

Brooklyn Journal of International Law

Volume 30

Issue 3

SYMPOSIUM:

Intellectual Property Online: The Challenge of
Multi-Territorial Disputes

Article 10

2005

Complying with International Law: A Call for Free and Fair Elections

Lara R. Corchado

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/bjil>

Recommended Citation

Lara R. Corchado, *Complying with International Law: A Call for Free and Fair Elections*, 30 Brook. J. Int'l L. (2005).

Available at: <https://brooklynworks.brooklaw.edu/bjil/vol30/iss3/10>

This Note is brought to you for free and open access by the Law Journals at BrooklynWorks. It has been accepted for inclusion in Brooklyn Journal of International Law by an authorized editor of BrooklynWorks.

COMPLYING WITH INTERNATIONAL LAW: A CALL FOR FREE AND FAIR ELECTIONS

I. INTRODUCTION

Africa has an extensive history of ethnic conflict.¹ During the colonial era, many ethnic groups in Africa were arbitrarily joined together in an effort to form territorial units with little regard for the pre-existing boundaries.² Following independence, many African countries retained the boundaries that were established by colonial powers.³ The ethnic conflict that ensued has inevitably been reflected in the political processes and has largely prevented these countries from experiencing the stability necessary to establish a true democracy.⁴

An emerging right to democratic governance has been recognized by the international community.⁵ This right is based on the theory that governments derive their powers from the consent of the governed.⁶ This requires an electoral process characterized by public participation.⁷ Thus, an important manifestation of this right is holding free and fair elections. Because “representative democracy is an indispensable condition for

1. Okechukwu Oko, *Partition or Perish: Restoring Social Equilibrium in Nigeria through Reconfiguration*, 8 IND. INT'L & COMP. L. REV. 317, 319 (1998) [hereinafter Oko, *Partition or Perish*]. Chinedi Reginald Ezetah, *Minority Rights: International Law of Self-Determination and the Ogoni Question: Mirroring Africa's Post-Colonial Dilemma*, 19 LOY. L.A. INT'L & COMP. L.J. 811, 812 (1997).

2. INTERNATIONAL LAW: NORMS, ACTORS, PROCESS 124 (Jeffrey L. Dunoff, et al. eds., 2002).

3. The preservation of colonial borders was the result of *uti possedetis*. According to this principle, borders drawn under the colonial regime that corresponded to a colonial entity were preserved when the colonies achieved independence. *Id.* at 124.

4. See Oko, *Partition or Perish*, *supra* note 1, at 318–19. See also Linda Maguire, *Power Ethnicized*, 2 BUFF. JOUR. INT'L L. 49 (1995) (discussing how the policies of the colonial powers contributed to ethnic divisions in African colonies, especially in Rwanda and Burundi).

5. Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AMER. J. INT'L L. 46, 46–47 (1992).

6. *Id.* at 46.

7. *Id.* at 63.

[the] stability, peace and development,”⁸ elections are especially important in countries that have historically been plagued by ethnic conflict and are emerging from transitional periods.

While many African states have established democratic governments through elections, the political environments in which these elections are held have generally been regarded with suspicion. Indeed, many elections are marred by reports of threats, intimidation, harassment and violence.⁹ The hostile political environment in which many African elections are held naturally raises questions about the “fairness” of these elections. Instead of democratic governments, citizens have been subjected to oppressive regimes, which justify their political repression as based on a need to combat the security threats that ethnic conflicts pose.

Although these countries have taken substantial steps towards establishing a democratic government, this Note argues that there are international and domestic obligations to hold free and fair elections that have not been fulfilled. As an example, this Note will examine elections in Nigeria and Rwanda, two African states emerging from a transitional period. Part II will provide an overview of the political history in these two states. Part III will discuss the sources of the obligations to hold free and fair elections. Part IV will discuss the failure of these two countries to fulfill their obligations by examining the

8. O.A.S. Charter, pmb., available at <http://www.oas.org/juridico/English/agres1080.htm>.

9. See Ellen Knickmeyer, *Security Forces Move Out in Force to Quell Challenges to Africa's Longest-reigning Ruler*, ASSOCIATED PRESS, June 3, 2003 (For example, President Eyadema of Togo, a West African country, has been in power since 1963. Although Togo holds elections, President Eyadema has routinely used force to quash any opponents. Following the 1998 presidential elections when Eyadema abruptly stopped the vote count and declared himself the winner, international donors discontinued almost all funds to Togo.). See also INT'L CRISIS GROUP, ZIMBABWE: ANOTHER ELECTION CHANCE, EXECUTIVE SUMMARY AND RECOMMENDATIONS (2004), at <http://www.crisisgroup.org/home/index.cfm?id=3142&l=1> (last visited Mar. 9, 2005) (summarizing the problems with the political environment in Zimbabwe leading up to the March 2005 elections including how President Mugabe has “used economic bribery, bullying and propaganda to increase his support and remain in power.”). See also Franck, *supra* note 5, at 50 (The results of the 1988 national elections in Senegal were widely regarded as fraudulent by both opposition parties and social institutions. As a result, the opposition parties boycotted the 1990 local elections.).

repressive atmosphere in which the recent elections took place, the constitutional violations that resulted, and the inadequacy of the mechanisms designed to ensure free and fair elections. This Note will conclude in Part V that, in addition to fulfilling international and domestic obligations, free and fair elections are extremely important in countries plagued by ethnic conflict and emerging from a transitional period because they provide legitimacy both internationally and domestically.

II. POLITICAL HISTORY

A. Nigeria

During the colonial era, many of the different ethnic groups in Nigeria were forced into one “nation-state.”¹⁰ In Nigeria, there are approximately 250 ethnic groups.¹¹ There are three main ethnic groups: the Hausas in the North, the Yorubas in the West and the Ibos in the East.¹² Within these main ethnic groups are many smaller groups.¹³ The British disregarded the fact that many of these ethnic groups existed as separate tribal communities with their own languages, religion and culture.¹⁴ Despite this forced unification of different ethnicities, the colonial policies utilized by the British actually encouraged ethnic divisions and set the stage for ensuing ethnic distrust.¹⁵ Because Britain did not treat Nigeria as a single nation, its citi-

10. Oko, *Partition or Perish*, *supra* note 1, at 327–28.

11. Ezetah, *supra* note 1, at 813.

12. Okechukwu Oko, *Confronting Transgressions of Prior Military Regimes Towards a More Pragmatic Approach*, 11 *CARDOZO J. INT'L & COMP. L.* 89, 102–03 (2003) [hereinafter Oko, *Confronting Transgressions*].

13. *Id.* at 103.

14. Oko, *Partition or Perish*, *supra* note 1, at 327.

15. *See id.* at 330–31. In response to Britain's disregard of customary values and tradition, many citizens found solace in their ethnic groups. This had the effect of strengthening their ties to their ethnic groups and promoting loyalty to the different ethnic groups rather than to the state as a whole. In 1900, Britain adopted a policy of ruling the North and South as two separate entities and, in 1914, Southern Nigeria was divided into eastern and western regions. Because each region was comprised of different ethnic groups, British policy created a breeding ground for ethnic distrust among the different regions. *Id.*

zens did not consider themselves part of one nation and, thus, limited their concerns to their own ethnic groups.¹⁶

1. Post-Independence

When Nigeria achieved independence in 1960,¹⁷ it had an opportunity to establish an appropriate government for its multi-ethnic society. The government that was established, however, consisted of a parliamentary democracy in which political leaders tended to represent their respective ethnic groups.¹⁸ The ethnic distrust formed during the colonial era contributed to this post-independence political environment of ethnic self-interest in which the nation's welfare as a whole was rarely the focus of political campaigns.¹⁹ In this political environment, it was no wonder that the first post-independence elections in the republic of Nigeria proved useless as politicians "brutally displayed their lack of respect for democracy."²⁰

2. Military Rule

Nigeria's transition to democracy was undermined by the corruption that had infused the political process. The solution to Nigeria's degeneration into anarchy came in the form of a military government.²¹ In 1966, a military intervention was claimed necessary in order to avoid the country's demise.²² Following an unsuccessful coup in which the federal prime minister and finance minister were murdered,²³ General Ironsi, who was in command of the Nigerian army, took over administration of the country at the request of the remaining members the government.²⁴ The military regime promptly promulgated the

16. *See id.* at 331–32.

17. THE CARTER CENTER AND NAT'L DEMOCRATIC INST. FOR INT'L AFF., OBSERVING THE 1998–1999 NIGERIA ELECTIONS, FINAL REPORT 13 (1999) [hereinafter CARTER CENTER REPORT], at <http://www.cartercenter.org/documents/1152.pdf> (last visited Mar. 9, 2005).

18. Oko, *Partition or Perish*, *supra* note 1, at 331–33.

19. *Id.* at 332.

20. *Id.* at 333.

21. *Id.* at 333–34.

22. Elizabeth Knight, *Facing the Past: Retrospective Justice as a Means to Promote Democracy in Nigeria*, 35 CONN. L. REV. 867, 872 (2003).

23. *Id.*

24. Oko, *Partition or Perish*, *supra* note 1, at 334.

Constitution (Suspension and Modification) Decree.²⁵ This decree gave the military government the power to “make laws for the peace, order and good government.”²⁶ Under the pretense of promoting national unity, the decree suspended the Constitution and left the military regime free to “embark upon wholesale destruction of the democratic process.”²⁷ The military regime attempted to ensure compliance with its rule by quashing dissenters and undermining the entire system of government.²⁸ The military, however, was not immune from the ethnic divisions that plagued the country as a whole and nearly six months later, the army split off into ethnic groups.²⁹

The next military regime, headed by Colonel Gowon, was again the product of a coup in 1966.³⁰ This time, like the last, the justification for military intervention was a need to avoid the disintegration of the country.³¹ In response to growing ethnic tensions between the east and north regions, Colonel Gowon divided all four regions into twelve different states.³² The result, however, was a polarization of ethnic groups in newly created territorial divisions in which some states consisted of a single ethnic group.³³ A thirty-month civil war ensued after the eastern region threatened secession, but Colonel Gowon managed to crush the opposition in order to “maintain the territorial integrity” of the nation and to “assert the ability of the black man to build a strong progressive and prosperous modern state.”³⁴ In spite of Colonel Gowon’s promise that there would

25. See Okechukwu Oko, *Consolidating Democracy on a Troubled Continent: A Challenge for Lawyers in Africa*, 33 VAND. J. TRANSNAT’L L. 573, 591 (2000).

26. *Id.* at 591 n.83.

27. Oko, *Partition or Perish*, *supra* note 1, at 334. In 1966, General Ironsi promulgated the Unification Decree abolishing all regional governments. He justified his radical action on the grounds that the Decree would rid the country of all traces of regionalism thereby promoting the cohesion necessary for a successful government. *Id.*

28. Knight, *supra* note 22, at 872.

29. Oko, *Partition or Perish*, *supra* note 1, at 335.

30. *Id.* at 336.

31. Knight, *supra* note 22, at 873.

32. Oko, *Partition or Perish*, *supra* note 1, at 335.

33. *Id.* (For example, the East Central State, part of the former eastern region, was comprised solely of Ibos).

34. *Id.* at 335–36 (Colonel Ojukwu, the former governor of the eastern region, declared the former eastern region the Republic of Biafra). This was not

be a restoration of democracy following his transitional period of military rule, by the end of his reign democracy still had not been restored.³⁵

3. Return to Civilian Government

The military regime headed by Colonel Olusegun Obasanjo appeared to fare better in keeping its promise to restore democracy. A Constitution Drafting Committee, composed of fifty members from various states and professions, was created.³⁶ In an effort to address the concerns of the country's multi-ethnic communities, specific provisions were included to discourage ethnic conflict.³⁷ Most importantly, the new constitution established a presidential system of government,³⁸ finally fulfilling the military's promise of a restoration to democracy.

Once the Constitution was promulgated into law on October 1, 1979,³⁹ a Federal Electoral Commission (Commission) was established.⁴⁰ The Commission was responsible for organizing elections and regulating the activities of political parties.⁴¹ One of the main objectives of the Commission was to ensure that all political associations were open to every citizen, regardless of their ethnicity, and that each association truly reflected the multi-ethnic character of the country.⁴² When the military lifted

the last time Nigeria would be faced with a threat of secession. In October 1990, the Ogoni, an ethnic minority group located in the south of the country, presented its demand for self-determination to the military government of General Babangida. Ezetah, *supra* note 1, at 817–20. The Ogoni's demands were met with violent oppression. *Id.*

35. Colonel Gowon's reign ended in a coup in 1975. His successor was General Mohammed, a cabinet minister under Colonel Gowon. *See* Oko, *Partition or Perish*, *supra* note 1, at 338.

36. *Id.* at 337.

37. For example, the Constitution prohibited discrimination on the grounds of ethnic association, encouraged intermarriage among persons from different ethnic groups and promoted the formation of associations that cut across ethnic barriers. NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1979) § 15(2)–(3)(c)–(d).

38. *See id.* § 30–42. *See also* Oko, *Partition or Perish*, *supra* note 1, at 338.

39. *See* Const. (Enactment) Decree No. 25 (1978) (Nig.).

40. NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1979) § 140(1)(c).

41. Oko, *Partition or Perish*, *supra* note 1, at 339.

42. NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1979) § 202(b), (e).

the ban on political parties, however, many of the same politicians from the first post-independence political scene returned,⁴³ which set the stage for the elections of 1979.

4. Elections

Election monitors claimed the elections of 1979 were “tolerably free and fair.”⁴⁴ This appeared to restore some faith in the democratic system, as there was no military intervention. When President Shehu Shagari was re-elected in 1983, however, it became apparent that there had been widespread vote-rigging and that the election had been a fraud.⁴⁵ Not surprisingly, the military intervened again and ousted President Shehu Shagari, this time claiming the need to “redress the nation’s social and economic problems.”⁴⁶ Presidential elections were held again in 1993, and Moshood Abiola, a Yoruba businessman, was the apparent winner.⁴⁷ General Babangida, however, nullified the elections on the eve of the election results.⁴⁸ Many suspected the General of nullifying the election because Abiola was perceived as a threat to the northern tribes that traditionally dominated Nigerian politics.⁴⁹

43. Oko, *Partition or Perish*, *supra* note 1, at 340. Ultimately, the Commission approved five political parties: Great Nigeria’s People Party (GNPP); National Party of Nigeria (NPN); Nigeria Peoples Party (NPP); Peoples Redemption Party (PRP) and Unity Party of Nigeria (UPN). *Id.* at 339.

44. *Nigeria’s History of Turmoil*, WASHINGTONPOST.COM, (N.D.) [hereinafter *Nigeria’s History of Turmoil*], at <http://www.washingtonpost.com/wp-srv/inatl/longterm/nigeria/timeline.htm> (last visited Apr. 9, 2005). Shehu Shagari of the National Party of Nigeria (NPN) was elected in October 1979. *Id.*

45. RICHARD A. JOSEPH, *NIGERIA: THE RISE AND FALL OF THE SECOND REPUBLIC 170–73* (1987).

46. Knight, *supra* note 22, at 872.

47. Frank Aigbogun, *General Takes Control of Nigeria*, ASSOC. PRESS, Nov. 18, 1993, available at <http://washingtonpost.com/wp-srv/inatl/longterm/nigeria/stories/general111893.htm> (last visited Apr. 9, 2005).

48. CARTER CENTER REPORT, *supra* note 17, at 13. Both local and international election observers regarded the 1993 elections as “free and fair.” UN Office for the Coordination of Humanitarian Affairs, Irin Web Special On Nigeria, IRINNEWS.ORG (N.D.) [hereinafter Irin Web Special On Nigeria], at <http://www.irinnews.org/webspecials/nigeria/default.asp> (last visited Mar. 6, 2005).

49. Aigbogun, *supra* note 47. When Abiola declared himself President in 1994 he was arrested and charged with treason. Abiola eventually died in

Following the annulled election, General Babangida stepped down and established a civilian government that was promptly taken over by General Abacha.⁵⁰ Despite the military government's promise of a transition to democracy, the subsequent elections held in 1998 proved to be a ploy to preserve the military's power.⁵¹ Only five parties were permitted to participate in the elections and all nominated General Abacha.⁵² The elections were an effort to bolster the military's image, whose popularity was at an all-time low, both domestically and abroad, by implementing political reforms in response to the international community's growing concern about the government's brutal political repression.⁵³ The international community, however, denounced the elections and many Nigerian citizens voiced opposition to the present government through demonstrations, riots and increasing acts of violence.⁵⁴

When General Abacha suddenly died, his successor, General Abubakar, promptly stepped in and attempted to improve the image of the government.⁵⁵ It appeared that the transition to democracy would take place and, in 1998, Abubakar agreed that elections would be held by early 1999.⁵⁶ To facilitate this process, he established an Independent National Electoral Commission (INEC) in 1998 to organize and supervise the electoral process.⁵⁷

prison in 1998. *Nigeria's History of Turmoil*, *supra* note 44. His wife, Kudirat Abiola, was shot to death in 1996. *Id.*

50. CARTER CENTER REPORT, *supra* note 17, at 13.

51. *Id.* at 14.

52. *Id.*

53. *Id.* In response to the military government's harassment and detention of political dissidents, including journalists, human rights activists and politicians, the international community restricted aid and relations with Nigeria. *Id.* In particular, the United States and the European Union recalled their ambassadors and the U.N. General Assembly passed a resolution in December 1995 condemning the executions. Ezetah, *supra* note 1, at 822-23.

54. CARTER CENTER REPORT, *supra* note 17, at 14 (noting that there were also frequent anti-government bombings).

55. *Id.* at 14 (General Abacha reportedly died of a heart attack).

56. *Nigeria's History of Turmoil*, *supra* note 44.

57. See Const. (Independent National Electoral Commission Decree) Decree No. 17 § 4(1)(a) (1998) (Nig.). A former justice, Ephraim Akpata, was appointed chair of the commission. CARTER CENTER REPORT, *supra* note 17, at 16.

The INEC is authorized to exercise considerable discretion in the performance of its duties to organize, conduct and supervise all elections.⁵⁸ Its duties include conducting voter registration, compiling authentic voter registers and monitoring political parties.⁵⁹ In order to perform its duties, the INEC may establish rules and regulations to govern the operation of the parties as well as their campaigns.⁶⁰ In addition, the INEC is authorized to issue guidelines to govern the election process.⁶¹

For the 1998-99 elections, former U.S. President Jimmy Carter initiated a mission to observe the elections.⁶² Although international election monitors agreed that the elections were an important step in the democratization process, they noted many "electoral irregularities."⁶³ In an ironic twist, former military ruler, Olusegun Obasanjo was confirmed the winner.⁶⁴ It was alleged that the election was influenced by northern military political power when the Muslim Hausa in northern Nigeria dominated the military and exerted its power to keep a Christian Yoruba from becoming President for fear that government funds would be diverted away from the North.⁶⁵ In spite of the allegations of bribery and recognition of election process deficiencies, the election was nevertheless hailed as an important step in the democratic process.⁶⁶

58. NIG. CONST. (Constitution of the Federal Republic of Nigeria, 1999) 3rd sched., § 15(a).

59. *Id.* § 15(e)-(f).

60. *Id.* § 15(c), (f).

61. *See* Const. (Independent National Electoral Commission Decree) Decree No. 17 § 4 (1998) (Nig.).

62. *See generally* CARTER CENTER REPORT, *supra* note 17. (Local elections were held on Dec. 5, 1998; State and Governor elections were held on Jan. 9, 1999; National Assembly elections on Feb. 10, 1999 and the National elections on Feb. 27, 1999.).

63. *Id.* at 32 (noting that the reported voter turnout greatly exceeded voter registration).

64. Irin Web Special on Nigeria, *supra* note 48. Obasanjo was the military ruler who handed over the government to civilian rule in 1979. *Id.* Obasanjo was jailed by General Abacha for allegedly plotting to overthrow the government. *Id.* He was released just months before the election. *Id.*

65. Knight, *supra* note 22, at 886. Although President Obasanjo is of Yoruba descent, it was alleged that he "had the support of the military and was controlled by powerful northern political interests." *Id.*

66. *Id.*

B. Rwanda

1. Colonial History

When Rwanda was colonized by Germany in the late nineteenth century,⁶⁷ it was inhabited by three ethnic groups: Hutu, Tutsi and Twa.⁶⁸ The Tutsi migrated to Rwanda in the fourteenth century, which was already inhabited by the Hutu and Twa.⁶⁹ Although the Tutsi were greatly outnumbered by Hutus, it became the dominant group.⁷⁰ Rwanda was a monarchy and the Tutsi kings ruled from the 1600s forward.⁷¹ Despite the political dominance of the Tutsi, the Hutu and Tutsi lived in relative peace before colonization.⁷²

After Germany's defeat in World War I, Rwanda was ceded to Belgium.⁷³ Like Germany, Belgium administered a colonial policy of indirect rule.⁷⁴ Unlike Germany, however, Belgium arbitrarily determined who the rulers of Rwanda would be and replaced all Hutu leaders with Tutsis.⁷⁵ In addition, the Tutsi

67. Maguire, *supra* note 4, at 55. In the late 1800s, there were many German-led expeditions into the region that would become known as Ruandi-Urundi, now known as the countries Rwanda and Burundi. *Id.* By 1899, Germany exercised "de facto control" over the area through the establishment of various military outposts and Rwanda became part of German East Africa. *Id.*

68. Dorinda Lee Peacock, Comment, *It Happened and It Can Happen Again: The International Response to Genocide in Rwanda*, 22 N.C.J. INT'L L. & COM. REG. 899, 911 (1997). The Twa were the original inhabitants of the region, the Hutu were agriculturalists and the Tutsi were pastoralists. *Id.*

69. BBC News, *Timeline: Rwanda* (Aug. 26, 2003) [hereinafter *Rwanda Timeline*], at http://news.bbc.co.uk/1/hi/world/africa/country_profiles/1070329.stm (last visited Mar. 6, 2005).

70. Peacock, *supra* note 68, at 911.

71. *Rwanda Timeline*, *supra* note 69.

72. Maguire, *supra* note 4, at 61. The relationship between the Hutu and Tutsi strongly resembled the European feudal system. *Id.* The Hutu were agriculturalists and harvested crops on parcels of land and paid the Tutsi to protect them. *Id.* Although the social system was based on inequality, each ethnic group relied on the other, thus, neither group resorted to violence against the other. *Id.*

73. *Id.* at 55.

74. *Id.*

75. *Id.*

also enjoyed economic and educational advancement.⁷⁶ The basis of Belgium's policy was the alleged superiority of the Tutsi, who most resembled Europeans as they were taller and had lighter complexions than the Hutu.⁷⁷ As a result of Belgium's policy of preferential treatment, Hutus were systematically excluded from participating in the political, educational and judicial spheres of society.⁷⁸

When Rwanda was deemed a UN trust territory in 1946, Belgium became responsible for promoting Rwanda's transition towards independence.⁷⁹ Belgium's policy towards its colonial inhabitants, however, took a different approach. Instead of exhibiting clear preferential treatment towards the Tutsi, the Belgians began to promote and incite the existing atmosphere of ethnic and political tension.⁸⁰ Although the Belgians implemented constitutional reforms designed to give the Hutu greater representation in government, the Tutsi retained their control over government positions.⁸¹ Despite the Hutus demand for representation proportionate to their numbers, the Tutsi were, naturally, reluctant to relinquish control.⁸² Finally, as a result of Hutu discontent and Belgium encouragement, the Hutu began to rebel against the politically dominant Tutsi.⁸³

In 1959, Hutu discontent manifested itself in a violent uprising that resulted in thousands of deaths.⁸⁴ Thousands of Tutsis fled to Uganda, including Tutsi King Kigeri V.⁸⁵ The result of

76. BBC News, *Rwanda: How the Genocide Happened* (June 7, 2001) [hereinafter *Rwanda: How the Genocide Happened*], at <http://news.bbc.co.uk/1/hi/world/africa/1288230.stm> (last visited Mar. 6, 2005).

77. Maguire, *supra* note 4, at 55, 62–64. See also *Rwanda: How the Genocide Happened*, *supra* note 76 (discussing the basis for the Belgians' preferential treatment of the Tutsi).

78. Maguire, *supra* note 4, at 55.

79. *Id.* at 56.

80. *Id.* at 56–57.

81. *Id.* at 57. During this period of transition, the Tutsi held all forty-three of the chiefdoms, 549 sub-chief positions (out of 559) and approximately eighty-two percent of judicial and agricultural positions. *Id.*

82. U.S. DEP'T OF STATE, U.S. DEP'T OF STATE POST REPORT, RWANDA [hereinafter U.S. DEP'T OF STATE RWANDA REPORT], at http://foia.state.gov/MMS/postrpt/pr_view_all.asp?CntryID=125 (last visited Feb. 27, 2005).

83. *Id.*

84. *Rwanda: How the Genocide Happened*, *supra* note 76 (estimating that more than 20,000 Tutsis were killed).

85. *Rwanda Timeline*, *supra* note 69.

the "Rwandan Revolution," which was primarily led by the Hutu-dominated political party, Parti du Mouvement de l'Emancipation Hutu (PARMEHUTU), was the abolition of the monarchy and the establishment of a republic.⁸⁶ Thus, when Rwanda gained independence in 1962, the Hutus were in power of the newly formed, independent Republic of Rwanda.⁸⁷

2. Post-Independence

In the years following independence, the Hutu maintained their political power by systematically discriminating against the Tutsi.⁸⁸ Under the repressive Hutu regime, Tutsis were periodically subjected to waves of killing and ethnic cleansing.⁸⁹ In Uganda, Rwandan refugees, mostly comprised of Tutsi whose return had been continually prevented by the Hutu government, formed a rebel group, the Rwandan Patriotic Front (RPF).⁹⁰ In 1990, the RPF invaded Rwanda and the civil war that ensued lasted for three years with a death toll in the thousands.⁹¹ In an effort to end the civil war, the Organization for African Unity (OAU) mediated a peace agreement,⁹² the Arusha Peace Accords, between the Rwandan government, headed by President Habyarimana, and the RPF in 1993.⁹³

86. Maguire, *supra* note 4, at 57.

87. *Rwanda Timeline*, *supra* note 69 (Gregoire Kayibanda, a Hutu, became president of independent Rwanda).

88. Samantha Powers, *Bystanders to Genocide*, THE ATLANTIC MONTHLY, Sept. 2001, available at <http://www.mtholyoke.edu/acad/intrel/power.htm> (last visited Apr. 9, 2005).

89. *Id.* The situation was quite the opposite, however, in Burundi, Rwanda's neighboring country. Maguire, *supra* note 4, at 58. From 1966–1983, Tutsi ruled Burundi and the Hutu were subject to persecution and periodic killing. *Id.*

90. L. Danielle Tully, Note, *Human Rights Compliance and the Gacaca Jurisdictions in Rwanda*, 26 B.C. INT'L & COMP. L. REV. 385, 388 (2003).

91. Maguire, *supra* note 4, at 57. During the civil war of the 1990s France provided the Hutu regime with military support. See generally PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES (1998) (discussing French action in Rwanda).

92. S.C. Res. 872, U.N. SCOR, 48th Sess., 3288th mtg. ¶ 5, U.N. Doc. S/RES/872 (1993).

93. See Peace Agreement Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Aug. 4, 1993 [hereinafter Arusha Peace Accords].

Under the Arusha Peace Accords, there was to be power sharing among the Rwandan government, the RPF and other newly-formed political parties under a transitional government that would govern until democratic elections were held.⁹⁴ The United Nations established a neutral force, the U.N. Assistance Mission for Rwanda (UNAMIR), to assist in the implementation of the peace agreement and to supervise the establishment of a new government and elections by December 1995.⁹⁵ Hutu extremists, however, refused to accept the terms of the peace agreement and initiated a plan of terror against Tutsis and Hutu moderates who supported the agreement.⁹⁶

3. Genocide

In April 1994, the fragile state of security in Rwanda was destroyed literally overnight when President Habyarimana and President Ntaryamira of Burundi, who were returning from a peace conference, were killed when their plane was shot down.⁹⁷ Within hours of President Habyarimana's death, the Rwandan Armed Forces (FAR) and Hutu militia groups⁹⁸ embarked on a systematic killing spree targeting Tutsis, politically moderate Hutus who supported the peace agreement, peacekeepers and human rights activists.⁹⁹ Although the 1994 genocide was the result of a carefully planned attack organized by the Rwandan Presidential Guard, who reportedly prepared lists of targets in advance, the violence soon spread and the civilian population,

94. Protocol of Agreement on Power-Sharing within the Framework of a Broad-Based Transitional Government Between the Government of the Republic of Rwanda and the Rwandese Patriotic Front, Oct. 30, 1992, arts. 14, 23(1) [hereinafter Arusha Protocol].

95. S.C. Res. 872, *supra* note 92, ¶¶ 2–3, 6.

96. Powers, *supra* note 88.

97. *Frontline: The Triumph of Evil: 100 Days of Slaughter: A Chronology of U.S./U.N. Actions* (1999), at <http://www.pbs.org/wgbh/pages/frontline/shows/evil/etc/slaughter.html> (last visited Mar. 6, 2005).

98. Tully, *supra* note 90, at 388. The Interahamwe, “Those Who Attack Together,” and the Impuzaamugambi, “Those With a Single Purpose,” were trained by extremist Hutus in Rwanda to help carry out the genocide. *Id.*

99. Powers, *supra* note 88 (among the first victims was Prime Minister Agathe Uwilingiyimana who became head of state after President Habyarimana's death).

encouraged by Hutu-controlled radio stations,¹⁰⁰ also took part in the attacks.¹⁰¹ By July 1994, however, the RPF had defeated Hutu extremists and established a new government, the Government of National Unity, thus bringing the genocide to an end.¹⁰²

4. Post-Genocide

Following the genocide, Rwanda entered a period of reconstruction. Former President Habyarimana's political party, the Mouvement Republicain Nationale pour la Democratie (MRND), was outlawed¹⁰³ and new mechanisms were created to prosecute those responsible for genocidal acts.¹⁰⁴ To demonstrate its commitment to establishing a multi-ethnic government under the Arusha peace agreement, the new government chose Pasteur Bizimungu, a Hutu, to be President and a majority of cabinet posts were assigned to members of the Tutsi-dominated RPF.¹⁰⁵ In spite of this action, however, the new government was clearly Tutsi-dominated.

100. See Jamie Frederic Metzler, *Rwandan Genocide and the International Law of Radio Jamming*, 91 AM. J. INTL L. 628 (1997). Radio-Television Libre des Milles Collines (RTL) was a semi-private station founded by Hutu extremists that would broadcast propaganda against Tutsis and moderate Hutus. *Id.* at 631. The broadcasts were designed to incite attacks against individuals who were identified and criticized on the air. *Id.* During the genocide, RTL broadcast the names of targets as well as the license plate numbers of specific vehicles said to contain "accomplices." *Id.*

101. Peacock, *supra* note 68, at 916. It is estimated that approximately 500,000 Tutsis were killed as a result of the 1994 genocide. HUMAN RIGHTS WATCH WORLD REPORT 2003: RWANDA [hereinafter HUMAN RIGHTS RWANDA REPORT], at <http://www.hrw.org/wr2k3/africa9.html> (last visited Mar. 6, 2005).

102. Tully, *supra* note 90, at 389. Following the RPF's victory, an estimated two million Hutus fled the country. *Rwanda: How the Genocide Happened*, *supra* note 76.

103. U.S. DEP'T OF STATE, RWANDA HUMAN RIGHTS PRACTICES 1995, Mar. 1996, at <http://www.state.gov/r/pae/ei/bgn/2861.htm> (last visited Mar. 6, 2005).

104. Organic Law 8/96, arts. 19–23 (1996) (Rwanda), available at <http://preventgenocide.org/law/domestic/rwanda.htm> (last visited Mar. 6, 2005) (The Rwandan government created special chambers within the existing courts to deal exclusively with genocide cases. In addition, four categories were established to separate criminals with different degrees of responsibility.).

105. Peacock, *supra* note 68, at 918.

The RPF's political philosophy consisted of the notion that a "true democracy" could only be achieved through public participation in public affairs and the eradication of ethnicity.¹⁰⁶ Because ethnic discrimination was used to legitimize political power, the RPF ideology aimed to eliminate ethnicity from the political arena.¹⁰⁷ The Rwandan government implemented political policies designed to control the actions of political parties that were justified by the need to ensure that the opposition did not foster ethnic division.¹⁰⁸ Most notably, political organizing was banned until 1999.¹⁰⁹ Although the motivation for these policies may have been justified given the highly politicized environment surrounding the genocide, the result was that many political freedoms were restricted, thus undermining the RPF ideology of public participation in political affairs.

In April 2000, Paul Kagame, the Tutsi leader of the RPF, became president when President Bizimungu resigned.¹¹⁰ Former President Bizimungu, who openly criticized his colleagues for being unnecessarily harsh on the opposition, was essentially forced to relinquish his post.¹¹¹ The following year, he and former Minister Charles Ntakirutinka formed a new political party that was promptly declared illegal by the government.¹¹² In April 2001, Bizimungu was arrested and imprisoned for engaging in illegal political activities and fostering ethnic divisions.¹¹³

106. INT'L CRISIS GROUP, "CONSENSUAL DEMOCRACY" IN POST-GENOCIDE RWANDA: EVALUATING THE MARCH 2001 DISTRICT ELECTIONS 3 (2001) [hereinafter ICG REPORT 1], at http://www.crisisgroup.org/library/documents/report_archive/A400453_09102001.pdf (last visited Apr. 6, 2005).

107. *Id.*

108. *Id.* at 4.

109. U.S. DEP'T OF STATE RWANDA REPORT, *supra* note 82.

110. BBC News, *Profile: Rwanda's Strongman* (Aug. 27, 2003) [hereinafter *Rwanda Profile*], at <http://news.bbc.co.uk/1/hi/world/africa/3170451.stm> (last visited Mar. 6, 2005). (Born in Rwanda, Paul Kagame grew up in Uganda and had been a soldier for most of his life. In 1979, he joined the National Resistance Army (NRA) in Uganda where he was a guerilla soldier before he was made head of military intelligence. Kagame along with his friend, Fred Rwigyema, helped establish the RPF.)

111. *Id.*

112. HUMAN RIGHTS RWANDA REPORT, *supra* note 101. The political party, PDR-Ubuyanja, was declared illegal although there was no controlling law permitting the government to declare its illegality. *Id.*

113. *Id.*

In November 2000, the National Electoral Commission (NEC)¹¹⁴ was formed to supervise the March 2001 district elections in which the Rwandan government's decentralization policy¹¹⁵ would be put into practice. The NEC, which was given considerable authority, is officially responsible for preparing, organizing and conducting elections, which includes establishing district and provincial electoral commissions to prepare for elections at the local level.¹¹⁶ Its primary objective, however, is to ensure that elections are free and transparent.¹¹⁷ The 2001 district elections were perceived as an important step in the transition process.¹¹⁸ Although there were very few reports of electoral misconduct, the tight political control exercised by the RPF over the elections prevented it from being a democratic process.¹¹⁹ International monitors observed that voters generally selected candidates whom they believed the influential members of the community would support.¹²⁰ In addition, the NEC, which approved the final selection of candidates, used its power to veto candidates who did not support government policies.¹²¹ In spite of the doubts as to the existence of a real choice for Rwandan voters, the 2001 district elections were considered a substantial step towards democracy.¹²²

III. SOURCE OF OBLIGATION TO HOLD FREE AND FAIR ELECTIONS

As discussed in the introduction, the international legal community has recognized an emerging right to democratic

114. The Arusha Peace Accords stipulated that an independent Electoral Commission had to guarantee the organization of free and fair elections. Arusha Protocol, *supra* note 94, art. 24(c).

115. Having identified an overly centralized state as one of the primary causes of the 1994 genocide, the Rwandan government adopted a policy of "consensual democracy" in which the country was divided into districts that were to be run at the administrative level through collective decision-making. See ICG REPORT 1, *supra* note 106, at 3-5.

116. National Electoral Commission, at [http://www.comelena.gov.rw/index eng.htm](http://www.comelena.gov.rw/index.eng.htm) (last visited Apr. 14, 2005).

117. See RWANDA CONST. art. 180 (2003).

118. ICG REPORT 1, *supra* note 106, at ii.

119. *Id.* at iii.

120. *Id.* at 19.

121. *Id.* at iii.

122. *Id.* at 20.

governance.¹²³ Thomas Franck, the legal scholar who first introduced this theory, argues that democratic entitlement has become an international norm.¹²⁴ Therefore, countries seeking legitimacy internationally must conform to the norms of the international community.¹²⁵ In order to conform to this norm, countries must govern with the consent of their citizens.¹²⁶ This is especially important in countries emerging from transitional periods where validation by the international community is paramount.¹²⁷

According to Franck, self-determination, an internationally-guaranteed human right, is the primary basis of democratic entitlement.¹²⁸ Franck interprets the right to self-determination as the right of “peoples in all states to free, fair and open participation in the democratic process of governance freely chosen by each state.”¹²⁹ Democracy can be defined as involving three central rights: “the right to take part in government, the right to vote and be elected, and the right to equal access to public service.”¹³⁰ Thus, free and fair elections are crucial elements of democratic governance.

“Free and fair elections” is the general term used to describe the international standard for political participation in governance.¹³¹ The right to such elections, however, presupposes the existence of other human rights, such as freedoms of expres-

123. Franck, *supra* note 5, at 46–47.

124. *Id.* at 47.

125. *Id.* at 48.

126. *Id.* at 46.

127. See OAS Charter, *supra* note 8 (“representative democracy is an indispensable condition for [the] stability, peace and development...”). See also Franck, *supra* note 5, at 50. Franck also notes that election monitoring can be particularly useful where there is doubt as to the legitimacy of a regime. *Id.* at 75.

128. *Id.* at 52.

129. *Id.* at 59 (Although the meaning of self-determination has different interpretations in international law, Franck interprets it as a peoples’ right to inclusion in their government’s politics rather than the right of a people to become an independent state).

130. Muna Ndulo, *The Democratization Process and Structural Adjustment in Africa*, 10 IND. J. GLOBAL LEG. STUD. 315, 334 (2003).

131. Ibrahim J. Gassama, *Safeguarding the Democratic Entitlement: A Proposal for United Nations Involvement in National Politics*, 30 CORNELL INT’L L.J. 287, 294 (1997).

sion, thought, assembly and association.¹³² Moreover, the holding of free and fair elections may not always be sufficient if the candidates are not truly committed to democracy.¹³³ However, free and fair elections may serve as “evidence of consent to the process by which a populace is consulted by its government.”¹³⁴ Thus, free and fair elections legitimize governance.

Evidence of the right to democratic governance can be found in both international customary law and treaties. Because countries are required to conform their laws to their international obligations, evidence of an obligation to hold free and fair elections can also be found in the domestic law of Nigeria and Rwanda.

A. Customary International Law

A basis for the right to democratic governance can be found in customary law. Customary law results from the practice of states that are followed out of a sense of legal obligation, or *opinio juris*.¹³⁵ As of 1991, more than 110 governments are legally committed to permitting multi-party, secret ballot elections.¹³⁶ Furthermore, as of 2003, more than three-quarters of African countries have adopted democratic systems of governance.¹³⁷ The existence of a rule of customary international law is generally more difficult to confirm because it is not codified in a single binding document. However, evidence of customary law can be found in the practice of states such as governmental acts and official statements of policy.¹³⁸ Furthermore, treaties may also constitute evidence of customary law if they are widely accepted.¹³⁹

The UN has become increasingly involved in promoting democracy. In 1993, the UN Security Council authorized member

132. See Susan Marks, *The End of History? Reflections on Some International Legal Theses*, 8 EUR. J. INT'L L. 449, 458 (1997), available at <http://www.ejil.org/journal/Vol8/No3/index.html> (last visited Mar. 6, 2005).

133. *Id.*

134. *Id.*

135. Restatement (Third) on Foreign Relations Law § 102(2), cmt. c [hereinafter Restatement].

136. Franck, *supra* note 5, at 47.

137. Ndulo, *supra* note 130, at 318.

138. Restatement, *supra* note 135, § 102 cmt. b.

139. *Id.* § 102(3).

states to use force to restore the democratic government in Haiti.¹⁴⁰ Aside from this Security Council resolution, UN action has been primarily in the form of electoral assistance. From 1991 to 2001, the UN received requests for electoral assistance from no less than fifty-three countries, including Nigeria and Rwanda.¹⁴¹ These UN actions reflect the theory that democratic entitlement is an international norm. UN General Assembly Resolutions also provide evidence supporting a legal right to democratic governance. Although General Assembly Resolutions are not binding, if passed with overwhelming support they may constitute strong evidence of customary law.

The Universal Declaration of Human Rights, for example, was passed with overwhelming support in 1948.¹⁴² Although this resolution does not have the force of a treaty, over the years it has gained such esteem that it may constitute a customary rule of international law.¹⁴³ It articulates a right to political participation and states “[t]he will of the people shall be the basis of the authority for the government.”¹⁴⁴ It further states “this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage.”¹⁴⁵ It also articulates rights that are essential components of democratic entitlement, such as freedoms of opinion, expression,¹⁴⁶ assembly and association.¹⁴⁷

More recent resolutions reinforce the notion that a right to democratic governance exists and that free and fair elections are a necessary element of democracy. In 1991, the General Assembly adopted a resolution entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.”¹⁴⁸ This resolution was committed to enhancing the UN’s role in

140. Ndulo, *supra* note 130, at 336.

141. *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General*, U.N. GAOR, 56th Sess., Annex 1, Agenda Item 131(b), U.N. Doc. A/56/344 (2001).

142. See Franck, *supra* note 5, at 61.

143. *Id.*

144. Universal Declaration on Human Rights, art. 21, G.A. Res. 217A(III), U.N. GAOR, 3d Sess., U.N. Doc. A/810 (1948).

145. *Id.*

146. *Id.* art. 19.

147. *Id.* art. 20.

148. See G.A. Res. 45, U.N. GAOR, 69th Plenary mtg., U.N. Doc. A/RES/45/150 (1990).

the electoral process, especially in countries seeking to strengthen their electoral systems.¹⁴⁹ In 2001, a resolution called upon states to encourage democracy through the “development of ... an electoral system that ensures periodic, free and fair elections.”¹⁵⁰ It further expressed its commitment to the “process of democratization of States.”¹⁵¹

B. Treaties

Additional evidence of the right to democratic governance can be found in treaties in which the right to political participation has been codified. The terms of a treaty are legally binding on its signatories and the parties must implement and enforce domestic laws to conform to their treaty obligations.¹⁵² Both Rwanda and Nigeria are signatories without qualifications to the International Covenant on Civil and Political Rights (ICCPR)¹⁵³ and the African Charter on Human and People's Rights (African Charter).¹⁵⁴ Additionally, both are parties to the International Covenant on Economic, Social and Cultural Rights (ICESCR), however, only Nigeria is a signatory without reservation.¹⁵⁵ All three treaties set forth provisions for civil and political freedom for all people.

The ICCPR, one of the most important multilateral human rights treaties, was ratified in 1966.¹⁵⁶ Nigeria became a party in 1993¹⁵⁷ and Rwanda did so in 1975.¹⁵⁸ The right to political

149. *See id.* ¶ 9.

150. *Promoting and Consolidating Democracy*, U.N. GAOR 3d Comm., 55th Sess., 81st Plenary mtg. ¶ 1(a), U.N. Doc. A/RES/55/96 (2001).

151. *Id.* at 2.

152. Vienna Convention on the Law of Treaties, *entered into force* Jan. 27, 1980, arts. 26–27, 1155 U.N.T.S. 331, 338 [hereinafter Vienna Convention]. (Nigeria became a party on July 31, 1969 and Rwanda became a party on Jan. 3, 1980. Both are signatories without qualifications.)

153. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, art. 25(a), 999 U.N.T.S. 85, 273, 275 [hereinafter ICCPR].

154. African Charter on Human and People's Rights, *adopted* June 27, 1981, art. 13, 1520 U.N.T.S. 217, 263, 266 [hereinafter African Charter].

155. International Covenant on Economic, Social and Cultural Rights, *adopted* Dec. 16, 1966, art. 1(1), G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, 69 [hereinafter ICESCR].

156. ICCPR, *supra* note 153, 999 U.N.T.S. at 171.

157. *Id.* at 273.

158. *Id.* at 172 n.1.

participation is evident in Article 25, which provides that all people have the right to take part in the conduct of public affairs, directly or through freely chosen representatives.¹⁵⁹ The ICCPR further provides that there will be “genuine periodic elections” that demonstrate the “free expression of the will of the electors.”¹⁶⁰ Thus, free and fair elections are an integral part of the right to political participation. Furthermore, the ICCPR guarantees certain fundamental human rights, such as freedoms of thought,¹⁶¹ expression¹⁶² and association,¹⁶³ which are the underpinnings of a free and fair election.

The African Charter was ratified in 1981¹⁶⁴ and both Nigeria and Rwanda became parties to it in 1983.¹⁶⁵ The Charter is committed to the promotion and protection of people’s rights and freedoms, including civil and political rights.¹⁶⁶ Evidence supporting a right to democratic governance can be found in Article 13, which states “every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives.”¹⁶⁷ Thus, citizens have the right to vote and be elected. Finally, the African Charter guarantees certain human rights whose existence are a necessary component of holding free and fair elections, such as freedoms of association¹⁶⁸ and assembly.¹⁶⁹

Additionally, both Nigeria and Rwanda are parties to the ICESCR¹⁷⁰ which states that “[a]ll peoples have the right to self-determination” and that “[b]y virtue of that right they freely determine their political status.”¹⁷¹ While there is no specific provision articulating the right to political participation, according to Franck’s interpretation, self-determination entails free, fair and open participation in the democratic process of govern-

159. *Id.* at 179.

160. *Id.* art. 25(b).

161. *Id.* art. 18.

162. *Id.* art. 19(2).

163. *Id.* art. 22.

164. African Charter, *supra* note 154, 1520 U.N.T.S. at 217.

165. *Id.* at 245 n.1.

166. *See id.* at 246.

167. *Id.* at 248.

168. *Id.* art. 10.

169. *Id.* art. 11.

170. ICESCR, *supra* note 155, 993 U.N.T.S. at 172 n.1.

171. *Id.* at 173.

ance.¹⁷² Thus, the ICESCR can be read to support a right to democratic governance.

C. Other Evidence

Although Nigeria and Rwanda are not legally bound by treaties to which they are not a party,¹⁷³ the existence of other treaties guaranteeing a right to political participation demonstrates that it is a widely accepted right. The American Convention on Human Rights (American Convention) sets forth provisions guaranteeing the right to political participation.¹⁷⁴ Article 23 states that every citizen has the right to vote and be elected in genuine and periodic elections.¹⁷⁵ This provision is similar to Article 25 of the ICCPR,¹⁷⁶ which further substantiates the theory that democratic governance is customary law. Furthermore, fundamental human rights relating to political participation are also guaranteed, such as freedoms of thought, opinion,¹⁷⁷ association¹⁷⁸ and assembly.¹⁷⁹

Additionally, the Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms (Protocol) articulates a right to democratic governance.¹⁸⁰ Article 3 states that parties shall hold “free elections...under conditions which will ensure the free expression of the opinion of the people....”¹⁸¹ The European Court of Human Rights has interpreted this to mean that states are required to permit their citizens to participate in free and open elections.¹⁸²

The existing customary law and treaty law make clear that democratic governance is, in fact, an international norm. As an

172. Franck, *supra* note 5, at 52.

173. Restatement, *supra* note 135, § 102(3).

174. See American Convention on Human Rights, *entered into force* July 18, 1978, 1144 U.N.T.S. 143, 145 [hereinafter American Convention].

175. *Id.* at 151.

176. ICCPR, *supra* note 153, 999 U.N.T.S. at 179.

177. American Convention *supra* note 174, 1144 U.N.T.S. at 148–49.

178. *Id.* art. 16.

179. *Id.* art. 15.

180. See Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *entered into force* May 18, 1954, art. 3, 213 U.N.T.S. 262, 264.

181. *Id.* at 264.

182. Franck, *supra* note 5, at 66.

international norm, states are obliged to conform to it.¹⁸³ Furthermore, the failure to conform to this norm constitutes a violation of international law.¹⁸⁴ Thus, countries that hold elections in politically repressive atmospheres marked with electoral fraud have failed to conform to this norm and have violated international law.

IV. EVIDENCE OF THE FAILURE TO FULFILL OBLIGATIONS

As discussed above, there is evidence supporting the existence of an international obligation to hold free and fair elections. While interpretations as to what constitutes free and fair may differ,¹⁸⁵ it is clear that “elections cannot be merely used to lend authority to borderline authoritarian regimes.”¹⁸⁶ Elections in which the party in power retains its power by manipulation, electoral fraud and intimidation clearly do not satisfy the criteria of free and fair. Furthermore, instances such as these violate the right to democratic governance because the election results do not reflect the will of the people.

The African Charter and the ICCPR, as discussed above, support the existence of a right to democratic governance.¹⁸⁷ As signatories, Nigeria and Rwanda are obligated to conform their domestic laws to fulfill their treaty obligations.¹⁸⁸ Furthermore, Article 26 of the African Charter states that parties have a “duty... to allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of rights and freedoms guaranteed by the present Charter.”¹⁸⁹ This part of the Note will examine the political atmosphere surrounding the recent 2003 elections in Nigeria and Rwanda and discuss how these countries failed to fulfill their

183. See Restatement, *supra* note 135, at § 102 (noting that sources of a rule of international law can be “in the form of customary law, by international agreement or by derivation from general principles common to the major legal systems of the world.”).

184. *Id.*

185. Gassama, *supra* note 131, at 294.

186. Amy N. Lippincott, Note, *Is Uganda's “No Party” System Discriminatory Against Women and a Violation of International Law?*, 27 BROOK. J. INT'L L. 1137, 1153 (2000).

187. See *supra* Part III, B.

188. See African Charter, *supra* note 154, art. 1, 1520 U.N.T.S. at 246; ICCPR, *supra* note 153, art. 2(1–2), 999 U.N.T.S. at 173.

189. African Charter, *supra* note 154, art. 26, 1520 U.N.T.S. at 250.

international obligations to hold free and fair elections. It will also examine some of the shortcomings of the national institutions created to ensure that elections are free and fair.

A. Nigeria

The Nigerian government still reflects the ethnic division that has existed since the country achieved independence. All of its military heads of state have come from the Hausa ethnic group, except for General Ironsi and General Obasanjo, the current President of Nigeria.¹⁹⁰ The Presidential lineups reflected the divisions along ethnic lines as they generally consisted of a Northerner with a Southern running mate or vice versa.¹⁹¹ Additionally, the 2003 elections reflected the strong influence the military still has on Nigerian politics. Not only was President Obasanjo's main rival, General Buhari, a former military leader, two of the other candidates who ran for the presidency were also former members of the military.¹⁹²

1. 2003 Elections

Many of the problems that have plagued Nigeria since its first attempt at civilian rule were reflected in the most recent April 2003 elections in which President Obasanjo of the People's Democratic Party (PDP) was re-elected with sixty-two percent of the vote.¹⁹³ The elections were marred by reports of numerous cases of electoral fraud such as underage voting, multiple voting, stuffing ballot boxes, snatching of ballot boxes and falsi-

190. Oko, *Confronting Transgressions*, *supra* note 12, at 117 n.158.

191. EUROPEAN UNION ELECTION OBSERVATION MISSION, NIGERIA FINAL REPORT 9 (2003) [hereinafter EUEOM REPORT], at http://europa.eu.int/comm/external_relations/human_rights/eu_election_ass_observ/nigeria/rep03.pdf (last visited Apr. 1, 2005).

192. Irin Web Special on Nigeria, *supra* note 61 (Maj-Gen. Ike Nwachukwu was a former foreign minister in a previous military government and Emeka Odumegwu-Ojukwu was a colonel in the Nigerian army who led the attempted secession of the eastern region that resulted in the Biafra civil war in 1967).

193. Lara Maupin, Lesson Plan, *Nigeria Elections*, NEWSHOUR EXTRA (2003), at http://www.pbs.org/newshour/extra/teachers/lessonplans/world/nigeria_4-23.html (last visited Mar. 31, 2005). (President Obasanjo's primary opponent, Muhammadu Buhari, a Muslim former military leader, won thirty-two percent).

fication of results.¹⁹⁴ Election observers noted that the established political parties, such as the PDP, were the parties primarily involved in the electoral malpractice.¹⁹⁵ In addition to the controversy surrounding the presidential elections, there were numerous challenges to the elections for state governorship, senator, and legislative seats.¹⁹⁶ This caused some to name the election 2003 “auction, selection or deception 2003.”¹⁹⁷

2. Electoral Law

The Electoral Law of 2002 sets forth numerous provisions governing the electoral process in Nigeria.¹⁹⁸ However, the 2003 elections reflect the inadequacy and inconsistency of many of its provisions.

The Electoral Law does not provide an adequate mechanism for redressing abuses by the INEC and political parties because the only way to challenge an election or election results is by bringing an election petition before the appropriate Election Tribunal.¹⁹⁹ However, only candidates or political parties may

194. EUEOM REPORT, *supra* note 191, at 37.

195. *Id.* at 42.

196. The Lagos State Election Tribunal dismissed Anthony Olufunso Williams' petition challenging his opponent's Bala Tinubu's win and confirmed Tinubu as the governor of Lagos. Innocent Anaba, *Electoral Tribunal Confirms Tinubu's Election*, THE VANGUARD, June 3, 2003. Collins Eselomo challenged the election of Solomon Funkekeme to the State House of assembly citing large-scale irregularities in the election result. *Tribunal Upholds Election of Lawmaker*, DAILY TRUST, Aug. 12, 2003. The Delta State Election Tribunal upheld the election noting that the petitioner did not want to pursue his case. *Id.* Willy Ezugwu challenged the Independent National Electoral Commission's (INEC) declaration of Fidelis Okoro as the senator for Enugu North in the Enugu Election Tribunal. *Tribunal Dismisses INEC's Motion Against Proceedings*, DAILY TRUST, Aug. 8, 2003.

197. Ahmadu Kurfi, *The 2003 Elections and its Aftermath at* http://www.nigerdeltacongress.com/articles/2003_elections_and_its_aftermath.htm (last visited Apr. 1, 2005).

198. *See generally* Electoral Law (2002) (Nig.).

199. *Id.* § 131(1). The appropriate Election Tribunal for Presidential elections is the Court of Appeals; for all other elections petitions must be brought before the Election Tribunal established by the Electoral Law. *Id.* § 131(2). *See also* § 134(1) (“[a]n election may be questioned on any of the following grounds... (b) that the election was invalid by reason of corrupt practice or non compliance with the provisions of this Act; (c) that the respondent was not duly elected by majority of lawful votes cast at the election.”).

bring these petitions.²⁰⁰ Voters may file a complaint with the Public Complaints Commission, but this institution has no method of enforcing any of its findings.²⁰¹ Thus, those who are most affected, the voters, do not have an adequate means of redress.

Section 36 of the Electoral Law provides that each party may have representatives at each polling station for which they have a candidate.²⁰² However, there is no limit to the number of agents who may be present, which facilitated harassment of voters by party agents. For example, PDP Party agents were observed checking the ballots before putting them into ballot boxes.²⁰³ At another polling station, a PDP agent was observed specifically telling a voter to vote for General Obasanjo.²⁰⁴

The Electoral Law does not provide a strict method for publication of election results. Section 61 has been interpreted as not requiring that results be posted publicly while votes are being counted.²⁰⁵ Thus, electoral officers simply declared the winners without issuing any public notice.²⁰⁶ However, the method of counting as well as the time it took raised doubts as to the validity of the results.²⁰⁷ Furthermore, election observers, as well as some political parties, were unable to obtain a breakdown of the results.²⁰⁸ The concerns of credibility were verified when election observers, after piecing together information, produced figures that were unrealistic given the actual number of registered voters compared to the number of votes counted.²⁰⁹

3. INEC

Although the INEC is primarily responsible for ensuring that elections are free and fair, it suffers from several structural and administrative defects that prevent it from fulfilling its responsibilities. In addition, the INEC's dependence on the govern-

200. *Id.* § 133(1)(a)–(b).

201. EUEOM REPORT, *supra* note 191, at 14.

202. Electoral Law § 36 (2002) (Nig.).

203. EUEOM REPORT, *supra* note 191, at 36 n.27.

204. *Id.* (The polling station was located in Bokkos, LGA.).

205. *Id.* at 31.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

ment prevents it from operating as an independent institution. Given the INEC's apparent acquiescence in the reported instances of electoral fraud, it is clear that the INEC is not operating as the independent, unbiased, neutral entity that it was created to be.

The basic structure of the INEC reflects its dependence on the government. The INEC is composed of twelve commissioners and a chairman who are directly appointed by the President with the approval of the Council of State.²¹⁰ The Resident Electoral Commission (REC) administers INEC functions at the state level and each state office is headed by a Resident Electoral Commissioner who is also directly appointed by the President but without the approval of Senate.²¹¹

Furthermore, the INEC depends on the government for its funding. The INEC's budget must be approved before any funds are allocated.²¹² In addition, there appears to be no distinction between operational budgets and electoral budgets.²¹³ Thus, the provisions governing the appointment of electoral commissioners, as well as the lack of independent funding, do not adequately guarantee the independence of the INEC.

The INEC, which is authorized to issue specific guidelines, failed to do so in areas that need the most regulation, such as campaign and political party financing. The Electoral Law provides for a threshold of twenty Nairas in campaign expenditures per registered voter.²¹⁴ However, PDP party members were observed distributing hundreds of new bicycles to potential voters.²¹⁵ In other areas, outright bribery of voters by PDP agents was observed.²¹⁶

Furthermore, the guidelines issued by the INEC were overly restrictive and, thus, prevented many political parties from registering. In late 2002, the Supreme Court of Nigeria ruled that the guidelines were too restrictive and overturned them.²¹⁷ As a

210. NIG. CONST. 3rd sched. § 6(a)(iv). *See also* EUEOM REPORT, *supra* note 191, at 17.

211. NIG. CONST. 3rd sched. § 14(2)(a).

212. EUEOM REPORT, *supra* note 191, at 18.

213. *Id.*

214. Electoral Law § 84 (2002) (Nig.).

215. EUEOM REPORT, *supra* note 191, at 27 n.16.

216. *Id.* at 34 n.23.

217. *Id.* at 13.

result of this ruling, twenty-six parties registered for the elections.²¹⁸ However, these parties did not have adequate time to prepare for the elections and consequently were at a disadvantage to the incumbent political parties.

The failure of the INEC to adhere to and interpret the electoral law was a significant shortcoming in the 2003 elections. Furthermore, the flagrant disregard of electoral procedures by polling and party agents undermined the democratic foundation of the electoral process. The Nigerian government has emerged from a long period of military rule in which democracy was nothing more than a facade. While there have been substantial improvements since the return to civilian rule, elections marred by widespread patterns of electoral fraud such as these fail to meet the international criteria for free and fair elections. Thus, Nigeria has failed to meet its international obligation to hold free and fair elections.

B. Rwanda

Since the RPF has been in power, the distinction between it and the government has become practically non-existent.²¹⁹ As a result it has been able to enjoy a prominence in politics. Part of the RPF's power lies in the fact that it was the party that essentially ended the genocide.²²⁰ As a result of this authority, challenges to the RPF are often viewed as challenges to national unity. In fact, any political party that has attempted to challenge RPF power has been effectively silenced by accusations of promoting ethnic divisions,²²¹ creating an atmosphere of political repression. While the desire to exert strict control over the political process is desirable given the tragic events of the

218. *Id.*

219. NAT'L DEM. INST. FOR INT'L AFFAIRS, ASSESSMENT OF RWANDA'S PRE-ELECTION POLITICAL ENVIRONMENT AND THE ROLE OF POLITICAL PARTIES 4 (Aug. 3–11, 2003) [hereinafter NDI REPORT], at http://www.accessdemocracy.org/library/1642_rw_assessment_092203.pdf (last visited Apr. 1, 2005).

220. See Toby Manhire, *What They Said About the Vote in Rwanda*, THE GUARDIAN, Aug. 28, 2003 ("Mr. Kagame derives moral authority from the fact that he is the leader of the group that single-handedly stopped the genocide.").

221. Article 33 of the Rwanda Constitution states "[p]ropagation of ethnic, regional, racial or discrimination or any other form of division is punishable by law." RWANDA CONST. art. 33 (2003).

1994 genocide, “democracy depends on certain values, such as tolerance and trust....”²²² Thus, in order for the process of democratization to fully take effect in Rwanda, the RPF must open the political arena to its opposition.

1. 2003 Elections

In August 2003, the first multi-party elections were held since the 1994 genocide. Incumbent President Kagame won the presidency with approximately ninety-five percent of the vote.²²³ Although the NEC proclaimed the elections free and fair, many election monitors and international observers were skeptical about the election results.²²⁴ European Union (EU) election monitors reported that President Kagame’s representatives controlled many of the voting stations and intimidated electoral officials and voters.²²⁵ At some polling stations the monitors claimed that they were simply denied access.²²⁶ The Amani Forum, another team of observers from the Great Lakes Region in Africa, reported that it was “difficult to say that the elections were free and fair.”²²⁷

222. Ndulo, *supra* note 130, at 341.

223. Although there are small discrepancies in the percentage of votes cast for President Kagame, it appears that 95% is the most accurate. BBC News, *Rwandan President Claims Landslide* (Aug. 26, 2003) [hereinafter *Rwandan President*], at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/africa/3178611.stm> (94%) (last visited Apr. 1, 2005); Arthur Asiiimwe, *Small Parties to Back RPF Again*, ALL AFRICA, Sept. 3, 2003 (95%); *Supreme Court Confirms Kagame’s Victory*, PANAFRICAN NEWS AGENCY (PANA) DAILY NEWSWIRE, Sept. 4, 2003 [hereinafter *Kagame’s Victory*] (95.05%).

224. Amnesty International issued a press release stating that the RPF continually harassed opposition supporters and engaged in unlawful tactics in order to silence the opposition or force members to join the RPF. AMNESTY INT’L, PRESS RELEASE, RWANDA: RUN-UP TO PRESIDENTIAL ELECTIONS MARRED BY THREATS AND HARASSMENT, (AI Index: AFR 47/010/2003) (Aug. 22, 2003) [hereinafter AMNESTY INT’L PRESS RELEASE], available at <http://web.amnesty.org/library/Index/ENGAFR470102003> (last visited Apr. 9, 2005); Grace Matsiko & Geoffrey Kamali, *A Look at Kagame’s Landslide Win*, ALL AFRICA, Sept. 3, 2003.

225. Matsiko & Kamali, *supra* note 224 (Colette Flesch was head of the European Union delegation that monitored the elections).

226. *Id.*

227. *Id.* (The Amani Forum is made up of members of Parliament from the Great Lakes Region).

Faustin Twagiramungu,²²⁸ President Kagame's primary opponent, petitioned the Supreme Court to nullify the election results.²²⁹ During the campaign, Twagiramungu was forced to run as an independent after his political party, Democratic Republican Movement (MDR), was banned for allegedly promoting politics based on ethnicity.²³⁰ He claimed that the RPF engaged in intimidation tactics to pressure voters into voting for Kagame.²³¹ He also cited incidents of vote-rigging and violations of the electoral law.²³² On September 3, 2003 the Supreme Court upheld the results of the presidential elections.²³³ The Court dismissed Twagiramungu's petition after ruling that his petition was not supported by material evidence.²³⁴ Although this may have been true, the fact that the President of the Supreme Court is an RPF member²³⁵ certainly raises doubts as to the impartiality of the Court's ruling.

2. Constitutional Violations

In 2003, a new constitution was approved in Rwanda. Article 52 recognizes a multi-party system of government.²³⁶ Thus, the norm of democratic entitlement is reinforced by the notion that the people must consent to the way they are governed. The recognition of a right to political freedom is also evident in Article 33, which guarantees "freedom of thought, opinion, conscience

228. Twagiramungu was the former Prime Minister of the post-genocide government. He resigned due to differences with the RPF and spent eight years in exile in Belgium. Robert Walker, *Profiles: Kagame's Opponents*, BBC NEWS (Aug. 22, 2003), at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/africa/3174211.stm>.

229. BBC NEWS, *Rwanda Poll Challenge Rejected* (Sept. 2, 2003) [hereinafter *Rwanda Poll*] at <http://news.bbc.co.uk/1/hi/world/africa/3201931.stm>.

230. AMNESTY INT'L PRESS RELEASE, *supra* note 224.

231. Asiiimwe, *supra* note 223; see also *Rwanda Poll*, *supra* note 229.

232. Asiiimwe, *supra* note 223.

233. *Rwanda Poll*, *supra* note 229.

234. *Kagame's Victory*, *supra* note 223.

235. In addition to Simeon Rwagasore, the President of the Supreme Court, the leaders of the judicial fora, both courts and tribunals, were RPF members. INT'L CRISIS GROUP, RWANDA AT THE END OF THE TRANSITION: A NECESSARY POLITICAL LIBERALISATION, App. E, (2002) [hereinafter ICG REPORT 2], at http://www.crisisgroup.org/library/documents/report_archive/A400453_09102001.pdf (last visited Apr. 6, 2005).

236. RWANDA CONST. art. 52 (2003).

and the public manifestation thereof.”²³⁷ The 2003 elections, however, reflect that the democratic process was undermined by the numerous violations of constitutional provisions.

Under the Constitution, citizens are guaranteed the right to freedom of expression and opinion.²³⁸ The campaign period leading up to the election, however, was marred by allegations of “government-sponsored intimidation.”²³⁹ According to Amnesty International, the RPF has routinely used intimidation and violence against the opposition.²⁴⁰ One voter reported that when he attempted to vote for another candidate, an RPF supporter grabbed his ballot and told him “not to waste his time.”²⁴¹ Incidents such as this indicate that the government has not respected this fundamental constitutional right.

Article 53 of the Constitution provides that citizens are free to join or not join political organizations.²⁴² During the campaign period, the RPF reportedly used coercion to force people to attend its rallies.²⁴³ In addition, many opposition supporters were detained and released only after agreeing to announce their support for the RPF.²⁴⁴ The fact that six of the eight political parties in Rwanda supported President Kagame²⁴⁵ lends credence to the allegation that the opposition was intimidated. At the very least, it is strong evidence of the RPF’s control over the government.

While freedom of association is guaranteed by the Constitution, this right, like others, may be limited to maintain national security.²⁴⁶ Consequently, this right remained suspended during the entire transitional period. When the law governing po-

237. *Id.* art. 33.

238. *Id.*

239. *High Turnout as People Vote in First Election Since Genocide*, THE VANGUARD, Aug. 27, 2003. See also Guy Selassie, *Election 2003: Incumbent Wins Ballot, Loses Credibility in Rwandan Poll*, WORLD MARKET ANALYSIS, Aug. 27, 2003.

240. AMNESTY INT’L PRESS RELEASE, *supra* note 224.

241. BBC News, *Rwanda Poll Splits African Press* (Aug. 28, 2003), at <http://newsvote.bbc.co.uk/mpapps/pagetools/print/news.bbc.co.uk/1/hi/world/af-rica/3187949.stm> (last visited Mar. 26, 2005).

242. RWANDA CONST. art. 53 (2003).

243. AMNESTY INT’L PRESS RELEASE, *supra* note 224.

244. *Id.*

245. Asiimwe, *supra* note 223.

246. RWANDA CONST. arts. 35, 43 (2003).

litical organizations was enacted on June 26, 2003,²⁴⁷ political parties and candidates had two months to organize and begin campaigning. Political organizing, however, is still prohibited on the local level making it difficult for the opposition to garner support.²⁴⁸ The opposition could hardly compete with the unfair advantage that the RPF had, because the RPF was the only party permitted to function when political organizing was banned.

In addition, it appears that the RPF enjoyed many advantages that the opposition did not during the campaign period. Under the Electoral Law, media time is to be allocated equally among the candidates;²⁴⁹ however, reports indicate that the RPF was granted considerably more time on the airwaves.²⁵⁰ Although the NEC president reported that the RPF was the only party that had held public rallies in nearly every province,²⁵¹ allegations that the RPF coerced people into attending its rallies undermine this declaration of RPF popularity.²⁵²

Although Article 34 of the Constitution guarantees freedom of press and information,²⁵³ the media is subject to many government-imposed restrictions. Members of the press who have criticized the government, particularly journalists, have continuously faced the threat of imprisonment, detention or exile.²⁵⁴ The only licensed television and radio stations are owned by the government and, thus, subject to its control.²⁵⁵ The government's control over the media may be a result of rampant use of the airwaves to broadcast propaganda during the genocide.²⁵⁶

247. See Organic Law No. 16/2003 Governing Political Organizations and Politicians (2003) (Rwanda).

248. RWANDA CONST. art. 52 (2003); see also NDI REPORT, *supra* note 219, at 2, 4.

249. NDI REPORT, *supra* note 218, at 9.

250. Matsiko & Kamali, *supra* note 224.

251. *NEC Sets Deadline for Submission of Candidate Representatives*, RWANDA INFORMATION EXCHANGE (Aug. 8, 2003), at <http://www.rwanda.net/english/News/news082003/news08082003.htm> (last visited Mar. 26, 2005).

252. NDI REPORT, *supra* note 219, at 4.

253. RWANDA CONST. art. 34 (2003).

254. AMNESTY INT'L, RWANDA REPORT 2003, at <http://web.amnesty.org/report2003/rwa-summary-eng> (last visited Mar. 26, 2005).

255. NDI REPORT, *supra* note 219, at 5.

256. See generally Metz, *supra* note 100, at 628 (discussing how the radio was used to incite ethnic tension in Rwanda).

However, the fact that the RPF appeared to have unlimited access to the media while it restricted the opposition's access undermined the justification for such strict control.

According to the Organic Law Governing Political Organizations and Politicians, the assets of political organizations are to be derived from contributions from members, donations, legacies, its property, activities or state grants.²⁵⁷ While it appeared that other political parties and candidates did not have many resources, the RPF reportedly gave gifts including livestock, t-shirts and memorabilia at its rallies, leading to the conclusion that state resources were being used.²⁵⁸ Although there are no clear rules on the use of government resources for campaigning, Article 32 of the Constitution prohibits the embezzlement of public property.²⁵⁹ If state resources were used, this would be an unconstitutional use of government funds.

3. NEC

The NEC was created to ensure the presence of fair and free elections.²⁶⁰ There are several inherent problems, however, that prevent the NEC from being the independent, neutral institution it was intended to be. The structure of the NEC renders it dependent on the RPF-controlled government, resulting in a strong connection between the government and the NEC. In addition, the NEC has considerable discretion to interpret the electoral law, thus, its policies are very difficult to challenge.

The NEC is composed of a Permanent Secretariat that includes an Executive Secretary and five Deputies who are nominated by the Prime Minister with the approval of Cabinet and the Council of Commissioners elected to serve on the NEC before and after elections.²⁶¹ Because the government is controlled by the RPF, the Permanent Secretariat reflects this political makeup. In addition, the confirmation of District Commissioners can only be made by the Permanent Secretariat which is

257. See Organic Law No. 16/2003 Governing Political Organizations and Politicians art. 21 (2003) (Rwanda).

258. NDI REPORT, *supra* note 219, at 4.

259. RWANDA CONST. art. 32 (2003).

260. See *id.* art. 180.

261. See National Electoral Commission, *supra* note 116; ICG REPORT 1, *supra* note 106, at 12–13.

dominated by the RPF.²⁶² Consequently, most electoral commissioners are RPF supporters. Thus, members of the government may effectively secure their jobs through their appointment of members of the NEC.

Despite the NEC's purported neutrality, there appears to be a strong connection between it and the RPF. For example, in 2002, the President of the Commission and the Executive Secretary were notoriously powerful RPF members and their decisions were often the decisive factor when choosing candidates for local electoral commissions.²⁶³ The current NEC president touted the fact that people were defecting from Twagiramungu's camp at a press conference during the campaign period.²⁶⁴ This raised suspicions that he was acting as a campaign agent for the RPF.²⁶⁵ Given the connection between the NEC and the government, the NEC's neutrality and independence is doubtful.

Another problem is that the NEC has considerable discretion in interpreting and defining the electoral law. Article 45 of the Rwandan Constitution provides that all citizens have the right to participate in government, whether directly or through freely-chosen representatives.²⁶⁶ The Electoral Law provides all electoral candidates are required to be "persons of integrity," yet the law does not provide a definition of integrity.²⁶⁷ Thus, what constitutes integrity is largely left to the discretion of the NEC, which allows the NEC to use this vague qualification as a pretext to prevent certain citizens from participating in government.

In addition, the NEC has the authority to ban any political party that promotes politics based along ethnic lines, a violation under the Electoral Law and the Constitution.²⁶⁸ Art. 38 (1) of the Organic Law Governing Political Organizations and Politi-

262. See National Electoral Commission, *supra* note 116; ICG REPORT 1, *supra* note 106, at 12.

263. ICG REPORT 1, *supra* note 106, at 12 (The former President of the Commission was Protais Musoni and the Executive Secretary was Christophe Bazivamo).

264. Matsiko & Kamali, *supra* note 224.

265. *Id.*

266. RWANDA CONST. art. 45 (2003).

267. ICG REPORT 1, *supra* note 106, at 14.

268. *Id.* at 16; RWANDA CONST. art. 54 (2003).

cians provides that during the campaign period, every politician or political party is obliged to “avoid any speech, writing or any other kind of action based on discrimination or division.”²⁶⁹ Article 54 of the Constitution prohibits political organizations from basing themselves on race or ethnic groups.²⁷⁰ Since 2000, several parties have been exiled on the grounds that they were fostering ethnic divisionism; there appears, however, to be little or no evidence supporting these allegations.²⁷¹ Many suspect that these accusations are a pretext to silence political opponents.²⁷²

Although the Electoral Law provides for appeals to the Supreme Court, the NEC interpreted this to mean that the court provided a forum for allegations of “ballot manipulation” but not for challenges to NEC policies.²⁷³ Individuals may challenge NEC policy by first appealing to the district level, the provincial level, the NEC and then, finally, to the Supreme Court.²⁷⁴ As a result of this lengthy and burdensome process, few complaints are successful.²⁷⁵ Thus, any redress for an abuse of power by the NEC is subject to its own interpretation of the Electoral Law.

The strict political control exercised by the RPF during the pre-election period suggests that the 2003 elections did not truly reflect the will of the people of Rwanda. Furthermore, the repression of the opposition violated treaty obligations to ensure equal access to public service and freedom of association.²⁷⁶

269. Organic Law No. 16/2003 Governing Political Organizations and Politicians art. 38(1) (2003) (Rwanda).

270. RWANDA CONST. art. 54 (2003).

271. As of 2003, approximately eleven political parties were in exile: Rwandan Democratic Alliance (ADR); Alliance for Democracy and National Reconciliation (ADRN IGIHANGO); Alliance for National Regeneration (ARENA); African Democratic Congress (CDA); Congres du Peuple (a party created from the split in the ARENA party); Democratic Forces for the Liberation of Rwanda (FDLR); Resistance Forces for Democracy (FRD); Movement for Peace, Democracy and Development (MPDD); Monarchist Movement (NATION); Democratic Rally for the Return of Refugees (RDR); Union of Rwandan Democratic Forces (UFDR). ICG REPORT 2, *supra* note 235, at 40–41.

272. *Profile: Rwanda's Strongman*, *supra* note 110.

273. ICG REPORT 1, *supra* note 106, at 14.

274. *Id.*

275. *Id.*

276. See e.g., African Charter, *supra* note 153, 1520 U.N.T.S. 217; ICCPR, *supra* note 154, 999 U.N.T.S. 85.

Faced with the difficult task of rebuilding a nation after genocide, the Rwandan government has embarked on a mission to build national unity and rid the country of the ethnic divisions that led to the horrific events of 1994. Although Rwanda's system of consensual democracy is based on public participation in public affairs, in practice, this policy has been used to effectively silence those who do not espouse RPF ideology. By refusing to let the opposition effectively compete, the government has undermined its attempt to hold free and fair elections.

V. CONCLUSION: THE IMPORTANCE OF FREE AND FAIR ELECTIONS

As established above, there is an international norm of democratic governance. Free and fair elections are an indispensable element of democratic governance. The most obvious benefit of holding free and fair elections is democracy.²⁷⁷ Democratic elections are generally defined as elections that are fairly administered, grant equal voting rights to those who qualify to vote, and permit eligible voters to elect and be elected.²⁷⁸ These procedural guarantees ensure that an election is free and fair.²⁷⁹

However, there are other benefits to be derived from holding free and fair elections. One of those benefits is political legitimacy.²⁸⁰ Free and fair elections signify that results reflect the free expression of the will of the people. Thus, those who are elected gain legitimacy. Popular leaders would expect to do well in elections, but when such leaders participate in undemocratic elections and are victorious, they lose legitimacy.²⁸¹ Furthermore, free and fair elections lead to international support. The emerging international norm of democratic governance mandates that only democracy can validate governance.²⁸² Thus, the international community is reluctant to support governments that have come to power undemocratically.

277. Nhan T. Vu, *The Nondemocratic Benefits of Elections*, 28 CASE WEST. RES. J. INT'L L. 395, 395 (1996).

278. *Id.* at 454.

279. *Id.*

280. *Id.* at 455.

281. *Id.* at 459.

282. Ndulo, *supra* note 130, at 336.

2005]

FREE AND FAIR ELECTIONS

1065

Finally, by holding free and fair elections, countries reinforce their support for human rights. Countries that are parties to human rights treaties have an obligation to enforce those rights. Democratic governance presupposes the existence of fundamental human rights and free and fair elections demonstrate that these rights have been exercised freely.

*Lara R. Corchado**

* B.A., Fordham University, J.D. Brooklyn Law School (expected June 2005). I would like to thank my family for their support and encouragement throughout my law school years. I would especially like to thank my mother, Helen Corchado, not only for her support but also for her enduring patience.