1993, at 10, Fujimori pointedly offered his support. See Carla Anne Robbins, *Fujimori's Support for Yeltsin Accents Problem*

rator in Serrano's seizure of power — made his own bid for the presidency in contradiction, the U.S. pointedly stated that it could not intervene in another country's constitutional dispute.<sup>577</sup> And when Serrano's successor de León used a demand for the mass resignation of the legislature as a way of forcing out sixteen of its members, the U.S. did not condemn him. Indeed, even though protesters supporting de León's demand occupied or blocked the entrance to the legislature on at least two occasions,<sup>578</sup> the U.S. did not undertake a campaign to brand de León an unstable demagogue. Nor did it do so when, as the January 1994 referendum neared, he publicly hinted that he would carry out his own congressional purge if the voters rejected his proposed constitutional reforms.<sup>579</sup>

My point is not to take the U.S. to task for failing to have the same policy with regard to struggles between legislatures and executives everywhere, but to make clear that one cannot attribute the U.S. stance towards Aristide and the Haitian legislature to some general concern with the proper conditions for constitutional democracy. Similarly, it seems unlikely that U.S. urgings that Aristide reign in his supporters rested on some general desire to nurture the regular functioning of parliamentary democracy. The United States' position likely rested less upon a close reading of Haitian constitutional law or a general position on constitutionalism than upon its preference for more conservative policies. To the extent that it is capable of acting as a coherent body, the current legislature may generally be more conservative than Aristide, having been elected with much less of a popular mandate than Aristide himself received.<sup>580</sup> It is also

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*U.S. Faces in Supporting Peru*, WALL ST. J., Mar. 29, 1993, at A8 ("He advised Mr. Yeltsin, 'Don't go back.' And he said the world would have to learn that democracy means more than 'mere formalities' like constitutions and parliaments.")

577. See *supra* note 360-361. By contrast, the U.S. had no hesitation in requiring Aristide to promise not to serve beyond the February 1996 expiration of his term under the Haitian constitution. See *supra* text accompanying note 551.

578. See *supra* part III.C.

579. See *supra* note 391.

580. Certainly, Aristide has significant support within the legislature. But in the elections that gave him the presidency, the National Front for Change and Democracy (FNCD), a leftist coalition that backed Aristide's candidacy, was able to field candidates for only about half the seats in the legislature. Statistics on turnout vary, but far fewer voters, perhaps a quarter of the electorate, participated in the January legislative runoffs, which determined the outcome of 42 out of the 83 seats in the Chamber of Deputies and 22 out of the 27 seats in the Senate, than in the December presidential election. See *Aristide Backers Gain Plurality*, FACTS ON FILE WORLD

possible — to the extent that any generalizations can be ventured — that legislative bodies in traditional societies of such stark, overwhelming inequality as that which characterizes Haitian society may typically be more conservative than an executive elected in a closely monitored and fairly conducted election.<sup>581</sup>

The U.S. attempt to swing Haitian politics in a more conservative direction could, of course, backfire. With greater attention focused on the legislature, Aristide's overwhelming popularity might mean that the next scheduled elections will increase his support in the Parliament.<sup>582</sup> It would not then be surprising to see the U.S. pressure Aristide to disregard more radical policies suggested by the legislature. If, on the other hand, the effort to create a conservative institutional tilt succeeded, then Aristide could be transformed into little more than a figurehead.<sup>583</sup> That would likely undermine the prospects for

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NEWS DIGEST, Jan. 31, 1991, at 70, C3; Howard W. French, *Haiti Turnout Is Sparse In Legislative Elections*, N.Y. TIMES, Jan. 21, 1991, at A5; *High Abstention in Second-Round Polls*, LATIN AM. WKLY. REP., 31 Jan. 1991, at 10; Douglas W. Payne, *Haiti: The Politics of the Spirit*, FREEDOM REV., May-June 1991, at 4, 9; THE 1990 GENERAL ELECTIONS IN HAITI, *supra* note 504, at 61, 64-65. Whether the drop-off was due to a sense of anticlimax, a lack of understanding of the political process, fears evoked by the violent attempted coup by *tontons macoutes* leader Roger Lafontant on January 6, 1991, or some combination of those factors, see THE 1990 GENERAL ELECTIONS IN HAITI, *supra* note 504, at 62-65; *Low Turnout as Haitians Pick National Assembly*, CHI. TRIB., Jan. 21, 1991, at 6, the result was a legislature in which Aristide's backers command only a plurality. Payne, *supra*, at 11; THE 1990 GENERAL ELECTIONS IN HAITI, *supra* note 504, at 65 (noting that even if all of FNCD candidates had won, Aristide would not have had a majority). For a breakdown by party of the parliament elected in 1991, see *Haiti Chiefs Backers Get Assembly Plurality*, CHI. TRIB., Jan. 27, 1991, at 5.

Further complicating the situation was a split between the Lavalas movement and the FNCD. The latter, fearing that it would be eclipsed by a new organization, took a largely oppositional stance towards Aristide. See Marx V. Aristide and Laurie Richardson, *Haiti's Popular Resistance*, NACLA REP. ON THE AMERICAS, Jan.-Feb. 1994, at 30, 34.

581. To some extent, legislative bodies in such circumstances reflect the power of local elites and informal but well-established systems of patronage. For example, one reason that advocates of land reform in the Philippines hoped that Corazón Aquino would carry it out by decree soon after the ouster of Ferdinand Marcos was that "[t]hey feared that the new Congress, which was to convene in July 1987, would be landlord dominated." Joel Rocamora, *Discontent in the Philippines*, 8 WORLD POL'Y J. 633, 638 (1991).

582. See Don Bohning, *Saving Haiti Will Take Years of U.S. Help*, MIAMI HERALD, Nov. 13, 1994, at 5M.

583. See PLUMMER, *supra* note 443, at 232:

According to the constitution of 1987, the president shared power with a premier. Accommodation with centrist interests might well blunt the

democracy by convincing most Haitians that democracy means little to them.

Similarly, the need to ensure the physical safety of all members of parliament cannot translate into a general ban on popular mobilization to pressure it. On the contrary, given the unrepresentativeness of the parliament, such mobilization is all the more necessary if the kind of programs the vast majority of Haiti's people favor are not to be blocked by it.<sup>584</sup> By way of contrast, President de León's threat to bring the Guatemalan people to the streets to force the "cleansing" of the legislature evoked no condemnation from the U.S. government. Nor was there any condemnation from the U.S. when, shortly thereafter, he threatened to "appeal to the people" if the Guatemalan Congress proceeded with charges against him of ignoring judicial orders. Of course, death threats against members of the Haitian parliament (or of any legislature) are unacceptable; but, for the reasons given above, the most effective context in which to prevent them would be one in which democracy has meaning for most people. That, in turn, means bringing corrupt members of the elite and military to justice, and ensuring that Aristide's second government has the power to effect real reforms.<sup>585</sup>

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radical thrust of the new president's energies and limit what he could accomplish in the social welfare realm. Resistance to redistribution policies would be felt from within and without the country.

*Cf.* Amy Wilentz, *Haiti's Usual Politics of the Absurd Now Enters Chaotic Relam of the Surreal*, L.A. TIMES, Oct. 13, 1991, at M2:

The U.S. State Department . . . likes the concept of Aristide the freely elected president, but is not crazy about the reality of Aristide the socialist spokesman for Haiti's poor. An Aristide reinstated with help from the United States would be an Aristide with a heavy personal and political debt to pay, which might include softening his rhetoric, moderating further his reform efforts and quietly assuring Haiti's economic and military elite that business-as-usual is acceptable.

584. *See supra* note 580. To limit democracy to parliamentary debates, exchanges between the president and the legislature, and periodic elections is not simply insufficient as a conception of democracy in general. In the Haitian context, it is a deeply conservative conception. The best parallel would be U.S. AID's efforts, mentioned earlier, to promote policy reform on labor issues by "diverse internal interests." No one could possibly find fault with that as a general matter; but AID looked only to business-oriented groups for the dialogue it sought to promote. Limiting popular mobilization and making parliamentary functioning the central feature of democracy in Haiti would bring a similarly conservative cast to the democratic "dialogue."

585. Indeed, limiting mob violence is the only way to bring about real social change. As Trouillot notes, the *dechoukaj* in 1986 "touche[d] only the small fry of the Duvalierist elite." TROUILLOT, *supra* note 454, at 222. Further, it perpetuates the violent element in Haitian politics which was manifested most strikingly in Aristide's

### C. *Improving the Santiago Commitment*

The conclusions that emerge from a close examination of the OAS's and particularly the United States' performance in response to the coups in Haiti, Peru, and Guatemala are hardly earthshaking. The apparent commitment of the member states to restoring democracy was carried out only half-heartedly. The U.S. showed a great willingness not only to compromise respect for democracy in light of other interests, but also to manipulate the record on human rights. And it consistently manipulated the issue of the relationship between the legislature and the executive.

I should emphasize that my point is not that the Santiago Commitment and trigger mechanism as formulated in June 1991, together with the Charter amendments proposed in December 1992, are nothing more than useless diversions. But the record of the OAS's and the United States response to the coups in Haiti, Peru, and Guatemala makes clear the dilemma. A mechanism that directly involves states is likely to have more forceful impact than other mechanisms (like adjudication) that do not, but precisely because it does directly involve states it will also be subject to distortions and manipulations that undercut the promotion of democracy and human rights.

As noted earlier,<sup>586</sup> the response to this dilemma can proceed along either or both of two tracks. Looking to the first track, human rights advocates might concentrate on building up additional regional mechanisms that would make vigorous support by the U.S. and other states for democracy elsewhere more likely, and manipulation of human rights issues less likely. As noted, the OAS could be considered already to have moved a step in this direction. Before the Santiago commitment, other states generally had the option of making little or no condemnation of a coup. The Santiago Commitment and proposed Charter amendments have effectively removed that option, by requiring *some* response.<sup>587</sup>

Given the problems with the response to the coups in Haiti, Peru, and Guatemala, there might be some benefit to creating additional mechanisms and procedures to help control the *con-*

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own overthrow.

586. See *supra* part I.

587. See *supra* part I.

tent of the response in a way that forces states to react vigorously to coups and constrains their tendency to compromise democracy and human rights in favor of other foreign policy objectives.<sup>588</sup> Two aims ought to underlie such reforms. The first is to oust the instigators of the coup as quickly as possible. The second is to ensure that the actions taken toward that end be done in such a way as to bolster the long-term prospects for democracy and human rights — or at least not to undermine those prospects.

With regard to the first aim, the OAS might, for example, institute procedures that require member states to set a date certain for the return to democracy. Or it might institutionalize the requirement of an automatic embargo whenever there is a military coup or other interruption of constitutional government.<sup>589</sup> It could also create a mandatory and escalating list of actions, beginning with diplomatic isolation and ending in military intervention of some sort, with each step along the way being mandatory unless the OAS delayed it.<sup>590</sup>

Another action worth serious consideration would be to try to deal in advance with the difficulty of making a regionally imposed embargo effective in a world of global trading patterns. One possibility would be to amplify the Santiago Commitment to call for automatic efforts to involve the U.N. whenever a trade

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588. Had it not been for Mexican opposition, according to Robert Pastor, the OAS might have been more specific about what kind of response it should take. See PASTOR, *supra* note 1, at 250 ("The Venezuelans wanted an agreement on the steps that the OAS would take, but the Mexicans blocked their effort.").

589. Either of these could be done by the passage of a resolution by the General Assembly, as was the case with the "trigger mechanism."

590. See PASTOR, *supra* note 1, at 283:

What more should the OAS do to fulfill its mission to defend democracy? It must recognize that coups do not occur in a political vacuum, and thus the restoration and consolidation of democracy requires a two-track process aimed at applying escalating international pressure to intensive internal negotiations. On the international level, the OAS should legislate an automatic, escalatory sequence of sanctions that would permit everyone to know exactly what to expect if and when the democratic process is interrupted. The steps would be diplomatic isolation, cessation of bilateral and multilateral aid programs, the freezing of financial assets, a trade embargo enforced by the navies of OAS members, and finally, after an appropriate period of time, an inter-American peace force. Each step would be implemented within a certain fixed period of time unless the OAS Secretary General recommended a delay.

Pastor goes on to explain that "the inter-American peace force should be composed initially of civilians; but if this proves inadequate, the last step — dispatching a collective military force — needs to be taken." *Id.*

embargo was imposed. Another would be to impose a blockade whenever a regional embargo was imposed. The experience with Haiti strongly suggests that purely regional sanctions will often have severely limited effectiveness. But even purely regional economic sanctions could be made more effective.<sup>591</sup>

The threat of military force might also be made more effective. Regional arrangements could be made within the hemisphere for collective military intervention — say, among the small Caribbean states.<sup>592</sup> More ambitiously, a standing military command might be created under OAS auspices.<sup>593</sup> Military intervention of various sorts (ranging from a blockade to commitment of ground forces) could be considered when diplomatic and economic pressures failed to bring about a return to democracy. While it would seem unrealistic to create a mechanism that required the use of military force in all instances where other means failed, the very existence of a standing military force would add an implicit threat of intervention in every case, and force the member states to give the option serious consideration.

With regard to the second aim, the OAS should give serious consideration to institutionalizing some form of a requirement that leaders of coups be brought to justice for the coup itself and for human rights violations committed during the period when constitutional government has been interrupted. By “requirement” I simply mean some formal commitment that makes it politically much harder for states to press for amnesty for coup leaders and participants in the same way that, by requiring some public response, the “trigger mechanism” virtually demands a condemnation of a coup. A formal resolution by the OAS General Assembly condemning the practice of granting amnesty to coup participants would be a step in the right direction.

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591. Tom J. Farer, *Collectively Defending Democracy in a World of Sovereign States: The Western Hemisphere's Prospect*, 15 HUM. RTS. Q. 716, 739-40 (1993).

592. *Id.* at 716, 748.

593. Tom Farer earlier proposed something like this with regard to the smaller states of the Caribbean basin. See Tom J. Farer, *A Multilateral Arrangement to Secure Democracy*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM, *supra* note 18, at 115. See also U.S. Regional Policy — Unilateral or Cooperative?, COHA'S WASH. REP. ON THE HEMISPHERE, July 20, 1994, at 3 (speculating that Argentinean proposal to tie Inter-American Defense Board more closely to OAS “could be an initial step in redefining cooperative security through creating a hemispheric force, under the OAS's aegis, to deal with regional problems”).



The potential benefits of such further moves along the first track are clear: At worst, they would help reduce the tendency of states to react half-heartedly and manipulatively to threats to democracy and human rights in the Americas. At best, they might help ensure that when a return to democracy is made, the long-term prospects for its survival would be improved rather than hobbled by the continuing presence of a military that had escaped punishment for its interruption of constitutional government. At the same time, it must be acknowledged that the argument for such moves is not absolute.

First, there is a case to be made for preserving flexibility of response.<sup>594</sup> Not every situation will present the same circumstances. There might be instances where the best approach is a more graduated or slightly lower key response, combined with incentives to return to democracy, and other instances where only the most immediate, vigorous, and sustained pressure will have any hope of succeeding. Realistically, it does seem unlikely that states would be willing to cede discretion entirely by adopting a mandatory schedule of escalating sanctions. One way to deal with that concern would be to make the series of escalations presumptive. The OAS could decide to deviate from the sequence in a particular case, but only if it were willing to bear the political cost of appearing not to respond vigorously to a coup.

Second, the problems inherent in enforcing embargoes effectively and threatening the use of military force are daunting. To seek U.N. involvement in every case in which embargoes are imposed would amount to a general admission of OAS failure. To be sure, such an admission might have its benefits, especially because a partial embargo can be so damaging to the poor people of the target country without accomplishing its aim. But even if the OAS could be persuaded to make the admission, the

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594. The Inter-American Dialogue, an influential think-tank, has divided responses to "democratic ruptures" into three categories — political and diplomatic, economic, and military — along an escalating continuum. See CONVERGENCE AND COMMUNITY: THE AMERICAS IN 1993, *supra* note 1, at 36. In contrast to Pastor's approach, see *supra* note 388, it has taken the position that "[t]he Inter-American community should not try to impose a predetermined solution following a democratic breakdown," *id.* at 35, and that "[t]here should be no automaticity regarding the selection, sequencing, or escalation of sanctions," *id.* at 37. On the Inter-American Dialogue's emergence as a kind of Trilateral Commission for Latin America in the 1990s, see Roger Burbach, *Clinton's Latin America Policy: A Look at Things to Come*, NACLA REP. ON THE AMERICAS, May 1993, at 16, 20.

Security Council might well be reluctant to accept constant involvement in such matters; it did so only hesitantly in Haiti.<sup>595</sup>

There are also good grounds for worrying about the prospect of military intervention authorized by the Security Council or the OAS.<sup>596</sup> It would likely be used only against smaller states, so that it would never even enter into the picture against many members of the OAS. And the United States' great weight within the OAS would require the formulation of strong institutional constraints to counter the likelihood of abuse by the U.S., with its long history of intervention into Latin American countries for its own ends (and to the other countries' great detriment). While the very necessity of multilateral authorization would impose some restraint on the U.S., that might well be insufficient in itself — as experience with the U.N. Security Council demonstrates.<sup>597</sup>

Further, military intervention lends itself to subsequent occupations, as the United States' twenty-year occupation of Haiti shows. The U.S. intervention into Haiti will almost certainly be followed up by an occupation that will last the remainder of Aristide's term.<sup>598</sup> Even though the U.S. will not be the

595. In 1991, the Security Council declined to take action. *See supra* note 65. At the time, its inaction seems to have reflected three factors. First, the U.S. apparently did not push hard for Security Council action. Second, for obvious reasons China (which has a veto) was not enthusiastic about becoming involved in efforts to oust a regime that had used military force to take power and gone on to commit systematic human rights violations. And it abstained when, in July 1994, the Security Council finally authorized military intervention. Third, because they view the Security Council as dominated by the great powers, many smaller and medium sized members of the U.N. are suspicious of efforts to expand the Council's mandate beyond the more narrowly conceived set of threats to international peace — typically involving the use or threat of armed force between two or more states.

596. For a useful analysis, see Farer *supra* note 591 at 741-46.

597. With the demise of the Soviet bloc, the U.S. enjoys tremendous power within the U.N. *See* Phyllis Bennis, *The U.N.: Washington's Captive Tool*, COVERT ACTION INFO. BULL., Summer 1992, at 29; Burns H. Weston, *Security Council Resolution 678 and Persian Gulf Decision Making: Precarious Legitimacy*, 85 AM. J. INT'L L. 516, 535 (1991) ("With the unambiguous military victory over Iraq, there is not a little apprehension that the United Nations, financially dependent upon the United States and stripped of the prior check and balance of Cold War rivalry, has become but a venue for imposing upon the world a *pax* or *lex americana*, apprehension that the 'new world order' . . . will in fact be a unipolar world of unbridled American power in which Washington will enforce its economic and strategic policies worldwide in whatever way it sees fit"). For a more tentative verdict, see Henry J. Richardson III, *The Gulf Crisis and African-American Interests Under International Law*, 87 AM. J. INT'L L. 42, 77 (1993). Even if such fears perhaps overstate the United States' power, its power within the OAS is hardly likely to be less than its power in the U.N.

598. Steven Greenhouse, *Nations Enlisting in a Unit To Maintain Order in Hai-*

sole occupying force, it will likely set the tone for the occupation. And that will not bode well for Haiti, which likely accounts for Aristide's long reluctance openly to call for a U.S. invasion.<sup>599</sup> The United States' apparent view that the army is, in the words of one commentator, "the only functioning institution in the country,"<sup>600</sup> was reflected in its insistence on amnesty and its determination that the military be "reformed" and "professionalized" rather than abolished. This top-down view ignores the vibrancy of grass-roots organizations that had marked Haiti before the coup and which have the potential to give meaning to its democracy now that Aristide has returned. To the extent that occupations are corollaries of invasions, there are good reasons not to press for an invasion in every case where sanctions do not appear to be working.

Third, the issue of amnesty for leaders of coups is in one sense a complicated one.<sup>601</sup> To be sure, in some respects, the question is simple. There is no doubt about the damage impunity does to the long-term prospects for democracy: A military whose officers escape personal responsibility for staging a coup is for that very reason more likely to commit one again. Nor can there be any question about the searing sense of anger, injustice, and impotence that granting impunity to torturers and

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ti, N.Y. TIMES, June 8, 1994, at A7.

599. See Howard W. French, *Aristide Stand Seen as a Sign of Distrust of U.S.*, N.Y. TIMES, July 18, 1994, at A5 (quoting Aristide adviser Robert White, "The United States has no history of restoring popular governments . . . . He doesn't want to give a total green light to the United States to occupy Haiti."). See also Howard W. French, *Doubting Sanctions, Aristide Urges Action*, N.Y. TIMES, June 3, 1994, at A4 (call by Aristide for "surgical action" to remove coup leaders, and opposing occupation); Tim Johnson, *79th Anniversary of U.S. Invasion Brings Out Protesters*, MIAMI HERALD, July 29, 1994, at 6A.

600. Garry Pierre-Pierre, *Haiti Strongman Reported To Set Retirement Date*, N.Y. TIMES, June 28, 1994, at A5.

601. For good accounts of the complex legal issues surrounding amnesty for military leaders who enjoy significant power even after formally handing over their power to a civilian government, see Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537, 2595-2612 (1991); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put Into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991); Diane F. Orentlicher, *A Reply to Professor Nino*, 100 YALE L.J. 2641 (1991). See also Diane F. Orentlicher, *The Role of the Prosecutor in the Transition to Democracy in Latin America*, in TRANSITION TO DEMOCRACY IN LATIN AMERICA, *supra* note 13, at 249; George C. Rogers, Note, *Argentina's Obligation to Prosecute Military Officials for Torture*, 20 COLUM. HUM. RTS. L. REV. 259 (1989); José Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992).

murderers wreaks on their victims.<sup>602</sup> Finally, granting impunity to those who abuse human rights is itself wrong, as the Inter-American Commission ruled in holding that amnesties granted to military officers by Argentina, El Salvador, and Uruguay were inconsistent with the American Convention on Human Rights.<sup>603</sup> In other contexts outside Haiti, different organs of the U.N. have taken a stand against impunity.<sup>604</sup>

Still, one cannot dismiss out-of-hand practical concerns about the necessity of negotiating with the leaders of the coup, who are likely to insist, at least at the outset, on amnesty. Where all means of pressure had been exhausted and the issue of amnesty appeared to be the sole barrier to a settlement that returned an elected government to power, there might be a case

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602. See, e.g., Katherine Ellison, *Freedom for Torturers Galls Victims of 'Dirty War'*, MIAMI HERALD, Aug. 8, 1993, at 1A.

603. See Cases 10.147, 10.181, 10.240, 10.262, 10.309, and 10.311 [Argentina], Inter-Am. C.H.R. 41, OEA/ser.L/V/2.83, doc. 14 rev. 7 (1993); Case 10.287 [El Salvador], *id.* at 83; Cases 10.029, 10.145, 10.305, 10.372, 10.373, 10.374, and 10.375 [Uruguay], *id.* at 154. See generally Juliane Kokott, *No Impunity for Human Rights Violations in the Americas*, 14 HUM. RTS. L.J. 153 (1993). See also Advisory Opinion OC-13/90, Inter-Am. C.H.R. (1993) (Requested by Argentina and Uruguay), *reprinted in* 14 HUM. RTS. L.J. 252 (1993); *OAS Confronting Crisis of Credibility*, COHA'S WASH. REP. ON THE HEMISPHERE, July 9, 1993, at 1, 6. The Commission's references in the Argentinean and Uruguayan cases to the right of the victim in many Latin American legal systems to be a party to criminal proceedings might be read to limit its holding to such systems, see ANNUAL REPORT, *supra*, at 48, 162. But the Commission also strongly emphasized the state's duty to investigate and hold responsible those who commit human rights violations, *id.* at 49, 90, 164, a duty which would seem to apply regardless of the victim's rights to bring criminal proceedings.

For an argument that amnesty for Haiti's military leaders would violate the American Convention, see IMPUNITY FOR CRIMES AGAINST HUMANITY AND NATIONAL RECONCILIATION: HAITI'S OBLIGATIONS UNDER INTERNATIONAL LAW (Center for Human Rights and Constitutional Law, Jan. 1994).

604. For example, Article 18 of the General Assembly's Resolution and Declaration on the Protection of All Persons from Enforced Disappearance, G.A. Res. 47/133, U.N. GAOR, 47th Sess. (1993) *reprinted in* 32 I.L.M. 903, 909 (1993), states that "[p]ersons who have or are alleged to have committed" disappearances "shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction." Similarly, the Security Council not only condemned the October 1993 coup in Burundi, but also demanded that "those responsible for . . . [the] violent deaths [of top government officials] and other acts of violence should be brought to justice." *Security Council Condemns Coup in Burundi*, Xinhua General Overseas News Service, Oct. 25, 1993, available in LEXIS, Nexis Library, NEWS File; *U.N. Council Condemns Burundi Military Coup*, Reuter Library Report, Oct. 25, 1993, available in LEXIS, Nexis Library, NEWS File. The Sub-Commission on Prevention of Discrimination and Protection of Minorities has also become involved in the issue of impunity. See *Working Paper on Impunity*, U.N. Sub-Comm'n on Prevention of Discrimination and Protection of Minorities, U.N. Doc. E/CN.4/Sub.2/1992/18 (1992).

for amnesty. Moreover, there may be ways to counterbalance the damage that impunity potentially creates. In El Salvador, one aim of the Truth Commission was to identify military officers who had participated in human rights violations so that they could be removed.<sup>605</sup> Or, rather than attempt to constrain the army by setting a precedent through trials of coup leaders and human rights violators, countries that face no internal or external military threat might abolish their armies or drastically reduce them in size and weapon power.<sup>606</sup> None of these alternatives addresses the argument that it is simply wrong for human rights violators to go free,<sup>607</sup> but they might help offset the very real tendency of amnesties to undercut the long-term prospects for democracy and human rights.

It might, then, be wise to preserve a degree of flexibility concerning amnesty. What I am *not* arguing, I should add, is

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605. By contrast, the Truth Commission for Guatemala will not name individuals responsible for human rights violations. See Trish O'Kane, *Truth Panel Will Shake Up Military*, S.F. CHRON., July 4, 1994, at 10A. In April 1993, a Truth Commission was suggested for Haiti. It would have existed only to burden the new government with the financial obligation to compensate victims of the army's abuses. In exchange for amnesty for the military leaders, a Truth Commission would be set up to "assign responsibility for crimes and assess damages to be paid to victims by the Government." Howard W. French, *Offer of Amnesty Removes Obstacle to Accord in Haiti*, N.Y. TIMES, Apr. 14, 1993, at A1. Thus, while the personal fortunes of the leaders who committed the crimes — fortunes they obtained through their illegal acts — would be protected, the fledgling democracy would be saddled with further debts. See *id.* This seems a particularly perverse reason for creating a Truth Commission.

606. By contrast, what is likely *not* to work are programs to "professionalize" the military. Such programs have in the past done little to improve the militaries' respect for human rights, partly because very little has been done at a concrete level to make them effective. See Holly Burkhalter & Juan Mendez, *Force-Feeding Freedom*, RECORDER, July 22, 1993, at 9. In fact, the U.S. has a long history of "professionalizing" Latin American soldiers through training programs in the U.S., whose graduates include some of the most brutal and dictatorial figures like Noriega in Panama and D'Aubuisson of El Salvador. See Douglas Waller, *Running a 'School for Dictators'*, NEWSWEEK, Aug. 9, 1993, at 34.

Whatever meager (and probably unrealistic) hopes one might entertain about professionalization programs, any potential benefits they might have are inevitably undermined when the military escapes with impunity. See Burkhalter & Mendez, *supra* ("In Haiti . . . [t]he actual experience of soldiers who see that accountability for their crimes can be eliminated by the stroke of a pen through an amnesty is likely to be a more resonant lesson for them than the . . . [U.S. Administration of Justice's] best efforts to promote human rights in its aid and training program.")

607. See, e.g., Aryeh Neier, *Watching Rights*, 256 NATION 825 (1993) ("From the standpoint of principle, it is essential that civilized society show its respect for the victims of crimes against humanity and fidelity to the laws forbidding such crimes, regardless of the anticipated consequences.")

that states should press deposed leaders to agree to amnesties simply because that makes negotiations easier, or because they wish to serve interests other than the protection of democracy and human rights.<sup>608</sup> At the very most, an amnesty might be justifiable after all other measures for pressuring the military leaders have been exhausted, and even then, it should be as limited as possible,<sup>609</sup> and accompanied by other means designed to offset its harmful effects on the prospects for democracy.<sup>610</sup> Further, whatever *quid pro quo* arguments might otherwise be made in favor of amnesty, they clearly do not apply to a military that is removed by force.<sup>611</sup>

In any event, while some additional institutional constraints on states' responses to coups — that is, further development along the first track — would be worth serious consideration, precisely what form those constraints ought to take is open to

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608. The U.S. handling of the issue of amnesty for Haiti's military seems to illustrate both these types of indefensible approaches. At best, one could say that the U.S. made the decision to pressure Aristide to agree to amnesty for coup leaders without determining that such an amnesty was absolutely necessary. That is, it made the decision to press Aristide to accede to an amnesty before the full range of pressures — including an effective embargo — had been applied. At worst, one wonders whether the United States' seeming haste to conclude that Aristide should agree to an amnesty was influenced by a positive desire not to see him returned to power as a vigorous leader.

609. Kenneth Roth draws a distinction between the state's granting amnesty for crimes against itself — the coup — and crimes against others — violations of individuals' human rights. See Roth, *Haiti and Clinton*, *supra* note 82. To be sure, there seems little conceptual distinction between the two. The overthrow of a democratically elected government could be said to violate individuals' right to democracy, see *supra* text accompanying notes 26-27, and a wrong against an individual has traditionally been conceived under international law as a wrong against the state of which the individual is a national, see, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§902, cmt. i, 713, cmt. a (1987). But as a practical matter the distinction might offer a basis for compromise in some cases.

610. *But see* Kokott, *supra* note 603, at 159 (arguing that the Inter-American Court's holding in Velásquez Rodríguez Case, Judgment of July 29, 1988, Ser. C, No. 4, on which the Inter-American Commission based the holdings discussed above, see *supra* text accompanying note 603, "implies a prohibition of amnesties even in the case of transition from a military dictatorship to a democratic regime").

611. There is another question that needs to be distinguished. When a state like the U.S. wrongfully makes it a condition early on that the deposed elected leader agree to an amnesty for coup leaders, it may be that the deposed leader must go along with the demand for amnesty as the only practical way to win international or regional support for his return. Cf. Amy Wilentz, *Exile's Return?*, 256 NATION 580, 580-81 (1993) ("In exile, Aristide has learned that to keep your head above the churning waters of international intrigue, you have to temper your movements, moderate your breath."). But that necessity cannot justify the imposition of the condition in the first place.

some debate. What seems beyond debate, however, is that such constraints cannot provide the whole answer. So long as there remains some discretion on states' part — and it is hard to see how regional or international mechanisms could eliminate it, particularly given the indeterminacy of constitutionalism — the possibility of manipulating the issues or compromising support for democracy and human rights will always remain.

On the issue of amnesty for coup leaders, for example, I have suggested that there may be some case for preserving a degree of flexibility, because it is possible that achieving the best possible solution for restoring democracy and human rights could require some form of amnesty in some circumstances. Once that element of discretion is admitted, however, there is a strong likelihood that states may use it for other purposes. They may insist on an amnesty because it makes settlement easier (as opposed to making it possible) and because they may appreciate rather than lament the fact that an amnesty for the military could weaken a particular democratically elected leader upon his return.

An equally complicated question is how to balance power between the legislature and the executive. As I have argued, the U.S. used the occasion of the coup in Haiti to press for a shift in power toward the legislature, most likely because it calculated that doing so would push Haitian politics in a more conservative direction.<sup>612</sup> Similarly, the United States' insistence that Aristide forswear any declaration that the clock was not running on his term during the time he was deposed almost certainly stemmed from its desire to see Aristide pass from the scene, not from a scrupulous concern for some conception of constitutionality.

At the same time, it would be undesirable to try to declare such questions purely domestic matters. As the autogolpes in Peru and Guatemala remind us, concentrating all power exclusively in the executive does pose real threats to democracy. Even more so than the question of amnesty for coup leaders, then, this issue appears to be ill-suited to some tight constraint on states' discretion.

Both these examples indicate that, as they become more directly involved in the protection of democracy and human rights elsewhere, states inevitably will need an element of dis-

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612. See *supra* part IV.B.

cretion. It would be desirable, therefore, to work toward changes that would help increase states' political will to deal effectively and straightforwardly with the promotion of democracy and human rights elsewhere; and that suggests the need for developments along the second track I mentioned earlier.<sup>613</sup> Another reason for looking to the second track is that only a stronger commitment to promoting democracy and human rights is likely to result in states' paying adequate attention to the long-term social and economic factors underlying the prospects for democracy.<sup>614</sup> To put it differently, efforts to constrain the tendency of states to place less than full weight on the promotion of democracy abroad would most likely do little to make them more likely to promote the kinds of long-term structural reforms that would create more propitious conditions for democracy.

It would be useful, therefore, to begin thinking about what it would take to make states take the protection of democracy and human rights abroad more seriously. It is to that issue that I now turn.<sup>615</sup>

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613. See *supra* part I.

614. See *supra* part IV.A.

615. The domestic experience of the U.S. itself suggests the need for such a shift in focus. Through various general and specific statutes, Congress has repeatedly attempted to constrain executive decision-making on foreign aid by requiring the president to certify that aid recipients' human rights records are satisfactory, or that there are compelling reasons for providing aid notwithstanding a recipient's poor human rights record. See generally Jeffrey A. Meyer, Note, *Congressional Control of Foreign Assistance*, 13 YALE J. INT'L L. 69 (1988). These statutes have not been entirely without effect. At the very least, they have performed a valuable function in helping to give human rights issues a larger role in public debates over foreign policy than they might otherwise enjoy. Still, they have not prevented the executive branch from manipulating the human rights record and engaging in deceptive certifications. See, e.g., *supra* note 461 (concerning certification of Peru's human rights record); Tanya Broder & Bernard D. Lambek, Note, *Military Aid to Guatemala: The Failure of U.S. Human Rights Legislation*, 13 YALE J. INT'L L. 111 (1988).

One might respond to this record by seeking to make Congressional restrictions judicially enforceable. See, e.g., Steven S. Drachman, Note, *The War in Cambodia and the Case for Judicial Enforcement of Human Rights Conditions on Foreign Aid*, 30 COLUM. J. TRANSNAT'L L. 661 (1992); Bryan Gregory, Note, *Dodging the Bullet: Judicial Review, Presidential Policy and International Labor Rights Education and Research Fund v. Bush*, 18 N.C. J. INT'L L. & COM. REG. 409 (1993). Nothing in my discussion in part V below of the relationship between democracy at home and abroad rules is inconsistent with such a move. As a general matter, however, I believe that it would be preferable to find ways to increase political pressure on the executive, rather than confining efforts to judicial means. Cf. Stephen J. Schnably, *Beyond Griswold: Foucauldian and Republican Approaches to Privacy*, 23 CONN. L. REV. 861 (1991) (arguing for greater reliance on political struggle than on judicial activism to protect rights).



## V. THE NEED FOR AN EXPANDED COMMITMENT TO DEMOCRACY AND HUMAN RIGHTS WITHIN THE U.S.

A negative factor — the inadequacy of the first track — suggests that it would be worthwhile to attempt to proceed along the second one.<sup>616</sup> What positive reasons are there for thinking it would be useful to try to change the terms of the Faustian bargain posed by the prospect of greater direct state involvement in the promotion of democracy and human rights abroad? And what would it take to bring about such a change? My aim in this part is not to answer these questions definitively or even to pose them in exhaustive form, but simply to show that further exploration in the context of regional or international attempts to promote democracy and human rights would be worthwhile.

These questions are relevant because the United States' commitment to democracy and human rights abroad is very weak at best.<sup>617</sup> Yet a prerequisite for the Santiago Commit-

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616. See *supra* part IV.C.

617. The tentativeness, to say the least, of the U.S. commitment to human rights in foreign policy has long been matched by a hesitance to make its own conduct subject to international human rights treaties. To be sure, the U.S. has recently ratified several human rights conventions, including the International Covenant on Civil and Political Rights, the Genocide Convention, the Torture Convention, and the International Covenant on the Elimination of All Forms of Racial Discrimination (ICERD).

On the Covenant, see International Covenant on Civil and Political Rights, *supra* note 42. The Senate gave its advice and consent to ratification on April 2, 1992, and the Covenant entered into force with respect to the U.S. on September 8, 1992. See 31 I.L.M. 645 (1992) (reproducing S. EXEC. DOC. 23, 102d Cong., 2d Sess.).

On the Genocide Convention, see Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (1951). The Senate gave its advice and consent to ratification on February 19, 1986, see 132 CONG. REC. S1,355-81 (daily ed. Feb. 19, 1986). After implementing legislation was passed, see Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S. §§ 1091-1093 (1988)), the President deposited the instruments of ratification and the treaty entered into force with regard to the U.S. on February 23, 1989. See U.N. OFFICE OF LEGAL AFFAIRS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS OF DEC. 31, 1990, at 95, U.N. Doc. ST/LEG/SER.E/9, U.N. Sales No. E.91.V.8 (1991); Office of the Legal Advisor, U.S. Dep't of St., Treaties in Force 329 (1992).

On the Torture Convention, see International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 44, at 197. The Senate gave its advice and consent to ratification on October 27, 1990, see 136 CONG. REC. S17,486-92 (daily ed. Oct. 27, 1990), but provided that the U.S. should not finally ratify the Convention until implementing legislation was enacted. See S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. app. A, at 37 (1990). Implementing legislation was approved in 1994, see Section 506 of the Foreign Relations Authori-

ment to succeed is a stronger commitment to, and expanded conception of, democracy and human rights on the part of the OAS, in which the U.S. is a key actor.<sup>618</sup> Such a commitment is unlikely to be forthcoming without a parallel domestic transformation within the U.S., one that vastly increases the relatively weak domestic pressure on the U.S. government to act more consistently with human rights and democracy abroad.

To be sure, popular pressure can already have some effect. Indeed, as the political difficulties that President Clinton faced during the Haiti crisis made clear, there are significant constraints on the government's ability to commit U.S. forces to combat or other military intervention in the Third World. These constraints are so strong that they can be overcome essentially only if the involvement will be relatively brief and the (American) casualties limited.<sup>619</sup> Moreover, as noted earlier, racial, ethnic, and religious identities can provide a basis for popular

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zation Act, Pub. L. 103-236, 108 Stat. 382 (1994), opening the way for U.S. ratification.

On the ICERD, see the International Convention on the Elimination of All Forms of Racial Discrimination, Jan. 4, 1969, 660 U.N.T.S. 195, *reprinted in* 5 I.L.M. 352 (1966). The Senate gave its advice and consent to ratification on June 24, 1994. See S. EXEC. REP. NO. 29, 103d Cong., 2d Sess. (1994).

This apparent trend toward U.S. acceptance of human rights conventions is less important than it might first appear. The Senate's embrace of all four treaties was less than enthusiastic, as indicated not only by the various understandings, declarations, and reservations attached to its consent, but also by the fact that it conditioned ratification upon an understanding that the treaties not be self-executing. See 138 CONG. REC. S4,784 (daily ed. Apr. 2, 1992) (International Covenant on Civil and Political Rights); 132 CONG. REC. S1355 (daily ed. Feb. 19, 1986) (Genocide Convention); 136 CONG. REC. S17,492 (daily ed. Oct. 27, 1990) (Torture Convention); 132 CONG. REC. S1,378 (daily ed. Feb. 19, 1986); S. EXEC. REP. NO. 29, 103d Cong., 2d Sess. 8,25-26,33 (1994) (ICERD). On the United States' long history of hesitance to ratify human rights treaties, see generally NATALIE KAUFMAN, *HUMAN RIGHTS TREATIES AND THE SENATE: A HISTORY OF OPPOSITION* (1990); David Weissbrodt, *United States Ratification of the Human Rights Covenants*, 63 MINN. L. REV. 35 (1978).

618. See *supra* part I.

619. Further, when the question concerns other governments' (or non-governmental actors') policies, there is more room for criticism than when the United States' own policies are at stake. The outcry over "ethnic cleansing" in Bosnia is one example — an example that also casts doubt on any notion that U.S. citizens are simply indifferent to human rights violations, at least when the violations have particularly chilling resonances of Nazi Germany. And even when the question is U.S. support for major human rights violators, the government is not unconstrained. See generally, e.g., Tamar Jacoby, *The Reagan Turnaround on Human Rights*, FOREIGN AFF., Spring 1986, at 1066 (concluding that criticisms of its human rights policy by human rights groups had some effect on Reagan administration); Susan Welch and David P. Forsythe, *Foreign Policy Attitudes of American Human Rights Supporters*, 5 HUM. RTS. Q. 491, 503-507 (1983).

organization to influence government policy.<sup>620</sup>

Still, without denigrating the effectiveness of, say, the opposition to the United States' Central American policies throughout the 1980s,<sup>621</sup> the striking fact remains that in a democratic society such policies did not evoke a greater outcry.<sup>622</sup> The government has a very wide latitude to pursue policies that profoundly disrespect democracy and human rights elsewhere. How that latitude might be narrowed is the subject of this last part.

### A. *The Problem of Effectiveness*

#### 1. The Weakness of Democratic Constraint on U.S. Foreign Policy Regarding Democracy and Human Rights

We have looked at the problems of effectiveness and perspective in Haiti, Peru, and Guatemala. But insofar as the United States' response is concerned, these are merely the latest ex-

620. See *supra* part I.

621. On the contrary, the question is how to build on its accomplishments.

622. Douglas Porpora poses the question this way:

Between 1979 and 1987, the United States armed, trained, and financially backed the military forces of the government of El Salvador, which over the same period carried out a policy of ongoing, systematic murder against the Salvadoran population. I am not speaking here of military actions taken against guerrilla combatants. Instead, I am speaking of the systematic murder of over seventy thousand men, women, and children who were noncombatants — journalists, priests, nuns, teachers, labor organizers, students, political figures, and others. Roughly 1 percent of El Salvador's population was so destroyed. Also as a direct result of United States actions, another seventy thousand civilians were similarly murdered during the same period by the military government of Guatemala. Finally, and again during the same period, the United States created a force of counter-revolutionaries (the "contras") to overthrow the revolutionary Sandinista government in Nicaragua. The contras rarely confronted the Sandinista army in open battle. Nor, in contrast with other guerrilla armies, did they focus their attacks on military targets. Instead, they deliberately attacked defenseless civilians, including old people, women, and children.

It is true that the United States did not itself carry out the systematic murder in any of these countries. Yet it put the bullets and guns in the hands of the murderers, trained the murderers how to use them, and organized them for that end. The United States might just as well have pulled the triggers of the guns itself. What concerns me is that the people of the United States, like the people of Nazi Germany, allowed their government to do such a thing. I am all the more concerned because, unlike Nazi Germany, the United States is a democracy in which protest is considerably safer.

amples of a recurring feature of U.S. foreign policy. The U.S. government has little or no real commitment to human rights.<sup>623</sup> This lack of commitment may well stem from the inadequacy of democratic constraint on U.S. foreign policy.<sup>624</sup>

The lack of commitment is clearly evident in U.S. policy towards Latin America and the Caribbean.<sup>625</sup> The U.S., for example, supported the destabilization of the Chilean economy and the overthrow of its elected president, Salvador Allende.<sup>626</sup>

623. For good general accounts of the United States' consistent undermining of democracy and human rights in Latin America, see NOAM CHOMSKY, *TURNING THE TIDE: U.S. INTERVENTION IN CENTRAL AMERICA AND THE STRUGGLE FOR PEACE* (1985); Edward S. Herman, *The United States Versus Human Rights in the Third World*, 4 HARV. HUM. RTS. J. 85 (1991). Cf. Tom J. Farer, *A Multilateral Arrangement to Secure Democracy*, in *DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM*, *supra* note 18, at 115, 118 ("the history of the United States, like that of any great power, does not foster belief that the United States would apply sanctions [against military regimes] evenhandedly"). For a more positive assessment, see PASTOR, *supra* note 1, at 198-202.

In addition, the government routinely seizes upon human rights issues when doing so serves some other strategic end; the sudden interest the Bush Administration and some members of Congress took in the status of human rights under Saddam Hussein provides the best recent example. See JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* 55-61 (1992); Peter M. Labonski & Kunal M. Parker, *Human Rights as Rhetoric: The Persian Gulf War and United States Policy Toward Iraq*, 4 HARV. HUM. RTS. J. 152 (1991).

624. One could question whether it makes sense to speak of the commitment of "the U.S. government" to democracy and human rights elsewhere, ignoring the differences between Democratic and Republican administrations. For the reasons given below, however, I believe that it does. See *infra* text accompanying notes 644-651. Cf. CHOMSKY, *supra* note 623, at 251 ("U.S. foreign and domestic policy has roots in institutional structures; only in a limited way does it reflect the personal preferences and commitments of particular individuals who happen to hold office.").

625. But it is not confined to the Western Hemisphere, as the United States' support of the brutal UNITA forces in Angola made clear. See generally Dennis Hevesi, *Rights Violations in Angola Cited*, N.Y. TIMES, Apr. 9, 1989, at 5; HUMAN RIGHTS WATCH, *ANGOLA: VIOLATIONS OF THE LAWS OF WAR BY BOTH SIDES: AN AFRICA WATCH REPORT* 4-5, 39, 109-18 (1989); Craig R. Whitney, *A Onetime Backer Accuses Savimbi*, N.Y. TIMES, Mar. 12, 1989, at 9; Craig R. Whitney, *Ex-Allies Say Angola Rebels Torture and Slay Dissenters*, N.Y. TIMES, Mar. 11, 1989, at 1. On U.S. backing of UNITA, see Richard W. Hull, *United States Policy in Southern Africa*, 89 CURRENT HIST. 193, 196, 228 (1990).

626. As the Church Committee reported, the U.S. funded "spoiling" operations — propaganda and other activities" during Chile's September 1970 presidential campaign in an effort to preclude a victory by Salvador Allende's Popular Unity Coalition. See *ASSASSINATION PLOTS*, *supra* note 576, at 229. It set about to prevent Allende's election as President immediately after he won a plurality, making contacts with Chilean military officers to assure them of U.S. support for a coup, and supporting the kidnapping and eventual assassination of the Chilean Army's Commander-in-Chief, who insisted on respecting the constitution. *Id.* at 225-54; SERGIO BITAR, *CHILE: EXPERIMENT IN DEMOCRACY* 36-37 (Sam Sherman trans., 1986). On U.S. at-

Throughout the 1980s, the U.S. continually made cynical charges about human rights violations in Nicaragua,<sup>627</sup> while supporting the contras, who engaged in massive human rights violations.<sup>628</sup> The United Nations' Truth Commission Report makes clear beyond cavil that the Salvadoran army to which the U.S. gave such crucial support throughout the 1980s engaged in systematic terror and brutality, violating basic human rights in the grossest way possible.<sup>629</sup> The Report, however, is no revelation in that respect — the Salvadoran government's abysmal human rights performance was clear from documentation available before the Report was made public.<sup>630</sup> The inquiries

tempts to destabilize the Chilean economy during Allende's presidency, see BITAR, *supra*, at 125-27, 165-68. See also *id.* at 170-71 (influence of U.S. in encouraging military to play domestic role).

627. See, e.g., DAVID P. FORSYTHE, *THE POLITICS OF INTERNATIONAL LAW: U.S. FOREIGN POLICY RECONSIDERED* 39 (1990) (noting that not only did the U.S. misrepresent human rights situation in Nicaragua, but also "initiated significant military moves against Nicaragua at the very time Washington was claiming important human rights violations; and external attacks could only lead to more repression, not less"); see also CRITIQUE: REVIEW OF THE DEPARTMENT OF STATE'S COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1984, at 71-83 (Americas Watch, Helsinki Watch, and Lawyers Committee for International Human Rights, 1985); Suzanne B. Goldberg et al., Note, *Nicaragua: United States Assistance to the Nicaraguan Human Rights Association and the Nicaraguan Resistance*, 1 HARV. HUM. RTS. Y.B. 260, 272-74 (1988).

628. See, e.g., REED BRODY, *CONTRA TERROR IN NICARAGUA: REPORT OF A FACT-FINDING MISSION: SEPTEMBER 1984-JANUARY 1985* (1985). For a concise description and analysis of U.S. policy towards Nicaragua under the Reagan administration, see FORSYTHE, *supra* note 627 at 31-62.

Even one relatively sympathetic critic cannot help but note the contrast between the Reagan Administration's concern for human rights in Nicaragua and its lack of concern for human rights in El Salvador and Guatemala, as well as its obvious disregard for human rights violations by the contras. See Tamar Jacoby, *The Reagan Turnaround on Human Rights*, FOREIGN AFF., Spring 1986, at 1066, 1079.

629. DE LA LOCURA A LA ESPERANZA: LA GUERRA DE 12 AÑOS EN EL SALVADOR (Informe de la Comisión de la Verdad para El Salvador, U.N., 1992-1993) [Report by the Truth Commission for El Salvador, U.N., 1992-1993] [hereinafter DE LA LOCURA A LA ESPERANZA]. See also Tim Golden, *Salvador Officers Named As Killers in U.N. Report*, N.Y. TIMES, Mar. 15, 1993, at A1; Tim Golden, *U.N. Report Urges Sweeping Changes in Salvador Army*, N.Y. TIMES, Mar. 16, 1993, at A1; HOUSE COMM. ON FOREIGN AFF., 103d Cong., 1st Sess., COMPARISON OF U.S. ADMINISTRATION TESTIMONY AND REPORTS WITH 1993 U.N. TRUTH COMMISSION REPORT ON EL SALVADOR 2-3 (Comm. Print 1993).

630. See, e.g., AMERICAS WATCH, *EL SALVADOR'S DECADE OF TERROR: HUMAN RIGHTS SINCE THE ASSASSINATION OF ARCHBISHOP ROMERO* (1991); RAYMOND BONNER, *WEAKNESS AND DECEIT: U.S. POLICY AND EL SALVADOR* 9 (1984); AMERICAS WATCH, *EL SALVADOR: THE MASSACRE AT EL MOZOTE: THE NEED TO REMEMBER* (Mar. 4, 1992), at 15-16 [hereinafter AMERICAS WATCH, *THE MASSACRE AT EL MOZOTE*]; FARMER, *supra* note 335, at 249-53. As Aryeh Neier put it, the significance of the Truth

triggered by the Report, if taken seriously, could hardly avoid acknowledging a conscious decision by the U.S. government to play down or deny the existence of severe human rights violations in pursuit of its Cold War agenda.<sup>631</sup> Indeed, so profound was the disrespect for human rights that the U.S. appears to have intimidated a key witness to the murder of four Jesuits on November 16, 1989,<sup>632</sup> and to have impeded the Truth

Commission's report lies in the difference "between knowledge and acknowledgment." 256 NATION 475, 475 (1993). James C. Scott's discussion of "hidden transcripts" provides an insightful analysis of the potential significance of that difference. See JAMES C. SCOTT, DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS 216 (1990).

631. See Tim Johnson, *Grisly Evidence of '81 Salvadoran Massacre Mounts*, MIAMI HERALD, Oct. 29, 1992, at 21A; Clifford Krauss, *How U.S. Actions Helped Hide Salvador Human Rights Abuses*, N.Y. TIMES, Mar. 21, 1993, at 1; Clifford Krauss, *U.S., Aware of Killings, Worked with Salvador's Rightists, Papers Suggest*, N.Y. TIMES, Nov. 9, 1993, at A4; *Papers Point to U.S. Deception on Salvadoran Crimes*, MIAMI HERALD, Mar. 21, 1993, at 1A. See generally CONDONING THE KILLING: TEN YEARS OF MASSACRES IN EL SALVADOR (1990).

In June 1993 President Clinton promised a full review of the matter. See Clifford Krauss, *Clinton Vows Full Review of U.S. Role in El Salvador*, N.Y. TIMES, June 13, 1993, at 23.

In July 1993, the State Department issued its own report, which it had undertaken in March 1993, see Clifford Krauss, *Christopher Picks El Salvador Panel*, N.Y. TIMES, Mar. 25, 1993, at A9, finding that it had acted properly on the whole. Even when mistakes were admitted, the State Department-appointed panel blamed the media. The panel recounted State Department charges that critics of the Salvadoran military were "so shrill that they were deaf to every effort at dialogue," Report at 35-36, and concluded that the media had "magnified" the Department's mistakes, *id.* at 2, with coverage of a "rote quality," *id.* at 37-38, that focused only on the Department's instances of misleading the public. Not surprisingly, the panel's Report was widely denounced by members of Congress and human rights groups as entirely inadequate. See Clifford Krauss, *Testimony in '82 on Salvador Criticized*, N.Y. TIMES, July 16, 1993, at A3.

That same month, the House Subcommittee on Western Hemisphere Affairs released a report prepared by the Congressional Research Service. The Report showed, in the words of its Chairman, a "disturbing pattern of administration deception with respect to human rights violations." COMPARISON OF U.S. ADMINISTRATION TESTIMONY AND REPORTS WITH 1993 U.N. TRUTH COMMISSION REPORT ON EL SALVADOR, *supra* note 629, at iii. It is revealing, for example, to compare the well-known massacre at El Mozote as described by the Truth Commission and Americas Watch with the misleading statements made by Reagan administration officials at the time. See *id.* at 40-43; AMERICAS WATCH, THE MASSACRE AT EL MOZOTE, *supra* note 630; DE LA LOCURA A LA ESPERANZA, *supra* note 629, at 118-25.

632. See, e.g., Michael K. Frisby, *U.S. Aide: Rebels Gained in Priests' Killing*, BOSTON GLOBE, Dec. 20, 1989, at 17 (charge by Lucia Barrera de Cerna that she was "harassed and threatened with deportation during the interrogation [by U.S. and Salvadoran authorities in Miami] and eventually changed her story [claiming to have witnessed Salvadoran military members killing the Jesuits] because she was frightened"); James A. Goldston and Anne Manuel, *Are We Shielding the Killers of Salvador's Priests?*, N.Y. TIMES, Jan. 21, 1990, § 4, at 21.

Commission's work.<sup>633</sup>

Many of the serious problems with democracy and human rights in Guatemala today stem from the United States' overthrow of the Arbenz government in 1954.<sup>634</sup> More recently, the U.S. pressured Peru to accept more "anti-drug" aid to the military — ironically, over Fujimori's resistance — notwithstanding its very poor human rights record (which the Bush Administration nevertheless certified as acceptable).<sup>635</sup> And with regard to Haiti, the U.S. has a long record of fostering highly repressive regimes.<sup>636</sup>

What is striking is that most U.S. citizens do not actively support policies that violate human rights and impede the spread of democracy elsewhere. To be sure, "failure to support" certain policies does not necessarily imply opposition to them. It is possible that most people simply do not care about democracy and human rights abroad, so that even with the advent of greater democratic constraint there would be little or no impetus for changing U.S. foreign policy.<sup>637</sup> One might even ask what

At the trial of nine Salvadoran army members held on September 26-28, 1991, two defendants were convicted but seven others were acquitted despite having confessed to taking part in the murders. For a critique of the trial and the inadequacies of the Salvadoran government's handling of the prosecution, see AMERICAS WATCH, *EL SALVADOR, THE JESUIT TRIAL: AN OBSERVER'S REPORT*, vol. 3, No. 8 (Dec. 13, 1991).

633. See Christopher Marquis, *U.S. Accused of Hurting U.N. Probe into Salvador's Civil War Horrors*, MIAMI HERALD, Nov. 6, 1992, at 14A.

634. See *supra* part III.C. See also *supra* note 522.

635. See Pamela Constable, *Latin Drug Effort Revives Old Fears*, BOSTON GLOBE, June 16, 1990, at 1; Michael Isikoff, *U.S. Aid to Peru Tied to Cocaine Flow*, WASH. POST, Sept. 13, 1991, at A18; William R. Long, *In Peru, One Too Many Disappearances?*, L.A. TIMES, Aug. 25, 1991, at 18A; Christopher Marquis, *Coca-Growing Nations Shun U.S. Military Aid Say Army Buildup Could Threaten Democracy*, MIAMI HERALD, Aug. 11, 1990, at 12A. Peru reportedly was told that it would lose economic aid if it did not accept increased military aid. *Effort Revives Old Fears*, BOSTON GLOBE, June 16, 1990, at 1; Christopher Marquis, *supra*. See also *supra* note 461.

On Fujimori's resistance to the aid, see AMERICAS WATCH REPORT ON PERUVIAN HUMAN RIGHTS, *supra* note 497, at 135-36; Pamela Constable, *In Peru, Doubts on US Aid Plan Antidrug Pact at Issue*, BOSTON GLOBE, Aug. 13, 1991, at 2; Pamela Constable, *In Peru, Doubts on US Drug Aid*, BOSTON GLOBE, June 15, 1990, at 1.

The effort to foist military aid on Peru was part of a larger effort to increase military aid to other Andean countries, including Colombia. See *Is U.S. Anti-Narcotics Assistance Promoting Human Rights Abuse in Colombia?*, HUM. RTS. WORKING PAPER, Mar. 1991, at 1; Elena Manitzas, *Human Rights, Justice and U.S. Aid: The Colombian Contradiction*, 1 U. MIAMI Y.B. INT'L L. 309, 323-24 (1991).

636. See generally, e.g., PLUMMER, *supra* note 443.

637. See, e.g., SCHOULTZ, *supra* note 18, at 19-38 (noting lack of general public concern for questions of human rights, aid, and intervention in foreign policy, other

would happen if people did concern themselves more with the government's foreign policy: Would they oppose U.S. policies that undermine democracy and human rights elsewhere? The surge of jingoistic approval that seems to accompany every U.S. invasion of a Latin American or Caribbean country might suggest that they would not.<sup>638</sup> Nor can one simply dismiss the thought that more than a few U.S. citizens likely had greater concern for the expense and inconvenience of according humanitarian protection to Haitian refugees than for the fact that summary return of refugees amounted to sentencing many of them to political persecution at the hands of the Haitian military.<sup>639</sup>

Even thus qualified, there remains a contrast worth noting between U.S. foreign policy and popular support for it. The rise of opposition to U.S. policies in Central America in 1980s, as in the Sanctuary Movement, provides some support for this conclusion.<sup>640</sup> Further, while there was to a wide degree a lack of knowledge about U.S. foreign policy in Central America,<sup>641</sup>

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than at a very abstract level). See also Leslie H. Gelb, *Fearing Voters . . .*, N.Y. TIMES, Feb. 18, 1993, at A2 (arguing that voters tend to show an "America first" lack of interest in foreign policy). For an argument that the elite shapes foreign policy but denying that "the mass public . . . respond[s] ignorantly or inconsistently," see EUGENE R. WITTKOPF, *FACES OF INTERNATIONALISM: PUBLIC OPINION AND AMERICAN FOREIGN POLICY* 218 (1990).

638. See, e.g., William M. Leogrande, *An Anachronism, But It Works*, L.A. TIMES, Dec. 28, 1989, at B7 (characterizing surge of support for Bush after Panama invasion as "normal public reflex to rally 'round the flag whenever U.S. forces go to war").

639. On the other hand, while the Bush Administration seemed very concerned about the expected unpopularity of allowing large numbers of Haitians to seek temporary refuge in the U.S., polling data indicated that a majority of people in Miami favored offering haven to them. See Cathy Booth, *Send 'Em Back!*, TIME, June 8, 1992, at 43; Larry Rohter, *Haven for Haitians Backed in Miami*, N.Y. TIMES, Feb. 5, 1992, at A8. But see *Immigrants Less Welcome in 1990s America*, THE GALLUP POLL MONTHLY, Mar. 1992, at 5, 8 (67% of respondents nationally answered "yes" to the question, "Do you agree or disagree with the recent U.S. decision to refuse to allow Haitian refugees to immigrate to the United States?"). Similarly, although California's anti-immigrant Proposition 187 passed by a wide margin in November 1994, its approval also evoked demonstrations and widespread criticism. See Paul Feldman & Rich Connell, *Wilson Acts to Enforce Parts of Prop. 187*, L.A. TIMES, Nov. 10, 1994, at A1.

640. See, e.g., ANN CRITTENDEN, *SANCTUARY: A STORY OF AMERICAN CONSCIENCE AND THE LAW IN COLLISION* (1988).

641. Opinion polls taken in the 1980s showed a high degree of uncertainty, for example, about which side the U.S. government was supporting in Nicaragua. See David K. Shieler, *Poll Shows Confusion on Aid to Contras*, N.Y. TIMES, Apr. 15, 1986, at A6; THOMAS CAROTHERS, *IN THE NAME OF DEMOCRACY: U.S. POLICY TOWARD LATIN AMERICA IN THE REAGAN YEARS* 20-21, 87, 95, 108 (1991). See generally FORSYTHE, *supra* note 627, at 41-42; Mark Falcoff, *The Apple of Discord: Central*



polling data in the 1980s indicated that most of those who knew about the conflict opposed U.S. aid to the contras.<sup>642</sup> At the very least, there is reason to doubt that most people would lend positive support to U.S. policies that result in massive violations of human rights and undermining of democracy.<sup>643</sup> Indeed, it would be absurd to argue that the U.S. government supported the Salvadoran army and the contras so consistently because there were was strong popular pressure to do so.

The question therefore is how to deal with the disjunction between a long record of foreign policy actions that disrespect democracy and human rights, on the one hand, and a lack of general public support for them, on the other. Addressing this disjunction goes far beyond simply electing a different president or party. It is true that, particularly at the level of rhetoric, there have been differences in emphasis from one administration to the next. It was President Carter who elevated support for human rights to a central role in statements of U.S. foreign policy, particularly regarding Latin America;<sup>644</sup> it was Presi-

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*America in U.S. Domestic Politics, in RIFT AND REVOLUTION: THE CENTRAL AMERICAN IMBROGLIO* 360, 360-61 (Howard J. Wiarda ed., 1984).

642. See CAROTHERS, *supra* note 641, at 87, 95, 108; David K. Shipler, *Poll Shows Confusion on Aid to Contras*, N.Y. TIMES, Apr. 15, 1986, at A6. Cf. CAROTHERS, *supra* note 641, at 20-21 (noting lack of popular support for aid to Salvadoran military). See also Hobart A. Spalding, *The Two Latin American Foreign Policies of the U.S. Labor Movement: The AFL-CIO Top Brass vs. Rank-and-File*, 56 SCI. & SOC'Y 421 (1992-1993) (arguing that top officials of AFL-CIO were far more supportive of U.S. policy in Central America than middle-level union officials and union members, and that top officials attempted to suppress growing opposition movement within union ranks). For a similar argument based on a survey of public opinion in Western Europe, see Richard P. Claude and Thomas B. Jabine, *Exploring Human Rights Issues with Statistics, in HUMAN RIGHTS AND STATISTICS: GETTING THE RECORD STRAIGHT* 5, 18-19 (Thomas B. Jabine and Richard P. Claude eds., 1992).

643. A different question is posed by the degree to which people would support affirmative efforts by the U.S. government to promote human rights abroad. Compare Anne E. Geyer and Robert Y. Shapiro, *The Polls — A Report: Human Rights*, 52 PUB. OP. Q. 386 (1988) (concluding that the issue is generally unimportant for the U.S. public, and that whatever support they have for it tends to be qualified by support for other foreign policy goals), with Kathleen Pritchard, *Human Rights: A Decent Respect for Public Opinion?*, 13 HUM. RTS. Q. 123 (1991) (arguing that Geyer and Shapiro's reading of the data understates the extent of public support for human rights in U.S. foreign policy). See also Welch & Forsythe, *supra* note 619, at 498 (concluding that support for promotion of human rights as part of foreign policy is lower among the general public than among interest groups active in human rights area).

644. See PASTOR, *supra* note 1, at 49 ("Carter's policies on human rights and democratization came to dominate the public's perception of his approach to Latin

dent Reagan who, at the outset of his administration, nominated to the chief human rights post in the State Department an individual who proclaimed that human rights should have no part in U.S. foreign policy.<sup>645</sup> As a candidate, President Clinton sharply criticized President Bush's human rights record in Haiti, China, and Bosnia.<sup>646</sup> Nor are the differences purely rhetorical. The inauguration of the Clinton administration, for example, marked the start of renewed efforts to bring some kind of political resolution to Haiti.<sup>647</sup>

Nevertheless, the continuities are in many ways more striking. President Clinton's adoption of the Bush Administration's policy of interdicting Haitian refugees makes this clear, but it is not the only example.<sup>648</sup> The Carter Administration made the decision to support the Salvadoran government despite its horrendous human rights record and lack of democracy.<sup>649</sup> In supporting the overthrow of Somoza in Nicaragua, the Carter Administration acted with extreme reluctance, bowing to the inevitable at the last minute and even then attempting to use the OAS to preclude a Sandinista victory notwithstanding the Sandinistas' broad support.<sup>650</sup> Looking back further, the United

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America.”).

645. See CAROTHERS, *supra* note 641, at 123. The nominee, Ernest W. Lefever, withdrew after the Senate Foreign Relations Committee voted against him. John M. Goshko, *Rejected 13 to 4, Lefever Withdraws*, WASH. POST, June 6, 1981, at A1.

646. See, e.g., David Lauter, *Clinton Blasts Bush's Foreign Policy Record*, L.A. TIMES, Aug. 14, 1992, at A1.

647. See *supra* part III.A.

648. It is difficult to see any major difference between Clinton's and Bush's policies toward Bosnia. See, e.g., Thomas L. Friedman, *White House Finds Bosnian Fratricide 'Problem from Hell,'* MIAMI HERALD, Apr. 10, 1993, at 13A. And President Clinton ultimately decided not to condition trade preferences with China on its human rights record. See Thomas L. Friedman, *U.S. Is to Maintain Trade Privileges for China's Goods*, N.Y. TIMES, May 27, 1994, at A1 (“the President, instead of imposing sanctions, junked his threat and today gave what was surely the most eloquent defense of the Bush Administration's China policy ever uttered at the White House, including by President Bush”).

649. See CAROTHERS, *supra* note 641, at 14-16. Equally important, the Carter administration failed to support the junta that took power in October 1979 in its plan to initiate serious talks with the Salvadoran guerrillas. See CONFRONTING REVOLUTION: SECURITY THROUGH DIPLOMACY IN CENTRAL AMERICA ch. 3 (Morris J. Blachman et al. eds., 1986).

Defending the Carter administration, Robert Pastor notes that it temporarily suspended aid in November 1980 when three nuns and a Catholic lay worker (all Americans) were murdered, and restored it only when several specific conditions were met by the Salvadoran military. PASTOR, *supra* note 1, at 58-59. What he fails to make clear is how reacting with such selective vigor to the murder of Americans constitutes a policy of protecting human rights.

650. See SCHOULTZ, *supra* note 18, at 344 n.1; PASTOR, *supra* note 1, at 54;

States' long history of intervention and bolstering of militaries throughout Latin America and the Caribbean extends across party lines; the twenty year occupation of Haiti spanned both Democratic and Republican administrations.<sup>651</sup>

## 2. The Structural Barriers to Democracy

If the problem is a lack of democratic constraint on the United States' foreign policy, how might we address that deficiency? It might be useful to distinguish broadly between two types of strategies, one cultural or moral and the other structural. If there is too little democratic constraint on U.S. foreign policy, the former approach would argue, we need to look principally to the moral judgments that people make and the culture that promotes those judgments. After all, we do have an elected

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Martha L. Cottam, *The Carter Administration's Policy Toward Nicaragua: Images, Goals, Tactics*, 107 POL. SCI. Q. 123 (1992). More generally, the Carter administration's approach to Nicaragua reinforced the logic of cold-war stereotypes, which meant that the issue of aid to the Salvadoran guerrillas had to be treated as the definitive issue in U.S.-Nicaraguan relations, see THOMAS P. ANDERSON, POLITICS IN CENTRAL AMERICA 168, 190-91 (1982), and covert CIA funding had to be given to groups opposing the Sandinistas, see Peter Kornbluh, *Nicaragua*, in INTERVENTION IN THE 1980S, *supra* note 16, at 235, 240 ("[W]hen Ronald Reagan took office on January 20, 1981, he inherited a CIA covert operation against the Sandinistas already under way."). For a general critique of Carter's foreign policy in the context of Latin America and the Caribbean, see PEARCE, *supra* note 17, at 116-65. For more favorable evaluations, see PASTOR, *supra* note 1, at 42-64; ANDERSON, *supra*, at 192-93. For a critique of Carter's policy toward the Nicaraguan revolution from a conservative, Cold War point of view, see RICHARD C. THORNTON, THE CARTER YEARS: TOWARD A NEW GLOBAL ORDER 357-76, 510-16 (1991). For an account of the continuities of U.S. foreign policies towards Nicaragua from Carter through Bush, see WILLIAM I. ROBINSON, A FAUSTIAN BARGAIN: U.S. INTERVENTION IN THE NICARAGUAN ELECTIONS AND AMERICAN FOREIGN POLICY IN THE POST-COLD WAR ERA 27-45 (1992) [hereinafter A FAUSTIAN BARGAIN].

Another area of some similarity is the Philippines; during his administration Carter made clear that the Marcos regime had the full backing of the U.S. — a policy that both his predecessors and successor followed. See HAWES, *supra* note 519, at 145-47.

651. See also Roger Burbach, *Clinton's Latin America Policy: A Look at Things to Come*, NACLA REP. ON THE AMERICAS, May 1993, at 16, 17 (noting that throughout U.S. history, "[b]asic changes in Latin America policy have previously been undertaken by Republican administrations and then consolidated by Democratic presidents").

For a general comparison of the Carter and Reagan administrations' policies towards human rights, see A. GLENN MOWER, JR., HUMAN RIGHTS AND AMERICAN FOREIGN POLICY: THE CARTER AND REAGAN EXPERIENCES (1987). While his book is a useful compilation of issues that faced the two presidents, Mower's willingness to take both administrations' proclamations concerning human rights at face value tends to undermine his analysis.

government, and people are not sent to jail for criticizing it or seeking to have it voted out of office. By this approach, the problem is simply that people do not care passionately and intensely enough about U.S. support for violations of democracy and human rights abroad. We might say that they fail to attend to their "obligation to keep informed about distant atrocities."<sup>652</sup> Another version of this kind of criticism is that Americans do not particularly care about what happens abroad, their apathy capable of being shaken only by the sight of starving children on the evening news.<sup>653</sup>

There is some merit to this approach. Carlo Filice lays out a convincing set of reasons for concluding that "most people in developed countries have a prima facie obligation to make serious attempts to become informed about the current major moral atrocities, especially those occurring within their country's sphere of influence."<sup>654</sup> Unfortunately, it is very easy to move from this argument to observations about how cynical Americans have become,<sup>655</sup> and from there to assertions that Americans are at fault for not feeling and acting upon a greater sense of responsibility for the myriad ways their own government violates human rights or supports those who do.

Simply to set out a moral obligation and then argue that it is generally possible to fulfill it, however, risks overlooking the ways in which a social structure can systematically discourage fulfillment of that obligation. It is like concentrating one's efforts on establishing the proposition that a battered woman has a moral obligation to get herself and her children away from her abusive husband, all the while ignoring the social structures

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652. Carlo Filice, *On the Obligation to Keep Informed About Distant Atrocities*, 12 HUM. RTS. Q. 397 (1990). Cf. *Report Of the Working Group on a Draft Declaration on the Right and Responsibility Of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, U.N. ESCOR, Comm'n on Hum. Rts., 47th Sess., Agenda Item 23, U.N. Doc. E/CN.4/1991/57 (1991), revised by U.N. Doc. E/CN.4/1991/57/Corr. 1 (1991).

653. For discussions of this assertion, see, e.g., Nik Gowing, *Behind the CNN Factor; Lights! Camera! Atrocities! But Policy Makers Swear They're Not Swayed By T.V. Images*, WASH. POST, July 31, 1994, at C1; Thomas B. Rosenstiel, *Role of TV News in Shaping Foreign Policy Under Increasing Scrutiny*, L.A. TIMES, July 25, 1994, at A14.

654. Filice, *supra* note 652, at 401.

655. Cf. JEFFREY C. GOLDFARB, *THE CYNICAL SOCIETY: THE CULTURE OF POLITICS AND THE POLITICS OF CULTURE IN AMERICAN LIFE* 19 (1991) ("We have rapidly replaced cynicism as a critical sense, a form of ironic satire, with a mocking cynicism that does little to upset the status quo."); *id.* at 13-29, 61-64.

that systematically tie her to her husband and push her back if she tries to leave him. The result comes dangerously close to blaming the victim in cases where the woman fails to escape her husband, leaving herself and her children at risk.<sup>656</sup> We would do better to focus attention on changing the relevant social structures: in the short term, providing shelters for battered women and adequate legal protection against husbands who track them down and attack them after they leave, and in the long run equalizing women's power with men's and undertaking other reforms so that battering is less likely to occur in the first place. The point of such a structural approach is not to dismiss the existence of a moral issue but rather to respond to it more effectively.<sup>657</sup> To focus principally on people's apathy or cynicism or general lack of concern for foreign policy, for example, would make it too easy to overlook the structural factors that systematically promote such attitudes. The danger is that we will, in effect, blame the victim.<sup>658</sup>

Take the question of a sense of responsibility. It is true that to a large degree American politics are marked by apathy and cynicism on the part of the electorate, of which low voter turnout is one manifestation. Yet, there are good reasons for attributing that tendency not to some inherent feature of mass culture or deficiency of American morality, but to political and economic arrangements that promote inattention to foreign policy and also remove the government from democratic control.<sup>659</sup> In such an environment, it becomes much easier to feel little or no moral responsibility for policies that have no direct impact domestically. Thus, the Reagan administration — though facing more than trivial opposition — could still count on far less controversy

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656. See generally Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1, 12-13 (1991) [hereinafter *Legal Images of Battered Women*].

657. Cf. Schnably, *supra* note 625, at 935-48 (similar approach in context of abortion and gay rights).

658. A political parallel can be drawn as well. That is, just as Filice argues that individuals have a moral duty to concern themselves with human rights violations elsewhere, so one could argue that the U.S. has some duty under international law to refrain from violating human rights abroad (or even to mount vigorous opposition to human rights violations elsewhere, see, e.g., Note, *Human Rights Violations During the Tiananmen Square Massacre and the Precedents Obliging United States Response*, 13 CARDOZO L. REV. 1375, 1399 (1991)). But it would be more fruitful, in my view, to try to identify the structural factors that cause the U.S. not to mount such opposition, and ask how they might be changed.

659. See *infra* text accompanying notes 664-685.

over its decision to create the contras and support the Salvadoran Army than over a decision to send U.S. troops abroad, precisely because such proxy wars have less direct impact on people here.

In that regard, then, the particular structure of American democracy tends to support apathy. If that is so, it is also reasonable to suspect that a different social and political structure would promote a greater sense of responsibility. It is possible, for example, that greater democratic control over the government might have promoted a heightened sense of responsibility among the electorate for the massive human rights violations and undermining of democracy that the U.S. promoted in Central America.

One can generalize the point. Indeed, doing so is crucial because a lack of a sense of citizen responsibility for what the government does is not, in my view, the principal problem with democracy in the U.S. Broadly speaking, "democracy" remains an unrealized ideal here in at least two ways: There are significant structural barriers to the expression and formulation of independent popular opinion through the electoral process, and whole areas of social life beyond the electoral sphere remain undemocratic. Thus, a key factor underpinning the long record of U.S. government actions undermining democracy and human rights abroad, I would argue, is a set of social, political, and cultural institutions that systematically undermine democracy at home.<sup>660</sup>

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660. Another structural argument is possible. There is a whole literature going back to Kant and Schumpeter on whether "liberal democracies" are less likely to go to war against each other, with a number of commentators arguing in the affirmative. See IMMANUEL KANT, *TO PERPETUAL PEACE: A PHILOSOPHICAL SKETCH* (1795); JOSEPH SCHUMPETER, *The Sociology of Imperialisms*, in *IMPERIALISM AND SOCIAL CLASSES* 70-130 (1955) (capitalist democracies less likely to be imperialist than 18th century absolute monarchies). See also BRUCE RUSSETT, *GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD* 24-42 (1993); R.J. Rummel, *Libertarianism and International Violence*, 27 *J. CONFLICT RES.* 27 (1983); Fernando R. Tesón, *The Kantian Theory of International Law*, 92 *COL. L. REV.* 53 (1992); Michael W. Doyle, *Liberal Institutions and International Ethics*, in *POLITICAL REALISM AND INTERNATIONAL MORALITY: ETHICS IN THE NUCLEAR AGE* 185 (Kenneth Kipnis & Diana T. Meyers eds., 1987) [hereafter *POLITICAL REALISM AND INTERNATIONAL MORALITY*]. For critiques, see David Garnham, *War-Proneness, War-Weariness, and Regime Type: 1816-1980*, 23 *J. PEACE RES.* 279 (1986); Diana T. Meyers, *Kant's Liberal Alliance: A Permanent Peace?*, in *POLITICAL REALISM AND INTERNATIONAL MORALITY*, *supra*, at 212.

I have doubts about the assertion that liberal democratic institutions act as a brake on a state's likelihood of committing aggression against other liberal democra-

At the same time, to identify these limitations is to specify the grounds for possible transformation.<sup>661</sup> If the barriers to greater electoral democracy were overcome, there would be greater potential for democratic constraint on U.S. foreign policy-making. And if our society were more generally democratic, then greater popular constraint on foreign policy-making would be more likely to translate into support for an expanded conception of democracy and human rights abroad.<sup>662</sup>

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cies. The idea that citizens in liberal democracies will constrain their government's militaristic tendencies in their own self-interest, for example, seems too simple. As Meyers points out, "liberal democracy does not in any straightforward way place state action under the control of majority interests." Meyers, *supra*, at 215. Indeed, the aim of the argument I set out below is to show how little "democracy" there is in our own liberal democracy, in part because people's access to information and their ability to act upon it are severely limited. Moreover, it would be a mistake to focus exclusively on traditionally conducted war; the U.S. has shown little hesitation to use covert action to undermine smaller or newly established democracies. See David P. Forsythe, *Democracy, War, and Covert Action*, 29 J. PEACE RES. 385 (1992). It also used covert action to influence domestic politics in post-War Europe and Japan. See Jonathan Kwitney, *The C.I.A.'s Secret Armies in Europe*, 254 NATION 444 (1992); William D. Montalbano, *Cold War Secret: Allies' Last Defense Line*, L.A. TIMES, Nov. 15, 1990, at A6; Tim Weiner, *C.I.A. Spent Millions to Support Japanese Right in 50's and 60's*, N.Y. TIMES, Oct. 9, 1994, at 1.

In any event, the debate, particularly in its most abstruse forms, see R.J. Rummel, *On Vincent's View of Freedom and International Conflict*, 31 INT'L STUD. Q. 113 (1987); Jack Vincent, *Freedom and International Conflict: Another Look*, 31 INT'L STUD. Q. 103 (1987), is largely irrelevant to my aims. My principal concern here is with U.S. policy towards democracy and human rights in Third World countries, and even adherents of the liberal democracy thesis tend not to apply it to that context. See, e.g., Doyle, *supra*, at 190-201.

661. See generally CHOMSKY, *supra* note 623, at 237-53.

662. Tom Farer has suggested, in a more limited way, the existence of such a connection. See Tom J. Farer, *A Multilateral Arrangement to Secure Democracy*, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM, *supra* note 18, at 115. As noted earlier, see *supra* note 593, Farer concludes that a coercive mechanism directed by majority vote of the member states in the OAS could probably be relied upon to counter coups and promote democracy in the smaller states of the Caribbean, rather than simply act as a cover for the United States' tendency to use "institutionalized channels of intervention . . . in ways that tend to freeze the political agenda in Caribbean basin countries and to deflect the natural trajectory of their political systems as they respond to shifts in their economies and societies." *Id.* at 128. He bases this conclusion on his assessment of democracy in the U.S. today:

[D]evelopments within the United States — including a better-educated and more sophisticated electorate, a Congress better equipped in terms of infrastructure and psychology to review the executive handling of foreign policy, and the proliferation of human rights monitoring groups with elite sponsors and some media and grass roots support — make it considerably more difficult today than it was in either the early years of this century or during the first phases of the Cold War for the executive branch to subvert democracy in the name of democracy.

Once again, it is not my aim here to produce definitive support for this claim, or to provide an exhaustive survey of current diagnoses of the contemporary problems of democracy. I seek only to suggest some reasons why this claim about the relationship of democracy in the U.S. to U.S. foreign policy might be worth further exploration through a structural approach.<sup>663</sup>

The electoral process is an appropriate starting point for an examination of the structural barriers to democracy, for it bears nearly all the weight of our conception of democracy.<sup>664</sup> Even a cursory look reveals serious problems. In most elections low voter turnout is as noteworthy as the particular outcome.<sup>665</sup>

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*Id.* at 128-29. Even with respect to Caribbean basin nations, he argues that "West European participation in any system for the defense and promotion of democracy would reduce the risk of abuse, as it enhances the chance of success," *id.* at 129, because it would help to mellow the "paranoid anxiety" that has "periodically inflamed our politics and distorted our priorities," *id.* at 130. He does, however, argue that such an ambitious scheme would not be possible with regard to the larger Latin American states. *Id.* at 130. In a sense, the Santiago Commitment and trigger mechanism represent the first efforts at building a scheme of the sort Farer earlier envisaged.

There is much in Farer's analysis with which I would agree. Certainly, the changes in U.S. democracy that he mentions are valuable developments that, in themselves, bode well for the possibility of promoting democracy. In the end, though, what is more striking to me is how inadequate those developments were to prevent the U.S. from pursuing (even if not quite as freely as the Reagan and Bush Administrations would have preferred) policies that were profoundly disrespectful of human rights and democracy in Central America and the Caribbean.

663. Cass Sunstein has recently attempted a diagnosis of major structural impediments to democracy in the United States. See Cass Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U.L. REV. 949 (1991). He focuses exclusively on reforming various aspects of public law, which may be appropriate if one's goal is to bring about democratization *through* law. As is obvious from the discussion below, however, I believe that much more than reform of governmental structures is needed.

664. See generally JOSHUA COHEN AND JOEL ROGERS, *RULES OF THE GAME: AMERICAN POLITICS AND THE CENTRAL AMERICA MOVEMENT* 17-29 (1986).

665. See MICHAEL M. GANT & NORMAN R. LUTTBEG, *AMERICAN ELECTORAL BEHAVIOR, 1952-1988*, 83-119 (1991). For a country that prides itself on democracy, it is striking that over the last 60 years, anywhere from 40 to 50 percent of the voting age population has not taken part in Presidential elections. See STATISTICAL ABSTRACT OF THE UNITED STATES 1991, at 270 (No. 453) ("Participation in Elections for President and U.S. Representatives: 1932 to 1988"). See also Robert Pear, *55% Voting Rate Reverses 30-Year Decline*, N.Y. TIMES, Nov. 5, 1992, at B4 (noting turnout of approximately 55% of voting age population in 1992 presidential election). Subject to some fluctuation, the overall trend in the post-War era has been one of decline in voter turnout. See GANT & LUTTBEG, *supra*, at 86-87. See also B. GINSBERG & M. SHEFTER, *POLITICS BY OTHER MEANS: THE DECLINING IMPORTANCE OF ELECTIONS IN AMERICA* (1990); William Crotty, *Political Participation: Mapping the Terrain*, in *POLITICAL PARTICIPATION AND AMERICAN DEMOCRACY* 1 (William Crotty ed., 1991); John



Anemic turnouts result from a variety of factors, one of which is "Byzantine" registration requirements that disproportionately exclude those with less education and income.<sup>666</sup> But they may well also result from a perception that voting accomplishes little. That perception, in turn, has a real basis in the inordinate and central role that our system of campaign finance accords money. Those who cannot hire expensive lobbyists or make large campaign contributions find themselves with highly limited access to Congress and the executive branch.<sup>667</sup>

Further, elections take on increasingly less meaning if the bodies that are elected come to lose power to ones that are not. Expansion of free trade regimes — from the creation of a common market in North America<sup>668</sup> to the enlargement of

R. Petrocik & Daron Shaw, *Nonvoting in America: Attitudes in Context*, in *POLITICAL PARTICIPATION AND AMERICAN DEMOCRACY*, *supra*, at 67.

Further, there is a class and racial dimension to the anemic rates of participation in the electoral process. Turnout is significantly lower among African-Americans than among whites, *see* U.S. DEPARTMENT OF COMMERCE, BUREAU OF CENSUS, *Population Characteristics: Voting and Registration in the Election of November 1988*, CURRENT POPULATION REPORTS, SERIES P-20, No. 440, at 2 (Table A), and lower among working class voters than among the general population, *see id.* at 60 (Table 11), blunting the potential for significant change through elections. *See generally* FRANCES FOX PIVEN AND RICHARD CLOWARD, *WHY AMERICANS DON'T VOTE* 160-63 (1988); GANT & LUTTBEG, *supra*, at 99-100; CHOMSKY, *supra* note 623, at 243-44.

666. *See* PIVEN & CLOWARD, *supra* note 665, at 17; BENJAMIN GINSBERG, *THE CAPTIVE PUBLIC: HOW MASS OPINION PROMOTES STATE POWER* 193-99 (1986). The opposition of Senate Republicans to voting registration at welfare offices under the "Motor Voter" bill furnishes telling evidence of the relation between obstacles to registration and the maintenance of conservative predominance in our electoral system. *See* Lawrence L. Knutson, *Senate Passes Voter Bill with Compromise*, *BOSTON GLOBE*, Mar. 18, 1993, § 3, at 3.

667. *See, e.g.*, LARRY SABATO, *PAC POWER: INSIDE THE WORLD OF POLITICAL ACTION COMMITTEES* (1984); PHILIP M. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1988). *See also* WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF AMERICAN DEMOCRACY* (1992). For a good analysis of the relationship between the role of campaign finance and the current conservative domination of politics, *see* THOMAS FERGUSON AND JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986); GINSBERG, *supra* note 666, at 166-72. *See also* PORPORA, *supra* note 622. *Cf.* GANT & LUTTBEG, *supra* note 665, at 142 ("Only the naive would seriously argue that government pays equal attention to all citizens. The lower class probably does not have the impact on government that the middle and uppers classes do. It is therefore unfair to expect the disaffected to be anything but alienated and distrustful.")

668. North American Free Trade Agreement Between The Government of the United States of America, the Government of Canada, and the Government of the United Mexican States, *reprinted in* 32 I.L.M. 289 (1993). *See* Keith Bradsher, *Economic Accord Reached by U.S., Mexico and Canada Lowering Trade Barriers*, *N.Y. TIMES*, Aug. 13, 1992, at A1. *See generally, e.g.*, Irwin P. Altschuler & Claudia S. Pasche, *The North American Free Trade Agreement: The Ongoing Liberalization of*

GATT<sup>669</sup> in the Uruguay Round<sup>670</sup> — seems likely to be accompanied by a growing reliance on international mechanisms to harmonize policies previously treated as domestic matters. The most dramatic and well-known example is the decision by a GATT panel pronouncing illegal a U.S. statute designed to protect dolphins from slaughter in the tuna trade.<sup>671</sup> The increasing importance of international mechanisms is accompanied by a shift of power from the legislature to unelected executive agencies accountable only through the extremely indirect and tenuous mechanism of presidential elections.<sup>672</sup>

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*Trade with Mexico*, 28 WAKE FOREST L. REV. 7 (1993).

669. General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, 61 Stat. A3, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (entered into force Jan. 1, 1948) [hereinafter GATT].

670. See generally, e.g., JOHN H. JACKSON, *RESTRUCTURING THE GATT SYSTEM* (1990).

671. United States — Restrictions on Imports of Tuna, GATT Doc. DS21/R (Sept. 3, 1991), *reprinted in* 30 I.L.M. 1594 (1991). The GATT panel held that the Marine Mammal Protection Act (MMPA), 16 U.S.C. §§ 1361-1407, violates the GATT, 61 Stat. A3, 55 U.N.T.S. 187. Pursuant to the MMPA, which was enacted to protect dolphins from being killed by tuna fishermen, the U.S. had banned Mexican tuna imports because Mexico had failed to reduce the number of dolphins killed by its tuna fleet. See generally Carol J. Beyers, Comment, *The U.S./Mexico Tuna Embargo Dispute: A Case Study of the GATT and Environmental Progress*, 16 MD. J. INT'L L. & TRADE 229 (1992); Eric Christensen & Samantha Geffin, *GATT Sets Its Net on Environmental Regulation: The GATT Panel Ruling on Mexican Yellowfin Tuna Imports and the Need for Reform of the International Trading System*, 23 U. MIAMI INTER-AM. L. REV. 569 (1991-92).

672. See, e.g., GREIDER, *supra* note 667, at 388-389 ("Arguments that were once decided, up or down, in the public forums of democratic debate are now floating off into the murk of international diplomacy and deal making."); *id.* at 377-403. See also Noam Chomsky, *The Masters of Mankind*, 256 NATION 412 (1993). Cf. Alexander Cockburn, *Clinton, Labor and Free Trade*, 255 NATION 489 (1992) ("Global economic integration favors elites at the expense of majorities in both industrial and developing countries."). GATT has also raised concerns over states' role in the federal system. See, e.g., *State AGs Seek Summit on GATT Impact*, FOOD CHEMICAL NEWS, July 18, 1994. It is important to note in examining structural barriers to democracy, however, that rarely is any particular structure or trend entirely unambiguous in its implications. For example, even NAFTA could bolster democracy in some respects. In a common market it can no longer be true — at least as regards Mexico — that U.S. support for human rights violators elsewhere has no direct impact on people here. Human rights violations in Mexico, from disrespect for the most obvious civil and political rights (e.g., the long tradition of rigging elections), to violations of the more cutting edge economic and social rights (e.g., the severe environmental and workplace hazards at many maquiladoras) will be harder to ignore, because the U.S. and Mexican economies will be more closely tied together. See Thomas Gibbons, *Tough Trade-Offs*, HUM. RTS., Spring 1992, at 26; Martin Shupack, Note, *Human Rights and the United States-Mexico Free Trade Agreement*, 4 HARV. HUM. RTS. J. 163 (1991); Hobart A. Spalding, *The Two Latin American Foreign Policies of the U.S. Labor Movement: The AFL-CIO Top Brass vs. Rank-and-File*, 56 SCI. & SOC'Y 421,

Finally, elections also have limited meaning if the information made available to the electorate is limited, or if people have inadequate opportunities to make use of it. Yet there are few outlets in the mass media for critical voices. We have a mass media that, for all the mythology occasioned by Watergate, rarely challenges the government's version of key events in foreign policy, often provides a ready outlet for corporate viewpoints disguised as policy science, and generally accords little access to dissident voices.<sup>673</sup> Moreover, opportunities to make use of in-

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425-26 (1992-1993).

673. A number of structural factors are involved, including a lack of inclination on the part of a corporate-dominated media to pose fundamental questions about the structure of our society. *See generally, e.g.*, BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (3d ed. 1990); EDWARD S. HERMAN AND NOAM CHOMSKY, *MANUFACTURING CONSENT: THE POLITICAL ECONOMY OF THE MASS MEDIA* (1988); Edward S. Herman and Gerry O'Sullivan, "Terrorism" as Ideology and Cultural Industry, in *WESTERN STATE TERRORISM* 39, 62-68 (Alexander George ed., 1991). As Benjamin Ginsberg puts it, "the opinion that contemporary rulers heed is in many respects an artificial phenomenon that national governments themselves helped to create and that their efforts continue to sustain." GINSBERG, *supra* note 666, at 32. One of the most important aspects of this molding is the social construction of the "marketplace of ideas," which has "provide[d] an institutional framework within which the upper classes could use their socioeconomic and ideological powers to enhance and reinforce one another." *Id.* at 89; *see generally id.* at 86-107.

The precise ways in which the media's support for the status quo gets played out vary from one context to another. William Greider gives a good example of how corporations with a long-term interest in weakening the "Superfund" law were able to commission studies questioning its effectiveness, which were then duly reported in the *New York Times* and other papers. GREIDER, *supra* note 667, at 42-49. Shanto Iyengar argues that commercial considerations dictate what he calls an "episodic" structure of TV news programs that emphasizes "good pictures" rather than analysis, and that that structure, by promoting public inattention to underlying social policies, tends to undermine democratic accountability. SHANTO IYENGAR, *IS ANYONE RESPONSIBLE? HOW TELEVISION FRAMES POLITICAL ISSUES* 14, 138-39 (1991); *id.* at 137 ("event-oriented and case study news coverage effectively insulates incumbent officials from any rising tide of disenchantment over the state of public affairs"). *See also id.* at 139-43; DAVID L. ALTHEIDE AND ROBERT P. SNOW, *MEDIA WORLDS IN THE POSTJOURNALISM ERA* 165-82, 199-200 (1991); Herman, *supra* note 411, at 92-96.

Aside from these relatively more subtle considerations, one should not ignore the increasing tendency on the government's part brazenly to assert a right to manipulate the flow of news to ensure maximum support for its policies in times of military conflict — as the Persian Gulf War demonstrates. *See* JOHN R. MACARTHUR, *SECOND FRONT: CENSORSHIP AND PROPAGANDA IN THE GULF WAR* (1993); Michelle D. Boydston, Note, *Press Censorship and Access Restrictions During the Persian Gulf War: A First Amendment Analysis*, 25 *LOY. L.A. L. REV.* 1073 (1992); David A. Frenznick, *The First Amendment on the Battlefield: A Constitutional Analysis of Press Access to Military Operations in Grenada, Panama, and the Persian Gulf*, 23 *PAC. L.J.* 315 (1992); Matthew J. Jacobs, Note, *Assessing the Constitutionality of Press Restrictions in the Persian Gulf War*, 44 *STAN. L. REV.* 675 (1992); Gara LaMarche, *Managed News, Stifled Views: Free Expression as a Casualty of the Per-*

formation — to participate in electoral politics in an informed way — may have deteriorated to some extent in recent years. Over the last two decades, incomes of Americans have stagnated or even declined. Meanwhile, most people's working hours have increased.<sup>674</sup> In this environment, it is harder to be concerned about anything that does not directly affect one's life. It is not that long working hours *preclude* concern about and involvement in foreign policy issues, but that they foster an environment that makes it harder to be seriously concerned about them.<sup>675</sup>

As it stands, the electoral process has severe limitations as the embodiment of democracy. But even reformed it would be an inadequate embodiment. No system of representative government can obviate the necessity of mass mobilization and participation in intermediate social, political, and economic bodies.<sup>676</sup>

*sian Gulf War*, 9 J. HUM. RTS. 45 (1991). See also *Nation Magazine v. United States Dep't of Defense*, 762 F. Supp 1558 (S.D.N.Y. 1991). As MacArthur makes clear, however, what is equally striking is the extent to which the media played along with the censorship. See generally MACARTHUR, *supra*. Perhaps the most striking example is NBC's later hiring of Pete Williams, the Pentagon spokesman who helped manipulate press coverage of the Persian Gulf War. See Jacqueline Sharkey, *Prime-Time Pete: Is the Pentagon's Truth-Blocking Spokesman Fit for Network Journalism?*, WASH. POST, May 2, 1993, at C2.

674. See JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 29 (1991) (since 1969, "the average employed person is now on the job an additional 163 hours, or the equivalent of an extra month a year").

675. Cf. David Shapiro, *Election Year Offers Opportunities for Advocacy Groups*, Pipeline, at 1 [Alliance for Justice Winter 1992] ("Only during boom times do people have the luxury of paying attention to other issues" besides the economy) (quoting Republican media and political consultant); GINSBERG, *supra* note 666, at 140 (arguing that "the entire area of international affairs is mainly an upper-middle-class concern"). Ginsberg seems correct in noting something of a class bias in the extent to which different topics are covered, see, e.g., *id.* at 141 (noting that "trade union news and events are discussed only in the context of major strikes or revelations of corruption"). He seems to assume, however, that certain topics are intrinsically of interest to some groups and not others. Yet that very differential requires explanation. This phenomenon is part of a broader political structure that, in a variety of ways, "raises the cost of participation [in politics] for ordinary people," and so disfavors "those whose 'strength is in numbers,' and not in their wallets." JOSHUA COHEN AND JOEL ROGERS, *RULES OF THE GAME: AMERICAN POLITICS AND THE CENTRAL AMERICA MOVEMENT* 19, 4 (1986).

676. The talk about the need to create "civil society" in emerging Eastern European and Latin American democracies is premised on this assumption to some extent. See, e.g., JEAN COHEN AND ANDREW ARATO, *CIVIL SOCIETY AND POLITICAL THEORY* ix (1992) (defining "civil society" as "a sphere of social interaction between economy and state, composed above all of the intimate sphere (especially the family), the sphere of associations (especially voluntary associations), social movements, and forms of public communication."). See also AMERICAS WATCH HAITIAN REFUGEE REPORT, *supra* note 452, at 3-4 ("While many international observers of Haiti bemoan

Yet in the U.S., opportunities to participate directly in the determination of the conditions of one's life, though not entirely absent, are limited.<sup>677</sup> The constraints that widespread racism and gender discrimination place on people's ability to control their everyday lives undermine democracy as much as they do equality.<sup>678</sup> Attempts to apply the ideals of democracy to decisions about work or plant closings immediately face the reality — not just the ideology or cultural belief — that democracy plays very little role in the sphere of work: Workers who go on strike will be fired and replaced, demonstrators will be arrested if they violate private property rights, and the whole legal system will, almost without exception, support management's right to close up shop and move elsewhere in search of cheaper labor.<sup>679</sup>

The two main structural barriers to democracy, then, are

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its lack of economic development, its civil society was remarkably advanced [before the coup] . . . . [T]he strength of Haitian civil society lay in its breadth and diversity outside the narrow realm of electoral politics."); Ton de Wit & Vera Gianotten, *The Center's Multiple Failures*, in *THE SHINING PATH OF PERU*, *supra* note 295, at 45, 55 ("The underlying context for Peru's violence is a weak civil society and a weak state . . . . [A] key component of any solution must . . . include creative proposals for building a civil society that gives content to human rights . . . ."); *Guatemala: Democracy Recouped?*, N.Y. TIMES, June 3, 1993, at A14 (while outside pressure played a role, "it was the widespread hostility of Guatemalan civil society that assured . . . [Serrano's] downfall").

677. For an insightful critique that takes into account both the relative openness of U.S. society and ways in which "democracy" is narrowly channelled and tightly constrained, see NOAM CHOMSKY, *ON POWER AND IDEOLOGY: THE MANAGUA LECTURES* 113-32 (1987).

678. Racism undercuts democracy in a number of other ways as well. In the electoral sphere, for example, it helps undercut the possibility of progressive alliances. It also works directly to undermine democratic constraint on U.S. foreign policy by supporting the denigration of Third World peoples who are the typically the objects of the United States' subversion of democracy and human rights abroad. See Richard Falk, *Terrorist Foundations of US Foreign Policy*, in *WESTERN STATE TERRORISM* 102, 115-16 (Alexander George ed., 1991).

679. See *Local 1330, United Steel Workers v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980); *Abbingdon v. Dayton Malleable, Inc.*, 561 F. Supp. 1290 (S.D. Ohio 1983); *Charter Township of Ypsilanti v. General Motors Corp.*, 506 N.W. 2d 556 (Mich. Ct. App.) (per curiam), *app. denied*, 509 N.W. 2d 152 (Mich. 1993), *rev'g* *Charter Township of Ypsilanti v. General Motors Corp.*, No. 92-43075-CK (Cir. Ct. Washtenaw County, Feb. 9, 1993). For an effort to fashion a property right on the part of workers and the community, see Joseph Singer, *The Reliance Interest in Property*, 40 *STAN. L. REV.* 611 (1988). Congress enacted a notice provision in 1988. See *Worker Adjustment and Retraining Notification Act*, 29 U.S.C. §§ 2101-2109. However, it remains merely a notice statute. *Id.* § 2102. Even as a notice statute, its effect appears to be minimal at best. See Sylvia Nasar, *Layoff Law Is Having Slim Effect*, N.Y. TIMES, Aug. 3, 1993, at C1.

the inadequacies of the electoral process and the confinement of democratic practice to elections. These structural barriers both reinforce and depend upon cultural notions that undermine democracy. In an environment in which elections have limited significance, for example, image-making tends to replace true debate over the issues, debasing political rhetoric.<sup>680</sup> That debasement, in turn, helps create a culture of cynicism that, by mocking everything, intrinsically favors the status quo.<sup>681</sup>

Confining democratic practice to the electoral sphere also tends to leave other spheres subject to an undercurrent of authoritarianism, helping to produce a denigration of democracy in general.<sup>682</sup> We have an education system that, for most, emphasizes passivity and rote learning rather than critical, independent thought. The emphasis arises not simply from the content of the education, but from its structure.<sup>683</sup> The dominance of the conception that technology dictates hierarchy and extreme

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680. See, e.g., GOLDFARB, *supra* note 655, at 61-64.

681. Goldfarb presents this argument. See generally GOLDFARB, *supra* note 655.

Porpora argues that a basic feature of U.S. politics is political apathy, which he identifies as "a social creation, manufactured by the basic structure of American society." PORPORA, *supra* note 622, at 149. That structure, in his view, has two basic components. One is a vastly unequal distribution of wealth, which translates into unequal political power. The other is the "winner-take-all" political system, which by forcing candidates to appeal to large blocs, squeezes out dissenting voices and fosters a sense that it matters little which candidate or party wins. *Id.* at 149-152.

682. Another source of that strain may be, to some extent, the anti-communist and cold war hysteria that has been deeply ingrained in our culture for decades. But the collapse of the Soviet bloc will have a significant effect on that hysteria as a source of automatic support for whatever foreign policy the U.S. happens to promulgate. See Jerel A. Rosati, *The Domestic Environment, in INTERVENTION IN THE 1980S*, *supra* note 16, at 147, 156 (net result of the collapse of the anticommunist consensus for U.S. foreign policy is that U.S. interventionism in the Third World is more tentative and precarious).

683. See SAMUEL BOWLES AND HERBERT GINTIS, *SCHOOLING IN CAPITALIST AMERICA: EDUCATIONAL REFORMS AND THE CONTRADICTIONS OF ECONOMIC LIFE* (1976). The educational system certainly does not promote a critical attitude toward the United States' own history. It is doubtful, for example, that most people are aware of the U.S. occupation of Haiti for two decades beginning in 1915, or of the long history of U.S. support for the Haitian military which today poses such a barrier to the prospects for democracy and human rights there. Cf. GINSBERG, *supra* note 452, at 35 ("the study of history in every nation is designed in part, perhaps primarily, to convince students of their nation's heroic past, brave leaders, and moral superiority") (footnote omitted). Indeed, one wonders whether all scholars know about it, or whether its significance registers with them. Amazingly, Pastor remarks that, after invading Mexico, President Wilson "persisted in his pursuit of liberty in the hemisphere," and states that Wilson "encouraged free elections in . . . Haiti," PASTOR, *supra* note 1, at 187, without mentioning that it was Wilson who initiated the brutal twenty year occupation of Haiti.

division of labor at work means that people spend a good deal of their lives in organizations that emphasize obedience to managerial dictates over democratic participation and decision-making.<sup>684</sup> Finally, we have an ideology of property that appears to link the protection of individual liberty to the preservation of enormous disparities in the distribution of wealth and in private economic power.<sup>685</sup>

### 3. Overcoming the Structural Barriers

The kinds of structural reforms needed to bring true democracy to the U.S. are sweeping and comprehensive. One of the

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684. Porpora has the most extensive discussion of which I am aware of the cultural factors that lie behind the lack of effective democratic constraint on U.S. foreign policy in Central America. One is an authoritarianism ingrained in school and at work, which inculcates a hesitance to question the President:

Americans are actually trained to be this way from their earliest experiences in school, where they are not taught to question their teachers or their textbooks but to studiously memorize facts that they will later be asked to regurgitate on exams. And the facts are not neutral. Curricula in social studies and history, for example, are not designed to make students into critical evaluators of their nation and its history but to make them into loyal supporters of the United States and the way we do things here. To think critically, students need to receive a fairly presented alternative point of view, for it is only from the standpoint of an alternative perspective that one learns the critical questions to ask of one's own. Such an alternative perspective is rarely taught.

PORPORA, *supra* note 622, at 171 (footnote omitted). He goes on:

Unfortunately, these educational experiences only get reinforced when students go on to find jobs and fit themselves into one or another hierarchy of authority. Just as all workers know they need not explain their own directives to workers below them, so does it not occur to them to question the directives they receive from above. Thus, Oliver North resonated favorably with many Americans watching the Iran-contra hearings when he said, "If the Commander in Chief tells this Lieutenant Colonel to go stand in the corner and sit on his head, I will do so." However high sounding these words may be, they are actually a chilling echo of the mentality of Eichmann.

*Id.* at 172 (footnote omitted). He also points to the pervasiveness of consumer culture, noting that "commercial advertisements are perhaps the most widely shared form of nonfiction in American culture" and advertisements routinely "stretch the truth" in obvious ways, giving rise to a "culture of deceit" which views it as "perfectly all right and indeed part of the game to stretch the truth." *Id.* at 176-77.

Porpora's analysis is quite helpful in identifying the ways in which, culturally, the democratic spirit is lacking or impaired in the U.S. At the same time, he provides little guidance as to how these factors could be changed; and one is left with the sense that he may inadvertently have overemphasized people's passivity and manipulability.

685. See generally JENNIFER NEDELSKY, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY* (1990).

most obvious areas which requires reform is the conduct of elections. There is good reason to believe that universal voter registration, achieved by completely eliminating the barriers to registration that have kept participation low, would itself produce an important change in politics.<sup>686</sup> Accompanied by serious reform of campaign financing, the practice of democracy would be immeasurably enhanced.<sup>687</sup> This implies that human rights advocates, who have increasingly argued for recognition of a right to democratic governance or political participation, must take their concerns beyond the formalities of election practices. Any emerging norm that fails to imply a need for real reform of U.S. election practices (and not just a need to end rigged elections in Third World countries) will be severely inadequate.<sup>688</sup>

The other major structural barrier to full democracy in the U.S. is the confinement of democratic practice to the sphere of elections. That barrier, too, must be overcome. Significantly, the more far-reaching kinds of reforms needed are by no means unknown to human rights advocates. A growing body of literature on the interrelationship between economic development and human rights in the Third World faces up squarely to the dimensions of such a task. James Paul, for example, suggests an ambitious agenda of how human rights concerns can be integrated into the planning of development projects promoted by inter-

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686. See GINSBERG, *supra* note 666, at 198. See also PIVEN & CLOWARD, *supra* note 665, at 254-55.

687. For one proposal, see Marty Jezer & Randy Kehler, *Let's Have Real Campaign Reform*, 255 NATION 496 (1992) (exclusive public financing of election campaigns accompanied by discounted postal rates and free or low cost rates for access to broadcast media).

688. In his argument for the recognition of a right to political participation under international law, for example, Gregory Fox identifies a core set of norms embodied in human rights treaties: "universal and equal suffrage; a secret ballot; elections at reasonable periodic intervals; and an absence of discrimination against voters, candidates, or parties." Fox, *supra* note 27, at 570. Even when he argues for an expansion of those norms based on international election monitoring practice, his criteria seem narrow: "1) citizens must have the opportunity to organize and join political parties, and such parties must be given equal access to the ballot; 2) to the extent the government controls the media, all parties must have the opportunity to present their views through the media; and 3) the election must be overseen by an independent council or commission not tied to any party, faction, or individual, but whose impartiality is ensured both in law and practice." *Id.* at 590. Such criteria almost completely overlook the structural barriers to full electoral democracy discussed earlier. In a sense, the narrowness represents the idea that serious problems with electoral democracy exist now only outside the established industrial democracies of Europe, North America, and Japan.



national development agencies.<sup>689</sup> Moreover, to ensure rights of participation, people should have timely notice of projects that will affect them, and be ensured effective access to legal resources, the courts, government officials, and the media; in addition, local self-managed associations should be protected and promoted. Rights to goods like food, education, and health need to be promoted to empower those affected by development projects. The right to equality in matters like access to credit must be ensured. These goals seem to have been very much part of Aristide's plan for Haiti before the coup.<sup>690</sup>

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689. James C.N. Paul, *International Development Agencies, Human Rights and Humane Development Projects*, 17 *DENV. J. INT'L L. & POL'Y* 67, 81-88 (1988); James C.N. Paul, *The Human Right to Development: Its Meaning and Importance*, 25 *J. MARSHALL L. REV.* 235 (1992). See also, e.g., MILTON J. ESMAN AND NORMAN T. UPHOFF, *LOCAL ORGANIZATIONS: INTERMEDIARIES IN RURAL DEVELOPMENT* (1984); J. CLARK, *DEMOCRATIZING DEVELOPMENT: THE ROLE OF VOLUNTARY ORGANIZATIONS*; FRIEDMAN, *supra* note 520; Valentine M. Moghadam, *Development and Women's Emancipation: Is There a Connection?*, 23 *DEV. AND CHANGE* 215, 244-46 (1992); Dorane L. Fredland, *Empowering Women in Rural India: A Model for Development*, in *WOMEN TRANSFORMING POLITICS: WORLDWIDE STRATEGIES FOR EMPOWERMENT* 192, 198-201 (Jill M. Bystydzienski ed., 1992).

Obviously, rights of participation are currently far from being realized. As one commentator has put it, "there is an almost total absence of accountability to the people affected by its projects and to the public in member countries. The Bank withholds all written documents prepared in the planning of projects from the public in both borrower and donor countries, despite the fact that the Bank has been insisting over the past three years that it recognizes the importance of involving local NGOs and community groups in its development activities." Bruce Rich, *The Emperor's New Clothes: The World Bank and Environmental Reform*, 7 *WORLD POL'Y J.* 305, 323 (1990). For a discussion of the interaction between democracy and rights of participation in the context of an Indian dam project, see ASIA WATCH, *BEFORE THE DELUGE: HUMAN RIGHTS ABUSES AT INDIA'S NARMADA DAM* (1992).

Moreover, the World Bank has done little to remedy the lot of those who are forced to resettle by large scale projects like dams. See Rich, *supra*, at 313. For an earlier critique of the Bank's resettlement efforts in a particular project, see PAYER, *supra* note 520, at 262-66.

690. The then-Independent Expert on Haiti for the Commission on Human Rights described Aristide's program as follows:

In the economic field, he stated from the very outset his preference for any economy based on participation, particularly in regard to the peasants. A programme comprising a start on agrarian reform as well as technical and credit support from small and medium-sized peasant enterprises was proposed. He announced a tax reform to rationalize finances, increase the State's resources, to improve and expand services and establish a proper civil service. In the social field, a literacy campaign was proposed together with health care and the extension of health services, greater emphasis on public education, the creation of new jobs and the improvement of working conditions. In general terms, although it was never precisely defined, Jean-Bertrand Aristide's programme of government may be viewed as a project for modernization to implement a

While the concrete considerations involved in implementing these rights will vary significantly in the U.S. from those at play in the Third World, the similarity of needs is striking — particularly insofar as they concern the question of extending participation in decision-making to spheres beyond electoral politics.<sup>691</sup> For example, democracy in the U.S. will remain a stunted ideal without greater democratic control over social investment decisions — from broad reforms of the way capital is allocated generally to the assurance of greater community and worker control over the closing of a factory.<sup>692</sup>

change towards political and social democracy.

1992 *Bruni Celli Report*, *supra* note 48, at 16.

In his autobiography, Aristide places great emphasis on participation, and links it to protection and rehabilitation of Haiti's environment. See ARISTIDE WITH WARGNY, *supra* note 471, at 151 (discussing agricultural cooperatives run by peasants, "[t]o transform the peasants into managers, key decision-makers for their living space, was also to guarantee the reconstruction of the natural world. A land that was their very own would be a treasure not to be squandered, but that would reconquer its own self."); *cf. id.* ("In the city or in the country, it is necessary to combat anonymity, to return the decisions to those who are most involved.").

Aristide is not alone in noting the necessity of a grassroots approach to development. See, e.g., Robert E. Maguire, *The Peasantry and Political Change in Haiti*, CARIBBEAN AFF., Apr.-June 1991, at 1, 7 (noting creation of "small farmer programs of storage and marketing of locally produced grains" as a way of "breaking a cycle of poverty through increased control over harvests beyond the farmgate"); DEWIND & KINLEY, *supra* note 431, at 154:

A development strategy [for Haiti] that promotes economic democracy would be based on basic principles or guidelines intended to increase the control which Haiti's poor have over the nation's economy:

(1) Development assistance would be channeled directly to the poor rather than to the government or to the private sector elite.

(2) Development projects would be planned and administered democratically by Haitian participants rather than through the government, private enterprise, or foreign private voluntary organizations.

(3) Priority would be placed on organizing Haiti's productive resources to meet the population's consumption needs through domestic markets rather than to produce exports for the international market. The remittances of migrants from abroad would be considered one such resource.

See *id.* ("the creation of a development process that is democratically controlled will help the poor to establish democratic political institutions and, eventually, a democratic government."); *id.* at 153-66. See also HAITI AFTER THE COUP, *supra* note 106, at 44-47 (describing grassroots development strategy of Peasant Movement of Papaye).

691. For a similar agenda regarding community development in the U.S., see CHRISTOPHER GUNN & HAZEL DAYTON GUNN, RECLAIMING CAPITAL: DEMOCRATIC INITIATIVES AND COMMUNITY DEVELOPMENT 150-66 (1991).

692. See, e.g., UNGER, *supra* note 56, at 491-502 (proposing democratically accountable central capital funds); Fred Block, *Capitalism without Class Power*, 20 POL. & SOC'Y 277 (1992) (proposing reforms to deal with capital flight, capital

### B. *The Problem of Perspective*

The last observation on the problem of effectiveness leads directly to the problem of perspective. As is the case with the problem of effectiveness, the problem of perspective is a general one in U.S. foreign policy. In its human rights pronouncements, the U.S. government, particularly during the Reagan-Bush Administrations, has been hostile to the idea of economic and social rights.<sup>693</sup> In the Reagan era, the U.S. emphasized elections to the point of excluding other human rights concerns.<sup>694</sup> In that regard, it has consistently shown the same kind of manipulation that it has demonstrated in relation to Haiti.<sup>695</sup> The U.S. is notorious for accepting elections conducted under conditions of intimidation and dishonesty as valid — the 1984 elections in Panama provide one example<sup>696</sup> — while rejecting as

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strikes, and other phenomena that undermine reform efforts of progressive governments' and other social actors). On factory closings, see *supra* note 679.

693. See, e.g., Paula Dobriansky, U.S. Hum. Rts. Policy: An Overview, U.S. Dep't of St., Bureau of Pub. Aff., Current Policy No. 1091 (1988). The U.S. is a signatory (though not a party) to the International Covenant on Economic, Social, and Political Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3. However, President Carter proposed so many limiting reservations, understandings, and declarations to the ESC Covenant that adherence would be stripped of much of its meaning. See *Four Treaties Pertaining to Human Rights: Message From the President of the United States*, 95th Cong., 2d Sess. at VIII-XI (1978). In the Reagan administration any remaining sense of obligation was easily tamed by complacent assurances that the U.S. "is fully in keeping" with any economic rights that may exist. See Richard Schifter, U.S.-Soviet Quality of Life: A Comparison, U.S. Dep't of St., Bureau of Pub. Aff., Current Policy No. 713 (1985).

694. See sources cited *supra* note 40.

695. See WILENTZ, *supra* note 439, at 393 (noting view of Cyrus Vance and Henry Kissinger that "U.S. support for elections . . . should be based not so much on a people's right to self-determination as on preventing unfriendly governments from establishing themselves").

696. See JOHN DINGES, *OUR MAN IN PANAMA: HOW GENERAL NORIEGA USED THE UNITED STATES — AND MADE MILLIONS IN DRUGS AND ARMS* 194-200 (1990); R.M. KOSTER AND GUILLERMO SÁNCHEZ, *IN THE TIME OF THE TYRANTS — PANAMA: 1968-1990*, at 23 (1990). For an extensive analysis of the 1984 election, see RAUL ARIAS DE PARA, *ANATOMY OF A FRAUD: THE 1984 PRESIDENTIAL ELECTIONS IN PANAMA* (no date). See also Seymour Hersh, *Panama General Reported to Rig Election in 1984*, N.Y. TIMES, June 22, 1986, at 1, 12; The Washington Office on Latin America Conference, *U.S. Electoral Assistance and Democratic Development: Chile, Nicaragua and Panama*, at 26-27 (Jan. 19, 1990). The U.S. itself later publicly admitted that the elections, in which Nicolas Ardito Barletta was proclaimed the victor, were rigged. See U.S. DEPT OF ST., COUNTRY REP. ON HUM. RTS. PRAC. FOR 1985, at 640, 646 (1986) (Rep. Submitted to the House Committee on Foreign Aff., and the Senate Committee on Foreign Relations, Feb. 1986). This did not stop the U.S. from keeping silent about its conclusions at the time of the election, recognizing the presidency of

meaningless fairly conducted elections that produce outcomes it dislikes — as the United States' rejection of the 1984 elections in Nicaragua shows.<sup>697</sup>

The problem has a domestic counterpart. In the U.S., the dominant conception of democracy is a narrow one, reflecting a social structure that, as discussed earlier, narrowly confines democratic practice to a small segment of social life. There is a long political tradition in the U.S. of identifying rights as civil and political rights to the exclusion of economic and social rights, and of viewing rights as purely individual. Moreover, there is a long tradition of emphasizing negative rights as real

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Barletta (like Bazin, a former World Bank official tagged as the conservative alternative to a more radical opponent), and indeed praising his inauguration with the same sycophancy that marked then-Vice President Bush's praise of Ferdinand Marcos' "adherence to democratic principles." See George Shultz, *A Forward Look at Foreign Policy*, DEPT ST. BULL., vol. 84, no. 2093, at 5, 6 (Dec. 1984), at 5, 6 (speech of Secretary of State praising Barletta's inauguration); George Shultz, *A Steady Course for American Foreign Policy*, in DEPT ST. BULL., vol. 84, no. 2088, at 35, 37 (July 1984) (describing rigged 1984 election in Panama as "an exhilarating moment for democracy"). On Vice-President Bush's remarks, see *In Toast to Marcos, Bush Lauds Manila Democracy*, WASH. POST, July 1, 1981, at A20.

A major reason for the United States' recognition of Barletta's presidency appears to have been his agreement to scuttle the Contadora peace process sponsored by Panama, Colombia, Mexico, and Venezuela. To the Administration's dismay, the Contadora process was on the verge of producing a regional settlement of the conflicts in Nicaragua and El Salvador that would have required, among other things, the end of U.S. support for the contras. See DINGES, *supra*, at 198-99.

697. International election observers reported that the elections, if not perfect, were generally fairly conducted. See Robert J. McCartney, *Sandinistas Winning in Nicaragua*, WASH. POST, Nov. 6, 1984, at A1; see also *Elections in Nicaragua*, FIN. TIMES, Nov. 7, 1984, at 18. Nevertheless, after having attempted to induce opposition candidates to abstain from participating, see Stephen Kinzer, *Ex-Contra Looks Back, Finding Much to Regret*, N.Y. TIMES, Jan. 8, 1988, at A3 (noting statements by "diplomats and other Nicaraguan politicians" that "the United States secretly sought to have opposition candidates quit the race"); cf. Tad Szulc, *Contras: Lost in a Jungle of Mismanagement*, L.A. TIMES, Mar. 15, 1987, at 1 (statement by leading opposition figure Arturo Cruz implicating CIA in failure of his candidacy for president to be timely registered in 1984), the U.S. denounced the election as fraudulent. See Tim Coone, *Sandinistas Head for Poll Victory*, FIN. TIMES, Nov. 6, 1984, at 22; *U.S. Sees 'Lost Opportunity'*, N.Y. TIMES, Nov. 6, 1984, at A3. See generally A FAUSTIAN BARGAIN, *supra* note 650, at 30-33.

The U.S. has been far more active than one might think simply from the charge that it rejects elections whose outcomes it dislikes. Robinson shows in exacting detail how thoroughly the U.S. sought to manipulate the 1990 elections in Nicaragua. See generally *id.* at 146 ("The U.S. electoral intervention project can be understood only when seen in its entirety — as a skillful combining of military aggression, economic blackmail, CIA propaganda, NED [National Endowment for Democracy] interference, coercive diplomacy, and international pressures into a coherent and unitary strategy.").

rights, and positive rights as efflorescences that disfigure the very idea of rights. That distinction tends in practice to support a narrowing of the idea of human rights to civil and political rights, though there is no strictly logical reason for that connection. Finally, the dominant conception of democracy reduces it to casting a vote periodically in elections rather than enjoying ongoing rights of participation in many spheres of public life.<sup>698</sup> Indeed, there is no shortage of theorists who positively celebrate the narrowness of democracy and who are concerned that the U.S. may be suffering from "too much" democracy.<sup>699</sup>

The significance of this narrow perspective on democracy lies in a double link to the problem of effectiveness. On the one hand, if it is true that we need greater democracy in the U.S. to restrain the government from pursuing policies that result in human rights violations abroad, and even to have it become a vigorous advocate of human rights, it is also true that creating a more effective democratic constraint on the government will require an expansion of our notion of democracy. As long as attempts to bring democracy back to life focus with near exclusivity on elections — *e.g.*, reforming campaign finance — and on other civil and political rights, the chances of bringing about the kind of wide-ranging social, economic, and cultural reforms that are needed here will be quite small. Human rights advocates are correct to focus their attention on the U.S. as well as other countries.<sup>700</sup> However, it is insufficient to restrict those concerns to violations of civil and political rights (especially as those rights have traditionally been conceived). If issues like labor rights, plant closings and community notice, and environmental hazards, to name a few, are conceived of as separate political matters beyond the scope of human rights work, human rights advocates will inadvertently tend to reinforce the very stunting of democracy that leaves the government relatively free to pursue policies that violate human rights abroad.

On the other hand, even if there were more popular pres-

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698. *See, e.g.*, GINSBERG, *supra* note 666, at 48-57, 209.

699. The neoconservative theorists of democracy who came to prominence in the 1970s provide a prominent example. *See generally* PETER STEINFELS, *THE NEOCONSERVATIVES: THE MEN WHO ARE CHANGING AMERICA'S POLITICS* (1979). For a more recent example of distaste for too much democracy, *see* FULLER, *supra* note 443, at 2, 183, 187. For a critique of the concern that democracy itself is the problem, *see* CHOMSKY, *supra* note 623, at 221-37.

700. *See supra* note 41.

sure generating constraints on the United States' formulation of its foreign policy, there would be a tendency for the pressure to have too narrow a focus in the absence of an expanded conception of what democracy and human rights mean. U.S. sponsorship of terrorism is a human rights issue,<sup>701</sup> but it is not the only kind of human rights issue that should be on the agenda. Debt restructurings and IMF austerity plans, for example, are human rights issues, not simply technical or financial problems for resolution by experts or the market. "Development" cannot be taken as some neutral good, encompassing as it does everything from ecologically sound projects that empower people in their daily lives to subsidized de-forestation or massive capital-intensive projects like dams that forcibly displace thousands of people.<sup>702</sup>

### C. Conclusion

I have argued that the Santiago Commitment and proposed Charter amendments constitute hopeful steps towards regional implementation of the ideals of democracy and respect for human rights — but that the hope may well prove in vain without a deepening of democracy in the U.S. itself. The willingness of states to compromise protection of democracy elsewhere and to manipulate human rights issues seems too strong to be dealt with solely by attempting to create international or regional mechanisms which take that willingness for granted while attempting to reign it in. This observation, however, still leaves open the question of the effect that greater democracy at home would likely have had on the U.S. response to the coups in Haiti, Peru, and Guatemala.

It would probably be helpful to think in terms of a spectrum of foreign policy actions ranging from the most to the least affected by greater democracy at home. Any action involving the commitment of U.S. troops to imminent combat would rank as the most sensitive to democratic constraint. Policies that actively undermine democracy and human rights elsewhere by means of systematic terror — *e.g.*, direct and extensive support for groups like the contras, the Salvadoran army, or the UNITA forces in

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701. See generally Edward S. Herman, *U.S. Sponsorship of International Terrorism*, in *THE NEW WORLD ORDER AND THE THIRD WORLD* 17 (Dave Broad and Lori Foster eds., 1992).

702. See *supra* part IV.B.1.

Angola — would probably be the next most vulnerable to constraint. Other forms of support for militaries with established records of human rights abuses (particularly if, as in the case of Haiti, the U.S. also has a long record of anti-democratic intervention) would rank further along the spectrum. Still further along would be the failure of the U.S. to press strongly for democracy and human rights, at least where those efforts could be undertaken without too great a perceived cost. At the end of the spectrum would be the issue of active U.S. support for significant land reform, rights of participation in planning and executing development projects, and the like.<sup>703</sup>

This analysis implies that U.S. policy towards Haiti, Peru, and Guatemala might not have ranked first among the areas of foreign policy likely to be affected by greater democracy at home. The issues in Peru and Guatemala were relatively subtle precisely because the autogolpes did not fit the mold of the classic military coup, and did not appear to have been U.S.-inspired. The military regime in Haiti was certainly brutal enough, but — while the U.S. was by no means lacking in responsibility for Haiti's plight — the connections between the U.S. government and the Haitian military were not as clear-cut and direct as those between the U.S. government and the Salvadoran army or the Nicaraguan contras. That fact, in turn, lessened the obviousness of U.S. responsibility for the Haitian military's brutalities.<sup>704</sup>

Moreover, even with a formal return to constitutional gov-

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703. Thus, I am not arguing that more democratic constraint on U.S. foreign policy-making would necessarily lead to a policy of vigorous or even interventionist support for democracy and human rights elsewhere. My claim is more limited. With greater democracy in the U.S., there would be pressure on the government not to engage in policies that undermine democracy and human rights elsewhere. Although the U.S. might or might not attempt to pressure dictatorial governments to democratize, or to aid Eastern European states in their own transformations to democracy, at least it might be less likely to support dictatorships or undermine the efforts of other states, particularly in the Western Hemisphere, to develop their own democracies. While the distinction between refraining from undermining democracy elsewhere and actively aiding it may not always be a sharp one, there seems enough difference to support the more modest kind of change.

704. On the other hand, it is true that a more vigorous reaction to the coups in Haiti and Peru would not have imposed great cost on the U.S. A true embargo against Haiti, for example, would have caused little economic hardship on the U.S., exerted far greater pressure on the military and its elite backers, and — if it had been imposed swiftly — might have held out the prospect of a quicker resolution of the Haitian crisis.

ernment (in varying degrees), all three countries' prospects for democracy over the long run are weakened by severe inequalities of income and wealth and associated problems. Any significant popular pressure on the U.S. to promote economic and social rights elsewhere as vigorously as it claims to champion civil and political rights will have to await more than a reform of the electoral process in the U.S. That is, greater democracy in the electoral sphere here might by itself produce more constraints on the United States' ability to undermine core civil and political rights abroad (e.g., freedom from torture). But it may take significant steps in the direction of expanding our own conception of democracy to include economic and social rights before even a reformed electoral process would produce substantial popular pressure on the U.S. government to support economic and social rights elsewhere.

If there are reasons, then, for thinking that U.S. foreign policy in cases like those presented by the coups in Haiti, Peru, and Guatemala might be less dramatically affected than would other aspects of foreign policy, neither is it clear that a deepening of democracy here would have *no* effect on such cases. Indeed, it would be odd to reject reforms along the second track for that reason: After all, any approach that focuses exclusively on the first track is also likely to have severe limits in terms of constraining U.S. foreign policy.<sup>705</sup> And bringing greater democracy to the U.S. would of course have many domestic benefits beyond effecting basic changes in U.S. foreign policy. In the end, it would be a fundamental mistake — and a needless one — not to heed the call of the Santiago Commitment to renew democracy and human rights within our own borders.

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705. See *supra* part IV.