DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW

edited by

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CHAPTER I

Legitimacy and the democratic entitlement

Thomas M. Franck

I DEVELOPING OVERLAPPING CONSENSUS

In the world that emerged after the collapse of the Fascist and Communist ideologies, the principal cause of war has become unfairness and anomie. How the means of a good life are distributed among peoples and persons and whether people and persons are adequately consulted in the decisions that determine their life-prospects: these are the principal determinants of war and peace.

The role of the State, in an era of increasing transnationalization of big decisions and of the localization of subsidiary ones, is to serve as the forum for that organized social discourse, leading to a high degree of consensus regarding *what is fair*. That consensus is essential to the avoidance of war: in particular, *civil war*, the principal form of belligerence in the new era.

The most important instrument for developing overlapping consensus is the voting booth. Attention must therefore be paid to democracy as a right protected by international law and institutions. Democracy does not provide a guarantee against civil war. It merely provides the only known process by which a genuine social discourse can proceed among persons legitimately representing the spectrum of opinions and interests in a community or *polis*. Without it, there can be decisions. There can even be negotiation and discourse. But there can never be a genuine social convergence.

"Democracy," as etymology suggests, concerns the role of people in governance. The right to democracy is the right of people to be consulted and to participate in the process by which political values are reconciled and choices made. Some aspects of this right are therefore, nowadays, encompassed in human rights instruments. Rights to free speech, press, religion, and assembly are examples of associational and discursive entitlements which are already formulated in conventions.

Even more recently, we have seen the emergence, specifically, of an internationally constituted right to electoral democracy that builds on the human rights canon, but seeks to extend the ambit of protected rights to ensure meaningful participation by the governed in the formal political decisions by which the quality of their lives and societies are shaped.

II THE CONSENT OF THE GOVERNED

More than two centuries have elapsed since the signatories of the U.S. Declaration of Independence endorsed two radical propositions. The first is that citizens should have "unalienable rights" protected by governments which derive "their just powers from the consent of the governed." We may call this the "democratic entitlement." In declaring this right, the authors were uninhibited by any trace of cultural modesty, baldly asserting its equal application to persons at all times and in all places. 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 evidently believed that the legitimacy of the new Confederation of American States was not established solely as a consequence of the *de facto* transfer of power from Britain to its colonies, but also required further acknowledgment by "mankind." This may be seen as a prescient glimpse of the power of the community of nations to validate government by consent, and invalidate all other governance.

For two hundred years, these two notions – that the right to govern depends on governments having met both the democratic entitlement of the governed and also the standards of the community of states – have remained a radical vision. This radical vision, while not yet fully encapsulated in law, is now rapidly becoming a normative rule of the international system. The "opinions of mankind" have begun in earnest to require that governments, as a prerequisite to membership in the community of nations, derive "their just powers from the consent of the governed." Increasingly, governments recognize that their legitimacy depends on meeting normative expectations of the community of States. Democracy is thus on the way to becoming a global entitlement, one which may be promoted and protected by collective international processes.

The UN Secretary-General, Kofi Annan, has succinctly put it thus:

"It is increasingly recognized that good governance is an essential building block for meeting the objectives of sustainable development, prosperity and peace . . . [G]ood governance comprises the rule of law, effective state institutions, transparency and accountability in the management of public affairs, respect for human rights, and the meaningful participation of all citizens in the political process of their countries and in decisions affecting their lives."[1]

III THE EMERGENCE OF AN INTERNATIONAL LEGAL ENTITLEMENT

While democracy has long been a right of people in some nations, enshrined in their constitutions and traditions and enforced by their judiciary and police, this has not been true universally. That democracy is *becoming* an entitlement in international law and process is due in part to the very recent political reality of a burgeoning pro-democracy movement within the States that constitute the world community. 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 and tragic submergence beneath bogus "people's democracy" or an outright dictatorship, the legitimation of power is a basic but elusive reform. As of late 1997, approximately 130 national governments were legally committed to permit open, multiparty, secret-ballot elections with a universal franchise. Most had joined this trend within the previous decade.[2] While a

[1] Report of the Secretary-General on the work of the Organization, GAOR, 52nd Sess., Supp. No. 1 (A/52/1), 1997, p. 5, para. 22.

[2] This enumeration was compiled by reference to reports in the *N.Y. Times* and the *Country Reports on Human Rights Practices*, prepared by the Department of State for the appropriate committees of Congress. States which currently make legal provision for determining their governments by recourse to multiparty secret ballot elections are: Albania, Andorra, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Bangladesh, Barbados, Belarus, Belgium, Belize, Benin, Bolivia, Bosnia, Botswana, Brazil, Bulgaria, Canada, Cape Verde, Central African Republic, Chile, Colombia, Comoros, Congo, Cook Islands, Costa Rica, Côte d'Ivoire, Croatia, Cyprus, Czech Republic, Denmark, Djibouti, Dominica, Dominican Republic, Ecuador, Egypt, El Salvador, Eritrea, Estonia, Finland, France, Gabon, Gambia, Georgia, Germany, Greece, Grenada, Guatemala, Guinea, Guyana, Hungary, Honduras, Iceland, India, Ireland, Israel, Italy, Jamaica, Japan, Kazakstan, Kenya, Kiribati, Korea (South), Latvia, Lesotho, Liberia, Liechtenstein, Lithuania, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Mali, Malta, Marshall Islands, Mauritius, Mexico, Micronesian Federation, Moldova, Mongolia, Morocco, Mozambique, Namibia, Nauru, Nepal, Netherlands, New Zealand, Nicaragua, Niger, Norway, Pakistan, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Romania, Russia, San Marino, Sao Tome, Senegal, Serbia, Seychelles, Singapore, Slovakia, Slovenia, Solomon Islands, South Africa, Spain, Sri Lanka, St. Kitts, St. Lucia, St. Vincent,

few may arguably be democratic in form rather than substance, most are, or are in the process of 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. This is new and important.

The almost-complete triumph of Humeian, Lockean, Jeffersonian, Montesquieuian, or Madisonian notions of democracy (in Latin America, Africa, Eastern Europe, and to a lesser extent in Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which the future development of global society will turn. It is the unanswerable response to claims 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,[3] but it is also a functional question which can be, and is now being, stated in global legal terms. Are we witnessing the evolution of an international rule system which defines the minimal requisites for a democratic process to exercise power? What norms will such a rule system encompass? Is the international community capable, consensually, of developing an institutional and normative framework for monitoring fulfillment of those requisites? Is the community of nations able collectively to recognize and to sanction noncompliance?

In other words, it is now time to ask whether the community of nations is ready to assume systematic responsibility for a new task of dazzling importance and complexity: the validation of governance in member states. Do we have, or are we in the process of evolving, a legit-

Footnote 2 (*cont.*)
Sweden, Switzerland, Tajikistan, Tanzania, Thailand, Tonga, Trinidad, Tunisia, Turkey, Tuvalu, Ukraine, United Kingdom, Uruguay, Vanuatu, Venezuela, Western Samoa, Zambia, Zimbabwe. Several more States, such as 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), Kenya (included), Singapore (included) and Serbia (included), as well as several former Soviet States which were not included. The somewhat subjective judgment, here, pertains to whether the elections were decisive, depending on various factors. In the large majority of cases, however, the decision to include or exclude is not seriously in doubt. It should be recalled, however, that the test for inclusion is whether the legal system establishes free and secret elections. Whether these are conducted fairly is another question.

[3] 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* (rev. edn. 1953), pp. 67–105.

imate international system of rules and processes for requiring and monitoring the compliance of nations with a new global democratic order?

IV TWO LEGITIMACIES

These questions, in turn, raise two separate issues of legitimacy which, although related, should not be confused. First, there is the legitimacy of national *governments*. Secondly, there is the legitimacy of the increasing *international validation* of the governance, and the rules and processes of that validation. It is the latter issue which is of primary interest to the international lawyer (although the importance stems from its manifest connection with the legitimacy of governments). We are witnessing a sea change in international law, as a result of which the legitimacy of each government will one day be measured definitively by international rules and processes. We are not quite there yet, but the outlines are emerging of such a new world, in which the citizens of each State will look to international law and organization to guarantee them fair access to political power and participation in societal decisions. For some people, this will be no more than an embellishment of existing rights already protected by domestic constitutional order. For others, it will be a dream come true.

Citizens, however, will not be the only beneficiaries. We have observed that the prime motivation for democratic entitlement is the need of governments for validation. Without validation, the task of governance is fraught with difficulty. In other words, validation is prized as evidence of a regime's legitimacy. Legitimacy, in turn, is the quality of a rule – or of a system of rules, or a process for making or interpreting rules – which by its manifest fairness pulls those addressed towards voluntary compliance.

In Western democracies legitimacy has been achieved largely by subjecting the political process to rules, which are often immutably entrenched in an intrepid constitution. In such States the fairness of the electoral process is monitored by credible local actors ranging from perceptive judges to investigative journalists. Thus a lucky few nations have succeeded in evolving their own legitimate means of validating the process by which the people choose those to whom they entrust the exercise of power. To achieve such a system of autochthonous validation, those who hold or seek political power have made a farsighted bargain comparable to John Locke's social compact:[4] to facilitate governing they have surrendered control over the nation's validation process to various

[4] *See* John Locke, *Two Treatises of Government*, W. Carpenter, ed. (New York: Dutton, 1966), pp. 119–20, 164–66.

others such as national electoral commissions, judges, an inquisitive press, and above all to the citizenry acting at the ballot box. These decide collectively whether the requisites for democratic entitlement have been met by those who claim the right to govern. This process bestows legitimacy, giving back to those who govern far more power than they surrendered.

Unfortunately, in many nations no such bargain was struck. Those who claim to govern cannot demonstrate that they have fulfilled the requirements of democracy, even if they purport to recognize that obligation. Senegal affords a recent example. In 1988, when elections were widely perceived to have been rigged, the victors' claim to power was not legitimated and they failed to secure the consent of the governed.[5] The promise of stability was not realized. In such circumstances, governments, even traditionally xenophobic ones, turn increasingly to the international system for observers in order to validate elections. What they seek is legitimation by a global standard monitored by processes of the international system. Requests in 1994 by Malawi, South Africa, Mexico, and Belarus for observers to attend their presidential or parliamentary elections are a few recent and notable instances of this remarkable trend.[6] Governments seek such validation to avoid the alternative: persistent challenges to authority by coups, counter-coups, instability and stasis, and in order to obtain the essential societal acquiescence. Having failed to create the prerequisites for autochthonous validation, they look to the rules and organs of the international system to codify the prerequisite of democratic governance and to certify their compliance. To quote once again UN Secretary-General Kofi Annan:

> The value that Member States attach to democratization is reflected in the large number of requests the United Nations receives for electoral assistance – no fewer than eighty in the past five years. United Nations electoral assistance seeks in the first instance to enhance the effectiveness of international observers in making assessments regarding the legitimacy of an electoral process and its outcomes, and to recommend election-related policy changes through dialogue with the Government, political parties and the civil society . . . [T]he United Nations also emphasizes the importance of building the domestic institutional capacity of Member States in constitutional and electoral law reforms and strengthening Governments' own institutional capacities to organize elections.[7]

[5] US Department of State, 102d Cong., 1st Sess., Country Reports on Human Rights Practices for 1990; Report submitted to the Committee on Foreign Relations, US Senate and the Committee on Foreign Affairs, House of Representatives (Comm. Print 1991), 322–23.

[6] Malawi: *N.Y. Times*, June 21, 1994, at A8; South Africa: *N.Y. Times*, Jan. 15, 1994, at A3; Mexico: *N.Y. Times*, May 13, 1994, at A6; Belarus: *N.Y. Times*, June 24, 1994, at A9.

[7] Report of the Secretary-General on the work of the Organization, 1997, *supra* note 1, at p. 7, para. 38.

All these activities on the part of the international system in such inherently domestic affairs of States would have been unthinkable a decade ago. Yet all were undertaken at the specific request of States with the consent of a responsible UN organ. Thus, in 1996–97, elections were observed in Algeria, Ghana, Madagascar, Mali, and Yemen; further electoral assistance was also provided to Bangladesh, the Comoros, Gambia, Guyana, Haiti, Liberia, Mali, and Mexico.[8]

V LEGITIMATING THE INTERNATIONAL REGIMES

The international system responds no longer solely out of moral or ideological commitment to an expanding ambit of human rights, but now also out of self-interest. As global and regional institutions assume powers which were once the sole preserve of sovereign States – for matters now perforce transnational, such as environmental pollution, nonproliferation of nuclear weapons, and the prevention of breaches of the peace – it is very much to the advantage of such institutional endeavors that their initiatives be perceived as legitimate and fair. This cannot be achieved if any significant number of the participants in the decision-making process are palpably unresponsive to the views and values of their own people. In the legitimacy of national regimes resides the legitimacy of the international regime. The UN that raises and allocates several billion dollars annually for general and specific purposes of the global village cannot pretend to do so legitimately if the States parties to these allocations are out of touch with their own tax-paying citizenry.

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 validating activity has evolved from the *ad hoc* to the normative: that is, the degree to which the process of legitimation has itself become legitimate. Do the global rules and processes for democratic validation have the indices of legitimacy? In other words, is a consistent, determinate set of standards evolving by which the international system can extend, or withhold, validation of national processes of popular consultation and participation? In the international context, 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 operate in accordance with generally accepted principles

[8] *Ibid.*

of right process.[9] Are we developing a global canon of legitimate rules and procedures by which to judge the democracy of nations?[10]

VI ORIGINS OF THE DEMOCRATIC ENTITLEMENT

The process leading up to the birth of a democratic entitlement began with chapters XI and XII of the UN Charter. The latter bestowed on the UN an express legal right to intervene in and validate the democratic process within trust territories. The General Assembly soon also found grounds for exercising a supervisory role in colonial elections and referenda immediately prior to independence. This gradually became an accepted element in legitimizing such crucial transitions. Thus, UN observers oversaw in 1965 the referendum establishing a new constitution for the Cook Islands,[11] and in 1968 observed the pre-independence referendum and elections in Spanish Equatorial Guinea.[12] Similar monitoring by the UN occurred during the referendum on the future status of West New Guinea (West Irian) in 1969,[13] and during the November 1980 elections in the New Hebrides, then under French and British administration, which led to the creation of independent Vanuatu.[14]

As the colonial era drew to a close, the significance of the UN's election-monitoring role, instead of declining, appears to have increased. This is partly because the last 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 which acted as midwife in the birth of an independent Namibia. This was formerly the German colony known as South West Africa, and had been under South African administration since Germany's defeat in World War I. It was set on the road to independence by the General Assembly's symbolic termination of South Africa's mandate in 1966. A

[9] Thomas M. Franck, *The Power of Legitimacy Among Nations* (Oxford: Clarendon Press, 1990) p. 19.

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

[11] GA Res. 2005, UN GAOR, 19th Sess., 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).

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

[13] GA Res. 1752, UN GAOR, 17th Sess., Supp. No. 17, at 70, UN Doc. A/5217 (1963); *Report of the Secretary-General regarding the Act of Self-determination in West Irian*, UN Doc. A/7641 (1969).

[14] GA Res. 34/10, UN GAOR, 34th Sess., Supp. No. 46, at 199, UN Doc. A/34/46; *Report of the United Nations Mission to Observe the Elections in the New Hebrides*, UN Doc. A/34/852 (1980).

landmark advisory opinion of the International Court of Justice confirmed that termination,[15] and, in 1978 a decision of the Security Council established the parameters for the territory's political development and democratic entitlement.[16] 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 then it had become difficult to take the lid off the pressure cooker without an explosion. Tribal and racial rifts were potential obstacles to a peaceful transition.

UNTAG was created by the Security Council precisely to prevent a pre-independence civil conflict, and it monitored the final months of South African administration and supervised the elections immediately prior to independence. It not only monitored a vote, but also 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; it was instrumental in ensuring the peaceful and fair election preceding independence. Deploying more than 7,000 military and civilian personnel at a cost of $373 million, it prepared the November 1989 elections and conducted them so successfully that a situation fraught with risk became a model of political transformation.[17]

While chapters XI and XII laid the legal groundwork for an entitlement of peoples – dependent peoples – to democratic governance, a further large step towards realization of the democratic entitlement was the General Assembly's adoption of the Universal Declaration of Human Rights on December 10, 1948.[18] As a mere resolution, it did not claim binding force, 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 remarkable determinacy, specifically recognizing a universal right to freedom of opinion and expression (Article 19) as well as peaceful assembly and association (Article 20). The specificity of the Declaration has helped make it a landmark of continuing importance and recognized legitimacy.

[15] Namibia (SW. Africa) Case, 1971 ICJ 3 (Advisory Opinion of January 26).

[16] SC Res. 435 (1978). It did not authorize the sending of UNTAG until 1989. SC Res. 628 (1989); SC Res. 629 (1989).

[17] *Namibia, Independence at Last*, 27 UN Chronicle, no. 2 (June 1990), at p. 4. Namibia formally achieved independence on March 21, 1990. *Ibid.*

[18] GA Res. 217A, UN GAOR, 3rd Sess., at p. 71, UN Doc. A/810 (1948).

The entitlements first prescribed by the Declaration are repeated with even greater specificity in the Covenant on Civil and Political Rights.[19] Spelled out in that treaty are specific rights to freedom of thought (Article 18) and of association (Article 22). Article 19(2) is a particularly 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,"[20] these restrictions, like the rule itself, are subject to case-by-case review by the quasi-judicial Human Rights Committee of independent experts.[21] Rights to opinion, expression, and association are contained in Articles 18, 19 and 22.

When the Civil and Political Rights Covenant entered into force, the democratic entitlement entered a new phase. It established discursive rights of political participation, pioneered in connection with colonies and now made universally applicable by the Covenant. It shifted the prior focus, from "peoples" to persons and from decolonization to personal political participatory entitlements in independent nations. It entitles peoples in all States to free, fair, and open participation in the democratic process of governance chosen by each State.

The establishment of the Human Rights Committee to monitor compliance and give opinions incrementally increases the determinacy of the new norms. Borrowing from the earlier experience of colonial self-determination, when oversight committees such as the General Assembly's Special Committee on Non-Self Governing Territories monitored the performance of colonial powers, the Covenant imposes reporting requirements on States. Now, however, reports and complaints are made not to a political body but to an independent panel of experts, increasing the likelihood that the review procedure will be perceived as fair. Since the Covenant came into force, reporting and scrutiny have been formalized and depoliticized to an extent. Case-by-case applications of the norms have been welded to the process. This adumbration

[19] International Covenant on Civil and Political Rights, Dec. 16, 1966, p. 999 UNTS 171, *reprinted in* 6 ILM (1967) p. 368 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR]. [20] *Ibid.* at Art. 19(3).

[21] *See* Dominic McGoldrick, *The Human Rights Committee* 461 (Oxford: Clarendon Press, 1991).

is gradually imbuing the Covenant's provisions with a perceptible aura of legitimacy which few governments are willing to ignore.[22]

VII RECENT SURGE OF THE ENTITLEMENT

In the years since the fall of Communism, these earlier initiatives have been augmented by UN supervision of democratic participation in crucial political decisions. This has become increasingly routine in situations of civil conflict in independent states. In 1992, UN observers validated Eritrea's plebiscite on secession from Ethiopia.[23] By the mid-nineties it had become commonplace for independent nations like Mexico or South Africa to ask to have their elections monitored by the UN and regional organizations.

The monitoring of elections in States riven by civil strife received its first major impetus when the UN was asked to monitor elections in Nicaragua. In August 1987 five Central American presidents signed the Esquipulas II agreement, which was a blueprint for restoring peace and ensuring legitimacy in that State. It called for free, internationally monitored elections, and, on March 3, 1989, the Nicaraguan Foreign Minister requested the Secretary-General to establish an observer mission to verify the fairness of his nation's forthcoming vote.[24] The General Assembly had already authorized the Secretary-General to assist the Esquipulas process in appropriate ways,[25] but that resolution had made no specific mention of election monitoring. Nevertheless, the Secretary-General thought he had "sufficient legislative basis" to comply with Nicaragua's request.[26] As a result, he established ONUVEN on July 6, 1989,[27] an initiative approved by the Security Council three weeks later.[28]

The active, far-reaching role of the UN observers in Nicaragua clearly illustrates how much the groundrules for international election monitoring had evolved in practice from the days of observing decolonizing votes in British Togoland or Ruanda-Urundi. The observers

[22] As of 1999, 144 States were parties to the Covenant. Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E, *available* at <http://www.un.org./Depts/Treaty/final/ts2/newfiles/part_boo/iv_4.html>.

[23] GA Res. 47/114 (1992) and UN Doc. A/47/544 (1992).

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

[25] GA Res. 24, UN GAOR, 43rd Sess., Supp. no. 49, at p. 27, UN Doc. A/43/49 (1989).

[26] UN Doc. A/44/304, at p. 2 (1989).

[27] UN Doc. A/44/375 (1989).

[28] SC Res. 637 (1989).

deployed by the Secretary-General did not merely monitor voting. They actively observed the activities of the Supreme Electoral Council in drafting and implementing new laws applicable to nominating, campaigning, and related activities. Observers were deployed throughout the electoral campaign and involved themselves in mediating disputes between candidates concerning access to funding, the media, and even to 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 which might have undermined the legitimacy of the outcome.[29] At the final stage, ONUVEN observed the voting and established its own projection of results.[30] 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."[31]

On October 10, 1990 the UN established ONUVEH, the mission to oversee the Haitian elections. This was controversial, being seen by some States as a potential precedent entitling the international community to monitor anywhere. While the same might have been said of ONUVEN, Nicaragua was different in that its long civil war could be said to have given rise to a threat to the peace sufficient to rationalize an exceptional UN role in validating those national elections as part of an internationally brokered peace process. In Haiti's case, there was no such obvious connection to international peace. Instead, the UN was invited to oversee elections by the Haitian Transitional Government.[32] In normative terms, Haiti was the first instance in which the UN, acting on the request of an independent national government, intervened in an electoral process solely to validate the legitimacy of the outcome.

Despite misgivings, ONUVEH was launched with the imprimatur of the General Assembly.[33] Once again, the monitors' authority extended far beyond overseeing the ballot count. Their first report noted Haiti's lack of democratic traditions and its long history of totalitarianism and

[29] *See, e.g.,* The Situation in Central America: Threat to International Peace and Security and Peace Initiatives, UN Doc. A/44/927 (1990) (Fifth Nicaragua Report). *See also* UN Doc. A/44/642 (1989) (First Report); UN Doc. A/44/834 (1990) (Second Report); UN Doc. A/44/917 (1990) (Third Report); UN Doc. A/44/921 (1990) (Fourth Report).

[30] Fifth Nicaragua Report, *supra* note 29. [31] *Ibid.* at p. 3. [32] UN Doc. A/44/965 (1990).

[33] GA Res. 45/2 (1990).

violence, much of it government-inspired and some of it quite recent.[34] In preemptive response to this problem, the Assembly authorized the recruiting of observers "with solid experience in the public order field."[35] 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."[36]

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 UN, he also noted the formidable obstacles lying ahead for Haitian democracy, and advocated "launching a civil education campaign on the importance of the parliament and local authorities."[37] This is a long-term task, but ONUVEH had been given an operational life of only two months. With prescience, the Secretary-General 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 would have to be made under the auspices of the community of nations. When his advice was ignored, the anticipated consequences ensued.

Since then, UN monitoring or observation nevertheless has been authorized in a growing number of post-colonial situations: Eritrea,[38] Cambodia,[39] Mozambique,[40] and (most significantly) South Africa, to which in 1994 the UN sent 1,800 electoral observers.[41] Notably, the mandate of the UN in implementing the 1996 accords that ended decades of civil war in Guatemala – a role including but not limited to building democracy – made provision for verification of implementation until the year 2000.[42]

The monitoring of elections has also been taken up by regional organizations. The Organization of American States has been especially

[34] 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). [35] GA Res. 45/2, para. 1(d) (1990).
[36] United Nations Electoral Assistance to Haiti, UN Doc. DPI/1120 (1991).
[37] Electoral Assistance to Haiti: Note by the Secretary-General, UN Doc. A/45/870/Add.1, at 23 (1991). [38] SC Res. 47/114 (1992). [39] SC Res. 745 (1991); SC Res. 717 (1991).
[40] SC Res. 782 (1992); SC Res. 797 (1992). [41] SC Res. 894 (1994).
[42] Report of the Secretary-General on the work of the Organization, 1997, *supra* note 1, p. 18, para. 122.

active, beginning with the despatch of a 435-person commission to Nicaragua in 1990 to observe 70 percent of polling sites.[43] A major OAS presence was also mounted during the Haitian elections,[44] not only as poll-watchers but also to assist in drafting the electoral law and in organizing voter registration.[45] Over the past few years, OAS monitors have observed elections in, *inter alia*, Surinam, El Salvador, Paraguay, Panama, and Peru.[46] In the post-1989 transition from Communism in Eastern Europe, regional monitoring has also played an important part. Members of the Organization for Security and Co-operation in Europe (the OSCE) have sent missions to play a role in various elections, beginning with Bulgaria's 1990 election.[47]

On a non-governmental level, several members of the US Congress and other OSCE legislatures observed the Bulgarian and Czech electoral campaigns to ensure fairness,[48] as did their counterparts from other Western European parliaments. Non-governmental organizations (NGOs), too, have become professional global electoral monitors. Emissaries of the Council of Freely Elected Heads of Government of the Carter Center in Atlanta, Georgia, have observed many elections, including the crucial 1990 Nicaraguan and 1991 Zambian polls.[49] The US National Democratic Institute for International Affairs has monitored elections in dozens of countries since 1986.[50] At least half a dozen teams of such foreign observers, including experts from the US, the Philippines, Japan, and the Commonwealth, monitored parliamentary elections in Bangladesh on February 27, 1991.[51] International observers from Canada, France, Germany, and the US verified the propriety of elections held in Benin in March 1991.[52] Sixty-five representatives of NGOs observed the independence referendum conducted in Latvia on March 3, 1991.[53]

It is likely that such activity will increase. Elliot Richardson, head of

[43] *N. Y. Times* (Feb. 23, 1990), at A3. [44] OEA/Ser.G/CP/RES.537, doc. 805 (1990).

[45] 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 at p. 1 (1990).

[46] OEA/SerD/III-42 at p. 33 (1992); OEA/Ser.D/III-44 at p. 49 (1994); OEA/Ser.D/III-46 at p. 44 (1996). [47] *N.Y. Times* (June 6, 1990), at A10.

[48] Thomas S. Kahn, "Bulgaria's Different Pathway," *Christian Science Monitor*, June 22, 1990, at p. 18. Helsinki Watch also sent monitors. *N.Y. Times* (June 11, 1990), at A1. For the first democratic election in Czechoslovakia *see N.Y. Times* (June 10, 1990), sec. 1, A31.

[49] *N.Y. Times* (Aug. 9, 1989), at A13; *N.Y. Times* (Nov. 1, 1991), A3.

[50] *National Democratic Institute for International Affairs, Response to United Nations General Assembly Resolution 45/150: Developing a United Nations Elections Assistance Capability*, at p. 2 (1991).

[51] *N.Y. Times* (Feb. 28, 1991), at A5. [52] *N.Y. Times* (Mar. 12, 1991), at A11.

[53] *Financial Times* (Mar. 4, 1991), at p. 14.

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."[54] As Professor Michael Reisman has recently observed, "results of such elections serve as evidence of popular sovereignty and become the basis for international endorsement of the elected government."[55]

In addressing the Forty-Fifth General Assembly, President George Bush proposed the establishment of a standing UN electoral commission to assist a requesting nation in guaranteeing that its elections are free and fair.[56] The Secretariat has responded with an Electoral Assistance Division which, together with the United Nations Development Programme, provides technical assistance to States needing help in organizing and conducting elections.[57] The Secretary-General has also prepared guidelines to help member States which are considering a request for such assistance or for monitoring, supervising, or verifying an election. These make it clear that UN participation depends upon the requesting government demonstrating the basic requisites for fairness: "that political parties and alliances enjoy complete freedom of organization, movement, assembly and expression without hindrance or intimidation" and that these conditions are to be verified by "observer teams" stationed in "regional or provincial capitals." The observers must be free to "establish regular contacts with political parties and social organizations at the national and local levels" and to carry out "a programme of village and municipality visits throughout the country" in order, among other objectives, to "verify the observance by all parties of the stipulations of the electoral law and any code of conduct that might have been agreed upon among the parties or established by the electoral authorities."[58] Thus, the requesting State is put on notice that its application for validation of an election by international monitoring will not be considered unless the requisites for electoral democracy have been agreed and the prospects for their effective implementation are favorable.

[54] Fifth Nicaragua Report, *supra* note 29, at p. 3 (1990).

[55] W. Michael Reisman, "Sovereignty and Human Rights in Contemporary International Law," *Am. J. Int'l L.* 84 (1990), pp. 868–69.

[56] *N.Y. Times* (Oct. 2, 1990), at A12.

[57] Enhancing the effectiveness of the principle of periodic and general elections, Report of the Secretary-General, UN Doc. A/47/668/Add.1 (November 24, 1992), p. 10, para. 28. Strengthening the role of the United Nations in enhancing the effectiveness of the principle of periodic and genuine elections and the promotion of democratization, UN Doc. A/52/129, December 12, 1997.

[58] *Ibid.*, Addendum, at p. 4, para. 13.

It is likely that the practice of requesting international electoral monitoring will become a routine part of national practice, particularly useful when the democratic legitimacy of a regime is in question. Of course, there are still hard-core abstainers, such as the totalitarian governments of Myanmar, North Korea, and China. However, their number is diminishing. The government formed in May 1991 after the end of the civil war in Ethiopia immediately undertook to conduct "free, democratic and internationally monitored elections" within a year.[59] At about the same time, the insurgents who took power in Eritrea committed themselves not to secede from Ethiopia until after a UN-monitored plebiscite.[60] What is remarkable is not that in particular cases the democratic process has been monitored and declared legitimate, but rather that such recourse to international legitimation through election monitoring is becoming the rule rather than the exception.

A recent UN Secretariat study, noting the rising demand for monitoring, has started to set out the juridical, institutional, administrative, and fiscal parameters for an expanded UN electoral monitoring service.[61] The OAS Secretariat has provided a companion regional study.[62] 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 phase "democratic entitlement." These data make it strikingly apparent that international election monitoring cannot be limited merely to guaranteeing citizens' right to cast a vote, but must also ensure a far broader basket of democratic rights, of the type described in the text of the Civil and Political Rights Covenant and the Charter of Paris.

A study which seeks to connect the dots of practice with lines of enunciated principle must also look at those instances in which election monitoring has been 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. Perhaps even more persuasive was the objection that he had not been invited to participate early enough in the process, before the outgoing regime had established the rules and methods by which the election campaign was to be conducted.[63] In 1991 the Secretary-General also rejected requests for election monitoring made by Lesotho and

[59] *N.Y. Times* (May 29, 1991), at A6.
[60] *N.Y. Times* (June 22, 1991) at A3.
[61] *Principles for United Nations Observance of Elections*, Confidential Memorandum, June 6, 1989.
[62] OEA/Ser.G/CP/RES.421, doc. 606 (1985).
[63] *See* "UN Says it Won't Monitor Romanian Elections," Reuters News Service, NEXIS, CURRENT Library (January 25, 1990).

Zambia, again on the public ground that he was unauthorized, in the absence of special circumstances, to engage in the monitoring of elections in sovereign States, but also on the private ground that the effectiveness of his participation had not been sufficiently assured.

There is reason for such caution. Commentators have rightly warned that the monitoring of voting alone may place observers in the position of legitimating an electoral victory which was not fairly achieved. This need not imply fraud or repression but, more likely, the effect on free choice of the continuing "normal" operation of entrenched social and political institutions.[64] While no observation process can reach back into a nation's history to extirpate the impacted roots of social and cultural inequalities, observers can do – and 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 clear and specific. To that end, a robust repertory of practice, an explicit canon of principles, and an institutional framework for implementation is developing which is capable of increasing the determinacy of the entitlement. Some of this recapitulation of the lessons learned in field-practice is being undertaken by non-governmental organizations.[65]

Apparent failures such as the monitoring missions in Angola and (for quite different reasons) in the Western Sahara are fortunately exceptions, more than offset by the credible and path-breaking operations culminating in fair elections in difficult situations such as Namibia, Cambodia, Nicaragua, and El Salvador. As the entitlement becomes an accepted norm, a lengthy international law debate will end. Do governments validate international law or does international law validate governments? The answer is becoming apparent: each legitimates the other.

VIII VALIDATION AND MONITORING

The validation of governments by the international system is rapidly being accepted as an appropriate role of the United Nations, the regional systems and, supplementarily, for NGOs. Democracy and human rights are now requirements for admission of new member

[64] Leslie Gelb, "The Free Elections Trap," *N.Y. Times* (May 29, 1991), at A23.

[65] *See, e.g.,* the Special Edition, Electoral Assistance Activities From January 1, 1992 to June 30, 1993, Electoral Assistance Network, EAU/DPA (1993). *See also* M. Hodgson, "When to Accept, When to Abstain: A Framework for UN Election Monitoring," 25 *N.Y.U. J. Int'l L. and Pol.* 25 (1992), p. 137.

States into the European Union, as enumerated by the Maastricht Treaty. Indeed, the European Court of Human Rights has held that "democracy is without doubt a fundamental feature of the European public order."[66] A recent study conducted by the Netherlands Minister of Foreign Affairs gives expression to the new normative expectation. It asks: what can reasonably be expected of a European State seeking to join the European Communities and the Council of Europe? It answers 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 Freedoms . . . "[67] Such an international test for validation of governance and entry into a society of nations would have been unthinkable even a decade ago; in the new Europe it is considered unexceptionable. Some comparable rule 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 specific guidelines set out in the OSCE's Copenhagen Declaration and Paris Charter and declare these applicable to Article 25 of the Civil and Political Covenant. The Human Rights Committee in any event is likely to interpret Article 25 in accordance with the Copenhagen and Paris principles, but it would be better if this were specifically endorsed by a resolution of the Assembly. Such a resolution would, among other benefits, guide and assist the Human Rights Committee in more effectively monitoring compliance by the large majority of States party to that global instrument. It would also help to make more determinate the content of the evolving customary law applicable to national political practices. By bringing the evolution of UN practice approximately into line with that of the OSCE, the emerging democratic entitlement would attain greater specificity and coherence.

How coherent is the new normative canon of the democratic entitlement? The democratic entitlement rests on the still-radical principle that the community of States is empowered to compose and apply codes which regulate the conduct of governments towards their own citizens.

[66] Case of United Communist Party of Turkey and Others v. Turkey (133/1996/752/951), Judgment of the European Court of Human Rights (January 30, 1998), para. 45.

[67] 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*, at pp. 30–31 (1990).

The very idea of general international monitoring of elections in sovereign States still arouses passionate ire, not only among the increasingly isolated totalitarian regimes, but also among some nations with long memories of humiliating interventions by States bent on "civilizing" missions. While they are willing to see the international community engage in occasional monitoring of elections to end a civil war or regional conflict, they accept this only as a necessary exception, not as a normal manifestation of a universal democratic entitlement.

The prospect of such dissent was clearly foreshadowed in 1990 when the Assembly considered the proposal to establish ONUVEH, the observer group to monitor Haiti's elections. Here, a link between election monitoring and peace was much harder to demonstrate since no armed hostilities were underway. ONUVEH was therefore created in the face of significant opposition from several UN members, notably China, Cuba, and Colombia.[68] The long spectre of US hemispheric interventions was invoked in the Assembly's corridors. It was said that the UN was becoming a front for the neo-colonial ambitions of the US and other North Atlantic members of the Rich Man's Club, invoking electoral rights to divert attention from the rights of the poor to food. Several months elapsed before suspicions were assuaged by diplomatic assurances that the Haitian case, too, would set no general precedent. Cuba, in the Assembly's 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 . . ."[69] and stressed that "elections . . . can never be regarded as a matter affecting international peace and security . . ."[70] Mexico also went on record as rejecting any precedential value in the authorization of ONUVEH.[71] These States contended that UN election monitoring in an independent nation is unlawful *per se*, in the absence of exceptional peace-making exigencies. That this attitude is changing, however, has been demonstrated by the astonishing request of Mexico, only three years later, for international observers to monitor its own Presidential elections to assuage the suspicions of its electorate.

The International Court of Justice has rebuffed the claim that monitoring is intrusive, and thus unlawful *per se*. In the 1986 Nicaragua

[68] The Security Council failed to reach consensus on the issue, with China threatening to veto in the Security Council and Cuba and Colombia in the General Assembly arguing 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). [69] *Ibid.* at p. 62.

[70] *Ibid.* at pp. 58–60. [71] *Ibid.* at pp. 64–65.

decision, in connection with commitments made by the Sandinista government to abide by democratic electoral standards, the Court stated that it

> cannot 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.[72]

It is also clear that no legal impediments prevent voluntary international election monitoring as a means of protecting the emerging right of all peoples to free and open electoral democracy. However, this is not to say that any *duty* yet obliges States to have their elections internationally validated. Although we have noted that the OSCE process in Europe seems poised to pioneer such a general duty, even there the duty has not, as yet, been explicitly imposed on all members. In the international community, while there may be a duty under Article 25 of the Civil and Political Rights Covenant (as in its regional and customary law analogues) to permit free and open elections and to subject national compliance to review by the Human Rights Committee, there is still no obligation to permit election monitoring by international or regional organizations. Indeed, 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 is likely to be resisted. It must be admitted, however, that a "rule" which only applies voluntarily may have less legitimacy and may be seen as less fair than one that is of general application.

This was demonstrated when the General Assembly tiptoed around the democratic entitlement at its session in the fall of 1990. Passing two somewhat incongruent resolutions, one of which restates the democratic entitlement and commends monitoring[73] while the other emphasizes State sovereignty, affirming "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"[74] and

[72] Military and Paramilitary Activities in and against Nicaragua (Nic v. US), 1986 ICJ 14, at 131 (Judgment of June 27, 1986). [73] GA Res. 45/150 (1991), paras. 2, 3, 8, 10, 11.
[74] GA Res. 45/151 (1990), para. 2.

urging all States "to respect the principle of noninterference in the internal affairs of States."[75] The General Assembly has continued to pass versions of these two resolutions in the years since 1991.[76]

Opponents fear mostly that the monitoring process will be used to reimpose a form of neo-colonialism under the banner of 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. True, as John Stuart Mill has warned, the moral fiber of a nation may be weakened if it relies on the intervention of outsiders, rather than its own efforts, to achieve liberation.[77] However, given the technological edge which contemporary dictators enjoy over their own citizens, the chances of successful self-liberation have declined since Mill's day. Uganda's President Godfrey L. Binaisa, after the overthrow of Idi Amin's bloody junta, quite properly chided the General Assembly's delegates for their indifference to the plight of his nation's people. "In 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 seem to have fallen on deaf ears." Acerbically, 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."[78]

In an age in which an effective confrontation with entrenched auto-

[75] *Ibid.*, *para.* 4.

[76] On December 12, 1997, the General Assembly again passed two different resolutions. The first, entitled *Respect for the Principles of National Sovereignty and Non-Interference in the International Affairs of States in Their Electoral Process*, reaffirms that "any activities that attempt, directly or indirectly, to interfere in the free development of national electoral processes, in particular in the developing countries, or that are intended to sway the results of such processes, violate the spirit and letter of the principles established in the Charter and in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations." GA Res. 52/119 (1997). The second resolution, entitled *Strengthening the Role of the United Nations in Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections and the Promotion of Democratization*, commends "the electoral assistance provided to Member States" and recommends that "the Electoral Assistance Division continue to provide post-election assistance, as appropriate, to requesting States and electoral institutions, in order to contribute to the sustainability of their electoral processes." GA Res. 52/129 (1997).

[77] John Stuart Mill, *Dissertations and Discussions: Political, Philosophical and Historical* (1873), vol. III, pp. 238–63.

[78] UN Doc. A/34/PV.14, at pp. 4–6 (1979).