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MONEY TALKS: PUTTING THE BITE IN PARTICIPATORY RIGHTS THROUGH INTERNATIONAL FINANCIAL ASSISTANCE

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Abstract: Democratic elections are one of the foundational elements of a stable, healthy, and vibrant modern state. Current treaty law guarantees four basic participatory rights: periodic and regular elections, universal suffrage, secret ballots, and non-discrimination. Those rights are bolstered further through United Nations election monitoring and state practice. This Note argues that more must be done to guarantee true participatory rights in emerging and lesser developed nations. In particular, it proposes attaching conditions to World Bank funding that require adherence to the rights guaranteed under global and regional treaty law and the customary practice of states and international actors. In order to accomplish this goal, compliance with those conditions should be measured through United Nations monitoring reports.

INTRODUCTION

“Elections do not democracy make. They are, however, the lynchpin of the democratic process.”¹ Those were the comments of the Organization for Security and Cooperation in Europe (OSCE) Parliamentary Assembly President and Special Coordinator for the observers of elections in Belarus in March 2006.² The OSCE and its election observers criticized the election due to “harassment and arrests of opposition candidates, propagandistic coverage on state media and extensive irregularities in the counting of ballots.”³

In nations with strong democratic traditions, the pendulum of governmental control constantly swings back and forth, temporarily resting in one ideological camp or the other, and often somewhere in

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¹ Press Release, OSCE, Belarusian Election Severely Flawed Due to Arbitrary Use of State Power and Restrictions on Basic Rights (Mar. 20, 2006), <http://www.osce.org/item/18438.html>.

² *Id.*

³ C.J. Chivers & Steven Lee Meyers, *Election in Belarus Did Not Meet Standards, Observers Say*, N.Y. TIMES, Mar. 21, 2006, at A6.

between.⁴ Disenchanted voters rest easily knowing that the domestic legal framework affords them another opportunity in only a few short years to pass judgment and change course.⁵ While there may be calls for reform in the interim, the democratic system itself is fundamentally the safeguard against excessive abuse.⁶

This is not so in emerging and developing nations.⁷ There, the likelihood of free and fair elections in the future is much less certain.⁸ Relying on unstable domestic systems to guarantee future plebiscites is tenuous at best.⁹ And yet, those who defend the sovereign rights of nations at all costs argue against international involvement in elections, even though they are fully aware that fair elections might not be possible.¹⁰

The Belarus election is illustrative. President Aleksandr G. Lukashenko officially won by a wide margin, garnering eighty-three percent of the votes.¹¹ Like the OSCE, the United States and the European Union also denounced the elections.¹² Both the United States and the E.U. offered only the possibility of a widened visa ban for top Belarus officials to address with that state's failure to meet minimum elections standards, essentially leaving recourse only to internal forces within Belarus.¹³ The disputed nature of the election leaves Lukashenko with what the Council of Europe's Secretary General, Terry Davis, called "a tainted mandate."¹⁴ What can the Belarusian people do to rectify the situation? Short of a backlash on the order of the South African experience, what will international pressure accomplish? In theory, international human rights law, based on treaty and custom, guarantees future

⁴ See Eric W. Orts, *The Rule of Law in China*, 34 VAND. J. TRANSNAT'L L. 43, 88–89 (2001).

⁵ See *id.*

⁶ See *id.*

⁷ See Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 540–41 (1992).

⁸ See *id.*

⁹ See *id.*

¹⁰ See *id.* at 590–91.

¹¹ See Chivers and Meyers, *supra* note 3, at A6.

¹² See *id.*

¹³ See *id.* In fact, both only decided to impose actual sanctions for "cracking down on a peaceful protest" rather than for the election itself. C.J. Chivers, *U.S. and Europe Plan Sanctions Against Belarus*, N.Y. TIMES, March 25, 2006, at A1.

¹⁴ Kim Murphy, *As President Basks, Foes Rally; Belarusian Leader Lukashenko Declares 'The Revolution' Over After His Reelection. U.S. Joins Protesters in Calling for a New Vote*, L.A. TIMES, March 21, 2006, at A8.

election rights.¹⁵ But the lack of adequate enforcement measures to achieve those safeguards renders those rights moot.¹⁶

This Note argues that the best way to ensure compliance with international requirements for democratic elections is to condition international financial assistance for emerging and developing states on fulfillment of international human rights standards for free and fair elections. Part I reviews the history of elections and the manner in which governments have been chosen, including the traditional notions of sovereignty that underpin broad deference to activities within domestic borders.

Part II outlines the development of binding international human rights law with respect to democratic elections and the specific minimum requirements for free and fair elections. First, it describes treaty law, including the primary instrument, the International Covenant on Civil and Political Rights ("ICCPR"), as well as regional treaties in Europe, the Americas, and Africa, followed by a review of the customary practice of states and international actors through election monitoring and individual state elections. Part II concludes with a review of the attachment of non-economic conditions on developing nations by the World Bank and the incorporation of human rights goals in those conditions.

Part III argues that in order to guarantee that developing states adhere to international human rights standards on participatory rights, the World Bank should condition funds, in part, on compliance with these minimum standards based on United Nations (U.N.) election monitoring. Part IV concludes, noting that conditioning funds in this manner would be a concrete move to institutionalizing free and fair elections in the international system.

I. BACKGROUND AND HISTORY

According to the latest available information, over 123 countries can be characterized as electoral democracies.¹⁷ But this was not always the case. At the start of the twentieth century, a mere nine countries could boast such a record.¹⁸ Prior to 1948, notions of state sovereignty over domestic affairs precluded human rights from providing a

¹⁵ See *infra* notes 32–71 and accompanying text.

¹⁶ See *infra* notes 72–80 and accompanying text.

¹⁷ FREEDOM HOUSE, FREEDOM IN THE WORLD SURVEY: ELECTORAL DEMOCRACIES 2005, available at <http://freedomhouse.org/template.cfm?page=205&year=2005>.

¹⁸ Fox, *supra* note 7, at 540. Fox notes that this low number does not even include the question of suffrage for women which would likely lower it even more. *Id.*

state's population any safeguards in this area.¹⁹ Human rights were not incorporated into international law until the close of World War II as the horrors of that catastrophic period sparked the Nuremberg Trials, the U.N. and its ancillary bodies, and the Universal Declaration of Human Rights.²⁰ Thus, prior to 1948, individuals possessed no rights under international law, which afforded rights only to states.²¹

Traditionally, in the international system, recognition by other states demonstrates the legitimacy of states and their governments.²² And, a state typically recognizes another state's government and its representatives without regard to the process by which they were chosen.²³ Monarch, autocrat, parliament, president—each historically has had legitimacy, no matter the process by which they came to power.²⁴ The prevailing method through the nineteenth and the early twentieth centuries was based primarily on de facto control—whoever controlled the population and territory, and thus the government, *was* the government.²⁵ The simplicity of this “absolutist” sovereignty system is self-evident.²⁶ In practice, even today states recognize “illegitimate” governments (in the colloquial sense) based on the politics of the day, politics that only occasionally include internal factors such as adherence to human rights.²⁷

The concept of national elections, even in its weakest form, was not a recurring feature internationally until the middle of the nineteenth century.²⁸ “Popular” sovereignty—the idea that the legitimacy of a government is based on the implied or actual consent of the citizenry—swirled around as a theory of domestic organization for many years prior to its incorporation into international law.²⁹ The Enlightenment writers introduced popular legitimacy long before the rise of

¹⁹ *Id.* at 544–45.

²⁰ *Id.*

²¹ *Id.* at 545.

²² See Fox, *supra* note 7, at 546–47.

²³ *Id.* at 549.

²⁴ *Id.* at 547–49.

²⁵ *Id.* at 549–50.

²⁶ See *id.*

²⁷ See Fox, *supra* note 7, at 549–50; cf. Matthew Griffin, *Accrediting Democracies: Does the Credentials Committee of the United Nations Promote Democracy Through Its Accreditation Process, and Should It?*, 32 N.Y.U. J. INT'L L. & POL. 725, 765–66 (2000) (noting that “the Organization of African Unity (OAU) declared at its 1999 summit in Algiers that it would no longer recognize governments that have come to power through undemocratic means”).

²⁸ Fox, *supra* note 7, at 546.

²⁹ See *id.* at 547, 550.

international human rights law.³⁰ But early notions of popular sovereignty were focused primarily on the internal structure and legitimacy of governments rather than international standards for achieving that legitimacy.³¹

II. DISCUSSION OF ISSUES

At present, the participation of citizens in the electoral process has become firmly rooted in international human rights law.³² The foundation for these rights stems from two sources.³³ First, global and regional treaty law on participatory rights binds individual state signatories.³⁴ Second, the pattern and practice of election monitoring through the U.N. and the Human Rights Committee, as requested by states, combined with those treaties, creates customary international law binding all states.³⁵ These two general sources of international law shape the contours of the specific electoral rights.³⁶

A. Treaty Law

The Universal Declaration of Human Rights (“Universal Declaration”), adopted by the U.N. General Assembly on December 10, 1948, is the logical starting point for a discussion of treaty law on participatory rights.³⁷ While non-binding, the Universal Declaration planted the seeds that blossomed into many of the human rights treaties that followed.³⁸ Article 21 of the Declaration states:

³⁰ *Id.* at 548.

³¹ *See id.* at 550.

³² *See, e.g.,* Oren Ipp & Terence F. Hoverter, *Identifying International Principles for Resolving Election Disputes*, 57 ADMIN. L. REV. 829, 830 (2005).

³³ Fox, *supra* note 7, at 570, 588.

³⁴ Kofi Darko Asante, Note, *Election Monitoring's Impact on the Law: Can It Be Reconciled with Sovereignty and Nonintervention?*, 26 N.Y.U. J. INT'L L. & POL. 235, 276 (1994).

³⁵ *Id.* at 279–80.

³⁶ *See infra* notes 64–71 and accompanying text.

³⁷ Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3rd Sess., 1st plen. mtg., U.N. Doc A/810 (Dec. 12, 1948) [hereinafter Universal Declaration]; *see Ipp & Hoverter, supra* note 32, at 830 n. 2 (stating “the ICCPR expands on the universal principles found in the Universal Declaration”).

³⁸ Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19 WISC. INT'L L.J. 295, 298 (2001) (calling the Universal Declaration “the foundational document of the human rights regime”). Some provisions of the Universal Declaration have crystallized into binding law. *See* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 61 (1992). For the purposes here, the provision regarding participatory rights has been codified in treaty law and thus the legal status of the Universal Declaration provision is moot. *See infra* notes 41–67 and accompanying text.

- (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives. (2) Everyone has the right of equal access to public service in his country. (3) The will of the people shall be the basis of the authority of government; this will shall be expressed 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.³⁹

This was the first formal declaration of these rights in the international context.⁴⁰

1. International Covenant on Civil and Political Rights

The principles outlined in the Universal Declaration became binding in the principal legal instrument codifying participatory rights: the International Covenant on Civil and Political Rights.⁴¹ Article 25 of the ICCPR states:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 [regarding discrimination] and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to 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;
- (c) To have access, on general terms of equality, to public service in his country.⁴²

³⁹ Universal Declaration, *supra* note 37, art. 21, at 75. While the Universal Declaration does not have the binding nature of a treaty, it is well established that it has overwhelming support and is so highly regarded that it has become a “customary rule of state obligation.” Franck, *supra* note 38, at 61.

⁴⁰ Fox, *supra* note 7, at 546.

⁴¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, S. Exec. Doc. E 95–2, 999 U.N.T.S. 171 [hereinafter ICCPR]. As of April 2007, 160 nations have ratified the ICCPR. China is notably absent. OFFICE OF THE UNITED NATIONS COMMISSION FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (April 19, 2007), <http://www.ohchr.org/english/countries/ratification/4.htm>.

⁴² ICCPR, *supra* note 41, art. 25.

These substantive rights are further bolstered by other provisions of the ICCPR which establish the “essential preconditions for an open electoral process,” including the rights to opinion, expression, and association that are necessary for campaigning.⁴³

2. Regional Treaties

A number of regional treaties have further advanced the principles articulated in the ICCPR.⁴⁴ The most commonly cited instruments include the African Charter on Human and Peoples’ Rights (African Charter),⁴⁵ the American Convention on Human Rights (American Convention),⁴⁶ the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Protocol),⁴⁷ and a host of treaties through the OSCE.⁴⁸

Each of the regional treaties provides substantive support to the ICCPR but is often narrower in scope.⁴⁹ For example, the European Protocol has neither a provision guaranteeing universal suffrage nor does it prohibit discrimination or mention equal access to public service.⁵⁰ Article 3 merely states that 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 a legislature.”⁵¹ Despite its limited text, however, the European Commission and the European Court of Human Rights “have interpreted Article 3 to provide guarantees substantially similar to those contained in [the ICCPR].”⁵²

The American Convention, by contrast, is largely identical to the ICCPR, but the peculiarities of the participatory problems in the Americas have led the Inter-American Commission on Human Rights,

⁴³ *Id.* at 18, 19, 22; Franck, *supra* note 38, at 61.

⁴⁴ *See infra* notes 45–63 and accompanying text.

⁴⁵ African Charter on Human and Peoples’ Rights, June 27, 1981, 1520 U.N.T.S. 217 [hereinafter African Charter].

⁴⁶ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 143 [hereinafter American Convention].

⁴⁷ First Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, 213 U.N.T.S. 262 (entered into force on May 18, 1954) [hereinafter European Protocol].

⁴⁸ *See, e.g.*, Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, June 29, 1990, 29 I.L.M. 1305 [hereinafter Copenhagen Document].

⁴⁹ *See infra* notes 50–63 and accompanying text.

⁵⁰ Fox, *supra* note 7, at 560–64.

⁵¹ European Protocol, *supra* note 47, at art. 3.

⁵² Fox, *supra* note 7, at 560–61.

the principal treaty body, to interpret the rights outlined in the treaty within the context of wholesale violations of other human rights by states.⁵³ Thus, the central concern of Article 23 of that convention, according to the Commission, is whether elections are “authentic.”⁵⁴ The Commission has determined that “authentic” means an election that takes place with “a legal and institutional structure conducive to election results that reflect the will of the voters.”⁵⁵

The African Charter deviates from the ICCPR in a different way than its European and American counterparts.⁵⁶ Article 13(1) states: “Every citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law.”⁵⁷ The African Charter lacks the provision guaranteeing that an electoral choice must reflect the free expression of the electors’ will or the opinion of the people, opening the door to one-party elections.⁵⁸

Through the OSCE, many states have adopted a number of documents reconfirming their commitment to participatory rights.⁵⁹ The Copenhagen Document, concluded on June 29, 1990, established the principles for the structure of all electoral systems.⁶⁰ In essence, it suggested that “[t]he key principles of a democratic election can be summed up in seven words: universal, equal, fair, secret, free, transparent, and accountable.”⁶¹ The Charter of Paris, signed only months later, broadly endorsed participatory rights and created an Office for Free Elections to implement the Copenhagen Document.⁶² The following year, OSCE helped underscore the seriousness of the rights through the Moscow Document, which injected popular legitimacy as a core value into states’ commitments, in contrast to the *de facto* test, by di-

⁵³ *Id.* at 565–66.

⁵⁴ *Id.* at 566.

⁵⁵ *Id.*

⁵⁶ *Id.* at 568.

⁵⁷ African Charter, *supra* note 45, art. 13(1).

⁵⁸ Fox, *supra* note 7, at 568. Professor Fox suggests that the clause alluding to “accordance with the provisions of law” in the African Charter might in fact mean that Article 13 requires no more than that which is already provided for in national constitutions, rendering Article 13 “entirely useless.” *Id.*

⁵⁹ See Ipp & Hoverter, *supra* note 32, at 831.

⁶⁰ Fox, *supra* note 7, at 569.

⁶¹ OSCE OFFICE OF DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, ELECTION OBSERVATION—A DECADE OF MONITORING ELECTIONS: THE PEOPLE AND THE PRACTICE (2005), available at <http://www.osce.org/item/17148.html?ch=478>; see Copenhagen Document, *supra* note 48, at ¶¶ 5–8.

⁶² Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190, 207 [hereinafter Charter of Paris]; Fox, *supra* note 7, at 569.

recting member states not to recognize usurping forces in the event of a coup against a duly elected government.⁶³

3. Synthesis of Treaty Based Participatory Rights

Many commentators suggest that, taken together, the Universal Declaration, the ICCPR, and the regional treaties evince a clear set of standards for free and fair elections under international human rights law.⁶⁴ They argue that participatory rights law guarantees four basic components: periodic and regular elections, universal suffrage, secret ballots, and non-discrimination.⁶⁵ The precise contours of those rights remain hazy.⁶⁶ State practice through election monitoring provides the critical guidance on many of those ambiguities.⁶⁷

B. U.N. Election Monitoring

According to Gregory Fox, one of the principal proponents of international law as a source for participatory rights, election monitoring provides the logical rights inferred by the treaty-based standards.⁶⁸

The standards derived from [U.N.] election monitoring permit the addition of the following elements of a legally sufficient election to those derived solely from the human rights treaties: 1) citizens must have the opportunity to organize and join political parties, and such parties must be given equal access to the ballot; 2) to the extent the government controls the media, all parties must have the opportunity to present their views through the media; and 3) the election must be overseen by an independent council or commission not tied to any party, faction, or individual, but whose impartiality is ensured both in law and practice.⁶⁹

⁶³ Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding ¶ 17, Oct. 3, 1991, 30 I.L.M. 1670 [hereinafter Moscow Document]; Fox, *supra* note 7, at 570.

⁶⁴ E.g., Fox, *supra* note 7, at 570; Ipp & Hoverter, *supra* note 32, at 831.

⁶⁵ E.g., Fox, *supra* note 7, at 570; Ipp & Hoverter, *supra* note 32, at 831.

⁶⁶ Fox, *supra* note *supra* note 7, at 570.

⁶⁷ *Id.*

⁶⁸ *Id.* at 570, 588–89.

⁶⁹ *Id.* at 589.

Fox's contention, made in 1992, before the democratization across Europe and other parts of the world in the 1990s, simply fills in the details for meeting the four basic components to a free and fair election.⁷⁰ Interestingly, the U.N. has not explicitly used the treaty provisions of the ICCPR as a basis to engage in election monitoring, but rather has done so based on other powers and at the invitation of individual states.⁷¹

C. *The Problem of Enforcement*

Binding or not, these norms, like much of international human rights law, are hollow without a means to enforce or encourage compliance.⁷² The First Optional Protocol to the ICCPR ("Optional Protocol"), which came into force on March 23, 1976, provides for some enforcement.⁷³ The Optional Protocol allows individuals to report violations to the Human Rights Committee, the treaty body under the ICCPR.⁷⁴ Anyone who claims that his or her rights under the ICCPR have been violated and who has exhausted all domestic remedies may petition the Committee.⁷⁵

While the Human Rights Committee has issued many rulings on individual complaints since its inception, the enforcement is weak based on the language of the Optional Protocol.⁷⁶ Article 4 states: "the Committee shall bring any communications submitted to it under the present Protocol to the attention of the State Party to the present Protocol alleged to be violating any provision of the Covenant" and "within six months, the receiving State shall submit to the Committee written explanations or statements clarifying the matter and

⁷⁰ See *supra* notes 66–69 and accompanying text.

⁷¹ Fox, *supra* note 7, at 570–71.

⁷² Ipp & Overter, *supra* note 32, at 831.

⁷³ Optional Protocol to the International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 302 [hereinafter *Optional Protocol*]. As of April 2007, 109 nations have ratified the *Optional Protocol*. OFFICE OF THE UNITED NATIONS COMMISSION FOR HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, <http://www.ohchr.org/english/countries/ratification/5.htm> [hereinafter *Optional Protocol Ratifications*]. A Second *Optional Protocol* aimed at abolishing the death penalty was added to the treaty and came into force in 1991 and has only sixty parties. OFFICE OF THE UNITED NATIONS COMMISSION ON HUMAN RIGHTS, RATIFICATIONS AND RESERVATIONS: SECOND OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, <http://www.ohchr.org/english/countries/ratification/12.htm>.

⁷⁴ *Optional Protocol*, *supra* note 73, art. 2.

⁷⁵ *Id.*

⁷⁶ See *infra* notes 77–79 and accompanying text.

the remedy, if any, that may have been taken by that State.”⁷⁷ About two-thirds of the parties to the ICCPR have ratified the Optional Protocol.⁷⁸ As merely a reporting and explanation procedure the Optional Protocol lacks any real compliance mechanism.⁷⁹ A more effective measure is needed to encourage compliance with these norms and money is the key to the solution.⁸⁰

D. World Bank Lending Conditions

1. World Bank Assistance

The World Bank grew out of the Bretton Woods Conference that restructured the world financial system in 1944, and originally focused on rebuilding war-torn states after World War II.⁸¹ The Bank consists of two institutions, the International Bank for Reconstruction and Development (IBRD) and the newer International Development Association (IDA), and helps finance development projects in member states that often lack the credit required by commercial banks.⁸² For developing states, financial resources from the World Bank are frequently the primary source of capital for critical development projects.⁸³ Along with the International Monetary Fund (IMF), the World Bank, for most developing nations, is an indispensable part of the evolution from a “lesser developed countr[y]” to the community of developed nations.⁸⁴

⁷⁷ Optional Protocol, *supra* note 73, art. 4.

⁷⁸ Optional Protocol Ratifications, *supra* note 73. Not surprisingly, the United States, ever skeptical about outside monitoring of domestic activity, has not ratified the Optional Protocol. *See id.*

⁷⁹ *See* Optional Protocol, *supra* note 73, art 2, 4.

⁸⁰ *See, e.g.,* John Kifner, *Palestinian Prime Minister Calls Western Aid Cutoff “Blackmail,”* N.Y. TIMES, April 9, 2006, at 11.

⁸¹ Mark E. Wadzyk, *Is It Appropriate for the World Bank to Promote Democratic Standards in a Borrower Country?*, 17 WIS. INT’L L.J. 553, 553 (1999); Asante, *supra* note 34, at 256 n.138.

⁸² Wadzyk, *supra* note 81, at 553. The World Bank (IBRD and IDA), combined with the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency (MIGA), and the International Center for Settlement of Investment Disputes (ICSID), collectively make up the World Bank Group. *Id.* at 555–56. Each institution within the group has specific purposes but they share a collective goal of development, economic growth, and poverty reduction. *Id.*

⁸³ *Id.* at 553.

⁸⁴ *See id.*

Financing generally comes in two forms: investment loans and development policy loans.⁸⁵ Investment loans have a long-term focus (five to ten years) and finance goods, works, and services in support of economic and social development projects in a broad range of sectors.⁸⁶ Development policy loans have a short-term focus (one to three years), and provide quick-disbursing external financing to support policy and institutional reforms.⁸⁷ These loans typically include an array of conditions placed upon the member state by the Bank.⁸⁸

2. Non-Economic Conditional Lending and Governance Initiatives

Development policy loans, formerly adjustment loans, have been the principal vehicle for non-economic conditionality, although both place conditions on the borrowing state.⁸⁹ As the economic, political, and human rights landscape has changed over the last fifty years, so has the World Bank.⁹⁰ The Bank's lending practices are no longer conditioned on strictly economic factors, but include a variety of policy-focused lending based on education, the environment, governance, human rights, economic transformation, and private sector development.⁹¹ The Bank has increasingly looked to "good governance" considerations and analyzed aspects of a member's governance in its loan decisions.⁹² In fact, according to a vice president and general counsel of the World Bank, "conditionality has thus evolved from macroeconomic measures to detailed reforms affecting the public administration itself."⁹³ In this regard, the Bank prizes political stability and sound economic management as key to healthy economic development.⁹⁴

⁸⁵ See WORLD BANK, FINANCING INSTRUMENTS, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120721~menuPK:232467~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited Apr. 15, 2007).

⁸⁶ WORLD BANK, INVESTMENT & DEVELOPMENT POLICY LENDING, <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20120732~menuPK:268725~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited Apr. 15, 2007).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Wadrzyk, *supra* note 81, at 554, 562. Wadrzyk notes that the life span of the World Bank "coincides with the life span of the notion of human rights, both of which have grown and adjusted over these past 50 years." *Id.* at 562.

⁹¹ *Id.* at 554, 562.

⁹² *Id.* at 562-63.

⁹³ Ibrahim Shihata, *The World Bank and "Governance" Issues in Its Borrowing Members*, in *THE WORLD BANK IN A CHANGING WORLD: SELECTED ESSAYS* 53, 59 (Franziska Tschofen & Antonio R. Parra eds. 1991).

⁹⁴ Wadrzyk, *supra* note 81, at 565.

In specific instances, the World Bank has expressly worked to improve social conditions within member states.⁹⁵ For example, funding to Brazil at the start of the twenty-first century was conditioned upon “public investment and social reforms including education and labor issues.”⁹⁶ The 2002 Country Assistance Program Status Report for Brazil makes specific reference to “social and economic progress,” “improvements in education,” “reforms to the labor code,” and other social policy conditions.⁹⁷ In Chad and Cameroon, the Bank imposed conditions on governance as a prerequisite to its involvement in natural resources funding.⁹⁸ The Bank required these states to create an advisory group, related to the oil projects, designed to make recommendations to both nations on “governance in general, the use of funds, and the engagement of civil society.”⁹⁹

Thematically, the Bank has embarked on two broad non-economic-based initiatives that ultimately benefit its mission to reduce poverty—public sector governance and anti-corruption—which underscore the importance of effective democratic processes.¹⁰⁰ Thus, the Bank’s efforts to reform public sector governance are for the purpose of “building efficient and accountable public sector institutions. . . . [G]ood policies are not enough [T]he Bank cannot afford to look the other way when a country is plagued by deeply dysfunctional public institutions that limit accountability, set perverse rules of the game, and are incapable of sustaining development.”¹⁰¹

Moreover, the Bank sees corruption as “among the greatest obstacles to economic and social development.”¹⁰² The Bank seeks to combat corruption through five key elements: increasing political ac-

⁹⁵ Claire R. Kelly, *Enmeshment as a Theory of Compliance*, 37 N.Y.U. J. INT’L L. & POL. 303, 348 (2005).

⁹⁶ *Id.*

⁹⁷ Memorandum of the President of the Int’l Bank for Reconstruction and Dev. and the Int’l Fin. Corp. to the Executive Dirs. on a Country Assistance Strategy Progress Report for the Federative Republic of Brazil, Report Number 24182-BR, World Bank Group, May 20, 2002, at 1–5, available at [http://lnweb18.worldbank.org/external/lac/lac.nsf/4c794feb793085a5852567d6006ad764/7f0b9030b410c10885256c38006145c1/\\$FILE/CASPR2002.pdf](http://lnweb18.worldbank.org/external/lac/lac.nsf/4c794feb793085a5852567d6006ad764/7f0b9030b410c10885256c38006145c1/$FILE/CASPR2002.pdf).

⁹⁸ Stephen D. Krasner, *The Hole in the Whole: Sovereignty, Shared Sovereignty, and International Law*, 25 MICH J. INT’L L. 1075, 1094 (2004).

⁹⁹ *Id.*

¹⁰⁰ WORLD BANK INSTITUTE, GOVERNANCE & ANTI-CORRUPTION, <http://www.worldbank.org/wbi/governance/> (last visited Apr. 15, 2007) (noting that “[t]he World Bank views good governance and anti-corruption as central to its poverty alleviation mission”).

¹⁰¹ WORLD BANK, PUBLIC SECTOR GOVERNANCE, <http://www.worldbank.org/public-sector/> (last visited Apr. 15, 2007).

¹⁰² WORLD BANK, ANTI-CORRUPTION, <http://www.worldbank.org/publicsector/anti-corrupt/> (last visited Apr. 15, 2007).

countability, strengthening civil society participation, creating a competitive private sector, encouraging institutional restraints on power, and improving public sector management.¹⁰³ In support of these two ends—anti-corruption and public sector governance—the Bank has embarked on specific development projects aimed at targeting these problems.¹⁰⁴ In that regard, the goals of quality governance and ending corruption are the primary purposes of the projects for explicit economic reasons rather than prerequisites to funding.¹⁰⁵

III. ANALYSIS

A. *The Solution—Money Talks*

The problem of enforcing the participatory rights ostensibly guaranteed by international human rights law is not unique.¹⁰⁶ Enforcement of other rights under the international system also poses problems.¹⁰⁷ Nor is the solution of encouraging compliance based on financial incentives new—it is the quintessential incentivizer.¹⁰⁸ While a specific proposal to encourage compliance with minimum election requirements has not been suggested, one commentator has raised the possibility of conditions on World Bank funding in this vein:

Although democratic reform conditionality is not currently practiced by the Bank, it is within the realm of possibility in the future. The Bank has recognized the advantages of popular participation in the design and implementation of specific development programs. In extreme cases, posits the Bank's Legal Counsel, the Bank may see fit to require a degree of democratization within a Borrower country before granting a loan.¹⁰⁹

¹⁰³ *Id.*

¹⁰⁴ *Id.* (noting “the World Bank has supported more than 600 anticorruption programs and governance initiatives developed by its member countries”).

¹⁰⁵ *See id.*; WORLD BANK, PUBLIC SECTOR GOVERNANCE, *supra* note 101; *see also* Wadrzyk *supra* note 81, at 570 (noting that these types of considerations are permitted based on “vigorous and documented analysis of their economic impact”).

¹⁰⁶ *See* Fox, *supra* note 7, at 597–98.

¹⁰⁷ *See id.*

¹⁰⁸ *See, e.g.*, Kifner, *supra* note 80, at 11.

¹⁰⁹ Wadrzyk, *supra* note 81, at 574.

Others have cited the Bank's past record of pressing for political change in states such as Kenya and Malawi in the early 1990s through its consultative groups.¹¹⁰

The World Bank should make a more explicit prerequisite condition for funding based on states' records on participatory rights.¹¹¹ This condition must be an initial threshold requirement for funding because political participation is an essential precondition to other rights.¹¹² Two scenarios are likely.¹¹³ First, and more egregious: in cases where elections are overturned and an incumbent regime refuses to yield power, the Bank's agreements with the state require immediate cessation of funds.¹¹⁴ Admittedly, these circumstances are not likely to take place very often.¹¹⁵ Second, and less egregious: the Bank, during negotiations with a state, requires minimum electoral standards as a precondition to lending in a similar manner as other non-economic-based conditions.¹¹⁶ Thus, the Bank would gauge compliance based on the holding of periodic democratic elections by the state and enforce the condition in a similar manner as other conditions.¹¹⁷

The process of review naturally requires specific, identifiable, and reviewable information in order to make the results objective.¹¹⁸ That source of information should be the reports from the U.N. election monitoring missions.¹¹⁹ The results of elections monitored by the U.N. provide for specific "verifiable data that can be scrutinized."¹²⁰ To that end, only the minimum requirements must be met by states to satisfy the preconditions; this would diffuse, to some extent, concerns that these conditions would effectively be a complete roadblock to

¹¹⁰ Makau Wa Mutua, *The Ideology of Human Rights*, 36 VA. J. INT'L L. 589, 651-52 (1996). Mutua notes, however, that this kind of pressure was largely absent under similar circumstances in China, Zaire, Morocco, Indonesia, and other states. *Id.*

¹¹¹ See Wadrzyk, *supra* note 81, at 572.

¹¹² Fox, *supra* note 7, at 595.

¹¹³ *Cf. id.* at 603 (foreseeing the first scenario with U.N. accreditation as the enforcement mechanism and implying the second scenario encompassing all other cases).

¹¹⁴ *See id.*

¹¹⁵ *Id.*

¹¹⁶ See WORLD BANK, CONDITIONALITY REVISITED: CONCEPTS, EXPERIENCES, AND LESSONS 5 (Stefan Koeberle et al. eds.) (2005), available at <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/Conditionalityrevisedpublication.pdf> [hereinafter CONDITIONALITY REVISITED].

¹¹⁷ *See id.*

¹¹⁸ Fox, *supra* note 7, at 604.

¹¹⁹ *See id.* at 603.

¹²⁰ *Id.* at 604.

aid.¹²¹ They must hold periodic elections through secret ballots with universal suffrage and non-discrimination as well as the other standards outlined above.¹²²

There are two principle advantages to using U.N. observers.¹²³ First, while the World Bank is a specialized and independent institution, it is, in fact, an agency of the U.N.¹²⁴ Moreover, “[b]ecause of its international status, the World Bank should consider its responsibilities to the U.N. and rules of international law when making decisions.”¹²⁵ Indeed, the U.N. “has become extensively involved in monitoring elections and assisting Member States in their transitions to democracy. Often far more than mere ballot counters, election monitors have played crucial roles in the reengineering of states with limited democratic institutions and traditions.”¹²⁶ Second, election monitoring reports, while always subject to criticism, are most authoritative, and thus most useful for legal precedent, when they are official documents of the U.N. rather than from outside observers.¹²⁷

B. Criticisms of Conditional Lending and Institutional Obstacles

Conditional lending has not been without controversy over the last ten years.¹²⁸ Some commentators have argued that the World Bank fails to actually enforce the conditions set on development projects.¹²⁹ Others claim that conditionality “is coercive and wreaks violent consequences on the hapless poor.”¹³⁰ Moreover, critics contend that conditions themselves cannot create sustainable reform.¹³¹ Some human

¹²¹ See *supra* notes 64–71 and accompanying text (addressing minimum standards); *infra* notes 128–37 and accompanying text (addressing criticisms of conditionality).

¹²² See *supra* notes 64–71 and accompanying text.

¹²³ See *infra* notes 124–27 and accompanying text.

¹²⁴ Agreement Between the United Nations and the International Bank for Reconstruction and Development art. I, Nov. 15, 1947, 16 U.N.T.S. 346; Wadrzyk, *supra* note 81, at 565.

¹²⁵ Wadrzyk, *supra* note 81, at 565–66.

¹²⁶ Griffin, *supra* note 27, at 762–63.

¹²⁷ See, e.g., Fox, *supra* note 7, at 607. The politicized nature of the U.N. is not unnoticed here. Nonetheless, the accountability of the U.N. is different in kind from independent and private organizations. *Cf. id.*

¹²⁸ See generally CONDITIONALITY REVISITED, *supra* note 116, at vii; M.A. Thomas, *Can the World Bank Enforce Its Own Conditions? The World Bank and the Enforcement Critique of Conditionality* (2003), at 2 (2003), available at http://www.worldlearning.org/wlid/docs/wl_pp3.pdf.

¹²⁹ Thomas, *supra* note 128, at 2.

¹³⁰ *Id.*

¹³¹ *Id.*

rights commentators even contend that some conditions may interfere with another human right, the right to development aid itself.¹³²

A more fundamental obstacle to conditional lending based on overtly political considerations lies in the Articles of Agreement of the World Bank.¹³³ Specifically, the Bank is prohibited from interfering in the politics of member states.¹³⁴ Yet, as the Bank has expanded the use of non-economic conditionality, particularly in the areas of anti-corruption and public sector governance, it has done so on the assumption that stable, accountable, honest and transparent institutions breed compliance with development agreements, lead to better outcomes, and help meet the Bank's core mission of reducing poverty.¹³⁵ In order to overcome this concern, the Bank can either interpret human rights to be outside the Bank's prohibition on political activity or amend its Articles to realign itself with human rights standards.¹³⁶ Two other international lending institutions, the Inter-American Development Bank and the European Bank for Reconstruction and Development, have either interpreted their charters more broadly or explicitly required multiparty democracies as lending recipients.¹³⁷

C. Differences Between the Proposed Framework and Traditional Conditional Lending

The solution proposed here is different from the conditions traditionally imposed by the Bank and thus lacks the inherent problems of conditionality.¹³⁸ And while much has changed in conditionality in recent years, criticisms still remain.¹³⁹ Unlike traditional conditionality, a participatory rights condition would be a threshold requirement rather

¹³² Wadrzyk, *supra* note 81, at 573.

¹³³ *Id.* at 559–60.

¹³⁴ Articles of Agreement of the International Bank for Reconstruction and Development art. IV, § 10, Dec. 27, 1945, 60 Stat. 1440, 2 U.N.T.S. 134 (amended Dec. 17, 1965) [hereinafter IBRD Articles] (“The Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations shall be weighed impartially in order to achieve the purposes stated in Article I.”) The International Development Association has nearly identical political activity prohibitions. Articles of Agreement of the International Development Association art. V, § 6, Jan. 26, 1960, 11 U.S.T. 2284, 439 U.N.T.S. 249.

¹³⁵ See, e.g., WORLD BANK, PUBLIC SECTOR GOVERNANCE, *supra* note 101.

¹³⁶ Wadrzyk, *supra* note 81, at 574.

¹³⁷ Carlos Santiso, *Good Governance and Aid Effectiveness: The World Bank and Conditionality*, 7 GEO. PUB. POL'Y REV. 1, 17 (2001).

¹³⁸ See *infra* notes 139–46 and accompanying text.

¹³⁹ See generally Thomas, *supra* note 128.

than a project-specific condition.¹⁴⁰ Moreover, this condition lacks the complexity of traditional conditions.¹⁴¹ Instead, the condition is based on simple, achievable goals.¹⁴² Further, because of the U.N.'s traditional role of technical assistance in holding elections, the member state will have additional support in fulfilling the condition.¹⁴³ Finally, a participatory rights condition is policy neutral.¹⁴⁴ That is, while democratic governance is undoubtedly a specific world view, the advancement of that specific goal makes no particular value judgment about accomplishments and policies.¹⁴⁵ Rather, it gives a state the opportunity to choose its own path on any individual policy through popular sovereignty.¹⁴⁶

D. *Benefits to the World Bank, Participatory Rights, and Member States*

While one might initially ask why it makes sense to impose this condition through the World Bank and not the IMF. The answer lies in their differing missions.¹⁴⁷ The World Bank focuses on poverty reduction through growth and social change projects whereas the IMF is targeted toward macroeconomic concerns.¹⁴⁸

Creating a threshold participatory rights condition in World Bank funding is good for the Bank itself in a number of specific ways.¹⁴⁹ As Axel Dreher shows, "only regional autonomy and elections significantly and positively influence compliance rates."¹⁵⁰ This kind of concrete democratic governance condition encourages compliance in other conditions set by the Bank by placing the focus on the deci-

¹⁴⁰ Cf. WORLD BANK, INVESTMENT & DEVELOPMENT POLICY LENDING, *supra* note 86 (noting the project specific nature of current conditional lending in contrast to the proposed standard).

¹⁴¹ See *supra* notes 89–105 and accompanying text.

¹⁴² See *supra* notes 121–22 and accompanying text.

¹⁴³ See Griffin, *supra* note 27, at 762–63.

¹⁴⁴ See Wadrzyk, *supra* note 81, at 574.

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

¹⁴⁷ David D. Driscoll, INTERNATIONAL MONETARY FUND, THE IMF AND THE WORLD BANK HOW DO THEY DIFFER?, 1996, at 2, available at <http://www.imf.org/external/pubs/ft/exrp/differ/differ.htm>.

¹⁴⁸ See *id.*

¹⁴⁹ See *infra* notes 150–57 and accompanying text.

¹⁵⁰ Waly Wane, THE THEORY AND PRACTICE OF CONDITIONALITY: A LITERATURE REVIEW, in REVIEW OF WORLD BANK CONDITIONALITY 10, (World Bank: Operations and Policy Country Services ed.) (2005), available at <http://siteresources.worldbank.org/PROJECTS/Resources/40940-1114615847489/webConditionalitysept05.pdf>.

sion-making process.¹⁵¹ As a result, it increases transparency in the decision-making process.¹⁵² Transparency directly impacts the Bank's mission to target corruption in member states.¹⁵³ This framework helps advance the institutionalization of "ownership"—a key goal of World Bank conditional lending following criticism of the practice over the past ten years.¹⁵⁴ Externally, open governmental decision-making aids local "Civil Society Organizations" to become active participants in the process of policy making, another Bank concern.¹⁵⁵ Moreover, as a check on member states, such a condition would become a regular benchmark for monitoring World Bank projects.¹⁵⁶ Finally, open democratic processes make it easier to encourage private investment because investors rely on stable democratic systems to ensure a proper return on their investment.¹⁵⁷

For participatory rights and the global world, the benefits of the proposed solution are innumerable.¹⁵⁸ The proposed framework would incentivize the creation of a democratic culture in developing nations.¹⁵⁹ Nations that make the transition to democratically elected governments bolster their own legitimacy and credibility in the eyes of the international community and their people.¹⁶⁰ Moreover, it would encourage adherence to international standards of participatory rights,

¹⁵¹ See Fox, *supra* note 38, at 307 (noting that compliance in many areas of governmental activities increases with broad citizen participation, and other democratic reforms domestically).

¹⁵² See *id.*

¹⁵³ See WORLD BANK, ANTI-CORRUPTION, *supra* note 102.

¹⁵⁴ See WORLD BANK, REVIEW OF WORLD BANK CONDITIONALITY, available at <http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/0,,contentMDK:20292723~pagePK:41367~piPK:51533~theSitePK:40941,00.html> (last visited Apr. 15, 2007).

¹⁵⁵ See WORLD BANK, THE WORLD BANK AND CIVIL SOCIETY, available at <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20092185~menuPK:220422~pagePK:220503~piPK:220476~theSitePK:228717,00.html> (last visited Apr. 15, 2007) (noting that inclusion of Civil Society Organizations, such as community-based organizations, NGOs, indigenous peoples organizations, labor unions, faith-based groups, and foundations, "can enhance . . . operational performance by contributing local knowledge, providing technical expertise, and leveraging social capital. Further, CSOs can bring innovative ideas and solutions, as well as participatory approaches, to solving local problems").

¹⁵⁶ See Wadrzyk, *supra* note 81, at 574.

¹⁵⁷ *Id.* at 558; see WORLD BANK, FINANCING INSTRUMENTS, *supra* note 85.

¹⁵⁸ See *infra* notes 159–61 and accompanying text.

¹⁵⁹ See Franck, *supra* note 38, at 47–48.

¹⁶⁰ See, e.g., Nhan T. Vu, *The Non-Democratic Benefits of Elections—The Case of Cambodia*, 28 CASE W. RES. J. INT'L L. 395, 395 (1996). Cf. Fox, *supra* note 7, at 597 (noting the fact that South Africa's government was viewed as illegitimate absent adherence to basic human rights).

adding weight to their binding nature from a customary law perspective and bolstering their importance in the international system.¹⁶¹

Finally, focusing on developing nations as opposed to other nations utilizes the most likely candidates for democratic change.¹⁶² When nations become serious about development, they are in the perfect position for structural and institutional change.¹⁶³ As the World Bank's review of the role and place of conditionality in international financial assistance stated, "[t]urnaround cases, new governments, and crisis situations may provide windows of opportunity for reform."¹⁶⁴ Through its work, "the Bank seeks to strengthen the economies of borrowing nations so that they can graduate from reliance on Bank resources and meet their financial needs, on terms they can afford directly from conventional sources of capital."¹⁶⁵ Moreover, this is a time when their populations are looking for legitimacy and a voice in the government.¹⁶⁶ Established autocracies that are not developing, for example, lack the internal political incentive and willingness to make change.¹⁶⁷ While this certainly leaves a gap in enforcement, achieving a change in adherence to international standards on participatory rights in states that do meet the criteria, still accomplishes the goals in the states that are most ripe for change and in a majority of states worldwide.¹⁶⁸

CONCLUSION

Participatory rights generally, and democratic elections specifically, have arguably become a requirement for states in the international legal system. While adherence to international minimum standards is growing, more needs to be done to encourage compliance. Conditioning World Bank funding in this regard is one step toward further institutionalizing free and fair elections in the international system. The leverage that the World Bank holds is immense and can be put to use in a constructive way that advances its goals and benefits member states and the global system.

¹⁶¹ See Fox, *supra* note 7, at 570–71, 604.

¹⁶² See CONDITIONALITY REVISITED, *supra* note 116, at 4.

¹⁶³ See *id.*

¹⁶⁴ *Id.*

¹⁶⁵ Driscoll, *supra* note 147, at 6.

¹⁶⁶ See Franck, *supra* note 38, at 47–48.

¹⁶⁷ See Andrew Coleman & Jackson Maogoto, *Democracy's Global Quest: A Noble Crusade Wrapped in Dirty Reality?*, 28 SUFFOLK TRANSNAT'L L. REV. 175, 240–41 (2005).

¹⁶⁸ See *supra* notes 162–67 and accompanying text.

The U.N. did not monitor the elections in Belarus. Perhaps that nation would have requested participation from the U.N. if it knew that its financial assistance from the World Bank was on the line, assistance on the order of \$190 million since its independence and over \$22 million in active projects.¹⁶⁹ The technical assistance provided by the U.N. might have averted the questionable results now boiling over in the region, further benefiting the people of Belarus and guaranteeing true popular sovereignty.

¹⁶⁹ WORLD BANK, BELARUS: PROJECTS & PROGRAMS, <http://web.worldbank.org/external/default/main?menuPK=328463&pagePK=141155&piPK=141124&theSitePK=328431> (last visited Apr. 15, 2007). Much of the early funding in Belarus was for clean up of the Chernobyl Nuclear disaster. *Id.*