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Author(s): Thomas M. Franck

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THE EMERGING RIGHT TO DEMOCRATIC GOVERNANCE

*By Thomas M. Franck**

Legitimacy in 1991 flows not from the barrel of a gun but from the will of the people.

U.S. Secretary of State James A. Baker III

I know what real democracy is, what democracy is worth.

*A thirty-seven-year-old Soviet lieutenant colonel
who early on sided with anticoup forces†*

I. INTRODUCTION: THE POWER OF DEMOCRATIC LEGITIMACY

More than two centuries have elapsed since the signatories of the U.S. Declaration of Independence sought to manifest two radical propositions. The first is that governments, instituted to secure the “unalienable rights” of their citizens, derive “their just powers from the consent of the governed.” We may call this the “democratic entitlement.” The second proposition, perhaps less noted by commentators, is that a nation earns “separate and equal station” in the community of states by demonstrating “a decent respect to the opinions of mankind.” The authors of the Declaration apparently believed that the legitimacy of the new Confederation of American States was not made evident solely by the transfer of power from Britain but also needed to be acknowledged by “mankind.” This we may perceive as a prescient glimpse of the legitimating power of the community of nations.

For two hundred years, these two notions have remained a radical vision. The purpose of this essay is to demonstrate that the radical vision, while not yet fully word made law, is rapidly becoming, in our time, a normative rule of the international system. In the process, the two notions have merged. Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment 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.

II. THE VALIDATION OF GOVERNANCE

Two recent events underscore this trend. The failure of the August coup in the Soviet Union, an event of inestimable human, political and historic import, demonstrates—for those sensitive to trends—that democracy is beginning to be seen as the *sine qua non* for validating governance. While President Boris Yeltsin of the Russian Republic and many Soviet citizens deserve primary credit for this

* Editor in Chief. The author wishes to express warm appreciation to many members of the Board of Editors for their helpful comments, as well as Paul Szasz, Robert Crouse, Gregory Fox, Dennis Sughrue, and the members of my honors seminar at the NYU Center for International Studies. Special thanks are due to the Filomen D'Agostino and Max E. Greenberg Research Fund of New York University School of Law.

† N.Y. Times, Aug. 22, 1991, at A15, col. 6; and *id.*, Aug. 21, 1991, at A9, col. 1.

triumph, it also derived considerable impetus from the new global climate, as evidenced by the vigor with which leaders of other democracies around the world aligned themselves against the coup's leaders. Equally significant is the reaction of governments in the Organization of American States and the United Nations General Assembly to the overthrow, in September 1991, of the elected President of Haiti, Jean-Bertrand Aristide, by a military coup. On October 11, the Assembly unanimously, without vote, approved a ground-breaking resolution demanding the return of Aristide to office, full application of the Haitian Constitution and full observance of human rights in Haiti.¹ The OAS, a week earlier, had unanimously recommended that its member states take "action to bring about the diplomatic isolation of those who hold power illegally in Haiti" and "suspend their economic, financial, and commercial ties" with the country until constitutional rule is restored.²

In both the Soviet and the Haitian cases, the leaders of states constituting the international community vigorously asserted that *only* democracy validates governance. This dramatic statement attains even more potency if, as in the Haitian case, it is transposed from political philosophy, where it is "mere" moral prescription, to law, where a newly recognized "democratic entitlement" was used in both the OAS and the UN General Assembly to impose new and important legal obligations on states. The OAS resolution, for one, stated that "the solidarity of the American states and the high aims which are sought through it require the political organization of those states on the basis of the effective exercise of representative democracy."³ Undeniably, a new legal entitlement is being created, based in part on custom and in part on the collective interpretation of treaties.

This newly emerging "law"—which requires democracy to validate governance—is not merely the law of a particular state that, like the United States under its Constitution, has imposed such a precondition on national governance. It is also becoming a requirement of international law, applicable to all and implemented through global standards, with the help of regional and international organizations.

The transformation of the democratic entitlement from moral prescription to international legal obligation has evolved gradually. In the past decade, however, the tendency has accelerated. Most remarkable is the extent to which an international law-based entitlement is now urged by governments themselves. This is a cosmic, but unmysterious, change. For nations surfacing from long, tragic submergence beneath bogus "people's democracy" or outright dictatorship, the legitimization of power is a basic, but elusive, move in the direction of reform. As of late 1991, there are more than 110 governments, almost all represented in the United Nations, that are legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise. Most joined the trend in the past five years.⁴ While a few, arguably, are democracies more in form than in substance,

¹ UN Doc. A/46/L.8/Rev.1 (1991).

² Support to the Democratic Government of Haiti, OEA/Ser.F/V.1/MRE/RES.1/91, corr.1, paras. 5, 6 (1991).

³ *Id.*, preamble.

⁴ This enumeration was compiled by reference to reports in the *New York Times* and the *Country Reports on Human Rights Practices for 1990*, *infra* note 10, submitted by the Department of State to the appropriate committees of Congress. States that currently make legal provision for determining their governments by recourse to multiparty, secret-ballot elections are: Albania, Angola, Antigua and Barbuda, Argentina, Australia, Austria, the Bahamas, Bangladesh, Barbados, Belgium, Belize, Benin, Byelorussia, Bolivia, Botswana, Brazil, Bulgaria, Canada, Cape Verde, Chile, Colombia, the Comoros,

most are, or are becoming, genuinely open to meaningful political choice. Many of these new regimes want, indeed need, to be validated by being seen to comply with global standards for free and open elections.

That governments themselves now argue for the entitlement merely indicates their long-overdue recognition of an immutable fact of life: government cannot govern by force alone. To be effective, pace Austin,⁵ law needs to secure the habitual, *voluntary* compliance of its subjects; it cannot rely entirely, or even primarily, upon the commanding power of a sovereign to compel obedience. Consequently, governments no longer blinded by the totalitarian miasma seek to validate themselves in such a way as to secure a high degree of voluntary public acquiescence in the governing process. Consent benefits the governing as much as the governed: that sociological truism is at last becoming a political axiom. In western industrialized nations, at least since the middle of the nineteenth century, such validation has increasingly been sought and achieved by governments. This is the hard-won tradition most of the world now seeks to emulate.

Since the beginning of the twentieth century, however, there has also been a countertendency. The notion of democracy as validation has been challenged, quite powerfully, first, by the notion of the "dictatorship of the proletariat" and, more recently, by a related theory of forced-march "modernization."

The doctrine of the dictatorship of the proletariat argued, with considerable force, that governing, especially in an industrial society, should not be an art but a science. It postulated, at least in theory, a dictatorship of trained and doctrinally correct economists, administrators, sociologists and political scientists capable of implementing correct policies. The complexities of governance were thought to be too great to be left to amateurs selected by the vagaries of popular passion.⁶

Congo, the Cook Islands, Costa Rica, the Côte d'Ivoire, Cyprus, Czechoslovakia, Denmark, Dominica, the Dominican Republic, Ecuador, Egypt, El Salvador, Estonia, Finland, France, Gabon, Gambia, Germany, Greece, Grenada, Guatemala, Guyana, Hungary, Honduras, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kiribati, Korea (Republic of), Latvia, Liberia, Liechtenstein, Lithuania, Luxembourg, Madagascar, Malaysia, Mali, Malta, the Marshall Islands, Mauritius, Mexico, the Micronesian Federation, Mongolia, Morocco, Mozambique, Namibia, Nauru, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, the Philippines, Poland, Portugal, Romania, São Tomé, Senegal, Singapore, the Solomon Islands, the Soviet Union, Spain, Sri Lanka, St. Kitts, St. Lucia, St. Vincent, Sweden, Switzerland, Tonga, Trinidad, Tunisia, Turkey, the Ukraine, the United Kingdom, Uruguay, Vanuatu, Venezuela, Western Samoa, Zambia and Zimbabwe. Several more states, such as Nigeria and Ethiopia, are committed to free, multiparty elections but have not yet enacted the necessary constitutional or legislative fiat. It must also be conceded that there are borderline cases, such as Morocco (included) and Jordan (not included), in which the elections are not necessarily decisive, depending on various factors, including the disposition of a monarch with substantial residual powers. In the large majority of cases, however, the decision to include or exclude is not seriously in doubt—though it should be recalled that the test for inclusion is whether the legal system establishes free and secret elections. Whether these are conducted fairly is another question.

⁵ Austin defined law as the enforced command of a sovereign to a subject. J. AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* 201 (I. Berlin, S. Hampshire & R. Wollheim eds. 1954) (1832).

⁶ See, e.g., Theses on the Role of the Communist Party in the Proletarian Revolution Adopted by the Second Congress, in 1 *THE COMMUNIST INTERNATIONAL: 1919–1943 DOCUMENTS* 127 (J. Degras ed. 1971).

In 1920 Trotsky offered this response to a suggestion that the dictatorship of the Communist Party and the dictatorship of the proletariat were not identical:

Today we received peace proposals from the Polish Government. Who decides this question? We have the Council of People's Commissars, but that too must be subject to a certain control. Whose

The contemporary theory of "modernization," which originated in the European fascist-charterist dictatorships of the 1930s, found new respectability among leaders of postcolonial Latin America, Africa and Asia, as well as some western friends of the Third World.⁷ In the Third World, it was argued, the task of modern nation building—melding disparate tribes and clans to create new economies of scale—was said to warrant suspending imported bourgeois democratic values which, at any rate, were virtually meaningless in a largely rural, communal and illiterate society. The model was not a pompous Mussolini making Italian trains run punctually but Oliver Cromwell dismissing Parliament and getting Britain organized. In a few countries—Singapore, South Korea and Taiwan—the model seemed to work for a time, in the sense that much social and economic progress was achieved. In most instances, however, the implied promise was not kept.

Since the middle of the 1980s, both the "dictatorship of the proletariat" and the theory of "modernization" have collapsed under the weight of their evident failure. Throughout socialist Eastern Europe and in most of the dictatorships of Africa and Asia, the people have rejected both theories, together with the espousing governments, beginning with the televised popular revolution against Ferdinand Marcos in the Philippines. Instead, people almost everywhere now demand that government be validated by western-style parliamentary, multiparty democratic process. Only a few, usually military or theocratic, regimes still resist the trend. Very few argue that parliamentary democracy is a western illusion and a neocolonialist trap for unwary Third World peoples.

This almost-complete triumph of the democratic notions of Hume, Locke, Jefferson and Madison—in Latin America, Africa, Eastern Europe and, to a lesser extent, Asia—may well prove to be the most profound event of the twentieth century and, in all likelihood, the fulcrum on which the future development of global society will turn. It is the unanswerable response to those who have said that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of western industrial states.

The question is not whether democracy has swept the boards, but whether global society is ready for an era in which *only* democracy and the rule of law will be capable of validating governance. This may be a venerable philosophical issue known to Plato,⁸ but it is also a functional question that can be, and now is being, stated in global legal terms. Are we witnessing the evolution of an international rule system that defines the minimal requisites of a democratic process capable of validating the exercise of power? What norms will such a rule system encompass? Is the international community capable of developing, consensually, an institutional and normative framework for monitoring compliance with those requisites? Is the community of nations able to define and manage appropriate consequences of noncompliance?

control? That of the working class as a formless, chaotic mass? No. So we convened the central committee of the party to discuss the proposal and decide on the answer. . . . The same is true of the agrarian question, the food question, and all other questions.

Id. at 127–28.

⁷ Cf. D. APTER, *THE POLITICS OF MODERNIZATION* (1965).

⁸ Plato's effort, in the *Statesman*, the *Laws* and the *Republic*, to define the extent to which a ruler's legitimacy is validated by wisdom, on the one hand, and by his subordination to the laws, on the other, is analyzed in G. SABINE, *A HISTORY OF POLITICAL THEORY* 67–105 (rev. ed. 1953).

III. LEGITIMACY AND THE INTERNATIONAL SYSTEM OF RULES

These questions, in turn, raise two separate issues of legitimacy that are related but should not be confused: first, the legitimacy of national governments and, second, the legitimacy of the emerging international rules and processes by which the governance of nations is increasingly being monitored and validated. The latter issue is of primary interest to the international lawyer, but its importance is due to its manifest connection with the former. We are witnessing a sea change in international law, as a result of which the legitimacy of each government someday will be measured definitively by international rules and processes. We are not quite there, but we can see the outlines of this new world in which the citizens of each state will look to international law and organization to guarantee their democratic entitlement. For some states, that process will merely embellish rights already protected by their existing domestic constitutional order. For others, it could be the realization of a cherished dream.

Citizens, however, will not be the only beneficiaries. We have observed that the engine pulling the democratic entitlement is the craving of governments for validation. Without validation, the task of governance becomes fraught with difficulty. Regimes prize validation, then, as evidence of their legitimacy. Legitimacy, in turn, is the quality of a rule, or a system of rules, or a process for making or interpreting rules that pulls both the rule makers and those addressed by the rules toward voluntary compliance.

Western democracies have achieved legitimacy largely by subjecting the political process to rules, often immutably entrenched in an intrepid constitution. These lucky few nations have succeeded in evolving their own legitimate means of validating the process by which the people choose those they entrust with the exercise of power. To achieve such a system of autochthonous validation (and thus to facilitate governing), those who hold or seek political power have made a farsighted bargain comparable to John Locke's social compact;⁹ they have surrendered control over the nation's validation process to various others: national electoral commissions, judges, an inquisitive press and, above all, the citizenry acting at the ballot box. This collectivity decides whether the standards of the democratic entitlement have been met by those who claim the right to govern. In return, the legitimacy bestowed by that process gives back far more power to those who govern than they surrendered.

In many nations, unfortunately, no such bargain was struck. Those who claim to govern cannot demonstrate that they have fulfilled the requirements of the democratic entitlement, even if they purport to recognize that entitlement. Senegal, for example, is a multiparty state with universal franchise and a secret ballot, but the results of the 1988 national elections were rejected as fraudulent both by opposition parties and by other social institutions. The other parties subsequently boycotted the 1990 local elections and refused to accept the Government's legitimacy.¹⁰ Increasingly, as will be demonstrated later in this essay, governments whose legitimacy is questioned are turning to the international system for that

⁹ See J. LOCKE, TWO TREATISES OF GOVERNMENT 119–20, 164–66 (W. Carpenter ed. 1955) (1690).

¹⁰ U.S. DEPARTMENT OF STATE, 102D CONG., 1ST SESS., COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990: REPORT SUBMITTED TO THE COMMITTEE ON FOREIGN RELATIONS, U.S. SENATE AND THE COMMITTEE ON FOREIGN AFFAIRS, HOUSE OF REPRESENTATIVES 322–23 (Comm. Print 1991).

validation which their national *polis* is as yet unable to give. They do so to avoid the alternative—persistent challenge to authority by coups, countercoups, instability and stasis—and to enable themselves to govern with essential societal acquiescence. What they seek is legitimization by a global standard monitored by processes of the international system.

The capacity of the international community to extend legitimacy to national governments, however, depends not only on its capacity to monitor an election or to recognize the credentials of a regime's delegates to the UN General Assembly, but also on the extent to which such international activity has evolved from the ad hoc to the normative: that is, the degree to which the process of legitimization itself has become legitimate.

In any rule system, national or international, legitimacy has its own modalities. It is to the latter that the international lawyer's creative perspective must turn. Do the global requisites for democratic validation of governments now include, or are they evolving into, rules and procedures that are perceived as legitimate by those to whom they are addressed? In the international context,¹¹ legitimacy is achieved if—or to the extent that—those addressed by a rule, or by a rule-making institution, perceive the rule or institution to have come into being and to be operating in accordance with generally accepted principles of right process.¹²

Empirically, legitimacy can be demonstrated by observing rules, and the decisions of rule-making or rule-applying institutions. Some are habitually obeyed, without recourse to police enforcement, while others are largely ignored. Different rules exhibit varying degrees of compliance pull, which is the measure of a rule's legitimacy. However, the degree of a rule's pull to compliance cannot be measured solely by observing actual compliance. A more sensitive measure would have to take into account, additionally, the degree to which a violator exhibits deference to a rule even while violating it: for example, by lying about, or covering up, the violation or the circumstances in which the violation occurred.

Purely deductive research on rule legitimacy—pulse taking in the form of large-scale empirical investigation of compliance pull—is difficult to structure. Abstract/inductive reasoning about the nature of legitimacy is more feasible. Thus, one may postulate four indicators: *pedigree*, *determinacy*, *coherence* and *adherence*.¹³ The content of these four indicators of legitimacy will be defined in ensuing sections of this essay. For this general overview, it is sufficient to summarize as follows: pedigree refers to the depth of the rule's roots in a historical process; determinacy refers to the rule's ability to communicate content; coherence refers to the rule's internal consistency and lateral connectedness to the principles underlying other rules; and adherence refers to the rule's vertical connectedness to a normative hierarchy, culminating in an ultimate rule of recognition, which embodies the principled purposes and values that define the community of states. A hypothesis may now be ventured: the degree to which a rule, or a rule-making process, exhibits these four qualities will determine the degree to which the rule or the process has matured and is perceived to be legitimate.

Those indicators provide a conceptual map with which to approach the previously posed questions. They afford a convenient way of sorting through the welter

¹¹ Legitimacy, in this as in all other contexts, is a matter of degree. Some rules and institutions enjoy more legitimacy than others.

¹² T. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS 19 (1990).

¹³ *Id.* at 50–194.

of data to reach some estimate as to whether the global system is evolving legitimate rules and institutions capable of validating national governance. That estimate, in turn, will help us understand and react appropriately to the inevitable counterindicative challenges: recidivist tendencies and totalitarian holdouts.

In seeking to assess whether an international democratic order is emerging, data will be marshaled from three related generations of rule making and implementation. The oldest and most highly developed is that subset of democratic norms which emerged under the heading of "self-determination." The second subset—freedom of expression—developed as part of the exponential growth of human rights since the mid-1950s and focuses on maintaining an open marketplace of ideas. The third and newest subset seeks to establish, define and monitor a right to free and open elections.

These three subsets somewhat overlap, both chronologically and normatively. Collectively, they do not necessarily penetrate every nook and cranny of democratic theory. For example, the three subsets do not yet address normatively the thorny issue of the right of a disaffected portion of an independent state to secede; nor, as we shall see, is it conceptually or strategically helpful—at least at this stage of its evolution—to treat the democratic entitlement as inextricably linked to the claim of minorities to secession. Still, these three increasingly normative subsets are large building stones, gradually reinforcing each other and assuming the shape of a coherent normative edifice. Moreover, regional subsets are adding some supernumerary buttresses, cornices and lintels to the new structure that dovetail with, and enrich, the emerging global architecture. Some examples of these will be included in our inventory.

IV. PEDIGREE: THE CASE OF SELF-DETERMINATION

Self-determination is the historic root from which the democratic entitlement grew. Its deep-rootedness continues to confer important elements of legitimacy on self-determination, as well as on the entitlement's two newer branches, freedom of expression and the electoral right.

Symbolic validation and pedigree provide legitimacy's cultural and anthropological dimension.¹⁴ As with any rule, the capacity of the democratic entitlement to pull toward voluntary compliance depends, in part, on the strength of what W. Michael Reisman refers to as "the authority signal."¹⁵ Specifically, the legitimacy of a rule reflects the durability, as well as the consistency, of its acknowledgment and application in practice.

Since self-determination is the oldest aspect of the democratic entitlement, its pedigree is the best established. Self-determination postulates the right of a people organized in an established territory to determine its collective political destiny in a democratic fashion and is therefore at the core of the democratic entitlement. Symbolically, it is signified by a long-evolving tradition of maintaining observers, on behalf of international and regional organizations, at elections in colonies and trust territories. Early observer missions developed operational procedures. They sent reports to their sponsoring international agency or committee, which helped the community's political organs and individual member governments make deductions about the legitimacy of the decolonization process. Gradually, with many variations, the observer missions' methods became the standard operating proce-

¹⁴ *Id.* at 91.

¹⁵ Reisman, *International Lawmaking: A Process of Communication*, 75 ASIL PROC. 101, 110 (1981).

dure for validating an exercise of self-determination. Later in this essay, we will recapitulate these rules and procedures. Here, however, we are concerned with the pedigree, the time frame within which those processes took root and matured.

The aspiration that underpins the principle of self-determination is of an antiquity traceable, in the West, at least to the Hebrews' exodus from Egypt,¹⁶ estimated to have been approximately in 1000 B.C.¹⁷ Its modern rise to the status of universal entitlement began when the Versailles Peace Conference¹⁸ undid, or brought into line with late nineteenth-century European nationalist sensibilities, the work of the Congress of Vienna, which had utterly disregarded ethnic sensibilities in redrawing the map of post-Napoleonic Europe. Embarking on another redesign of Europe after the First World War, President Woodrow Wilson made self-determination his lodestar. To this end, firmly overriding the doubts of Secretary of State Robert Lansing,¹⁹ he reinforced the U.S. team of negotiators with an unusual contingent of historians, geographers and ethnologists,²⁰ the more effectively to argue for the norm's supremacy over power politics and strategic or economic considerations. Consequently, the American delegation summoned up extensive data on demographics and evidence of ethnicity in advocating free choice by "peoples."²¹

Thus prodded, the conference authorized twenty-six on-site consultations with different European groups seeking self-determination.²² The Danes of Schleswig, annexed to Prussia in 1864, were able to secure agreement that "the frontier between Germany and Denmark shall be fixed in conformity with the wishes of the population."²³ Wilson also prevailed in the view "that all branches of the Slav race" in what was to become Czechoslovakia "should be completely freed from German and Austrian rule"²⁴ in full consultation with Slavic representatives.²⁵ He resisted efforts by France's Premier Clemenceau to establish an independent Rhenish buffer state consisting of unwilling Germans.²⁶ Although the Versailles settlement also brought self-determination to Poland,²⁷ as regards the Upper Silesian and Czech boundary settlements, as well as Fiume, Wilson reluctantly came to concede that sometimes one had to consider "other principles"—strategic, economic and logistic—that could "clash with the requirements of self-determination."²⁸

¹⁶ Exodus 1:2.

¹⁷ The author is indebted to Fr. Robert Crouse, Professor of Classics at Dalhousie University and King's College, for this approximation, one carefully hedged with caveats appropriate to so risky an enterprise.

¹⁸ See H. HANNUM, AUTONOMY, SOVEREIGNTY, AND SELF-DETERMINATION 20–31 (1990). The use of self-determination at Versailles and subsequently is also discussed more fully in Franck, *Legitimacy in the International System*, 82 AJIL 705, 743–48 (1988).

¹⁹ "[T]he phrase [self-determination] is simply loaded with dynamite. It will raise hopes which can never be realized." R. LANSING, THE PEACE NEGOTIATIONS, A PERSONAL NARRATIVE 97 (1921). See Brilmayer, *Secession and Self-Determination: A Territorial Interpretation*, 16 YALE J. INT'L L. 177 (1991).

²⁰ 1 R. S. BAKER, WOODROW WILSON AND WORLD SETTLEMENT 109 (1922).

²¹ 1 S. WAMBAUGH, PLEBISCITES SINCE THE WORLD WAR 13 (1933).

²² 1 R. S. BAKER, *supra* note 20, at 188.

²³ 2 A HISTORY OF THE PEACE CONFERENCE OF PARIS 203 (H. W. V. Temperley ed. 1920).

²⁴ 4 *id.* at 261.

²⁵ *Id.* at 262.

²⁶ 4 THE INTIMATE PAPERS OF COLONEL HOUSE 334–35, 345 (C. Seymour ed. 1928).

²⁷ 1 S. WAMBAUGH, *supra* note 21, at 16.

²⁸ M. POMERANCE, SELF-DETERMINATION IN LAW AND PRACTICE 4 (1982); D. 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.

Nevertheless, the principle of self-determination, as championed by Wilson and the minorities released from the embrace of the German, Russian and Austro-Hungarian Empires, was applied vigorously, if sometimes imperfectly, to the vanquished lands of postwar Europe. In the rest of Europe, however, it was applied only in Ireland. In denying self-determination to the Åland Islands—which sought to join Sweden by breaking away from Finland, itself newly emancipated from Russia—a Versailles-created international commission of jurists observed that the Covenant of the League of Nations did not even mention the principle and that it had not yet attained the status of a positive rule of law.²⁹ More important, self-determination played little part in the disposition of the vast overseas lands and peoples of the former German Empire, which were doled out to Australia, Belgium, Britain, France, Japan, New Zealand and South Africa. It was applied badly, if at all, to the former Turkish dependencies in Asia. The League's mandate system evinced only muted concern for the wishes of those territories' inhabitants.

Remarkably, after the Second World War the principle of self-determination became the most dynamic concept in international relations. Former German, Japanese and Italian colonies were placed under the trusteeship of the victors (and, in one case, the vanquished), with the clear obligation "to promote . . . progressive development towards self-government or independence" in accordance with "the freely expressed wishes of the peoples concerned."³⁰ Conceptual evolution, however, did not stop there. Soon not only was self-determination recognized as a writ for obtaining decolonization but, by the terms of the very first article of the UN Charter, it achieved the status of a fundamental right of all "peoples" as a necessary prerequisite to the development of "friendly relations among nations." At least potentially, the concept was thus both universalized and internationalized, for it could now be said to portend a duty owed by all governments to their peoples and by each government to all members of the international community.

This was no random theoretical happenstance. In the postwar world of rising nationalisms, denials of self-determination were palpably no mere domestic matter. Repression tended to generate friction with neighboring states where liberation movements habitually sought sanctuary and succor. As in Bangladesh, Eritrea and the Southern Sudan, self-determination, denied, precipitated the flight of hordes of refugees, placing onerous economic, social and political strains on the neighboring states of refuge. Thus was self-determination firmly linked in theory and fact to the main UN task of preventing conflict among nations, a link that carries far-reaching, but ambiguous, implications for its future normative development (as this essay later seeks to demonstrate).

In the thirty-five years following the surrender of the Axis powers, self-determination transformed the world's political landscape. At this stage, the norm had clear, though limited, secessionist overtones, in the sense that it legitimated the secession of colonies from empires. Concurrently, the norm also evolved in a way that did not legitimate self-determination of minorities *within* a colony. The General Assembly warned against efforts to compromise a colony's "territorial integrity" by those—like Nigeria's Ibos—seeking to secede.³¹ Beginning with India,

²⁹ L. BUCHHEIT, *SECESSION: THE LEGITIMACY OF SELF-DETERMINATION* 71 (1978).

³⁰ UN CHARTER Art. 76(b).

³¹ Note, however, the decision of the political leaders of imperial India to partition the country, in effect permitting Pakistan to secede. On "territorial integrity," see Declaration on the Granting of

Burma and West Africa's Gold Coast, Britain acted in compliance with the norm's evolving requirements; it was followed, with more or less enthusiasm, by France, the Netherlands, Belgium, Spain, Portugal and South Africa. Imperial powers complained about the General Assembly's use of Charter Article 73(c) to monitor political developments in their colonies, but the resistance gradually abated. As a result of the impetus of decolonization, UN membership almost tripled. That this remarkable devolution could have been accomplished, for the most part, without recourse to war or revolution is a tribute to the normative legitimacy and primacy accorded self-determination by the consistent practice—despite lapses—of the community of states.³² As we shall see, the growth of this process was facilitated by UN reporting requirements, the Organization's close scrutiny of the work of colonial administrations and the active involvement of the United Nations in monitoring elections and plebiscites in territories advancing toward independence. Self-determination was seen to require democratic consultation with colonial peoples, legitimated by an international presence at elections immediately preceding the creative moment of independence.

Today, the process of decolonization is nearly complete. Nevertheless, the principle of self-determination retains vigor, manifestly having contributed to the decision by the leaders of the Soviet Union, beginning in 1989, to withdraw their military forces and political suzerainty from Eastern Europe and, more recently, from the Baltic States. Its pull prompted South Africa's decision to give independence to Namibia and Morocco's *volte-face* regarding Western Sahara. When another vestige of imperfect decolonization, the Angolan civil war, ended in 1991, it was on the basis of an agreement to hold free, internationally observed elections, which, *nunc pro tunc*, would give Angola the legitimate regime it had failed to acquire at the chaotic moment of its independence.³³ Another UN-supervised process of popular consultation was created by the Paris agreement ending the civil war in Cambodia.³⁴ As we shall discuss in detail, the idea of self-determination has evolved into a more general notion of internationally validated political consultation, one that is beginning to be applied even to independent (postcolonial) states like Nicaragua and Angola, albeit without implying the community's right to validate secessionist movements within sovereign states.

The story of self-determination, as the first building block in the creation of a democratic entitlement, may thus be seen as a remarkable saga that tells of a rule that gradually augments its compliance pull, overcomes resistance and ultimately brings about an incontestable, historic transformation. Rules that acquire this

Independence to Colonial Countries and Peoples, GA Res. 1514, 15 UN GAOR Supp. (No. 16) at 66, UN Doc. A/4684 (1960); and Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, Annex to GA Res. 2625, 25 UN GAOR Supp. (No. 28) at 121, UN Doc. A/8028 (1970), reprinted in 9 ILM 1292 (1970) [hereinafter Friendly Relations Declaration]. Note also GA Res. 1654 of 1961, in which, without dissent, the Assembly expressed itself as "[d]eeply concerned that, contrary to the provisions of paragraph 6 of the Declaration, acts aimed at the partial or total disruption of national unity and territorial integrity are still being carried out in certain countries in the process of decolonization." 16 UN GAOR Supp. (No. 17) at 65, UN Doc. A/5100 (1961).

³² See Franck, *The Stealing of the Sahara*, 70 AJIL 694 (1976).

³³ As part of the cease-fire package, UNAVEM, the UN observer mission in Angola, oversaw the withdrawal of Cuban troops. The mission will culminate in the observance of elections in 1992. See N.Y. Times, May 26, 1991, §1, at 9, col. 1; and *id.*, June 1, 1991, at A1, col. 3.

³⁴ Final Act of the Paris Conference on Cambodia, UN Doc. A/46/608-S/23177, Annex (1991).

kind of pedigree have a unique claim to legitimacy. Moreover, the deeply embedded roots of self-determination also anchor the legitimacy claims of other, more recent, components of the democratic entitlement.

V. DETERMINACY: ITS FUNCTION IN BESTOWING LEGITIMACY

Thus we see that the democratic entitlement has roots in the conduct of states dating back at least to 1918. From this beginning, practice has proliferated. But practice is not enough to legitimate new norms. The dots of practice must be connected by lines of enunciated principle—conceptualized reasons for acting—if the shapes of legitimate rules are to emerge. The production of legitimate norms depends on a combination of persistent practice and enunciated concepts. In addition, to legitimate a rule, the underlying principles must be enunciated in a way that makes their content determinate. In this section, then, we will look at the determinacy of those principles that stake out the democratic entitlement. Just as an enunciated principle needs to be implemented in common practice before achieving recognition as a binding rule, so a common practice, to be accepted as establishing a norm, needs principled enunciation.

By determinacy we mean the literary property of a rule: that which makes its message clear.³⁵ The determinacy of a rule directly affects its legitimacy because it increases the rule's transparency and thus its capacity to pull members of the international community toward voluntary compliance. It is true that all written communications, including rule texts, suffer from some degree of elasticity of meaning. It is also true that "moderate indeterminacy does not undermine the law's legitimacy."³⁶ Nevertheless, the more opaque and elastic the rule text, the less compliance pull it is likely to exert. Obviously, a rule that cannot be understood is unlikely to be obeyed. A rule that is vague opens itself to creative misconstruction by those whose conduct it is intended to regulate. Perhaps most important, the indeterminacy of a rule undermines its compliance pull by reducing the contingent expectation of reciprocity that helps pull states toward compliance. States, like persons, often obey rules even when it is to their short-run advantage not to do so, in the expectation that by denying themselves the gain that would accrue from noncompliance they will reinforce the power of the rule to pull others toward compliance, to the states' future benefit. This deferred-gratification rationale for rule compliance falls away, however, when the rule text is so indeterminate as not to support a reasonable expectation that compliance in one instance will reinforce the pull toward compliance in future contingent situations. Reciprocity affords little inducement to voluntary rule compliance if the rule is so fuzzy that its applicability to future cases will be easy to dispute and hard to demonstrate.

While the determinacy of a rule may initially be judged by examining the clarity of its text, even a quite elastic text may be rendered more determinate if it is subjected regularly to case-by-case interpretation, utilizing administrative or adjudicatory procedures accepted as legitimate in the community to which the rule is addressed. For example, the International Court of Justice, in interpreting Article 83(1) of the Convention negotiated by the Third United Nations Conference on the Law of the Sea, has taken a highly indeterminate text—one that calls for "an equitable solution" in apportioning an undersea coastal shelf among neighboring

³⁵ T. FRANCK, *supra* note 12, at 52–55.

³⁶ Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989).

states—and has rendered it increasingly determinate.³⁷ So, too, as a result of litigation between Finland and Denmark currently before the Court, will we “discover” whether a tall, self-propelled oil rig constitutes a “vessel” under the right of unimpeded passage through straits as established by the Law of the Sea Convention.³⁸ The determinacy of a rule may therefore depend not only on its text, but also on the work of legitimate institutions charged with reducing textual indeterminacy in specific disputes.

Thus understood, how fares the determinacy of a normative entitlement to democracy? Are there rule texts that convey principles that are specific, or capable of being rendered so, by persuasive case-by-case interpretation and application? We shall now examine the determinacy of existing and emerging rules that bear on the previously identified main historic components of the democratic entitlement: self-determination, freedom of expression and electoral rights.

Determinacy and Self-Determination

As noted, self-determination is legitimated by its long pedigree. Despite lacunae, it also has a large and precise textual canon, refined by a growing “jurisprudence” of interpretation. In addition to the role of self-determination among the purposes of the UN Charter and in the UN trusteeship system, under Article 73, members responsible for administering non-self-governing territories pledged to “develop self-government, to take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions.” These provisions not only were implemented zealously by the UN system, but also were augmented by additional normative texts that concerned two issues essential to the determinacy of self-determination: *to whom* does it apply and *how* is it to be implemented? If rule texts establishing rights do not provide answers to these basic questions, they lack determinacy and the rule’s legitimacy is diminished.

To whom does self-determination apply? The first serious effort to enunciate the applicable principles was undertaken by the fifteenth General Assembly in the annex to Resolution 1541 of December 15, 1960. It attempts to stipulate the test for determining whether a territory is non-self-governing within the meaning of Article 73(e) of the Charter. Under Principle IV of the resolution, non-self-governing status exists *prima facie* “in respect of a territory which is geographically separate and is distinct ethnically and/or culturally from the country administering it.” Once that test has been met, Principle V states, “other elements may then be brought into consideration,” including those “of an administrative, political, juridical, economic or historical nature. If they affect the relationship between the metropolitan State and the territory concerned in a manner which arbitrarily places the latter in a position or status of subordination, they support the presumption” that the territory is non-self-governing.³⁹

³⁷ United Nations Convention on the Law of the Sea, *opened for signature* Dec. 10, 1982, UN Doc. A/CONF.62/122, reprinted in UNITED NATIONS, OFFICIAL TEXT OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA WITH ANNEXES AND INDEX, UN Sales No. E.83.V.5 (1983), 21 ILM 1261 (1982). For the Court’s interpretation of Article 83(1), see Continental Shelf (Tunisia/Libyan Arab Jamahiriya), 1982 ICJ REP. 18 (Judgment of Feb. 24); Continental Shelf (Libyan Arab Jamahiriya/Malta), 1985 ICJ REP. 13 (Judgment of June 3).

³⁸ See Passage through the Great Belt, 1991 ICJ REP. 12 (Order of July 29).

³⁹ GA Res. 1541, 15 UN GAOR Supp. (No. 16), *supra* note 31, at 29.

The 1970 Declaration on Friendly Relations elaborated the Charter “principle of equal rights and self-determination of peoples” by reiterating the duty to end colonialism and to permit each colonial territory to assume a “political status freely determined by” the inhabitants. More broadly, the declaration attributes to “all peoples”—not merely the inhabitants of colonies—“the right freely to determine, without external interference, their political status.”⁴⁰

This broader concept of a *universal* right of self-determination is further enunciated in Article 1 of the International Covenant on Civil and Political Rights.⁴¹ This treaty, ratified or acceded to by 113 states as of November 1991, but probably binding on other states as customary law,⁴² states categorically: “All 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.” This provision has been called the “most controversial” in a document created and steeped in considerable controversy.⁴³ Western powers, in particular, at first argued that the right was only a political principle, that it was ill-defined and unsuited to a treaty enumerating individual—as opposed to collective—rights and thus inappropriate to the unique quasi-judicial enforcement machinery envisaged by the Covenant. Nevertheless, its proponents insisted that the norm of self-determination was fundamental, and a precondition, to the enjoyment of all other enumerated individual rights and freedoms. As a result, “the tide of political opinion in favour of including a right of self-determination proved irresistible”⁴⁴ and the principle was given pride of place among the designated entitlements. More significantly for the long term, the majority—including states that had opposed inclusion of the right—utterly rejected the notion that the entitlement applied only to colonial “peoples,” declaring, rather, that if included, it must apply to peoples anywhere, whether in a politically independent state or a dependent territory.⁴⁵

The Covenant clearly intends to make the right of self-determination applicable to the citizens of all nations, entitling them to determine their collective political status through democratic means. It also makes an important distinction between that right of each nation’s collective *polis* and the rights of minorities within each state, which the Covenant elucidates in Article 27. Under Article 27, “ethnic, religious or linguistic minorities . . . shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

Notably, not included among the enumerated rights of these minorities as defined in Article 27 is any entitlement to secede.⁴⁶ When the Covenant came into force, the right of self-determination entered its third phase of enunciation: it ceased to be a rule applicable only to specific territories (at first, the defeated European powers; later, the overseas trust territories and colonies) and became a

⁴⁰ Annex to GA Res. 2625, *supra* note 31, principle 4.

⁴¹ International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 UNTS 171, *reprinted in* 6 ILM 368 (1967) (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 UNTS 3, *reprinted in* 6 ILM 360 (1967) (entered into force Jan. 3, 1976).

⁴² T. MERON, *HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW* 80–81 (1989); Sohn, *Generally Accepted International Rules*, 61 WASH. L. REV. 1073, 1077–78 (1986); Schachter, *International Law Implications of U.S. Human Rights Policies*, 24 N.Y.L. SCH. L. REV. 63, 68 (1978).

⁴³ D. McGOLDRICK, *THE HUMAN RIGHTS COMMITTEE* 14 (1991).

⁴⁴ *Id.* ⁴⁵ *Id.* at 15.

⁴⁶ For a different view as to the legal status of the right to secede, see Brilmayer, *supra* note 19.

right of everyone. It also, at least for now, stopped being a principle of exclusion (secession) and became one of inclusion: the right to participate. The right now entitles peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state. When such participation is denied, when a people that, in the terms of the aforementioned 1960 General Assembly resolution, "is geographically separate and is distinct ethnically and/or culturally" has been placed "in a position or status of subordination,"⁴⁷ perhaps a secession option may reemerge as an international legal entitlement. That aspect of self-determination, however, is far less clear at present than the entitlement to democratic participation in governance.

How is self-determination to be implemented? Gradually, answers to this question have also emerged. During the first forty years of the United Nations, members responsible for trust territories and colonies were charged with making periodic reports on their progress; these reports were subjected to increasing scrutiny by various UN bodies. Since the coming into force of the Covenant, reporting and scrutiny have been formalized, depoliticized to an extent, and welded to the process of case-by-case norm application. This development will help shape the postcolonial concept of self-determination and give it more determinacy. The Covenant thus foresees a continuing, growing body of law made by means of the interpretation and application of its provisions by an expert, independent, quasi-judicial body.

As usual, this process begins with a form of monitoring. The 113 states parties to the Covenant are legally obliged to "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."⁴⁸ These reports are scrutinized by a Human Rights Committee of eighteen members elected by states parties to the Covenant, who serve in their personal capacities⁴⁹ for a term of four years.⁵⁰ While the Committee is not a court, it does have the right to question the reports submitted by members. It transmits its reviews and such general comments as it thinks appropriate to the states parties to the Covenant and to the UN Economic and Social Council.⁵¹ Under an optional procedure, parties may also agree to permit other parties to allege violations in a formal complaint.⁵² An Optional Protocol permits individuals to lodge complaints against accepting states.⁵³ As of November 1991, sixty-three of the parties to the Covenant had agreed to give the Committee the competence to consider petitions. A recent study concluded that the Committee members have succeeded in establishing a high degree of independence and judiciousness.⁵⁴

Formally, all petitions brought under the Optional Protocol are drawn to the Committee's attention by the UN Secretary-General.⁵⁵ More than a hundred such

⁴⁷ GA Res. 1541, *supra* note 39.

⁴⁸ ICCPR, *supra* note 41, Art. 40(1).

⁴⁹ *Id.*, Arts. 28, 30.

⁵⁰ *Id.*, Art. 32.

⁵¹ For a discussion of this procedure, see D. McGOLDRICK, *supra* note 43, at 62–119.

⁵² ICCPR, *supra* note 41, Art. 41. For a discussion of this procedure, see D. McGOLDRICK, *supra* note 43, at 120–246.

⁵³ ICCPR, *supra* note 41, Optional Protocol, *opened for signature* Dec. 19, 1966, Art. 1, 999 UNTS 302; *see also* D. McGOLDRICK, *supra* note 43, at 127.

⁵⁴ D. McGOLDRICK, *supra* note 43, at 45.

⁵⁵ Human Rights Committee, Provisional Rules of Procedure, Rule 78(1), UN Doc. CCPR/C/3/Rev.2 (1989). *See Report of the Human Rights Committee*, 44 UN GAOR Supp. (No. 40) at 179–82, UN Doc. A/44/40 (1989).

"cases" have been taken up and fewer than twenty were dismissed for lack of evidence of a violation. Some 150 more petitions are pending.⁵⁶ Although the Covenant envisages the possibility of voting, the Committee's decisions to date have been taken by consensus.⁵⁷

The Committee, so far, has not had much occasion to explain the content of the right of self-determination. Only one petition-based case has been heard. While it rejected as inadmissible a claim by a Grand Captain of the Mikmaq tribal society that Canada was denying his people their right of self-determination, the Committee based its rejection on the applicant's inability to demonstrate that he was authorized to represent the tribe or that he, personally, had been deprived of a right protected by the Covenant.⁵⁸ As noted, the Covenant validates free and equal political participation as well as the cultural rights of minorities, but not necessarily secession. The Committee's finding leaves open the possibility that another individual might succeed in bringing a comparable petition if he or she can demonstrate having the *bona fides* to act in a representative capacity and alleges a denial of cultural autonomy or free and equal political participation.

The Committee does not merely consider reports and complaints. Periodically, it also makes more general findings on the state of civil and political rights and prepares summaries of the developing normative expectations arising from the Covenant. In its general commentary on Article 1, the Committee has been rather cautious, merely reiterating the primacy of self-determination among the human rights enumerated in the Covenant. "In accordance with the purposes and principles of the Charter of the United Nations," the Committee has written, "article 1 . . . recognizes that all peoples have the right of self-determination. The right . . . is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights."⁵⁹

The right to self-determination, in sum, may be said to be poised to move toward still greater determinacy. Its general normative content already has been spelled out in General Assembly resolutions to which a large majority of the international community has assented, and in several widely ratified treaties, beginning with the UN Charter and culminating in the Covenant. Equally important to the determinacy of the right of self-determination is the institutional potential for applying and clarifying the emerging rules; while the Committee's accomplishments have been modest, a systemic basis has been laid for more solid results. Now that the inhibitions of Cold War politics have been lifted and the liberal democratic sensibility is widely shared by the membership, what began as review by politicized, anticolonial committees of the General Assembly and by the Trusteeship Council may be expected to become a judicious process of principled rule interpretation by independent experts.

⁵⁶ D. McGOLDRICK, *supra* note 43, at 127.

⁵⁷ *Id.* at 48.

⁵⁸ A.D. v. Canada, Report of the Human Rights Committee, 39 UN GAOR Supp. (No. 40) at 200, UN Doc. A/39/40 (1984). See also Ominayak and Lubicon Lake Band v. Canada, Report of the Human Rights Committee, 45 UN GAOR Supp. (No. 40), vol. 2, App. A, UN Doc. A/45/40 (1990). See discussion in D. McGOLDRICK, *supra* note 43, at 254–56; and McGoldrick, *Canadian Indians, Cultural Rights and the Human Rights Committee*, 40 INT'L & COMP. L.Q. 658 (1991).

⁵⁹ General Comments of the Human Rights Committee, UN Doc. CCPR/C/21/Rev.1, at 10–11 (1989). See also D. McGOLDRICK, *supra* note 43, at 247–48.

Determinacy and Free Expression

The second building block in constructing a normative entitlement to democracy is the right of free political expression. This right originated conceptually in the antitotalitarianism born of World War II and was first enunciated normatively in the Universal Declaration of Human Rights, adopted by the General Assembly on December 10, 1948.⁶⁰ As a mere resolution, the Universal Declaration does not have the force of a treaty; yet it was passed with such overwhelming support, and such prestige has accrued to it in succeeding years, that it may be said to have become a customary rule of state obligation. More to the point, its text manifests considerable determinacy, specifically recognizing a universal right to freedom of opinion and expression (Article 19), as well as to peaceful assembly and association (Article 20).

These entitlements reappear with even greater specificity in the legally binding Covenant on Civil and Political Rights.⁶¹ Spelled out in that treaty are specific rights to freedom of thought (Article 18) and freedom of association (Article 22). Article 19(2) is an especially important component of the democratic entitlement. It states: "Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice." While Article 19(2) is subject to restriction by law where "necessary . . . [f]or the protection of . . . public order . . . , or of public health or morals,"⁶² these restrictions, like the rule itself, are subject to case-by-case review and application by the Human Rights Committee.⁶³

Rights to opinion, expression and association contained in Articles 18, 19 and 22 look both backward and forward. They are a refinement of an aspect of the older right of self-determination; they also constitute the essential preconditions for an open electoral process, which is the newest component of the democratic entitlement. First mooted in the Universal Declaration, they became explicit treaty-based entitlements by incorporation into the Covenant and are likely to be made even more explicitly determinate by the review and monitoring of required national reports on compliance and specific petitions by complainants. The Human Rights Committee, for example, has been critical, albeit in a circumspect manner, of the compliance of Uganda and Zanzibar under Tanzanian control.⁶⁴ The Committee has also posed searching questions to representatives of Mali⁶⁵ and Jamaica⁶⁶ regarding the openness of their marketplaces of ideas. Professor Dominic McGoldrick has commended

the close, detailed and critical analysis undertaken by members under the reporting process. The dialogue between the [Committee] and the States parties, in so far as it has developed, has been both direct and constructive. [Committee] members have in a diplomatic but forthright way criticized or expressed strong doubts concerning the compatibility with article 19 of specific ideological conceptions of and wide restrictions on freedom of expression.⁶⁷

⁶⁰ GA Res. 217A (III), UN Doc. A/810, at 71 (1948).

⁶¹ ICCPR, *supra* note 41.

⁶² *Id.*, Art. 19(3).

⁶³ See D. McGOLDRICK, *supra* note 43, at 461.

⁶⁴ Report of the Human Rights Committee, 36 UN GAOR Supp. (No. 40) at 42–43, UN Doc. A/36/40 (1981) [hereinafter 1981 Report].

⁶⁵ *Id.* at 50–51.

⁶⁶ *Id.* at 56–57.

⁶⁷ D. McGOLDRICK, *supra* note 43, at 469–70.

In their tough questioning of the representatives of reporting states, the Committee's members are now aided regularly, behind the scenes, by a network of non-governmental organizations.

While most of these critiques have occurred under the aegis of the general reporting requirement, a few case-by-case reviews have taken place under the Optional Protocol. The Committee found Uruguay's military regime in violation of Article 19(2) of the Covenant when it denied a petitioner the right freely to engage in political and trade union activities.⁶⁸ In *Perdoma and DeLanza v. Uruguay*,⁶⁹ the complainants alleged that they had been detained on account of "subversive association" based on their political views and connections. The Committee concluded that there was no evidence to substantiate the authorities' charge and that the arrest, detention and trial of the petitioners had not been justified on any of the grounds permitted in Article 19(3).⁷⁰

When rules are impartially applied, whether by judges, administrators or experts, the determinacy of those rules increases and so, also, their legitimacy. Thus far, the Human Rights Committee's review of complaints regarding restrictions on expressive rights has just begun to have an impact, but in view of the end of the Cold War, the prognosis is much better. Moreover, other avenues for international protection of these rights are opening up, as evidenced by the requests of the intergovernmental Human Rights Commission to the UN Secretary-General that he appoint special representatives to report on alleged gross violations by various governments. In this respect, a significant new role for the Secretary-General was recently agreed upon by both the Government and insurgents in El Salvador. Under UN auspices, the parties consented to the establishment of ONU-SAL, the UN Observer Group in El Salvador, which is to be controlled by the Secretary-General and is to supervise, and thereby seek to ensure citizens' rights to, free expression and association as part of a plan to create the circumstances for civil peace.⁷¹

In addition to such activity at the global level, parallel and reinforcing norm building and defining is under way at the regional level. The European Convention for the Protection of Human Rights and Fundamental Freedoms, the best-established regional normative system, provides in Article 10, paragraph 1: "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."⁷²

Paragraph 2 of Article 10 does permit derogation in the form of

restrictions . . . 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

⁶⁸ *Alba Pietroroia v. Uruguay*, Communication R.10/44, 1981 Report, *supra* note 64, at 153-59.

⁶⁹ Report of the Human Rights Committee, 35 UN GAOR Supp. (No. 40) at 111, UN Doc. A/35/40 (1980) [hereinafter 1980 Report].

⁷⁰ *Id. See also Grille Motta v. Uruguay*, Communication R.2/11, 1980 Report, *supra* note 69, at 132; *Weinberg Weisz v. Uruguay*, Communication R.7/28, 1981 Report, *supra* note 64, at 114; *Hertzberg v. Finland*, Communication R.14/61, Report of the Human Rights Committee, 37 UN GAOR Supp. (No. 40) at 161, UN Doc. A/37/40 (1982).

⁷¹ Central America: Efforts Towards Peace: Report of the Secretary-General, UN Doc. S/22494 and Corr.1 (1991); *see also* N.Y. Times, Aug. 13, 1991, at A8, col. 3.

⁷² European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 221, Europ. TS No. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention].

reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

The application of both the rule and its exceptions, however, is subject to review by a commission of experts and a European Human Rights Court.⁷³ These bodies have augmented the determinacy of the system. As in a mature regime, the European Commission and Court of Human Rights have made key decisions balancing the rights of individuals against specific exceptions. The Court has weighed freedom of the press against a defendant's right to an impartial trial.⁷⁴ It has drawn boundaries between free expression and obscenity⁷⁵ and sought a balance between a free press and the laws of libel and slander.⁷⁶ In so doing, it has made far more specific—hence legitimate—the Council of Europe's system of norms pertaining to expressive rights, just when it is rapidly expanding to include the newly freed nations of Eastern Europe.

Comparable progress is being made by the more recently established inter-American regional system. The 1969 American Convention on Human Rights⁷⁷ provides an elaborate textual basis for freedom of thought and expression (Article 13), the right of assembly (Article 15) and freedom of association (Article 16). Monitoring and enforcement is performed by two institutions created by the OAS Charter: the Inter-American Commission on Human Rights (Articles 34 and 64(1)) and the Inter-American Court of Human Rights (Articles 33, 62 and 64). The Court consists of seven judges elected by the states adhering to the Convention, who serve for a term of six years. As of May 1990, ten states—not including the United States—had accepted its jurisdiction.⁷⁸

Determinacy and Electoral Rights

The third and newest building block in constructing the entitlement to democracy is the emerging normative requirement of a participatory *electoral* process. Despite its infancy, it, too, is rapidly evolving toward that determinacy which is essential to being perceived as legitimate. As early as 1948, the Universal Declaration of Human Rights, in Article 21, clearly enunciated the right of all persons to take part in government, as well as 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." At the time, only UN members outside the socialist, Arab and Latin American blocs took this as a restatement of conditions already prevailing in their *polis*. With rapid decolonization, the proportion of UN members actually practicing free and open electoral democracy began to shrink further under the aegis of one-party modernizing authoritarianism in Africa and

⁷³ *Id.*, Art. 19, establishing the European Commission on Human Rights and the European Court of Human Rights. *See also* Arts. 20–55.

⁷⁴ *The Sunday Times Case*, 30 Eur. Ct. H.R. (ser. A) (1978).

⁷⁵ *Handyside Case*, 24 Eur. Ct. H.R. (ser. A) (1976); *Case of Muller and Others*, 133 Eur. Ct. H.R. (ser. A) (1988).

⁷⁶ *Lingens Case*, 103 Eur. Ct. H.R. (ser. A) (1986).

⁷⁷ American Convention on Human Rights, Nov. 22, 1969, OEA/Ser.K/XVI.1.1, doc. 70, rev.1, corr.1 (1970), reprinted in 1 THE INTER-AMERICAN SYSTEM, pt. II at 51 (F. V. García-Amador ed. 1983), 9 ILM 673 (1970) (entered into force July 18, 1978) [hereinafter American Convention].

⁷⁸ Argentina, Colombia, Costa Rica, Ecuador, Guatemala, Honduras, Peru, Suriname, Uruguay and Venezuela. *See Current State of Conventions and Protocols on Human Rights*, Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V.II.79, doc. 12, rev.1, Ann. A (1991).

Asia. Nevertheless, even in that relatively hostile atmosphere, few states were willing openly to block the textual evolution of a specific electoral entitlement, however many mental reservations their regimes may have harbored. Thus, two decades later, the Civil and Political Covenant was opened for signature,⁷⁹ entering into force in 1976 as a set of legal obligations now binding on more than two-thirds of all states. With the balance now heavily tilting toward the substantial new majority of states actually practicing a reasonably credible version of electoral democracy, the treaty-based legal entitlement also begins to approximate prevailing practice and thus may be said to be stating what is becoming a customary legal norm applicable to all.

Article 25 extends to every citizen the right:

- (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.

Admirable as it is, this standard still needs greater specificity. Textual determinacy, once again, is gradually being augmented by process determinacy under the auspices of the Human Rights Committee, which is authorized to monitor compliance. That body has discussed the implications of Article 25 in connection with its review of national reports on implementation and a small number of petitions lodged under the Optional Protocol. In reviewing two citizens' complaints against the military regime of Uruguay, the Committee concluded that the complainants had been arbitrarily deprived of protected rights by decrees banning their political party and by being barred from running for office.⁸⁰

During the Cold War, it was difficult to utilize the Human Rights Committee to hone the rule outlined in Article 25. Now the Committee is likely to perform that function more effectively as the members' ideological divisions narrow and citizens become more willing to risk submitting complaints. This evolution would be accelerated if, as seems likely, the United States ratified the Covenant. If, as seems less likely, the United States also ratified the Protocol permitting individual complaints,⁸¹ the determinacy of the entitlement would be further legitimized, which, surely, must accord with our nation's interest and ethos.

The new climate has also permeated the General Assembly. At its forty-fifth session, that body adopted a resolution entitled Enhancing the effectiveness of the principle of periodic and genuine elections.⁸² This nonbinding, yet important, document reaffirms and further specifies the electoral entitlement first outlined in the Universal Declaration of Human Rights and later embodied in Article 25 of the Covenant. It "stresses" the member nations'

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.⁸³

⁷⁹ ICCPR, *supra* note 41.

⁸⁰ Case 34/1979, 1981 Report, *supra* note 64, at 130; Case 44/1979, *id.*, Ann. XVI, at 153.

⁸¹ *Supra* note 53.

⁸² GA Res. 45/150 (Feb. 21, 1991).

⁸³ *Id.*, para. 2.

The resolution also declares “that determining the will of the people requires an electoral process that provides an equal opportunity for all citizens to become candidates and put forward their political views, individually and in co-operation with others, as provided in national constitutions and laws.”⁸⁴ It commends “the value of the electoral assistance” the United Nations has provided member states at their request,⁸⁵ and asks the Secretary-General to seek the views of members and others on how the Organization can best respond to further such requests and to report his findings to the next Assembly, together with “an account of United Nations experience in election monitoring.”⁸⁶

At its next session the Assembly, with only four dissents, passed Resolution 46/137 of December 17, 1991, which declared that “periodic and genuine elections” are a “necessary and indispensable element” and a “crucial factor in the effective enjoyment . . . of a wide range of other human rights.” The resolution established a procedure for authorizing the monitoring of national elections and endorsed the Secretary-General’s decision to create an office, headed by a senior official, “to act as a focal point . . . in order to ensure consistency in the handling of requests of Member States organizing elections.”

Parallel and reinforcing norm-generating activity occurring in regional frameworks has accelerated this evolution. The Charter of the Organization of American States, in Article 5, establishes the duty of members to promote “the effective exercise of representative democracy.” The OAS Ministers of Foreign Affairs and the Organization’s Permanent Council have issued a series of resolutions affirming this regional entitlement while censuring those committing apparent violations. For example, in June 1979, the Ministers demanded the “immediate and definitive replacement of the Somoza regime” in Nicaragua and the installation of a “democratic government” with the “holding of free elections as soon as possible.”⁸⁷ Similarly, in December 1987, the Permanent Council took note of the “deplorable acts of violence and disorder” that had taken place in Haiti during that year’s failed elections, expressed its “conviction that it is necessary to resume the democratic process” and urged the “Government of Haiti to adopt all necessary measures so that the people of Haiti may express their will through free elections.”⁸⁸ In May 1989, the Ministers decided that “General Manuel Antonio Noriega . . . [had] abridged the right of the Panamanian people to freely elect their legitimate authorities” and thus had “seriously jeopardize[d]” an “essential purpose” of the OAS, which “is to promote and consolidate representative democracy.” They further called for a “transfer of power in the shortest possible time” by means of “democratic mechanisms.”⁸⁹

On June 5, 1991, the Ministers adopted a crucial resolution on representative democracy. Its preamble states that the principles of the OAS Charter “require the political representation of [member] states to be based on effective exercise of representative democracy” and, in its operative sections, the resolution decides that the Secretary General shall

call for the immediate convocation of a meeting of the Permanent Council in the event of any occurrences giving rise to the sudden or irregular interruption of the democratic political institutional process or of the legitimate exer-

⁸⁴ *Id.*, para. 3.

⁸⁵ *Id.*, para. 8.

⁸⁶ *Id.*, paras. 10, 11. The Secretary-General’s report to the Assembly is UN Doc. A/46/609 (1991).

⁸⁷ OEA/Ser.F/II.17, doc. 40, rev.2 (1979).

⁸⁸ OEA/Ser.G/CP/RES.489, doc. 720 (1987).

⁸⁹ OEA/Ser.F/II.21, doc. 8, rev.2 (1989); see also OEA/Ser.F/II.21, doc. 45 (1989).

cise of power by the democratically elected government in any of the Organization's member states.⁹⁰

Within ten days, the Ministers of Foreign Affairs or the OAS General Assembly must convene so as to "look into the events collectively and adopt any decisions deemed appropriate."⁹¹ It was this procedure that was invoked to bring about sanctions against the regime established by the military coup in Haiti in September 1991.⁹²

Alongside these quasi-legislative developments, a regional quasi jurisprudence is germinating. In 1990, the Inter-American Commission on Human Rights, in considering a complaint of electoral fraud and other impropriety against Mexico, began to spell out in some detail the right of access, under general conditions of equality, to a nation's public functions.⁹³

Even more dramatic are recent efforts by the nations of Europe to make the electoral entitlement explicit and specific. Article 3 of Protocol 1 to the European Human Rights Convention obliges the parties to "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 Finding the Greek colonels' regime in violation, the European Court of Human Rights interpreted this Protocol to require "the existence of a representative legislature, elected at reasonable intervals."⁹⁵ The European Commission, meanwhile, has rejected the purist argument that the Protocol requires states to adopt a system of proportional representation.⁹⁶

As members of the Conference on Security and Co-operation in Europe,⁹⁷ the same nations, augmented by Canada, the United States and the nations of Eastern Europe, recently joined unanimously in spelling out the contents of the new right to participate in free and open elections. At a meeting in Copenhagen in June 1990, they affirmed that "democracy is an inherent element of the rule of law" and recognized "the importance of pluralism with regard to political organizations."⁹⁸ Among the "inalienable rights of all human beings," they decided, is the democratic entitlement, including "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"; a government "representative in character, in which the executive is accountable to the elected legislature or the electorate"; and political parties that are clearly separate from the state.⁹⁹ The thirty-five

⁹⁰ Representative Democracy, OEA/Ser.P/AG/RES.1080 (XXI-0/91), para. 1.

⁹¹ *Id.*, para. 2.

⁹² Support to the Democratic Government of Haiti, *supra* note 2.

⁹³ Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.77, doc. 7, rev.1, at 97 (1990) (Mexico Report).

⁹⁴ Protocol 1 to the European Convention, *supra* note 72, Mar. 20, 1952, 213 UNTS 262, entered into force May 18, 1954, and, as of June 1991, had been ratified by all but one party to the Convention (Liechtenstein).

⁹⁵ The Greek Case, 12 Y.B. EUR. CONV. ON HUM. RTS. 179 (1969); *see also* Case of Mathieu-Mohin, 113 Eur. Ct. H.R. (ser. A) at 22 (1987).

⁹⁶ Application 7140/75, 7 Eur. Comm'n H.R. 95, 97 (1977).

⁹⁷ Conference on Security and Co-operation in Europe, Final Act, Aug. 1, 1975, 73 DEP'T ST. BULL. 323 (1975), *reprinted* in 14 ILM 1292 (1975).

⁹⁸ 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 ILM 1305, 1308, para. 3 (1990) [hereinafter Copenhagen Document].

⁹⁹ *Id.*, para. 5.

CSCE participants also linked recognition of the democratic entitlement by governments to the validation of their right to govern: "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,"¹⁰⁰ they declared, implying the illegitimacy of regimes that deny their citizens basic democratic rights.

According to Professor Theodor Meron, one of the public members of the U.S. delegation, the "language of Copenhagen goes far beyond any existing human rights instruments."¹⁰¹ The document is detailed to an unprecedented degree, establishing a standard that the UN General Assembly might profitably emulate in a resolution. Citizens have the right to expect "free elections at reasonable intervals, as established by law"; a national legislature in which at least one chamber's membership is "freely contested in a popular vote"; a system of universal and equal adult suffrage; a secret ballot or its equivalent; free, nondiscriminatory candidature for office; freedom to form political parties that compete "on a basis of equal treatment before the law and by the authorities"; fair and free campaigning; "no legal or administrative obstacle" to media access, which must be available "on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process"; and a guarantee that the "candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise" terminated in accordance with law.¹⁰²

This unprecedented North Atlantic and Europe-wide initiative to endorse and define a popular right of electoral democracy¹⁰³ went on to commend the growing practice of involving foreign observers in national elections. The participating states invited "observers from any other CSCE participating States and any appropriate private institutions and organizations who may wish to do so to observe the course of their national election proceedings, to the extent permitted by law," and pledged to "endeavour to facilitate similar access for election proceedings held below the national level."¹⁰⁴

Later in 1990, the leaders of the thirty-four CSCE states joined in Paris to declare "a new era of democracy, peace and unity."¹⁰⁵ Unanimously, they endorsed an extraordinary Charter, which commits them "to build, consolidate and strengthen democracy as the only system of government of our nations."¹⁰⁶ The Charter restates the older entitlement to free expression but adds the right of every individual, without discrimination, "to participate in free and fair elections,"¹⁰⁷ backed by the leaders' pledge to "co-operate and support each other with the aim of making democratic gains irreversible."¹⁰⁸ Although the Charter is not a treaty, its language is weighted with the terminology of *opinio juris*. It is deliberately norm creating. In particular, the Charter builds on the assumption

¹⁰⁰ *Id.* at 1309, para. 6.

¹⁰¹ Meron, *Democracy and the Rule of Law*, 153 WORLD AFF. 23, 24 (1990). See also Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

¹⁰² Copenhagen Document, *supra* note 98, at 1310, para. 7.

¹⁰³ Buerenthal, *The Copenhagen CSCE Meeting: A New Public Order for Europe*, 11 HUM. RTS. L.J. 217, 221–22 (1990).

¹⁰⁴ Copenhagen Document, *supra* note 98, at 1310, para. 8.

¹⁰⁵ 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 ILM 190, 193 (1991) [hereinafter Paris Charter].

¹⁰⁶ Paris Charter, *supra* note 105, at 193. ¹⁰⁷ *Id.* at 194.

¹⁰⁸ *Id.* at 195.

that electoral democracy is owed not only by each government to its own people, but also by each CSCE state to all the others. According to Judge Thomas Buergenthal, another U.S. participant in the Copenhagen meeting, today

no domestic institution or norm, in theory, is beyond the jurisdictional reach of the CSCE. Here the traditional domestic jurisdiction doctrine, which has tended to shield the oppressive state practices and institutions from international scrutiny, has for all practical purposes lost its meaning. And this notwithstanding the fact that non-intervention in the domestic affairs of a state is a basic CSCE principle. Once the rule of law, human rights and democratic pluralism are made the subject of international commitments, there is little left in terms of governmental institutions that is domestic.¹⁰⁹

In this connection, one should note that the United States is a party to this normative evolution of the CSCE process.

To safeguard the rights concerned, the Paris Charter establishes an institutionalized process for monitoring compliance with the electoral duties of states. It gives the CSCE several organs, including a secretariat at Prague¹¹⁰ and an Office for Free Elections at Warsaw. The latter is to "facilitate contacts and the exchange of information on elections within participating States."¹¹¹ The Charter also envisages the eventual creation, after further consultations, of a "CSCE parliamentary assembly, involving members of parliaments from all participating States," to achieve "greater parliamentary involvement in the CSCE."¹¹²

The new Office for Free Elections and its functions are described in the "supplementary document" appended to the Charter.¹¹³ The office is to "foster the implementation" of the provisions of the Copenhagen Document pertaining to electoral democracy and, to this end, is authorized to "compile information," including, but not limited to, reports by governments on elections and the electoral process in participating states, "as well as reports of election observations." It is also to "serve to facilitate contact among governments, parliaments or private organizations wishing to observe elections and competent authorities of the States in which elections are to take place."¹¹⁴

Most recently, in September to October 1991, these nations' representatives unanimously endorsed the Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE. It reaffirms "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." The participating states "categorically and irrevocably declare[d] 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."¹¹⁵ More important yet is the mechanism and procedure established in paragraphs 3–16, which envisages a "resource" of experts, up to three of whom may be named by a state requesting good offices or mediation services in connec-

¹⁰⁹ Buergenthal, *CSCE Human Dimension: The Birth of a System*, 1 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, No. 2, at 3, 42–43 (forthcoming).

¹¹⁰ Paris Charter, *supra* note 105, at 206.

¹¹¹ *Id.* at 207.

¹¹² *Id.*

¹¹³ *Id.* at 214–15.

¹¹⁴ *Id.* at 214.

¹¹⁵ Conference on Security and Co-operation in Europe, Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, Oct. 3, 1991, Preamble, at 2 (unofficial text of the U.S. delegation), *reprinted* in 30 ILM 1670 (1991). [hereinafter Moscow Document].

tion with any domestic dispute arising under the "human dimension." If a CSCE state poses a human dimension question to another member and that member does not itself invite such a mission of inquiry, the requesting state and five others may invoke the process, with one expert of the three-person panel to be selected from the "resource" list by the requesting state, one by the requested state, and the third by agreement between the other two or by the ranking official of the CSCE designated by its Council. These "rapporteurs" are to establish the facts and report on them, and they may give advice on possible solutions to the problems raised. Most important of all is part II of the Moscow Document, in which the members pledge that they

will 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 values.¹¹⁶

The evolution of textual determinacy with respect to the electoral entitlement is a relatively recent development. In practice, however, the monitoring component of the entitlement has a long history. The long record of UN election monitoring both in the former trusteeship territories and in some colonies immediately before they attained independence was already mentioned as instrumental in establishing pedigree. But that practice also honed the normative content of the entitlement. As early as May 1956, the Trusteeship Council sent monitors to the plebiscite in which the people of British Togoland chose to join Ghana.¹¹⁷ Its monitors were involved in conducting the preindependence plebiscites in the British Cameroons in November 1959 and February 1961.¹¹⁸ Similarly, following the November 1959 violence between the Hutu and Tutsi tribes in what was then Belgian-administered Ruanda-Urundi, the United Nations supervised a preindependence election and referendum that determined the separation of the linked indigenous kingdoms and the future of the monarchy.¹¹⁹

In 1961 the United Nations assisted New Zealand, the administering authority, in conducting a plebiscite in Western Samoa that endorsed a draft constitution and a form of association with the former trustee.¹²⁰ On June 17, 1975, the

¹¹⁶ Moscow Document, *supra* note 115, para. 17, at 9.

¹¹⁷ Report of the United Nations Plebiscite Commissioner for the Trust Territory of Togoland under British Administration, UN Doc. T/1258 and Add.1 (1956).

¹¹⁸ See GA Res. 1350, 13 UN GAOR Supp. (No. 18A) at 2, UN 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"); GA Res. 1352, 14 UN GAOR Supp. (No. 16) at 26, UN Doc. A/4354 (1959) (whether the Southern Cameroons wished to achieve independence by "joining the independent Federation of Nigeria [or] the independent Republic of Cameroons"); GA Res. 1473, *id.* at 38 (putting the questions posed in the GA 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, UN Doc. T/1556 and app. (1961).

¹¹⁹ GA Res. 1579, 15 UN GAOR Supp. (No. 16), *supra* note 31, at 34 (elections); GA Res. 1605, 15 UN GAOR Supp. (No. 16A) at 8, UN Doc. A/4684/Add.1 (1961) (referendum).

¹²⁰ GA Res. 1569, 15 UN GAOR Supp. (No. 16), *supra* note 31, at 33 (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, UN Doc. T/1564 and Add.1 (1961).

United Nations observed the vote in which residents of the Northern Mariana Islands endorsed a loose form of political confederation with the United States;¹²¹ and, at various times in the 1980s, it supervised plebiscites in the rest of the U.S. Pacific Islands Trust that determined the future status of those several archipelagoes.¹²²

The monitoring of political progress in trust territories led to the case-by-case enunciation of principles applicable to the democratic entitlement. Throughout the 1950s and 1960s, the Trusteeship Council and the General Assembly, on the basis of reports made by visiting missions, made recommendations to the states administering trust territories. These frequently specified the steps necessary to effect democratic participation by the inhabitants in choosing their political future. For example, in its 1959 report on Belgian administration of the Ruanda-Urundi Trust, the Council urged that the representation of inhabitants in the legislative body be increased and that it be given greater power. The Council also called for direct universal suffrage and an increase in the responsibilities of elected local authorities.¹²³ Such advice was influential both in determining the rate and direction of a territory's emancipation and in crystallizing a broadly shared expectation about the requirements of the democratic entitlement.

Although the United Nations had a specific legal ground for intervening in, and validating, the democratic process within trust territories, it also found bases for supervising colonial elections and referendums just prior to independence and this role gradually came to be an accepted element in legitimizing those crucial transitions. Thus, UN observers oversaw the referendum establishing a new constitution for the Cook Islands in 1965¹²⁴ and the preindependence referendum and elections in Spanish Equatorial Guinea in 1968.¹²⁵ The United Nations undertook similar monitoring of the referendum on the future status of West New Guinea (West Irian) from July 14 to August 2, 1969,¹²⁶ as well as of the November 1980 elections conducted in the New Hebrides under French and British administration, which led to the creation of independent Vanuatu.¹²⁷

As the colonial era drew to a close, the significance of the UN election-monitoring role, instead of declining, appears to have increased, partly because the last

¹²¹ Report of the United Nations Visiting Mission to Observe the Plebiscite in the Northern Mariana Islands, Trust Territory of the Pacific Islands, 43 UN TCOR Supp. (No. 2) at 24, UN Doc. T/1771 (1976).

¹²² See Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands, 51 UN TCOR Supp. (No. 1) at 14, UN 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, *id.* (No. 2) at 12–13, UN Doc. T/1865 (1984) (Sept. 7, 1983 plebiscite); Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, 53 UN TCOR Supp. (No. 2) at 14, UN Doc. T/1885 (1986) (Feb. 21, 1986 plebiscite).

¹²³ 24 UN TCOR Annex 1 (Agenda Item 3) at 21, UN Doc. T/L.928 (1959).

¹²⁴ GA Res. 2005, 19 UN GAOR Supp. (No. 15) at 7, UN Doc. A/5815 (1965); Report of the United Nations Representatives for the Supervision of the Elections in the Cook Islands, UN Doc. A/5962 and Corr.1 (1965).

¹²⁵ GA Res. 2355, 22 UN GAOR Supp. (No. 16) at 54, UN Doc. A/6716 (1967); United Nations Mission for the Supervision of the Referendum and the Elections in Equatorial Guinea, UN Doc. A/7200/Add.4, Anns. V, VI (1968). Independence was formally achieved on October 12, 1968.

¹²⁶ GA Res. 1752, 17 UN GAOR Supp. (No. 17) at 70, UN Doc. A/5217 (1962); Report of the Secretary-General regarding the Act of Self-determination in West Irian, UN Doc. A/7641 (1969).

¹²⁷ GA Res. 34/10, 34 UN GAOR Supp. (No. 46) at 199, UN Doc. A/34/46 (1979); Report of the United Nations Mission to Observe the Elections in the New Hebrides, UN Doc. A/34/852 (1979).

cases of decolonization were among the most difficult. In these, a UN "honest broker" role proved indispensable. A remarkable example is UNTAG, the UN transitional administration that acted as midwife in the birth of independent Namibia. Under South African administration since Germany's defeat in World War I, the territory was set on the road to independence first by the General Assembly's termination of South Africa's mandate in 1966, followed by a landmark advisory opinion by the International Court of Justice in 1971,¹²⁸ and by a decision of the Security Council in 1978 establishing the parameters for the territory's political development and democratic entitlement.¹²⁹ It took another decade, however, for the political climate in South Africa to change sufficiently to permit international implementation of self-determination through a UN-supervised vote. By that time, tribal and racial cleavages had become potential obstacles to a peaceful transition. Created by the Security Council precisely to prevent a pre-independence civil conflict, UNTAG monitored the final months of South African administration and supervised the elections immediately prior to independence. But UNTAG did not merely monitor a vote. It took responsibility for maintaining peace, overseeing the South African military withdrawal and assisting in the drafting of a new constitution. It helped achieve the rapid repeal of discriminatory legislation, implementation of an amnesty and the return of political refugees; and it was instrumental in keeping the election peaceful and productive. Deploying more than seven thousand military and civilian personnel at a cost of \$373 million, it prepared the November 1989 elections and conducted them so successfully that a risk-filled situation became, instead, a model of political transformation.¹³⁰

The Security Council authorized a similarly complex role for the United Nations in a resolution of April 29, 1991, that established a United Nations Mission for the Referendum in the Western Sahara.¹³¹ Under the plan negotiated by the Secretary-General with the Government of Morocco and the POLISARIO liberation movement, electoral monitoring is to be but one component of a project that gives the Organization predominant responsibility for governance of the territory in the period leading up to, and during, the crucial plebiscite. After almost two decades of war for control of the territory, the United Nations is to ensure security, facilitate large-scale repatriation of refugees, oversee the withdrawal of rival militias, and supervise the delicate process of determining who is eligible to vote.¹³²

Even more remarkable than its monitoring in trust territories and colonies is the recent supervision by the United Nations of crucial votes in independent member states. In the first of these, the 1990 election in Nicaragua, UN monitoring was the culmination of the Secretary-General's far more extensive "good offices" negotiations, in cooperation with the OAS, aimed at ending the Central American regional conflict. This effort led, in August 1987, to the Esquipulas II agreement

¹²⁸ Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), 1971 ICJ REP. 16 (Advisory Opinion of June 21).

¹²⁹ SC Res. 435, 33 UN SCOR (Res. & Dec.) at 13, UN Doc. S/INF/34 (1978). It did not authorize the sending of UNTAG until 1989. SC Res. 628, 44 UN SCOR (Res. & Dec.) at 2, UN Doc. S/INF/45 (1989); SC Res. 629, *id.*

¹³⁰ *Namibia, Independence at Last*, UN CHRON., June 1990, at 4. Namibia formally achieved independence on March 21, 1990. *Id.*

¹³¹ SC Res. 690 (Apr. 29, 1991).

¹³² The Situation Concerning Western Sahara: Report by the Secretary-General, UN Doc. S/22464 (1991).

between five Central American Presidents, which established a blueprint for restoring peace and ensuring legitimacy in Nicaragua. In response to its call for free, internationally monitored elections, on March 3, 1989, the Nicaraguan Foreign Minister requested that the Secretary-General establish an observer mission.¹³³ The General Assembly had already authorized the Secretary-General to assist the Esquipulas process in appropriate ways,¹³⁴ but that resolution had made no mention of election monitoring. Nevertheless, the Secretary-General thought he had a "sufficient legislative basis" to comply with Nicaragua's request.¹³⁵ As a result, he established ONUVEN on July 6, 1989,¹³⁶ an initiative approved by the Security Council three weeks later.¹³⁷

The active, far-reaching role of the UN observers in Nicaragua clearly illustrates how much the ground rules for international election monitoring had evolved in practice from the days of the missions to British Togoland and Ruanda-Urundi. The observers sent by the Secretary-General monitored the activities of the Supreme Electoral Council in drafting and implementing new laws applicable to nominating, campaigning and related activities. They were deployed throughout the electoral campaign and mediated disputes between candidates concerning access to funding, the media and even the streets. They oversaw the rights of political parties to organize and campaign, verified the campaigners' right of access to radio, television and newspapers, and investigated numerous charges of abuses and irregularities that might have undermined the legitimacy of the outcome.¹³⁸ At the final stage, ONUVEN observed the voting and established its own projection of the results.¹³⁹ Commenting on these varied functions, the head of ONUVEN, Elliot Richardson, noted that his group had decided early in its career "that responsibility for verification of the electoral process demanded more than merely recording the process, more than monitoring, and could not stop short of actively seeking to get corrected whatever substantial defects had been discovered."¹⁴⁰

Creating a UN mandate for ONUVEH, the mission established on October 10, 1990, to oversee Haitian elections, was more controversial. The Haitian case—greeted by many but feared by others—was seen as a potential precedent for international monitoring in any independent state. While the same might have been said of ONUVEN, Nicaragua's long civil war could have been seen as sufficiently threatening to the peace to justify, exceptionally, a UN role in validating those national elections. In Haiti's case, however, there was no obvious threat to international peace and the elections did not constitute part of a regional program for internationally supervised postwar reconciliation. In fact, the UN monitoring role there resulted solely from a request in a letter to the Secretary-General from the Haitian Transitional Government.¹⁴¹ In normative terms, Haiti may be understood as the first instance in which the United Nations, acting at the request of

¹³³ See *The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, UN Doc. A/44/642, at 2 (1989) [hereinafter First Nicaragua Report].

¹³⁴ GA Res. 43/24, 43 UN GAOR Supp. (No. 49) at 27, UN Doc. A/43/49 (1988).

¹³⁵ UN Doc. A/44/304, at 2 (1989).

¹³⁶ UN Doc. A/44/375 (1989).

¹³⁷ SC Res. 637, 44 UN SCOR, *supra* note 129, at 19.

¹³⁸ See, e.g., *The Situation in Central America: Threat to International Peace and Security and Peace Initiatives*, UN Doc. A/44/927 (1990) [hereinafter Fifth Nicaragua Report]. See also First Nicaragua Report, *supra* note 133; UN Doc. A/44/834 (1990) (Second Report); UN Doc. A/44/917 (1990) (Third Report); UN Doc. A/44/921 (1990) (Fourth Report).

¹³⁹ Fifth Nicaragua Report, *supra* note 138.

¹⁴⁰ *Id.* at 3.

¹⁴¹ UN Doc. A/44/965 (1990).

a national government, intervened in the electoral process solely to validate the legitimacy of the outcome.

Despite misgivings, ONUVEH secured the imprimatur of the General Assembly.¹⁴² Once again, the monitors were authorized to do far more than oversee the ballot count. Their first report noted the lack of democratic traditions in Haiti and its long history of totalitarianism and violence, much of it government inspired and some of it quite recent.¹⁴³ In preemptive response to this problem, the Assembly had authorized the recruiting of observers "with solid experience in the public order field."¹⁴⁴ As ONUVEH soon discovered, the

first task . . . was to help create a psychological climate conducive to the holding of democratic elections. . . . In this they were assisted by a radio and television campaign conducted by an ONUVEH information team. . . .

. . . [They] inquired into difficulties encountered by the registration and polling stations in registering voters and into irregularities reported to them. They attended political meetings . . . and monitored radio and television broadcasts to make sure that all candidates had equal access to the mass media.¹⁴⁵

Although the Secretary-General, in his final report on ONUVEH, expressed satisfaction with the fairness of the electoral process and the role played by the United Nations, he also noted the formidable obstacles that lay ahead for Haitian democracy and called for "launching a civil education campaign on the importance of the parliament and local authorities."¹⁴⁶ The Secretary-General rightly warned that, if electoral democracy is to be more than a one-time event in the history of a state with little experience in such matters, a far more sustained effort will have to be made under the auspices of the community of nations. This warning suggests the need for a long-term, preemptive assistance program. More, it at least implies the need for a longer-term international effort to create the grass roots elements of democratic political institutions and processes—a particularly challenging form of technical assistance—in nations without that tradition. This need, in turn, suggests an important future role for the nongovernmental, citizen-to-citizen organizations—at present, an underused, but invaluable, component of the UN system.

The military coup that ousted Haiti's elected Government on September 30, 1991, verified the Secretary-General's warning that elections are not necessarily a cure-all. The General Assembly responded less than two weeks later, passing by consensus a resolution that "[s]trongly condemns both the attempted illegal replacement of the constitutional President of Haiti and the use of violence, military coercion and the violation of human rights in that country" and "demands the immediate restoration of the legitimate Government." It also "[a]ppeals to the . . . Members" to "take measures in support" of action by the OAS to isolate Haiti diplomatically and economically.¹⁴⁷ By these provisions, the Assembly made clear its intention henceforth to regard the overthrow of a democratically elected

¹⁴² GA Res. 45/2 (Oct. 12, 1990).

¹⁴³ First Report of the United Nations Observer Group for the Verification of the Elections in Haiti, UN Doc. A/45/870, at 9–10 (1990).

¹⁴⁴ GA Res. 45/2, *supra* note 142, para. 1(d).

¹⁴⁵ United Nations Electoral Assistance to Haiti, UN Doc. DPI/1120 (1991).

¹⁴⁶ Electoral Assistance to Haiti: Note by the Secretary-General, UN Doc. A/45/870/Add.1, at 23 (1991).

¹⁴⁷ GA Res. A/46/L.8/Rev.1, paras. 1, 2, 4 (Oct. 11, 1991) (italics omitted).

regime as an appropriate subject for censure and even for recommending collective measures.¹⁴⁸

The Organization of American States has also engaged in election monitoring. Its members authorized the dispatch of a 435-person commission to Nicaragua in 1990 to observe 70 percent of the polling sites.¹⁴⁹ In addition, the OAS maintained a major presence during the Haitian elections,¹⁵⁰ not only to watch the polls, but also to assist in drafting the electoral law and organizing voter registration.¹⁵¹ Over the past two years, OAS monitors have observed elections in Suriname, El Salvador, Paraguay and Panama as well.¹⁵² As a result, in part, of such collective efforts,¹⁵³ the thirty-four OAS member states—with the lamentable exception of Haiti—all have governments chosen in accordance with the democratic entitlement.¹⁵⁴

Monitoring by governmental and nongovernmental observers also became an important ad hoc part of the post-1989 transition from Communist to democratic regimes in Eastern Europe. These events foreshadowed the textual declarations regarding election standards and procedures in the Copenhagen and Paris documents. Once again, practice preceded the drafting of new principles. The United States sent an official mission to monitor Bulgaria's 1990 election, as did several other CSCE governments.¹⁵⁵ Several members of Congress observed the electoral campaigns in Bulgaria¹⁵⁶ and Czechoslovakia,¹⁵⁷ as did their counterparts from some Western European parliaments.

At the unofficial level, additional election monitoring has taken place in recent years. Emissaries of the Council of Freely Elected Heads of Government of the Carter Center observed the 1990 Nicaraguan and 1991 Zambian elections.¹⁵⁸ The (U.S.) National Democratic Institute for International Affairs has monitored elections in twelve countries since 1986.¹⁵⁹ At least half a dozen teams of foreign observers, including experts from the United States, the Philippines, Japan and the British Commonwealth, monitored parliamentary elections in Bangladesh on February 27, 1991.¹⁶⁰ International observers from Canada, France, Germany and the United States verified the propriety of elections held in Benin in March 1991.¹⁶¹ Perhaps most remarkable was the authorized presence of sixty-five inter-

¹⁴⁸ The "secondary" role of the General Assembly in recommending collective measures by the members has been controversial, but was found to be justified by Article 17, paragraph 2 of the Charter. See Certain expenses of the United Nations (Article 17, paragraph 2, of the Charter), 1962 ICI REP. 151, 163 (Advisory Opinion of July 20).

¹⁴⁹ N.Y. Times, Feb. 23, 1990, at A3, col. 4. ¹⁵⁰ OEA/Ser.G/CP/RES.537, doc. 805 (1990).

¹⁵¹ Report of the Secretary General on the Assistance the Organization Is Giving to the Provisional Government of Haiti in its Electoral Process, OEA/Ser.G/CP/doc.2108/90, at 1.

¹⁵² N.Y. Times, June 9, 1991, §4, at 2, col. 1.

¹⁵³ See, e.g., the OAS condemnation of General Manuel Noriega's usurpation of democratic electoral process in Panama's election of May 7, 1989, *supra* note 89. See also N.Y. Times, May 18, 1989, at A8, col. 3; *id.*, Aug. 16, 1989, at A9, col. 1.

¹⁵⁴ N.Y. Times, June 9, 1991, §4, at 2, col. 1. Cuba is not a member.

¹⁵⁵ N.Y. Times, June 6, 1990, at A10, col. 3.

¹⁵⁶ See Kahn, *Bulgaria's Different Pathway*, Christian Sci. Monitor, June 22, 1990, at 18. Helsinki Watch also sent monitors. N.Y. Times, June 11, 1990, at A1, col. 1.

¹⁵⁷ N.Y. Times, June 10, 1990, §1, at 31, col. 1.

¹⁵⁸ N.Y. Times, Aug. 9, 1989, at A13, col. 1; N.Y. Times, Nov. 1, 1991, at A3, col. 1.

¹⁵⁹ National Democratic Institute for International Affairs, Response to United Nations General Assembly Resolution 45/150: Developing a United Nations Elections Assistance Capability 2 (1991) (memorandum submitted to the Secretary-General).

¹⁶⁰ N.Y. Times, Feb. 28, 1991, at A5, col. 4. ¹⁶¹ N.Y. Times, Mar. 12, 1991, at A11, col. 1.

national observers at the referendum on independence conducted in Latvia on March 3, 1991.¹⁶²

Elliot Richardson, as head of the UN observers in Nicaragua, predicted that "the United Nations is likely in the future to be called upon for similar assignments in other countries."¹⁶³ "The results of such elections," as Professor Reisman recently observed, "serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government."¹⁶⁴ Appropriately, President George Bush, in addressing the forty-fifth General Assembly, proposed the establishment of a standing UN electoral commission to assist nations, at their request, in guaranteeing that their elections will be free and fair.¹⁶⁵ A year later, as noted, the Assembly implemented that proposal.

Requesting international electoral monitoring thus will likely become an increasingly routine part of national practice, particularly useful whenever the democratic legitimacy of a regime is in question. Of course, there are still hard-core holdouts, such as the totalitarian governments of Myanmar, North Korea and China. Their number, however, is diminishing. The Government formed in Ethiopia in May 1991, after the end of the civil war, has undertaken to conduct "free, democratic and internationally monitored elections" within a year.¹⁶⁶ The insurgents who took power in Eritrea have committed themselves not to secede from Ethiopia until after a UN-monitored plebiscite, to be held within two years.¹⁶⁷

A recent study by the UN Secretariat, noting the rising demand for monitoring, made a start at setting out the juridical, institutional, administrative and fiscal parameters of an expanded UN electoral monitoring service.¹⁶⁸ The OAS was authorized to prepare a similar study.¹⁶⁹ These begin the conceptually difficult task of sifting through the increasing body of practice to clarify the meaning of the normative concept signaled by the phrase "democratic entitlement." These data make it strikingly apparent that international election monitoring cannot be limited to guaranteeing citizens' right to vote, but rather must also ensure a far broader panoply of democratic rights of the sort enunciated in the Civil and Political Rights Covenant and the Charter of Paris. In case-by-case implementation and the distillation of that experience, greater determinacy will be achieved.

A study that seeks to connect the dots of practice with lines of enunciated principle must also look at the several instances when election monitoring was denied. For example, in 1990 the Secretary-General refused to monitor the Romanian elections on the ground that his participation had not been authorized by the General Assembly or Security Council. He added, perhaps even more persuasively, that he had not been invited to participate early enough in establishing the rules and methods to be used in conducting the election campaign.¹⁷⁰ In

¹⁶² Fin. Times (London), Mar. 4, 1991, at 14.

¹⁶³ Fifth Nicaragua Report, *supra* note 138, at 3.

¹⁶⁴ Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AJIL 866, 868-69 (1990).

¹⁶⁵ N.Y. Times, Oct. 2, 1990, at A12, col. 1. ¹⁶⁶ N.Y. Times, May 29, 1991, at A6, col. 5.

¹⁶⁷ N.Y. Times, June 22, 1991, at 3, col. 1.

¹⁶⁸ Principles for United Nations Observance of Elections, Confidential Memorandum (June 6, 1989) (in the possession of the author).

¹⁶⁹ OEA/Ser.G/CP/RES.421, doc. 606 (1985).

¹⁷⁰ See U.N. Says It Won't Monitor Romanian Elections (NEXIS, CURRNT Library, Reuters, Jan. 25, 1990).

1991 the Office of the Secretary-General rejected requests for election monitoring made by Lesotho and Zambia, again on the ground that he felt he was unauthorized, in the absence of special circumstances, to monitor elections in sovereign states. The political organs of the United Nations may have been too cautious, so far, in giving the Secretary-General authority to respond favorably to a bona fide request by a member. On the other hand, the office of the Secretary-General may have been too cautious in denying requests for monitoring without even presenting them for approval to the Security Council or the General Assembly.

There is reason, nonetheless, for some caution. Commentators have rightly warned that the bare monitoring of the act of voting may place observers in the position of seeming to legitimate an electoral victory that was not fairly achieved. This reservation need not implicate fraud or repression but, more likely, concerns the effect on free choice of the normal operation of entrenched social and political institutions. In the words of a recent report to the General Assembly by the Secretary-General:

[R]equests should pertain primarily to situations with a clear international dimension; the monitoring of an election or referendum should cover the entire electoral process in order to secure conditions of fairness and impartiality; . . . there must be broad public support in the State for the United Nations assuming such a role; and, finally, there should be approval by the competent organ of the United Nations.¹⁷¹

In future, in keeping with Assembly Resolution 46/137 of December 17, 1991, all requests for monitoring will be considered by the Council or Assembly, which will have the task of evolving standards for accepting or refusing.

While no observation process can reach back far enough into a nation's history to extirpate the impacted roots of social and cultural inequalities, observers can do—and already have done—more than simply watch tellers count ballots. To make citizens' rights to free and open elections a legitimate entitlement, its parameters need to be made clear and specific. To that end, a robust repertory of practice, a canon of enunciated principles and an institutional framework for implementation are developing that are capable of giving the entitlement increasing determinacy.

As the entitlement becomes an accepted norm, a drawn-out debate in international law will draw to a close. Do governments validate international law or does international law validate governments? It is becoming apparent that each legitimates the other.

The capacity of the international system to validate governments in this fashion is rapidly being accepted as an appropriate role of the United Nations, the regional systems and, supplementarily, the NGOs. A recent study conducted by the Netherlands Minister of Foreign Affairs gives expression to the new normative expectation. It asked: what can reasonably be expected of a European state seeking to join the European Communities and the Council of Europe? The study finds that applicant states "must be plural democracies; they must regularly hold free elections by secret ballot; they must respect the rule of law; [and] they must have signed the European Convention on Human Rights and Fundamental Free-

¹⁷¹ Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, Report of the Secretary-General, UN Doc. A/46/609, para. 79, at 25 (1991). See also Gelb, *The Free Elections Trap*, N.Y. Times, May 29, 1991, at A23, col. 1.

doms.”¹⁷² Such a test for validation of governance and entry into a society of nations would have been unthinkable even a decade ago; it is considered unexceptionable in the new Europe. Some comparable rule in future should, and undoubtedly will, become the standard for participation in the multinational institutions of the global community.

As a step in this direction, the UN General Assembly might adopt and adapt the guidelines in the CSCE’s Copenhagen Document and Paris Charter and declare these applicable to Article 25 of the Civil and Political Covenant. Such a resolution, among other things, would guide and assist the Human Rights Committee in more efficaciously carrying out its monitoring of compliance by the large majority of states parties to that global instrument. It would also help to make more determinate the content of the evolving customary law applicable to national political practices. Bringing the evolution of UN practice approximately into line with that of the CSCE would endow the emerging democratic entitlement with greater specificity and coherence.

VI. COHERENCE OF THE DEMOCRATIC ENTITLEMENT

Pedigree and determinacy, as we have seen, give a rule the pull to compliance that we have identified as evidence of its perceived legitimacy. So also coherence. Coherence is that quality of a rule which permits it to be seen holistically: that is, as part of a rule context in which the parts gather compliance pull from the purpose and meaning of a larger whole. A rule that can plausibly lay claim to being part of such a skein exercises a greater compliance pull than one that cannot.¹⁷³

Another way of understanding coherence is to examine the extent to which the compliance pull of a rule, invoked in one case, is augmented by evidence that it has connections that lead beyond the specifics of that dispute. Such augmentation may appear in several forms. First, it may become apparent that the rule being tested is so intimately connected with a larger regulatory scheme—for example, as one clause of an entire treaty—as to bring into play the weight and purpose of the larger whole. Second, the rule being tested may evince an important principle—English common law abounds in such “maxims”: *nemo dat quod non habet*, for example—on which many distinct rules depend. Third, the issues in one instance may resemble those in others, creating a form of imperative to treat likes alike by applying the same rule.

How coherent, thus understood, is the normative canon of the democratic entitlement? Our examination of global and regional texts and processes will reveal that the rules pertaining to self-determination, freedom of expression and the right to participate in free and open elections are closely interwoven strands of a single fabric. These three generations of democratic entitlement, reinforced by regional systems, not only share many of the same or similar norms, but also have developed common or comparable kinds of institutions, procedures and customs. Each thread reinforces, and is reinforced by, the weave of the cloth.

When it comes to shared underlying principles, however, the connections are less straightforward. The democratic entitlement, after all, rests on the still-radi-

¹⁷² Letter from the Minister for Foreign Affairs (H. van den Broek) to the Advisory Committee on Human Rights and Foreign Policy (June 20, 1990), reprinted in NETHERLANDS ADVISORY COMMITTEE ON HUMAN RIGHTS AND FOREIGN POLICY, DEMOCRACY AND HUMAN RIGHTS IN EASTERN EUROPE 30–31 (1990).

¹⁷³ See T. FRANCK, *supra* note 12, at 150–82.

cal principle that the community of states is empowered to compose and apply codes governing the comportment of governments toward their own citizens. No doubt, some such assumption long ago justified "enlightened" colonialism; its relic is still on view in Article 38(1)(c) of the International Court's Statute, which authorizes the judges to consult "general principles of law recognized by *civilized nations*" (italics mine). The term "civilized" may still be tainted by association with Cecil Rhodes, but the notion that governments can be graded for deportment is not. The Charter limits UN membership to states that are "peace-loving" (Article 4(1)) and enjoins governments to respect the "equal rights and self-determination of [their own] peoples" (Article 1(2)). The Genocide¹⁷⁴ and Racism Conventions¹⁷⁵ certainly do qualify as rules of deportment imposed on all states by the community of nations. Having become customary as well as treaty law—if not also rules of *jus cogens*—these Conventions may be said to exemplify the principle that states collectively have the authority to determine minimum standards of conduct from which none may long deviate without eventually endangering their membership in the club.

Nevertheless, the notion that the community can impose such standards, on which the democratic entitlement is based, has always been challenged by reference to another, embodied in Article 2(7) of the Charter. It provides, as formal recognition of the centuries-old principle of state sovereignty, that the Organization shall not interfere in matters "essentially within the domestic jurisdiction of states." While, as noted above, this conflict may have been resolved within the regional context of the CSCE with the recognition by the Copenhagen Document and the Paris Charter of the paramountcy of the democratic entitlement, the clear-cut supremacy of that entitlement is not yet apparent in the global context. Of course, state sovereignty, by operation of technological advances as much as of heightened humanistic sensitivity, is not what it used to be. Even those who defend the continued vitality of the principle would probably concede that genocide does not fall "essentially" within the ambit of protected "domestic" government activity. Nor, certainly, do egregious racism and, at least since the 1960s, denials of self-determination. Since the coming into force of the Civil and Political Rights Covenant, aggravated denials of the right to free speech and to free and open elections also have become generally acknowledged exceptions to the principle of noninterference in states' domestic jurisdiction. Nevertheless, a residual conflict of principles still troubles many states.

The problem is not so apparent in general theory as in application. To proclaim a general right to free elections is less intrusive than monitoring any particular election in an independent state. Effective monitoring is even more intrusive than the mere observation of balloting. And collective action to compel states to adhere to a standard is the most intrusive of all. Thus, the conflict of principles needs to be recognized, made explicit, and reconciled to the general satisfaction of the large preponderance of states before the democratic entitlement's global legitimacy is demonstrated by real, as opposed to formulaic, coherence. That will require action to meet the practical concerns of states that still regard the nonintervention principle as of overriding importance to their national well-being.

¹⁷⁴ Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 UNTS 277 (entered into force Jan. 12, 1951).

¹⁷⁵ International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, 660 UNTS 195, *reprinted in* 5 ILM 352 (1966) (entered into force Jan. 4, 1969) [*hereinafter Racial Convention*].

Also unclear is the extent to which the various parts of the democratic entitlement can yet claim the legitimacy that derives from "treating like cases alike." Are virtually all states, for example, ready to have their elections monitored by a credible global process? This and other issues need to be examined in detail before the democratic entitlement can be said to have achieved universal coherence.

Significance of the Human Rights Connection

A bright line links the three components of the democratic entitlement. The rules, and the processes for realizing self-determination, freedom of expression and electoral rights, have much in common and evidently aim at achieving a coherent purpose: creating the opportunity for all persons to assume responsibility for shaping the kind of civil society in which they live and work. There is a large normative canon for promoting that objective: the UN Charter, the Universal Declaration of Human Rights,¹⁷⁶ the International Covenant on Civil and Political Rights,¹⁷⁷ the International Convention on the Elimination of All Forms of Racial Discrimination,¹⁷⁸ the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹⁷⁹ the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief,¹⁸⁰ and the Convention on the Elimination of All Forms of Discrimination against Women.¹⁸¹ These universally based rights are supplemented by regional instruments such as the European Convention for the Protection of Human Rights and Fundamental Freedoms,¹⁸² the American Convention on Human Rights,¹⁸³ the African Charter on Human and Peoples' Rights,¹⁸⁴ the Copenhagen Document¹⁸⁵ and the Paris Charter.¹⁸⁶

Each of these instruments recognizes related specific entitlements as accruing to individual citizens. These constitute internationally mandated restraints on governments. As we have seen, they embody rights of free and equal participation in governance, a cluster within which electoral rights are a consistent and probably necessary segment. The result is a net of participatory entitlements. The various texts speak of similar goals and deploy, for the most part, a similar range of processes for monitoring compliance, several of which have already become common usage in connection with the democratic entitlement. One can convincingly argue that states which deny their citizens the right to free and open elections are violating a rule that is fast becoming an integral part of the elaborately woven human rights fabric. Thus, the democratic entitlement has acquired a degree of legitimacy by its association with a far broader panoply of laws pertaining to the rights of persons vis-à-vis their governments.

¹⁷⁶ GA Res. 217A (III), *supra* note 60.

¹⁷⁷ ICCPR, *supra* note 41.

¹⁷⁸ Racial Convention, *supra* note 175.

¹⁷⁹ GA Res. 3068, 28 UN GAOR Supp. (No. 30) at 75, UN Doc. A/9030 (1973), reprinted in 13 ILM 56 (1974) (entered into force July 18, 1976) [hereinafter Apartheid Convention].

¹⁸⁰ GA Res. 36/55, 36 UN GAOR Supp. (No. 51) at 171, UN Doc. A/36/51 (1981), reprinted in 21 ILM 205 (1982).

¹⁸¹ GA Res. 34/180, 34 UN GAOR Supp. (No. 46) at 193, UN Doc. A/34/46 (1979), reprinted in 19 ILM 33 (1980) (entered into force Sept. 3, 1981).

¹⁸² European Convention, *supra* note 72.

¹⁸³ American Convention, *supra* note 77.

¹⁸⁴ African Charter on Human and Peoples' Rights, adopted June 27, 1981, OAU Doc. CAB/LEG/67/3/Rev.5, reprinted in 21 ILM 58 (1982) [hereinafter Banjul Charter].

¹⁸⁵ Copenhagen Document, *supra* note 98.

¹⁸⁶ Paris Charter, *supra* note 105.

Nevertheless, while we may well be moving in this direction, we may not have arrived. When, in November 1989, the UN Secretary-General was asked by the Nicaraguan Sandinista Government to monitor national elections, he felt compelled to link his acceptance not to the human rights framework but to older, perhaps better-established, norms of the international system. Indeed, he went out of his way to reassure the General Assembly that, while the United Nations had frequently supervised elections in the context of decolonization, "it has not been the practice to do so in respect of independent States." He even noted with pride that, "on a number of occasions over the years, we have declined invitations from Member States to that effect." Nevertheless, the Nicaraguan case could be distinguished because the request was not from "a single Member State, but one which has the support of the Presidents of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua," and thus "clearly belongs in the context of the Central American peace efforts."¹⁸⁷ The same effort to link the democratic entitlement and peacemaking is evident in the 1990 agreement negotiated by the Secretary-General between the Government of El Salvador and the insurgent Frente Farabundo Martí para la Liberación Nacional (FMLN).¹⁸⁸ It links the dispatch of UN monitors (ONUSAL) to observe human rights and the process leading up to Salvadoran elections with their larger role in ending the civil war.¹⁸⁹ Clearly, the content and scope of the democratic entitlement, in practice, will be shaped by whether it is connected to, and legitimized by, the relatively narrow *peacemaking*, or the much more expansive *human rights*, canon.

Coherence of Underlying Principles

So far, the Secretary-General's choice of the peacemaking linkage strategy has avoided a head-on conflict between proponents and opponents of election monitoring as a general normative democratic entitlement. Sooner or later, however, an unresolved conflict of deep-seated principles—the emerging right to free and fair elections and nonintervention in domestic affairs—is likely to generate a clash of political wills in the global and regional communities unless these dissonant principles are reconciled.

The very idea of general international monitoring of elections in sovereign states still arouses the most passionate ire, not only of the increasingly isolated residue of totalitarian regimes, but also of nations with long memories of humiliating interventions by states bent on "civilizing" missions. While they will accept occasional monitoring of elections to end a civil war or regional conflict, they consider it a necessary exception, not a normal manifestation of a universal democratic entitlement.

¹⁸⁷ UN Doc. A/44/210, at 2 (1989).

¹⁸⁸ Central America: Efforts Towards Peace, *supra* note 71.

¹⁸⁹ ONUSAL, the United Nations Observer Mission in El Salvador, will monitor the "release of individuals who have been imprisoned for political reasons . . . , the right of all persons to associate freely with others for ideological . . . political . . . or other purposes . . . , freedom of expression and of the press" and "freedom of movement." Agreement on Human Rights, Annex to Note verbale dated 14 August 1990 from the Charge d'affaires of the Permanent Mission of El Salvador to the United Nations addressed to the Secretary-General, UN Doc. A/44/971-S/21541, ann. at 4-5 (1990). For the March 1991 elections in El Salvador, however, the United Nations declined to mount an observer operation, dedicating its strained resources to other aspects of the peacemaking and monitoring process while letting the OAS take the lead, supported by nongovernmental organizations, in observing those elections. National Democratic Institute for International Affairs, *supra* note 159, at 14.

Conflict was clearly foreshadowed in 1990 when the General Assembly weighed the proposal to establish ONUVEH, the aforementioned observer group to monitor Haiti's elections. Since linkage between election monitoring and peace was much harder to demonstrate in the absence of armed hostilities, the creation of ONUVEH encountered significant opposition, notably from China, Cuba and Colombia.¹⁹⁰ The long specter of U.S. hemispheric interventions was invoked in the Assembly's corridors. Several months elapsed before suspicions could be assuaged by diplomatic assurances that the Haitian case, too, would set no general precedent. Cuba, in the debate prior to the vote authorizing ONUVEH, spoke emphatically against "any attempt to use this United Nations resolution or activity as a pretext for interfering in the internal affairs of Haiti"¹⁹¹ and stressed that elections "can never be regarded as affecting international peace and security."¹⁹² Mexico also went on record as denying any precedential value to the authorization of ONUVEH.¹⁹³ These states contended that UN election monitoring in an independent nation is unlawful *per se*, in the absence of exceptional peacemaking exigencies.

The International Court of Justice rebuffed this view indirectly in its 1986 *Nicaragua* decision. The majority stated, in connection with commitments binding a nation to electoral standards, that it could not

discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field. This is a conceivable situation for a State which is bound by institutional links to a confederation of States, or indeed to an international organization.¹⁹⁴

There are thus no legal impediments to institutionalizing voluntary international election monitoring as one way to give effect to the emerging right of all peoples to free and open electoral democracy, but this is not to say that states as yet have a *duty* to submit their elections to international validation. Although the CSCE, in Europe, seems poised to pioneer a generalized duty to be monitored, even it has not made the duty mandatory for all. In the international community, while there may be a duty under Article 25 of the Civil and Political Rights Covenant and its regional and customary law analogues to permit free and open elections and review of national compliance by the Human Rights Committee, there is as yet no obligation to permit actual election monitoring by international or regional organizations. Indeed, one should expect resistance to any effort to transform an election-monitoring option, exercisable at the discretion of each government, into an obligation owed by each government to its own people and to the other states of the global community. Admittedly, however, a "rule" that only applies self-selectively has far less legitimacy than one of general application.

¹⁹⁰ The Security Council failed to reach consensus on the issue, with China threatening to veto. In the General Assembly, Cuba and Colombia argued that election monitoring in an independent state, unrelated to a threat to the peace, constituted a violation of Article 2(7) of the Charter. See UN Doc. A/45/PV.29 (1990).

¹⁹¹ *Id.* at 62.

¹⁹² *Id.* at 59–60.

¹⁹³ *Id.* at 64–65.

¹⁹⁴ Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 ICJ REP. 14, 131 (Judgment of June 27) [hereinafter *Nicaragua* opinion].

This deficiency was demonstrated by the General Assembly's incoherent tiptoeing around the democratic entitlement at its session in the fall of 1990. The members passed two seemingly incongruent resolutions on monitoring, which reflect the concern of Third World states as they contemplate the seemingly inexorable evolution of an entitlement to democracy, including free elections and resultant international supervision. We have already noted the first of these resolutions, in which the democratic entitlement was restated by the Assembly and election monitoring commended as one way to ensure its implementation.¹⁹⁵ Almost in the same breath, however—and over the opposition of only twenty-nine states, mostly European, but also including Australia, Canada, Israel, New Zealand, Turkey and the United States—the second resolution affirmed “that it is the concern solely of peoples [of each state] to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitutional and national legislation”;¹⁹⁶ and it urged all states “to respect the principle of non-interference in the internal affairs of States.”¹⁹⁷ The vast preponderance of states voting for this resolution did not do so out of concern to protect dictatorships. Rather, they were worried about the underlying principle.

When underlying principles are coherent, the rules manifesting them assume increased legitimacy. When rules exemplify principles in collision, those rules are perceived as of low legitimacy. The principle underlying a universal democratic entitlement is that the participatory rights of persons in shaping their civil society may not be abridged arbitrarily by governments. This principle has powered the rights of self-determination and freedom of expression and, now, energizes the move to provide international protection for electoral rights.

There was a time when international efforts to implement the right of self-determination were vigorously opposed as trenching upon the right of governments, under Article 2(7) of the UN Charter, to administer their colonies without outside interference. That opposition gradually abated, as the principle of self-determination gained in determinacy. Efforts to monitor compliance with the right to freedom of expression have encountered similar expressions of outraged *amour-propre* by states called to task for arbitrarily silencing their own citizens. It is not surprising that passionate resentments should also arise in some quarters at the prospect of seeing the international community insinuate itself into the intimate political process by which governments are empowered by the citizenry.

The opponents are mostly motivated by fear that monitoring will be used to reimpose a form of neocolonialism under the banner of establishing democracy. That fear must be addressed, but it must also be put in perspective. History has warned, repeatedly, that the natural right of all people to liberty and democracy is too precious, and too vulnerable, to be entrusted entirely to those who govern. John Stuart Mill once observed that the moral fiber of a nation is weakened if the intervention of outsiders spares its people the trouble of liberating themselves.¹⁹⁸ In view of the technological edge dictators nowadays enjoy over their people, this proposition is no longer wholly defensible. The opposite case was stated by Uganda's President Godfrey L. Binaisa, who, after the overthrow of Idi Amin's

¹⁹⁵ See *supra* text at and notes 82–86.

¹⁹⁶ GA Res. 45/151, para. 2 (Dec. 18, 1990).

¹⁹⁷ *Id.*, para. 4.

¹⁹⁸ J. S. MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL AND HISTORICAL 238–63 (1873).

bloody junta, went before the General Assembly to chide its delegates for their indifference to his people's plight. "In the light of the clear commitment set out in . . . provisions of the Charter," he said, "our people naturally looked to the United Nations for solidarity and support in their struggle against the Fascist dictatorship. For eight years they cried out in the wilderness for help; unfortunately, their cries seemed to have fallen on deaf ears." Acerbicably, Binaisa observed that, "somehow, it is thought to be in bad taste or contrary to diplomatic etiquette to raise matters of violations of human rights by Member States within the forums of the United Nations."¹⁹⁹

Where dictators can only be confronted effectively with the active support of the international community, inhibitions about interference in the "domestic jurisdiction" of states seem less compelling than they used to be. "We are arriving at the conclusion," then Soviet Foreign Minister Boris D. Pankin observed recently, "that national guarantees [of human rights] are not sufficient. So we have to review the principle of noninterference in affairs of other governments."²⁰⁰ To this end, the Declaration of Human Rights and Freedoms, adopted by the Soviet Congress of People's Deputies on September 5, 1991, after the coup, states that "[e]very person possesses natural, inalienable and inviolable rights and freedoms. They are sealed in laws that must correspond to the universal declaration of human rights, the international covenants on human rights and other international norms and this declaration."²⁰¹ The OAS Foreign Ministers' 1991 resolution to the same effect has already been noted,²⁰² as have the CSCE heads' Paris Charter²⁰³ and Moscow Document.²⁰⁴

It thus appears that support is increasing even—perhaps *particularly*—among former totalitarian states for the proposition that the democratic entitlement, enhanced by linkage with other basic human rights and the accompanying international monitoring of compliance, has trumped the principle of noninterference. Even the 1991 resolution of the General Assembly warning about outside "interference" in the electoral process²⁰⁵ seemed to acknowledge this development, for it added an otherwise incongruous caveat,

that only the total eradication of *apartheid* and the establishment of a non-racial, democratic society based on majority rule, through the full and free exercise of adult suffrage by all the people in a united and non-fragmented South Africa, can lead to a just and lasting solution to the explosive situation in South Africa.²⁰⁶

Surely, this assertion demonstrates not the supremacy of nonintervention but, rather, its opposite: that undemocratic electoral processes imposed upon a people by their government are now almost universally regarded as counternormative and not beyond the purview of the international community. In 1991 the UN Human Rights Commission further affirmed this view by voting unanimously to condemn the military Government of Myanmar for having failed to carry out its promise to return that country to democratic, civilian rule.²⁰⁷ The junta's refusal to allow the elected legislature to meet and its arrest of many parliamentary

¹⁹⁹ UN Doc. A/34/PV.14, at 4–6 (1979).

²⁰⁰ N.Y. Times, Sept. 10, 1991, at A13, col. 5.

²⁰¹ N.Y. Times, Sept. 7, 1991, at 5, col. 3.

²⁰² Resolution on Representative Democracy, *supra* note 90.

²⁰³ Paris Charter, *supra* note 105.

²⁰⁴ Moscow Document, *supra* note 116.

²⁰⁵ See *supra* text at and notes 196–97.

²⁰⁶ GA Res. 45/151, *supra* note 196, para. 7.

²⁰⁷ N.Y. Times, Mar. 7, 1991, at A14, col. 1.

leaders were perceived as an international—not merely a domestic—issue, warranting a response from the community of nations.

Nevertheless, steps should be taken to meet the fear of some smaller states that election monitoring will lead to more Panama-style unilateral military interventions by the powerful, perhaps even for reasons less convincing than those which provoked the 1989 U.S. military strike against the Noriega dictatorship. That a new rule might authorize actions to enforce democracy still conjures up just such chilling images to weaker states, which see themselves as the potential objects of enforcement of dubious democratic norms under circumstances of doubtful probity. Of course, to give coherence to a general norm requiring free and open elections does not necessarily implicate military enforcement action.

If there is to be monitoring, some consequences could reasonably be expected to ensue for those who “fail the test.” And if monitoring evolves into a systemwide obligation, perhaps some consequences will attach even to a refusal to be monitored. As Judge Buergenthal has observed about the effect of the Copenhagen Document and the Paris Charter, there is bound to evolve a “linkage of human rights to other questions (trade, security, environment, etc.). . . . Linkage permits the participating States . . . to condition their bilateral and multilateral relations in general upon progress in the human dimension sphere.”²⁰⁸ While perhaps true, today, only regarding the CSCE, this effect is likely to point the way toward the enforcement of the democratic entitlement in the global community, as well.

This prospect evokes hope, but also justified fears that must be abated. The coherence of the democratic entitlement ultimately will depend on whether most states, most of the time, freely agree to be monitored: whether, in short, the process is perceived as legitimate. To achieve this normative coherence, monitoring will have to be uncoupled, in the clearest fashion, from a long history of unilateral enforcement of a tainted, colonialist “civilizing” mission. If the duty to be monitored is to develop as customary law, it must be reconciled in the minds of governments with their residual sovereignty. This requires that all states unambiguously renounce the use of unilateral, or even regional, *military* force to compel compliance with the democratic entitlement in the absence of prior Security Council authorization under chapter VII of the Charter; such authorization, except for *regional* action under Article 53, would require a finding that the violation had risen to the level of a threat to the peace.²⁰⁹ Such a pledge would merely reiterate the existing normative structure of the Charter, Articles 2(4), 51 and 53 in particular. Yet this reiteration is necessary, in view of the history of unilateral interventionism which has undermined that self-denying ordinance. Specifically, states must acknowledge that the evolution of a democratic entitlement cannot entitle a state or group of states to enforce the right by military action under the pretext of invoking Articles 51 or 53. *Ça va sans dire* is no answer to those demanding that assurance in the light of recent Soviet and U.S.-led unilateral or pseudoregional actions alleged to promote “democracy” in neighboring states and justified as “collective self-defense.”

²⁰⁸ Buergenthal, *supra* note 109, at 43.

²⁰⁹ The General Assembly, in the case of the 1991 Haitian military coup, appears to have concluded that it is empowered to recommend action of an economic and diplomatic kind to its members. In approving regional military action under Article 53, the Security Council appears not to be limited to cases in which international peace has been threatened or breached.

A specific renunciation of unilateralism would obviously not obviate every possibility that some negative consequences might ensue for governments unwilling to be monitored or to hold free elections; nor should it. The international community long has asserted, in the case of South Africa, a right of all states to take hortatory, economic and—in extreme cases—even military action to enforce aspects of the democratic entitlement,²¹⁰ but only when duly authorized by the United Nations in accordance with its Charter. Article 2(7), in barring UN intervention “in matters which are essentially within the domestic jurisdiction of any state,” stipulates that “this principle shall not prejudice the application of enforcement measures under Chapter VII.” Rhodesia’s Unilateral Declaration of Independence provoked a UN resolution permitting Britain to use military force.²¹¹ It is no longer arguable that the United Nations cannot exert pressure against governments that oppress their own peoples by egregious racism, denials of self-determination and suppression of freedom of expression. That litany is being augmented by new sins: refusals to permit demonstrably free elections or to implement their results. However, if the sin is committed, the international community may only invoke collective enforcement measures such as sanctions, blockade or military intervention in limited circumstances—as when the Security Council finds that a threat or breach of the peace has occurred—or if it collectively determines that it is not engaging in enforcement *against* a member but is acting at the request of a legitimate government against a usurper. These prerequisite determinations, however, must be made by the appropriate collective machinery of the community and not by individual members.

This procedure is both legally required and politically essential. To obtain the general consent necessary to render the denial of democracy a cognizable violation of an international community standard, it must be understood that whatever countermeasures are taken must first be authorized collectively by the appropriate UN institutions. Collective action—so the tremulous must understand and the powerful aver—is not a substitute for, but the opposite of, unilateral enforcement. In this respect, as in many others, the principal enemy of the evolution of a new rule is fear of its vigilante enforcement.²¹² For that reason, the entitlement to democracy can only be expected to flourish if it is coupled with a reiterated prohibition on such unilateral initiatives. Only then will the rule enjoy the degree of principled coherence necessary to the widespread perception of its legitimacy.

Treating Like Cases Alike

If voluntary acceptance of monitoring becomes the general practice of states, it will gradually evolve from an optional to a customary and, ultimately, mandatory means of satisfying the democratic entitlement. This transformation, surely, is to be encouraged, but it is unlikely to occur as a consequence of a global treaty. Too many states, especially smaller ones, still fear that it will erode the rule of nonintervention. It may occur, however, through gradual, incremental steps that make

²¹⁰ See Apartheid Convention, *supra* note 179. See also R. BISSELL, APARTHEID AND INTERNATIONAL ORGANIZATIONS 156–59 (1977).

²¹¹ SC Res. 253, 23 UN SCOR (Res. & Dec.) at 5, UN Doc. S/INF/23/Rev.1 (1968).

²¹² See Arend, *International Law and the Recourse to Force: A Shift in Paradigms*, 27 STAN. J. INT’L L. 1, 40–45 (1991).

voluntary submission an attractive option for most governments.²¹³ If the United Nations' concern to restore democracy in Haiti is grounded, in part, on the ousted government's having been legitimated by a monitored election, that constitutes a palpable inducement to governments to take up the option. When that option is generally taken, the international monitoring of an election will cease to be a special case and will have become normative, a rule that treats like cases alike.

We have already noted that the right of self-determination, as first enunciated and practiced at Versailles, lacked coherence because it applied only to the European territories of the former German, Austro-Hungarian and Turkish Empires. After the Second World War, the UN Charter, in Article 1(2), made "the principle of equal rights and self-determination of peoples" universally applicable. Nevertheless, for forty years thereafter, the right of self-determination was implemented only selectively, primarily in colonies and trusteeship territories. There may have been a reason it was applied to India but not to Hungary or Czechoslovakia, but, if so, no persuasive, principled distinction was advanced.²¹⁴

Undoubtedly, this incoherence undermined its legitimacy. More recently, we have seen the right at last becoming—in theory and increasingly in practice—one of universal application as it merges with newer aspects of the democratic entitlement. Thus, we may conclude that self-determination is evolving from incoherence to coherence, which reinforces its legitimacy.

The same may be said of the right of free expression. We have already observed the work of the Human Rights Committee in implementing Article 19 of the Civil and Political Covenant and protecting citizens' expressive rights. In giving effect to the general reporting requirement, the Committee has begun to impart principled coherence to the textual provisions, in the sense of filling in the interstices and fitting the parts to the purposes of the whole.²¹⁵ With the end of the Cold War, the remnants of the "double standard" in applying expressive rights through international monitoring institutions will mostly wither away.

Coherence is being aided by parallel regional initiatives. These tend to monitor and implement the rules equally, regardless of "whose ox is gored." Notable in this respect is the aforementioned work of the European Court of Human Rights and the Inter-American Court of Human Rights, as well as the as-yet inchoate potential of the new African Human Rights Commission.²¹⁶ Equal application of the expressive entitlement is reinforced by the textual convergence regarding

²¹³ While it is true that General Assembly resolutions, state practice or even a subsequent treaty cannot vitiate a specific rule of the UN Charter, all three can affect a Charter rule's interpretation. See Czaplinski & Danilenko, *Conflicts of Norms in International Law*, 21 NETH. Y.B. INT'L L. 3, 35–41 (1990).

²¹⁴ See T. FRANCK, *NATION AGAINST NATION* 224–45 (1985).

²¹⁵ D. McGOLDRICK, *supra* note 43, at 459–79. Under the procedure for review of country reports, the Committee has sought to

examine, comment, and request clarification in respect of the different aspects of freedom of expression revealed in the State reports. This has involved, for example, such matters as general and specific banning or censorship, registration or notification requirements, governmental control and direction in its various forms, limitations applicable to particular groups, for example, armed forces, civil servants, prior restraints or subsequent penal responsibility for publications, rights of reply or correction, the applicable limitations embodied in the criminal law or penal codes for offences such as blasphemy or blasphemous libel, sedition, subversive propaganda, anti-State or anti-ideological propaganda, and the effective remedies demanded by . . . an individual who claims that his rights under article 19 have been violated.

Id. at 461.

²¹⁶ The Commission is established by part II of the Banjul Charter, *supra* note 184.

freedom of expression of the European Convention on Human Rights,²¹⁷ the American Convention on Human Rights,²¹⁸ and the African Charter on Human and Peoples' Rights.²¹⁹ The too-long failure of the United States to ratify the Civil and Political Rights Covenant and the American Convention nevertheless has detracted from this convergence and is only in part mitigated by the fact that the U.S. Constitution, as implemented by the courts and Congress, puts the United States essentially, if not wholly, in compliance with the international and regional standards.

So far, less uniformity of application, and thus less global coherence, can be ascribed to the emerging rule on citizens' right to participate in free and open elections. As we have observed, on-site monitoring remains voluntary and exceptional. If it is to become a more general obligation, likes must be treated alike, which means that the new majority of democratic states must submit to it. They, who have the least to fear and the most to gain, should want to participate in universalizing the practice, if only to help legitimize it. Few states are likely to volunteer as long as participation in international monitoring is tantamount to a government's admission that it does not have credibility with its own people. To induce a pull toward compliance in deviant and recalcitrant regimes—those that most need it—on-site monitoring must also be practiced by the states that least need it. It must become an unremarkable universal habit.

VII. ADHERENCE AND THE DEMOCRATIC ENTITLEMENT

Adherence refers to the vertical connection between a specific rule of obligation and other "higher" principles that define the objectives of the rule system or set out its normative standards. A particular rule ("cross on the green, stop on the red") is more likely to pull toward voluntary compliance if it is seen to be within the framework of a community's normative hierarchy than if it is a mere ad hoc arrangement.²²⁰ The democratic entitlement also is more likely to be perceived as a legitimate rule if it can be seen as a necessary part of a normative hierarchy. As it happens, the right to democracy can readily be shown to be an important subsidiary of the community's most important norm: the right to peace.

With the exception of the principle *pacta sunt servanda*, no principle of international law has been more firmly established—first by the Kellogg-Briand Pact and, particularly since 1945, by the UN Charter—than that states "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."²²¹ Not only has this peace principle been featured in treaty law, but it has been resoundingly echoed in the jurisprudence of the International Court of Justice²²² and in *opinio juris* expressed in key UN resolutions.²²³

²¹⁷ European Convention, *supra* note 72, Arts. 9, 10, 11.

²¹⁸ American Convention, *supra* note 77, Arts. 13, 14, 15, 16.

²¹⁹ Banjul Charter, *supra* note 184, Arts. 8, 9, 10, 11.

²²⁰ T. FRANCK, *supra* note 12, at 184.

²²¹ UN CHARTER, Art. 2(4). See also Treaty Providing for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, Art. 1, 46 Stat. 2343, TS No. 796, 94 LNTS 57 (Kellogg-Briand Pact).

²²² See *Nicaragua* opinion, 1986 ICJ REP. 14.

²²³ The customary law is well summarized in the Court's *Nicaragua* opinion, *id.* at 98–105. See, especially, Friendly Relations Declaration, *supra* note 31; Definition of Aggression, GA Res. 3314, 29 UN GAOR Supp. (No. 31) at 142, UN Doc. A/9631 (1974), reprinted in 13 ILM 710 (1974).

Most recently, the Security Council, in its resolutions²²⁴ and actions to reverse Iraq's attack on Kuwait, reiterated the primacy of the entitlement to peace and protection against aggression. More than thirty nations joined in liberating Kuwait because, at last, aggression against one has begun to be seen as a contingent violation of the common peace. Stopping aggression and maintaining the peace has become the central concern of a newly cohesive international community.

If that principle indeed stands at the apex of the global normative system, the democratic governance of states must be recognized as a necessary, although certainly not a sufficient, means to that end. Peace is the consequence of many circumstances: economic well-being, security, and the unimpeded movement of persons, ideas and goods. States' nonaggressiveness, however, depends fundamentally on domestic democracy. Although the argument is not entirely conclusive, historians have emphasized that, in the past 150 years, "no liberal democracies have ever fought against each other."²²⁵ It has been argued persuasively that "a democratic society operating under a market economy has a strong predisposition towards peace."²²⁶ This stands to reason: a society that makes its decisions democratically and openly will be reluctant to engage its members' lives and treasure in causes espoused by leaders deluded by fantasies of grievance or grandeur.

No one has stated this position more eloquently than the eighteenth-century German philosopher Immanuel Kant. He examined the correlation between democratic governance and nonaggressiveness in his essay *Perpetual Peace*.²²⁷ There, he argued that democracy, leading to a "pacific union" among liberal states, would counteract the aggressive tendencies of absolutist monarchies by making government accountable to the majority. In contrast, a state of perpetual war would likely prevail between democracies and totalitarian states.²²⁸ Moreover, Kant discerned a three-way linkage among democracy, peace and human rights.²²⁹

Neither Kant nor his modern interpreters make the argument that democracies will not fight: only that they are not disposed to fight each other. The historical record bears this out.²³⁰ Consequently, one way to promote universal and perpetual nonaggression—probably the best and, perhaps, the only way—is to make democracy an entitlement of all peoples. This conclusion was eloquently and unanimously accepted as axiomatic by the CSCE representatives at their aforementioned 1990 Copenhagen meeting. Unanimously, they proclaimed "their conviction that . . . pluralistic democracy" is a prerequisite "for progress in setting up the lasting order of peace, security, justice and co-operation that they seek to establish in Europe."²³¹

²²⁴ SC Res. 660 (Aug. 2, 1990), reprinted in 29 ILM 1325 (1990), and subsequent resolutions. See Schachter, *United Nations Law in the Gulf Conflict*, 85 AJIL 452 (1991).

²²⁵ Mearsheimer, *Why We Will Soon Miss the Cold War*, ATLANTIC MONTHLY, August 1990, at 35, 46.

²²⁶ T. Smith, *Democracy Resurgent*, in SEA CHANGES 152, 157 (N. Rizopoulos ed. 1990).

²²⁷ I. KANT, *PERPETUAL PEACE* 107–39 (T. Humphrey rev. ed. 1983) (1795).

²²⁸ See Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986).

²²⁹ Note, however, that the notion of human rights operates to limit not only totalitarian, but also democratic, excess. Thomas Jefferson underscored this with his oft-quoted observation that "an *elective despotism* was not the government we fought for." T. JEFFERSON, NOTES ON THE STATE OF VIRGINIA 120 (W. Peden ed. 1954).

²³⁰ The point is well developed by Doyle, *An International Liberal Community*, in *RETHINKING AMERICA'S SECURITY* (G. Allison ed., forthcoming).

²³¹ Copenhagen Document, *supra* note 98, Preamble, at 1307.

The symbiotic linkage among democracy, human rights and peace is now widely recognized. Already in 1968, Security Council Resolution 253 invoked chapter VII of the Charter to impose military sanctions on Rhodesia. It expressly proceeded on the theory that gross denials of both human rights and the democratic entitlement can constitute "a threat to international peace and security."²³² At the regional level, the OAS Ministers of Foreign Affairs, in demanding the replacement of Nicaragua's Somoza dictatorship with a government chosen through free elections, declared in 1979 that democracy was the necessary precondition to "peace, freedom and justice." The dictatorship was characterized as "disrupting the peace of the Hemisphere."²³³ A decade later, in condemning the fraudulent Panamanian elections staged by General Noriega, the OAS Ministers stated that this crisis of governmental legitimacy "involves internal and external factors . . . and could seriously endanger international peace and security."²³⁴

This understanding of the three-way linkage among democracy, human rights and peace is further illustrated by the recent cease-fire agreement negotiated by the UN Secretary-General between the Government of El Salvador and the FMLN.²³⁵ As noted, it obliges the Government and the insurgents to work with yet another UN observer mission (ONUSAL), which is authorized to monitor and verify compliance with the basic human rights guaranteed by the signatories. The parties specifically recognized that compliance with human rights is a *sine qua non* to ending the war. They also accepted that the democratic entitlement must be guaranteed—and monitored by international observers—if peace is to be established.

Thus, it appears with increasing clarity, in normative text and practice, that compliance with the norms prohibiting war making is inextricably linked to observance of human rights and the democratic entitlement. The achievement of none of these basic objectives of the international community is possible, in any lasting sense, without the realization of them all. This interdependence suggests that the legitimacy of the democratic entitlement is augmented by its hierarchic relation to the peremptory norm of global peaceability.

A distinction needs to be noted here. As we have observed, some governments have argued that the international community's jurisdiction to intervene in the domestic affairs of states to secure compliance with the democratic entitlement is (or should be) limited to cases where its violation has given rise to breaches of the peace. Others have disagreed, claiming that the jurisdiction to intervene is also based on broader human rights law, which authorizes various intrusive forms of monitoring and even envisages sanctions against gross violators. One can prefer this latter view, while still agreeing that the democratic entitlement does have a connection to the United Nations' "peace" role, that the *legitimacy* of any collective international intervention to support a democratic entitlement is augmented by the entitlement's intimate link to peace. The substance of that link, however, is not merely the role of democracy in *making* or *restoring* peace after conflict has arisen but also—indeed preeminently—its role in *maintaining* peace and *preventing* conflict.

The World Court observed in the *Bernadotte* case that established rights and duties implicitly validate a penumbra of unenunciated, yet legitimate, means nec-

²³² SC Res. 253, *supra* note 211.

²³³ OEA/Ser.F/II.17, doc. 40/79, rev.2.

²³⁴ OEA/Ser.F/II.21, doc. 8/89, rev.2.

²³⁵ Central America: Efforts Toward Peace, *supra* note 71.

essary to give them effect.²³⁶ If the "end" of global peace demands the "means" of global democracy, a Charter-based system established to ensure peace must also be presumed to be authorized to ensure universal adherence to democratic political rights.

VIII. THE EMERGENCE OF DEMOCRACY AS A GLOBAL NORMATIVE ENTITLEMENT

The entitlement to democracy in international law has gone through both a normative and a customary evolution. It has evolved both as a system of rules and in the practice of states and organizations. This evolution has occurred in three phases. First came the normative entitlement to self-determination. Then came the normative entitlement to free expression as a human right. Now we see the emergence of a normative entitlement to a participatory electoral process.

The democratic entitlement, despite its newness, already enjoys a high degree of legitimacy, derived both from various texts and from the practice of global and regional organizations, supplemented by that of a significant number of non-governmental organizations. These texts and practices have attained a surprising degree of specificity, given the newness of the entitlement and especially of its requirement for free and open elections.

It is easy to deconstruct this now commonly used set of textual formulations and the accompanying practice. The terms (e.g., elections, free, fair) inevitably convey different meanings in various political cultures but, remarkably, evoke an amply demonstrable degree of convergent expectations. They crisscross sociocultural and political boundaries. The entitlement now aborning is widely enough understood to be almost universally celebrated. It is welcomed from Malagache to Mongolia, in the streets, the universities and the legislatures, not only because it portends a new, global political culture supported by common rules and communitarian implementing institutions, but also because it opens the stagnant political economies of states to economic, social and cultural, as well as political, development. As the heads of European Community states and governments pointed out in the group's conclusions of June 1991, "suppression of individual freedoms impede[s] an individual from participating in and contributing" to "the process of development."²³⁷ Economic development, as even the Chinese leadership must be discovering, is linked inextricably with political freedom. An economic free market cannot long flourish without creating pressure for a free market of ideas. At the same time, the problems of underdevelopment can only be addressed successfully in a world of stable, peaceable nations, which, in turn, also presupposes a world of open democracies.

The democratic entitlement's newness and recent rapid evolution make it understandable that important problems remain. We have considered these primarily under the rubric of coherence, indicating that this entitlement is not yet entirely coherent. The key to solving these residual problems is: (1) that the older democracies should be among the first to volunteer to be monitored in the hope that this will lead the way to near-universal voluntary compliance, thus gradually transforming a sovereign option into a customary legal obligation; (2) that a credible international monitoring service should be established with clearly defined

²³⁶ Reparations for injuries suffered in the service of the United Nations, 1949 ICJ REP. 174, 179–80 (Advisory Opinion of Apr. 11).

²³⁷ European Council, Presidency Conclusions, Doc. SN 151/2/91 (Ann. V) at 27 (1991).

parameters and procedures covering all aspects of voting, from the time an election is called until the newly elected take office; (3) that each nation's duty to be monitored should be linked to a commensurate right to nonintervention by states acting unilaterally; and (4) that legitimate governments should be assured of protection from overthrow by totalitarian forces through concerted systemic action after—and *only* after—the community has recognized that such an exigency has arisen. In the longer term, compliance with the democratic entitlement should also be linked to a right of representation in international organs, to international fiscal, trade and development benefits, and to the protection of UN and regional collective security measures.²³⁸

Both textually and in practice, the international system is moving toward a clearly designated democratic entitlement, with national governance validated by international standards and systematic monitoring of compliance. The task is to perfect what has been so wondrously begun.

²³⁸ To limit collective security measures to cases of attack against democratic states is a change in the system's rules that is unlikely to come about in the near future. Yet it is worth contemplating. Would it help Kuwait to establish a democratic internal order if its future protection by UN-authorized collective measures depended upon such a transformation?