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ARTICLES

THE DEMOCRATIC ENTITLEMENT*

*Thomas M. Franck***

I. INTRODUCTION

Elsewhere, writing in January, 1992, I indicated my belief that we are witnessing “the emergence of a community expectation: that those who seek the validation of their empowerment” must “patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.”¹

This optimistic view of the tide of human events was supported by evidence that, as of late 1991, there were more than 110 governments “legally committed to permitting open, multi-party, secret-ballot elections with a universal franchise.”² I also observed that most of these governments had switched from authoritarian to democratic validation within the decade.

Although these still valid statistics continue to astonish, the problematic of the “democratic entitlement” that I sketched in

* © Thomas M. Franck. This article is a draft of a chapter in the author’s forthcoming book to be published by Oxford University Press.

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1. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992).

2. *Id.* at 47.

1992 has become significantly more problematic. By this I do not mean that the bloom is off the rose. On the contrary, the widely, even fiercely, held aspiration propelling the democratic entitlement towards normative and institutional realization continues to move people everywhere. On January 29, 1994, at a conference organized by the New York University Center for International Studies, the ambassadors to the U.N. for Ethiopia and Sierra Leone emphatically dismissed the idea that electoral democracy is a western idea and not a value given priority in the nations of the Third World. Denouncing this critique, which is still advanced with considerable intellectual vigor by, among others, former President Lee Kwan Yew of Singapore, the ambassadors insisted that democratic participation in the national political process is as prized a value in Africa as in Europe or North America.

Thus, the proposition I advanced in 1992 has not been invalidated: there is still underway a global tendency towards the realization of the democratic entitlement. What has changed is our growing comprehension of the complexities inherent in that move. Nothing today seems as simple as it did two years ago. While there is more striving for peace and reconciliation through democratic—in place of military—struggle in places like Cambodia and Mozambique, elsewhere, the transition from communist totalitarianism has been marked by a disintegration of social order. The “end of history” has been seen for its light-headed absurdity. Instead of ending, history has become messier. Paradoxically, the appeal of totalitarian law and order has acquired a new cachet where it has been succeeded by civil war, corruption, and criminal rampage. In some places, electoral politics have become the foreplay of tribal war.

So it is time to rethink, retheorize, review. In this essay I shall briefly summarize the origins of the modern idea of a global democratic entitlement. Next, I will summarize the evolution of the norms and institutions which explicate, monitor, and seek to enforce the right to democratic governance and the legitimate exercise of legitimated power. Finally, and primarily, this essay will explore the contemporary complexities, the “grey areas,” wherein lie controversy and, one hopes, enlightenment as we pursue, and seek to shape and hone the emerging right

to democracy in accordance with ascertainable global public policy, minimum general expectations, and values.

This is not a dreamer's errand. In seeking to shape and hone, we shall strive to cut our normative cloth to fill the contours of the real world. We shall seek to calibrate the degree of common resolve and the extent of common resources available to protect and promote democracy through multilateral means, without over- or under-estimating the imminent prospects of reaching an El Dorado of perfect democracy. Our reach, in effect, should exceed our grasp, but not too much.

The first of the new complexities that make the democratic problematic more complex than it seemed even a mere two years ago is the definitional one, which we will discuss in detail later, in the coda of this essay. But a few words on this subject must be spoken right at the start. Definition is no mere linguistic exercise; it is a call to think strategically. While it may be true, as Edmond Cahn once observed, that some lawyers would not throw a drowning person a life preserver until the victim had first defined the term "help," it is surely inevitable that when we speak of a democratic entitlement, the definitional question should be raised promptly and explored thoroughly.

Perhaps the way for Americans to begin consideration of the matter is to look for a familiar benchmark. Is the United States federal government a democracy? The answer is not as self-evident as it seems. Bear in mind that many of the most incisive incisions and sutures in our *corpus juris* are made by judges holding life tenure and elected by no one. Judicial governance is not democratic, and no nation on earth has more government by judiciary than the United States: with India and Germany, their constitutions patterned after ours, the distant runners-up. Bear in mind, too, that our nation's elected federal legislature and elected presidency are confined, in their exercise of political power, by a constitution that we, contemporary Americans, neither wrote nor are able to amend except with great difficulty. Consider, also, that our laws are made by a senate elected on a basis which significantly skews the "one person, one vote" principle. And, recall that our President and Vice President are elected by an electoral college also capable of egregiously distorting the result of the popular vote. Then, recall that our cabinet officers rule without popular mandate,

unlike cabinet ministers of many parliamentary democracies. And, lastly, consider that the United States, once more out of step with many parliamentary democracies, imposes no cap on a political candidate's electioneering expenditure of personal resources, thereby creating an electoral playing field demonstrably tilted towards the very rich.

Do these aspects of our system disqualify us as a democracy? Instinctively, we say "no," and we thereby demonstrate that when we speak of democracy, we use the term in a situationally-relative sense. Absolute democracy, we acknowledge, is a condition of power-validation which no society—not even cantonal Swiss plebiscitary governance—embodies totally, to the exclusion of all countervailing considerations. Every democracy compromises democratic theory in socio-political practice. The countervailing considerations inducing such compromise may include, as Madison and Lord Acton so well understood, the need to protect the rights of minorities in the enjoyment of their basic rights and freedoms from abridgment by majoritarian preferences. There are other reasons why majoritarian preferences may be set aside: for example, to encourage stability and continuity, or in deference to history, geography, ethnicity, or even traditional elitism. An elite deference still perpetuates both Britain's House of Lords and our electoral college. Our Senate represents a preference for historic decentralized federalism over equal representation based on population.

For the purposes of this definitional introduction, such brief allusion to the counter-majoritarian constraints found in our own system of national governance alerts us to two elementary, but necessary, points of reference for our exploration of the democratic entitlement. *One* is that any nation's commitment to democracy is always a matter of degree, and, as we lawyers know, matters of degree, create the "grey areas" beloved by lawyers. A *second* point is that what really matters, what public policy and law seek to define and protect through the democratic entitlement, is not some unattainable, impracticable absolute democracy, nor the highest possible degree of democracy, but, rather, a *minimum* standard for democratic validation.

Such a standard does not seek to define the absolute ideal of democracy, nor does it prescribe the "best" mix of democratic

and counter-majoritarian ingredients in governance. Instead, the democratic entitlement creates a *presumption* in favor of governance by the free, equal, and secret expression of popular will. However, this is a *rebuttable* presumption. As a presumption, the democratic entitlement is satisfied when each departure from the presumptive standard is justifiable in accordance with commonly accepted subsidiary principles: that is, standards of deviation commonly accepted as necessary and proper in a free society.

For example, the European Convention on Human Rights in article 17 explicitly permits the prohibiting of "any activity or . . . act aimed at the destruction of any of the rights and freedoms" of others.³ Article 15 states that parties to this instrument are permitted to "take measures derogating from its obligations" in "time of war or other public emergency threatening the life of the nation."⁴ In article 10, the European Convention establishes the right of "everyone" to "freedom of expression" but also permits

restrictions . . . as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.⁵

It needs to be stressed that these exceptions are not exercisable solely at the political whim of governments but are reviewable by the European Commission and Court of Human Rights. The Commission and Court have exercised that power to strike an appropriate balance. These judicial bodies have found that a government has failed to demonstrate that a restriction on a protected democratic right has been adequately justified by exceptional necessity.⁶ On the other hand, they accepted as

3. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 17, 213 U.N.T.S. 221, 234 (entered into force Sept. 3, 1953) [hereinafter European Convention].

4. *Id.* art. 15, 213 U.N.T.S. at 232.

5. *Id.* art. 10, 213 U.N.T.S. at 230.

6. Lingens Case, 103 Eur. Ct. H.R. (ser. A) at 14 (1986); see MARK JANIS &

valid the German Government's explanation as to why its proportional representation system of elections excludes from parliamentary representation any party receiving less than five percent of the popular vote.

What may usefully be gleaned from all this is the contextual nature of the democratic entitlement, its non-absoluteness. But the non-absoluteness of a rule carries with it a special burden to establish legitimate processes for resolving disputes in the "grey area" between the rule and the exceptions. It will be useful to return to these definitional problems, which are proliferating even as the democratic entitlement itself proliferates. At this stage, however, it may suffice simply to note that the term is used in this essay in full cognizance that it denotes, in practice, a matter of degree, a tendency. But—and this is important—even as we recognize this contextuality, we reject the notion that it renders the core notion of an entitlement meaningless. On the contrary, as with so many of society's fundamental norms, an admission of the relativism made manifest by the definitional enterprise should whet the lawyer's appetite for more exacting normative parameters and legitimate processes for applying them. Good norms and good process contain and restrict the nihilistic tendencies implicit in the palimpsest of definition and deconstruction.

II. SOME HEAVY CONCOMITANTS OF THE DEMOCRATIC ENTITLEMENT: AND WHY THEY FLY

"Democracy," etymologically speaking, is all about the role of people in governance. It is about the right to be consulted when political choices need to be made. It is an idea as old as the Athenian *polis*, or the gathering of African elders around the village Baobab tree. What is of relatively recent origin is the idea that the right of people to be consulted in a meaningful fashion is not protected solely by a nation's constitution, as it has been for two hundred years in the United States, but, additionally, by international law.

The notion of international law, as I have argued elsewhere,⁷

RICHARD KAY, *EUROPEAN HUMAN RIGHTS LAW* 258-65 (1990).

7. THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

rests, ultimately, on a theory of community and the concomitant benefits and obligations which derive spontaneously from membership in that association of nations. States, when they think about international law, are empirically bound to say: "I am, therefore I *have* and I *owe*: I have *rights* and I owe *duties* or *obligations*." It would be premature, however, to insist that every nation is now obliged, as an incident of its statehood and its membership in the community of states, to govern itself democratically. That is for the future to fashion, if it will. At present, however, it can be asserted with adequate empirical evidence that such an associational obligation is in the process of coming into being; that, increasingly, it is being insisted upon by the community of states as a prerequisite for admission of new applicants for full membership and its benefits. So we stand on the cusp of a remarkable new idea: that each state owes an obligation of democratic governance to all other states as a price of its membership in the community of nations. And more: each government, as an incident of membership in the global intergovernmental system, owes to each of its citizens the acknowledgment of his or her right to participate meaningfully in the process of governance. More extraordinary still is the ensuing legal premise that when a citizen is denied the democratic entitlement by his or her government, a form of cause of action may lie in an appropriate international forum, which may determine whether the denial is lawful. Finally, if the denial is not sustained, the international system may provide a remedy to redress the international delict committed by a government, perhaps under color of its own laws, against its own citizens.

In this future, there will be two beneficiaries of the democratic entitlement or, conversely, two sets of aggrieved parties when the entitlement is denied. One will be the community of nations. The other will be the disenfranchised citizen. No wonder the "democratic entitlement" is a controversial notion. Little wonder it meets resistance, by no means only from actual or potential transgressors. To the extent the democratic entitlement becomes accepted international law, the ambit of sovereignty is commensurately diminished.

Yet, in the years since the collapse of communism, more than fifty states—remember, we are speaking in relative contextual

terms—have “gone democratic.” They clamor at the United Nations, in regional organizations, and at the doorstep of non-governmental organizations, for credible monitors to observe, and sometimes to run their first attempts at free and open elections. This seemingly paradoxical embrace, by sovereign governments, of a practice that, as it gradually evolves into customary practice and law, is bound to diminish their sovereignty, can be understood quite readily as a considered barter transaction between those in power and the global system. A little sovereignty is surrendered for a lot of legitimacy bestowed. Only citizens of governments long regarded as illegitimate, by their own nationals as well as by the international community, can fully comprehend legitimation’s immense value to those who would govern. Only to the extent a government is regarded as legitimately validated can it count on the willing assent of citizens and foreign states to its laws and practices. Legitimacy is valued as the necessary, albeit not a sufficient, condition of peaceable governance. That is why a credible, monitored election is the *sine qua non* for ending civil wars in Nicaragua, El Salvador, Mozambique, Angola and Cambodia. Increasingly, it is also the ticket for admission to the benefits of the global system: World Bank loans, most-favored-nation terms of trade, IMF credits, bilateral aid, and so forth.

We thus can understand why the internationalization and normativization of the democratic entitlement has both aroused passionate opposition and yet made remarkable progress in recent years. We live in a time when much governance is hobbled by a legitimacy deficit. To help remedy that condition, governments have become more willing to accept the encumbrance on sovereignty which the democratic entitlement imposes. In thus yielding a little, governments are purchasing legitimacy, but that is not all. They are also responding politically to a deep-seated value, shared by their own citizenry in common with those of most other nations. Within limits set by socio-political, cultural, and historic context, all people deeply desire a meaningful say in the shaping of their destiny. Let no apologists for authoritarian quick-fixes tell you otherwise. As in our national jurisprudence, the soil from which international law springs is the loam of widely-shared social values. Participatory democracy is becoming such a common value of humanity and

it is to this value that international law is already starting to respond.

III. CONTEMPORARY SOURCES OF THE DEMOCRATIC ENTITLEMENT: SELF-DETERMINATION

Evidence that democratic consultation manifests a universal value is to be found in the evolution of "self-determination"—democracy's grandparent—from a rather randomly-applied political expedient into a full-fledged international law, defined in general practice and judicial decisions, incorporated into treaties, and monitored as well as enforced by multilateral organizations. The normativization of self-determination shows the way the democratic entitlement will grow from shared value to legal norm.

The right to self-determination is not identical to the right to democracy. One deals with "peoples," the other with "persons." One is a collective right, the other an individual one. Although the collective desire of a "*people*" to self-determine their collective destiny differs from the desire of a *person* to participate individually in the shaping of that people's collective policy, the common thread is readily apparent: the desire for meaningful participation in a coherent socio-political process. Persons rally to collective self-determination—by struggling for the sovereignty of a nation, a tribe, or other identity group—primarily because they believe that their individual values and preferences are more likely to be realized in a collective political entity in which the shared identity of the participants ensures that greater voice will be given to each individual's life choices. The assumption that individual happiness can best be promoted by establishing sovereign affinity-groups can be seen either as logically impeccable or morally suspect, depending on the circumstances. India's pacific struggle for a secular, democratic republic represents the bright face of self-determination. The tribal wars of the former Yugoslavia and Angola represent a darker visage. Both demonstrate the power of the drive for self-determination.

Whatever its use or abuse, the urge of peoples to self-determination can be traced to antiquity. The exodus of the Hebrews from Egypt to found their own nation on ancestral soil, three

millenia ago,⁸ is echoed in the decision, at the Versailles Peace Conference,⁹ to grant self-determination to the Danes of Schleswig, the Slavs of the German and Austrian empires, and to Poland.¹⁰ In important instances, the wishes of a "people" was ascertained by plebiscites. U.S. Secretary of State Robert Lansing, reacting against Woodrow Wilson's enthusiasm for self-determination, prophetically surmised that "the phrase is simply loaded with dynamite."¹¹ Nevertheless, Versailles, although applying self-determination only imperfectly to parts of the defeated empires in Europe,¹² unleashed social values and launched a process of norm-formation that has reconfigured the modern world.

This tendency to reconfiguration was universalized by the United Nations Charter. At the insistence of the Soviet Union, India, Ethiopia, and to a lesser extent, the United States, the Charter placed former German, Japanese, and Italian colonies under the trusteeship of states clearly required "to promote . . . progressive development towards self-government or independence" in accord with "the freely expressed wishes of the peoples concerned."¹³ The first article of the Charter, moreover, recognized self-determination as a fundamental right of all peoples. Thus incorporated in a global law-making convention, self-determination became an entitlement owed by governments to subject "peoples" under their authority and by states to one another. The International Court of Justice, in its *Western Sa-*

8. *Exodus* 1:2.

9. See HURST HANNUM, *AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION* 20-31 (1990). The use of self-determination at Versailles and subsequently is also discussed more fully in Thomas M. Franck, *Legitimacy in the International System*, 82 *AM. J. INT'L L.* 705, 743-48 (1988).

10. See 1 SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR* 13-16 (1933); 1 RAY S. BAKER, *WOODROW WILSON AND WORLD SETTLEMENT* 188 (1922); 2 *A HISTORY OF THE PEACE CONFERENCE OF PARIS* 203-06 (H.W.V. Temperley ed., 1920); MICHLA POMERANCE, *SELF-DETERMINATION IN LAW AND PRACTICE* 4 (1982); DENNA FLEMING, *THE UNITED STATES AND WORLD ORGANIZATION* 152-55 (1938). For example, Czechoslovakia ended up with defensible boundaries only by denying self-determination to a large Sudeten-German minority.

11. ROBERT LANSING, *THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE* 97 (1921).

12. Self-determination was denied Upper Silesia, Fiume, and Sudetenland, among others, for strategic and economic reasons. FLEMING, *supra* note 10, at 152-55.

13. U.N. CHARTER art. 76(b).

hara Advisory Opinion, confirmed the primacy of this legal obligation.¹⁴

The member states to whom this Charter norm was addressed—the colonial powers: Britain, France, Belgium, Netherlands, Portugal, Spain and the United States—with greater or lesser alacrity, proceeded to implement the norm in practice, thereby more than tripling the number of states in the U.N. community. And the U.N. General Assembly, acting under article 73(c), as well as the Trusteeship Council, saw to it that they carried out the devolutionary requirement in a democratic fashion. Thus, the U.N. created not only a binding legal obligation but also the means to monitor and assess its implementation. Visiting U.N. missions observed elections in dependent territories, mandated plebiscites where necessary, and established a clear link between the right of a “people” to self-determination and the democratic entitlement of persons to participate in the process of designing their own sovereign institutions.¹⁵

That this normative process was able to generate a generally orderly transition from colonial status to independence for more than a billion subject-people cannot but have impressed on the world’s consciousness the utility of a rule which promotes the right of peoples, collectively, to govern themselves.

The repertory of decolonization practice makes clear that the right to self-determination is not absolute. For example, a rich region may not be entitled simply to impoverish a larger entity by breaking away from it. Indeed, the U.N. demonstrated this in 1961, when it authorized the use of force to keep the Katanga province united with Zaire.¹⁶ Again, the right is con-

14. 1975 I.C.J. 12.

15. See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16 at 66, U.N. Doc. A/4684 (1960). Since this supervisory U.N. role ceased upon a dependency’s attaining independence, it has sometimes been characterized sarcastically as “one man, one vote, one time.” Nevertheless, the right to self-determination has survived the end of U.N.-supervised decolonization, as evidenced by the break-up of the Soviet Union and of Czechoslovakia. Its continued legal efficacy is restated in article 1 of the International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, reprinted in 6 I.L.M. 368 (entered into force Mar. 23, 1976) [hereinafter ICCPR]. The same provision is stated as Article 1 of the International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3, reprinted in 6 I.L.M. 360 (entered into force Jan. 3, 1976).

16. S.C. Res. 5002, U.N. SCOR, 16th Sess., 942d mtg., ¶¶ 4, 8, 9 (1961).

textual and may require balancing with countervailing rights—for example, those, like “territorial integrity,” which are supported by notions of economic equity, geostrategic necessity, or the protection of minorities. This means that there will be grey areas; but “self-determination” remains a powerful root nurturing the democratic entitlement.

IV. CONTEMPORARY SOURCES OF THE DEMOCRATIC ENTITLEMENT: CIVIL AND POLITICAL RIGHTS INSTRUMENTS

Alongside the collective right to self-determination of peoples, contemporary international law has developed norms which are intended to protect the individual freedoms of persons. We have already referred to the European Convention on Human Rights, a regional instrument. Chief among the universal instruments incorporating rights of persons is the International Covenant on Civil and Political Rights of 1966, which has been ratified by over 100 states, most recently including the United States.¹⁷

Article 1 of this Covenant serves as a bridge between the collective rights born of the era of decolonization and the new era of protected individual freedoms. It states that “[a]ll peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁸ Although this provision, which proved very controversial at the drafting stage,¹⁹ at first appears merely to restate the Charter’s decolonization norm, it subtly introduces two important adumbrations. *First*, it makes self-determination generally applicable to all “peoples” in the post-colonial era,²⁰ and not merely to non-self-

17. 28 WEEKLY COMP. PRES. DOC. 1008 (June 5, 1992). But see Nadine Strossen, *United States Ratification of the International Bill of Rights: A Fitting Celebration of the Bicentennial of the U.S. Bill of Rights*, 24 U. TOL. L. REV. 203 (1992), for a critique of the extensive reservations the U.S. included with its ratification.

18. ICCPR, *supra* note 15, at 173.

19. DOMINIC MCGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 14, 15 (1991).

20. Professor Rosalyn Higgins, a member of the Human Rights Committee of Experts monitoring the application of the Civil and Political Rights Covenant, has written that the Committee has not had to determine which “peoples” are entitled to self-determination under article 1 of the Covenant because claims, to date, have been brought only by individuals under the Optional Protocol of the Covenant. The Optional Protocol, however, only envisages communications brought by “individuals . . . who claim to be victims of violations of any of the rights set forth in the Covenant.”

governing colonial peoples; and *second*, it firmly links (twice in one sentence) the collective concept of self-determination with the individual right of individuals “freely” to participate in civil society and its political processes. The definition of freedom is explicated in the rest of the Covenant which strongly emphasizes the rights of individuals. It requires governments to accommodate the enumerated personal entitlements as the necessary precondition of freedom.

The Covenant has its antecedent in the Universal Declaration of Human Rights, adopted by the General Assembly as a non-binding resolution on December 10, 1948.²¹ Among its provisions are ones setting forth a universal claim to freedom of expression (Article 19) and association (Article 20). Eighteen years later, the Covenant, a nearly-universal and binding legal instrument, built on the Declaration to specify the right of all persons to freedom of thought (Article 18), expression (Article 19), and association (Article 22). While, as in the aforementioned European Convention, most of these political rights are not absolute, but subject to restriction where “necessary . . . [f]or the protection of . . . public order . . . or of public health or morals,” the Covenant requires that the restrictions be imposed by law, rather than autocratic whim, and it makes their “necessity” subject to review by an independent Committee of Experts.²²

Higgins observes that the:

Rules of Procedure of the Human Rights Committee in turn emphasize that the communication is to be submitted by the individual concerned. There is no possibility for group or class actions under the Covenant procedures. The Committee has thus been faced with the dilemma. The right of self-determination is a right in the Covenant—albeit a right of a different kind from the rest, standing alone in Part I of the Covenant. But it is a right by peoples, not of any individual; and only individuals may bring communications.

Rosalyn Higgins, *International Law and the Avoidance, Containment and Resolution of Disputes: General Course on Public International Law of the Academy of International Law*, 230 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONALE [R.C.A.D.I.] 172-73 (1991). Perhaps this obstacle can be surmounted in the instance of a claim brought by a state party against another state party that has accepted the jurisdiction of the Committee over such claims.

21. G.A. Res. 217A(III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration of Human Rights].

22. ICCPR, *supra* note 15, at 178.

These personal freedoms—thought, speech and association—are the *sine qua non* of political liberty. The Covenant, in Article 25, underscores the individual right to democratic consultation and participation by granting every citizen the right:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors.²³

It is remarkable that such extensive recognition of political rights should have been the subject of agreement, even if more apparent than real, in 1966, at the height of the cold war and the spread of fashionable communist ideology. Since the collapse of communism, the gap between appearance and reality has begun to shrink. The General Assembly, in 1991, passed a virtually unanimous, although non-binding, resolution which puts an even more specific gloss on the emerging democratic entitlement.²⁴ It “stresses” the members’

conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.²⁵

This language is important for its sub-text, which refutes the notion, still paraded by a few governments,²⁶ that the advancement of economic, social, and cultural rights may best be served by restricting individual political rights and freedoms.

23. This provision echoes the terms of Article 21 of the Universal Declaration of Human Rights which proclaimed the claim of all citizens to take part in government and in “periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.” Universal Declaration of Human Rights, *supra* note 21.

24. G.A. Res. 45/150, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/150 (1990).

25. *Id.* ¶ 2.

26. Singapore, China, and Vietnam are examples.

V. INTERNATIONAL INSTITUTIONAL SUPPORT FOR THE DEMOCRATIC ENTITLEMENT

Not every nation is a party to the Covenant or voted for the Assembly resolutions that spell out the democratic entitlement. For those norms to become universal, they must be perceived by the community of nations as legal obligations binding on all governments. To this end, the members of the community have created (i) institutional support for governments seeking to make the stormy crossing from totalitarianism to democracy by way of free and fair elections, (ii) institutional means to conduct objective, periodic reviews of all states' compliance with the democratic entitlement, and (iii) precedents for collective action in support of the entitlement in instances of its flagrant violation. These may be thought of as carrots, microscopes, and sticks.

A. *Institutional Election Support (Carrots)*

Quite reasonably, the U.N. has fastened on elections as an indicator of compliance with the democratic entitlement: one which is necessary, even though not necessarily sufficient. Helping states to conduct free elections thus is an aspect of promoting compliance with the norm. Accordingly, acting upon specific authorization by the General Assembly in 1991,²⁷ the U.N. Secretary-General has created an office to handle requests by member states for assistance in organizing, conducting, and monitoring national elections. The office not only helps to conduct national elections but helps to assure and even to certify the fairness of the process.²⁸ This is a considerable carrot, prized by regimes where elections are novel and results might otherwise appear to lack probity.

Such a U.N. role is not new. Under the trusteeship system established by the Charter, the monitoring of elections in trust territories became a routine practice. As early as May of 1956, the Trusteeship Council dispatched monitors to a plebiscite in British Togoland which determined whether its population

27. G.A. Res. 137, U.N. GAOR, 46th Sess., U.N. Doc. A/RES/46/137 (1992).

28. *Id.*

wished to achieve independence in union with neighboring Ghana or preferred to be separate.²⁹ In subsequent years, many more elections, plebiscites and referenda were monitored by the Trusteeship Council in such dependencies as the British Cameroons (1959 and 1961),³⁰ Ruanda-Urundi (1961),³¹ Western Samoa (1961),³² the Northern Marianas (1976),³³ and various other parts of Micronesia (1983-86).³⁴ Similarly, a subcommittee of the General Assembly has monitored elections in various colonies *en route* to independence, including the 1965 referendum establishing a new constitution giving autonomy to the Cook Islands,³⁵ the 1968 pre-independence referendum in

29. *Report of the United Nations Plebiscite Commissioner for the Trust Territory of Togoland under British Administration*, U.N. Doc. T/1258 and Add.1 (1956).

30. See G.A. Res. 1350, U.N. GAOR, 13th Sess., Supp. No. 18A, at 2, U.N. Doc. A/4090/Add.1 (1959) (whether the Northern Cameroons wished "to be part of the Northern Region of Nigeria when the Federation of Nigeria becomes independent"); G.A. Res. 1352, U.N. GAOR, 13th Sess., Supp. No. 16, at 26, U.N. Doc. A/4354 (1959) (whether the Southern Cameroons wished to achieve independence by "joining the independent Federation of Nigeria [or] the independent Republic of the Cameroons"); G.A. Res. 1473, U.N. GAOR, 14th Sess., Supp. No. 16, at 38-39 (putting the questions posed in the G.A. Res. 1352 plebiscite before the Northern Cameroons); see also *Report of United Nations Commissioner for the Supervision of the Plebiscites in the Southern and Northern Parts of the Trust Territory of the Cameroons under United Kingdom Administration*, U.N. Doc. T/1556 and app. (1961).

31. G.A. Res. 1579, U.N. GAOR, 15th Sess., Supp. No. 16, at 34, U.N. Doc. A/4684 (1961) (elections); G.A. Res. 1605, U.N. GAOR, 15th Sess., Supp. No. 16A, at 8, U.N. Doc. A/4684/Add.1 (1961) (referendum).

32. G.A. Res. 1569, U.N. GAOR, 15th Sess., Supp. No. 16, at 33, U.N. Doc. A/4684 (1961) (whether the inhabitants of the territory accepted "the Constitution adopted by the Constitutional Convention . . . on 28 October 1960" and endorsed "that on 1 January 1962 Western Samoa should become an independent State on the basis of that Constitution"); see also *Report of United Nations Commissioner for the Supervision of the Plebiscite in Western Samoa*, U.N. Doc. T/1564 and Add.1 (1961).

33. *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Mariana Islands District, Trust Territory of the Pacific Islands, June 1975*, U.N. TCOR, 43d Sess., Supp. No. 2, at 24, U.N. Doc. T/1771 (1976).

34. See *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, June 1983*, U.N. TCOR, 51st Sess., Supp. No. 1, at 14, U.N. Doc. T/1860 (1984) (June 21, 1983 plebiscite for the islands of Truk, Yap, Kosrae and Ponape); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Marshall Islands, Trust Territory of the Pacific Islands, September 1983*, U.N. TCOR, 51st Sess., Supp. No. 2, at 12-13, U.N. Doc. T/1865 (1984) (1983 plebiscite); *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1986*, U.N. TCOR, 53d Sess., Supp. No. 2, at 14, U.N. Doc. T/1885 (1986) (1986 plebiscite).

35. G.A. Res. 2005, U.N. GAOR, 19th Sess., Supp. No. 15, at 7, U.N. Doc. A/5815 (1965); *Report of the United Nations Representative for the Supervision of the Elections*

Spanish Equatorial Guinea,³⁶ the 1969 referendum on the status of West Irian,³⁷ and the 1980 pre-independence elections in the New Hebrides.³⁸ This tradition of monitoring pre-independence elections in dependencies has continued with recent international observation of the Eritrean plebiscite on independence from Ethiopia.³⁹

More recently, the monitoring role has become more active. With South Africa's decision to grant independence to South West Africa (Namibia), the Security Council created UNTAG, the United Nations Transitional Administration for Namibia, with responsibility not only for organizing and conducting the territory's first free and universal election, but also for managing Namibia's dependency's peaceful transition to independence.⁴⁰ UNTAG monitored the final months of South Africa's administration, oversaw its military withdrawal, assisted in the drafting of a new constitution and the repeal of racially-discriminatory legislation, and facilitated an amnesty for political prisoners and the return of refugees and exiles. UNTAG's seven thousand military and civilian personnel were deployed so effectively that a historic transformation fraught with racial and tribal animosities occurred peacefully, a model of collective self-determination and respect for the democratic entitlement.⁴¹

Since then, the Security Council has authorized similar activist operations, using large U.N. administrative and military units to facilitate peaceful political transformations. In these, elections are a crucial element, but only one of many. Such

in the Cook Islands, U.N. Doc. A/5962 and Corr. 1 (1965).

36. G.A. Res. 2355, U.N. GAOR, 22d Sess., Supp. No. 16, at 54, U.N. Doc. A/6716 (1967); *United Nations Mission for the Supervision of the Referendum and the Elections in Equatorial Guinea*, U.N. Doc. A/7200/Add.4, Anns. V, VI (1968). Independence was formally achieved on October 12, 1968.

37. G.A. Res. 1752, U.N. GAOR, 17th Sess., Supp. No. 17, at 70, U.N. Doc. A/5217 (1962); *Report of the Secretary-General Regarding the Act of Self-Determination in West Irian*, U.N. Doc. A/7723 (1969).

38. G.A. Res. 34/10, U.N. GAOR, 34th Sess., Supp. No. 46, at 199, U.N. Doc. A/34/46 (1979); *Report of the United Nations Mission to Observe the Elections in the New Hebrides*, U.N. Doc. A/34/852 (1979).

39. *An Opening for Democracy in Eritrea*, WASH. POST, Apr. 30, 1993, at 18.

40. S.C. Res. 629, U.N. SCOR, 44th Sess., 2842 mtg., at 2, U.N. Doc. S/INF/45 (1989).

41. *Namibia, Independence at Last*, UN MONTHLY CHRON., June 1990, at 4. Namibia formally achieved independence on March 21, 1990. *Id.*

authorization was given for U.N. operations in the Western Sahara (1991),⁴² Cambodia (1992)⁴³ and Mozambique (1992).⁴⁴ In each instance, the U.N. role has been far more extensive than the mere monitoring of elections. It has entailed negotiating, and then implementing, a complex agreement among hostile parties for the reorganization of the nation, culminating in the empowerment of a democratically-elected government. In each instance, the Security Council acted in response to a request made by the government and the other principal political parties preparing to participate in the democratic process. Behind such facade of agreement, there may oft-times have lurked profound divergence, yet a forceful U.N. presence—and U.N. conducted or supervised elections—helped navigate the society past the shoals of civil conflict to the calmer seas of legitimate political authority.

That the U.N., in recent years, has developed an activist mode of election supervision has not meant abandoning the less intrusive mode. U.N. observers monitored the 1990 elections in Nicaragua, which ended that nation's prolonged civil war. They did so at the insistence of the Secretary-General, responding to a request by the Government of Nicaragua,⁴⁵ although his initiative later was formally approved by the Security Council.⁴⁶ U.N. monitors (ONUVEH) were also positioned in Haiti for the elections of 1991 at the request of that nation's government and on the authority of the Secretary-General,⁴⁷ an initiative subsequently approved by the General Assembly.⁴⁸

42. S.C. Res. 690, U.N. SCOR, 46th Sess., 2984th mtg., U.N. Doc. S/RES/690 (1991).

43. S.C. Res. 745, U.N. SCOR, 47th Sess., 3057th mtg., U.N. Doc. S/RES/745 (1992).

44. S.C. Res. 797, U.N. SCOR, 47th Sess., 3149th mtg., U.N. Doc. S/RES/797 (1992).

45. See *The Situation in Central America: Threat to International Peace and Security and Peace Initiatives*, U.N. Doc. A/44/927 (1990) (Fifth report of the Secretary-General United Nations Observer Mission). For the establishment of the U.N. monitoring mission, ONUVEN, see U.N. Doc. A/44/375 (1989).

46. S.C. Res. 637, U.N. SCOR, 44th Sess., 2871st mtg., U.N. Doc. S/RES/637 (1989).

47. *Adoption of Agenda and Organization of Work; Letter Dated 17 July 1990 From the Permanent Representatives of the Bahamas, Columbia and Haiti to the United Nations, Addressed to the President of the General Assembly*, U.N. GAOR, 44th Sess., Annex, Agenda Item 8, at 2, U.N. Doc. A/44/965 (1990).

48. G.A. Res. 45/2, U.N. GAOR, 45th Sess., U.N. Doc. A/RES/45/2 (1990).

Helping a state conduct peaceful and credible elections may be a key to ending civil conflict, but this is neither self-evident nor invariably the case. The "bad loser" scenario has led to the results of U.N.-supervised elections being overturned in Haiti and a U.N.-monitored election being rejected by the loser in Angola.⁴⁹ In the Western Sahara one or both parties' apparent unwillingness to risk losing the U.N.-supervised plebiscite has succeeded in stalling the operation for more than a year.

It is becoming clear that the success of U.N. operations of this sort depend on the extent to which the international community is willing to make a commitment commensurate with the task and the predictable problems it entails. It is by no means certain that the system is willing to make such a commitment with the necessary resources and over a sufficiently sustained period of time. To be sure, there are enthusiasts. Some analysts have called for a sort of long-term U.N. "receivership" of nations which have destroyed their political system and reduced them to "failed states."⁵⁰ Others have observed that this would merely reinvent the colonial era, with the U.N. in the role of colonizer. John Stuart Mill, a century ago, argued that democracy cannot be taught or imposed by outsiders.⁵¹ The costs have also been described as prohibitive. Yet there are also costs in systemic credibility when, as in Angola, the U.N. makes a "quickie" cameo appearance in an election, on the cheap, and then finds itself exposed to ridicule when the "bad loser" reverts to war. Fearing just such failures and troubled by the fiscal, personnel and legal implications of responding to too many requests, the Secretary-General in recent years has rejected invitations to monitor elections in Romania, Lesotho and Zambia.⁵² Yet, these prudent refusals also entail potential costs to the peace and security of the international system, as well as hindering the organic growth of the democratic entitlement. Obviously, both the failures and demurrals point to lacu-

49. *Troops Hold Sway in Wrecked Haitian Capital*, THE INDEPENDENT, Oct. 4, 1991, at 11; *Dos Santos Says Angola Must Not Remain Paralyzed on Brink of War*, UPI, Nov. 4, 1992, BC Cycle.

50. Gerald B. Helman & Steven Ratner, *Saving Failed States*, 89 FOREIGN POLICY 3 (Winter 1992-93).

51. JOHN S. MILL, 3 DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL AND HISTORICAL 238-63 (1873).

52. See *U.N. Says It Won't Monitor Romanian Elections*, REUTERS, Jan. 25, 1990.

nae in global policy which require far more consideration than they have hitherto received.

B. *Institutional Review of Compliance and Noncompliance*

A different sort of process, far less expensive, intrusive, and risky, is employed to keep under review the practices of governments in general insofar as they affect the right of persons to democratic participation in policy- and decision-making. This review is continuous and is conducted by established institutions with broad mandates to observe governments' compliance with standards to which they have agreed. Evidence of noncompliance and complaints of violation are scrutinized, discussed with the governments concerned, and findings are made.

The outstanding example of this genre is the Human Rights Committee of eighteen independent experts elected for four year terms by the parties to the Civil and Political Rights Covenant.⁵³ Its task is quasi-administrative and quasi-judicial. Monitoring of states' compliance with the Covenant is facilitated by their obligation to periodically "undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights."⁵⁴ The Committee scrutinizes these reports in the presence of a representative of the reporting state, and has the right to question the accuracy and sufficiency of the report. In this, members receive considerable assistance from nongovernmental human rights organizations which informally provide additional evidence of state conduct. The Committee then transmits its observations to the other parties and to the Economic and Social Council.

Under an optional procedure in the Covenant,⁵⁵ the Committee additionally may be empowered to hear complaints by one state party against another. Parties may also accept the Optional Protocol of the Covenant which authorizes the Committee to consider petitions by their citizens.⁵⁶

53. ICCPR, *supra* note 15, art. 40(1).

54. *Id.*

55. *Id.* art. 41. For a discussion of this procedure see MCGOLDRICK, *supra* note 19, at 120-246.

56. ICCPR, *supra* note 15, Optional Protocol, opened for signature Dec. 19, 1966,

Under these several procedures, the Committee is beginning to play an important role in monitoring compliance with those aspects of the democratic entitlement established by the Covenant. In its review of national reports it has been critical, albeit in a circumspect manner, of the compliance of countries like Uganda and Tanzania (respecting Zanzibar),⁵⁷ and has posed searching questions to Mali⁵⁸ and Jamaica,⁵⁹ among others. So far, it has proceeded cautiously and by consensus in dealing with country reports and citizens' complaints.

Some complaints of petitioners have been found to be valid. For example, the Committee cited Uruguay's military regime for violating a petitioner's right freely to engage in political and trade union activities.⁶⁰ In another case, the Committee found a petitioner had been detained on grounds not permitted by the Covenant article 19(3).⁶¹ The Committee has also held several petitioners' rights violated by an order banning their political party and prohibiting them from running for office.⁶²

On an *ad hoc* basis, the Secretary-General may be authorized to create a mechanism for monitoring compliance with human rights, including the political right to democracy, as part of the agreed process to end a civil war. A notable example is the Mexico City Agreements of 27 April 1991, brokered by the Secretary-General's Personal Representative. In it, the Government and insurgents in El Salvador agreed to the establishment by the Security Council of ONUSAL, the U.N. Observer Group in El Salvador.⁶³ Under the control of the Secretary-General, its mission is to ensure the "cessation of armed conflict," integrate

art. 1, 999 U.N.T.S. 302.

57. *Report of the Human Rights Committee*, U.N. GAOR, 36th Sess., Supp. No. 40, at 42-43, U.N. Doc. A/36/40 (1981) [hereinafter 1981 *Report*].

58. *Id.* at 50-51.

59. *Id.* at 56-57; see also MCGOLDRICK, *supra* note 19, at 469-70.

60. *Alba Pietroroia v. Uruguay*, Communication R.10/44, 1981 *Report*, *supra* note 57, at 153-59.

61. *Report of the Human Rights Committee*, U.N. GAOR, 35th Sess., Supp. No. 40, at 111, U.N. Doc. A/35/40 (1980) [hereinafter 1980 *Report*]; see also Grille Motta v. Uruguay, Communication R.2/11, 1980 *Report*, at 132; Hertzberg v. Finland, Communication R.14/61, *Report of the Human Rights Committee*, U.N. GAOR, 37th Sess., Supp. No. 40, at 161, U.N. Doc. A/37/40 (1982).

62. 1981 *Report*, *supra* note 57, at 42-43; *id.*, Annex XVI, at 153.

63. *Central America: Efforts Towards Peace: Report of the Secretary-General*, U.N. Doc. S/22494 and Corr. 1 (1991); see also N.Y. TIMES, Aug. 13, 1991, at A8, col. 3.

the insurgent forces into a new police force to observe the implementation of citizens' rights, including free expression and political association.⁶⁴ The agreement envisaged mutual disengagement, disarmament, and reconstruction of an integrated civil society. To this end, ONUSAL is authorized to observe "the electoral process . . . to conclude with the general elections in El Salvador in March 1994" which, the Security Council has said, "should constitute the logical culmination of the entire peace process"⁶⁵

It is now almost inevitable that, when parties to a civil war are ready to concede the impossibility of resolving the conflict through armed struggle, they call on the U.N. to organize the political infrastructure for a cessation of hostilities. In this process, a U.N.-run, or closely observed, election invariably is "the logical culmination." Most recently, this was the approach used in Cambodia,⁶⁶ Rwanda⁶⁷ and Mozambique.⁶⁸ In Cambodia and Mozambique the U.N.'s very extensive role included working with the parties to write the electoral laws, enrolling the voters, establishing the machinery for balloting and ballot counting, and scrutinizing the polling and ballot counting. While the success of this intervention by the U.N., sometimes aided by regional and nongovernmental organizations, has been beneficial to the war-ravaged state concerned, it has also helped to develop a systemic practice which is capable of evolving into customary law.

C. *Enforcement*

The United Nations system envisages collective measures against violators of international law under Chapter VII of the Charter. This requires a decision by the Security Council to

64. ONUSAL was established by the Security Council under S.C. Res. 693, U.N. SCOR, 45th Sess., 2988th mtg., U.N. Doc. S/RES/693 (1991).

65. S.C. Res. 832, U.N. SCOR, 48th Sess., 3223d mtg. at 2, U.N. Doc. S/RES/832 (1993).

66. S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg., U.N. Doc. S/RES/872 (1993).

67. S.C. Res. 782, U.N. SCOR, 47th Sess., 3123d mtg., U.N. Doc. S/RES/782 (1992).

68. S.C. Res. 797, U.N. SCOR, 47th Sess., 3149th mtg., U.N. Doc. S/RES/797 (1992).

deploy some or all of the means envisaged by articles 41, 42 or 43 of the Charter, ranging from severance of diplomatic relations, through trade embargoes, to direct military action by U.N. forces or by national forces authorized to act on the Council's behalf. Military enforcement actions of this sort have been authorized in a few instances, beginning with Korea in 1950 and, most recently, to repel the Iraqi invasion of Kuwait.⁶⁹ In only one instance, however, in the Security Council's decision to impose a selective economic embargo on Haiti in 1993, has the Council resorted to enforcement measures to compel a military junta to relinquish the reins of government to a democratically-elected President.⁷⁰

A decision to deploy collective measures requires the Council to make the determination that there exists a threat to the peace or breach of the peace. Prior to the Haiti military coup, there were doubts whether even an egregious denial by a government of its own citizens' democratic entitlement would ever be adjudged a threat to the peace. Now, the precedent has been established by the Council's invoking Chapter VII to impose its partial trade embargo.⁷¹ While it is not self-evident that the overthrow of a democratic regime in a tiny island-nation is a threat to international peace, the Council did come to that conclusion. It is useful to consider why the precedent was set.

Its rationale necessarily relies on a connection between peace and democracy. That connection was first made in Immanuel Kant's essay, *Perpetual Peace*.⁷² Kant postulated a correlation

69. In the instance of the Iraqi invasion of Kuwait, the Council authorized "Member States co-operating with the Government of Kuwait . . . to use all necessary means to uphold and implement" the Council's demands on Iraq to withdraw from Kuwait "and to restore international peace and security in the area." S.C. Res. 678, U.N. SCOR, 45th Sess., 2963d mtg., U.N. Doc. S/RES/678 (1990). For the Security Council resolution authorizing U.S. forces to defend South Korea on the U.N.'s behalf see S.C. Res. 84, U.N. SCOR, 5th Sess., 476th mtg., U.N. Doc. 5/1588 (1950).

70. S.C. Res. 841, U.N. SCOR, 48th Sess., 3238th mtg., U.N. Doc. S/RES/841 (1993). In February, 1994, the Security Council began consideration of tougher economic sanctions to restore democracy to Haiti. Steven Greenhouse, *U.S. is Seeking Tougher Embargo Despite the Strain on Haiti's Poor*, N.Y. TIMES, Feb. 5, 1994, at A1.

71. The Council decided that "in these unique and exceptional circumstances the continuation of this situation threatens international peace and security in the region." S.C. Res. 841, *supra* note 70.

72. IMMANUEL KANT, *PERPETUAL PEACE* 107-39 (T. Humphrey rev. ed. 1983) (1795).

between the quality of a state's domestic governance and its behavior towards others. In his view, perpetual peace was far more likely to be achieved between states in which governments are accountable to their people, than in autocracies. Modern empirical scholarship has validated Kant's theory.⁷³ There are a number of ways in which Kant's hypothetical confluence between peace and democracy—and, conversely, between totalitarianism and threats to the peace—is born out in practice. In the instance of Haiti and elsewhere, the denial of democracy demonstrably leads to peace-threatening consequences. Dictatorships tend to rally publics by creating external enemies against which military action is taken. Totalitarian rule frequently generates civil war, flows of refugees, and eventually, draws external actors into surrogate warfare.

This is not invariably true, and all anti-democratic rule is not identical, nor equally peace-threatening. That the Council may use collective measures to enforce the democratic entitlement does not prove that it must, or should, do so in every instance. Nevertheless, as a matter of law, it is important to note that the Council has demonstrated that it has jurisdiction to act, even though jurisdiction is not tantamount to obligation. The Council imposed a compulsory embargo on the delivery of oil and petroleum products and police equipment on Haiti after its military coup leaders made evident their refusal of U.N. demands to restore the democratically-elected government of President Jean-Bertrand Aristide.⁷⁴ The Council has also authorized member states to use military force to put teeth in these sanctions.⁷⁵

Left for further consideration are the circumstances in which the Council's enforcement power *ought* to be used. Obviously, this decision should take into account case-specific contexts and circumstances. Nevertheless, it is useful to begin to think nor-

73. See Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); see also Michael W. Doyle, *An International Liberal Community*, in *RETHINKING AMERICA'S SECURITY* (Graham Allison & Gregory F. Treverton eds., 1992); Anne-Marie Burley, *Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine*, 92 COLUM. L. REV. 1907 (1992).

74. S.C. Res. 841, *supra* note 70; S.C. Res. 873, U.N. SCOR, 48th Sess., 3291st mtg., U.N. Doc. S/RES/873 (1993).

75. S.C. Res. 875, U.N. SCOR, 48th Sess., 3293d mtg., U.N. Doc. S/RES/875 (1993).

matively, as well as instrumentally, about a range of contingencies: not merely because normative conduct will be perceived as more legitimate than is action based purely on expediency, but also because clear norms that credibly predict the response of the international community serve to deter potential violators of the democratic entitlement. As with nuclear deterrence, the objective of all normative strategy—one which, up to a point, predicts consequences of contingent actions in violation of established rules—is to deter counter-normative conduct and, thus, to avoid the need for a *post-hoc* enforcement.

In our conclusions we shall consider what bright lines such norms might draw.

VI. REGIONAL SUPPORT FOR THE DEMOCRATIC ENTITLEMENT

The increasing salience of a global democratic entitlement is primarily evidenced by its dramatic emergence in the global system. Any survey of this development, however, must also note the parallel progress in some regional systems. This is significant for the “larger picture” in two ways. *First*, the regional systems may serve as engines to pull the global system in the direction of selectively higher standards: more demanding norms, better compliance, and more rigorous monitoring and enforcement. In that sense, a regional system may be a laboratory for the global system. *Second*, regional responses to violations of the global entitlement are likely to be more sensitive to the socio-political context in which they occur and thus may be more successful in shaping the best remedial strategy. In practice, a two-tiered global and regional approach is emerging, with concomitant benefits, but also with attendant problems.

It is in Europe and the North Atlantic area that development of the democratic entitlement recently has shown the most vigor. In 1990, thirty-five members of the Conference on Security and Co-operation in Europe (CSCE)⁷⁶ affirmed that “democracy is an inherent element of the rule of law” and recognized “the importance of pluralism with regard to political orga-

76. Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), *reprinted in* 14 I.L.M. 1292 (1975).

nizations.”⁷⁷ The CSCE then spelled out in greater detail than has the global system, the inalienable democratic rights of every citizen. These include the right to participate in “free elections that will be held at reasonable intervals by secret ballot or by equivalent free voting procedure, under conditions which ensure in practice the free expression of the opinion of the electors in the choice of their representatives.”⁷⁸ The citizen is accorded a right to a government “representative in character, in which the executive is accountable to the elected legislature or the electorate” and to political parties which are clearly independent of the state.⁷⁹

This “Copenhagen” statement is not a treaty, but is couched in terms of *opinio juris* that indicate the participants’ unanimous intent to shape regional customary norms. The declaration also makes clear the parties’ intent to link emerging democratic norms to a system of collective validation of governance, stating that “the will of the people, freely and fairly expressed through periodic and genuine elections, is the basis of the authority and legitimacy of all government.”⁸⁰

The CSCE declaration goes much further than the Civil and Political Rights Covenant in defining the parameters of the democratic entitlement. It requires “free elections at reasonable intervals,” for each national legislature. At least one chamber must be “freely contested in a popular vote” for freely formed political parties and freely nominated candidates for public office. The election must be conducted in accordance with universal and equal adult suffrage, a secret ballot or its equivalent, after a fair and free campaign. There must be “no legal or administrative obstacle” to media access. Winners must be permitted to take and hold office “until their term expires or is otherwise” terminated in accordance with law.⁸¹

The Copenhagen statement invites “observers from . . . CSCE participating States and any appropriate private institutions” to

77. Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, reprinted in 29 I.L.M. 1305, 1308, para. 3 (1990) [hereinafter Copenhagen Document].

78. *Id.* ¶ 5.

79. *Id.*

80. *Id.* ¶ 6.

81. *Id.* ¶ 7.

observe all national elections, and pledged the parties to "endeavour to facilitate similar access for election proceedings held below the national level."⁸²

Later in 1990, these expansive but precise principles were further developed by the CSCE in the Charter of Paris⁸³ in which the leaders pledged to "co-operate and support each other with the aim of making democratic gains irreversible."⁸⁴ The following year, at the Moscow Conference on the Human Dimension of the CSCE, the members declared "that issues relating to human rights, fundamental freedoms, democracy and the rule of law are of international concern, as respect for these rights and freedoms constitutes one of the foundations of the international order."⁸⁵ They "categorically and irrevocably" declared "that the commitments undertaken in the field of the human dimension of the CSCE are matters of direct and legitimate concern to all participating States and do not belong exclusively to the internal affairs of the State concerned."⁸⁶ Specifically, the members pledged that they would

support vigorously, in accordance with the Charter of the United Nations, in case of overthrow or attempted overthrow of a legitimately elected government of a participating State by undemocratic means, the legitimate organs of that State upholding human rights, democracy and the rule of law, recognizing their common commitment to countering any attempt to curb these basic values⁸⁷

The Moscow Document also sets forth a system for mediating disputes in which one member alleges that another has denied its own citizens' democratic rights.⁸⁸

82. *Id.* ¶ 8.

83. Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe and Supplementary Document to Give Effect to Certain Provisions of the Charter, Nov. 21, 1990, Preamble, *reprinted in* 30 I.L.M. 190, 193 (1991) [hereinafter Paris Charter].

84. *Id.* at 195.

85. *Id.*

86. Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Oct. 3, 1991, Preamble, at 2 (unofficial text of the U.S. delegation), *reprinted in* 30 I.L.M. 1670, 1672 (1991) [hereinafter Moscow Document].

87. *Id.* ¶ 17.2, at 1677.

88. *Id.* ¶¶ 3-16, at 1673-77.

These new norms of the CSCE and accompanying processes have scarcely been tested. Nevertheless, democracy has become a litmus test of the European Union for recognition of new states in Eastern Europe⁸⁹ and by the Council of Europe for membership in that organization.⁹⁰ For example, the Arbitration Commission ("Badinter Commission") of the European Union's Conference on Yugoslavia advised the Union's Conference on the Former Yugoslavia that recognition of Bosnia-Herzegovina should await its government's acceptance both of the International Covenant on Civil and Political Rights and the CSCE's Charter of Paris.⁹¹ European regionalism has also generated relevant treaty law. The Council of Europe's Convention for the Protection of Human Rights⁹² establishes an elaborate, legally-binding system for regional protection of basic human rights. Article 3 of Protocol I of the European Convention essentially tracks the democratic entitlement set out in article 25 of the International Civil and Political Rights Covenant.⁹³ Expressive and associational rights are expounded in article 10, paragraph 1 of the Convention which states: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."⁹⁴ As with the global system, freedom of expression is treated as a relative and contextual right. Paragraph 2 of article 10 permits

derogation in the form of restrictions . . . necessary in a

89. European Community: Declaration on Yugoslavia and the Guidelines on the Recognition of New States, Dec. 16, 1991, 31 I.L.M. 1485 (1992) [hereinafter Brussels Document]. The test requires, *inter alia*, "respect for the provisions of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights . . ." *Id.* at 1487.

90. *Yeltsin Wins Wide European Backing But Must Earn Council Seat*, REUTERS LIBRARY REPORT, Oct. 8, 1993, BC Cycle.

91. Conference on Yugoslavia Arbitration Commission: Opinions on Questions Arising from the Dissolution of Yugoslavia, Jan. 11 and July 4, 1992, 31 I.L.M. 1488; see also Brussels Document, *supra* note 89, at 1486.

92. European Convention, *supra* note 3.

93. First Protocol to the European Convention, 20 March 1952, art. 3: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."

94. *Id.*

democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for the maintaining of the authority and impartiality of the judiciary.⁹⁵

Although the breadth of this “derogation” clause attracts criticism, it resembles contextual limitations on First Amendment rights implicit in U.S. courts’ “clear and present danger” test.⁹⁶ Under the European Convention, as in the U.S. system, ultimate decisions about the necessity and propriety of restrictions are subject to judicial review. Both rights-based claims of European citizens and the derogations claimed on grounds of necessity by European governments are subject to review by the European Court of Human Rights.⁹⁷

The tribunal has developed a formidable jurisprudence, weighing countervailing rights, and explicating, case by case, parameters to guide parties through the inevitable grey areas. Thus, it has weighed claims based on freedom of the press against counterclaims to a fair trial,⁹⁸ public decency⁹⁹ and protection against libel or slander.¹⁰⁰ While the process has resulted in a somewhat different balance than the one in the U.S., it probably accurately reflects the dominant values of European public opinion. More to the point, the systemic weighing and balancing of these competing rights has been principled and is widely perceived as legitimating the outcomes. It is a credible process, the development of which significantly outpaces—and, thus, may predict—the progressive development of the global system.

An echo of this European regional system is heard in the less-developed inter-American regional system. Its 1969 Conven-

95. *Id.*

96. *Schenck v. United States*, 249 U.S. 47, 52 (1919); *Feiner v. New York*, 340 U.S. 315, 319-20 (1951).

97. European Convention, *supra* note 3, art. 19. See also arts. 20-55.

98. *The Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) (1978).

99. *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1976); *Case of Muller and Others*, 133 Eur. Ct. H.R. (ser. A) (1988).

100. *Lingens Case*, 103 Eur. Ct. H.R. (ser. A) (1986).

tion on Human Rights¹⁰¹ establishes citizens' legal claim to freedom of thought and expression,¹⁰² assembly, and association.¹⁰³ As in Europe, a Commission¹⁰⁴ and Court¹⁰⁵ implement the norms, case by case, reconciling conflicts between competing norms and socio-political interests. In addition, on June 5, 1991, the Foreign Ministers of the Organization of American States adopted a resolution which states that the OAS Charter principles "require the political representation of [member] states to be based on effective exercise of representative democracy" and requires the convening of an immediate meeting of the OAS Permanent Council "in the event of any occurrence giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exercise of power by the democratically elected government in any of the Organization's member states."¹⁰⁶ This procedure has been used in a number of cases discussed below, including coups in Haiti, Honduras, and Peru.

VII. A NEW ISSUE AGENDA: NORMS AND BRIGHT LINES

This rehearsal of progress made towards a global and regionally-augmented democratic entitlement has demonstrated that the cup, while half-filled, is also still half-empty. Although the overall direction no longer seems in doubt, the obstacles are also coming more clearly into focus. It is to these we now turn.

We shall examine three problems encountered in practice by the global system in implementing the democratic entitlement. We designate them, respectively, as the *Angola/Western Sahara* problem, the *Haiti/Cambodia* problem and the *Algeria/Peru* problem. The names are merely symbolic shorthand.

The nub of the *Angola/Western Sahara* problem is this: should the U.N. agree to participate in monitoring or conducting an election (or plebiscite) even when it is not able to deploy

101. American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673 (1970) (entered into force July 18, 1978) [hereinafter American Convention].

102. *Id.*, art. 13, 9 I.L.M. at 679.

103. *Id.*, arts. 15-16, 9 I.L.M. at 688.

104. *Id.*, arts. 34, 64(1), 9 I.L.M. at 685, 692.

105. *Id.*, arts. 33, 62, 64(2), 9 I.L.M. at 685, 691-92.

106. Representative Democracy, OEA/ser.P/AG/RES.1080(XXI-0/91), ¶ 1.

sufficient forces to compel the parties to abide by the results? The *Haiti/Cambodia* problem poses a related question: should the U.N. participate in organizing a country for democracy without also deploying the capacity to create a civil society? The *Algeria/Peru* problem solicits our thinking about an even harder dilemma: should the international system accept that it may sometimes be necessary for a regime to suspend democracy in order to save it?

It is not our purpose, here, to examine the disputed realities of Angola, Western Sahara, Haiti, Cambodia, Algeria or Peru, but rather to create three idealized problem-paradigms in order to examine the prospects for principled responses by the international system to three widely-perceived potential pitfalls on the path to an established democratic entitlement.

A. *The Angola/Western Sahara Dilemma*

The emerging democratic entitlement is sometimes misperceived as a form of peacekeeping undertaken "on the cheap." For example, after a decade of civil war in Angola, implicating not only rival domestic tribal factions but also Cuba, South Africa, the Soviet Union, America and Zaire, the two rival factions signed a peace accord in May, 1991. Thereupon, the U.N. Security Council authorized the Secretary-General to deploy approximately one hundred unarmed military and civilian observers (UNAVEM II) to monitor the implementation of that accord. The U.N. personnel were authorized to "observe, not conduct" the elections that were the capstone of the agreement.¹⁰⁷

Although the U.N. observers were supplemented by others from nongovernmental organizations, and although they did eventually certify that the elections were reasonably free and fair,¹⁰⁸ the patently over-stretched monitoring operation lacked

107. Marrack Goulding, *Under-Secretary-General for Peacekeeping Operations*, N.Y. TIMES, Mar. 1, 1993, at A14; S.C. Res. 696, U.N. SCOR, 46th Sess., 2991st mtg., U.N. Doc. S/RES/696 (1991); S.C. Res. 747, U.N. SCOR, 47th Sess., 3062d mtg., U.N. Doc. S/RES/747 (1992).

108. S.C. Res. 785, U.N. SCOR, 47th Sess., 3130th mtg., ¶ 6, U.N. Doc. S/RES/785 (1992) (supporting the statement of the Special Representative heading UNAVEM II, "that the elections held on 29 and 30 September 1992 were generally free and

credibility. When the opposition faction, UNITA, rejected an outcome unfavorable to it, the U.N. observers were not only ineffectual but became the target of new hostilities, ultimately requiring rescue and hurried evacuation. What would have been necessary to avert such a palpable deficit in U.N. credibility? Should the U.N. refuse to monitor an electoral process unless it is given the means to enforce the outcome? What are the appropriate "means" to enforce an electoral outcome against a "bad loser"?¹⁰⁹

Somewhat similar problems of contingency planning and response capability are raised by the U.N. operation in the Western Sahara. On April 29, 1991, the Security Council authorized the Secretary-General to create a U.N. Mission for the Referendum in the Western Sahara.¹¹⁰ Under an agreement achieved with U.N. mediation, the Government of Morocco and the POLISARIO liberation movement were to end their twenty-year war and give the U.N. responsibility to prepare the ground for consulting the population on the territory's future in a free and fairly conducted plebiscite. The terms called on the U.N. to ensure security, facilitate large-scale repatriation of refugees, oversee the withdrawal of rival militias and supervise the critical process of drawing up the electoral rolls.¹¹¹ For more than three years, personnel of the U.N. mission have sat in the Western Sahara, unable to compel the parties to make the concessions necessary to implement the plan, yet unwilling to admit defeat by withdrawing. The question raised by these circumstances are similar to those raised by the U.N. in Angola, namely: what are the preconditions for success, why were they not insisted upon at the outset, and would it have been best not to have launched the operation if those preconditions could not be secured in advance: by the parties, by the international community, or both? Although the circumstances of U.N. involvement were different, in both Angola and the Western Sahara the means assigned to each mission were clearly inade-

fair").

109. The Council has threatened military sanctions against UNITA. S.C. Res. 851, U.N. SCOR, 48th Sess., 3254th mtg., ¶ 12, U.N. Doc. S/RES/851 (1993).

110. S.C. Res. 690, *supra* note 42, ¶ 2.

111. *The Situation Concerning Western Sahara: Report by the Secretary-General*, U.N. Doc. S/22464 (1991).

quate to the task. Can this sort of mismatch be rendered less likely in future?

B. *The Haiti-Cambodia Dilemma*

On September 30, 1991, a military coup ousted Haiti's democratic government which, only a short time before, had been elected in a vote conducted under elaborate U.N. auspices. ONUVEH, a large U.N. operation, had shared responsibility with the Organization of American States in managing the transition from totalitarian to democratic governance. In reporting the success of this transition, however, the U.N. Secretary-General had warned that elections are fragile mechanisms when the democratic entitlement is not rooted in the socio-political institutions and climate of a civil society. His prognosis was confirmed by the military coup.

The U.N. has responded, but only ineffectually. A resolution of the Assembly "demanded" restoration of the legitimate government.¹¹² Twenty months passed before the Security Council, at last, enacted a selective trade embargo under Chapter VII.¹¹³ To the extent sanctions have been effective, they have caused hardship primarily among the least-privileged in Haitian society and thus provoked a conflict between the U.N. and nongovernmental humanitarian relief organizations.

The failure of the U.N.'s effort to manage Haiti's transition to democracy poses another aspect of the problem of matching tasks to available means. In this instance, the problem is less one of assuring the adequacy of the means deployed to permit a democratic choice to be made than of determining the duration of the U.N.'s commitment to the outcome. In Haiti, at its zenith, ONUVEH had several thousand civilian personnel engaged in the process, but they were withdrawn immediately after the elections, with unsurprising consequences. What can we learn from this? Should the international system undertake to conduct or monitor elections only if the parties agree to a longer-term powerful U.N. presence and the U.N. members are willing

112. G.A. Res. A/46/L.8/Rev.1, U.N. GAOR, 46th Sess., ¶¶ 1, 2, 4, U.N. Doc. A/46/L.8/Rev.1 (1991).

113. S.C. Res. 841, *supra* note 70, ¶¶ 5-14.

to supply the necessary means? Should states, to qualify for assistance in organizing the transition to democracy, be required to accept a longer-term stewardship by the global system? For how long? Is the U.N. membership willing to make the necessary long-term commitments?

The same question is raised by the U.N.'s role in ending the civil war in Cambodia. The Security Council implemented a peace plan devised by the Cambodian factions. In a resolution of February, 1992, it authorized a mission (UNTAC) to supervise a "national reconciliation" and to ensure "the right to self-determination of the Cambodian people through free and fair elections"¹¹⁴

When UNTAC was fully in place, the U.N. had approximately thirty thousand personnel on duty in Cambodia. Although the Supreme National Council, under its President, Prince Norodom Sihanouk, administered Cambodia during this transition, UNTAC played a key role in every aspect of governance. It implemented the agreed cease-fire in the face of provocations, particularly by the Khmer Rouge.¹¹⁵ On May 23-28, 1993, the elections were held, peacefully and successfully, leading to the formation of a new democratic government.¹¹⁶ By the end of August, however, the Security Council had decided to terminate UNTAC, with the withdrawal of U.N. forces to be completed by November.¹¹⁷ An exception was made for twenty military liaison officers to monitor the security situation for a further six months.¹¹⁸

Given the known capabilities and intentions of the Khmer Rouge, should the international community have made a longer-term commitment to protect the democratically-elected government? What form would such a commitment take? What effect would it have on Khmer sovereignty? What would it cost?

114. S.C. Res. 745, *supra* note 43.

115. See S.C. Res. 810, U.N. SCOR, 48th Sess., 3181st mtg., U.N. Doc. S/RES/810 (1993).

116. S.C. Res. 840, U.N. SCOR, 48th Sess., 3237th mtg., U.N. Doc. S/RES/840 (1993).

117. S.C. Res. 860, U.N. SCOR, 48th Sess., 3270th mtg., ¶¶ 3, 4, U.N. Doc. S/RES/860 (1993). See also S.C. Res. 880, U.N. SCOR, 48th Sess., 3303d mtg., ¶¶ 10, 11, U.N. Doc. S/RES/880 (1993).

118. S.C. Res. 880, *supra* note 117, ¶ 12.

Would states be prepared once again to shed blood in Cambodia? On the other hand, if Cambodian democracy is not to be guaranteed by the international community, was it prudent to have invested so heavily in the carrying out of the Paris Agreements?

C. *The Algeria-Peru Dilemma*

In January 1991, the National Liberation Front, the political party which had governed Algeria since its independence in 1962, was decisively defeated at the polls by the Islamic Salvation Front (FIS) in the nation's first free multiparty parliamentary election. The fundamentalists won more than three million votes, and captured 188 of 231 contested seats. To prevent FIS from taking power, the army deposed President Chadli Benjedid, cancelled the final round of elections that would have consolidated the fundamentalists' victory, and named a five-man committee to rule the country under military auspices.¹¹⁹

Since then, politics has been replaced by terrorism (both by and against fundamentalists). Nearly 2,000 persons have been murdered by militant terrorists and death squads. A campaign of assassination and terror against Algerian intellectuals, judges and journalists has paralyzed efforts to restart a national dialogue of reconciliation.¹²⁰ Nations most directly affected by events in Algeria include France, to which half a million Algerians are expected to flee if a fundamentalist regime succeeds in establishing itself in Algiers, as well as Morocco, Tunisia and Egypt which, having attained some degree of secularization and electoral democracy, fear an ideological spill-over effect on their still-fragile civil societies.

The fundamentalists' success at the polls in 1991 reflects the deep discontent of the majority of Algeria's disadvantaged population. Algeria's external debt crisis has led to stringent economic reforms devised by the International Monetary Fund

119. Chris Hodges, *Islamic Guerillas in Algeria Gain Against Military Rulers*, N.Y. TIMES, Jan. 24, 1994, at A1.

120. The militants are reported to have forsworn "all dialogue, all truce and all reconciliation." Kim Murphy, *Algeria's New Lessons in War*, L.A. TIMES, Dec. 27, 1993, at A1.

which have plunged the economy into steep recession.¹²¹ Unemployment among persons aged fifteen to thirty is reported to stand at 84 percent.

The military-backed regime of Algeria argues with some conviction that, had it not stepped in when it did to halt the elections, they would have empowered a regime committed to the abolition of electoral democracy, the equality and political rights of women, and toleration of religious and political dissent. Parallels have been drawn to Hitler's Nazi Party success at the polls in Germany and to the success of the Zhirinovskiy-led Liberal Democrats in Russia.¹²² The claim made by the Algerian armed forces is that they had to destroy democracy in order to save it. "Sadly," the human rights organization Middle East Watch has reported, "the regime has done little in the field of human rights to distinguish itself from the . . . human rights disaster it claimed to be preventing . . ." ¹²³ As civil war approaches, it is predicted by observers that outright military rule will be imposed and the facade of civilian rule swept away. With FIS banned, and thousands of Islamic Fundamentalists in detention, the movement both has gone underground and become more extreme. The time for coopting them into the democratic process, if it ever existed, appears to have passed leaving little choice except between polar forms of authoritarian repression.¹²⁴

In Peru, too, democracy has been suspended by those who claim to want to save it. Although President Alberto Fujimori had been elected in a free and fair election, he perceived his task to be made impossible by the Shining Path rebellion, which, in twelve years, had claimed 25,000 lives, controlled forty percent of the countryside, and terrorized the judiciary. The crisis was worsened by deadlock in the legislature, where Fujimori had little support. On April 5, 1992, he dissolved Congress and suspended both the constitution and habeas corpus.

121. *Id.*

122. *Western Islamic Militants Will Be Hit By Secular Arabs and European Nationalists*, APS Diplomat News Service, Dec. 27, 1993, at 9.

123. *Algeria Condemned for 'Human Rights Disaster'*, THE GUARDIAN (U.K.), Jan. 4, 1994, at 9.

124. Caryle Murphy, *Algeria's Secular Army, Islamic Militants Battle for Power*, WASH. POST, Jan. 25, 1994, at A4.

The next day, the OAS summoned a meeting of its foreign ministers, which adopted a resolution stating that "representative democracy can only be promoted and defended through the means it upholds."¹²⁵ The resolution rejected "any other way as contrary to the fundamental principles established in the OAS Charter . . ." ¹²⁶ It took notice of the commitment made by President Fujimori to "summon immediately the election of a constituent congress through an electoral process invested with all guarantees for the free expression of the people and to restore representative democracy in his country."¹²⁷ The resolution's demand for "effective return of the representative democratic system as soon as possible, within the framework of respect for the principle of separation of powers and the rule of law" was specified as a precondition of "the full reinstatement of international assistance and aid."¹²⁸ Notably, however, the OAS did not impose economic sanctions, in view of President Fujimori's promise to permit the election of an eighty-member Congress to write a new constitution and exercise limited legislative powers. These elections were held in November and declared "free and fair" by international observers, including 250 OAS observers and a U.S. Congressional delegation.¹²⁹ Fujimori's party won thirty-eight percent of the vote and forty-four congressional seats and, despite the boycott of the elections by main traditional Peruvian parties in an effort to avoid legitimating the result, the U.S. and other OAS states chose to regard it as a first step back to democracy and the rule of law. In January, 1993, apparently free and fair municipal elections were held and opinion polls since the coup showed Fujimori's public support consistently above fifty percent.¹³⁰ Finally, in November, 1993, the Peruvian voters narrowly endorsed a new

125. See OAS Ad Hoc Mtg. of Foreign Ministers, Resolution on Support for the Reinstatement of Democracy in Peru, Res. 1/92 of April 13, 1992, and OAS Ad Hoc Mtg. of Foreign Ministers, Resolution on Democratic Reinstatement in Peru of May 18, 1992.

126. *Id.*

127. *Id.*

128. *Id.*

129. Gary Marx, *Saying Election Was Fair, U.S. Weighs Restoring Aid to Peru*, CHI. TRIB., Nov. 24, 1992, at C4.

130. James Brooks, *Peru's Leader Clears a Path with Sharp Elbows*, N.Y. TIMES, Feb. 22, 1993, at A3.

constitution which, while entrenching a strong presidency, returned Peru to a democratic system.

These political developments, contrasting sharply with those in Algeria, were accompanied by the capture on September 12, 1992 of the leadership of the Shining Path rebel movement whose insurrection had led to more than 25,000 killed and property losses of \$23 billion.¹³¹ By the end of 1993, Peru seemed to be back on the road to significant economic growth with which to underpin a reasonably democratic political system.¹³² By the end of 1993, the World Bank and bilateral governmental assistance agencies were again opening their purses to Peru.

Fujimori's initiative, and his "success" in working his way back into the good graces of the Peruvian people and the inter-American and global system, was bound to spawn imitators. A "copycat" auto-coup was attempted in mid-1993 by President Jorge Serrano Elias of Honduras. This effort, however, met with far more determined sanctions imposed by the United States and other leading trading partners in the American system, as well as by a general strike. The Serrano takeover collapsed after just a few days.

The Fujimori coup was perceived as a response to a true and profound crisis while that in Honduras was not. Fujimori, moreover, was able to convince the world that he was sincere in his efforts to restore a form of participatory electoral democracy and would do so with deliberate speed. Serrano had no such credibility. Fujimori permitted his actions to be ratified quickly by an internationally monitored plebiscite, as well as congressional and municipal election. And, lastly, Fujimori was able to defeat the insurrection which had destroyed the Peruvian economy and, with it, the faith in government essential to functioning democracy. In this, the Peruvian case stands in contrast also to that of Algeria, allowing us to deconstruct the central question: how should the global system respond to claims that democracy must at times be suspended in order to save it?

131. *Foreign Investors Do Unthinkable—Put Money into Peru*, CHI. TRIB, Nov. 7, 1993, at M11.

132. *Id.*

The new issue agenda, symbolized by the three exemplars—Angola/Western Sahara, Haiti/Cambodia, and Algeria/Peru—poses difficult choices which cannot be evaded indefinitely without undermining, perhaps fatally, the emergent democratic entitlement. There are several reasons for this. First: an entitlement which is enforced only occasionally, with no attempt at drawing principled distinctions between instances of enforcement and nonenforcement, is not a principle capable of deterring counter-normative behavior. Second, a norm selectively enforced, without benefit of a principled basis for making distinctions, will be regarded as unfair and thereby lose its legitimacy. If the democratic entitlement is to be perceived as credible and principled, norms must be developed to deal with the hard cases that test the rule, while retaining the rule's capacity to respond flexibly to contextual factors.

