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# Constitutionalism and Democracy: An Essay in Honor of Stanley N. Katz

IRWIN P. STOTZKY†

## PROLOGUE

On February 23–24, 2007, the Program in Law and Public Affairs, the Woodrow Wilson School, the History Department, and the American Studies Department of Princeton University honored Stanley N. Katz by holding a conference to analyze and celebrate his extraordinary public career. A committee of his colleagues and former students planned the conference. It included a mixture of formal and informal sessions on the themes and issues that have been important in his professional career. Panels explored topics in public policy, colonial history, American legal history, the history of nonprofits and philanthropy, the use of technology in teaching and scholarship, and the public humanities—all areas in which Katz has made important contributions.

It was an extraordinary conference. Several hundred people—including students, colleagues, and friends—attended and participated. Some delivered papers about his intellectual legacy, others gave talks about his personal and professional achievements, and still others made penetrating comments or asked serious questions about the presentations.

His career clearly deserved this outpouring of support. Stanley N. Katz is President Emeritus of the American Council of Learned Societies, the leading organization in humanistic scholarship and education in the United States. He currently holds the position of Lecturer with the rank of Professor in the Woodrow Wilson School of Princeton University.

Formerly Class of 1921 Bicentennial Professor of American Law and Liberty at Princeton University, Katz has taught in the history department at Harvard (1957–65) and held tenured positions in the history department at Wisconsin (1965–71) and at the University of Chicago Law School (1971–78). Over the years, he has been a visitor at several other law schools.

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† Professor of Law and Director, Center for the Study of Human Rights, University of Miami School of Law. I wish to thank Sylvia-Rebecca Gutiérrez for her excellent research assistance. I also wish to thank the editorial board of the *University of Miami Law Review*, particularly Laura J. Tepich and Michael S. Pieciak, for their fine editorial work. Copyright Irwin P. Stotzky and University of Miami Law Review, 2008.

Katz graduated Magna Cum Laude from Harvard University in 1955 with a major in English History and Literature. He received his M.A. from Harvard in 1954 and his Ph.D. in the same field from Harvard in 1961. He attended Harvard Law School in 1969–70.

He is a renowned scholar of American legal and constitutional history, and on philanthropy and nonprofit institutions. He is the Editor of the Oliver Wendell Holmes Devise *History of the Supreme Court of the United States* and of the forthcoming *Oxford International Encyclopedia of Legal History* (2009). Katz is the author and editor of scores of articles and books. He has served as president of the Organization of American Historians and the American Society of Legal History and as vice president of the Research Division of the American Historical Organization. He is a member of the Board of Trustees of the Newberry Library, the Copyright Clearance Center and many other institutions. He is currently president of the International Society for Cultural Property. He is a commissioner of the National Historic Publication and Records Commission. He also currently serves as chair of the American Council of Learned Societies/Social Science Research Council Working Group on Cuba. Katz is a member of the New Jersey Council for the Humanities, the American Antiquarian Society, the American Philosophical Society; a fellow of the American Society for Legal History, the American Academy of Arts and Sciences, and the Society of American Historians; a corresponding member of the Massachusetts Historical Society; and an Academico Correspondiente of the Cuban Academy of Science. He has honorary degrees from several universities.

Katz is currently working in the international arena. His recent research focuses upon the relationship of civil society and constitutionalism to democracy, and upon the relationship of the United States to the international human rights regime.

My relationship with Stanley Katz began in the early 1970s, when I was a student at the University of Chicago Law School. In addition to being a student in two of his classes, I worked on an independent research project under his supervision on the role of rank-and-file workers in union organizing and democratization in the steel industry.

As a law professor, Katz became a role model, in the best sense of that term, for countless students. In particular, students admired Katz for his keen intelligence and unquestioned integrity. While he constantly pushed students into questioning their assumptions, he did so in a gentle, positive way. Indeed, students often described Katz in the following manner: "Everyone doesn't like someone, but nobody doesn't like Stanley Katz." For anyone who knows anything about law schools and the

relationship between faculty and students, this is a highly unusual and positive expression about a law school professor!

Our relationship developed deeper ties when I began to work in the area of democratic transitions, first in Argentina and later in Haiti. Indeed, it was a great pleasure for me to have delivered this paper and to have had the opportunity to discuss such a complicated and complex topic—the transition from authoritarian to democratic regimes—at this conference honoring Stanley N. Katz. I am particularly pleased to honor Stanley Katz because of the intellectual, moral, and emotional support he has given me over the years as I have pursued the topic both in writing and in practice.

### I. THE WORK OF STANLEY N. KATZ

As the speakers at the conference in honor of Stanley N. Katz have demonstrated, history and law, particularly constitutional law, have been at the core of his work. In his eleven year reign as the President of the American Council of Learned Societies (ACLS), the focus of his constitutional law concerns shifted to comparative constitutionalism and to constitutionalism outside the United States. In the mid-1980s, in response to a Ford Foundation request to help it determine what Ford might do to commemorate the Bicentennial of the United States Constitution, Stan organized a project on the idea of constitutionalism. The result was a large grant for an ACLS project on comparative constitutionalism. The project began in 1987, lasted about five years, and covered Latin America, South/Southeast Asia, and Europe (both West and East). Stan presented his ideas that derived from this project in the Jefferson Lecture that he delivered at the University of California at Berkeley in 2000<sup>1</sup> and in a book he coedited in 1993.<sup>2</sup>

In his Jefferson Lecture, Stan examines two different conceptions of constitutionalism. The first account is an idealist, rationalist account. It suggests that there are rationally specific limits to constitutionalism. Stan quotes Walter Murphy's definition as the basic Western notion of liberal democratic constitutionalism:

Constitutionalism . . . enshrines respect for human worth and dignity as its central principle. To protect that value, citizens must have a right to political participation, and their government must be hedged in by substantive limits on what it can do, even when perfectly mir-

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1. Stanley N. Katz, *Constitutionalism, Contestation, and Civil Society*, 8 COMMON KNOWLEDGE 287 (2002).

2. CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD (Douglas Greenberg et al. eds., 1993).

roring the popular will.<sup>3</sup>

The second, contrasting account, described by a Kenyan lawyer from an African point of view claims:

[A]ll law, and constitutional law in particular, is concerned, not with abstract norms, but with the creation, distribution, exercise, legitimation, effects, and reproduction of *power*; it matters not whether that power lies with the state or in some other organized entity. From this perspective, therefore, the very idea of law, hence of *a constitution as a special body of law*, entails commitment or adherence to a theory of organized power . . . .<sup>4</sup>

Not surprisingly, Stan comes down on the African side of constitutionalism. He argues that constitutionalism must emerge from the particular indigenous political controversies and that its final form is, therefore, unpredictable. He defines constitutionalism in this way:

[S]horn of universals, what is constitutionalism? To my mind, if there is an essence of constitutionalism (and I believe there is), it is not to be found in the structure of the constitutional arrangements and institutions that are established in a particular country. Rather, it is to be found in the *practice* of constitutionalism, in a form of politics that is based on the notion of respect for the rule of law, in which the government, however it is configured, reflects the basic values and aspirations of the community.

That is to say that generic constitutionalism consists in a process within a society by which the community commits itself to the rule of law, specifies its basic values, and agrees to abide by a legal/institutional structure which guarantees that formal social institutions will respect the agreed-upon values.<sup>5</sup>

The paper then discusses the importance of the development of civil society to constitutionalism and democracy. Stan argues that broad-based political socialization—the creation of civil society—is a prerequisite to stable constitutionalism. Stated otherwise, the people “must be educated about the idea of limited government before such a government can succeed.”<sup>6</sup> After analyzing the history of the idea of civil society, he claims that by the eighteenth century the idea of civil society had split

3. Walter F. Murphy, *Constitutions, Constitutionalism, and Democracy, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 2, at 3, 3.

4. H.W.O. Okoth-Ogendo, *Constitutions without Constitutionalism: Reflections on an African Political Paradox, in* CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 2, at 65, 67.

5. STANLEY N. KATZ, *CONSTITUTIONALISM IN EAST CENTRAL EUROPE: SOME NEGATIVE LESSONS FROM THE AMERICAN EXPERIENCE* 14 (1994).

6. CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD, *supra* note 2, at xx.

into two strands. The first strand—the Lockean notion—denoted people living in economic activity and political freedom. Civil society represented private interests regulated by law. Indeed, Locke equated property with citizenship. The Lockean tradition rejected any notion of the public good. Its sole purpose was to protect private property.

The second strand, one that defines civil society as an intermediate sphere of voluntary association and activity standing between the individual and the state, is the more modern notion of civil society, and the one Stan focuses on. The idea here is that “voluntary associations fuse personal interest and the common good.”<sup>7</sup> The implications of this strand are legion, but in whatever form, they underlie the argument that civil society is the backbone of democracy. The concept of civil society became useful for developing strategies to assist countries in their transition to democracy, particularly in developing the theme that there must be space between the state and the free market. Civil society as a concept became very helpful as well in defining the process by which democratization could happen. Associational activities were said to create and nurture the social values that produce democratic activities. Scholars and activists argued that the existence of a strong and viable civil society was a necessary condition for democracy. Simultaneously, however, they argued that a vigorous civil society was a necessary but not a sufficient condition for democracy. Indeed, the appropriate political and legal institutions of constitutionalism are also prerequisites for the properly functioning democracy.

In the last part of his paper, Stan asks the following question: What is the relationship of civil society and constitutionalism? His answer is uncertain, but he does conclude democracy requires both civil society and constitutionalism. In his own words:

For someone who believes that constitutionalism and civil society are both highly contested processes, it seems likely that constitutional democracy must be the result of a long, conflicted, cultural process. I doubt that such vibrant constitutionalism can come into existence prior to the creation of a positive civil society, but I am also sure that civil society alone cannot produce such a result.<sup>8</sup>

This conclusion is as far as Stan goes. He does add, however, that for him the problem is practical not theoretical because a bright future for the world depends upon its solutions. He suggests that “[w]e need to do some very sophisticated history to examine different sorts of democratic societies . . . to determine the ways in which constitutionalism and civil society have coexisted and interacted, and to what degrees and in

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7. Katz, *supra* note 1, at 296.

8. *Id.* at 302.

what ways the interaction has necessarily been one of conflict.”<sup>9</sup> In this task “[t]he challenge is . . . to avoid an emphasis on political institutions that ignores the cultural contexts within which they are embedded or a focus on societal and cultural dynamics that ignores political contexts (disputes and struggles).”<sup>10</sup> The challenge is to analyze “how institutional, societal, and cultural factors interact and of what kinds of outcomes different combinations are likely to produce.”<sup>11</sup>

In this paper, I take up his challenge but probably not in the way he imagines. I do so in a more indirect way. I argue that there are many issues to confront prior to his challenge. Indeed, these issues are part of the process that people in various nations must confront, contest, and perhaps resolve before a constitutional democracy can be created, even in its most basic form.

## II. A BRIEF LOOK AT HAITI

On October 15, 1994, Jean-Bertrand Aristide, the first democratically elected President in the nearly 200-year history of Haiti, who had been overthrown by a coup only months after his election, was returned to power by approximately 20,000 American troops.<sup>12</sup> A second democratically elected government took office in 1995. In 2000, Aristide ran for and was elected President for the second time.<sup>13</sup> On February 29, 2004, he was once again forcibly removed from office and escorted out of the country, this time by American forces. At that point, Canada, France and the United States—the “three friends of Haiti”—put a puppet government in power. This new de facto government presided over a new reign of terror resulting in the murders of approximately 8000 people and the sexual assault of 35,000 women.<sup>14</sup> In 2006, the Haitian people elected a new president, but conditions have improved only marginally.<sup>15</sup> The attempt to “restore democracy” to Haiti—to create a “constitutional democracy”—had failed. What happened? This paper will describe and analyze the worldwide attempt to create constitutional democratic regimes, using Haiti as the prime example. In the first part of

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9. *Id.* at 303.

10. *Id.*

11. *Id.*

12. Gary Marx, *Haitian Leader Vows to Stay; Facing a Violent Revolt, Jean-Bertrand Aristide Promises to Protect the Nation's Fragile Democracy from Opponents He Says Are 'Terrorists,'* CHI. TRIB., Feb. 14, 2004, at 1.

13. *Id.*

14. Athena R. Kolbe & Royce A. Hutson, *Human Rights Abuse and Other Criminal Violations in Port-au-Prince, Haiti: A Random Survey of Households*, 368 LANCET 864, 868 (2006).

15. Andrew Buncombe, *Fewer Kidnappings, Improved Security—but Life Remains Harsh on the Streets of Haiti*, INDEP. (U.K.), Nov. 27, 2006, at 26.

the paper, in a position that has particular relevance today, I will argue that international military intervention, led by the United States, cannot create the conditions for democracy to bloom. In reaching this conclusion, I will analyze the international mechanisms the United States used to gain legitimacy for its actions and discuss some of the problems this raises. I will then describe and analyze the forces that hinder democracy, and suggest a new political-economy that may promote rather than block democratic reform.

### III. INTERNATIONAL MILITARY INTERVENTION

October 15, 2006 marked the twelfth anniversary of the so-called “restoration of democracy” in Haiti.<sup>16</sup> But the premise that an international military force can simply and magically restore democracy to a nation that has never experienced democracy and that lacks most of the institutional infrastructure, material resources, and an experimental agenda necessary to complete successfully this mission and thus to overcome the almost impenetrable cultural, economic, political, and social barriers of its own history, is seriously flawed, and it has serious consequences for the Haitian people. This flawed idea has created expectations among Haitians and the international community that cannot be met. Moreover, it has caused an outpouring of criticism of the efforts of both Haitians and the international community, particularly in the United States.<sup>17</sup> While the international effort can be criticized on many valid grounds, international aid remains indispensable to Haiti’s march—from “misery to poverty with dignity” —toward democracy. In this section of the paper, I wish to look at Haiti and ask what lessons one can learn from the international intervention that will have more general application to the incredible movement—the transition to democracy—that has occurred in the past three decades all over the world:

Indeed, during the closing decades of the twentieth century, a wave of democratization spread through most of Latin America, the Soviet Union, and parts of Eastern Europe, Africa, and Asia. This movement from dictatorship to democracy has not, of course, always run smoothly. There have been serious internal threats to fledgling democracies,

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16. See *President Aristide Returns*, N.Y. TIMES, Oct. 16, 1994, at E14; Larry Rohter, *Aristide Can Speak, but Can the U.S. Hear?*, N.Y. TIMES, Oct. 16, 1994, at E5.

17. Haitian history rejects foreign occupation. Indeed, the history of Haiti is a response to colonialism. The Haitian Revolution culminating in the independence of Haiti in 1804 consisted of a war against the colonial government of France. See MICHEL-ROLPH TROUILLOT, *HAITI: STATE AGAINST NATION: THE ORIGINS AND LEGACY OF DUVALIERISM* (1990). Haitians have a fierce hatred of foreign occupation. There was also a rejection of the use of United States troops by politicians and government officials in the United States when Clinton sent approximately 20,000 troops to Haiti in 1994 to restore President Aristide to power.



retrenchments, setbacks, and counterrevolutions leading to new authoritarian regimes.<sup>18</sup> What role has and should the international community play in this democratic drama?

Haiti is, of course, a unique case. It is a small, poor, vastly underdeveloped nation almost abandoned over the years by its neighbors and the world community. But Haiti is nevertheless an important example of a nation undergoing the rigors of the transition from dictatorship to democracy. How the international community handles questions concerning Haiti thus has broader, more general implications. It suggests methods to employ and paths to follow in future crises. Moreover, looking at Haiti's difficulties and suggested solutions to them also has broader, more general implications for the consolidation of the transition process around the world.

The story of Haiti is, at one level, uncomplicated. In 1990, a vast majority of the Haitian people—67.5 percent<sup>19</sup>—elected Jean-Bertrand Aristide President, in the first democratic election to take place in Haiti in its nearly 200-year history as an independent state.<sup>20</sup> Equally impressive was the election process.<sup>21</sup> It represented the culmination of an extraordinary international effort to launch Haiti on the path of democracy. Both the Organization of American States (O.A.S.) and the United Nations (U.N.) played major roles in helping Haitian officials assure the dignity of the election process.<sup>22</sup>

Within months after his installation as President, Aristide was over-

18. See generally Andres Oppenheimer, *Chávez's Authoritarian Move Was Predictable*, MIAMI HERALD, Aug. 14, 2008, at A7 (discussing the regime of Venezuelan President Hugo Chávez).

19. COUNCIL OF FREELY-ELECTED HEADS OF GOV'T, NAT'L DEMOCRATIC INST. FOR INT'L AFFAIRS, *THE 1990 GENERAL ELECTIONS IN HAITI* 61 (1991). Aristide actually received a substantially higher percentage of the vote. Many of the ballots in his favor, however, had to be discounted because voters failed to mark them properly. This was due to the high illiteracy rate among the electorate. In point of fact, virtually every one of the ballots that had to be discounted were votes for Aristide. See Interview with Cathy Maternowska, in Miami, Fla. (Nov. 8, 1993) (Maternowska, an anthropologist who lived in Haiti from 1985 to 1993, worked extensively with the poor of Haiti and was an observer of the 1990 election.).

20. For a useful account of the 1990 elections in Haiti see COUNCIL OF FREELY-ELECTED HEADS OF GOV'T, *supra* note 19.

21. In addition to the smooth functioning of the election process itself, voter turnout was an astounding seventy-five percent, despite formidable logistical challenges. The dirt roads and mountain paths of rural Haiti, where over seventy-five percent of the population lives, made the distribution of election materials treacherous and uncertain. The high illiteracy rate among Haitians compounded the already difficult challenges of registering and voting. Despite these difficulties, approximately 3.2 million Haitians registered to vote and more than 2.4 million voted on election day. Moreover, despite these logistical problems, virtually all observers who monitored the voting, both international and domestic, attested that the elections were free and fair and that the voters experienced no threats, intimidation, or harassment. See COUNCIL OF FREELY-ELECTED HEADS OF GOV'T, *supra* note 19, at 67–71.

22. Op-Ed., *Haiti Tries Again*, WASH. POST, Nov. 15, 1990, at A24.

thrown in a military coup and forced into exile, first in Venezuela and then in Washington.<sup>23</sup> The O.A.S. and U.N. immediately condemned the coup, speaking out forcefully against the de facto regime and in support of the democratically elected Aristide government. The international community responded with several other unprecedented actions. Indeed, between 1990 and 1997, the U.N. engaged in an unusually broad range of activities in support of democracy in Haiti, including election monitoring,<sup>24</sup> U.N. Security Council-mandated sanctions,<sup>25</sup> two peacekeeping operations,<sup>26</sup> a naval blockade,<sup>27</sup> and U.N. Security Council-authorized use of force against the de facto regime.<sup>28</sup> After several years of failed efforts to coax the de facto government to negotiate with Aristide for his return, and ostensibly because of serious human rights abuses resulting in the murders of several thousand people and the economic chaos created and then exacerbated by an embargo, the international community resorted to force.

The international community's response to the military coup which ousted Aristide is unique in at least three respects. In August 1994, the U.N. Security Council, for the first time in its history, gave approval for a forcible intervention in a Member State to change its government—to restore its democratically elected government.<sup>29</sup> This clearly differed from other situations in which the O.A.S. and U.N. had been involved, such as Nicaragua and El Salvador. Unlike those cases, the stated goals of the military intervention were neither to support democratic processes as a means of national reconciliation nor to uphold the integrity of the electoral process as a means of securing the fragile peace accords. Instead, the primary and publicly proclaimed goal was simply and solely the restoration (creation) of democratic governance. Stated otherwise, the overriding purpose of intervention was to replace an illegitimate regime (the de facto military government) with the legitimate regime (the democratically elected and internationally sanctioned Aristide government).

This was also the first time that the United States sought Security

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23. PETER HALLWARD, *DAMMING THE FLOOD: HAITI, ARISTIDE, AND THE POLITICS OF CONTAINMENT*, at xii (2007).

24. Jeane Kirkpatrick, *A Deal for the U.N.: Reform and We'll Pay Up*, *BALT. SUN*, Oct. 31, 1995, at 9A.

25. Terry Atlas, *U.S. Lifts Most Haiti Sanctions: Curbs Remain on Military, Nation's Elite*, *CHI. TRIB.*, Sept. 27, 1994, at 1.

26. *The Americas: Building a Reluctant Nation; Haiti*, *ECONOMIST*, Feb. 10, 2007, at 55.

27. Paul Lewis, *U.N. Backs Use of Ships To Enforce Haiti Embargo*, *N.Y. TIMES*, Oct. 17, 1993, at 15.

28. Larry Rohter, *U.N. Force Takes Up Duties in Haiti*, *N.Y. TIMES*, Apr. 2, 1995, at 14.

29. Julia Preston, *U.N. Authorizes Invasion of Haiti; Resolution Adds Pressure on Generals*, *WASH. POST*, Aug. 1, 1994, at A1.

Council authorization for the use of force within the Western Hemisphere. This is, of course, a sharp contrast from the unilateral interventions by the United States in Latin America during the twentieth century, the most recent examples being Grenada (1983) and Panama (1989). Despite the fact that the Clinton Administration viewed the crisis in Haiti with a growing urgency because of the increasingly large refugee migration from Haiti to the shores of Florida between 1991 and 1994,<sup>30</sup> the United States did not take unilateral military action. Rather, the United States used multilateral channels to resolve the crisis. While the use of multilateral avenues was less "efficient" than would have been unilateral methods, the Clinton Administration correctly understood that multilateral action offered important advantages, both domestically and internationally.

The Haiti case is unique in one other respect: This was the first test of the June 1991 O.A.S. Santiago Declaration on the protection of democracy.<sup>31</sup> Indeed, this case suggests a growing consensus among O.A.S. Member States and internationally that the Western Hemisphere should develop into a democratic zone free from military dictatorship.<sup>32</sup> Moreover, the Haiti case has been used as a precedent for the O.A.S. in its efforts to react to threats to democracy in Peru (1992), Guatemala (1993), and Paraguay (1996).

In 1996, after Aristide's term expired, he passed his office to the second democratically elected President, René Préval.<sup>33</sup> Aristide then ran for and was elected President for a second time in 2000.<sup>34</sup> In 2003 and 2004, a coalition of student groups, business organizations, and opposition politicians dissatisfied with his presidency, organized to force him from office.<sup>35</sup> At the same time, several loosely affiliated armed groups, made up mostly of former soldiers from Haiti's disbanded army, had been training in the neighboring Dominican Republic to take Haiti

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30. See, e.g., Susan Martin et al., *Temporary Protection: Towards a New Regional and Domestic Framework*, 12 GEO. IMMIGR. L.J. 543, 552 (1998); William E. Gibson & Lisa Ocker, *Refugee Problem Expands; Influx of Immigrants Swamps U.S. Officials*, FLA. SUN-SENTINEL, MAY 26, 1994, AT 1A.

31. See *The Santiago Commitment to Democracy and the Renewal of The Inter-American System*, O.A.S. General Assembly, 3d Plen. Sess. (adopted June 4, 1991), at 1, O.A.S. Doc OEA/Ser.P/XXI.O.2 (1991) [hereinafter *The Santiago Commitment*]; *Representative Democracy*, O.A.S. General Assembly, 5th Plen. Sess. (adopted June 5, 1991), AG/RES. 1080 (XXI-0/91), O.A.S. Doc. OEA/Ser.P/XXI.O.2 (1991).

32. No strong multilateral or regional efforts have been made to institute democracy in Cuba. While still formally a member of O.A.S., Cuba was suspended from the organization in 1962.

33. Larry Rohter, *Aristide Hands Power to Successor in Haiti*, N.Y. TIMES, Feb. 8, 1996, at A14.

34. Marx, *supra* note 12.

35. *Id.*

over by force, occasionally conducting raids across the border.<sup>36</sup>

In early February 2004, an armed group took over the city of Gonaïves and declared a revolt against the government.<sup>37</sup> The group took over the police station, freed prisoners from jail, and killed suspected opponents.<sup>38</sup> When the police were unable to quell this revolt, the armed groups in the Dominican Republic crossed the border and began a major campaign, attacking and taking cities and towns in the north of Haiti. Each time the insurgency attacked a city, it released all the prisoners held in jail, some of whom joined the fight. Often the insurgents executed police and other officials and prominent supporters of the elected government or Lavalas party.<sup>39</sup>

Many of the leaders of the armed insurgency had previously been implicated in large-scale violence against pro-democracy activists during the 1991–1994 de facto dictatorship. For example, Jodel Chamblain was the second in command of the death squad for the Front for the Advancement and Progress in Haiti (FRAPH), a paramilitary force aligned with the former military dictatorship. Another leader of the insurgency, Jean Pierre, alias Tatoune, was a local FRAPH leader in Gonaïves. Both had been convicted of murder in the Raboteau massacre trial.

On February 29, 2004, President Aristide was forced out of Haiti.<sup>40</sup> That day, the insurgents released thousands of prisoners from Haitian jails.<sup>41</sup> The insurgents and their allies conducted widespread attacks on supporters of President Aristide and on nonpolitical innocent peasants, which triggered an epidemic of violence. They murdered hundreds, perhaps thousands of people. There are no reliable statistics for total deaths,

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36. One of the top leaders of this group was Guy Philippe, a former soldier who had been integrated into the police force when the army was disbanded in 1995. Mr. Philippe became a high level police official. During his tenure, the United Nations Human Rights Mission in Haiti asserted that officers under his command routinely executed opposition figures and accused criminals. The United States Government accused Philippe of involvement in drug trafficking. Philippe was eventually forced to flee when it was revealed that he was plotting to overthrow the government. After he left Haiti, the authorities in the Dominican Republic arrested Philippe twice for plotting coups. Eventually they released him.

37. *Resistance Group Seizes City, Frees 100 Prisoners*, L.A. TIMES, Feb. 6, 2004, at A4.

38. *Id.*

39. See, e.g., *Haitian Rebels Bring in Reinforcements*, ST. LOUIS POST-DISPATCH, Feb. 14, 2004, at A18; Ian James, *Effort To Oust Aristide Intensifies in Haiti*, DESERET MORNING NEWS (Salt Lake City), Feb. 15, 2004, at A04; Reed Lindsay, *Gathering Storm; Gang Holding City in Haiti Allies with Former Military, Paramilitary Chiefs*, NEWSDAY, Feb. 16, 2004, at A6.

40. Lydia Polgreen & Tim Weiner, *Haiti President Forced Out; Marines Sent To Keep Order*, N.Y. TIMES, Mar. 1, 2004, at A1.

41. Matthew Hay Brown, *U.S. Leads Forces to Haiti—Power Vacuum: Aristide Flees Island Amid Rebellion, Pressure; Help on Way: 100 Marines Spearhead U.N.-Authorized Mission; Violence Sweeps Port-au-Prince in Wake of Leader's Hasty Departure*, ORLANDO SENTINEL, Mar. 1, 2004, at A1.

but the state morgue reported disposing of over 1000 bodies in the month of March 2004 alone.<sup>42</sup> Many of the bodies showed the signs of summary execution. Recently, a study<sup>43</sup> published in the prestigious British Journal, *Lancet*, reported that in the twenty-two month period after the departure of Aristide, approximately 8000 people were killed in political violence in Port-au-Prince alone.<sup>44</sup> Other human rights organizations estimate that perhaps 4000 people have been killed.<sup>45</sup> Many others have been arrested illegally by the police or by unaccountable paramilitary groups, and have been tortured. Thousands, and perhaps tens of thousands, have been forced to flee abroad or into internal exile. Many have been kidnapped and held for ransom.

Beginning in August 2004, the paramilitary forces set up command posts all over Haiti. This illegal group then openly announced the reformation of the Haitian army and brazenly marched in the streets of Port-au-Prince brandishing automatic weapons. These acts were, of course, clearly illegal. While the United Nations forces have successfully removed some of the paramilitary forces from their command posts, most units still maintain control over their command posts. Unfortunately, these paramilitary forces continue to operate with impunity and control many areas of the country.

The “three friends of Haiti”—Canada, France, and the United States—put in a puppet government to replace the democratically elected Aristide government. The United Nations sent another peacekeeping force of thousands of soldiers. Violence escalated even further. Corruption increased, the rule of law became a distant memory, and a civil war erupted pitting the de facto government and the U.N. peacekeeping force against the ghetto gangs.<sup>46</sup>

Unfortunately, political violence in Haiti does not show any signs of subsiding. Although it tapered off some in the months following the February 2004 coup d’etat, it peaked again from September 2004 through September 2005, and rose precipitously until the election of Préval in 2006.<sup>47</sup>

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42. INST. FOR JUSTICE & DEMOCRACY IN HAITI, HUMAN RIGHTS VIOLATIONS IN HAITI: FEBRUARY–MAY 2004 (2004), [http://www.haitiaction.net/News/IJDH/7\\_19\\_4.html](http://www.haitiaction.net/News/IJDH/7_19_4.html).

43. See Kolbe & Hutson, *supra* note 14. Violence in Haiti between 2004 and 2006 has also been well-documented by Amnesty International, teams from Harvard and the University of Miami Law Schools, Refugees International, the Committee to Protect Journalists and the International Crisis Group, among others. While some of the violence in Haiti is non-political, all of the reports identify perceived engagement in political activity as a significant risk factor for becoming a victim of violence.

44. *Id.* at 868.

45. Interview by Darren Ell with Peter Hallward, in Montreal, Que., Can. (May 14, 2008).

46. Letta Tayler, *Haiti A Place of Fear and Havoc*, *NEWSDAY*, Jan. 1, 2006, at 04.

47. See Jacqueline Charles, *Congress Is Asked To Let Haitians Stay: Rep. Alcee Hastings Is*

The institutions that should protect citizens from political violence have shown no capacity to do so. After the interim government assumed power, highly placed government officials sharply reduced the Haitian police force by firing many officers considered loyal to the ousted government.<sup>48</sup> In addition, the insurgents killed many other police officers, further reducing the police force. The interim government replaced the purged officers with former soldiers, many of whom had participated in the rebellion and many of whom were either convicted or accused of being involved in massive human crimes in the past, including thousands of murders.<sup>49</sup> This replacement action violated police regulations for recruitment and promotion. It also swelled the force with a large number of officers with no civilian police experience or training. These officers have never been held accountable to the official police hierarchy for violating the laws or police regulations. It appears they never will be.

The police force has also openly contributed to repression through illegal arrests, shooting at people involved in legal demonstrations, and even killing suspected political dissidents.<sup>50</sup> Some sources estimate that over 1000 political prisoners sit in Haiti's jails, the vast majority of whom have never been brought before a judge.<sup>51</sup> In some cases, the official reasons for the arrest listed in the file are "suspected association with the former regime."

Police have opened fire at crowds at several recent demonstrations. The most notable incident took place on February 28, 2005, when police shot into a crowd and killed a number of innocent people.<sup>52</sup> United Nations Peacekeepers, human rights workers, and the international media observed this "police riot." Nevertheless, the interim government did not prosecute or even discipline any of these officers for these murders.<sup>53</sup>

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*Seeking an 18-month Reprieve for Haitians Living in this Country Illegally, So They Can Stay and Work Legally*, MIAMI HERALD, Jan. 19, 2007, at 10A.

48. Letta Tayler, *Haiti No Law, No Order*, NEWSDAY, Jan. 1, 2006, at 07.

49. Interview with Brian Concannon, Jr., Dir., Inst. for Justice & Democracy, in Wash. D.C. (May 10, 2005).

50. *Id.*

51. Judith Scherr, *Justice Skewed in Haiti*, BERKLEY DAILY PLANET, Sept. 23, 2005, available at <http://www.berkeleydailyplanet.com/issue/2005-09-23/article/22376>.

52. Peter Prengaman, *Police Fire on Marchers Supporting Aristide*, ORLANDO SENTINEL, Mar. 1, 2005, at A6.

53. Interview with Mario Joseph, Attorney, Bureau des Avocats Internationaux, in Wash., D.C. (May 10, 2005). The Bureau des Avocats Internationaux (BAI) in Port-au-Prince, has helped victims prosecute human rights cases, trained Haitian lawyers and spoken out on justice issues since 1995. The BAI used to receive most of its support from Haiti's constitutional governments, but since February 2004, it has received most of its support from the Institute for Justice & Democracy in Haiti (IJDH), and no support from any government or political organization. See

Haitian police routinely shoot and kill young men and women accused of being dissidents. Although the police and even the United Nations have announced several inquiries into these killings,<sup>54</sup> I do not know of a single officer disciplined for these murders.

Some of the Haitian police officers and former military members have formed criminal gangs—murdering, kidnapping, and robbing innocent people. Any attempt to prosecute them has led to the death and disappearance of the accusers and witnesses.

Haiti's justice system does not provide protection for people targeted for persecution.<sup>55</sup> The rule of law is a sad joke. Those who complain of crimes by gang members are virtually *never* protected by the police. Indeed, some of the police, who are themselves gang members, target these victims for death or imprisonment on trumped-up charges. In most prisoner cases, the victim is denied access to a judge, or is only brought before a judge without the authority to release the prisoner. For example, in July 2004, a judge announced in court that he found no justification for the detention of Jacques Mathelier, a former government official, but gave the prosecutor time to respond. The authorities responded by transferring Mathelier outside the judge's jurisdiction to the National Penitentiary, where he remained as of the end of June 2005.<sup>56</sup> Jean-Marie Samedi, a grassroots activist, was ordered released by a judge on November 22, 2004, but the government simply ignored that order.<sup>57</sup> (Samedi later escaped from prison.) In December 2004, a judge ordered two former government officials, Harold Sévère and Anthony Nazaire, who had already spent ten months in prison, freed for lack of evidence.<sup>58</sup> Although the prosecutor approved the release, the

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INST. FOR JUSTICE & DEMOCRACY IN HAITI, THE BUREAU DES ADVOCATS INTERNATIONAUX, [http://www.ijdh.org/articles/article\\_bureau\\_internationaux.htm](http://www.ijdh.org/articles/article_bureau_internationaux.htm).

54. Interview with Brian Concannon, Jr., *supra* note 49; *see also* Brian Concannon, Jr., *Throwing Gasoline on Haiti's Fires*, BOSTON HAITIAN REP., July 2005, at 8, *available at* [http://www.ijdh.org/articles/article\\_recent\\_news\\_7-7-05.htm](http://www.ijdh.org/articles/article_recent_news_7-7-05.htm).

55. Interview with Brian Concannon, Jr., *supra* note 49; *see also* ORG. OF AM. STATES INTER-AM. COMM'N ON HUMAN RIGHTS, HAITI: FAILED JUSTICE OR THE RULE OF LAW? CHALLENGES AHEAD FOR HAITI AND THE INTERNATIONAL COMMUNITY (2005), *available at* [http://reliefweb.int/rw/RWFiles2006.nsf/FilesByRWDocUNIDFileName/LSGZ-6N4DQM-oas-hti-16mar.pdf/\\$File/oas-hti-16mar.pdf](http://reliefweb.int/rw/RWFiles2006.nsf/FilesByRWDocUNIDFileName/LSGZ-6N4DQM-oas-hti-16mar.pdf/$File/oas-hti-16mar.pdf).

56. Interview with Brian Concannon, Jr., *supra* note 49; *see also* Brian Concannon, Jr., *Disturbing the Peace*, BOSTON HAITIAN REP., Nov. 2004, at 10, *available at* [http://www.ijdh.org/articles/article\\_disturbing-the-peace.html](http://www.ijdh.org/articles/article_disturbing-the-peace.html).

57. *See* INST. FOR JUSTICE & DEMOCRACY IN HAITI, JEAN-MARIE SAMEDI, [http://www.ijdh.org/articles/article\\_jean-marie-samedi.htm](http://www.ijdh.org/articles/article_jean-marie-samedi.htm); *see also* Aff. of Mario Joseph in Support of Contention that Domestic Remedies in Haiti Are Not Available for Petitioner, Inter-Am. Comm'n on Human Rights, Pet. of Yvon Neptune, *available at* [http://www.ijdh.org/pdf/DeclarationofMarioJosephAv\\_ENU.pdf](http://www.ijdh.org/pdf/DeclarationofMarioJosephAv_ENU.pdf).

58. Lyn Duff, *Three Political Prisoners Freed in Haiti*, S.F. BAY VIEW, Apr. 20, 2006, *available at* <http://ijdh.org/pdf/RoundupApril15-242006.pdf> (located on page 35 of the file).

Minister of Justice issued an illegal order for them to remain in prison, and both remained in prison as of December 2006.<sup>59</sup>

Government officials arrested Father Gérard Jean-Juste, a Catholic priest, in October 2004 without warrant, and dragged him from his church where he was serving hundreds of children their only meal of the day.<sup>60</sup> Although the Haitian Constitution entitles detainees to a hearing within forty-eight hours, Father Jean-Juste spent seven weeks in prison with no evidence ever presented against him before being freed for lack of evidence. On July 15, 2005, police again arrested Father Jean-Juste at the airport on the basis of unsubstantiated charges.<sup>61</sup> They temporarily released him, but required him to return for more questioning. Later, they arrested him again and imprisoned him on trumped-up charges. After he spent several more months in jail, and after a firestorm of international criticism, the interim government allowed him to go to Miami to be treated for cancer.<sup>62</sup>

Judges are under significant pressure not to release prisoners, regardless of the evidence against them. In July 2004, ANAMAH, the national judge's association, issued a press release condemning executive interference in judicial matters.<sup>63</sup> In December, the Minister of Justice personally wrote to the Chief Judge of the Port-au-Prince Trial Court, ordering him to take all the cases away from Judge Fleury, who had ordered Father Jean-Juste's release.<sup>64</sup> The Minister of Justice also ordered the Chief Judge to take all the cases away from Judge Fabien, who had ordered the release of four other people who had spent ten months in jail on trumped-up charges.<sup>65</sup> One of the judges resigned in

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59. *See id.*

60. *Haiti Human Rights Alert: Illegal Arrest of Catholic Priest, Rev. Gérard Jean-Juste*, INST. FOR JUSTICE & DEMOCRACY IN HAITI, Oct. 18, 2004, [http://www.ijdh.org/articles/article\\_human\\_rights\\_alert\\_oct1304.htm](http://www.ijdh.org/articles/article_human_rights_alert_oct1304.htm).

61. Letter from Maxine Waters, U.S. Rep., to James Foley, U.S. Ambassador to Haiti (July 15, 2005), *available at* [http://www.ijdh.org/articles/article\\_jean\\_juste\\_letter.htm](http://www.ijdh.org/articles/article_jean_juste_letter.htm).

62. Alva James-Johnson, *A Long Road for Priest; In Broward, Rev. Jean-Juste Finds Relative Obscurity a Blessing*, FLA. SUN-SENTINEL, Dec. 4, 2006, at 1B.

63. Irwin P. Stotzky, *Introduction to ANNA MANCE ET AL., HAITI: HUMAN RIGHTS INVESTIGATION: MARCH 11-16 2006*, at 6 (Ctr. for the Study of Human Rights, Univ. of Miami School of Law 2006); *New Haitian Human Rights Report: Miami Law School Investigates UN "Failures"*, HAITI ACTION.NET, July 22, 2006, [http://www.haitiaction.net/News/CSHR/7\\_22\\_6/7\\_22\\_6.html](http://www.haitiaction.net/News/CSHR/7_22_6/7_22_6.html).

64. Aff. of Mario Joseph in Support of Contention that Domestic Remedies in Haiti Are Not Available for Petitioners, Inter-Am. Comm'n on Human Rights, Pet. of Haiti Citizens Against the Interim Gov't of Haiti, the United States, and Brazil, *available at* [http://www.ijdh.org/articles/article\\_jachr\\_2-2-06d.htm](http://www.ijdh.org/articles/article_jachr_2-2-06d.htm).

65. Memorandum from Maren Dobberthien, Bureau des Avocats Internationaux, Mario Joseph, Bureau des Avocats Internationaux, Brian Concannon Jr., Inst. for Justice & Democracy in Haiti to December 5 Case File (Apr. 21, 2006), *available at* [http://www.ijdh.org/articles/article\\_recent\\_news\\_4-24-06.html](http://www.ijdh.org/articles/article_recent_news_4-24-06.html).



protest. These orders are as illegal in Haiti as they are in the United States.

Neither the police nor the judiciary effectively investigate or prosecute killings. Although the government has made arrests in some high profile incidents, in most cases these arrests were illegal, and no evidence has been presented against the accused. As a result, the justice system provides almost no deterrence to would-be political killers.

The press is not able to monitor the police effectively. As the Committee to Protect Journalists and others have documented, attacks against journalists by private groups and the government have sent many journalists into hiding, and silenced others.<sup>66</sup> In mid-January 2005, the police executed Abdias Jean, a journalist with a Florida radio station, after he witnessed police execute two men.<sup>67</sup> Several press organizations and even UNESCO denounced this killing. "In another notorious incident in January 2005, Prime Minister Gerard Latortue threatened journalist Guy Delva, the correspondent for Reuters in Haiti and the head of the Haitian Journalists Association."<sup>68</sup> Journalists who criticize the insurgents, the gangs, the police, and the government have been threatened, beaten, even kidnapped.

An unprecedented level of violent non political crime accompanied Haiti's political violence, especially between 2005 and 2006. There has been a wave of murders, kidnappings, beatings, and robberies, which the police have proven powerless to combat. The common crime has two connections with the political violence. First, in some cases it is conducted by groups that originally armed themselves for political reasons and then became gangs involved in robberies and drug running. Second, the common crime can be a convenient cover for the political crime. It would be easy to arrange for a political opponent or witness to be killed and simply disguise it as an ordinary murder.

The recent national elections, including the presidential election, were postponed several times.<sup>69</sup> They were originally scheduled for October, then rescheduled for November and then December 2005, and then rescheduled again for January 2006.<sup>70</sup> The election finally took

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66. See Brian Concannon Jr., Dir. of Inst. for Justice & Democracy in Haiti, Inter-Am. Comm'n on Human Rights, General Situation of Human Rights in Haiti Hearing (Mar. 4, 2005), available at <http://www.ijdh.org/brian.pdf>.

67. *Id.*

68. *New Haitian Human Rights Report: Miami Law School Investigates UN "Failures,"* *supra* note 63.

69. Kathie Klarreich, *Kidnapping an Election; With Gangs Rampant in the Streets, Democracy in Haiti Takes a Backseat to Chaos and Insecurity*, TIME, Jan. 9, 2006, at 38.

70. See Danna Harman, *Haiti Heads to Polls . . . at Last*, CHRISTIAN SCI. MONITOR, Feb. 7, 2006, at 1.

place in February 2006.<sup>71</sup> On February 7, 2006, the people of Haiti elected René Préval as their next President.<sup>72</sup>

Haiti's elections caused an increase in political violence. Many people, especially supporters of the ousted government, opposed having elections at all.<sup>73</sup> Those who participated, especially the former military people and gang members, did everything they could to prevail, including murdering any common citizen whom they perceived as being opposed to their candidate or to the corruption of the system itself. The police and gang members used the elections as a front to murder witnesses to their crimes.

President Préval's inauguration took place on May 14, 2006.<sup>74</sup> A new government took office on June 6, 2006.<sup>75</sup> These positive developments suggested that human rights and security conditions in Haiti would improve. This, however, has not been the case. Indeed, the situation continues to deteriorate.

Between 2004 and 2006, during the Latortue reign, untold numbers of innocent Haitians have been summarily executed, arbitrarily thrown into prison, tortured or driven into hiding. The political violence is widespread, systematic, and targeted against the urban and rural poor suspected of being opposed to the present regime and its affiliates. Perpetrators of this violence include the Haitian National Police and death squad elements, such as gang members, working with the police. The violence continued, indeed increased, particularly between 2005 and 2006.<sup>76</sup> Kidnappings of those considered "wealthy" by the gang members, particularly Americans, have increased exponentially.<sup>77</sup> According to the FBI, at least twenty-eight Americans were kidnapped and three killed in attempted abductions in 2005 alone.<sup>78</sup> Haiti has replaced

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71. *Id.*

72. Richard Dufour & Keith Jones, *Washington Reluctantly Concedes Préval Is Haiti's President-Elect*, WORLD SOCIALIST WEB SITE, Feb. 21, 2006, <http://www.wsws.org/articles/2006/feb2006/hait-f21.shtml>.

73. One of the reasons they opposed the elections was because they feared losing their monopolies on power.

74. Manuel Roig-Franzia, *Préval Sworn in as Haiti's President; Returning Leader Urges Citizens To Nurture Peace in Restored Democracy*, WASH. POST, May 15, 2006, at A10.

75. Brian Concannon Jr., *Haiti's Political Prisoners Exemplify Challenges of Democratic Transition*, POWER AND INTEREST NEWS REPORT, Sept. 11, 2006, [http://www.pinr.com/report.php?ac=view\\_report&report\\_id=552](http://www.pinr.com/report.php?ac=view_report&report_id=552).

76. See Reed Lindsay, *Haiti's Image of Fear 'A Big Myth' to Some; Tourists, Foreign Investors Keep Their Distance*, WASH. TIMES, Mar. 4, 2008, at A12.

77. See, e.g., *Spotlight: Haiti—Kidnapping Criminal or Political?—Calm Threatened by Recent Crime Surge*, MEMPHIS COMMERCIAL APPEAL, July 23, 2006, at A8; Carol J. Williams, *The World: Wave of Kidnappings Heightens Sense of Terror in Haitian Capital*, L.A. TIMES, June 29, 2005, at 4.

78. Joe Mozingo, *Abductions for Ransom Soar in Haiti*, MIAMI HERALD, Dec. 7, 2005, at 1A.

Colombia as the kidnapping capital of the hemisphere.<sup>79</sup> Anyone who is perceived by the gangs as having any money, such as a criminal deportee from the United States, is at great risk of being kidnapped and held for ransom.

The increased violence will likely continue for several reasons. First, the people involved in the past persecution remain at large. The interim government or the rebels freed every person imprisoned under the democratic governments in connection with human rights violations. At least two people with credible accusations of large-scale persecution against them ran as Presidential candidates in the February 2004 elections: rebel leader and former soldier, Guy Philippe, and Franck Romain, a Duvalierist and former mayor of Port-au-Prince who spent sixteen years in exile fleeing formal charges that he masterminded the 1987 massacre at the St. Jean Bosco church.<sup>80</sup> The only major arrest for human rights violations committed under the interim government was for the August 2005 soccer massacre, and government officials were freed on March 9, 2006.<sup>81</sup> In the lead-up to the February elections, President Préval had to cancel many of his campaign appearances, including his final rally, because his opponents threatened violent demonstrations if he appeared. Although redemocratizing the police and justice systems may eventually create a deterrent to political persecution, with current personnel it is unlikely that the police will make serious efforts to protect people from political violence in the near term. Between July 4 and July 7, 2006, paramilitary attacks on the Grande Ravine neighborhood left twenty people dead.<sup>82</sup> No arrests, to my knowledge, ever occurred for those attacks.

Second, although the police technically answer to constitutional authorities, it is unlikely that the constitutional authorities will be able to purge the former soldiers that the interim government illegally integrated into police ranks. These officers have engaged in a disproportionate amount of brutality and political persecution, and it is likely that they will continue to do so until they are purged. The police force is sharply reduced already while common crime is very high, so the government will be reluctant to fire more police officers, even brutal or crooked ones. The supporters of the integrated officers in the force, and in influential sectors of society at large, will fight any purge, and the new gov-

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79. *Id.*

80. *Haiti: Thirst for Justice: A Decade of Impunity in Haiti*, HUMAN RIGHTS WATCH, Sept. 1996, <http://hrw.org/reports/1996/Haiti.htm>.

81. Reed Lindsay, *Gang Killings May Be Political; 21 Slain in Slum; Gunmen Likely Tried To Destabilize Government*, WASH. TIMES, July 14, 2006, at A15.

82. Dave Welsh, *Thousands March in Haiti Demanding End to Reign of Terror*, HAITIACTION.NET, [http://www.haitiaction.net/News/HAC/10\\_14\\_6/10\\_14\\_6.html](http://www.haitiaction.net/News/HAC/10_14_6/10_14_6.html).

ernment will be reminded that the same people played a key role in removing Haiti's last constitutional government.

Third, the judges and prosecutors who participated in the justice system's repression under the interim government are still in their positions, and still engaging in persecution. After more than two and a half years in office, the elected government has shown little ability to stop this persecution. Indeed, almost all of the political prisoners and criminal deportees remain incarcerated.

Fourth, the precedent set in February 2004—where political violence overthrew an elected government—will encourage those left out of the government to seek power through violence. If they do, they will likely start by murdering innocent people. Haiti finds itself in almost as bad a condition as before the first election of Aristide in 1990, when the Duvaliers still ruled. Indeed, between 2004 and 2006, Haiti was a newsreel in reverse—foreign occupation, a repressive, corrupt government, and rampant, unchecked political violence.

The international effort continues. The attempt to help Haiti create the necessary infrastructure for democracy to develop—economically, politically, and socially—however, has not been as successful as the original military intervention. Unfortunately, the results of the outside world's intervention in Haiti may well prove unsuccessful and impermanent in a way that Graham Greene<sup>83</sup> would have well understood. Nevertheless, the questions that the Haiti case raises are surprisingly numerous and important. For example, is democracy so widely accepted as an international norm, at least in the Western Hemisphere, that the international community has a right, indeed even a duty, to restore it when it is forcibly overthrown by a military coup and whose *de facto* government has committed gross human rights violations, trampled on the rights of the people, and caused massive refugee flows? If so, what particular bodies can legitimately (and legally) exercise such a right of intervention? Can an outside military intervention and then a peacekeeping mission create the conditions for democracy to develop and help to secure it?

Before analyzing some of these issues, several preliminary observations seem relevant. They color the horizon and add perspective to the analysis. The first is the role of the United States, and the decision to use force. The United States took a very long time and a circuitous path to decide to use force. Indeed, it is not the case that the United States was intent on intervening militarily in Haiti from the beginning of the crisis and originally planned on using the O.A.S. and the U.N. as institutional

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83. See generally GRAHAM GREENE, *THE COMEDIANS* (1966) (depicting such failure during the Duvalier reign of terror).

structures in which to implement and legitimize its military plans.<sup>84</sup>

In point of fact, as the Haitian crisis developed, it was not at all clear what the Clinton Administration intended to do in Haiti. Clinton appeared first to favor negotiations, then economic sanctions, and later a naval blockade to force the coup leaders out. Mysteriously, Clinton's position vacillated almost daily. It was only after several years of inconsistent approaches and actions by the United States, including the forced repatriation of thousands of Haitian refugees, coupled with severe domestic criticism of his actions by the Congressional Black Caucus, human rights organizations and other groups, and the skilled work of Aristide in exerting domestic and international pressures on Clinton, that Clinton decided to use force. In retrospect, it now seems self-evident that only the threat or the use of force would dislodge the de facto regime from Haiti. But this was not so obvious to those involved, and there was certainly no strong United States interest in taking military action.

It is irrefutable that the decision to use force was reached late and somewhat chaotically, through the vagaries and uncertainties of the American domestic political process. The Clinton Administration employed the U.N. framework to legitimize military action only after the United States concluded that force was absolutely necessary to restore the Aristide government to power.<sup>85</sup> Security Council resolution 940 gave authority for "all necessary means"—meaning the use of military force—to be used.<sup>86</sup> This, of course, helped to legitimize military action in a divided and skeptical United States.

A second, and perhaps a contentious observation, is that one of the main catalysts—if not the main catalyst—for United States intervention in Haiti was the migration to the shores of South Florida of vast numbers of Haitian refugees who were seeking asylum in the United States. As a result of the 1991 military coup and President Aristide's ouster from power, thousands of Haitians seeking asylum departed Haiti by boat and attempted to reach the United States.<sup>87</sup> Between 1992 and 1994, the

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84. Both because of domestic and international pressure, President Clinton realized that the use of force should be a last resort. Indeed, domestically, Clinton did not want to adhere to the War Powers Resolution for a variety of reasons, including getting into a public battle with members of Congress opposed to using military force to return Aristide to power. See John J. Kavanagh, *U.S. War Powers and the United Nations Security Council*, 20 B.C. INT'L & COMP. L. REV. 159, 180–82 (1997).

85. See Tom Squitieri, *U.S. Studies Haiti Invasion/Military Action Would Return Ousted President*, USA TODAY, May 2, 1994, at 1A. Senator Bob Graham, a vocal proponent of more drastic change, firmly believed that economic sanctions would not work, and advocated invasion. Susan Benesch, *Graham: Be Ready for Haiti Invasion*, MIAMI HERALD, June 20, 1994, at A8.

86. S.C. Res. 940, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

87. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 163 (1993).

United States Coast Guard interdicted Haitians bound for the United States on the high seas and returned them directly to Haiti.<sup>88</sup> This action was taken in direct violation of an agreement between the Haitian and United States governments and in violation of international law. Many of those who were returned to Haiti faced persecution from the de facto government. The inflow of refugees increasingly became a politically sensitive issue, and it was in response to domestic political pressure to take action to stem the tide of boat people that the Clinton Administration pushed for an internationally sponsored intervention in Haiti. Clinton feared that the spectacle of thousands of poor, black Haitians washing up on Florida's shores would harm his presidential reelection campaign.<sup>89</sup> He particularly feared that he would lose votes in Florida, a pivotal state in his reelection strategy.<sup>90</sup> Stated otherwise, the major reason for the United States led intervention was the flow of refugees to the United States and Clinton's fear of losing vital votes because of it. Every other issue, including the murders of 5000 people, took a back seat to that reason. It is likely that the Clinton Administration hoped that if democracy could be "restored" to Haiti, perhaps the flow of refugees would cease. The fear of Haitian boat people continues to be a strong incentive for United States aid to Haiti.

A third observation, and quite a troubling one, is also irrefutable. Particular elements of the United States government encouraged the intransigence of the military coup leaders and thus needlessly prolonged the crisis, with dire consequences for the Haitian people. Select members of Congress and the defense establishment, most notably officials of the Central Intelligence Agency (C.I.A.), the Pentagon, and the State Department, continued to assure the coup leaders, in subtle and not so subtle ways, that the United States actually supported the de facto military government and not the democratically elected Aristide government.<sup>91</sup> The de facto military leaders simply did not believe that the United States and the international community would ever take military action to restore Aristide to power. The coup leaders, therefore, placated the international community by pretending to negotiate with the Aristide government in good faith, all the while hoping to prolong the return of Aristide until his official term in office had ended.

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88. Intense litigation ensued over these actions. See, e.g., *id.*; Haitian Refugee Ctr., Inc. v. Baker, 953 F.2d 1498 (11th Cir. 1992).

89. Randy Lilleston, *Déjà Vu for Clinton*, ARK. DEMOCRAT-GAZETTE, July 10, 1994, at 13A. 90. *Id.*

91. See IRWIN P. STOTZKY, SILENCING THE GUNS IN HAITI: THE PROMISE OF DELIBERATIVE DEMOCRACY 30-41, 166-76 (1997); Susan Benesch, *Haitian Army Trades Truncheons for Trumpets*, MIAMI HERALD, June 12, 1995, at 1A; Larry Rohter, *Aristide Weakens Army and Makes It Dependent on Him*, N.Y. TIMES, Jan. 15, 1995, at 8.

In addition to encouraging the coup leaders not to compromise with the Aristide government, the United States government officials opposed to Aristide orchestrated a campaign to smear Aristide's public image. Early in Aristide's exile, for example, the C.I.A. distributed a false report that branded Aristide as mentally unstable, claiming that he had spent time in a mental hospital in Canada.<sup>92</sup> The C.I.A. also spread a false rumor that Aristide and his cohorts committed political assassinations.<sup>93</sup> Senator Jesse Helms, who has always had reservations about Aristide and attempted to undermine President Clinton's goal of restoring Aristide to power, basing his conclusions on the C.I.A. report, referred to Aristide as a "psychopath" and a "demonstrable killer."<sup>94</sup> The report was a sham. The Cable News Network (C.N.N.) found no report of Aristide being treated for mental depression or any other problem in Canada, and the report was revealed to be based on unconfirmed information supplied by the very people who overthrew Aristide.<sup>95</sup> The C.I.A. admitted that it had been paying individuals in the Haitian military leadership for this and other kinds of information since the early 1980s.<sup>96</sup> These, and other actions<sup>97</sup> taken by those United States officials opposed to Aristide's return, clearly continue to cause problems for the creation of democracy in Haiti.

A fourth important observation is also a somewhat touchy and speculative one. It is whether there was an implicit or explicit agreement among the five permanent members (the Permanent Five)<sup>98</sup> of the U.N. Security Council. While there is no direct proof of this, there has been a great deal of speculation that horse trading took place to allow the military intervention in Haiti. The speculation suggests that in exchange for a free hand in Haiti, including the use of force, the United States agreed

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92. STOTZKY, *supra* note 91, at 45 n.39 (citing Elaine Sciolino, *Haiti's Man of Destiny Awaiting His Hour; Haiti's Man of Destiny Awaits Transition from Political Martyr to Statesman*, N.Y. TIMES, Aug. 3, 1993, at A1).

93. Irwin P. Stotzky, *Democracy and International Military Intervention: The Case of Haiti*, in DEMOCRACY AND HUMAN RIGHTS IN LATIN AMERICA 125, 130 (Richard S. Hillman et al. eds., 2001).

94. *Id.*

95. *U.S. Rejects Document on Aristide's Health*, N.Y. TIMES, Oct. 31, 1993, at L12.

96. See Tim Weiner, *Key Haiti Leaders Said To Have Been in the C.I.A.'s Pay; Aristide Aides Angered*, N.Y. TIMES, Nov. 1, 1993, at A1.

97. These sources continued to spread false and unsubstantiated information about Aristide and his government after Aristide had been reinstated. The worst of these rumors suggested that Aristide and his associates were involved in numerous political murders. The accusations continue through today. Even in exile after his forced ouster from office in 2004, Aristide is now being portrayed as the power behind the throne, a murderer, and either a drug dealer or a leader who gets paid off by drug dealers. For a discussion of these and other issues about the opposition to the Aristide and Préval governments in the United States, see STOTZKY, *supra* note 91.

98. The Permanent Five includes China, France, the Soviet Union (now Russia), the United Kingdom, and the United States.

that other members of the Security Council could have a similarly free hand in their areas of influence. For example, Russia wanted autonomy to deal with Georgia and Tajikistan, and believed that France and the United States owed it such a free hand in exchange for its support of French action in Rwanda and United States action in Haiti. In reading the discussions of the Security Council during this period, there certainly appears to be an acceptance by the Permanent Five that actions taken in their regions of interest would be tolerated by the other Security Council members. To put it another way, national political concerns rather than deep moral principles seem to have played the most crucial role in the use of force in Haiti.

One final observation. In many parts of the world, particularly in Latin America and the Caribbean, including Haiti itself, there was and remains a deep suspicion of United States military intervention,<sup>99</sup> and with good reason. Such intervention in the past invariably had questionable purposes and results. It was almost always used to support rather than to overthrow authoritarian regimes and to support United States commercial interests. The 1915–1934 United States occupation of Haiti is a prime example.<sup>100</sup> One result of this history was that the O.A.S., while struggling valiantly to do the right thing about Haiti, was not able to do everything necessary to restore democracy. The U.N. Security Council was better situated and able to make the difficult decisions than was the O.A.S., the principal regional body. Employing the U.N. Security Council as authority for the intervention also offered the Clinton Administration an important moral force. Most importantly, the U.N. approval of the use of force limited the international and domestic opposition to the United States-led action.<sup>101</sup>

There were other advantages to U.N. approval. The coalition-building role that the United States had to assume, to get international support through the Security Council for the intervention in Haiti, was critically important. It helped shape United States methods and goals in Haiti, and for the better. Moreover, the fact that the United States did put together an internationally accepted policy on Haiti suggests broader consequences for the methods employed to justify the use of force in the future. Unilateral military action by the United States has certainly become more difficult to justify after the internationally sanctioned military intervention in Haiti.

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99. Iraq, of course, makes the point even stronger.

100. For a discussion and analysis of the United States occupation of Haiti see HANS SCHMIDT, *THE UNITED STATES OCCUPATION OF HAITI, 1915–1934* (1971).

101. Pamela Constable, *U.S., Others Condemn Haiti for Expulsions; Opposition to an Invasion Lessens*, BOSTON GLOBE, July 13, 1994, at 8; Lucia Mouat, *As UN Council Weighs US Invasion of Haiti, All Eyes on the Junta*, CHRISTIAN SCI. MONITOR, July 25, 1994, at 1.



These observations put into context the underlying, but perhaps well-hidden, reasons for the intervention. They show the role of power in the resolution of international legal issues. They act as filters on the possibilities of future international interventions. On a broader level, they also help keep the focus on the possible transformative resolutions to some of the incredibly difficult problems facing nations undergoing the transition process.

A note of caution. The issues involved are highly complex, layered, and ever changing. Every nation has its own peculiar culture, history, social structure, and economy. Thus, every case is, in some sense, *sui generis*. Nonetheless, broad patterns can be discerned and generalizations can be made that are quite helpful in analyzing the transition process and the possibilities of developing strong democracies in former authoritarian nations.

What are the implications of these observations? Suppose the United States decides to use military force to “restore democracy” to Colombia, Ecuador, or Venezuela.<sup>102</sup> Is Haiti a precedent for a future legal and legitimate humanitarian intervention in other states? Indeed, Security Council mandated use of force in support of democracy in Haiti will surely be cited as a precedent for similar action in some other country. But too much should not be made of the Haiti case, and certainly not a new international legal doctrine. The decision to use force to restore Aristide to power came about only after many other approaches over a three-year period failed, including a series of economic sanctions, attempted negotiations, and a naval blockade,<sup>103</sup> so that its ground breaking nature is less compelling as a precedent than it might otherwise be. Moreover, the Security Council’s decision to use force was driven almost exclusively by the national interests of the United States, particularly President Clinton’s fear that Haitian refugee migration to the shores of South Florida would upset his reelection strategy and cause him to lose Florida, and thus the presidency. Furthermore, the anticipated effective military opposition from Haiti was virtually nonexistent. Even more significant is another unique situation. The democratically elected head

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102. This is not such a far-fetched possibility. Colombia, for example, presents serious concerns for its neighbors. Its two most consuming problems—the drug trade, and a brutal, nearly forty year civil war—are getting worse. They increasingly threaten neighboring countries. Venezuela, one of the largest suppliers of oil to the United States, is seen as particularly vulnerable. But now that Chavez has taken power, perhaps it is less vulnerable. The Clinton Administration unveiled a \$1.3 billion dollar plan to help Colombia, which included \$955 million dollars in security assistance. The plan risked dragging the United States into a costly counter-insurgency war and close alliance with Colombia’s military forces. See Editorial, *Dangerous Plans for Colombia*, N.Y. TIMES, Feb. 13, 2000, at WK16; see also David Adams, *Colombia Aid Gets New Scrutiny*, ST. PETERSBURG TIMES, May 4, 2007, at 10A.

103. STOTZKY, *supra* note 91, at 30–41.

of government essentially authorized these steps in exile. In addition, a strong regional interest existed in reversing the coup against Aristide, both because of the refugee flows from Haiti and because of the fear that the military forces in other emerging democracies would be encouraged by the intransigence of the Haitian coup leaders. All of these conditions were singular.

Moreover, world events since that time suggest a cautious approach in the use of Haiti as a precedent for the use of multinational military interventions all over the world. For example, the palace coup in Cambodia in which the second Prime Minister effectively removed the first Prime Minister in July 1997<sup>104</sup> provoked no serious talk at the U.N. of military intervention. This is so even though the U.N. had played an instrumental role in the Cambodian elections leading to the creation of the first Prime Minister's government.<sup>105</sup> Further, the commission of massive human rights abuses in other nations after the Haiti experience simply did not lead to multinational military intervention. For example, human-rights abuses in East Timor, Afghanistan,<sup>106</sup> and Algeria have not brought military intervention by the international community for a variety of reasons, including historical and regional factors, economic interests, the causes of the violations, the scale of the problem, and the perceived cost of the remedy. (The U.S. invaded Iraq, of course, without the sanction of the U.N.)

But the Haiti case is a precedent in several ways. Never before had the Security Council authorized force to remove a *de facto* government and reinstate a democratic one within a Member State. Never before had the international community used force to restore a democratically elected president and replace the very coup leaders who had overthrown him. If the United States wishes to act multilaterally again in the Western Hemisphere, its approach to Haiti should act as an important precedent. There is a caveat to offer, however. The circumstances of the Haiti case were unique, particularly in the domestic politics of the United States, and unlikely to be replicated.

There are, nonetheless, some important lessons to be learned from the Haiti crisis and the intervention that may be suggestive for future crises. To begin with, military enforcement of economic sanctions imposed on a state as a means for preventing repression can itself have serious effects on the well-being of the nationals of that country. The

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104. See Tom Fawthrop, *Prince Removed by Hun Sen in Cambodia Coup*, TIMES (London), July 7, 1997, at 13; Keith B. Richburg, *Hun Sen Gains Prominent Ally; Ousted Cambodian Prince's Foreign Minister Named Co-Premier*, WASH. POST, July 17, 1997, at A25.

105. See Fawthrop, *supra* note 104.

106. There were other reasons, of course, for the use of military force in Afghanistan.

sanctions imposed on Haiti created considerable hardships on the very people (the Haitian people) who were meant to be helped. This resulted in or at least aggravated serious problems of malnutrition, deteriorating health care, and hunger that approached starvation. The sanctions also harmed the ability of hospitals and relief organizations to function because of the lack of fuel. In addition, the international community withheld supplies from the de facto regime to put added pressure on it.<sup>107</sup> In turn, the de facto leaders withheld supplies from the Haitian people to place pressure on the international community. At the same time, Haiti's military leaders and the economic elite avoided economic hardships by smuggling supplies for themselves across the porous border with the Dominican Republic.<sup>108</sup> The de facto military government actually thrived on the embargo and other economic sanctions by taking over the drug trafficking business.<sup>109</sup> Context is crucial. Economic sanctions are effective only if the rational economic maximizer (here the de facto regime) perceives that it will be harmed.

Second, the interplay between the U.N., the O.A.S., and the United States was a significant element of the intervention. It led to sanctions, forced negotiations and, eventually, military intervention. But it was the United States that intended to and indeed did call the shots, while simultaneously being somewhat constrained by these organizations. While the United States was eager to obtain U.N. approval for military intervention and to develop cooperation with these international organizations and, more particularly, certain nations, in the end it wanted to decide when and how to intervene. The multilateral approach, however, to some extent, limited the freedom of the United States to act unilaterally. Horse-trading almost certainly took place.

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107. E.g., Brian Concannon Jr., '*Naje Pou Soti*': *Legal Obstacles Facing Haiti's Prével*, JURIST, Mar. 8, 2006, <http://jurist.law.pitt.edu/forumy/2006/03/naje-pou-soti-legal-obstacles-facing.php>; Kenneth Freed, *Next Step; Haiti: A Society Burning with Sorrow*, L.A. TIMES, Oct. 26, 1993, at 1 (estimating that more than ten thousand people have starved to death since the first international embargo went into effect in October 1991); see also Howard W. French, *Study Says Haiti Sanctions Kill Up to 1,000 Children a Month; Harvard Report Finds a Big Rise in Malnutrition*, N.Y. TIMES, Nov. 9, 1993, at A1 (estimating that, as a result of embargo, an additional thousand Haitian children were dying each month).

108. Terry Atlas, *U.S. Lifts Most Haiti Sanctions Curbs Remain on Military, Nation's Elite*, CHI. TRIB., Sept. 27, 1994, at 1; Anne-Marie O'Connor, *Haiti's Wealthy May Avoid Sting of Sanctions*, PITTSBURGH POST-GAZETTE, June 11, 1994, at A4.

109. STOTZKY, *supra* note 91, at 175-76 (1997). For example, Joseph Michel Francois was the Chief of Police of Port-au-Prince during the de facto government's reign of terror between 1991 and 1994. He was heavily involved in drug trafficking. Indeed, on March 7, 1997, he was indicted in Miami on charges that he helped smuggle 66,000 pounds of cocaine and heroin into the United States. Indictment, *United States v. Ketant*, No. 97-6007, at 11-14 (S.D. Fla. Jan. 21 1997). He placed the military structure in Haiti under his control to help ship large amounts of drugs into the United States. I discovered much of this information as the chairman of an international drug commission in Haiti from 2000-2003.

Third, the Security Council resolution contained some important restrictions that affected the development of troops in Haiti. It authorized invasion only by a "multinational force," so that the United States had to seek support from other states. Moreover, the resolution authorized using "all necessary means" only to "facilitate the departure from Haiti of the military leadership consistent with the Governors Island Agreement."<sup>110</sup> Furthermore, with respect to a new government, it authorized only the restoration of the Aristide government.<sup>111</sup> This is important because Aristide was viewed negatively by many politicians—mostly very conservative and right-wing politicians—in the United States. The resolution also established a U.N. observer force to monitor the operations of the multinational force and to lay the groundwork for a peacekeeping force.<sup>112</sup>

Fourth, the Haiti case illustrates the inherent tension between seeking all possible non-forcible means for ending a crisis and effectively addressing that crisis. For example, the last-hour success of the Carter delegation in averting a violent military invasion undoubtedly saved lives. Unfortunately, it also resulted in recognition of the "honor" of and a general amnesty for the de facto military leaders who had frequently been branded by President Clinton as thugs and murderers. One can generalize from these facts as follows: the less force used in the intervention, the greater is the sense that the international community is not intruding too excessively into the sovereignty of a nation. At the same time, however, the less forcible the intervention, the greater must be the compromises made by the international community to accommodate the de facto authorities who necessitated the intervention in the first place. This, of course, may cause problems for the creation of a democracy for years to come.<sup>113</sup>

Fifth, Haiti is an example of a pattern of initial intervention led by a major power to be followed by a U.N.-commanded force charged with assisting in establishing, to some extent, some form of national reconciliation. The U.N. demanded that the initial force disarm the de facto government forces because it feared that a U.N.-commanded force would be unable to do so. The United States, however, refused to engage in a broad disarmament campaign, which has resulted in serious security problems for the democratically elected government and the people of Haiti.

Sixth, the Haitian people strongly desired justice and reconciliation,

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110. S.C. Res. 940, *supra* note 86, ¶ 4.

111. *Id.*

112. *Id.*

113. See STOTZKY, *supra* note 91, at 17–51.

thereby establishing a strong basis for the international community to provide useful assistance and resources to Haiti in helping to create the conditions needed to establish a democracy. But, over the years, frustration has replaced hope. Increased violence has replaced frustration.<sup>114</sup>

Seventh, it is undeniable that Security Council resolution 940<sup>115</sup> will be seen in at least two ways. It will be seen as a precedent for a very expansive view of what can constitute a threat to international peace and, therefore, used in support of multinational action through the U.N. to promote the development (or at least the preservation) of democracies. On the other hand, as I stated above, Haiti may also be seen as a singular, unusual case in which the vagaries of domestic United States politics are not likely to be repeated.

Finally, the Haiti case illustrates the difficulty that the United States government faces in using force unilaterally or even with multinational support and, simultaneously, a method for overcoming any domestic roadblocks to the use of force. The difficulty in using force reflects the influence of the doctrine attributed to General Colin Powell when he served as Chairman of the Joint Chiefs of Staff.<sup>116</sup> According to this doctrine, United States military force should be used abroad only rarely, and then with overwhelming power, in order to avoid debilitating casualties and engagements such as the Vietnam War.<sup>117</sup> This approach caused the Pentagon to oppose most of the military engagements urged on it by others in Washington.<sup>118</sup> As long as Powell remained in power (until September 1993), the use of force in Haiti was unlikely.<sup>119</sup> In addition, Powell's doctrine derived not only from his personal charisma and military credentials, but also from Clinton's weak position vis-à-vis the United States military. He was seen as someone who had chosen to avoid serving in Vietnam and whose earliest policy priorities included the acceptance of gays in the military, which had foundered ignominiously on the Pentagon's opposition.<sup>120</sup>

Precisely because Clinton's military options on Haiti were circumscribed by the Pentagon's reservations and by Congressional skepticism over the use of force in Haiti, a U.N. framework for addressing the crisis

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114. For a discussion of some of these problems and possible solutions to them, see discussion *infra* Parts IV and V.

115. See S.C. Res. 940, *supra* note 86.

116. See COLIN L. POWELL WITH JOSEPH E. PERSICO, *MY AMERICAN JOURNEY* 434 (1995).

117. *Id.*

118. For example, Powell quotes Madeline Albright as chafing at the constraints his policy imposed on United States policy in Bosnia. See *id.* at 576.

119. He changed course on Iraq. This will forever remain a blot on his record.

120. Cf. Steve Goldstein, *Colin Powell: Will He Run? He's Not Talking About a White House Bid. Both Supporters and Detractors Wonder*, PHILA. INQUIRER, Dec. 21, 1994, at A01 (discussing Colin Powell's service in Vietnam and his opposition to allowing gays in the military).

was invaluable to Clinton. Thus, as of 1993, the U.N. was at the heart of Clinton's Haiti policy. Once the Clinton Administration decided that only the use of force would dislodge the de facto regime in Haiti, it still faced the very tricky problem of lending domestic and international legitimacy to this goal. It used the U.N. Security Council to achieve it. For example, with Security Council authorization in hand, the Clinton Administration did not seek Congressional support for the multinational force under the War Powers Resolution,<sup>121</sup> as many of its critics in Congress of both parties then demanded.<sup>122</sup> The timing of the multinational forces landing in Haiti was apparently designed to occur before Congressional opposition overwhelmed the Clinton Administration.<sup>123</sup> Thus, one important lesson from the Haiti case is that the multilateral route for the promotion of what is perceived as United States national interests and for the use of force can be rewarding. It certainly can help to overcome domestic opposition and perhaps even convince domestic opinion of the legitimacy of the use of force to "restore democracy." It can also be used to defuse any regional opposition to such strategy.<sup>124</sup>

#### IV. THE TRANSITION PROCESS

The Haiti case is suggestive for other significant reasons. It teaches important lessons about the difficulties of the transition process and the creation and stabilization of a democratic nation. It demonstrates that if the relevant political actors, both domestic and international, are to be successful in helping to create the conditions for democracy to bloom, they must be highly educated and thoughtful on a number of significant issues. They must be intimately familiar with, and understand the history and culture of, a nation. They must understand the major problems and

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121. See 50 U.S.C. §§ 1541–1548 (2008). The Act was passed in 1973 to constrict the President's ability to introduce United States military forces into hostilities without congressional approval.

122. E.g., Marilyn Greene, *GOP Puts Clinton on Notice: Foreign Policy Our Game Now*, USA TODAY, Dec. 12, 1994, at 10A. See JOHN HART ELY, *WAR AND RESPONSIBILITY: CONSTITUTIONAL LESSONS OF VIETNAM AND ITS AFTERMATH* (1993).

123. The Clinton Administration never publicly argued that Security Council authorization substituted for Congressional approval, but the Administration's timing and actions strongly suggest this position. Importantly, the Clinton Administration did not take the legal position that Congressional consent was superfluous because Security Council authorization sufficed. See Kavanagh, *supra* note 84, at 180–82. Such a position would surely have caused a Congressional uproar. Instead, the Administration claimed that the planned deployment was consistent with the sense of Congress as expressed in the Defense Appropriations Act of 1994, that it satisfied the requirements of the War Powers Resolution, and that the operation was "not a war in the constitutional sense." See Marian Nash, *Contemporary Practice of the United States Relating to International Law*, 89 AM. J. INT'L L. 96, 122 (1995) (discussing the War Powers Act and the deployment of military forces into Haiti).

124. President George W. Bush has never learned this lesson.

complexities inherent in the transition from dictatorship to democracy. And they must have a clear vision of the justificatory theories for democracy. To put it another way, the creative experiments necessary to transform a society will not take place without such knowledge, and the international community's effort to help nations overcome their authoritarian legacies will simply fail. Unfortunately, the international community's recent efforts in Haiti since 1994 illustrate this failure.

The original intervention by the international community in 1994 and its approach to Haiti have been successful in a very limited way, but the long term prognosis for creating the conditions for democracy to flower has been shattered by events since that intervention. The international community was successful in restoring the Aristide government to power, and political power was transferred from one duly elected government to another—from Aristide to Préval, from Préval back to Aristide, and from Aristide back to Préval. This adds up to a total of four democratically elected governments since 1990. The Army was abolished and a new and at first relatively well-trained police force was created which, for all its limitations, functioned reasonably well for a short period under extremely difficult conditions.<sup>125</sup> Today it is in disorder. Political violence, criminal violence, and human rights violations are once again a serious problem. Abject poverty, disease, and unemployment, among other serious problems, persist. Life for the vast majority of Haitians remains frightening.

In spite of their problems, Haitians do not expect or want a return to dictatorship, however benign. When one looks to the future, it is clear that democratization remains at an embryonic stage. The democratization process has been reversed. In point of fact, since 2004, Haiti has clearly been sliding in the wrong direction.

It is relatively clear that the international community, particularly the United States, dramatically underestimated the Haitian challenge. After the success of the 1994 military intervention, the international community did not have a well thought-out plan linked to the publicly stated reasons for the intervention—to restore democracy—that would have given the Haitian people a fighting chance to challenge successfully some of those almost unresolvable problems.<sup>126</sup> The international

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125. See Carol J. Williams, *Haiti Debates Having a Homegrown Army; The Military Was Disbanded in 1995, and Some Think it's Time To Put it Back Together*, L.A. TIMES, July 30, 2007, at A8. The United Nations trained the police force, and appointed former New York City Police Commissioner Ray Kelly to head the training group. See Ron Howell, *Offer To Train Rookies in Native Land*, NEWSDAY, Mar. 8, 2004, at A23.

126. This is the point at which theory becomes important. Contrary to most people who favor democracy, I believe that justificatory theories of democracy are essential for creating solutions to the problems. See STORZKY, *supra* note 91.

community simply assumed that economic and political development, and social harmony, would be relatively easy to achieve. This was a dangerous illusion. In fact, there appears to be an inverse relationship between these factors. The very weaknesses of Haitian institutions and modes of operation, which made the military engagement so easy and successful, make the economic, political, and social challenges so difficult. The debility of Haitian institutions and their operations provided no strong basis for resisting a military invasion; neither did they, or the culture that had emaciated them, provide a foundation for democratic, political, or economic development. The society lacks a cohesive national identity and any sense of collective purpose.

Therefore, before political actors can judge whether humanitarian intervention in the guise of military force and the occupation of a country is justified, they need to have a clear understanding of the goals of intervention and whether they are justifiable. Simply because the action may be “legal” does not, of course, necessarily make it morally justifiable. These political actors also need to understand the problems associated with any transition to democracy and to be imaginative in trying to resolve those problems, working within the history and culture of that particular nation. Transformation requires knowledge, theory, and the courage to take steps necessary for positive reform.

To begin with, one needs a moral justification for democracy.<sup>127</sup> Most political actors involved in the process of consolidating democratic regimes, however, find conceptions of democracy, and all they entail, relevant only from the perspective of subjective legitimacy; that is, from the perspective of the functionality of the political system. Subjective legitimacy is the generalized belief of the population in the moral justifiability of the government and its directives. Democracy is therefore seen as an instrument to the end goal of stability. In effect, those engaged in democratic transition who propose institutional reforms are attempting to create, consolidate, and stabilize democratic structures while averting threats of reversal to authoritarian alternatives. These political actors and scholars are clearly firm partisans of democracy and take it for granted that it is the best political system. They do not, however, consider that what makes democracy the best political system is relevant to ascertaining the means for its creation and preservation. Instead, they typically adopt a perspective characterized by a results-oriented process, concluding that whatever is responsible for making democracy the morally best system of government can be identified by certain factual features—regular ways in which citizens may affect a change of government, the

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127. For a thorough discussion and analysis of theories of democracy and suggested policies derived from some of these theories, see STOTZKY, *supra* note 91.



division of power, or respect for basic rights. Simply by identifying and replicating the phenomenon or desired results, using a system in force in some paradigmatic country, such as the United States, Britain or France, these actors seek, in a value-neutral way, the proper means for achieving or preserving that system.

This method is mistaken; indeed, it is deeply flawed. Democracy is a normative concept and cannot be identified in depth without articulating fully the evaluative conception that justifies its distinctive institutions. The inevitability of this normative inquiry is demonstrated by the inherent conflicts and tensions within the distinctive institution of democracy, making it impossible simply to identify and adopt appropriate democratic institutions. Any number of questions can be raised to prove this point. Is democracy the phenomenon of representation (the weakest form of democracy), or is a system of representation merely an auxiliary institution imposed by the difficulties of direct democracy in an open society? Is it the separation of the executive and the legislative powers, or is it instead an optimal arrangement that is not adopted in parliamentary democracies without the loss of value? Is it the recognition of a bill of rights as limits to majoritarian decisions imposed by independent judicial institutions? Are political parties distinctive democratic institutions, or are they unnecessary in a better working, well functioning democracy? Is the proportional representative system the best method of democratic representation, or is it only one of many diverse alternatives that must be chosen for technical reasons?

When we come to realize the full range of these issues, it is clear that there are no distinctive institutions of democracy outside of a value-laden theory that simply justifies a set of options. We cannot identify institutions commonly understood as democratic and work out a method for stabilizing them without systematically analyzing the moral theory that justifies them. Reality does not tell us which institutions are essential and which are contingent in relation to a normative concept like that of democracy. We are unable to determine what contingencies we can manipulate to preserve the essentials of the concept. The "realist" who thinks otherwise is mistaken, even substantially confused.

While this is not the place to discuss fully theories of democracy and their justifications, it is clear that the best means for countering some of the difficulties of moving from dictatorship to democracy are to create a polity governed by universal and impersonal principles where individual citizens, who are not identified with any particular interests but preserve the capacity of adopting different ones, make choices in a process of public justification and dialogue. This requires broad popular participation in governmental decision making and its consequent

actions, led by strong participative and ideologically committed political parties and parliamentary bodies. These parties and parliaments must themselves, of course, be internally democratic, open, and disciplined.

These conclusions are based on an epistemic view of democracy and upon the utmost respect for the autonomy of each individual. In this view, autonomy consists of the exercise of self-governing capacities, such as the capacities of understanding, imagining, reasoning, valuing, and desiring. Free persons have, and are recognized as having, such capacities. In a political order dedicated to serving the conditions of free deliberation for its members, those members can legitimately expect of that order that it not only permit, but also encourage the exercise of such capacities—that it permit and encourage autonomy. Indeed, one of the hallmarks of liberal democracy is the notion of the citizen who is not identified with any interest, but is free to choose and has an equal voice in expressing his choice.

Thus, it is apparent that the international community lacked a valid normative conception of democracy when it intervened in Haiti and failed to create the proper incentives in Haiti to help democracy grow. Moreover, if the international community, lead by the United States, did have a coherent normative conception of democracy, it seems to have misunderstood how to apply it—to create the conditions for a constitutional democracy to grow—to its actions in Haiti.

An additional serious problem afflicts the international effort in Haiti and exacerbates the failure to understand the significance of normative justifications for democracy. There seems to be a misunderstanding, even an ignorance, of the problems associated with the transition and consolidation process.<sup>128</sup> But before one can judge the potential for a successful transition from dictatorship to democracy in any nation undergoing this difficult process, one must understand the problems associated with it. To put it another way, this process presents difficult problems of its own that must be understood before one can create policies favorable to the creation of a democracy.

But there is a further complication. The problems of the transition process and possible solutions to them, in turn, cannot be successfully addressed without a valid justificatory theory of democracy. Theory and practice go hand in hand. As a base line, such a democratic vision requires a continuous order of mutually assured and encouraged autonomy in which political decisions are manifestly based on the judgments of members of that society who are perceived and treated as free and

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128. For an analysis of different characterizations of the process of transition see *THE BREAKDOWN OF DEMOCRATIC REGIMES* (Juan J. Linz & Alfred Stepan eds., 1978); *TRANSITIONS FROM AUTHORITARIAN RULE: LATIN AMERICA* (Guillermo O'Donnell et al. eds., 1993) (1986).

equal persons. The expression of self-governing capacities must operate both within the formal institutions of politics and in the affairs of daily life. The democratic order must satisfy the conditions of equal freedom and autonomy that give it definition.

What are some of the issues associated with the creation and consolidation of a democracy? There are several significant features of the consolidation of democracies that have taken place in Latin America and Haiti. The first significant feature of the consolidation is the fact that the process of democratization has taken place in many of these nations during some of the worst economic, social, and political crises in the history of these nations. In general, these crises include the commission of massive human rights violations (murder, rape, and torture), enormous debts, hyperinflation, epidemics, dramatic and surprising increases in already high rates of infant mortality, extremely high rates of unemployment, and the collapse of entire systems of social welfare.<sup>129</sup>

Haiti presents an uncomfortably extreme example of many of these problems. There, the human and material resources are in such short supply, or have been degraded by such severe poverty (even destitution), illiteracy, malnutrition, disease, violence, corruption, overpopulation, rapid urbanization, deforestation, and soil erosion, as to raise serious questions about Haiti's continued survival as a society and as an independent nation-state.

Even before the crisis erupted, between 1991 and 1994, over the military's refusal to restore President Aristide to power, Haiti was the poorest country in the Western Hemisphere.<sup>130</sup> Its per-capita income was \$370 a year.<sup>131</sup> At that time, in a country of approximately seven million people, there were fewer than a thousand doctors.<sup>132</sup> The life expectancy was a mere fifty-six years, one in every eight babies died before reaching the age of one, and seventy percent of all children were estimated to suffer from some form of malnutrition.<sup>133</sup> At least two-thirds of the population were illiterate, and the state school system was so inefficient and small that fewer than five percent of eligible students were enrolled in government high schools.<sup>134</sup> As if these problems are not bad enough in

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129. Argentina during the reign of terror is the prime example of these problems. See Jefferson Morley, *Argentina's Trial, Latin Tribulations*, N.Y. TIMES, Dec. 17, 1985, at A27. See NAT'L COMM'N ON THE DISAPPEARANCE OF PERSONS, NEVER AGAIN (Writers and Scholars Int'l trans., 1986) (1984), [http://web.archive.org/web/20031004074316/nuncamas.org/english/library/nevagain/nevagain\\_001.htm](http://web.archive.org/web/20031004074316/nuncamas.org/english/library/nevagain/nevagain_001.htm).

130. *Haitians Resigned to Sanctions*, ST. PETERSBURG TIMES, June 24, 1993, at 10A.

131. John Kifner, *Mission to Haiti: The Overview; Haitians Rejoice as American M.P.'s Visit Police Posts*, N.Y. TIMES, Sept. 27, 1994, at A1.

132. Larry Rohter, *Haiti Is a Land Without a Country*, N.Y. TIMES, Aug. 14, 1994, at E3.

133. *Id.*

134. *Id.* The state of education, a key to development, is one of the major reasons that Haiti

themselves, many of the doctors, engineers, administrators, and others with the necessary skills to change Haiti have been killed or driven into exile.<sup>135</sup> Most of those who are in exile do not wish to risk their lives and fortunes by returning to Haiti until positive changes occur.<sup>136</sup> The irony is that Haiti needs these very same people to make the changes that would attract them to return. Unfortunately, these conditions have not improved since the “restoration of democracy.” It is clear that many of these conditions have become even more serious since the international military intervention.<sup>137</sup>

The most difficult obstacles to democracy in many countries, particularly in Haiti, however, may be psychological and cultural. For example, the tradition of a predatory, oppressive state has left Haitians deeply distrustful of government and of foreigners. Haiti’s political culture has long been characterized as an admiration of force. Political disputes are often settled not by negotiation, but through the exercise of force, and respect for democratic procedures and obligations, including reasoned justifications for actions, is minimal.

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remains one of the poorest countries in the world. The teachers remain wholly inadequate to the task of educating the millions of those desiring to improve their lives. For example, in December 1996 and January 1997, Haiti’s approximately twelve hundred grade school teachers took a simple test, and almost all of them failed it. Only four hundred could alphabetize a list of words; only forty-one could arrange fractions by size. This ignorance is reflected in the students. More than half of the children between six and twelve cannot read. In addition, classrooms are extremely overcrowded—some have more than two hundred students—and most classrooms do not have benches, chalkboards, or even doors. See Michael Norton, *Teacher Strike Highlights Education Crisis in Haiti; They Want Better Training—and Their Pay*, MIAMI HERALD, Jan. 13, 1997, at 8A.

135. Indeed, there are sizable populations of exiled Haitians in New York, Montreal, Paris, and Miami.

136. See Interview with Jean Jean-Pierre, Journalist, The Will. Voice, in New York, N.Y. (Aug. 5, 2005).

137. For example, in 2004, according to estimates by the World Bank, Haiti’s gross national income (GNI) measured at 2002–2004 prices was equivalent to \$390 per head or \$1,680 per head on an international purchasing-power parity basis. 1 THE EUROPA WORLD YEAR BOOK 2058 (47th ed. 2006). “In 1995–2004 the population increased at an average annual rate of 2.0%, while gross domestic product (GDP) per head decreased, in real terms, by an average of 1.2% per year.” *Id.* During this time period (1995–2004), “Haiti’s overall GDP decreased, in real terms, at an average annual rate of 0.8%.” *Id.* In 2003–2004, real GDP decreased by 3.8%. *Id.* In 1997, primary school enrollment “included only 19.4% of children in the relevant age-group (18.9% of boys; 19.9% of girls).” *Id.* at 2059. In 1997, secondary school enrollment included only 34.2% of children in the relevant age-group (35.2% of boys; 33.2% of girls). *Id.* “In 1999 combined enrolment in primary, secondary and tertiary education was 52%.” *Id.* In addition, children in Haiti are more likely to die during early childhood than in any other country in the Western Hemisphere. The under-five mortality rate in 2004 was 117 per 1000 live births. *Id.* at 2060. In fact, one of every fourteen babies in Haiti dies before reaching his or her first birthday. U.N. CHILDREN’S FUND [UNICEF], CHILD ALERT: HAITI 1 (2006), available at <http://www.unicef.org/childalert/haiti/>. Moreover, in 2007, the life expectancy at birth was 57.03 years. CENT. INTELLIGENCE AGENCY, THE WORLD FACT BOOK 2007, at 250 (2007). Malnutrition is, of course, another serious problem. Indeed, one of every three children in Haiti is chronically malnourished. *Specialist Tries To Reverse Malnutrition in Haiti*, BIOTECH L. WKLY., Sept. 1, 2006, at 457.

Furthermore, there is great controversy in the international community about whether the problems associated with these transitions and the attempts to address them are leading to a change in the economic and social structures of these countries necessary to allow for a new oligopolization of the economy. To put it another way, it remains unclear whether a new oligopolization will develop which will greatly restrict the avenues of access for the powerless sectors of society to the basic goods necessary for leading a life of dignity, or whether, on the contrary, the crisis is leading to more efficient schemes of production, thereby benefiting all sectors of society. In Haiti, the unequal distribution of resources, and thus the general living conditions, has become even more disparate since the international military intervention. The elites have obtained an even larger share of the wealth than they possessed before the intervention, and everyone else (more than ninety percent of the population) has been made worse off.<sup>138</sup> This has led to a loss of hope, indeed, even to a sense of desperation on the part of the vast majority of Haitians.

The problem is even more difficult than it is generally perceived to be. In many of the nations in the transition process, but particularly in Haiti, the present circumstances result from a long-fought war of attrition against the vast majority by a small but ruthless ruling class. Ironically, Haiti is the product of a revolution against slavery and colonialism. It emerged as a nation in 1804, after a thirteen-year struggle against France that resulted in the destruction of the French colony of Saint Dominique.<sup>139</sup> Almost immediately after independence, the Haitian elites attempted to recreate the plantation economy, treating the rural masses in much the same way as the French colonial oppressors had treated them. The former slaves, however, simply refused to return to a state of slavery. Instead, they settled as small peasants on land bought or re-conquered from the State, or abandoned by large landowners. The urban elites then devised a dual strategy to counter this problem.

The first part of the plan was economic. The elites used the fiscal and marketing systems of the country to create wealth-producing mechanisms for themselves. They became traders, politicians, and state employees. They prospered by living off the peasants' labor. Taxes collected by the import-export bourgeoisie at the urban markets and cus-

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138. See, e.g., BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2003 (2004), available at <http://www.state.gov/g/drl/rls/hrrpt/2003/27902.htm>.

139. For a general discussion of the history of Haiti see DAVID NICHOLLS, FROM DESSALINES TO DUVALIER: RACE, COLOUR AND NATIONAL INDEPENDENCE IN HAITI (1979); see also STOTZKY, *supra* note 91; TROUILLOT, *supra* note 17.

tomhouses—paid solely by the peasants—provided the entire source of government revenues. The elites then took over the state and used the state revenues as their personal bank accounts.<sup>140</sup>

The second part of the plan was political. The strategy was to isolate the peasants on small mountain plots and keep them away from politics. It was a brilliant but corrupt strategy. The peasants, who unknowingly subsidized the elites, had no say whatsoever in how the state was to be run. The exploitation continued throughout the nineteenth and twentieth centuries. For example, beginning in the late 1950s, Papa “Doc” Duvalier came to power and exploited this plan. He used the state funds as his own personal bank account to enjoy incredible economic and political power.<sup>141</sup> Even today, the entrepreneurial class continues to prosper at the expense of the vast majority of Haitians. Indeed, many Haitians continue to feel enslaved.

Under the best of circumstances, a nation such as Haiti cannot be changed structurally without some yielding of power by the haves—the economic elite. But, of course, rulers who profit from stasis are disinclined to risk change. Moreover, if it is to be the policy of the United States and the rest of the international community, which it appears to be, to sustain at all costs the present distribution of economic power in Haiti, hardly anything can be done that will necessarily have long-range beneficial political and social consequences and thus allow Haiti to become a constitutional democratic nation.

A second prominent obstacle that nations face in the transition process is the corrosive power of the phenomenon known as corporatism.<sup>142</sup> Indeed, for the transition process to succeed, the people must dissolve the network of *de facto* power relationships, which corporations create and jealously protect by taking advantage of the power vacuum left by representatives of popular sovereignty. Under the umbrella of authoritarian rule, a number of social groups representing particular interests sculpt a place for themselves after a bargaining process which includes their support for the present regime. Such groups include the military, religious organizations, coalitions of entrepreneurs, trade unions, and even the so-called independent press. Once democratic rule is estab-

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140. See BERNARD DIEDERICH & AL BURT, *PAPA DOC: HAITI AND ITS DICTATOR* (1986); JAMES FERGUSON, *PAPA DOC, BABY DOC: HAITI AND THE DUVALIERS* 30–59 (1987); TROUILLOT, *supra* note 17.

141. For analysis of all of these points, see STOTZKY, *supra* note 91, see TROUILLOT, *supra* note 17.

142. For an interesting discussion of the concept of corporatism and its relationship to state and society in Latin America see *AUTHORITARIANISM AND CORPORATISM IN LATIN AMERICA* (James M. Malloy ed., 1977). For a discussion of corporatism see Irwin P. Stotzky, *Suppressing the Beast*, 53 U. MIAMI L. REV. 883, 884–90 (1999).

lished, these groups stubbornly resist relinquishing their power to representatives of the people.

Corporatism is usually expressed and functions in complicated ways. There is some control by the State over these interest groups and organizations, many of which are part of civil society, and there are a variety of official and unofficial mechanisms that are used to alter their operation.<sup>143</sup> Simultaneously, however, these organizations exert enormous pressures upon government actors and agencies. These pressures allow the corporative forces to obtain favored treatment of various kinds, amounting to a legal monopoly of particular interests. Sometimes this monopoly power of the corporative interests is unaccompanied by any significant state influence over these forces. In other situations, alternative legal or even constitutional privileges short of monopoly may be granted that shield the organization from the raw competitive forces of popular expression, such as a free market.

Corporatism is an insidious and powerful force, and it is very difficult to overcome. Haiti is a harsh example of the devastation created by corporatism. Between 1991 and 1994 the military corporative forces assumed total power and influence in, and completely violated and destroyed any semblance of democratic practices and institutions.<sup>144</sup> The military forces consolidated their rule by intentionally and ruthlessly suppressing Haiti's once diverse and vibrant civil society. They assassinated approximately 5000 people, brutalized and tortured thousands of others, and forced perhaps 500,000 people to go underground.<sup>145</sup> The military systematically repressed virtually all forms of independent association in an attempt to deny the Haitian people any organized base for opposition.

Aristide's major accomplishment as President was to abolish the military.<sup>146</sup> Recently, the democratically elected government has attempted to prosecute military officials who were involved in massive human rights violations.<sup>147</sup> But security is an absolute necessity to pur-

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143. For example, some governments allow private firms to control or monopolize certain industries such as the power and telecommunications industries.

144. During this period, several thousand Haitians were murdered, illegally arrested, detained, tortured or forced into hiding. Unfortunately Aristide's reinstatement to office did not totally stop the violence. Indeed, political murder continued after his return and into President Préval's term. STOTZKY, *supra* note 91, at 28-29 nn.51 & 54.

145. See Interview with Cathy Maternowska, *supra* note 19; Interview Jean Jean-Pierre, *supra* note 136.

146. Rohter, *supra* note 91.

147. For example, in August 1995, a mid-level member of the para-military group FRAPH was convicted of the murder of Antoine Izmerly, a prominent businessman and supporter of Aristide. There have been on-going investigations of human rights offenses committed by the de facto regime between 1991 and 1994 since the return of Aristide in 1994. On September 20, 2000, after an investigation that started shortly after President Aristide's reinstatement in 1994, the Haitian

sue this strategy. With approximately 250,000 automatic weapons cached around the country,<sup>148</sup> stability remains fragile. The failure to understand corporative power and the fear of placing international forces in harm's way led to a failure by the multinational forces to disarm the military, in spite of the fact that such a campaign was clearly compatible with Security Council Resolution 940.<sup>149</sup> Part of this misunderstanding was the belief that removal of all privately held weapons in Haiti would have seriously disturbed the balance of power in Haitian society, dangerously concentrating all fire power in the hands of a democratically elected government whose long-term commitment to the rule of law and democracy could not be guaranteed. This grave error has led to unnecessary suffering. Indeed, the international community's failure to disarm the former military forces has led to a surge in garden variety crimes, attacks on Parliament and on the Haitian National Police, an increasingly large number of drug related murders committed by former military officials who have formed criminal gangs,<sup>150</sup> and the second violent overthrow of the democratically elected Aristide government.

The entrepreneurial sector constitutes another corporative source directed at the democratically elected government. It seeks to obtain a

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government began the prosecution of dozens of former military leaders for the massacre of at least fifteen residents of a poor neighborhood in Gonaïves in April 1994. Marie-Andre Auguste, *Coup Leader, Army Officers Given Life in Prison for 1994 Haitian Massacre*, ASSOCIATED PRESS, NOV. 16, 2000. The Raboteau slayings were part of a series of attacks undertaken by the coup leaders to break support for Aristide. *Id.* At the trial, only twenty-two of the defendants actually appeared in court. *Id.* On November 9, 2000, sixteen of these twenty-two defendants were convicted of taking part in the massacre. *Id.* Twelve of the sixteen, including the military commander of the town at the time of the massacre, Captain Castera Cénafils, and a grassroots figure turned paramilitary leader, Jean Tatoune, were sentenced to life in prison with hard labor. The other four defendants received sentences of up to nine years imprisonment. Six defendants were acquitted. *Id.* All of the convicted defendants also were ordered to pay the equivalent of \$2,300—a large amount in Haiti—to a fund to benefit the families of the victims.

On November 16, 2000, a Haitian court sentenced the fifteen defendants who did not appear in court, and were being tried *in absentia*, to life in prison with hard labor. The absent defendants include coup leaders Raoul Cedras and Philippe Biamby, both of whom received asylum in Panama; former Port-au-Prince police chief, Michel Francois, who is in Honduras; and paramilitary leader Emmanuel Constant, who cut a deal with the C.I.A. and lives in New York City. *Id.* Prosecutors alleged that they masterminded the attack. *Id.* Lawyers were not allowed to defend the absent defendants. *Id.* Judge Napla Saintil tried them without a jury exclusively on the basis of a 172-page bill of accusation presented to the court by the Haitian government prosecutors. *Id.* The absent defendants will be arrested if they return to Haiti, but would have the right to a new trial if they return. *Id.* Moreover, the Haitian government has asked a number of nations, including the United States, to extradite several former military officials who have been indicted in Haiti for committing murders during the coup period. The United States has refused to do so.

148. See Interview with Cathy Maternowska, *supra* note 19; Interview with Jean Jean-Pierre, *supra* note 136.

149. See S.C. Res. 940, *supra* note 86.

150. See, e.g., СТОТЗКУ, *supra* note 91, at 29 n.54.



variety of privileges or protective measures and preserve those previously secured. In Haiti, the entrepreneurial sector has attempted to boycott many measures designed to achieve progressive levels of taxation.<sup>151</sup> It has also pushed hard for the complete privatization of nine state owned industries, hoping to secure them and reap huge profits.<sup>152</sup> This elite class has ruled Haiti since its independence in 1804, using the state resources as its personal bank account and keeping the vast majority of Haitians in a state of extreme poverty, even slavery.

The corporative actors do not, however, play the same role in each nation. For example, the Catholic Church does not function in Haiti as it does in Argentina and trade unions hold different positions in Haiti than in Brazil. But the script is nevertheless repeated in each country because the formal creation or establishment of democratic rule is simply not sufficient to destroy the corporative power relationships built up during the dictatorship periods. The corporations try to preserve their power relations and privileges through the transition, generating different types of crises, such as a military or economic threat, which exert tremendous pressure on the fragile economic regime.

Inextricably intertwined and connected in a multitude of ways to these two features of the transition and consolidation process (the economic, political, and social crises and the problems of corporatism) is a third factor—the failure to fulfill the requirements of the rule of law in both the formal and informal aspects of public and private life. In Haiti, as in virtually every other nation undergoing the transition from dictatorship to democracy, this failure manifests itself in the concentration of power solely in the executive branch of government, leading to massive human rights abuses and a total disregard for the functions of the other branches of government. For example, during the coup period (1991–1994), members of the Haitian armed forces systematically assassinated and tortured thousands of people, including government officials who attempted to uphold the rule of law.<sup>153</sup> Indeed, the military blatantly ignored judicial orders to arrest soldiers or officers accused of human rights abuses.<sup>154</sup> It ignored the basic rights guaranteed by the Constitution and any laws passed by Parliament which threatened its hold on power.<sup>155</sup> In light of this and Haiti's history of these abuses, a Creole

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151. *Id.* at 90 n.18.

152. Interview with Jean Jean-Pierre, *supra* note 136. Elites constantly refer to their desire to maintain their monopolies on state-owned industries, particularly the power and communications industries.

153. STOTZKY, *supra* note 91, at 29 n.54.

154. *Id.*

155. *See id.* During the most recent interim government period, 2004–2006, similar human rights abuses occurred.

proverb aptly summarizes the Haitian people's view about law: "Law is paper; bayonet is steel."

The violation of legal norms, however, is not restricted to formal military or de facto government officials. Unfortunately, such behavior is a distinguishing mark of political and social life at large, and has existed throughout the nation's history. This failure to follow the rule of law is evident in both social practices and in the actions of governmental officials.

This tendency toward unlawfulness does not, however, infect only public officials. Unfortunately, it equally infects the general society. This mentality correlates with a general trend toward anomie in society as a whole. It manifests itself in such things as enormous black markets, tax evasions, corruption in private economic activities, nonobservance of efficient economic norms, and noncompliance with the most basic rules of society, such as elementary traffic and urban regulations.<sup>156</sup>

This unlawfulness mentality is often the product and cause of collective action problems. Frequently, the combination of expectations, interests, possibilities of actions, and their respective payoffs is such that the rational course of action for each participant in the process of political or social interaction advises that person not to comply with a certain norm, despite the fact that general compliance with it would have been for the benefit of everybody in—Pareto's terms—or almost everybody. This "dumb anomie" is intimately connected with both the stunting and the reversal of economic and social development.

Therefore, for a successful transition to democracy to occur in Haiti, it is critical for the international community to help Haitians consolidate the rule of law. This is important not only to secure respect for fundamental rights and for the observance of the democratic process, but also to achieve satisfactory levels of economic and social development. But the international community seems to have misunderstood the contours of the rule of law, placing its resources almost solely into strengthening the judiciary. Even those efforts have not appreciably improved the system of justice. In point of fact, despite the international community's best efforts to help strengthen the integrity of the judicial system, it remains corrupt and inefficient. Indeed, years of corruption and governmental neglect have left the judicial system nearly moribund. For example, a shortage of adequately trained judges and prosecutors, among other systemic problems, has created a huge backlog of criminal cases, with many detainees waiting months or even years in pretrial

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156. Argentina is an example of all these problems. See, e.g., *Poll Finds Corruption Alive, Well in Argentina; Bribery and Tax Evasion Remain Rampant, Survey of Top Executives Shows*, ST. LOUIS POST-DISPATCH, May 4, 1998, at A7.

detention before getting a court hearing.<sup>157</sup> If an accused person ultimately is tried and found not guilty, there is no redress against the government for time served.<sup>158</sup> While it is certainly necessary to strengthen the judiciary, this is simply insufficient to achieve the goal of establishing the rule of law in Haiti.

## V. A DIFFERENT VISION

While many of these problems and the legacy of their history can only be overcome by the Haitian people, the international community's help is essential. But only the correct international incentives directed at the real problems will lead to a viable, sound democratic revolution in Haiti. So far, these incentives have not been properly employed. The deepest roots of Haiti's problems lie not simply or most significantly in the country's politics or in its cultural history. Institutional reforms of the type championed by the international community—such as total privatization of state owned industries or “judicial reform”—will simply not work until the more serious problems are confronted. While the moral turpitude of the elites is real, Haiti's political problems lie in the social and economic organization of the country. To put it another way, Haiti's crisis lies in social inequality and economic maldistribution. Unless and until these difficult issues are addressed, there is little hope for positive changes for the millions of Haitians trapped in despair and destitution. If they are addressed, however, it is likely that positive changes in the political sphere will follow. The only hope Haiti has for achieving a valid democracy is the creation of a new socioeconomic arrangement, which will be difficult to initiate, and even harder to maintain. But the absence of material deprivation is a prerequisite for the conditions necessary to create a constitutional democracy. What steps must be taken to achieve this goal?

An energized, vital constitutional democracy means much more than holding periodic elections. It requires an environment of personal security for people to pursue their desires, their professions, to move about freely, and to explore new ideas. Democracy also means, among other things, the building of vibrant institutions of justice and law and the full blooming of civil society—the broad array of political parties, independent media, independent labor unions, and nongovernmental organizations, such as women's groups, all of which encourage political

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157. BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, *supra* note 138.

158. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, AND LABOR, U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—2001 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8332.htm>.

and social participation. While these choices—and democracy is always a choice—cannot necessarily be imposed by the international community, they certainly can be encouraged by it.

While many nations are reaching for democracy, what are the policy choices for changing the political economy? The overriding characteristic of the political life and discourse of nations in the transition process is a frustrated desire to escape the choice between a nationalist-populist project and a neoliberal project. The rejection of these alternatives and dictatorship has a deeper meaning than is traditionally understood. It is a revulsion against a feigned public life, which is in fact little more than a weapon or disguise of private interests. The problem is not unique to Haiti. It is reflected in the institutional structures of many developing nations.<sup>159</sup> The dominant regimes of the less-developed economies, and even their critics, often start with the desire merely to imitate and import the institutional arrangements of the rich industrial democracies. They do this in the hope that from similar institutional devices, similar economic and political development will result. But such imitation has not led to these desired results. The failure of these efforts at emulation may nevertheless be useful to the development of new and experimental institutional structures, which may shed light on the suppressed opportunities for transformation. But Haiti and many of these nations have not yet started on this path.

The import-substituting protectionist style of industrialization and the pseudo-Keynesian public finance of a national-populist approach is unable to deal effectively with the huge problems facing these nations. Latin America, for example, still faces the problems of hyperinflation and stagnation created by irrationally closed economies and massive public spending.<sup>160</sup> Neoliberalism (neoliberalismo), the single-minded pursuit of foreign investment and its accompanying austerity and inequality, is unable to service the real conditions of sustained economic growth.

Neoliberalism's rise to the status of religious doctrine is largely due to the influence of the United States, particularly in regulating and controlling the conduct of international monetary and trade organizations. The Reagan Administration pushed the Latin Americans into pro-business austerity programs and set the tone for a worldwide reduction of government rule. Neoliberalism's acceptance is also due to the policies of the World Bank and the International Monetary Fund and to the

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159. This notion is reflected in any Latin American nation in which a very small group of very rich people control the government. See, e.g., *Latin America in Deep Recession—South America Suffering from Succession of Economic Shocks*, S.F. CHRON., Nov. 22, 1990, at B6.

160. Again, Argentina and Brazil are prime examples.

wealth of its corporative backers in a region where money matters above all else in politics. Nevertheless, globalization has not had the desired consequences.

What is clearly needed now is to somehow fix neoliberalism's major flaw—chiefly that it does not help the poor, vast majority live a dignified life. Instead, corporative power creates wealth for a small minority, while almost enslaving the majority. If democracy seeking governments do not spread the benefits of globalization, countries such as Haiti will remain divided between a very small group of ultrarich economic elite and a very large group of desperately poor and marginalized people.

Unlike neoliberalism's claim that government should play a minor role in the economy, real democratic change requires government to play an important and dynamic role. At a minimum, the international community must encourage these governments to pursue locally designed policies to draw the poor into the global economy. To achieve this minimal goal, these governments must be given incentives to pursue a vision of a political economy that is quite different than the image traditionally suggested.

In political economy terms, promising alternatives which will allow a flowering of democracy might develop in a seriously underdeveloped nation such as Haiti in a variety of rather experimental directions. Each of these experiments, of course, must be continuously monitored so they can be changed as they unfold to meet the requisite goals of democratization. This method is one of the few ways that a positive transformation may take place in Haiti. Flexibility is a key to success.

Moreover, what we may be able to say and do about the future possibilities of democratization depends crucially on our interpretation of contemporary political, social and economic history. The radical change many of these nations are making from inward oriented statist growth is still in full swing. Macroeconomic policy makers still wrestle with price instability and proper exchange rate regimes. External threats and internal mistakes only prolong the transition and generate uncertainties that exacerbate the problems. Simultaneously, microeconomic changes, technical leaps and innovations, the legal evolution of firms, and the use and disbursement of property rights are still more in flux than fixed on the eve of new cycles of growth or retraction.

At first blush, it may appear that Haiti's relationship to the world economy leaves it with relatively few options. But I believe that options do exist. Although we understand large-scale transitions imperfectly, what we do know is that decisions made while institutions and partnerships are being created and forged have significant—indeed enormous—

subsequent effects. Thus the conjuncture of deep structural transformation means that what these nations do now will shape what they can do later. It is not just the structures, but also the rules that will shape them, that are changing.

Three major areas of concern are evident in the social, political and economic spheres. The first involves money. Macroeconomic instability is a major force in undermining the ability of people, rich and poor alike, to save and invest for the long term view. International sources may help, but without local savings or investment, they often leave these nations exposed to forces over which they have the least control.

The second area of concern is the legal structure girding ownership and use of property rights. Reform of corporate law and the emergence of a new regulatory regime (paradigm) may help private parties to seize upon new property rights to create new enterprises and new industries. In both of these areas, the liberalization of the market is the factor that should give the single biggest boost to long-term growth. Increasing growth, however, is not the same as sustaining it. In both of these areas, rule making and enforcement will certainly become the cornerstones for growth.

The third concern is the approach to human capital. Both the long-term view and long-term progress will be shaped by human skills and aptitudes. In Latin American and Haiti, for example, the educational systems are impoverished. Good, sound education is scarce and increasingly hard to find. It is, therefore, expensive and unequally distributed. If it is true, as many claim, that education yields increasing returns, this is clearly a matter of urgency for these nations.

These three areas of concern do not necessarily add up to an indictment of the state in Haiti. Rather, they are best seen as an injunction that the state perform its role as a state, with public duties and public authority. Indeed, there are public goods—sound currency, security, the rule of law, and education—for which the state has an overwhelming, indeed incomparable comparative advantage. Long-term growth in this region may well depend on governments' abilities to appreciate and exploit their own mandates and resources. An active state is essential to the success of such democratic reforms.

If governments are to play this major role, what steps can they take? First, as I have already suggested, it is important that Haiti and these other nations take macroeconomic stabilization very seriously. One way of doing this is through a dramatic rise in and focusing of the tax rate which would impose upon the privileged classes and regions of these nations the costs of public investment in people and in infrastructure. It would be utterly unrealistic for these nations to take another

approach and conceive of a sound financial system as one based on a drastic lowering of governmental expenditure rather than on a raising and rationalization of taxes. There needs to be a strong preference for a universal, direct consumption-based tax—taxing, in a steeply progressive way, the difference between income and savings—as the means to finance the state while promoting capital formation and productive investment. Countries like Argentina and Haiti will need large amounts of international aid for a long period to augment these taxings, because these nations are in financial crisis. But this aid must not be based on the same schemes that have harmed their economies and helped lead these nations into their present predicaments.

Second, there must be a push to train the poor majority in a variety of skills needed in the global economy. Simultaneously, the state must help create the conditions for an “anti-dualist” political economy. These democratically minded governments have to aggressively attack and overcome the internal division of these nations into two (or more) economies that are only tentatively and hierarchically connected. What is needed is the consolidation and development of a technologically skilled group of people—a vanguard—in both the public and private sectors, and the use of this group to lift up and transform the immense, backward second economy. This approach would also suggest attempting joint public-private ownership of enterprises and encouraging decentralized capital allocation and management. These two or more economies cannot be allowed to become the platform for an antiquated fordist-style industry that is unable to compete abroad except through internal wage repression and that is incapable of transforming the second economy. For example, networks of small and medium-sized enterprises represent the most dynamic forces in many of the economies of the developing nations and are even paralleled by external experiments in the large businesses with the greatest potential for growth and innovation. These intimations of an alternative, less conforming industrial future—changing the organization of firms, perhaps by making them more democratic, as well as the character of regional economies within the country—need to be developed by a deliberate economic program, sometimes with the determined help of the international community. Indeed, the international community must play a central role in this experiment through monetary and technical assistance, including training people in highly technical skills.

Third, if the breakdown of corporative control of the economy is to succeed, the strict requirements of capitalism must be imposed on the so-called free market capitalists through the privatization of the private sector. Because market forces tend to concentrate wealth and power, a

democratically minded government must ensure that no barriers exist to participation in the market. Indeed, the more players in the market, the less concentration of wealth and power. Otherwise, there is the omnipresent risk of the dominant player whose power may skew the debate or the policy toward his own self-serving ends, which may not be democratically optimal ones. Therefore, the government must control monopoly, encourage business formation, and even compete to counteract the power of the dominant big-business actors. In addition, the activist state must protect local businesses from the overwhelming power of international influences. Local voices remain unheard when powerful external forces control the media, the economy or the political sphere.

There are, of course, many positive aspects to a private market. If the economy is successfully privatized, this will mean real competition, real refusal of the capitalization of profits through the socialization of losses, real antitrust, real markets in corporate control, real constraints on nepotism and inheritance, and real private responsibility for the costs of public investment necessary to meet some of these goals. Such a capitalist regime requires parliament to pass laws, and the executive and the courts to enforce them, opening the market so everyone can compete on a somewhat level playing field.

These governments must also develop a parallel set of institutions to compete in the marketplace. Public companies should be created and developed to compete with the private ones. Moreover, these governments must impose on these public companies the requirements of serious and decisive competition and independent financial responsibility. Total privatization of publicly owned companies is not necessarily a good idea.

The last part of the plan is educational. There must be a massive investment in people and infrastructure, financed by taxes on the people with the goods—those who possess the wealth. There must be a priority of such claims on the budget, backed by procedural devices with executive force. In addition, preventive public health, sanitation, and food supplementation need to be given preference over therapeutic medicine. Even more important for democratic change is the fact that the people must be educated. Free public schools must be open to everyone, and literacy programs created and developed. There must also be a shift of the control of education away from the memorization of facts and towards an emphasis upon the mastery of generic practical and conceptual capabilities.

In the organization of government, politics and civil society, the alternative to nationalist-populist or neoliberalist projects may take the form of a public-law counterpart to the political economy I have just



outlined, animated by the same concerns and moving toward the same goals. Experiments should be attempted in these areas as well. For example, structural reforms require at least two sets of institutional innovations. First, a merger of the electoral characteristics of presidential regimes is needed, posing a periodic threat to oligarchic control of political power. There must be a facility for rapid resolution of impasse through priority accorded to programmatic legislation, liberal resort to plebiscites and referenda, and perhaps the vesting of power in both the legislative and executive branches of government to provoke anticipated elections in the face of impasses over the direction any particular country should take. Second, measures must be taken to heighten the level and to broaden the scope of political mobilization in society, especially through the strengthening of the political parties, public financing of political campaigns, increased free access to television and radio, and the breakup of any broadcasting cartel. Direct democracy must be encouraged at all levels of society.

The macropolitics of institutional change must be complemented by a micropolitics confronting the logic of habitual social interactions. The typical elements of this logic include a predominance of patron-client relations, with their pervasive mingling in the same associations and encounters of exchange, power, and sentimental allegiance. There is frequently an oscillation between rule formalism and personal favoritism, and each creates the opportunity and need for the other. There is also a stark contrast between the treatment of "insiders" and "outsiders," and the consequent shortage of impersonal respect and reliability.

A democratic system must be capable of challenging and changing both the established arrangements of the economy and the polity, and the intimate habits of sociability. In this task, those who yearn for democracy must combine a strategic approach to the satisfaction of recognized material interests with the visionary invocation of a reordered society. In nations striving for democracy that are trapped in these impoverished visions and systems, nothing is more important than encouraging the belief in the people that structural change is possible. The Haitian government and the international community must encourage such beliefs and actions.

More than fourteen years after the deployment of the multinational force, it is clear that Haiti's struggle for internal security and economic, social, and political development—its attempt to become a democratic nation—will continue to be a tortuous one. Unsettled political conditions, weak management of the economy, public indifference to the electoral process, and grinding poverty underscore how poorly the international intervention has succeeded in helping to create the condi-

tions for democracy. Some may, therefore, conclude that only Haitians can overcome the legacy of their history. Even if one ultimately reaches this conclusion, it is also correct to add that the international community is essential if Haitians are to achieve their goal. But only the correct international incentives directed at the real problems will lead to a democracy in countries like Haiti. So far, those incentives have simply not been properly employed.

#### EPILOGUE: A FINAL THOUGHT

Stan's view of constitutionalism suggests another crucial point in the creation and development of constitutional democracies—the importance of a constitutional adjudicative tradition. In the United States, for example, the establishment of a constitutional adjudicative tradition and certain forms of remedies, such as structurally transforming injunctive remedies, have aided in the process of protecting human rights by establishing methods of rational discourse that have helped to develop a moral consciousness in the citizenry. This tradition, exemplified by *Brown v. Board of Education*<sup>161</sup> and its progeny, and the decisions interpreting the guarantees of the Bill of Rights,<sup>162</sup> has led to the protection of human rights.

Many Latin American and other nations striving for constitutional democracies have failed to develop this type of constitutional adjudicative tradition. Although fragile, such a process can be useful to developing democracies. My thesis is that the process of constitutional adjudication has been significant in the United States precisely because it establishes a tradition that ultimately protects individuals against the arbitrary actions of government. This tradition, by helping to create a

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161. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

162. Although cases such as *Brown v. Board of Education*, 347 U.S. 483 (1954) (banned racial segregation in public schools), and *Baker v. Carr*, 369 U.S. 186 (1962) (recognized the principle of one person—one vote), are often viewed as the most significant modern decisions, and although they were certainly great steps forward for the nation and the Constitution, I believe that the decisions incorporating the guarantees of the Bill of Rights were even more significant. These decisions bind the states to almost all of the restraints of the Bill of Rights. The vehicle for this impressive development was the Fourteenth Amendment. Simply put, it has served as the legal instrument of an egalitarian revolution—a revolution in judicial legal method as well as in substance. The Supreme Court employed this amendment, as well as the other Civil War amendments, to protect citizens from the employment of government authority that violates our national conceptions of human dignity and liberty. The United States has been radically transformed by the standards, promises, and power of the Fourteenth Amendment. Citizens of all states are now no less citizens of the United States. Each person is entitled to due process and equal protection of the laws from all levels of government, state as well as federal. For an elaboration of this theme see Irwin P. Stotzky, *Federalism, Judicial Review, and the Protection of Individual Rights* (Aug. 5, 1992) (unpublished manuscript, on file with the author).

moral consciousness in the citizenry through the process of rational discourse, has acted as a barrier against abuses by the government.

At the same time, however, a caveat is in order. The constitutional adjudicative tradition is not a magic elixir that will cure all the diseases of any society attempting to consolidate a democracy. It may be that such a tradition is not wholly sufficient to protect these rights even in a developed democracy. In the United States, for example, it is also true that the tradition has not always been faithful to the premise of developing and perpetuating moral consciousness. Indeed, since the early 1970s, the Rehnquist-led Court has interpreted Bill of Rights' guarantees in a manner calculated to restrict their scope severely. The current Bush Administration has, of course, attempted to dilute these precious rights even further. I believe that it is not the necessary outcome of such a tradition, but the failure to adhere to its stringent demands, that has led to an erosion and derogation of the very human rights that are meant to be celebrated.

Furthermore, the methods of adjudication established in the United States are not necessarily transferable to developing democracies. Differences in cultures, history, and the role of law in each specific nation shape and define the methods of adjudication. Nevertheless, I believe that the establishment of a constitutional adjudicative tradition in these nations making the transition to democracy will be extraordinarily important in perpetuating respect for the rule of law and ultimately will act as a barrier against deprivations of human rights.

It is, therefore, critically important for nations attempting to make the transition from authoritarian rule to democratic rule to consolidate the rule of law. This is important not only to secure respect for fundamental rights and for the observance of the democratic process, but also to achieve satisfactory levels of economic and social development. It is also necessary—and obvious—that the consolidation of the rule of law, with the consequent overcoming of “dumb anomie,” requires strengthening the independence, reliability, and efficiency of the judicial process.

To do this, nations must satisfy the guarantees which derive from the idea of due process of law. These guarantees are concerned with the way in which an act of State coercion—which because of its very nature infringes upon an individual right and thus must be specially justified—may be exerted against a particular individual. The general principle in a liberal democracy is that when a government act coercively deprives an individual of a vital good, as many independent powers of the state as possible should intervene to ensure that such an act is truly necessary for the good of society. The legislative branch of government necessarily intervenes in regulating constitutional rights. It draws a balance between

constitutional rights and determines the conditions under which some of them may be limited for the sake of others. While the necessary generality of this legislation guarantees some degree of impartiality, it is clear that the power may be arbitrarily applied. Thus, the power of the state to perpetrate an act of coercion against an individual must necessarily be mediated by an independent judicial power. Indeed, the ideal of a liberal democracy is that a judge should always intervene between an individual and an act of state coercion.

As many commentators argue,<sup>163</sup> there are two main justifications for interposing a measure of due process between the coercive deprivation of a good and the individual who is the victim of it. The first is an intrinsic value resulting from the fact that the individual in question is not merely an object to be manipulated, but rather is part of a dialogue in which the prosecution tries to convince him of the rightness of the coercion, as part of a cooperative search for truth. The second justification ascribes to due process an instrumental value; it is viewed as a mechanism for the impartial application of laws. Both justifications, of course, complement each other. To have a dialogue in which the person affected is an active part of the power process is the best way of achieving impartial applications of the law.

The general guarantee of due process of law implies a series of other guarantees; for example, those due process guarantees associated with access to the jurisdiction of courts. Thus, there must be guarantees related to the conditions for standing, the availability of appropriate remedies, such as *habeas corpus* and injunctions, which protect basic rights, the guarantee against being tried *in absentia*, the possibility of appeals, the availability of legal assistance, the proximity of courts, the openness of the judicial procedure, and the efficiency and expedience of that procedure.

Other crucial due process guarantees are those due process guarantees related to the characteristics that the judicial process must satisfy, which include: (a) the observance of the democratically enacted laws; (b) the unrestricted search for the truth about the facts; and (c) the impartiality of the judge between the parties involved in the process. Additional implied guarantees include those due process guarantees associated with the conditions that state coercion must fulfill, such as not imposing cruel or inhumane punishment, being rational in enforcing the purpose of social protection that the law was passed to meet, allowing the individual the possibility of avoiding prosecution and pun-

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163. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 666–67 (2d ed. 1988); Irwin P. Stotzky & Alan C. Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 MINN. L. REV. 733 (1978).

ishment if he complies with the legal requirement (an idea which rejects retroactive and vague legislation), and not punishing an individual for the commission of involuntary acts.

In many nations which have attempted to make the transition to democracy, the ideal of due process of law has not been actively enforced. Indeed, respect for the guarantees of due process has often suffered from considerable oscillations and from a combination of progressive constitutional and legislative acts and judicial decisions that intentionally disregard those guarantees. This has occurred despite the fact that such guarantees are recognized in most of the constitutions of these nations.<sup>164</sup>

Moreover, although it is clear that the guarantees in the constitutions of these nations do not explicitly include many of the necessary remedial devices, such as *habeas corpus* and injunctions, which allow access to the administration of justice, it is obvious that without proper remedial devices the rights become meaningless. To put it another way, the existence of efficacious remedies inheres in the very rights guaranteed in a liberal democracy. In spite of this recognition, many of these nations do not have remedies sufficient to protect guaranteed rights, of, if they do have the necessary remedies, the authorities have been almost powerless to enforce them.

Legal assistance is another guarantee that is sorely lacking in many of these nations. For example, such assistance in many nations is quite costly, in part as a result of the length of the judicial proceedings. Although there are some mechanisms for free legal assistance—such as lawyers for poor and incompetent people—the procedures for appointing lawyers to cases is extremely inefficient. In addition, these lawyers defend relatively few cases, such as those involving minors or the mentally incompetent. There are also mechanisms for legal assistance organized by municipalities or lawyers associations, but these are equally inefficient and insufficient. It is also true that courts are not generally accessible to large segments of the population, both because of geographical location and because their procedures are too cumbersome, expensive, and slow for dealing with the kinds of controversies common to the large majority of the population.

The judicial process itself raises grave concerns. In Argentina, for example, there has historically been institutional instability because of the large degree of dependence by the courts, particularly by the Supreme Court, on the political process. The Argentine Supreme Court, as in many of these nations' supreme courts, is unstable because it fre-

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164. Examples, of course, include Argentina and Haiti.

quently reverses its own opinions and because its justices are frequently replaced. Indeed, almost every new government has had a judiciary of their own choice. For example, during the military regimes, one of the first acts was to assault the judicial power. The military leaders selected judges who would legitimize the military's seizure of power. With the return of civilian government, the opportunity to shape the judiciary came directly after the previous military assault on it. Nevertheless, in some of the civilian governments, particularly President Alfonsín's government, the judiciary maintained its independence.

The due process guarantees which should be granted in the course of the judicial process are further impaired in these nations because of the extreme slowness of the proceedings, the secretness and exaggerated ritualism in which they are conducted, the delegation of many judicial functions to clerical employees, the *ex parte* communications many judges engage in, and so forth. All of these factors destroy the impartiality and expediency of the administration of justice.

There are also problems in complying with the requirement of legality under which coercion may be exerted by the State. The major problems about the conditions that acts of coercion must satisfy have to do with the ways in which government detains people and treats them from arrest through imprisonment. The problem runs deeper. Large numbers of acts of torture and maltreatment on the part of the police and paramilitary forces are still reported, though they have certainly diminished since reestablishment of democracy. Prisons are crowded, unhealthy and non-rehabilitative places. There have been several inmate uprisings in these countries. Perhaps the most grievous situation is that of people held in detention during the entire length of their trial, without any possibility of parole. They are in almost the same conditions as convicts, and often the trial lasts so long that they serve the entire sentence for a crime for which they may later be found not guilty. Moreover, they are not allowed any compensation for this preventive detention. Further, many judges tend to convict a detainee after he has been in prison for such a long time. In their minds, a retroactive conviction legitimates the detainee's imprisonment.

However depressing these factors appear to be, and however debilitating to the strengthening of the rule of law and the consolidation of democracy, all is not lost. There are signs of hope. For example, major progress in the procedural conditions for the protection of human rights has been effected by the ratification of several international agreements in some nations undergoing the transition to democracy, such as

the American Convention on Human Rights,<sup>165</sup> the International Covenant on Civil and Political Rights,<sup>166</sup> with the optional protocol, and in the International Covenant on Economic, Social, and Cultural Rights.<sup>167</sup>

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165. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

166. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

167. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.