

Michigan Journal of International Law

Volume 18 | Issue 3

1997

The Fallacy of Neutrality: Diary of an Election Observer

Jeanne M. Woods

Loyola University New Orleans School of Law

Follow this and additional works at: <https://repository.law.umich.edu/mjil>



Part of the [Comparative and Foreign Law Commons](#), [Election Law Commons](#), [Law and Politics Commons](#), and the [Law and Race Commons](#)

Recommended Citation

Jeanne M. Woods, *The Fallacy of Neutrality: Diary of an Election Observer*, 18 MICH. J. INT'L L. 475 (1997). Available at: <https://repository.law.umich.edu/mjil/vol18/iss3/3>

This Article is brought to you for free and open access by the Michigan Journal of International Law at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of International Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

THE FALLACY OF NEUTRALITY: DIARY OF AN ELECTION OBSERVER

Jeanne M. Woods*

“What’s past is Prologue . . .”¹

Tuesday, April 26, 1994.

Shrouded in a Rawlsian veil of ignorance,² I have no anchor in time or space. The veil is quite fashionable: lacy; black; seductive. Draped in its folds I am ageless and nameless, undefined by race, creed, or gender. I have no past. My will is free, unencumbered by history or tradition. I am newly born.

Nearby in a Capetown hospital, another newborn prepares to emerge from the dark warmth of her mother’s womb. At 1:45 p.m., a baby girl will brave the glare of flourescent reality as her mother is gently coaxed by those around her. The air is electric, filled with tense expectancy; the urgings become more insistent.

Beads of perspiration gather on the woman’s brow as she reaches for the hand extended before her. Her labor has been long and hard; bolts of lightning sear through her bulging frame to create a passage for the new life. She fears at times that she will not endure, that the pain will overcome her before the opening has widened sufficiently, her infant stillborn, suffocated in the birth canal. She struggles to comply with the encouraging words of those around her.

* Associate Professor, Loyola University New Orleans School of Law. J.D., Temple University School of Law (1981); B.A., Antioch College (1974). I would like to thank Professor David Kennedy and the participants in the 1996 Harvard Law School Law Teachers and Scholars Workshop for helping to shape the direction of this essay. I would also like to thank Henry J. Richardson III and Cynthia Lepow for their comments on earlier drafts. Finally, I would like to thank Christine Thomas for her outstanding research assistance.

1. WILLIAM SHAKESPEARE, *THE TEMPEST* act 2, sc. 1, ll. 253–54.

2. See JOHN RAWLS, *A THEORY OF JUSTICE* 12, 136–42 (1971). The Rawlsian project attempts to rehabilitate traditional social contract doctrine, *id.* at 16, in order to maintain its viability in the face of the gross disparities in wealth distribution. His polemic against utilitarianism gropes with the inevitable contradiction between formal equality (equal liberty) and substantive equality (distribution of wealth). See *id.* at 6. While the social contract reflects the domestic liberal paradigm, premised on individual autonomy and consent to the social order, in international law contract is replaced by treaty, and autonomy is replaced by sovereignty. This essay argues that in both systems, neutrality—metaphorically the veil of ignorance—supports the fiction of consent.

But "push" is not the exhortation that is to greet the new arrival. For the mother-to-be is making history not only for herself, but for her world. And so, she faithfully follows the instructions of her coaches: "Put your 'X' in the box." And as she does, the proud mother ensures that her newborn daughter will forever reflect her place in that history: she bestows upon her the name "Nelson Madiba"³ Lakay, thus heralding the birth of South African democracy.⁴

NEUTRALITY AS LEGAL FICTION

A product of a historically specific social order, political theory plays a distinct role with respect to that order. As a manifestation of a philosophy, or, world view, it reflects either the dominant discourse in the society, the purpose of which is to justify and maintain the status quo,⁵ or an alternative view which seeks to discredit, and ultimately change, the status quo. A theory which is progressive in one era may be retrogressive at another point in time. Legal theory is distinct, but not divorced from political theory;⁶ the two are dialectically interconnected, each influenced by and, in turn, influencing the other. And the interplay of theoretical models reflects, and is reflected in, real social and historical events.⁷

The theory of neutrality plays a key role in maintaining the credibility of the existing liberal order. It is the guarantor of the social contract,

3. "Madiba," which means grandfather, is a term of affection by which South Africans refer to Nelson Mandela. See Philip Hoare, *Into the Heart of the Hero's Homeland*, THE INDEPENDENT, May 10, 1997, available in 1997 WL 10465951.

4. The first democratic elections in South Africa were held from April 26–29, 1994. The voting period included one day for "Special Votes," designed to accommodate the ill and physically disabled, prisoners, and pregnant women. See *Report of the Secretary-General on the Question of South Africa*, U.N. SCOR, 49th Sess., Plenary Meetings, at 12, U.N. Doc. 5/1994/717 (1994) [hereinafter *Secretary General's Report*]. Votes were cast for a party list of candidates, rather than for an individual candidate. Given the high level of illiteracy (estimated 60–70% of adult population) and the first-time voter status of the majority of the population, the relatively simple system of marking the ballot with an 'X' was needed. See Kader Asmal & Jacques de Ville, *An Electoral System for South Africa*, in FREE AND FAIR ELECTIONS 1, 21–22 (Nico Steytler et al. eds., 1994).

5. See, e.g., KARL MARX AND FREDERICK ENGELS, THE GERMAN IDEOLOGY 65 (C.J. Arthur ed., 1970) ("[T]he thinkers of the class . . . make the perfecting of the illusion of the class about itself their chief source of livelihood . . .").

6. See, e.g., Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 668 (1960) (stating that "constitutional law is for the most part political theory expressed in lawyers' language").

7. See ALASDAIR MACINTYRE, AFTER VIRTUE 58 (1981) ("Every action is the bearer and expression of more or less theory-laden beliefs and concepts; every piece of theorising and every expression of belief is a political and moral action.").

the undisputed sine qua non of fairness and justice. Derived from the Latin neuter, meaning "neither," neutrality connotes restraint from choice between competing values. It is Rousseau's concept of law: general and abstract rules. Under this conception, privileges, and class distinctions are legitimate so long as they do not expressly identify particular individuals subject to them.⁸

Neutrality is one of many conceptual fictions of liberal discourse.⁹ A legal fiction is "contrived by the law" to facilitate adjudication of issues.¹⁰ Such fictions may serve as symbols, to make abstract concepts tangible¹¹ or, they may be myths designed to promote some normative principle or goal.¹² The problem arises when these fictions cease to be recognized as inventions, or as "presumptions about reality,"¹³ and are believed to have an independent existence in reality. Then, they "purport to provide us with an objective and impersonal criterion, but they do not."¹⁴ According to the philosopher Alasdair MacIntyre, a fiction is "a pseudo-concept available for a variety of ideological uses Hence, when we encounter its use in practical life, it is always necessary to ask what actual project or purpose is being concealed by its use."¹⁵ For example, Professor Derrick Bell argues that racially neutral anti-discrimination law disguises continued bias, and creates a tendency for self-blame because of the difficulty of identifying more subtle forms of oppression.¹⁶ Similarly, in employment law, the enforcement of a neutral right to contract ignores the imbalance of power between worker and employer.¹⁷

Neutrality is not just another fiction, however; it is central to "the whole liberal world view of (private) rights and (public) sovereignty mediated by the rule of law . . . [and] is only an attractive mirage masking the reality of economic and political power."¹⁸ The supposed

8. See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 82, book II, ch 6. (Maurice Cranston trans., Penguin Books 1968).

9. See MACINTYRE, *supra* note 7, at 62 (discussing fictions of "utility" and "rights").

10. BLACK'S LAW DICTIONARY 894 (6th ed. 1990).

11. The fiction of corporate personality provides one example.

12. For example, the fiction of the "reasonable man" promotes socially acceptable conduct.

13. See *Martin Marietta Co. v. Gould, Inc.*, 70 F.3d 768, 771 (4th Cir. 1995).

14. MACINTYRE, *supra* note 7, at 68.

15. *Id.* at 62.

16. See DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL* 6 (1992).

17. See *id.* at 101.

18. *Id.* at 103.

neutrality of the liberal legal order supports other fictions that comprise the constitutive pillars of that order. For example: that individuals consent to the social contract; that because of this consent liberalism preserves individual autonomy; and that because the liberal order is premised on individual autonomy and consent, its social and economic consequences are legitimate and just.

Wednesday, April 27, 1994.

I am afloat, in the original position,¹⁹ when Johannesburg Airport is bombed.²⁰ The news is sobering, for being permitted to know something of the natural order of things,²¹ I know that bombs can kill. I am on my way to the front lines, so to speak, with only an "Official Observer" armband to protect me.

I have, you see, experienced first-hand the wanton violence that defines South African political life,²² narrowly escaping death in neighboring Gaborone, Botswana . . .

It is June 1985. I am here on a United Nations-sponsored mission to document South African aggression aimed at destabilizing neighboring states.²³ It is one a.m. on the morning after my arrival in

19. See RAWLS, *supra* note 2, at 18. In Rawls' theory the original position, an abstraction of the Lockean state of nature, produces not a liberal, contract-based system of government, but rather establishes the "principles of justice" that inhere in such a system. *Id.* at 11. Tautologically, the original position itself incorporates "our considered judgments of justice." *Id.* at 21.

20. A bomb placed in a white Peugeot exploded at Jan Smuts Airport at 7:15 a.m. on April 27, the first day of general voting. Police arrested thirty-one members of right-wing groups—including a policeman and a police reservist—in connection with that blast, as well as a series of car bombings on the eve of the election which killed twenty-one people and injured at least 173. Andre Koopman, *31 Arrested in Bombs 'Breakthrough'*, CAPE TIMES, April 28, 1994, at 1.

21. See RAWLS, *supra* note 2, at 137 (Parties in the original position are presumed to know the "general facts about human society.").

22. By the end of April 1994, 20,436 people had been killed in political violence in South Africa. Of these, 1,439 were killed in the four months preceding the election. See INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS LEGAL OBSERVER MISSION TO THE SOUTH AFRICAN ELECTIONS, FINAL REPORT 21–22 (June, 1994) [hereinafter IADL REPORT].

23. Following the liberation of Angola and Mozambique from Portuguese colonialism in 1975, and majority rule in Zimbabwe in 1980, the South African apartheid regime, portraying itself as a preserve of "democracy" and "Western values" surrounded by hostile "Marxist-Leninist" States, and it began a campaign of economic and military destabilization against its neighbors. This campaign involved direct aggression in the form of air strikes and commando raids against so-called "terrorist bases" in the neighboring countries, and the creation and/or maintenance of so-called "rebel groups" which roamed the countryside attacking primarily civilian and economic targets. See, e.g., RICHARD LEONARD, SOUTH AFRICA AT WAR: WHITE POWER AND THE CRISIS IN SOUTHERN AFRICA 59–97 (1983).

Gaborone, when intermittent explosions penetrate the stillness of the slumbering town. I am thinking that the ominous sounds could not mean what I feared; after all, I had just arrived!

The first timid rays of light confirm the unthinkable; shine brightly through the lingering smoke; dance with the shadows of burnt-out carcasses of houses and cars; illuminate the blood-soaked beds, the vivid red splashes on walls and window sills; expose the dismembered limbs and decapitated head peeping obscenely through the rubble; steady the nerves of the local folk flocking from the police stations to which they had fled in terror.

Crowds mill around the gutted ruins, stare in shocked disbelief as the meaning of the night's events sinks in. They had been invaded. South African commandos in white Datsun mini-buses and Ford Cortina vans had careened through their quiet residential neighborhoods; shouting over loudspeakers in Afrikaans,²⁴ English, Sesotho, ordering them to stay indoors and switch off their lights; wiping out the unlucky ones who got in the way. Attacking ten scattered houses simultaneously with heavy artillery—hand grenades, machine guns, mortar shells. Retreating triumphantly toward the South African border.

Twelve are confirmed dead. I tour the smoldering sites, interviewing witnesses. I photograph the bullet-riddled body of a pajama-clad child a little younger than my own daughter. I listen to Levi's trembling account of survival in the house where I was supposed to have been; of crouching under a bed while his brother and sister-in-law are cut down by machine-gun fire. But for my tardy driver—and no telephone—I might have been among the victims.

Now the violent specter of the apartheid past threatens to consume the country's impending democratic debut.²⁵ The Goldstone Commission of Inquiry into Violence and Public Intimidation reports a high-level conspiracy to derail the elections, involving senior officials of the police,

24. Afrikaans is the language of the formerly ruling Afrikaners, and is associated with the domination and oppression of Blacks. See Paul Taylor, *Father of His Country*, WASH. POST MAG., Feb. 13, 1994, at 10, 17.

25. Apartheid was officially abolished in February, 1991, with the repeal of the Black Land Act (27) of 1913, the Development Trust and Land Act (18) of 1936, and the Group Areas Act (36) of 1966. See C.G. van der Merwe, *Law of Property (Including Mortgage and Pledge)*, in ANNUAL SURVEY OF SOUTH AFRICAN LAW 121-26 (1991).

the Inkatha Freedom Party (Inkatha), the KwaZulu police, and right-wing paramilitary groups²⁶—many of the same players in the destabilization campaign.

Yet, I am here as the bearer of law, and I know that the law born of the social contract “is not burdened by the past.”²⁷ I am one of thousands of neutral observers²⁸ dispatched through various governmental and nongovernmental organs to monitor the elections and to determine whether they are “free and fair.”²⁹ I am ushering in a new phase of the struggle for democracy and human rights in South Africa, under the auspices of nationally negotiated, internationally brokered elections.

As an adjudicator of fairness, I serve a judicial norm-enforcing function; as an international monitor, I am not only an arbiter, but a norm-creator, midwife to a gestating right to democracy.³⁰ I must, therefore, exorcise Gaborone’s intransigent ghost,³¹ shed my prior empirical knowledge.³² For in order to yield justice, I must remain in the

26. See *Letter Dated 31 March 1994 from the Chairman of the Special Committee against Apartheid to the Secretary-General*, U.N. GAOR, 48th Sess., Agenda Item 38, at 9, para. 32, U.N. Doc. A/48/921, 5/1994/383 (1994) [hereinafter *Letter Dated 31 March 1994*]. The Goldstone Commission, headed by a prominent South African jurist, was created by the United Nations Security Council pursuant to Resolution 765 (July 1992).

27. POST-MODERN LAW: ENLIGHTENMENT, REVOLUTION AND THE THE DEATH OF MAN 7 (Anthony Carty ed., 1990) [hereinafter Carty].

28. Election observers were bound by a Code of Conduct, enacted into South African law. Independent Electoral Commission Act (Act No. 150 of 1993) § 24(1)(h), reprinted in IADL REPORT, *supra* note 22, at F-13. The Act provided, in pertinent part “[o]bservers shall maintain strict impartiality in the conduct of their duties, and shall at no time express any bias, or preference with reference to any registered party or nominated candidate.” *Id.*

29. The United Nations Organization Mission in South Africa (UNOMSA) was established in September, 1992 to help lay the groundwork for the elections. Its “Electoral Mandate,” agreed to by the U.N. Security Council in January 1994, identifies these specific goals: to observe the conduct of the Independent Electoral Commission (IEC) and its organs in all stages of the electoral process; to observe the various measures taken to ensure freedom of organization, movement, assembly and expression during the election campaign; to monitor security efforts; to verify sufficient voter education efforts; to verify that qualified voters were permitted to vote; to verify free access to voting stations, secrecy of the vote, proper custody of ballots, secure counts, and the timely announcement of poll results; and to coordinate the deployment and activities of other international observers. See *Secretary-General’s Report*, *supra* note 3 at 14, para. 54.

30. Support for a right to democracy is reflected in numerous international instruments. See, e.g., *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections* G.A. Res. 45/150, U.N. GAOR, 45th Sess., U.N. Doc A/45/150 (1991); *Declaration on the Granting of Independence to Colonial Countries and Peoples* G.A. Res. 1514(xv), U.N. GAOR, 15th Sess., U.N. Doc A/450 (1960); *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3rd Sess., art. 2, U.N. Doc. A1810 (1948); *International Covenant on Civil and Political Rights*, art. 25, 99 U.N.T.S. 171 (Mar. 23, 1976). See generally Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539, 552, 572–90 (1992).

31. See Carty, *supra* note 27, at 7 (“We do not contract. Instead, we are already contracted. . . . As contracted, we are bound to the past.”).

32. See RAWLS, *supra* note 2, at 19 (Principles chosen in original position should match “our considered convictions of justice . . . which we now make intuitively.”).

original position behind the veil of ignorance.³³ The veil will shield my judgments from the past and its present-day consequences, the violence and the fear, the yesterday and the tomorrow, the known and the unknown.

Saturday, April 15, 1994.

I have just arrived in Johannesburg, exhausted but thrilled. After working against apartheid for more than twenty years, I will participate in its final downfall. The city feels very different from what I remember from my last visit . . .

It is August 1985, during the state of emergency.³⁴ I have traveled here spontaneously as part of my investigatory mission.³⁵ It is the height of the popular uprising led by the United Democratic Front;³⁶ thousands of pro-democracy activists have been arrested and detained.³⁷ I did not plan to come here. But my exiled friends in the Frontline States³⁸ insist that it is necessary if I am to understand fully the regime's destabilization strategy. I am also curious to find out just how far the people are prepared to go with their revolt.

33. See *id.* at 9.

34. The apartheid regime declared a state of emergency on July 20, 1985 in major areas of the country, including Johannesburg. See Nathaniel Sheppard Jr., *S. Africa Releases Names of Detainees*, July 24, 1985, § 1, at 3. A key feature of the decree was the barring of all journalists, television crews and other media representatives from the emergency areas. See DION BASSON & HENNING VILJOEN, *SOUTH AFRICAN CONSTITUTIONAL LAW* 250-51 (1988).

35. See *supra* note 23 and accompanying text.

36. The United Democratic Front was a multi-racial anti-apartheid coalition formed in response to the adoption of a new constitution in 1983. See CATHOLIC INSTITUTE FOR INTERNATIONAL RELATIONS, *SOUTH AFRICA IN THE 1980S: STATE OF EMERGENCY 7* (1986) [hereinafter CATHOLIC INSTITUTE]. Adopted pursuant to a whites-only referendum, the Constitution denationalized the African population. See S. AFR. CONST. (Republic of South Africa Constitution Act, No. 110, 1983) at Part X para. 100(1)(ix). The Constitution also established segregated houses of Parliament for the "colored" and Indian people, *id.* at Part IV; and vested the State President with potentially wide authoritarian powers, *id.* at Parts III para. 6(1); VI para. 30; V paras. 19(1)(a) and (b); and IX para. 80.

37. According to the Detainees' Parents Support Committee, over 12,000 people were detained between July 20, 1985 and March 31, 1986. In the same period, thirty-two activists were charged with treason. See *Detainees Parents Support Committee on Doubling of Detention Rate in 1986*, BBC SUMMARY OF WORLD BROADCASTS, Apr. 11, 1986, at § 4 available in LEXIS, World Library, Allnws File. By December, 1985, according to the Independent South African Institute of Race Relations, nearly one-thousand people had been slain. See Arik Bachar, *South African Death Toll Now 1,000, Zimbabwe Border Tense*, REUTERS N. EUR. SERVICE, Dec. 17, 1985 available in LEXIS, World Library, Allnws File.

38. The term "Frontline States" refers to the independent black African states in the region of southern Africa, including Angola, Botswana, Lesotho, Mozambique, Swaziland, Tanzania, Zambia and Zimbabwe. See *SADC Officials Discuss Regional Matters*, XINHUA ENG. NEWSWIRE, June 26, 1996 available in 1996 WL 10823044.

Posing as a tourist, I obtain a seventy-two hour transit visa in Swaziland, dispose of any telltale signs of my mission, memorize the telephone number of my "contact," a prominent journalist, and go "Inside." The atmosphere is very tense. Armored tanks rumble through the black townships. In the city a political strike renders blacks invisible on the streets, while white merchants aggressively solicit patronage from me, an obvious foreigner. The people I meet—without exception—tell me they are prepared to die for their freedom.

The contrast now is striking. Johannesburg's streets surge with African life, and very few whites can be seen downtown. I am told that there are underground routes through which they can escape to the suburbs. The bustle of daily life masks the tension caused by the threatened Inkatha assault on the city.³⁹ Things appear normal, except for the razor-sharp wire barricading some sections of the city. In the suburbs and townships, however, the mood is fearful. Everyone is planning to stay home on Monday, the day Inkatha threatens to storm Johannesburg. Inkatha has been violently opposed to the elections.⁴⁰ Only days before, it led a group of axe-wielding *impi* warriors through the city, leaving death and devastation in its wake. Inkatha openly trains "self-defense" units in Ulundi.⁴¹

The Goldstone Commission confirmed the existence of hit squads in the Natal Province, consisting of members of the Inkatha-dominated KwaZulu police.⁴² In March, the Commission reported that high-ranking South African officials⁴³ assisted Inkatha in carrying out violent attacks against the African National Congress (ANC).⁴⁴ Police officers testifying

39. The Inkatha party began as a Zulu cultural organization launched by Chief Mangosuthu ("Gatsha") Buthelezi in 1975. Claiming about a million members, Inkatha followed a policy of dialogue and collaboration with the apartheid regime, and frequently played a role of violently disrupting the democratic movement. See CATHOLIC INSTITUTE, *supra* note 36, at 44-49.

40. On January 7, Inkatha announced that it would not participate in elections unless the government and ANC acceded to "demands for greater autonomy." See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 4, at 1 (Jan. 14, 1994) [hereinafter LAWYERS' COMMITTEE REPORT, Issue 4].

41. The capital of the KwaZulu "homeland."

42. See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW REPORT, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 2, at 3 (Dec. 17, 1993) [hereinafter LAWYERS' COMMITTEE REPORT, Issue 2].

43. General Basie Smit, the second-ranking commander of the South African police, and General Krappies Engelbrecht, the chief of counter-intelligence, were named. See *Zulu-Based Group Sees a 'Dirty Trick' in Report by Judge*, N.Y. TIMES, Mar. 21, 1994, at A9.

44. See *id.*

before the Commission stated that from 1989 "until the very recent past," officials "oversaw a network that supplied automatic rifles, grenades, mortars and other weapons to Inkatha."⁴⁵ Previous investigations have disclosed government financing and training of Inkatha,⁴⁶ but this is the first implication of them directly in the violence.

Nevertheless, in the liberal tradition, Inkatha will not be excluded from the ballot;⁴⁷ therefore, I must not judge the moral worth of the competing parties,⁴⁸ so long as they follow the rules. Moral truth is unknowable;⁴⁹ indeed, moral judgments are inappropriate for enforcement through law.⁵⁰ The veil screens out moral value judgments from the realm of law.⁵¹ I must therefore avoid any "express preference for any named groups."⁵² My neutral role requires indifference to who the winner is.⁵³ Yet, this indifference masks the ultimate choice,⁵⁴ which has already been made.⁵⁵

45. Bill Keller, *Inquest Finds South African Police Aided Zulus in Terror Campaign*, N.Y. TIMES, March 19, 1994 at A1.

46. In March, 1992, Buthelezi's former personal assistant testified that Inkatha members received military training in Namibia, which was then under South African rule. David B. Ottoway, *Buthelezi Linked to Trainees; Inkatha Chief Signed Checks, Ex-Aide Says*, WASH. POST, March 1, 1992, at A23. Previously, the *Weekly Mail* disclosed that the government secretly funded Inkatha rallies and an affiliated labor union. See David B. Ottoway, *S. Africa Probe Targets Inkatha, Alleged Fronts; Judge Says No Evidence Shows Pretoria Secretly Funding Political Organizations*, WASH. POST, February 5, 1992, at A23.

47. See *infra* note 223 and accompanying text.

48. See RAWLS, *supra* note 2, at 19 ("Systems of ends are not ranked in value.").

49. See Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 782 (1983) ("Liberalism's psychology posits a world of autonomous individuals, each guided by his or her own idiosyncratic values and goals, none of which can be adjudged more or less legitimate than those held by others.").

50. See, e.g., BELL, *supra* note 16, at 51 (suggesting that the current Supreme Court deems *Brown v. Board of Education* ineffective as an enforcement tool because it is a mere "call to higher morality").

51. See David Kennedy, *Book Review*, 21 HARV. INT'L L.J. 301, 304 (1980) (reviewing LOUIS HENKIN, *HOW NATIONS BEHAVE* (2d ed.)(1979)) ("To the positivist . . . law is an expression of will, not right . . . distinct from morality.").

52. Tushnet, *supra* note 49, at 806.

53. See Herbert Weschler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 11-12, 15 (1959).

54. See ALASDAIR MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 3-4 (1988) ("[Liberalism's] requirement of disinterestedness in fact covertly presupposes one particular partisan type of account of justice, that of liberal individualism, which it is later used to justify, so that its apparent neutrality is no more than an appearance."). See also RAWLS, *supra* note 2, at 21.

55. See *infra* notes 200-21 and accompanying text.

NEUTRALITY AS FIG-LEAF

The original position, however, does not entail a totally blank slate; it is "characterized by stipulations that are widely accepted."⁵⁶ These stipulations—individualism, private property, freedom of contract, the patriarchal family—are the normative values and seemingly immutable institutions of the market state.⁵⁷ They are, by definition, neutral.⁵⁸ Thus, the original position presupposes that only liberal institutions, and the prevailing distribution of power therein, are rational, and therefore form the premises upon which rational men⁵⁹ select and order principles of justice.

Indeed, in Rawlsian discourse, justice and rationality are interchangeable. Justice is by definition rational,⁶⁰ rationality is intuitive⁶¹ and efficient.⁶² The first principle of justice is, therefore, what is rational, intuitive, and efficient in the context of the widely accepted stipulations of liberalism: equal liberty.⁶³ The principle of equal liberty—produced by

56. RAWLS, *supra* note 2, at 14. See also Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3 (1971) (stating that majoritarianism is one such stipulation).

57. See RAWLS, *supra* note 2, at 137. (In the original position, parties "understand political affairs and the principles of [liberal] economic theory; they know the basis of social organization [the market] and the laws of human psychology. Indeed, the parties are presumed to know whatever general facts affect the choice of the principles of justice."). See also Chris Jochnick & Roger Normand, *The Legitimation of Violence: A Critical History of the Laws of War*, 35 HARV. INT'L L.J. 49, 57 (1994) ("These effects are by their nature hidden; the contingent, malleable power relations that produce law are made to seem natural, neutral, and inevitable.").

58. See Tushnet, *supra* note 49, at 824 ("Principles are 'neutral' only in the sense that they are, as a matter of contingent fact, unchallenged, and the contingencies have obvious historical limits.").

59. One commentator suggested that the concept "rational men" meant "the elites throughout the system, including its periphery." Immanuel Wallerstein, *Civilizations and Modes of Production: Conflicts and Convergences*, in CULTURE, IDEOLOGY, AND WORLD ORDER 66 (R.B.J. Walker ed., 1984).

60. See RAWLS, *supra* note 2, at 17.

61. See *id.* at 24 (suggesting that theories embodying rationality "have a deep intuitive appeal."). But see MACINTYRE, *supra* note 7, at 67. ("[O]ne of the things that we ought to have learned from the history of moral philosophy is that the introduction of the word 'intuition' by a moral philosopher is always a signal that something has gone badly wrong with the argument.").

62. See RAWLS, *supra* note 2, at 14 (defining rationality as "taking the most effective means to given ends").

63. See *id.* at 60 (defining the first principle of justice as providing "each person . . . an equal right to the most extensive basic liberty compatible with a similar liberty for others"). Equal liberty thus prevails over countervailing conceptions of justice that might be "intuitive" in the context of a different paradigm. For example, it is conceivable that equal distribution of goods might be a paramount concern of a system of justice in a milieu characterized by communitarianism, social ownership, or matriarchy.

rationality and in turn producing justice—is one of the principles rational men⁶⁴ would consent to in a position of procedural equality.⁶⁵

If parties are procedurally equal, the law and its implementers must formally profess neutrality.⁶⁶ If I am to be neutral, the veil must block out my Gaborone experience. I must also disavow sympathy with any of the contending parties—the ANC, Inkatha, the separatist Afrikaner Volksfront—or their ideologies, for partisanship is irrational, and by definition cannot produce justice;⁶⁷ consequently, it is unjust.⁶⁸

My task, therefore, is to superimpose rationality through law, in its awesome universality and objectivity,⁶⁹ upon irrational politics, to miraculously transform the events that are to transpire.⁷⁰ In the hands of the neutral arbiter, a cacophonous struggle for power becomes a legal defining moment, law “act[ing] on the everyday as . . . order on chaos,”⁷¹ . . . as “the metropolis . . . mobilized for deployment on the periphery.”⁷² Law will bestow credibility and legitimacy upon the election and the resulting political order. Once the political order is legitimated, its decisions will acquire normative force,⁷³ and an aura of inevitability will descend upon its social and economic consequences.⁷⁴ In this way, the crucial dichotomy between law and politics will be preserved.⁷⁵

64. See *id.* at 27. Rawls consistently “gender”alizes his predictions of outcomes under his “justice as fairness” paradigm.

65. See generally *id.* at 12–14. But cf. Kennedy, *supra* note 51, at 301 (“While the powerful of any ideological stripe will prefer a system of free bargaining among procedural equals, this should never satisfy the weak.”).

66. See ROUSSEAU, *supra* note 8, at 82.

67. See MACINTYRE, *supra* note 54, at 3.

68. See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 273 (1974) (“To claim that a prohibition or rule is nonneutral presupposes that it is unfair.”).

69. See Weschler, *supra* note 53, at 15.

70. International observers were expected to observe all aspects of pre-election matters, including organization, education initiatives, campaigning; observe the election procedure on polling days and the counting of the ballots; attend political meetings and rallies; and observe the conduct of the police and security forces. See *Secretary General’s Report*, *supra* note 3, at 12, paras. 44–47.

71. See David Kennedy, *Autumn Weekends: an Essay on Law and Everyday Life*, in *LAW IN EVERYDAY LIFE* 212 (Austin Sarat & Thomas R. Kearns eds., 1993).

72. *Id.* at 191.

73. See MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 56 (1989).

74. See Jochnick & Normand, *supra* note 57, at 57–58. “[L]aw influences the public perception of an act by imbuing it with the psychic trappings of lawfulness Whereas national law legitimates the domestic social order, the international legal regime reflects and reifies the status, rights, and obligations of states. International law legitimates the hierarchies through which power is presently distributed.” *Id.* at 58 n.30 (citing GEORG SCHWARZENBERGER, *POWER POLITICS: A STUDY OF INTERNATIONAL SOCIETY* 203 (1951)).

75. See Weschler, *supra* note 53, at 11 (judicial criteria should be “criteria that can be framed and tested as an exercise of reason and not merely as an act of willfulness or will”).

I am, as well, the bearer of justice. Neutral law will ensure procedural equality among the contenders. It will place the ruling National Party, the architects of apartheid, and the formerly banned ANC on equal footing. Law will render the previously disenfranchised blacks equal to the whites; the veil will conceal the fact that it was only four months before that blacks were given any say in the running of the country.⁷⁶ Behind its lacy folds, we are unaware that it was only four months ago that South Africa's white-controlled parliament voted to restore citizenship to the estimated ten million Africans banished to the barren, nominally independent, "homelands."⁷⁷ But, the incisive words of W.E.B. DuBois penetrate the veil:

Here, at a stroke of a pen was erected a government of millions of men,—and not ordinary men either, but black men emasculated by a peculiarly complete system of slavery, centuries old; . . . they come into a new birthright, at a time of war and passion, in the midst of the stricken and embittered population of their former masters.⁷⁸

Nevertheless, liberal law renders the parties procedurally equal, and that means that the process is fair. And procedural fairness means justice,⁷⁹ despite the past and ongoing inequities.⁸⁰ The veil of ignorance will cancel out the advantages gained from differences in wealth, status, military prowess, or racial and gender oppression.⁸¹ In this way, neutrality constrains naked power.⁸²

See also Kennedy, *supra* note 51, at 304 ("The triumph of positivism was accompanied by a rigid separation of law and politics.").

76. Black South Africans were first given input with the launch of the Transitional Executive Council (TEC). The Transitional Executive Council Act 151 of 1993 established the TEC. The TEC consists of one member from each party represented in CODESA, and was established to promote uninhibited canvassing, voter education and to eliminate impediments to legitimate political activities. Although the TEC was merely an advisory body the international community responded favorably to its formation. *See* LAWYERS' COMMITTEE REPORT, Issue 2, *supra* note 42, at 1 ("The installation of the TEC [on December 6, 1993] triggered the repeal, . . . on December 9, of the United Nations oil embargo against South Africa.").

77. *Id.* at 2. The law reinstating citizenship to the residents of Transkei, Venda, Bophuthatswana and Ciskei was adopted on December 15, 1993.

78. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 29 (1968) (discussing circumstances faced by newly emancipated slaves).

79. *See* Rawls, *supra* note 2, at 136 ("The idea of the original position is to set up a fair procedure so that any principles agreed to will be just.").

80. *Id.* at 140 (suggesting that what is just in the abstract will remain just once differences surface).

81. *Id.* at 18–19.

82. *See* Tushnet, *supra* note 49, at 783–84.

And indeed, naked power must be constrained in certain contexts if the law/politics dichotomy, hence the normative power of law, is to be maintained.⁸³ Power must be constrained in the judicial arena, the quintessential legal forum, although neutral principles theorists acknowledge that judicial decisionmakers face “inescapably ‘political’ ” choices.⁸⁴ In the face of such choices, moral relativism is required, because liberal philosophy deems these choices to be among equally worthy values,⁸⁵ reduced to equally valid legal arguments.⁸⁶ Liberal theorists advocate judicial neutrality because the courts are not sovereign—they do not derive their authority from popular consent—and therefore “are bound to function otherwise than as a naked power organ” when making such choices.⁸⁷ But, this reasoning does not apply to the political arena. The legislature is sovereign, therefore it may behave in an overtly partisan fashion,⁸⁸ and any limits imposed on its authority bear a heavy burden of justification.⁸⁹

Likewise, in international law, neutrality does not delimit the State when acting in its sovereign capacity; it is not imposed or expected when States act to advance their economic, military, or diplomatic self-interests. It does not apply to terms of trade, territorial defense, its votes in the United Nations, IMF, GATT, or the World Bank. Neutrality is imposed, however, when States act in a judicial capacity, resolving disputes between procedural equals. Thus, in the international arena, where it is harder to conceal the influence of naked power, the veil is even more important.⁹⁰ Naked power is irrational, and does not belong in a setting

83. See Dencho Georgiev, *Politics or Rule of Law: Deconstruction and Legitimacy in International Law*, 4 EUR. J. INT'L L. 1, 2 (1993).

84. See Weschler, *supra* note 53, at 15.

85. See *id.* Accordingly, Weschler characterized the issue in *Brown v. Board of Education* not as equal protection, but freedom of association. Under this view, both sides had equally valid moral positions with regard to the right to associate or not to associate. See *id.* at 34. Similarly, Bork achieves neutrality by framing issues of rights as mere competing “gratifications,” the worth of which is incapable of being judged. See Bork, *supra* note 56, at 10, 17.

86. See Kennedy, *supra* note 71, at 217 (“[T]he great claim of liberal legal science [is] to have beaten the swords of political conflict into the ploughshares of argument.”).

87. See Weschler, *supra* note 53, at 19. See also Bork, *supra*, note 56, at 6, 12. *But cf.* MACINTYRE, *supra* note 7, at 235 (“[O]ne function of the Supreme Court [is] to keep the peace between rival social groups adhering to rival and incompatible principles of justice by displaying a fairness which consists in even-handedness in its adjudications.”).

88. See Weschler, *supra* note 53, at 16 (“Is there not . . . a vital difference between legislative freedom to appraise the gains and losses in projected measures and the kind of principled appraisal . . . that alone is in the province of the courts?”).

89. See Bork, *supra* note 56, at 10–11.

90. Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 EUR. J. INT'L L. 66, 86 (1991) (stating that MacIntyre argues “that the very object of the [liberal] exercise is to engage in a pretense of rationality so as to conceal the ‘real’ forces at work in international society”). See generally MACINTYRE, *supra* note 7.

where law and justice are the asserted goals. Neutral and objective rules must constrain power and irrationality, or at least provide a fig-leaf in which to clothe the beast.⁹¹

Sunday, April 17, 1994.

An ANC rally in a Johannesburg park—complete with reggae music and tie-dyed hippies—reminds me of my youth in the anti-war and civil rights movements. A meeting with a National Party Member of Parliament reminds me that what I am witnessing here is no ordinary transfer of power, but a transition from fascism. Advocate Pienaar is a former government official responsible for administering some of the worst atrocities of apartheid.⁹² As his aide serves us tea and cookies in the plush, sunlit conference room, he explains that apartheid was a “mistake,” an error of judgment, not a crime.⁹³ The National Party has apologized, he piquedly reminds us, and now the country must put the past behind it.

I am haunted, again, by Gaborone, by little Peter Mafoka's blood-drenched pajamas. By Tim Williams' gaunt face as he describes his narrow escape over a fence as his house is bombed. "You know," he shakes his head incredulously, "I lived there with three little children." By the dismembered bodies of the two Batswana house-keepers who were unlucky enough to move into a house recently vacated by South African refugees. Two arms are found in the debris, three legs. Bits of hair and scalp are scattered across the lawn . . .

91. See Tushnet, *supra* note 49, at 825 (“The theory of neutral principles requires that judges be able to rely on a shared conception of the proper role of judicial reasoning.”).

92. Louis Pienaar was a former Minister of Home Affairs and Environment Affairs from 1991 to 1993 and a former Minister of National Education and Environmental Affairs from 1990 to 1992. In these capacities, he was responsible for the hated system of inferior “Bantu education” forced upon African youth. Interview with Louis A. Pienaar, Advocate, in Cape Town, S. Afr. (Apr. 21, 1994). See also WHO’S WHO IN SOUTHERN AFRICA 1994–1995 377 (S. V. Hayes ed., 1995). Protest against this system had previously sparked the 1976 Soweto uprising. See R. W. JOHNSON, HOW LONG WILL SOUTH AFRICA SURVIVE? 191–92 (1977). Pienaar was also the last South African Administrator General of Namibia, during its illegal occupation of that country. See ALLAN D. COOPER, THE OCCUPATION OF NAMIBIA 110 (1991) (noting Pienaar’s reduced role compared to previous Administrators General due to his position in the Transitional Government of National Unity in Namibia). See also DENIS HERBSTEIN & JOHN EVENSON, THE DEVILS ARE AMONG US 117, 179 (1989) (asserting incidents of Pienaar’s complicity in delaying Namibian independence and self-determination).

93. Apartheid has been declared a “crime against humanity” by the United Nations General Assembly. G.A. Res. 2202, U.N. GAOR, 21st Sess., at 2, U.N. Doc. A/RES/2202/ (XXI) (1966).

But Pienaar says the veil will not be lifted in the interest of justice for apartheid's victims: "Nuremberg-type trials will be resisted to the utmost!" he vows. Trying former officials for human rights violations would "place a tension on the compromise that has been reached."

ENLIGHTENED NEUTRALITY

Neutrality's analogue in the contemporary international sphere is the principle of nonintervention.⁹⁴ As individuals are autonomous, states are sovereign, free from domination by procedurally equal others.⁹⁵ Sovereignty is at the heart of the post-Westphalian international order. From the seventeenth century onward flowed the "individualistic notion of the state as a mere sum total of individuals."⁹⁶ Locke situated States, like individuals, in a state of nature,⁹⁷ a state of freedom and equality⁹⁸ requiring consent to any limitations on their sovereignty.⁹⁹ Similarly, Rousseau likened the State to the individual.¹⁰⁰ And behind the Rawlsian veil of ignorance, States, too, would choose equal liberty.¹⁰¹

The philosophical parallels between classical international law and Western liberal theory are rooted in history.¹⁰² "[N]ot merely is . . . international law . . . influenced by Western culture, but it is in fact itself a part of that culture."¹⁰³ The sovereign nation-state and the autonomous

94. See ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION IN INTERNATIONAL AFFAIRS* 88 (1986) (The prohibition of intervention . . . is based on a pattern of domestic law analogy . . . to the same general, liberal equation of relations between states to relations between individuals. Just as the treaty becomes the contract of the middle-class world, and therefore central to a permanent international order, so also states must have, as individuals, a sphere of activity which is sacrosanct.).

95. Under this framework, international legal theory may parallel what Tushnet theorizes as "the atomistic premises of liberalism [that] treat each of us as autonomous individuals whose choices and values are independent of those made and held by others." Tushnet, *supra* note 49, at 805. See also, CARTY, *supra* note 94, at 90 ("A liberal-humanist insisted that human beings are free from and equal to one another. There is no authority which allows anyone to coerce another either for his own good or for some general or objective good.").

96. See JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 151 (1957).

97. See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 437 (Peter Laslett ed., Cambridge Univ. Press 1963) (1960).

98. See *id.* at 309.

99. See *id.* at 375-76.

100. See ROUSSEAU, *supra* note 8, at 63.

101. See RAWLS, *supra* note 2, at 378-79.

102. See MACINTYRE, *supra* note 7, at 9 ("Doctrines, theses, and arguments all have to be understood in terms of historical context. . . . So rationality itself, whether theoretical or practical, is a concept with a history: indeed there are . . . rationalities rather than rationality, just as it will also turn out that there are justices rather than justice.").

103. CARTY, *supra* note 94, at 130.

individual were born at the same historical moment, the epoch that begins in the 16th century¹⁰⁴ and culminated with the Enlightenment.

The theory of the Enlightenment was a revolutionary repudiation of feudal philosophy and institutions which constituted barriers to incipient capitalism. It exalted the idea of law as the product of rationality, rather than of an ontological system. In order to ensure a decisive break from feudalism, "the 'Law' of the Enlightenment dispenses with tradition and history,"¹⁰⁵ upon which feudal authority was based, and premises its authority on the fiction of individual consent.¹⁰⁶ The normative values of honor and loyalty which served the feudal hierarchy were replaced by liberty and equality which serve the marketplace.¹⁰⁷

The international principle of neutrality developed as part of the law of war,¹⁰⁸ a concession to commerce¹⁰⁹ exacted by the growing strength of the merchant class.¹¹⁰ Neutrality enabled the non-belligerent to assert its "right" to engage in commerce, free from the impediments of the war. The publicists of the Enlightenment grounded the laws of war in rationality.¹¹¹ Thus, moral relativism could be enlisted to preserve liberty; the neutral State deemed the war to be just on both sides.¹¹²

Once neutrality was proclaimed, specific rights and obligations attached. A neutral State was prohibited from delivering war matériel to the belligerents, and from allowing its territory to be used for war preparation.¹¹³ In exchange, there was a "presumption in favor of [the] continued liberty" of the non-belligerents to engage in trade with other States, as well as in non-military trade with the belligerents,¹¹⁴ and the neutral State maintained its right of territorial inviolability.

104. See R.B.J. Walker, *East Wind, West Wind: Civilizations, Hegemonies, and World Orders*, in CULTURE, IDEOLOGY, AND WORLD ORDER, *supra* note 59, at 2.

105. CARTY, *supra* note 27, at 6. See also MCINTYRE, *supra* note 7, at 335 (stating "the project of founding a form of social order in which individuals could emancipate themselves from the contingency and particularity of tradition by appealing to genuinely universal, tradition-independent norms was and is ...the project of modern, liberal individualist society").

106. See Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81, 82 (explaining that "[positivists] attribut[e] the force of law to historically specific sovereign consent").

107. See KARL MARX & FREDERICK ENGELS, *supra* note 5.

108. See T. J. LAWRENCE, *THE PRINCIPLES OF INTERNATIONAL LAW*, 474-76 (1895).

109. See, e.g., *In re Paquete Habana*, 175 U.S. 677 (1900) (recognizing neutrality of coast fishing vessels rendering them immune from capture as prizes of war under customary international law). The case is also an antecedent to the acceptance of international human rights laws as customary international law.

110. See LAWRENCE, *supra* note 108, at 557.

111. See Jochnick & Normand, *supra* note 57, at 61.

112. See KOSKENNIEMI, *supra* note 73, at 125.

113. See LAWRENCE, *supra* note 108, at 474.

114. See *id.* at 475.

The principle of neutrality in the law of war provides an intriguing analogy for the liberal domestic sphere. The judge, as a neutral arbiter, may not choose sides. She may not provide war matériel, that is, she may not elect to apply legal principles that benefit one identified class of litigants.¹¹⁵ The neutral arbiter, however, may otherwise continue to operate as if the war did not exist; thus, her territory will remain free from attack.¹¹⁶

Tuesday, April 19, 1994.

I am in training at the Independent Electoral Commission's (IEC) headquarters, where I become acquainted with the elaborate legal framework—legislation, agencies, and advisory commissions—put in place to govern the election process.¹¹⁷ A plethora of laws have been hastily enacted, and institutions instantly created by the outgoing white parliament to wallpaper over the longstanding violence and inequities.

The newly created structure has the awesome task of orchestrating a free and fair election in four months. The IEC, which has the primary responsibility for overseeing the April election,¹¹⁸ including coordinating and facilitating monitors' activities, holds its first meeting on December

115. See ROUSSEAU, *supra* note 8, at 82.

116. See DERRICK BELL, AND WE ARE NOT SAVED 58–59 (1987) (explaining that task of judicial arbiter is to preserve the institution of the judiciary).

117. See generally John Murphy et al., *Postscript: The Legal Framework of South Africa's First Democratic Election*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 241–52. The Independent Electoral Commission Act 150 of 1993 established the IEC and the Special Electoral Court (SEC). Additionally, Parliament enacted the Electoral Act of 1993, which provides the operational framework for the IEC.

The Independent Media Commission Act 148 of 1993 established the Independent Media Commission (IMC). The IMC is responsible for overseeing the equitable treatment of political parties by broadcasting licensees, state-financed publications and information services during the election period. The IMC's power is limited to "consulting" with broadcast licensees. The Independent Broadcasting Authority Act 153 of 1993 established the Independent Broadcasting Authority (IBA). The IBA has the authority to regulate broadcasting to ensure a diverse range of news.

The Sub-Council on Law and Order, Stability and Security and the Sub-Council on Defence have the responsibility to establish a National Peacekeeping Force. The Sub-Council on Intelligence is empowered to monitor and liaise with intelligence services country-wide.

118. See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 3, at 1 (Dec. 31, 1993) [hereinafter LAWYERS' COMMITTEE REPORT, Issue 3]. See Murphy et al., *supra* note 4, at 249. The IEC's specific mandate was to (1) administer, organize, supervise and conduct the elections; (2) promote conditions conducive to free and fair elections; (3) determine and certify the results and fairness of the elections; and (4) conduct voter education and enforce regulations. *Id.* at 245. Significantly, the IEC's certification of the election results is final and unappealable. *Id.* The IEC Act also established various independent tribunals, including the Special Electoral Court (SEC), and an elaborate hearings, appeal and review system. *Id.* at 247. Section 36 maintains that standing to invoke an appeal will be granted to parties, candidates or any interested person. *Id.* at 248.

20, 1993.¹¹⁹ Under the new regime IEC decisions will prevail over conflicting local, common or customary laws.¹²⁰

Thus, law will once again effect the triumph of reason over barbarity. The universalizing force of law will transform apartheid, recreating it as civilized democracy.¹²¹ It is archetypal law expressing the new reality of ruling interests;¹²² law as inscriber of the new ideological convention;¹²³ law as preserver of the status quo.¹²⁴ It is the stuff of which the veil is made. The veil will sweep away the outmoded legal obstacles of the past, permitting justice to take place.

Friday, April 22, 1994.

Greenmarket Square is a picturesque little section of Capetown, an open air crafts market surrounded by shops and restaurants. It is frequented by roving bands of street youth from the "colored" townships encircling the city, boys as young as seven or eight. The ragged, dirty-faced urchins extend plaintive fingers to me as I sit in an outdoor cafe. "Don't give them money," someone cautions. "They'll buy glue to sniff." So I offer one of them a piece of my sandwich, and am touched when he begins to share it with the others. Suddenly, a police van appears, slowing down at the curb. The sandwich falls to the ground as they scatter like so many stray cats, only to gather back together on the other side of the square when the van has disappeared.

I am the reification¹²⁵ of neutrality: the liberal paradigm; the denial that 'neutral intervention' is an oxymoron. The veil is proof that the law

119. See LAWYERS' COMMITTEE REPORT, Issue 3, *supra* note 118, at 1. The Lawyers' Committee served as the chief coordinator of U.S. NGO delegations.

120. See Murphy et al., *supra* note 4, at 252. The Act also specifies who may participate in the elections, how participation is to be effected, and the organization of electoral processes. *Id.* at 252-55. Participating parties are required to abide by the Electoral Code contained in schedule two of the Interim Constitution. *Id.* at 253. The Act's provisions are enforceable by the Electoral Tribunals set up by the IEC Act. *Id.*

121. See Carty, *supra* note 27, at 22.

122. See BELL, *supra* note 16, at 94.

123. The aura of legitimacy that law embodies enables its ideological role, that of "impress[ing] upon people a sense of obligation to the existing order." See Jochnick & Normand, *supra* note 57, at 57.

124. See BELL, *supra*, note 16, at 66-67.

125. See Carty, *supra* note 90, at 67 n.1 ("Reification means . . . to consider . . . an abstract idea or concept real or concrete.").

I am to implement is derived from the sovereign consent of the parties.¹²⁶ Consent to my presence attests to the legality, and inherent justice of my intervention.¹²⁷ Since my intervention is lawful and just, rational beings would consent to the conception of the good which it will impose.¹²⁸ This conception will not be a foreign model; the application of neutral rules will permit the maintenance of the fundamental status quo, the "continuation of [the] previously existing state."¹²⁹ Indeed, the maintenance of formal neutrality will actively lock in the prevailing relations of power, because in the context of conflict, preserving the status quo inherently disadvantages the weaker party. For example, the imposition of a "neutral" arms embargo on both sides to a conflict, when one party is already heavily armed, preserves the military balance of power.¹³⁰

Consensually¹³¹ and justly, South Africa's "appropriate distributive shares" in the free market¹³² will be ensured. The immutable institutions of liberalism—individualism, private property, freedom of contract, monogamy¹³³—can now take firm hold, unimpeded by the anachronisms of apartheid. This will guarantee the continued economic dominance of the white minority,¹³⁴ and the country's subordinate place in the global economy, its future tied to foreign investment.¹³⁵ The investment climate

126. *Id.* at 69 (Liberal discourse "drives to cover over difference and to insist upon the homogeneity of all experience, resulting in a contrived consensus.").

127. *See* RAWLS, *supra* note 2, at 27.

128. *See* MACINTYRE, *supra* note 54, at 336 ("[L]iberal individualism does indeed have its own broad conception of the good, which it is engaged in imposing politically, legally, socially, and culturally wherever it has the power to do so.").

129. *See* LAWRENCE, *supra* note 108, at 474 ("Neutrality is in a sense the continuation of a previously existing state.").

130. *See, e.g.*, S.C. Res. 713, U.N. SCOR, 45th Sess., 3009th mtg. at 3, U.N. Doc. S/RES/713 (1991) (imposing an embargo on all weapon and military equipment deliveries to all of Yugoslavia).

131. In its first session, the TEC ratifies the pre-existing international intervention, adopting a resolution "requesting that the United Nations, the Commonwealth, the European Community, the Organization of African Unity and individual governments provide election observers . . ." *See* LAWYERS' COMMITTEE REPORT, Issue 2, *supra* note 42, at 3. "The TEC also . . . appeal[s] to the UN to coordinate all international observers." *Id.* at 4.

132. *See* RAWLS, *supra* note 2, at 6 (discussing the "distinctive role of conceptions of justice . . . [as] . . . specify[ing] basic rights and duties and to determine the appropriate distributive shares").

133. *See id.* at 7.

134. In a nation of forty-three million, South Africa's five million whites boast per capita incomes eight times higher than blacks. *See* Lynne Duke, *White S. Africans Fear Their Fates in a Black Nation*, THE TIMES-PICAYUNE, June 2, 1996, at A26.

135. Sub-Saharan Africa is heavily dependent on capital from foreign governments to meet its resource needs. *See* ZIA GURESHI, GLOBAL CAPITAL SUPPLY AND DEMAND: IS THERE ENOUGH TO GO AROUND? 11 (The World Bank ed., 1996). "Saving rates in . . . Sub-Saharan Africa, averaging . . . [only] 16 percent of GDP, . . . are among the lowest [in the world,] and have declined over the past decade." *Id.* at 8. The World Bank forecasts a coming scarcity of official capital, thus requiring these countries to attract private investment. *Id.* at 11. Unlike the

will take priority over the needs of the impoverished black majority,¹³⁶ and business will proceed as usual.¹³⁷

Saturday, April 23, 1994.

"[A]nd gaunt Hunger wept beside Bereavement."¹³⁸

Crossroads. It is inconceivable to me that people can live under such conditions. In this notorious legacy of apartheid's forced removal policy¹³⁹ outside Capetown, row upon row of makeshift tin and plastic shacks lean against one another in a poignant effort of solidarity. No running water. No electricity. No toilets. Not a blade of grass or tree in sight. Miles from the "white" metropolitan areas.

I am here to observe "Operation Access," an IEC program designed to ensure that voters are exposed to a variety of political views. We arrive in a convoy of large white vans called "Koombis." The commando raid on Gaborone was conducted in similar vehicles. Our convoy forms a protective semi-circle around spokesmen for the African Christian Democratic Party and Inkatha Freedom Party as they address the sparse unsympathetic crowds under the watchful eyes of "peace monitors." Crossroads is considered a "no go" area; several thousand people were killed in political violence here last year, and local "defense units" resist any incursions into the community. I note some sporadic booing and name-calling when a white member of the Zulu-nationalist Inkatha, in

rest of the region, however, South Africa is able to attract significant private capital, due to its vast natural wealth and the accumulated wealth of the white minority.

136. Although South Africa is classified as an "upper middle income country," just under forty-six percent of the population lives in poverty. Norman Chandler, *Plotting S Africa's Patterns of Poverty*, THE STAR INTERNATIONAL WEEKLY, June 15, 1995 at 11. This includes more than half the African people (57.2 percent), who account for seventy-five percent of the population; nearly one-fifth of the "colored" population (19.8 percent) and just under seven percent of Asians, compared to only two percent of whites. *Id.* (graph). Also, nearly eight million blacks are homeless. See Suzanne Daley, *South Africa Losing Fight to House Homeless*, N.Y. TIMES, May 3, 1996, at A10.

137. See Editorial, *After Mr. Mandela*, N.Y. TIMES, July 28, 1996, § 4, at A12.

138. DuBois, *supra* note 78, at 33.

139. This policy was carried out pursuant to the Group Areas Act, adopted by the National Party in 1950. The Act empowered government officials to designate any area in South Africa as an ethnic area in which specific groups could be placed. See, e.g., Christopher Munnion, DAILY TELEGRAPH, Feb. 2, 1991, at 12. Its purpose was to remove the black majority from the centers and residential districts of urban areas, and resettle them in the "homelands" or in "locations" on the periphery of urban areas. The displaced populations remain accessible to the "white" towns, to which they commute for employment. About three and a half million people were forcibly removed between 1960 and 1982. See CATHOLIC INSTITUTE, *supra* note 36, at 15.

camouflage fatigues, advocates "separate development," the motto of the apartheid era. Otherwise, the event takes place without incident.

In July 1992, the United Nations Security Council unanimously adopted resolution 765, establishing a "National Peace Accord" for South Africa.¹⁴⁰ It was an attempt to render the political climate sufficiently calm to conduct a credible election.¹⁴¹ According to a United Nations Mission visiting the country in the weeks prior to the election, however, the Accord is ineffective, and widespread political intolerance, fear, intimidation and violence are on the rise.¹⁴²

Right-wing paramilitary groups are reportedly stockpiling weapons obtained through neighboring Swaziland and Mozambique despite government and police claims of stepped up border controls.¹⁴³ Moreover, the Mission reports that South Africa's attempt to create a National Peace-Keeping Force (NPKF) is not progressing well.¹⁴⁴ Previously, observers from the Commonwealth publicly expressed doubts over the prospects for the establishment of an effective peacekeeping force by the April elections. In a report issued by the Commonwealth Mission last December, observers note that substantial time is necessary to train a force that will be drawn from so many diverse sources, and cite the brevity of the pre-election period as a major obstacle to the timely and effective deployment of such a force.¹⁴⁵ Chaos reigns in the violence-stricken areas where the NPKF is hastily deployed. South African press reports cite inadequate training and logistical support as factors in the NPKF's inability to maintain order.¹⁴⁶

140. See S.C. Res. 765, U.N. SCOR, 46th Sess., 3096th mtg. at 2, U.N. Doc. S/RES/765 (1992).

141. The Resolution resulted in the establishment of the United Nations Organization Mission in South Africa (UNOMSA) in September, 1992, which began to deploy observers to oversee the process of preparing for the elections. A date was set a year later, in July 1993, for an election to be held nine months hence. See Edmund T. Piasecki, *Africa, in A GLOBAL AGENDA: ISSUES BEFORE THE 48TH GENERAL ASSEMBLY OF THE UNITED NATIONS* 56, 59-60 (John Tessitore & Susan Woolfson eds., 1993).

142. See *Letter Dated 31 March 1994, supra* note 26, at 8, para. 29.

143. See *id.* at 8 para. 31.

144. See *id.* at 9 para. 34.

145. See *LAWYERS' COMMITTEE REPORT*, Issue 2, *supra* note 42, at 3.

146. See, e.g., Chris Louw, Experts Warned that NPKF Wasn't Ready, *THE WKLY. MAIL & GUARDIAN*, April 22, 1994, at 14.

As the elections approach the violence escalates. "We do not come from a democratic tradition," one new voter will observe as she awaits her turn to cast a ballot. "I expect that we'll be on a learning curve for about the next five years."

Each bold step toward democracy has been accompanied by an intensification of violent resistance. The endorsement of the Interim Constitution in December coincides with a forty-three percent increase in deaths attributable to political violence across the country. According to the Johannesburg-based Human Rights Commission (HRC), 109 deaths are reported that week.¹⁴⁷ There is evidence that local ANC leaders are being targeted.¹⁴⁸ The chairperson of a Northern Natal branch is murdered; during the following week nine ANC supporters are murdered in squatter camps on the outskirts of Durban.¹⁴⁹ The violence is linked to government sources. Security force members are identified in half of all political violence incidents where the perpetrator is identifiable; close to forty South Africans die in police custody in the first eleven months of 1993.¹⁵⁰

Leaflets are distributed in affluent white communities which are passed off as ANC campaign material. One such leaflet claims that "all public service posts will be replaced by comrades," that no ammunition would be available to whites and [that] health institutions would be 'Africanized' and whites would be required to pay according to their income. The leaflet ends with the slogan, 'Viva! Kill a Boer,¹⁵¹ kill a farmer!' The ANC [calls] the leaflet a 'desperate attempt to discredit us.'¹⁵²

South Africa's Parliament adopts the Interim Constitution on December 22, 1993.¹⁵³ On December 24, a personal assistant to an ANC leader is assassinated by unknown gunmen.¹⁵⁴ In Natal, political violence

147. See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 1, at 4 (Dec. 3, 1993) [hereinafter LAWYERS' COMMITTEE REPORT, Issue 1].

148. The execution of key ANC leaders was a longstanding strategy of the regime. In the 1980's a number of exiled anti-apartheid activists such as Dr. Ruth First were assassinated by letter-bombs. See Paul Taylor, *S. Africa's Past Honors Pose Questions About Future Justice*, WASH. POST, Mar. 4, 1995, at A1, A22. After returning from exile, militant leader Chris Hani was assassinated at his home on April, 1993. See Paul Taylor, *Apartheid Foe Slain in S. Africa*, WASH. POST, Apr. 11, 1993, at A1. There were also many other unsuccessful attempts.

149. See LAWYERS' COMMITTEE REPORT, Issue 1, *supra* note 147, at 2.

150. See *id.*

151. The word *boer* literally means farmer, but it has acquired a pejorative connotation in reference to Afrikaners. See SOUTH AFRICA: A COUNTRY STUDY 439 (Harold D. Nelson ed., 1981).

152. LAWYERS' COMMITTEE REPORT, Issue 1, *supra* note 147, at 4-5.

153. S. AFR. CONST. (Act No. 200 of 1993).

154. See LAWYERS' COMMITTEE REPORT, Issue 3, *supra* note 118, at 2.

is responsible for at least thirty-two deaths between December 22 and 27.¹⁵⁵ Nationwide, political violence results in seventy-four deaths, compared to fifty-eight the previous week.¹⁵⁶ The white right-wing Conservative Party declares that the "Orange Free State province [will] resist, by force if necessary, inclusion into a unified South Africa." The Afrikaners People's Front also announces its intention to establish a white people's State, complete with alternative government structures.¹⁵⁷ On December 27, the South African Police withdraw regular police units from the impoverished Alexandra township, replacing them with members of the notorious Internal Stability Unit (ISU), which has frequently been accused of fomenting political violence. The ISU patrols the black townships with heavily armed vehicles.¹⁵⁸

The Afrikaanse Protestantse Church whose members include leaders from the Conservative Party and Afrikaner Weerstandsbeweging (Afrikaner Resistance Movement) announces that its members are responsible for recent bombings, and makes threats against voter education workers. Church officials warn that only when the April election is called off will they direct their members to stop their acts of violence.¹⁵⁹

At the Transitional Executive Council's (TEC) meeting on January 11, 1994,¹⁶⁰ the escalating political violence, including the murder of a photo-journalist by Inkatha supporters during an attack on ANC members, heads the agenda.¹⁶¹ A confrontation develops between the government and the TEC regarding the authority to deploy security forces into KwaZulu; there is a fundamental disagreement over the nature and scope of TEC authority. According to the government, "the TEC is an advisory body only and does not have the power to issue directives."¹⁶²

In one weekend in February forty-five people are killed in the volatile Natal province. Twelve children and two adults are killed during a

155. See LAWYERS' COMMITTEE REPORT, Issue 3, *supra* note 118, at 3.

156. See LAWYERS' COMMITTEE REPORT, Issue 2, *supra* note 42, at 2.

157. See *id.*

158. See *id.*

159. See LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 7, at 3 (Feb. 25, 1994) [hereinafter LAWYERS' COMMITTEE REPORT, Issue 7].

160. See LAWYERS' COMMITTEE REPORT, Issue 4, *supra* note 40, at 1.

161. See *id.*

162. *Id.* See also *supra* note 76 and the accompanying text. Ironically, upon the establishment of the TEC, Nelson Mandela urged the United Nations to lift sanctions against the regime. See Nelson Mandela, *Address to the Special Committee against Apartheid*, U.N. GAOR, 48th Sess., 669th mtg., U.N. Doc. A/AC/115/SR.669 (1993). Shortly thereafter, Commerce Secretary Ron Brown led a delegation of U.S. businessmen to South Africa. See, e.g., *Clinton Signs Measure Lifting Sanctions Against South Africa, Sends Trade Mission*, 10 INT'L TRADE REP. 2006 (Dec. 1, 1993).

midnight attack; the group had come to Natal from a rural village to attend a voter education workshop scheduled for the following day.¹⁶³ A state of emergency is declared in Natal.

ANC supporters [are] the victims in more than half of the 77 deaths recorded by HRC between March 30th and April 5th . . . According to a Reuters news report, 111 people [are] killed in political violence in Natal between Thursday, April 1st and Wednesday, April 6th. In the 24 hour period between April 5th and 6th alone, 23 people died, making that period one of the deadliest of the past four years.¹⁶⁴

Evidence is found of South African government efforts to prevent eligible voters from obtaining the necessary documentation to vote. The torn-up remnants of completed ID applications submitted by residents of Lenasia, a squatter camp near Johannesburg, are found in a dumpster behind a branch office of the Department of Home Affairs. Most residents of Lenasia are ANC supporters. Original birth certificates and photographs of the applicants are also found in the dumpster.¹⁶⁵

Monday, April 25, 1994.

It is the day before the elections. "BOMBERS STRIKE AGAIN" proclaim two-inch high headlines, towering above a photograph of Archbishop Desmond Tutu, his head bowed in prayer.¹⁶⁶ Eight people are killed when a car bomb explodes at a crowded taxi stand in a black area, one of nine bombings in the country within twenty-four hours.¹⁶⁷ Neo-Nazi whites are reportedly beating up blacks on their way to a political rally to be addressed by Winnie Mandela.¹⁶⁸ Six polling stations are bombed, and a car bomb kills nine people near the ANC headquarters in central Johannesburg,¹⁶⁹ which I had visited only a few days before. Susan Keane, a white ANC candidate for Parliament, is among the

163. See LAWYERS' COMMITTEE REPORT, Issue 7, *supra* note 159, at 2.

164. LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, SOUTH AFRICA: THE COUNTDOWN TO ELECTIONS, Issue 10, at 4 (Apr. 8, 1994).

165. See LAWYERS' COMMITTEE REPORT, Issue 7, *supra* note 159, at 3.

166. THE ARGUS, April 25, 1994, at 1.

167. See *8 Died in Second Car Bomb on Reef*, THE ARGUS, Apr. 25, 1994, at 1 [hereinafter THE ARGUS].

168. See *Winnie Cancels Rally*, THE ARGUS, Apr. 25, 1994, at 1.

169. See THE ARGUS, *supra* note 167, at 1.

victims.¹⁷⁰ Archbishop Tutu vows that the elections will not be derailed: "We are going to vote and elections are going to be free and fair."¹⁷¹

"FREE AND FAIR" AS A NEUTRAL CONSTRUCT

The concept of free and fair elections applies the theory of neutrality to the electoral context. "Free and fair" embodies the "acceptable rules of bargaining"¹⁷² in the quintessential majoritarian forum, emphasizing procedural equality, hence fairness and justice in the liberal sense. Its standards—universal and equal suffrage, secret ballot, and non-discrimination¹⁷³—promote liberalism's normative value of equal liberty. Liberalism's moral relativism is enshrined in the principle of free choice. Parties and policies are equally valid, provided they are within the previously drawn parameters.¹⁷⁴ The realization of individual autonomy—freedom to associate in political parties and to propagate policies of one's choice—completes the panoply of preferences that liberalism provides.¹⁷⁵

Although neutrality suggests restraint from choice, it does not mean value-free.¹⁷⁶ Through even-handed application of these neutral procedural standards, the values inherent in the liberal "conception of the good"—embodied in the power-sharing paradigm¹⁷⁷—are to be

170. See ANC's 'Unselfish' Susan Dies in Friend's Arms, THE ARGUS, Apr. 25, 1994, at 23.

171. Tutu Calls for Calm in Face of Violence, THE ARGUS, Apr. 25, 1994, at 1.

172. MACINTYRE, *supra* note 54, at 337 (arguing that "liberal modernity" requires such bargaining within society to determine the proper allocation of resources to diverse and competing spheres in which societal "good" may be pursued).

173. See, e.g., Fox, *supra* note 30, at 570, 590. See also, Pierre de Vos et al., *Introduction-Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at xxi. (free election means that every citizen should be able to express his or her choice of party or candidate [autonomy], while fairness demands that each party should have equal opportunity [equal liberty] to win the support of the electorate. According to South Africa's pro-democracy forces, "[a] national election . . . [is 'free and fair'] only when it is clearly devoid of fraud, rigging, voter coercion or violence . . . by secret balloting and an absence of constraints on the freedom of" association and assembly. *Id.* at 212.

174. See RAWLS, *supra* note 2, at 138 ("In arguing for a conception of justice we must be sure that it is among the permitted alternatives . . ."). See also MACINTYRE, *supra* note 54, at 336.

175. See MACINTYRE, *supra* note 7, at 336.

176. See Miller & Howell, *supra* note 6, at 664–67 (stating that abstract principles cannot be neutral, and all decisional knowledge involves value judgments. "[T]he personal factor manifest[s] itself . . . wherever there is an act of appraisal, choice, or accreditation").

177. See *infra* notes 206–220 and accompanying text.

implemented.¹⁷⁸ Procedural neutrality will transform an arranged marriage into a consensual union that comports with modern justice.

"Free and fair," like procedural equality generally, is not a dynamic concept. It rejects the viewing of events through an historical lens, focusing instead on a snap-shot in time, a freeze-frame that extends from the commencement of the campaign to the tallying of the votes,¹⁷⁹ as if "choice" only takes place (and can only be influenced) during the campaign or at the polls. This reasoning is consistent with the notion of justice in liberal discourse as an abstract concept, something other than what happens in everyday life.¹⁸⁰

The freezing of the moment facilitates the fictions of liberalism, allowing them to approximate reality.¹⁸¹ A living, breathing, moving process becomes a series of still images, not necessarily related to each other, and capable of varying, even contradictory interpretations.¹⁸² A still photo does not disclose what came before, or what is to follow. Thus, moral relativism becomes defensible and equality seems believable. The intense governmental repression and State-sponsored violence (suspended during the voting) can be forgotten in the exuberance of the moment. The National Party's access to vast government resources, compared to the opposition's lack of resources and skills,¹⁸³ may not seem significant; the erosion of ballot secrecy caused by the high illiteracy rate becomes invisible. Prisoners and their jailors are one. For the frozen moment allows us to turn "from substance to process, from reality to rhetoric."¹⁸⁴

178. See Tushnet, *supra* note 49, at 823 (arguing that judges do not proceed strictly from neutral principles but from a background of societal values that delimit the acceptable policies produced by neutral principles alone).

179. See, e.g., Pierre de Vos et al., *Introduction—Free and Fair Elections*, in *FREE AND FAIR ELECTIONS*, *supra* note 4, at xxii (stating that "[v]otes can be freely cast only where a free exercise of choice is possible. No undue influence should be brought to bear on voters *during the campaign*") (emphasis added).

180. See RAWLS, *supra* note 2, at 35. See also C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Margritte Regarding Postliterate Legal Reasoning*, 26 *UNIV. MICH. J.L. REFORM*, 69, 99–100 (1992) ("[H]uman conflict is merely tangential to the abstract issues of the law. The causes of conflict, and the aftermath of the solution (perhaps continued conflict), generally are not relevant to the holding of the case.").

181. See *Martin Marieta Co. v. Gould Inc.*, 70 F.3d 768, 771 (4th Cir. 1995) (stating that a fiction "is given life so long as common experience supports its application").

182. See Lepow, *supra* note 180, at 75–76 (discussing defense counsels' use of videotape in Rodney King police brutality trial).

183. The South African press reported that "the ANC [was] struggling to finance the critical last 10 weeks of its . . . campaign." *LAWYERS' COMMITTEE REPORT*, Issue 7, *supra* note 159, at 3.

184. See Kennedy, *supra* note 71, at 217.

*But for the veil, I would cry out, in the spirit of Galileo's retort about the Earth: "But it does move!"*¹⁸⁵

But the snapshot represents the dominant discourse, and outcomes are validated when the frozen images reflect a procedurally "free and fair" contest.¹⁸⁶ Liberal philosophy even recognizes an acceptable level of unfairness. Thus, the theory of neutrality serves yet another purpose, that of attempting to "reduce the risk of arbitrariness to an acceptable level."¹⁸⁷ Fraud should not be too blatant or too obvious. Acceptability is an indeterminate, malleable concept. In the South African context, violence has become a "widely accepted stipulation" in the Rawlsian sense, such that the mere reduction of violent disruptions in connection with the actual polling becomes prima facie evidence of fairness.¹⁸⁸

Tuesday, April 26, 1994.

While baby Nelson is awaiting her arrival, I am traveling to Pollsmoor Prison, just a few miles away, where her namesake had been housed for many years. He was transferred there from notorious Robben Island¹⁸⁹ when the regime, daunted by massive popular uprisings, and the imposition of economic sanctions, sought to begin talks with the opposition. It is rumored that the move was necessary because his fellow activists on the Island objected to negotiating while the people were engaged in revolt. Mandela was subsequently transferred to a more amiable setting, a warden's home on the edge of Victor Verster Prison, where he was to engage in years of negotiations with apartheid leaders on the transition to majority rule.¹⁹⁰

185. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 161 (16th ed. 1992) (attributed to Galileo by Abbé Iraitl in *QUERELLES LITTÉRAIRES* (1761), alleging that at his Inquisition Galileo whispered, "E pur si muove!" after recanting his claim that the earth revolved around the sun).

186. Even UNOMSA's guarded declaration that the election was "substantially" free and fair was enough. Unwilling to take any risks of violent rejection of the results, however, Mandela permitted blatant fraud to go unchallenged and, in a gesture of "reconciliation," awarded Cabinet seats to parties which had not attained the minimum threshold of votes. See *Secretary General's Report*, *supra* note 4, at 14; Michael Holman & Mark Suzman, *Mandela Creates Cabinet for Unity*, *FIN. TIMES*, May 7, 1994, at 1, available in LEXIS, World Library, Arcnws File.

187. Tushnet, *supra* note 49, at 805 (discussing the neutral theory that asserts that a requirement of consistency reduces arbitrariness).

188. See *Secretary General's Report*, *supra* note 4, at 1-5.

189. See generally INDRES NAIDOO, *PRISONER 885/63, ISLAND IN CHAINS* (1982) (presenting a moving description of this infamous Robben Island Prison).

190. The regime's first overture to Mandela came in 1984, following the imposition of economic sanctions. Clandestine negotiations between Mandela and apartheid officials began in the summer of 1986, during a brutal government crackdown on pro-democracy forces, as

Now the overwhelmingly black male prison population gathers in orderly fashion to exercise, for the first time, its newly won franchise. Only yesterday, the government announced that prisoners—with the exception of those serving sentences for murder, rape, or armed robbery—would be allowed to vote.¹⁹¹ “How does it feel?” I query. “Well, all right,” is the understated reply. Later, an ANC monitor¹⁹² is less restrained: “When I saw the first prisoner cast his vote, I wanted to cry.”

The veil muffles my response, for I am the “ideal observer:” neutral, impartial.¹⁹³ I am legitimate.¹⁹⁴ My presence legitimates.

In democratic theory an election legitimates power.¹⁹⁵ To the democratic forces of South Africa, I am there as a “watchdog”—to “ensure compliance with international standards,” to establish “public confidence and trust” in the elections.¹⁹⁶ It is their hope that I will contribute to the creation of a “climate in which national reconciliation and reconstruction can take place.”¹⁹⁷ They hope that I will ensure a patently legitimate transfer of power.

Voters will select from nineteen political parties, giving the election the appearance of being broadly democratic, and enabling the expression

thousands of anti-apartheid activists languished in detention. See Patrick Collings, *Profile of Nelson Mandela*, U.P.I., May 10, 1994, available in LEXIS, News Library, Arcnws File.

191. See Brendan Boyle, *S. Africa's Robben Island Prisoners Vote*, REUTERS N. AM. WIRE, Apr. 26, 1994, available in LEXIS, World Library, Allnws File.

192. See *Secretary-General's Report*, *supra* note 4, at 12 (“Registered political parties were entitled to appoint voting agents to monitor the conduct of the election at the voting stations and the counting process.”).

193. Cf. Ruth Wedgewood, *The Evolution of United Nations Peacekeeping*, 28 CORNELL INT'L L.J. 631, 632 (1995) (using the term “ideal observer” to describe an impartial non-party in the context of a multilateral decision).

194. See, e.g., Tushnet, *supra* note 49, at 807. (stating that the neutral principles theory “ultimately rests on the claim that, without neutrality, a decision ‘wholly lack[s] legitimacy’”).

195. This view is reflected in article 21 of the Universal Declaration of Human Rights, which establishes the will of the people as the basis of governmental authority. G.A. Res. 217 (III), U.N. GAOR, 3rd Sess., at 75, U.N. Doc. A/810 (1948). See also U.N. Convention on Human Rights, International Covenant on Civil and Political Rights, Dec. 19, 1966, 6 I.L.M. 368 (article 25 embraces the right to participatory government); Fox, *supra* note 30, at 604–605 (stating that “[e]lections provide an empirical test of the right of an incumbent government to exercise power”). See, e.g., FREE AND FAIR ELECTIONS, *supra* note 4.

196. See Medard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 212.

197. *Id.* at 237. South Africa's Multi-party Negotiating Council (CODESA) strongly supported international involvement in South Africa's transition. See *id.* at 223–24. CODESA called upon the United Nations to coordinate the activities of international observer missions of the Commonwealth, the European Union and the Organization of African Unity (OAU). See *Secretary-General's Report*, *supra* note 4, at 31.

of a wide range of permissible preferences.¹⁹⁸ The election, however, is preceded by multi-party negotiations, which have already defined the parameters of power for the soon to be elected government.¹⁹⁹ These negotiations constitute, in essence, the sovereign, “legislative” process which is absolved from the neutrality requirement.²⁰⁰ Looming over the talks is the double-edged threat of civil war from black tribalists²⁰¹ and white separatists²⁰²—both linked to the regime—and the ever watchful eyes of foreign investors.

There was tremendous pressure on the ANC leadership to abandon the liberation demands of the Freedom Charter,²⁰³ which had been its guiding platform since 1956, opting instead for a “civil rights” model. “The de Klerk government, the country’s four gigantic business conglomerates, the IMF and the World Bank, and virtually all Western governments were preaching free-market economics and urging privatization of South Africa’s scores of state-owned companies.”²⁰⁴ Preparing to take the reins of a crumbling economy, the ANC succumbed to the pressure.²⁰⁵

The result is power sharing,²⁰⁶ a compromise among parties procedurally equal, but vastly unequal in terms of real power. Power sharing

198. See generally MACINTYRE, *supra*, note 54, at 336 (discussing preferences and individual expression).

199. The regime commenced informal talks with Nelson Mandela while he was still imprisoned. Shortly after his release, in May 1990, the regime and the ANC held their first meeting. In December, 1991, formal talks about the transition began (CODESA I). See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs and Apartheid*, 19 *FORDHAM INT’L L.J.* 1464, 1512–13, n.222 (1996) (discussing the negotiations and the process of international legitimization of the negotiations strategy).

200. See Weschler, *supra* note 53; Bork, *supra* note 56.

201. See, e.g., Donatella Lorch, *Arms Ban is Defied at Rally by Zulu Party*, *N.Y. TIMES*, Apr. 6, 1994, at A13.

202. See, e.g., Bill Keller, *Mixed Signals Fatal for South African Separatists*, *N.Y. TIMES*, Mar. 12, 1994, at A3.

203. The Freedom Charter was adopted at the historic Congress of the People at Kliptown, South Africa on June 26, 1956. The Preamble made the revolutionary pronouncement that:

South Africa belongs to all who live in it, black and white, and that no government can claim authority unless it is based on the will of the people.

The Charter called for democracy, equality, and redistribution of the land and resources of South Africa. See NELSON MANDELA, *LONG WALK TO FREEDOM 197–98* (1994) (discussing the growth of the Pan Africanist Congress in 1959, which opposed the message of racial cooperation promoted by the ANC and underlying the Charter).

204. DAVID OTTAWAY, *CHAINED TOGETHER: MANDELA, DE KLERK, AND THE STRUGGLE TO REMAKE SOUTH AFRICA* 85 (1993).

205. See *id.* at 85–86.

206. The “power-sharing” concept had its genesis in the talks between Mandela and apartheid leaders. These discussions were initiated without any consultation with the rest of the ANC leadership. See *id.* at 25–29. Mandela later proposed the power-sharing approach to the ANC in July 1991. See *id.* at 163.

as the conception of the good resolves the ultimate constitutive questions facing the new nation, decisions which "govern the fundamental organisation of a state . . . and determine fundamental allocations of values among its peoples."²⁰⁷ Power sharing means that majority rule will be delayed. It means civil rights, not economic justice; emphasis on investment, not peoples' needs; amnesty, not justice; continuation, not transformation. Power sharing appears also to have been tacitly understood to limit the number of votes and provinces the ANC would be allowed to win. It thus created an inherent contradiction in the democratic process; the implementation of power sharing constituted a substantive rule under which the parties operated, a rule which countenanced—even required—massive violations of the procedural rules.

Power sharing means that South Africa will remain on the periphery of the world economy. By moving decisively away from apartheid, and into the liberal tradition, South Africa's black majority will achieve equal liberty in the only African country denominated an "emerging market" by the U.S. Commerce Department.²⁰⁸ South Africa's belated embrace of democracy will free its vast resources and markets from the isolation of apartheid making them fully accessible to international capital.²⁰⁹ Land long ago expropriated from the African people, however, will largely remain in white hands.²¹⁰ So will the country's mineral riches—its gold, diamonds, platinum, and other precious and strategic metals.²¹¹ The

207. Henry J. Richardson III, *The Constitutive Fiction of Neutrality in U. N. Peace-keeping*, presented at The African Society of International and Comparative Law Annual Conference (Aug. 1995) (on file with author).

208. See *U.S./ South Africa: Clinton Announces Modest Aid Package*, INTER PRESS SERVICE, May 5, 1994, available in LEXIS, News Library, Inpres File.

209. See generally Frederick Engels, *Anti-Duhring*, in *ON HISTORICAL MATERIALISM* 202, 206 (Progress Publishers ed., 1974) ("Trade on a large scale, [particularly] world trade, requires free owners of commodities who are unrestricted in their movements and as such enjoy equal rights; who may exchange their commodities on the basis of laws that are equal for them all.").

210. Under the Interim Constitution, only some of the land claims of those dispossessed would be honored. S. AFR. CONST. (Act No. 200, 1993) ch. 8, secs. 121–23. Only those who lost their land pursuant to the Native's Land Act 27 of 1913 are eligible for restitution; others would have no legal recourse. This remains in place under the 1996 Constitution. The government is authorized to purchase land from white owners to facilitate "land reform," S. AFR. CONST. (Constitution of the Republic of South Africa Bill, 1996) ch. 2 (Bill of Rights), sec. 25(4)(a) & (b), but current landowners are protected from "arbitrary deprivation," *id.* at sec. 25(1).

211. The mineral resources of South Africa include a reported fifty-four percent of the world's production of platinum, thirty-four percent of chrome, forty-six percent of vanadium, twenty-seven percent of gold, as well as large deposits of manganese ore, nickel, copper, and iron ore. See *South Africa's Return to World Markets Raises Competition Pressures*, FERTILIZER INT'L, Jan. 11, 1997, available in LEXIS, News Library, Curnws File. South Africa is also a historic source of many of the world's strategic minerals such as uranium. See Jean B. Tarter, *Government and Politics*, in *SOUTH AFRICA: A COUNTRY STUDY* 219, 289 (Harold D. Nelson, ed., 1981).

election will bring to fruition the Borkian vision of substantive neutrality: the application of principles that render impotent any preferences that infringe upon the prerogatives of the powerful.²¹²

The Western-brokered²¹³ compromise further entrenches the power imbalance; for in liberal society, "power lies with those who are able to determine what the alternatives are to be between which choices will be available [T]he range of possible alternatives is controlled by an elite, and how they are presented is also so controlled."²¹⁴

I am here to legitimate that compromise. It is a compromise not unlike that which made possible the founding of the American nation.²¹⁵ Property rights take precedence over human rights; racial justice is subordinated to national unity.²¹⁶ A version of federalism is adopted that dilutes the sovereignty of the black majority, through strong and entrenched regional government.²¹⁷ The negotiations produce an Interim Constitution which adopts the power-sharing paradigm.²¹⁸ It contains thirty-three principles with which the elected constituent assembly, charged with writing a new constitution for a democratic South Africa, must comply.²¹⁹ Observers note prior to the election that, "[t]o an extent, the [constituent assembly] will simply have the task of filling in the details of the new constitution."²²⁰

In the final analysis, however, this hijacking of the democratic process will not matter. The veil will banish these negotiations into the unknown past. When the election is adjudged on the extent to which it is free and fair, the freedom and fairness of the prior political process will not be factored into consideration. The preconditions to freedom will

212. See, e.g., Bork, *supra* note 56, at 31–33 (defining "political" as speech which is acceptable to a legislative majority. This definition bars speech protections to advocates of the forcible overthrow of the government or to advocates of civil disobedience).

213. See OTTAWAY, *supra* note 204, at 245.

214. MACINTYRE, *supra* note 54, at 345.

215. See DERRICK BELL, RACE, RACISM, AND AMERICAN LAW 26–30 (3d ed. 1992).

216. Analogously, procedural rights were enshrined in the United States Constitution concomitant with substantive rights that protected property in slaves. Thus, property was elevated above liberty and individual rights in the nation's basic law. See, e.g., BELL, *supra* note 116, at 29–31; Engels, *supra* note 209, at 207 ("[I]t is significant of the specifically bourgeois character of these human rights that the American constitution, the first to recognize the rights of man, in the same breath confirms the slavery of the coloured races existing in America: class privileges are proscribed, race privileges sanctioned.").

217. See Pierre de Vos et al., *Introduction- Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at xix.

218. S. AFR. CONST., (Act No. 200, 1993) ch. 6, secs. 8b(3), 88(2) & (5), 89(1) & (2).

219. There were thirty-two Constitutional Principles agreed to, but the inclusion of a two-thirds majority may be considered a thirty-third. See Pierre de Vos et al., *Introduction- Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at xx.

220. *Id.*

become the substantive rules that underlie the "free and fair" election process. They will be the substantive rules that I will neutrally enforce. They will be a given, a Rawlsian "widely accepted stipulation,"²²¹ that forms the context within which justice is defined.

Sunday, April 17, 1994.

On the eve of the Inkatha march, the Rand takes a precipitous plunge on world markets. The march is suddenly cancelled. (*I imagine State President de Klerk making a frantic telephone call: "Gatsha, the Rand is plummeting! Call off the march!"*).

Monday, April 18, 1994.

Inkatha publicly agrees to end its boycott of the election.²²² In the wake of its decision, the Johannesburg Stock Exchange rebounds. "Within hours of the announcement . . . the financial markets were buzzing. Shares added R15 billion in value."²²³

NEUTRALITY AND SOVEREIGNTY

In the spirit of the veil, liberalism posits self-interest as the "natural" starting point in the quest for justice.²²⁴ Just as powerful elites in domestic society act collectively as the "legal system" to protect their interests, powerful States act collectively as the "international community." International law, as a creature of sovereigns, expresses its self-interests; as the creator of sovereignty,²²⁵ law prescribes its content.

Like the normative principle of autonomy in domestic liberal discourse, the principle of sovereignty in the international context gives birth to the fiction that the parties to a conflict consent to intervention into their affairs.²²⁶ Consent is presumed when the collective decisionmaker

221. See *supra* notes 56–58 and accompanying text.

222. See *IFP Gets Moving as Campaign Fever Hits Climax in Durban*, THE ARGUS, Apr. 20, 1994, at 1.

223. *Gold Down But JSE is Still Poised for Investment Wave*, THE ARGUS, Apr. 20, 1994, at 1.

224. See RAWLS, *supra* note 2, at 13–14.

225. For the attributes of sovereignty, see Oscar Schachter, *The United Nations and Internal Conflict*, in LAW AND CIVIL WAR IN THE MODERN WORLD 401, 406 (John Norton Moore ed., 1974) (recognizing freedom from external coercion, freedom to choose domestic political, economic, and social systems, and territorial inviolability as the attributes of sovereignty).

226. See *id.* at 417–18 ("['S]overeignty' or 'national independence' constitutes a primary objective of the Charter [manifested in] the consent of the territorial sovereign as a continuing requirement for any international action by independent states."). See generally Georgiev, *supra*

professes neutrality—disinterest in the outcome of the controversy. This presupposes that the possible outcomes have not already been narrowed to acceptable choices,²²⁷ and that the intervention itself does not ultimately determine the outcome. The fiction of equal and sovereign actors assumes the identity of interests of all parties, and that the task of the arbiter is to mediate between equally valid choices.

But international law is the ultimate intrusion on its creator and creation, the sovereign State. The premise of sovereign equality is qualified by the power of the collective decisionmaker, which derives legal authority through the United Nations Charter, to which Member States have formally consented. The five Permanent Members of the Security Council, however, effectively control the principal lawmaking organ,²²⁸ and protect their interests while exercising authority in the name of the international community,²²⁹ thereby defining and redefining the parameters of sovereignty.

The result is a bifurcated version of sovereignty—one kind for the powerful, a lesser form for the weak. The vision of sovereignty enshrined in the Charter is, like liberalism's "autonomy," premised on procedural, not substantive equality.²³⁰ This is reflected in the posture of the Security Council vis-à-vis the transfer of power in South Africa.

Monday, April 25, 1994.

*"On my planet, everything is very small."*²³¹

The mustachioed face that peers out from the newspaper ad is tough, but worried. A solemn, dark-eyed lass leans against his bleached denim shirt, her shoulder safely cupped in his hand.²³² They are obviously, in South Africa's racial lexicon, "coloreds." "I'm sick and tired of being pushed around," asserts the bold caption. The ANC is branded a "bully,"

note 83 (arguing that consent is reified as a justification for international law and interventions based on this law).

227. See MACINTYRE, *supra* note 54, at 336 (Liberalism's "toleration of rival conceptions of the good in the public arena is severely limited.").

228. *But see infra* note 269, discussing the role of the General Assembly.

229. See generally Schachter, *supra* note 225, at 416–17.

230. See *id.* at 417–18.

231. ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE*.

232. See *THE ARGUS*, Apr. 25, 1994, at 17.

and an appeal is made to vote for the Democratic Party,²³³ whose members have "always fought as hard as they could for *my* rights."²³⁴

In another tabloid, a young mother wistfully cradles her infant as she pleads for "a party that'll stand up to the ANC."²³⁵ Again, their racial identity is clear; they, too, are "colored," the so-called "mixed-race," a group which, although subjected to racist conditions under apartheid, was nonetheless elevated above the African population and awarded benefits to ensure their loyalty to the regime.²³⁶ In the full-page ad, the Democratic Party promises to protect her and her child from "the abuse of power," the code-words for black majority rule and the end of the relatively privileged status of the coloreds.

Such appeals to racism seem normal to South Africans accustomed to living in a system built on racist ideology. Indeed, this is subtle by South African standards. The National Party, however, has run its own "Willie Horton" ad, featuring the notorious "Cape Strangler," now on trial for killing twenty-two local boys. The ad alleges that the ANC wants to give him and other dangerous criminals the right to vote. His face is darkened to make him look more black.²³⁷ Other ads claim blacks will seize houses from "colored" citizens,²³⁸ and decry affirmative action as an ANC scheme to take away the jobs and privileges awarded under apartheid's sophisticated divide and conquer rules.

This theme pervades the campaign, as white parties unabashedly vie for the "colored" vote, the majority in the Western Cape,²³⁹ the only Province they have a chance of winning. To the veiled—color-blind—monitors, the ads are innocuous, the slogans mere political posturing. They do not render the election less free or less fair.²⁴⁰ They do not violate the Electoral Code of Conduct.²⁴¹

233. The Democratic Party of South Africa is the former Progressive Federal Party, which was an opposition party in Parliament during apartheid. See *The Democratic Party*, S. AFR. BUS. INTELLIGENCE, Feb. 14, 1994, available in 1994 WL 8221172; Francis X. Clines, *The South African Vote: The Parties*, N.Y. TIMES, Apr. 28, 1994, at A15.

234. THE ARGUS, *supra* note 232, at 17 (emphasis added).

235. CAPE TIMES, Apr. 25, 1994, at 1.

236. See JOHNSON, *supra* note 92, at 194.

237. See Gregory Katz, *Mixed-race S. Africans are Uneasy*, DALLAS MORNING NEWS, May 6, 1994, at A1, A22.

238. See *id.*

239. See *id.*

240. In interviews after the voting, many "coloreds" reported that they voted for the National Party because they feared blacks would seize their property after the inauguration. See *Id.*

241. One National Party brochure, depicting black ANC members preventing a mixed-race woman from going to church, was ruled racist by the Independent Media Commission and withdrawn. See *id.*

NEUTRALITY AS OUTCOME-DETERMINATIVE

In South Africa, the international community is called upon to mediate an internal, as opposed to interstate, conflict.²⁴² In the context of internal conflict, the customary right of neutrality has been transformed by the Charter²⁴³ into a duty of nonintervention.²⁴⁴ Like neutrality in the domestic context,²⁴⁵ however, nonintervention in international law is normative,²⁴⁶ but not the norm in State practice.²⁴⁷ Despite the Charter,

242. Under customary international law, the doctrine of recognition of belligerency provides the vehicle for neutrality in the context of internal conflicts. Application of this doctrine accords international status to the parties to a civil conflict. Here again, moral relativism is preserved. The insurgents are accorded the status of a "belligerent community," triggering the application of international legal rules regarding the conduct of war. Thus, "[t]heir ships are not to be treated as pirates, nor are they, so far as Third States are concerned, merely in the position of traitors." See JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 254 (1979). Such neutrality would inevitably diminish the sovereignty of the de facto State, to the extent that the international status of the rebels is recognized.

Today, as with the recognition of States, a practice of collective recognition of belligerency has emerged which can be evidenced through the actions of the political organs of the United Nations. For example, in 1968, the General Assembly began to recognize the international character of the liberation struggles in southern Africa by calling upon the British and Portuguese governments to grant prisoner of war status to captured freedom fighters under the 1949 Geneva Conventions on the Laws of War. G.A. Res. 2383 (XXII) at 3 (1968) (Rhodesia); G.A. Res. 2395 (XXIII) at 3 (1968) (Portugal). A similar resolution condemned the apartheid regime for its "cruel, inhuman and degrading treatment of political prisoners" captured during the "legitimate struggle for liberation" and called for their release. G.A. Res. 2396 (XXIII) at 3, para. 8 (1968). These resolutions were adopted unanimously but for the two votes of South Africa and Portugal.

243. Articles 2(1) and 2(2) of the Charter enshrine the principles of sovereignty, equality and equal rights of States. See U.N. CHARTER art. 2, para. 1 and 2. Moreover, the proposed 1970 Declaration on Principles of International Law Concerning Peaceful and Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations embodies the liberal paradigms: "All States enjoy sovereign equality. They . . . are equal members of the international community." *Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation Among States*, U.N. GAOR, 25th Sess., Supp. No. 18, at 69, U.N. Doc. A/8018 (1970).

244. See U. N. CHARTER, art. 2 para. 7 (which excludes . . . interventions in matters "essentially within the domestic jurisdiction of any state"). *But see*, Oscar Schachter, *The United Nations and Internal Conflict*, in *LAW AND CIVIL WAR IN THE MODERN WORLD* 402 (John Norton Moore, ed., 1974) ("The fact that Article 2(7) contains no specific criteria for determining what is to be deemed essentially domestic or what constitutes intervention has of course given the United Nations organs wide latitude in applying those concepts to particular cases.").

245. See Weschler, *supra* note 53, at 23 ("Is it not also true and of importance that some of the principles the Court affirmed were strikingly deficient in neutrality, sustaining, for example, national authority when it impinged adversely upon labor, as in the application of the Sherman act, but not when it was sought to be employed in labor's aid?").

246. See, e.g., *Military and Paramilitary Activities in and Against Nicaragua* (Nicaragua v. United States) 1984 I.C.J. 169, at 186-88 (May 10) (stating that U.S. mining of Nicaraguan harbor constitutes an act of aggression violating international law).

247. See CARTY, *supra* note 94, at 90 ("The principle of non-intervention belongs among a litany of natural rights of States. . . . such natural rights were . . . no indication at all of State

military interventions by powerful States, on one pretext or another, remain commonplace; such interventions were a prominent feature of the political landscape in southern Africa throughout the liberation struggle.²⁴⁸ Non-military means are also used to take sides in internal conflicts; in South Africa, foreign trade, investment and diplomacy aided the de facto State to the detriment of the pro-democracy forces.

Election monitoring has become a highly respected form of peaceful intervention.²⁴⁹ Monitoring internationalizes an otherwise wholly domestic political event.²⁵⁰ Since elections are presumptively within the domestic jurisdiction of a State,²⁵¹ consent is a prerequisite to intervention. Thus, the degree of internationalization achieved through monitoring has varied in accordance with the degree of sovereignty which the international community accords the State in question.

Where the entity's sovereignty has been compromised in some way, such as colonial domination or war, concerns of autonomy have given way to international intervention which is significantly authoritative; the monitor assumes powers of a governmental character.²⁵² The most extreme option is complete administration. This form of monitoring, where the international community may control the security forces, has been employed in situations of civil war, such as in Cambodia.²⁵³

conduct." Jochnick and Normand point out that the contradiction between norms and practice in the law of war can be traced to its origins: "The enlightened theories of the publicists did not influence the practice of emerging European nation-states busily engaged in the imperial conquest, massacre, and enslavement of millions in the Americas, Africa and Asia." Jochnick & Normand, *supra* note 57, at 62.

248. For example, the United States and South Africa intervened in the Angolan civil war by covertly arming and training UNITA for many years. See Cindy Shiner, *Angola's Warring Parties Postpone Treaty Signing*, WASH. POST, Nov. 15, 1994, at A12.

249. See generally Fox, *supra* note 30.

250. The South African situation was already internationalized by virtue of apartheid and the massive human rights violations which that system entailed. Among these violations was the abridgement of the majority population's right to self-determination. Thus, the election, which would normally be a matter within the domestic jurisdiction of the State, acquired international dimensions. See Schachter, *supra* note 225, at 422 ("[A]t least three types of internal conflict are not to be regarded as essentially domestic: (1) conflicts which appear to endanger international peace and security; (2) conflicts between the peoples of a non-self-governing territory and the administering power, and (3) conflicts involving a large-scale deprivation of human rights of a distinct racial, ethnic, or national group within the country.").

251. See generally, IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 291-92 (4th ed. 1990) (discussing concept of domestic jurisdiction). See also U.N. CHARTER, art. 2, para. 7 (reserving matters of domestic jurisdiction to States).

252. See generally Fox, *supra* note 30, at 570-87 (discussing election monitoring prior to 1945, under the United Nations system, and in the post-colonial era).

253. Article 12 of the 1991 Paris Agreement established the United Nations Transitional Authority in Cambodia (Untac), which was granted authority to fully establish electoral laws, voter education, registration, ballot and counting systems, manage complaints and deliver a final assessment. See Madard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 209, 225.

Similarly, the United Nations Transition Assistance Group (UNTAG) in Namibia asserted some control over the former U.N. Trust territory during the transition period.²⁵⁴ In that case, the United Nations played a decolonizing role, as it previously had done in Zimbabwe.²⁵⁵

In South Africa, however, sovereignty is bifurcated; the white minority regime's sovereignty prevails over the black majority's self-determination and human rights claims.²⁵⁶ The "simple monitoring" model is adopted utilizing the existing domestic structures.²⁵⁷ International intervention will be visible but not intrusive. The five international members of the IEC do not even enjoy voting powers.²⁵⁸ Under the extreme limitations of this form of intervention, we can only document, not prevent the fraud; we are dependent, ultimately, upon the good will of the regime.²⁵⁹

Because neutrality freezes the status quo in place, the timing and extent of intervention can be outcome-determinative. Therefore, where large-scale human rights deprivations are involved, a model comparable to that employed in colonial contexts is warranted.²⁶⁰ Especially because the total disenfranchisement of the African majority—over seventy percent of the population²⁶¹—was a key aspect of that deprivation, the need for international control of the process of extending that franchise is heightened.

A hands-off model cannot confront the tremendous obstacles to a democratic transition existing under South African conditions, characterized by apartheid and racism, extreme State-sponsored violence,²⁶²

254. See Fox, *supra* note 30, at 576–79.

255. See *Committee of 24 Adopts Resolution on Southern Rhodesia*, WEEKLY NEWS SUMMARY, U.N. OFFICE OF PUBLIC INFORMATION, U.N. Doc. WS/391 (1969). See also *supra* note 30 and accompanying text.

256. The U.N.'s goals regarding internal conflict have emphasized the maintenance of *de facto* national sovereignty over other goals such as human rights and development. See Schachter, *supra* note 225, at 403–04.

257. See Madard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 228–29.

258. See *id.* at 230.

259. Judge Johann Kriegler, chair of the Independent Electoral Commission, stated that "the IEC would be relying heavily on the expertise of the government's Department of Home Affairs in planning and organizing the election." LAWYERS' COMMITTEE REPORT Issue 3, *supra* note 118, at 1–2.

260. See Schachter, *supra* note 225, at 408. It has been suggested that the South African situation constituted a form of "internal colonialism." See generally JOHN DUGARD, INTERNATIONAL LAW: A SOUTH AFRICAN PERSPECTIVE 198–230 (1995) (analyzing the evolution of international Human Rights Law: from the Nuremberg Trials to the South African Bill of Rights and International Human Rights norms).

261. See CATHOLIC INSTITUTE, *supra* note 36, at 15.

262. See generally Keller, *supra* note 45.

widespread deprivation and illiteracy,²⁶³ and a territory of vast size and complexity.²⁶⁴ The Security Council's decision to adopt such a model reflects the longstanding position of the powerful members of the international community on South Africa's sovereignty, which has been to treat it gingerly, notwithstanding the fact that matters of self-determination and racial discrimination are generally regarded as justifying intrusions on sovereignty.²⁶⁵

The apartheid regime consistently spurned international human rights norms. At the time of the election, South Africa was a party to only four of the twenty-five major human rights conventions.²⁶⁶ "Although [it] is a signatory to the United Nations Charter, it did not vote for the . . . Declaration of Human Rights."²⁶⁷ The United Nations General Assembly vigorously and consistently condemned the South African regime for its record of human rights violations,²⁶⁸ and declared it illegitimate.²⁶⁹ Indeed, as Professor Richardson asserts, the regime had been "adjudged to be virtually bereft of legitimacy under law."²⁷⁰ Nevertheless, the powerful States in many respects continued to accord the regime all the deference due to a fully sovereign State. With the exception of the 1977 arms

263. See *Secretary-General's Report*, *supra* note 4, at 18 (listing among the factors affecting the election extreme illiteracy, linguistic variety, and rural areas without access to television, newspapers, or radio).

264. See Madard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in *FREE AND FAIR ELECTIONS*, *supra* note 4, at 234.

265. See BROWNLIE, *supra* note 251, at 294.

266. South Africa was a party to the Convention on the Elimination of All Forms of Discrimination against Women (1981); the Slavery Convention of 1926; the Protocol Amending the 1926 Slavery Convention (1953); and the Slavery Convention of 1926 as amended. See Madard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in *FREE AND FAIR ELECTIONS*, *supra* note 4, at 219 n.13.

267. *Id.*

268. See, e.g., *The Policies of Apartheid of the Government of the Republic of South Africa*, U.N. GAOR Special Political Comm., 21st Sess., Agenda Item 34, at 2, U.N. Doc. A/RES/2202 (1966) (condemning apartheid as a "crime against humanity"); *International Convention on the Suppression and Punishment of the Crime of Apartheid*, U.N. GAOR 3d Comm., 28th Sess., Annex, Agenda Item 53, at 3, U.N. Doc. A/RES/3068 (1973); *Relationship between the United Nations and South Africa*, U.N. GAOR, 29th Sess., Agenda Item 3, U.N. Doc. GA/RES/3207 (1974) (rejecting credentials of South African representative); *Situation in South Africa*, U.N. GAOR Special Pol. Comm., 13th Sess., 2435th plen. mtg., Agenda Item 53, at 7-9, U.N. Doc. A/RES/3411/G (1975) (declaring South African government "illegitimate and has no right to represent the people of South Africa;" also recognizing liberation movement as "authentic representatives of overwhelming majority of South African people").

269. Although General Assembly resolutions are not legally binding per se, such resolutions can bind States as evidence of customary law. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS 2* (1963) (The "[c]ollective acts of states, repeated . . . and acquiesced in by sufficient numbers with sufficient frequency, eventually attain the status of law.").

270. Henry J. Richardson III, *Constitutive Questions in the Negotiations for Namibian Independence*, 78 AM. J. INT'L L. 76, 94 (1984).

embargo, the Security Council resolutions on South African apartheid were made pursuant to Chapter VI of the Charter, which made their enforcement subject to the sovereign consent of the regime,²⁷¹ notwithstanding the availability of nonconsensual enforcement measures²⁷² in cases of breaches of peace or international crimes.²⁷³ Classical peacekeeping between States²⁷⁴ has become the model for contemporary U.N. election monitoring.²⁷⁵ In theory, its two essential tenets, consent and neutrality, obviate concern about the justice of the intervention,²⁷⁶ and ensure that a "legal" rather than a "political" solution is imposed.²⁷⁷

Herein lies the paradox: liberalism's premise that neutral intervention is not outcome-determinative contradicts its own claims about the transformative power of rationality and law.²⁷⁸ In the context of election monitoring, the power to declare a transfer of political power "free and fair" carries the imprimatur of law, and the ability to bestow domestic and international legitimacy upon the results.²⁷⁹ This is the epitome of liberal law as "a form of policy that changes the stakes, and often 'escalates' the intensity, of political contests; it is a constraint comparable to force in its effects."²⁸⁰

Wednesday, April 27, 1994.

I begin my work on the first day of general voting at six-thirty a.m., at a polling station in the Bokaap district of Capetown. This mountainous region (the name means "above the Cape") is populated by the

271. See Schachter, *supra* note 225, at 414.

272. Such action may be taken under Chapter VII of the Charter when the Security Council decides that the situation involves a threat to or a breach of the peace or an act of aggression. See LELAND GOODRICH ET AL., CHARTER OF THE UNITED NATIONS, COMMENTARY AND DOCUMENTS, 306 (3d ed. 1969) (parties obligated to comply with article 40 resolutions).

273. See G.A. Res. 2202, *supra* note 93.

274. See Wedgewood, *supra* note 193, at 633 (discussing the tenets of classical peacekeeping).

275. See Fox, *supra* note 30, at 570-96.

276. See Wedgewood, *supra* note 193, at 633.

277. *Id.*

278. See *supra* notes 117-124 and accompanying text.

279. Election monitoring as a form of international intervention has been an important factor in the transition to self-government of several former colonial countries. The U.N. Trusteeship Council has monitored plebiscites in British Togoland, British Cameroon, Western Samoa, Namibia and Zimbabwe. See Madard Rwelamira & David Ailola, *International Monitoring of Free and Fair Elections*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 211 n.5.

280. Stanley Hoffman, *The Study of International Law and the Theory of International Relations*, PROC. AM. SOC. INT'L. L. 26, 34 (1963).

descendents of Malay slaves brought to the Cape to work on the sugar plantations. There, I am to observe the preparation of the ballot boxes.

The presiding officer shows us the empty boxes, closes them, and seals them with metal wires, fastened with metal clamps, plastic self-locking strip seals, and red tape with wax seals. Satisfied that the boxes are fraud-free and secure, we depart for our next assignment.

My next stop finds me in the African township of Guguletu at the Vukukhanye Primary School. The cold grayness of the morning emphasizes the stark poverty of the sprawling community. I arrive at my assigned station around seven-thirty a.m. My heartbeat quickens as I spy in the distance a seemingly endless stream of bodies snaking around the match-box structures that approximate housing for tens of thousands of black South Africans.

The mood is upbeat. They have come on crutches and in wheelchairs, or hobbling along with the help of a friend, discouraged by neither the morning chill nor the interminable lines. Those at the front lean against the chain-link fence surrounding the barren, dusty school yard, boasting that they have been waiting since two a.m. "I have hope," whispers one twenty-four year old woman softly. "Very much hope."

By eight-thirty a.m., the people are standing in a cold, driving rain, unsheltered but undeterred. The elders are shielded by the torsos of the young. Blankets are fetched from nearby homes. The poll has still not opened. They wait, with the stoic patience of the oppressed.

But, ultimately their spirit is broken. The ballots do not arrive. Inside the bare classroom, the youthful election workers, eager to put their new training to the test, look resentful and glum. Outside the throng is restless. The rain remains steady.

"It is a trick!" proclaims one woman at last. She is the first in line, swathed in a tattered brown overcoat, worry lines deeply etched into her face. I think she must be about sixty; I am saddened by the disappointment of this first-time voter. I try to cheer her up. She confides that she is a mother of two, in her thirties, who has had little formal education. Like the majority of people, especially women and those in rural areas, she has not been exposed to voter education initiatives.²⁸¹ "The regime tricked us into thinking we were going to vote today," she is

281. Nearly twenty million of South Africa's qualified voters were first-time voters. Previously disenfranchised voters were unfamiliar with basic concepts, such as the secrecy of the ballot, the nature and process of democracy, how to obtain proper eligibility documents. These questions were usually not covered in voter education initiatives; the substance was often limited to a basic explanation of the voting procedure. Nevertheless, the Secretary-General reported a successful voter education campaign. See *Secretary-General's Report supra* note 4, at 7, 18, paras. 63-64.

convinced. I promise her that it is real, not just a cruel joke, that I will try to do something about it. I phone to the IEC headquarters. I bring her hot tea from inside the polling station. I wait with her.

Slowly the dismal realization dawns. The people begin to trail away, one by one at first, then in droves, as the unrelenting rain comes in torrents, drowning out their residual determination. They will not vote today.

I am caught in the fundamental contradictions of the unknown,²⁸² the unknowable,²⁸³ and the immutable.²⁸⁴ I phone the IEC several times that day, and again the next. I offer to go wherever the ballots are and get them, but am told that this exceeds the scope of my mandate. Neutrality proceduralizes, rather than resolves conflict.²⁸⁵ I fill out an "Election Observer Incident Reporting Form."²⁸⁶ But in the three days of voting,²⁸⁷ no ballots ever make it to Vukukhanye Primary School.

The IEC was to receive many such reports. In all, nearly one-quarter of the polling stations lacked sufficient ballots and other materials.²⁸⁸ Guguletu, I will later learn, is an ANC stronghold. The IEC staffer in charge of delivering the ballots had somehow "disappeared" with them. Since there had never been a census in the township, no one knows how many voters were turned away.

Less than a month before the election, a United Nations team reported that the country was woefully unprepared for the estimated eighteen to twenty-three million prospective voters.²⁸⁹ Moreover, formal

282. In the original position the past is unknown. "[N]o one knows his place in society, his class position or social status; . . . natural assets and abilities, . . . parties do not know the particular circumstances of their own society . . . their economic or political situation, or the level of civilization and culture . . ." RAWLS, *supra*, note 2, at 137.

283. Moral truth is unknowable. "Systems of ends are not ranked in value." *Id.* at 19.

284. Liberal institutions are immutable. *See id.* at 7 ("[T]he legal protection of freedom of thought and liberty of conscience, competitive markets, private property in the means of production and the [patriarchal] monogamous family are [the subject of justice] examples of major social institutions."). *But see* MACINTYRE, *supra* note 54, at 335 (quoting David Lewis in *Philosophical Papers* at x-xi (vol. 1, 1983): "[O]ur 'intuitions' are simply opinions.>").

285. *See* KOSKENNIEMI, *supra* note 73, at 95. *See also* BELL, *supra* note 16, at 104.

286. Observers were responsible for reporting specific needs to IEC officials. The Commission had broad regulatory powers over political advertising, electoral irregularities, and adjudication proceedings. *See* John Murphy et al., *Postscript- The Legal Framework of South Africa's First Democratic Election*, in FREE AND FAIR ELECTIONS, *supra* note 4, at 249.

287. The vote was extended for an additional day in many areas because of the widespread insufficiency of ballots and other irregularities. *See* Rodney Pinder, *Mandela Confident of Free, Fair Election*, REUTERS N. AM. WIRE, Apr. 29, 1994, available in LEXIS, World Library, Arcnws File.

288. Only 75.71 percent had sufficient materials. *See Secretary-General's Report*, *supra* note 4, at 23.

289. A small United Nations delegation visited South Africa on a fact-finding mission from February 28 to March 6, 1994. The group's focus was on the preparation for the April 1994 elections, including general arrangements, voter education, safety conditions, polling sta-

complaints from registered parties and the IEC's own investigations produced evidence of systematic irregularities.²⁹⁰ The South African Police—implicated in conspiracies to derail the elections²⁹¹—were to investigate and resolve these disputes.

The veil barely conceals my disillusionment as I leave the Vukukhanye Primary School. I move to another polling station in Guguletu. A team of official United Nations monitors are just leaving. "No ballots here!" they announce almost jubilantly as they proceed to their next assignment.

My next station is in Langa, another desolate black township miles outside of Capetown. Everything appears to be going smoothly here. The election officials are very courteous and professional—they look as if they have been doing this for years. The presiding officer is an impressive young lawyer who inspires great hope for South Africa's future leaders. Observers are summoned whenever voters need and are given assistance. We are served coffee and tea.

Since there was no time for voter registration, each voter is required to produce an identity document, which is scrutinized closely. Once issued a ballot paper, officials mark the voter's fingers with an indelible dye to show that she has voted. She proceeds alone to a screened voting area, marks the ballot paper, indicating the party for which she wishes to

tions, the role of the international observers and monitors and the continued role of the international community after the elections. See *Letter Dated 31 March 1994, supra* note 26, at 5, para. 12. The mission recorded inadequate field staffing and deployment by the IEC—only a "minute fraction" of the necessary staff had been appointed. Offices were "scarcely functional." *Secretary-General's Report, supra* note 4, at 16, para. 59(a). IEC voter information inaccurately identified polling stations. *Id.* at 16, para. 59(b). The IEC estimated that less than a third of the 126,000 ballot boxes needed were available. *Id.* at 17, para. 59(c). The problem of inadequate plans for the field structure, including the movement of critical electoral equipment and materials, was compounded by scarce resources such as vehicles and drivers. The IEC had not developed an adequate logistical plan for the secure movement of ballot papers and boxes; had not developed a security plan; and had inadequate plans for the compilation and announcement of polling results, compounded by the fact of poor development of computer systems, ultimately forcing the resort to a manual tally of voting figures. *Id.* at 17–18.

290. Registered complaints totaled 3,558 including: intimidation (1,013 cases); violence (177 cases); interference with canvassing (322 cases); destruction of posters (267); "Chapter X" matters [undue influence, bribery, impersonation, interference w/election materials, canvassing, etc.,] (106 cases); "Various" voting infringements (540 cases); illegal identity cards (349 cases); Violations of the Electoral Code of Conduct (298 cases); Miscellaneous (688). KwaZulu/Natal, the base of the Inkatha Freedom Party, registered the largest number of complaints (741), followed by Western Cape (475) and PWV (409). See *Secretary-General's Report, supra* note 4, at 28, paras. 100–03.

291. See *supra* note 26 and accompanying text.

vote; displays the ballot paper to a voting officer so that the official mark stamped on the back of the ballot can be clearly recognized; and places the ballot in the ballot box. Eyes brimming with hope, and proud, toothless smiles give me, at last, a sense of fulfillment.

At Manenberg Secondary School, in a "colored" township, I hear an illiterate elderly woman, being given assistance,²⁹² say she wants to vote for "Madiba."²⁹³ She is bruskiy interrogated by a monitor from the IEC in Afrikaans:²⁹⁴ "Are you sure you want to vote for the ANC? Do you know what are the aims of the ANC?" A legitimate question, I suppose, had it been addressed to the two goats standing patiently in line outside.

I report it to Fatima, the presiding officer. She is brittle and defensive, resentful of my outsider interference. Reluctantly she gives me a form to fill out. Unsatisfied, I insist on calling the IEC to report the incident. I am told by an ANC Party Observer that there have been many complaints from voters of intimidation at this polling station.

In Mitchell's Plain, another "colored" area, election workers are openly campaigning for the ruling National Party. Ballot secrecy is compromised when officials log the names of the many voters who have needed assistance. When I raise the issue with IEC monitors, they assure me that the officials are doing nothing improper.

The polling station at Good Hope Seminary in central Capetown, a white area, is my last assignment for the day. It is modern, warm and bright, and no one is required to stand out in the rain. There is plenty of everything—ballots, friendly chatter, food. I am struck by the sharp contrast between this and the meager facilities in the African and "colored" townships. It seems unfair. But to the South Africans it is normal, the way things are.

*The veil reasserts its presence. I must not acknowledge this contrast, for knowledge of difference "allows people to be guided by their prejudices, rather than reason."*²⁹⁵

We observe the closing and securing of the ballot boxes: all unused ballots are counted in our presence and placed in boxes secured with masking tape. Then the openings of the ballot boxes are sealed with wire

292. Illiterate voters were entitled to assistance from a presiding officer in the presence of at least two monitors, observers, or any two other IEC officials. See *Secretary-General's Report*, *supra* note 4, at 13, para. 50.

293. See *supra* note 3.

294. See *supra* note 24.

295. See RAWLS, *supra* note 2, at 19.

padlocks, red tape, and red wax seals. But no provision has been made for the security of the ballot boxes as they are transported to the counting stations.

I retire late that night, listening uneasily to the steady rain. The next morning dawns brisk and clear.

Thursday, April 28, 1994.

Our van approaches the Kayamandi "location"²⁹⁶ on the second day of general voting, driving through the lush wine-growing region of Stellenbosch. A voluptuous rainbow arcs prophetically in the South African autumn sky. Turnout is light. The community bears the putrid scars of yesterday's heavy rainfall. I try not to notice the stench of the open sewers that pervades the air, or the residents forced to wade through puddles brimming with human waste. I am moved by glimpses of heroic attempts to remain human in an inhuman situation: some of the tin shacks have nice rugs on the floor; a few even have pirated electricity.

Sunday, May 1, 1994.

The vote counting begins. The tallying is slow and arduous. Due to a lack of computers, it is being conducted by hand.

Thursday, May 5, 1994.

Press reports indicate that the ANC is nearing the two-thirds majority it needs to write the Constitution and carry out its program.²⁹⁷

Friday, May 6, 1994.

I watch the final vote count on TV with a prominent South African family. *My work completed, I am finally able to shed the veil and cheer openly for the ANC.*

296. See *supra* note 139 discussing the forced removal policy.

297. See, e.g., ATLANTA J. & CONST., May 6, 1994, at A1 (reporting ANC had won 65.2 percent, with three-fourths of ballots counted); Bill Keller, *Buthelezi Seems to Beat Mandela in Zulu Province*, N.Y. TIMES, May 6, 1994, at A1 (reporting 64.7 percent).

Despite pervasive flaws,²⁹⁸ the elections are declared “substantially free and fair.”²⁹⁹ Prior to the announcement of the official results, the United Nations and other government monitors issue an “interim assessment” of the elections process, concluding that the IEC successfully accomplished its goal.³⁰⁰ Thus, the imprimatur of international law is placed upon the government of national unity, headed by the ANC, and including the former ruling National Party, and Inkatha. The country is free to embark upon a path of reconstruction and development.

Officially, the ANC wins 62.65 percent of the vote, lacking the two-thirds majority needed to write a new constitution without compromising major principles. Significantly, the National Party won the Western Cape, with the overwhelming support of the “colored” community.³⁰¹ And Inkatha “won” Natal, amid widespread allegations of fraud and intimidation.³⁰² While most of the fraud appeared to be directed against the ANC, the ANC leadership ultimately acquiesced in the vote stealing.³⁰³ And the international community achieved its goal of successful elections, protecting its interests at the expense of the peoples’ franchise. An American reporter expressed it thus: “Inkatha and the National Party have their own

298. According to the United Nations Report, materials were lacking at 23.44 percent of the “special voting” stations which accommodated persons who were confined or ill. *See Secretary-General’s Report, supra* note 4, at 22, paras. 79–84. Procedures were correctly applied at only 73.72 percent of the stations visited. With respect to the general voting, on April 27–28, observers collectively reported that correct procedures were applied at 81.13 percent of voting stations. The province of Northern Transvaal was reportedly the “worst overall” regarding sufficiency of materials, supplies and correct procedures. Late staffing, inadequate training and deployment also created systematic problems. Polling was extended to April 29 in Transkei, Ciskei, Venda, Lebowa, Gazankulu, and KwaZulu, to compensate for the procedural problems in these areas. *See id.* at 23, para. 83. Ballot counting was particularly problematic. Specific shortcomings included insufficient staff and facilities to ensure uninterrupted counting (only 84.06 percent had sufficient accommodations); the improper delivery of materials (only 78.82 percent complied with prescribed custody procedures); ballot paper reconciliation procedures (only 74.45 percent adhered to proper procedure); Notably, the IEC Chairman actually directed the modification of procedures because they proved to be “too onerous.” *See id.* at 25, para. 88. The Secretary-General noted allegations of fraudulent interference with ballot materials in certain parts of the country, but declined to offer a judgment in his report. *See id.* at 89, para. 25.

299. *See* John Carlin, *ANC Wins Seven out of Nine Provinces to Complete Landslide*, INDEPENDENT (London), May 7, 1994, at 12.

300. *See Secretary-General’s Report, supra* note 4, at 15–16, paras. 55–58.

301. *See* Gregory Katz, *supra* note 237, at A1 (“Instead of voting for the ANC, which launched the anti-apartheid struggle that led to mixed-race South Africans getting full citizenship, they gave a resounding victory to the National Party that designed and implemented apartheid in 1948.”).

302. In Natal, internal memoranda from IEC monitors urged that the provincial vote be invalidated. *See* Keller, *supra* note 297.

303. *See* Dele Olojede, *ANC Ignored Fraud; Inkatha ‘Victory’ Appears Rigged*, NEWSDAY (Nassua and Suffolk ed.) May 17, 1994, at A4.

provincial bases to work from—so democracy is flourishing here in the new South Africa.”³⁰⁴

And so, neutrality has once again preserved “sovereign consent,” but it is no more than Locke’s “empty concept of the will.”³⁰⁵ The real referents in South Africa, the African, “Colored” and Indian masses, had no sovereignty to protect.

EPILOGUE

June 17–30 1995.

I have returned to South Africa to assess the progress of democracy. In the airport, I am greeted by a young African woman in the immigration booth. She looks at me and smiles; we exchange knowing glances. She is aware that I recognize the significance of this moment. It is the first time an African has been permitted to hold such a post.

In my Johannesburg hotel, African clerks and waiters are being trained to use the cash register—they have never before been allowed to handle money. On the flight from Johannesburg to Capetown, I travel with several new African members of Parliament. They appear serious, but unsure, awed perhaps by their new positions and responsibilities. They are dressed in worn but stately attire as they retrieve battered suitcases from the terminal luggage rack.

But my perception of change rapidly dissolves as I pass Crossroads. The burgeoning squatter camp has greatly expanded, moving like a seething mass of corrugated tin and barbed wire to encroach upon the highway. It is as if it intends to cross the road and continue all the way to Capetown, as if it were another “dark human cloud” as DuBois described the newly emancipated African-American slaves, “that clung like remorse” on the heels of the liberating Union troops, “almost engulfing and choking them. In vain were they ordered back, in vain were bridges hewn from beneath their feet; on they trudged and writhed and surged . . . a starved and naked horde of tens of thousands.”³⁰⁶ The government’s first budget shifted only three percent of spending toward

304. Bob Drogin, L.A. TIMES Reporter on *Washington Week in Review* (PBS television broadcast, May 6, 1994) available in LEXIS, World Library, Arcnws File.

305. See COMMONS, *supra* note 96, at 187.

306. DuBois, *supra* note 78, at 26–27.

the poor;³⁰⁷ of a promised one million houses in five years, it has built only 12,000 in two years.³⁰⁸

The scene inside Parliament is strange. I listen to the debate, which focuses on the growing crime problem. An ANC MP points out that increased crime is a phenomenon that typically accompanies a transition from authoritarian rule. The white opposition members shout "Here, here!" boo and hiss in stereotypical British style. Where are the powdered wigs, I wonder? The problem of political violence persists. There were 457 deaths and 592 injuries in incidents of political violence in the government's first one hundred days.³⁰⁹

I meet with new government officials; they impress upon me the practical monetary problems caused by the internationally brokered deal. The country's vast wealth remains in private hands, and the government is broke; it cannot even afford to equip Parliament with computers.³¹⁰ The need to generate government revenues provides an impetus for privatization,³¹¹ the perceived panacea for capital problems in many parts of the world, encouraged by the economic policies of the major powers.³¹² Ironically, the ANC vigorously opposed the apartheid regime's proposals to privatize state-owned enterprises, likening the plan to "selling the family silver without even consulting the family."³¹³ Now in

307. See Paul Taylor, *South Africa's 'St. Nelson' No 'Messiah' to Neighbors*, WASH. POST, Sept. 2, 1994, at A1.

308. See Editorial, *supra* note 137.

309. See *Human Rights Commission Assesses First 100 Days*, BBC SUMMARY OF WORLD BROADCASTS, Aug. 20, 1994, available in LEXIS News Library, BBCSWB File.

310. An interesting analogy is provided by the accession of blacks in the United States to political leadership in the bankrupt urban communities. See, e.g., BELL, *supra* note 16, at 23-24.

311. According to a recent World Bank report, the debt crisis facing developing countries exacerbates capital shortages, while official sources of capital, upon which sub-Saharan Africa is disproportionately dependent, are drying up. In Latin American countries such as Argentina and Mexico, infrastructure services were privatized as a result of "severe macroeconomic distress" to generate revenues for government. See David Ferreira & Kamran Khatami, *Financing Private Infrastructure in Developing Countries* World Bank Discussion Paper No. 343 at 15-16 (1996) [hereinafter World Bank Discussion Paper]. "In Mexico the divestiture program began in 1983 as part of the macroeconomic stabilization program adopted with the support of the International Monetary Fund." *Id.* at 16. In Argentina, needed capital was provided to reduce the government's debts to foreign commercial banks. See *id.* "In addition to relieving the public sector's managerial constraints and alleviating fiscal burdens, privatization of infrastructure projects helps develop capital markets and create a [corporate] base." *Id.* at 17. "[I]nternational flows increasingly seek investment opportunities in developing and emerging markets due to lower yields in industrial countries . . . Long-term government bond yields in the G-3 markets (Germany, Japan and the United States) have fallen by half since 1990." *Id.* at 22.

312. For example, "public enterprises, industrial promotion, and trade protection are out; privatization, industrial deregulation, and free trade are in." *Id.* at 14.

313. See Christopher S. Wren, *Pretoria Retreats on Privatization*, N.Y. TIMES, Nov. 13, 1990, at A9 (quoting Max Sisulu, head of the ANC's economics department).

power, some elements in the party are pushing for a change in position. But privatization can have extremely adverse consequences for domestic employment.³¹⁴ This would be devastating in South Africa, where more than forty percent of the black workforce is unemployed.³¹⁵

I travel to Durban to investigate the rumored fraud in Natal. I am told by ANC activists that they were urged by their leaders not to pursue legal challenges to Inkatha's stolen victory. They are frustrated and angry. They feel betrayed. Some, on the other hand, remain cautiously optimistic. In a modest tavern in the township of Guguletu, I seek out the views of township residents. I share a drink with Themba and his friends whom I meet there. "Most of the people I know don't have jobs," he responds wistfully when I ask what his hopes are for the future. "And I would like a house." Mandela has only been in office a year, he reminds me. "We will give him a chance."

I have tea with a dear old friend who is now a high-level government official. He tells me that during the counting, certain Western heads of state telephoned Mandela, cautioning him to do something about the ANC's wide margin of victory.³¹⁶ (*So the omnipresent and omnipotent "monitors" were not restricted by the veil!*) Thus, while the sovereignty of the white minority was sheltered, the sovereignty of the black majority was compromised from the outset; their just demands for redistribution of the country's vast wealth were thwarted by the deal through which their political freedom was negotiated.

The creation of a black elite will be well under way if Mandela succeeds in implementing his privatization program. Yet, such an elite can only expect to remain subservient to foreign capital, upon which the South African economy is so heavily dependent.³¹⁷ Will the price of the negotiated political freedom in South Africa be, as in the rest of Africa, economic slavery? The rash of strikes by the powerful trade unions

314. In Argentina, for example, the company responsible for railways and subways was privatized. "In 1989, before it was privatized, the company employed 92,500 people. By 1994 the private concessionaires [companies from Belgium, Japan, Portugal and the United States, along with Argentine partners] and the authorities that assumed responsibility for its services together employed just over 19,500 people." World Bank Discussion Paper, *supra* note 311, at 18.

315. See *S. African Official Unemployment Rate is 32.6 PCT*, REUTERS FIN. SERVICE, Mar. 31, 1995, available in LEXIS, World Library, Allnws File.

316. Cf. Article 21, Universal Declaration of Human Rights G.A. Res. 217, U.N. GAOR, 3d Sess., at 75, U.N. Doc. A/RES/217 (1948) ("[T]he will of the people shall be the basis of the authority of government.").

317. Because infrastructure facilities are usually very expensive and local capital markets may be too thin to mobilize sufficient funds, foreign capital can help jump-start the privatization process. South Africa's economy has long been dependent on foreign capital, which accounts for the effectiveness of economic sanctions in bringing down apartheid. See generally, U.N. DEP'T OF POL. AND SEC. COUN. AFFAIRS, FOREIGN INVESTMENT IN THE REPUBLIC OF SOUTH AFRICA, U.N. Doc. ST/PSCA/SER.A/1, U.N. Sales No. 67.II.K.9 (1967).

indicates that their struggle is ongoing.³¹⁸ The South African people, who endured some of the worst atrocities known to humanity in the course of that struggle, will no more readily submit to black domination than to white. Their just aspirations go beyond procedural equality, and their right to economic self-determination will not wither away because the anachronism of apartheid has been replaced with a more sophisticated form of oppression.

What does the future hold in store for little Nelson Madiba, as she embarks on her life-journey? With the demise of apartheid, her condition has lost its international dimension.³¹⁹ The veil of ignorance offers her no protection from the ravages of naked power that are now free to reign—until the next election momentarily transforms naked power into pin-striped law. Then the veil will once again disguise the forces that dictate the possibilities of her life. Seen through the veil they will acquire an aura of inevitability, universality and permanence. Seen through the veil they will not look like the historically determined contingencies that they are, vulnerable to the countervailing power of the millions who, like her, are not among the privileged.

I fear that the auspicious promise of “a better life for all” that heralded her arrival will not be realized in her lifetime. Nevertheless, this slogan—necessitated by postmodern conditions³²⁰—moves closer to the dream of real equality than liberalism’s promise of equal liberty. And together with eighteenth century slogans of human rights,³²¹ twentieth century social and economic rights—to housing, health care, water, food and education—found their way into the new South African Constitution. Significantly, the Preamble “[r]ecognize[s] the injustices of [the] past.”³²²

There is hope in this, because liberalism is sometimes forced into concessions and accommodations by its own ideological rhetoric. The transformative power of ideology, often to the bafflement of its promulgators, is a result of the attempt of the dispossessed to realize the promises of the rhetoric.³²³ To avoid this transformation, liberal political theory attempts to shape and narrow the permissible discourse by

318. See Editorial, *THE BALTIMORE SUN*, Jan. 8, 1996, at A8.

319. See e.g., Henry J. Richardson III, *Book Review: International Law: A South African Perspective*, by John Dugard, 89 *AM. J. INT'L L.* 656, 658 (1995).

320. See MACINTYRE, *supra* note 7, at 65 (“[C]laims to the possession of rights . . . presuppose . . . the existence of a socially established set of rules [which] come into existence at particular historical periods under particular social circumstances.”).

321. See Engels, *supra* note 209 (“And as people were . . . living . . . in a system of independent states dealing with each other on an equal footing . . . it was a matter of course that the demand for equality should assume a general character reaching out beyond the individual state, that freedom and equality should be proclaimed *human rights*.”).

322. See generally *S. AFR. CONST.* (May 8, 1996).

323. See generally BELL, *supra* note 116, at 252–53.

compartmentalizing disciplines, sanitizing scholarship of political point of view, and emphasizing lifeless abstractions. That its idealist vision of equal liberty has no basis in reality is beside the point of the discourse; that its vision of justice as procedural equality advantages the powerful is the point.³²⁴

Contemporary political theory is dominated by the Enlightenment themes which have been posited as universal.³²⁵ Through the universalization of the central theme of rationality, "present and future inequalities were now said to be merited inequalities, the consequences of the presumedly autonomous inner efforts of individuals."³²⁶ Neutrality masks the fact that the unequal distribution of wealth and poverty, privilege and hopelessness is not an aberration, but a fundamental and essential component of the market state; that Crossroads must exist, for it is an integral part of the global economy;³²⁷ that the impoverishment of the South is a requisite for the prosperity of the North.³²⁸

The obliteration of history is the chronic obsession of liberalism; in this way it is able to successfully characterize historic injustices as too remote in time to be of significance.³²⁹ "From the standpoint of individualism . . . the self is detachable from its social and historical roles and statuses."³³⁰ We are therefore obliged to view history through the filmy veil: as fantasy and myth, glorifications of the past and its progeny.³³¹

324. See e.g., MACINTYRE, *supra* note 7, at 235 (Theoretical concepts are used "to furnish us with a pluralist political rhetoric whose function is to conceal the depth of our conflicts.").

325. See R.B.J. Walker, *East Wind, West Wind: Civilizations, Hegemonies, and World Orders*, in CULTURE, IDEOLOGY, AND WORLD ORDER, *supra* note 59, at 10. See also, Immanuel Wallerstein, *Civilizations and Modes of Production: Conflicts and Convergences*, in CULTURE, IDEOLOGY, AND WORLD ORDER, *supra* note 59, at 60-61 ("Just as British power and capitalist enterprise came to pervade the furthest corners of the world, so did the presumptions about universalist truths come to pervade and define our consciousnesses, our cosmologies, our moralities, our scientific efforts.").

326. Immanuel Wallerstein, *Civilizations and Modes of Production: Conflicts and Convergences*, in CULTURE, IDEOLOGY, AND WORLD ORDER, *supra* note 59, at 60-61.

327. See R.B.J. Walker, *East Wind, West Wind: Hegemonies, and World Orders*, in CULTURE, IDEOLOGY, AND WORLD ORDER, *supra* note 59, at 7 ("The universalization of parochial social and political concepts . . . appears as part of a system of stratification, one in which poorer states are integrated into a global division of labor organized by, and to the advantage of, the dominant powers.").

328. See *id.* at 8 ("Despite almost daily reminders, it is not always easy to comprehend the extent to which . . . the American way of life depends on the brutal exercise of power beyond its borders, on the underwriting of corruption and naked aggression on a global scale."); ("Sympathy for the poor is readily available, but it is more difficult to absorb the idea that poverty is at least partly perpetuated by the wealth of those who sympathize."). *Id.* at 13.

329. See BELL, *supra* note 116, at 138.

330. See MACINTYRE, *supra* note 7, at 205 ("Such individualism is expressed by those modern Americans who deny responsibility for the effects of slavery upon black Americans, saying, 'I never owned any slaves.'").

331. See MACINTYRE, *supra* note 54, at 4 ("[Liberalism's] conception of an ideal rationality as consisting in the principles which a socially disembodied being would arrive at

But for me, growing up in New Orleans during the era of American apartheid, the interdependence of law and history has never been merely an abstract concept. Facing the challenges of life today, in the second post-Reconstruction era,³³² I have disavowed the myth of law as liberator. Yet, I embrace the postmodernist challenge to liberalism's postulates, rejecting ahistorical neutrality, ideologically imposed limitations on solutions, and the presumed illegitimacy of partisanship.³³³ And I remain convinced that the discourse of rights that has matured through these decades of struggle remains a powerful weapon in the hands of those of us who, like Nelson Madiba Lakay, must yet set themselves free.

illegitimately ignores the inescapably historically and socially context-bound character which any substantive set of principles of rationality, whether theoretical or practical, is bound to have.”).

332. The first Reconstruction ended with the Hayes-Tilden compromise of 1877, through which the Republicans promised the Democrats both to remove all federal troops from the southern States and not to intervene further in political affairs in those States. See BELL, *supra* note 116, at 32–33. In the author's view, the second Reconstruction commenced with the Supreme Court's 1954 decision in *Brown v. Board of Education*, and ended with *Regents v. Bakke* in 1979.

333. The post-modernist “questions the context of the discourse which he deconstructs [and] . . . treats it as a historically conditioned discipline . . . [and] questions the uses to which it is put.” Carty, *supra* note 90, at 66.