

4-1-1997

The Right to Democracy: A Qualitative Inquiry

Reginald Eztah

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

Recommended Citation

Reginald Eztah, *The Right to Democracy: A Qualitative Inquiry*, 22 Brook. J. Int'l L. 495 (1997).
Available at: <https://brooklynworks.brooklaw.edu/bjil/vol22/iss3/1>

This Article 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.

ARTICLES

THE RIGHT TO DEMOCRACY: A QUALITATIVE INQUIRY

*Reginald Ezetah**

It is widely accepted that the end of the Cold War provided an opportunity for a new paradigm in the global search for peace and security. An examination of the old and persisting statist paradigm—which consists, at least partially, of mass murder by governments—belies the common assumption that most states possess a unity of identity, population, government, and territory. This assumption constitutes the moral and logical underpinnings of the statist model. However, new imperatives of justice, human rights, and self-determination have challenged the coercive order of the statist paradigm. Contrary to the statist model, it is becoming clear that enduring peace can be found only in order rooted in justice and human development, that is, in a *democratic peace*. However, the meaning of “democracy,” especially as expounded in scholarly literature and state practice, remains a riddle of immense proportions.

Given the asymmetries that surround the notion and practice of democracy, the implanting of a democratic culture or the fortification of existing democratic ethos is an all-important project. We cannot afford to leave this to the fortunes of a slow and uncertain voyage of domestic political change. A firm and decisive measure is called for now—a positive, multilateral revaluation of the concept, process, and practice of democracy—with the primary purpose of restoring sovereignty to the

* Member, Nigerian Institute of International Affairs. I would like to thank Professor Maurice Copithorne, Q.C., Special Representative of the United Nations Human Rights Commission in Iran, and Obiorah Okafor (Killam pre-doctoral fellow) for valuable comments on initial drafts of this paper. I am also grateful to Professor Ivan L. Head, O.C., Q.C., for his intellectual support.

people.

Conceptually, democracy must be accepted as a context-dependent idea that has a core, unalterable, universal standard. It should be redefined as an instrument of human development in order to give the incentive to civil society for pulling together behind democracy. Put in simple terms, there has to be a material stake for the ordinary man on the street in the survival of democracy. Totalitarianism is often effective in a disenchanted, indifferent, or weak civil society, one that fails to demand accountability. Through a grudging withdrawal, such a society passively encourages the totalitarian state. The guarantee of welfare rights could be cultivated as a rallying point of democratic solidarity for the masses of civil society.

The tensions inherent in pluralism are not necessarily accommodated by the majoritarian ethic of democracy, which runs through all spheres of participation. Therefore, it is time to go beyond the "participatory" index of international instruments and reconciliatory devices of domestic institutions, and to internationally criminalize political oppression of minorities and the official looting of public resources. This is one way of ensuring that democratic institutions and devices for reconciling competing claims that flow from diversity are not undermined by corrupt leadership. It is yet another way of reassuring minorities and the voiceless, and of building a consensus of democratic commitment in lieu of a consensus of opinion.

Legitimacy of any administration is a function of the aggregate perception of the majority of the populace, and the process by which this popular will is expressed is of central importance to democracy. Therefore, elections—used in this context in a broad sense to include any systemic expression of popular mandate accepted and affordable by a people, but which ensures free and fair contest—could be further legitimized by the participation of a neutral, disinterested observer. This external participation should be multilateral and all-embracing, such that the sovereignty of all states and nations are equally affected and none is relatively disadvantaged.

I. INTRODUCTION

The primary purpose of the United Nations Organization (U.N.) as set out in Article 1 of the U.N. Charter (the Charter)

is the maintenance of international peace and security.¹ Peace and security have maintained a prominent position in international relations since at least 1795, when Immanuel Kant proposed an international treaty on "Perpetual Peace" based on a guarantee of human rights in domestic laws.² Since Kant, the inter-connectedness of peace, security, human rights, and democracy has become axiomatic.³ This has been matched with revolutionary laws, such as the Uniting for Peace Resolution of 1950 (giving the General Assembly extraordinary powers of intervention in the interest of international peace in the event of a deadlock at the Security Council),⁴ and of more recent origin, an emergent norm of humanitarian intervention for the restoration of democracy. Since the inception of the Peace Resolution, activities of the United Nations have demonstrated that the Charter, through its focus on peace and security, presents a flexible instrument that could justify corrective measures to preserve democracy as long as those measures take place within a structured framework.⁵ It is on this premise—in light of the international legal regime's reformation crisis—that this article is based.

Despite the near-global consensus on the right to democra-

1. U.N. CHARTER art. 1(1).

2. Immanuel Kant, *Perpetual Peace: A Philosophical Sketch*, in *POLITICAL WRITINGS* 93 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (1795).

3. See, e.g., Brian Urquhart, *The UN and International Security After the Cold War*, in *UNITED NATIONS, DIVIDED WORLD* 81, 97 (Adam Roberts & Benedict Kingsbury eds., 2d ed. 1993) ("The spread of democracy, and respect for human rights, are indispensable elements of a more stable, less violent human society, and are, as such, a legitimate—indeed an indispensable—international concern"); BOUTROS BOUTROS-GHALI, *AN AGENDA FOR PEACE* at 39, U.N. Doc. A/47/277-S/24111, U.N. Sales No. E.95.I.15 (2d ed. 1995), reprinted in *UNITED NATIONS, DIVIDED WORLD*, *supra*, at 468; *Interrelationship Between Human Rights and International Peace: Report of the Secretary-General*, U.N. ESCOR, 40th Sess., Provisional Agenda Item 4, at 4, ¶ 7, U.N. Doc. E/CN.4/Sub.2/1988/2 (1988) (discussing the United Nation's recognition of a "complex interrelationship between . . . human rights and fundamental freedoms, . . . peace and security, and . . . economic, social and cultural development"); *Alma Ata Declaration*, U.N. SCOR, 47th Sess., Annex II, at 4, U.N. Doc. A/47/60-S/23329 (1991).

4. G.A. Res. 377A, U.N. GAOR, 5th Sess., Supp. No. 20, 302d plen. mtg. at 10-12, U.N. Doc. A/1775 (1950); see Fernando R. Tesón, *Collective Humanitarian Intervention*, 17 *MICH. J. INT'L L.* 323, 331 (1996).

5. See, e.g., G.A. Res. 1474, U.N. GAOR, 4th Emergency Special Sess., Supp. No. 1, 863d plen. mtg. at 1, U.N. Doc. A/4510 (1960) (requesting voluntary contributions and an arms embargo to restore peace in the Republic of the Congo).

cy, there remains a dearth of scholarly qualitative examination of the new international norm. This article, with the ultimate objective of unraveling all the contents of the right to democracy, will examine the liberal concept of democracy in the context of state practice. Part I of this article will demonstrate that liberal democracy, as we now know it, is not a universal phenomenon and is not the universal democracy envisioned when one speaks of "the right to democracy." Part II will further argue that because of philosophies stemming from international law and state practice, universal democracy must be based on a foundation of social welfare. Part III of the article will argue that the right to a democratic system of government should be considered a peremptory norm in international law. Part IV will describe the substantive, procedural, and structural content of the right to democracy. Part V will demonstrate that democracy suffers from an inherent weakness in its universal manifestation, and needs, therefore, to be reinforced through a convention. Finally, this paper proposes enhancing democracy by reinforcing *dēmokratia*, or "rule by the people," by means of a Convention on Democratic Governance, a proposed model of which is delineated in the Appendix.

II. THE MEANING OF DEMOCRACY

A. *Liberal Democracy*

"Democracy" was coined from the Greek word *dēmokratia* meaning "rule by the people."⁶ Its philosophical underpinnings lie in the theories of the social contractarians, particularly in John Locke's theory of Civil Government,⁷ which is founded on an initial presupposition of equality of all people.⁸ These theories are the foundation of liberal democracy, which is identified as a western idea, and the main features of which are individual freedom and political equality.⁹ The modern institutional

6. See Geraint Parry & George Moyser, *More Participation, More Democracy?*, in *DEFINING AND MEASURING DEMOCRACY* 44, 44 (David Beetham ed., 1994).

7. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 137 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

8. See *id.* at 269.

9. See Michael Saward, *Democratic Theory and Indices of Democratization*, in *DEFINING AND MEASURING DEMOCRACY*, *supra* note 6, at 6, 16-17; David Beetham, *Key Principles and Indices for a Democratic Audit*, in *DEFINING AND MEASURING DEMOCRACY*, *supra* note 6, at 25, 28.

framework of liberal democracy is based on the doctrines of separation of powers¹⁰ and free market economy.¹¹ So authentic and influential has this "western idea" become that modern-day scholars describe the new norm of a right to democracy as the universal legitimization of a "western idea."¹²

Historically, liberal democratic theory has withstood a barrage of criticism. Its presumption of equality has been described as romantic nonsense,¹³ and its individualism has been criticized for divesting the individual of his personality by divorcing him from his ontological bearings.¹⁴ According to the critics of liberal democracy, the consequent emptiness¹⁵ has observable political results, namely, a disorganized and fragmented public sphere.¹⁶ Thus, according to its critics, liberal democracy is, by and large, undemocratic, and its conceptual pillars of "popular sovereignty" and "legitimate governance" are

10. See 1 BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 151-62 (Franz Neumann ed., Thomas Nugent trans., 1949) (1748).

11. See JOHN RAWLS, *A THEORY OF JUSTICE* 270-74 (1971).

12. See Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 290 (1995); see also Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46, 49 (1992).

13. See generally Lee Kuan Yew, *Democracy and Human Rights for the World*, 20 MEDIA ASIA 33 (1993). Yew draws an instructive analogy between the specious assumption that all humans are equal and the principle of "one nation, one vote" in the U.N. General Assembly. While the General Assembly organ of the United Nations appears equal, its resolutions do not carry the force of sanctions. True power in the U.N. is reserved for the permanent members of the Security Council. See *id.* at 38.

14. See Victor Segesvary, *Group Rights: The Definition of Group Rights in the Contemporary Legal Debate Based on Socio-Cultural Analysis*, 3 INT'L J. ON GROUP RTS. 89, 93 (1995). In this brilliant paper, the author demonstrates that the individual and his community are ontologically interdependent; i.e., the life and destiny of the individual and his community are inextricably intertwined. See *id.*; see also ERWIN SCHRÖDINGER, *MY VIEW OF THE WORLD* 54 (Cecily Hastings trans., Ox Bow Press 1983) (1961); CAROL GOULD, *RETHINKING DEMOCRACY: FREEDOM AND SOCIAL COOPERATION IN POLITICS, ECONOMY, AND SOCIETY* 93-94 (1988).

15. See John Golding, *Two Who Made a Revolution*, N.Y. REV. BOOKS, May 31, 1990, at 8 (offering the paintings of synthetic cubist Georges Braque as examples of objective detachment devoid of meaning). Here the consequence of isolationism is a meaningless existence depicted by Braque's mood toward the end of his life: "I no longer believe in anything. Objects don't exist for me except insofar as a rapport exists between them and myself." *Id.*

16. See JÜRGEN HABERMAS, *THE STRUCTURAL TRANSFORMATION OF THE PUBLIC SPHERE: AN INQUIRY INTO A CATEGORY OF BOURGEOIS SOCIETY* 142 (Thomas Burger & Frederick Lawrence trans., 1989); David Held, *INTRODUCTION TO CRITICAL THEORY* 223-59 (1980).

no more than fraudulent myths.¹⁷

The observable contradiction inherent in liberal theory and liberal practice¹⁸ has undermined the liberal democratic system. The conceptual and practical problems of liberal theory are further entrenched by its laissez-faire economy, whose manifest aim of individual consumerism¹⁹ combines with the isolationism of liberal theory to create a type of nominalism. As a result, "human dignity" and "subjective freedom" become mere by-products of a complex process of material relations.²⁰

The reality of the foregoing is lost neither on the liberal politician²¹ nor on the liberal scholar.²² Indeed, contemporary definitions of democracy by liberal scholars manifest a tendency to look beyond empirical liberal structures, and toward liberal idealism.²³

Liberal democratic theory has not survived this onslaught

17. See Yew, *supra* note 13, at 38.

18. Egalitarianism is the silver thread that runs throughout the bounds and fabric of the theories of social contractarians, and this can hardly be reconciled with the liberal philosophy of equality. For example, Hobbes' *Leviathan* was omnipotent, a mortal god having monopoly over all political wisdom. THOMAS HOBBS, *LEVIATHAN* (C.B. MacPherson ed., Penguin Books 1985) (1651).

19. See RAWLS, *supra* note 11, at 273-74.

20. The intractability of the dilemma posed by liberalism in the laissez-faire context is analogous to the scholastic debates over God's will, in which some philosophers argue that God is not free if His decisions are motivated by His knowledge, if that is independent of His will. Others counter that God is not wise if He goes against His better judgment. See Nikolai Biryukov & Victor Sergeyev, *The Idea of Democracy in the West and in the East*, in *DEFINING AND MEASURING DEMOCRACY*, *supra* note 6, at 182, 189.

21. In recognition of the foregoing, the United States in 1975 established a trilateral commission to reexamine the concept and practice of liberal democracy. See PHILIP K. LAWRENCE, *DEMOCRACY AND THE LIBERAL STATE* 2 (1989).

22. Liberal scholars are beginning to acknowledge the tension between liberal individualism and the notion of society. See, e.g., JOHN RAWLS, *POLITICAL LIBERALISM* 190 (1993) (observing that while "[h]istorically one common theme of liberal thought is that the state must not favor any comprehensive doctrines and their associated conception of the good[,] . . . it is equally a common theme of critics of liberalism that it fails to do this and is, in fact, arbitrarily biased in favor of one or another form of individualism."). See generally RAWLS, *supra* note 11. Rawls, ostensibly battling with the fragmentary consequences of liberalism and the self consumerism of the free market economy, advocates social cooperation for the happiness of the "greatest number." In doing this, he undertakes the very difficult task of synthesizing seemingly conflicting concepts such as "liberty and equality," "individual self interest and toleration," and "social justice and free market capitalism." He ends up with an idealistic "well-ordered society" comprised of reasonable people. See *id.* at 453-62.

23. See, e.g., SAMUEL BRITTON, *THE ECONOMIC CONSEQUENCES OF DEMOCRACY* 274-77 (1977).

unscathed. Policies of social security, social welfare, and medical insurance are material evidence of a reversing trend, and ostensibly constitute a search for the social bonds that were undermined by laissez-faire liberalism. The capacity of these policies to uproot liberal theory's isolatory features remains to be seen.

However, the allure of certain aspects of liberal democracy has remained pervasive, such that some scholars hold the view that "[t]he liberal interpretation is not wrong. It just does not see the beam in its own eye."²⁴ While the liberal political formula offers a good doctrinal basis for fostering individual choice, liberty, and private property, its indisputable handicaps are its negation of social solidarity and its inability to provide the identity and meaning that are essential to the dignity and personality of the individual. The laissez-faire environment of liberal democracy is a perfect setting for eroding the public's freedom of opinion. Indeed, observable trends in liberal electoral processes point to a growing apathy, with less than fifty percent of eligible voters participating in the 1996 presidential elections in the United States.²⁵ As a necessary foundation for individual self-accomplishment, liberal free market democracy protects the privilege of a few at the expense of the majority

24. Jürgen Habermas, *What Does Socialism Mean Today? The Revolutions of Recuperation and the Need for New Thinking*, in *AFTER THE FALL: THE FAILURE OF COMMUNISM AND THE FUTURE OF SOCIALISM* 25, 31 (Robin Blackburn ed., Ben Morgan trans., 1991). Václav Havel construes liberal democracy's inability to gain universal acceptance as a consequence of its formulation as a pious doctrine, complete and unalterable, and its failure to come to terms with the harsh reality of a diverse and multicultural world. According to Havel, "[D]emocracy in its present Western form arouses skepticism and mistrust in many parts of the world." Václav Havel, *Democracy's Forgotten Dimension*, 31 *STAN. J. INT'L L.* 1, 10 (1995). Havel concludes:

The effective expansion of democracy therefore presupposes a critical self-examination, a process that will lead to its internalization.

. . . This internalization of democracy today can scarcely take the form of some doctrine, that is, a collection of dogmas and rituals. This probably would have exactly the opposite effect: To all the mutually distrustful cultural currents there would only be added others, ones that would be very artificial because they would not have grown out of the nourishing soil of myth-making eras. If a renaissance of spirituality does occur, it will far more likely be a multi-leveled and multi-cultural reflection, with a new political ethos

Id. at 12.

25. See R.W. Apple, Jr., *A Divided Government Remains, and with It the Prospect of Further Combat*, *N.Y. TIMES*, Nov. 7, 1996, at B6.

and in the face of widespread misery. Such a situation leaves much to be desired.

B. Relativity of Democracy In Practice

Democracy is a social theory, and thus has defied a universally accepted definition.²⁶ The appeal of its cardinal maxims, freedom and equality,

makes it susceptible in different cultures and societies to its acceptance by degrees.

Thus, in the biggest democracy of the world, India, the equality of people is thwarted by an extensive caste system and by religious divisions. In . . . the United States of America, the two top executives, the President and the Vice-President, are still elected by electoral colleges, not by popular vote.²⁷

Further, in Asia, the Japanese model, which is widely endorsed as one of the most successful liberal democracies, has in fact retained the ideals of Confucianism, which dictate primacy of group interest as opposed to the individualism of liberal democracy, and this ideal has informed judicial attitude.²⁸ The new Russian democratic system simply classifies as "dissident" individual or minority dissent; thus, the people as individuals do not in reality exercise such independent franchise as liberalism would contemplate.²⁹ While some pre-colonial African societies were essentially democratic, as demonstrated

26. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 1 (1956).

27. Filipe N. Bole, *Fiji's Chiefly System and its Pattern of Political Self-Reliance*, in CULTURE AND DEMOCRACY IN THE SOUTH PACIFIC 67, 69 (Ron Crocombe et al. eds., 1992). It is, however, important to note that in the recent history of U.S. democracy, the electoral college has in substance been a deadletter of the Constitution, as popular vote has been the decider of political contests for the presidency. Still, it is by no means insignificant that the non-populist and feudalistic philosophy of the electoral college has persisted as a constitutional principle in the world's foremost liberal democracy, and should the occasion arise, it would be the legal means for "electing" the president.

28. See Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERSP. 98, 108-09 (1990). The normative traditional saying in Japan is: "*Deru kugi wa uteru*," which means, "The nail that sticks up gets hammered down." Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 131 (1994).

29. See Nikolai Biryukov & Victor Sergeyev, *The Idea of Democracy in the West and in the East*, in DEFINING AND MEASURING DEMOCRACY, *supra* note 9, at 182, 194-95.

by the widely applied principle of public involvement in decision making,³⁰ post-colonial Africa attempted a wholesale adoption of liberal democratic systems without deference to cultural values. The most prominent models were the Westminster majoritarian model and the centralized executive model of Fifth Republic France. These models did not guarantee proportional representation, and thus accentuated the diversity inherent in the arbitrary colonial boundaries of Africa. Consequently, in contemporary Africa it is better to talk about "democratic impulses" than liberal democratic systems.³¹

So far, one may conclude that states' practice shows that the meaning of democracy is enriched by the culture in which it is examined. Accordingly, there is sufficient evidence that state practice does not endorse any particular political model as a universal democracy, nor has any one political model obtained legal status. In the U.N. forum, for example, countries whose systems hardly resemble liberal democracy but whose constitutions describe them as democratic, are nevertheless addressed as democracies, as is evinced by the use of terms such as "Republic," "Democratic Republic," "People," "Commonwealth," and "Federation" in U.N. instruments. However, it must be emphasized that the absence of a universal political model does not negate universal democracy.

III. THE LEGAL CONCEPT OF DEMOCRACY

A. *The Peremptory Norm of Self-Determination*

The norm of self-determination guarantees the right of a people or a nation freely to determine, without any outside interference, its political and legal status as a separate entity. Preferably, such self-determination will be effected through formation of an independent state; in addition, the people should have the right to choose their form of government, and their economic, social, and cultural systems.³² So conceived,

30. See RICHARD HODDER-WILLIAMS, AN INTRODUCTION TO THE POLITICS OF TROPICAL AFRICA 13-14 (1984). A good example of pre-colonial democracy is the Ibo traditional society in Nigeria, depicted in CHINUA ACHEBE, THINGS FALL APART (Ballantine Books 1983) (1959).

31. See Naomi Chazan, *Democratic Fragments: Africa's Quest for Democracy*, in 4 DEMOCRACY AND MODERNITY 111, 112 (S.N. Eisenstadt ed., 1992).

32. See Frank Przetacznik, *The Basic Collective Human Right to Self-Determination of Peoples and Nations as a Prerequisite for Peace: Its Philosophical Back-*

self-determination is Janus-faced: On the one hand, it means political independence from alien domination or an already existing sovereign state, while on the other hand, it entails a people's democratic choice about its governance.³³ Self-determination has peremptory normative status (*jus cogens*) in international law³⁴ and can be set aside only by a subsequent peremptory norm of contrary effect.³⁵ Therefore, the right to democracy as an internal aspect of the right to self-determination of "all peoples"³⁶ and nations can properly be classified as an overriding customary international law.³⁷ Because the nationalist aspect of self-determination dominated the bipolar Cold War period as a result of the politically and ideologically sensitive question of colonies and non-self-governing territories,³⁸ the notion of internal self-determination as customary international law has suffered in obscurity.

ground and Practical Application, 69 REVUE DE DROIT INTERNATIONAL DE SCIENCES DIPLOMATIQUES ET POLITIQUES 259, 263 (1991).

33. See Jane E. Stromseth, *Self-Determination, Secession and Humanitarian Intervention by the United Nations*, 86 AM. SOC'Y OF INT'L L. PROC. 370, 370 (1992). Thomas Franck has defined the right of self-determination as the right of "a people organized in an established territory to determine its collective political destiny in a democratic fashion" Franck, *supra* note 12, at 52.

34. See HÉCTOR GROS ESPIELL, *THE RIGHT TO SELF-DETERMINATION: IMPLEMENTATION OF UNITED NATIONS RESOLUTIONS* at 11, U.N. Doc. E/CN.4/Sub.2/405/Rev.1, U.N. Sales No. E.79.XIV.5 (1980) (study prepared by Héctor Gros Espiell, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 515 (4th ed. 1990). Quite recently, the International Court of Justice has reaffirmed the erga omnes character of the right to self-determination as "irreproachable" in the case of East Timor (Port. v. Austl.), 1995 I.C.J. 90, 120 (June 30), reprinted in 34 I.L.M. 1583, 1589.

35. See BROWNLIE, *supra* note 34, at 515.

36. *Universal Realization of the Right of Peoples to Self-Determination*, G.A. Res. 93, U.N. GAOR, 48th Sess., 85th plen. mtg., Agenda Item 108(a), at 3, U.N. Doc. A/RES/48/93 (1994); *Right of Peoples to Self-Determination: Report of the Third Committee*, U.N. GAOR, 48th Sess., Agenda Item 108(a), at 10, U.N. Doc. A/48/626 (1993); see 1993 U.N.Y.B. 871, U.N. Sales No. E.94.I.1.

37. See Jean Salmon, *Internal Aspects of the Right to Self-Determination*, in *MODERN LAW OF SELF-DETERMINATION: TOWARDS A DEMOCRATIC LEGITIMACY PRINCIPLE?* 253, 277 (Christian Tomuschat ed., 1993).

38. See Patrick Thornberry, *The Democratic or Internal Aspect of Self-Determination with Some Remarks on Federalism*, in *MODERN LAW OF SELF-DETERMINATION: TOWARDS A DEMOCRATIC LEGITIMACY PRINCIPLE?*, *supra* note 37, at 101, 120.

B. *The Right to Democracy*

The issue of a right to democracy has been extensively commented on by scholars, especially some of "the most highly qualified [western] publicists,"³⁹ and there is a near consensus among these publicists on the existence of a right to democracy, as well as on the legitimacy of collective intervention for the restoration of democracy.⁴⁰ Though their thesis is of doubtful validity, Michael Reisman and Lois Fielding have gone further by endorsing unilateral intervention for the protection of democracy.⁴¹ Whereas unilateralism is illegal under the terms of article 2 of the Charter,⁴² and is contrary to the normative principle of collective security on which the U.N. system is founded,⁴³ scholars recognize that there is an inter-

39. Statute of the International Court of Justice, June 26, 1945, art. 38(1)(d), 59 Stat. 1055, 1060, 3 Bevans 1179, 1187 (in making judicial determinations, the International Court of Justice (I.C.J.) shall apply, *inter alia*, "the teachings of the most highly qualified publicists").

40. See Franck, *supra* note 12, at 90-91; Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539, 552-70 (1992); Gregory H. Fox, *National Sovereignty Revisited: Perspectives on the Emerging Norm of Democracy in International Law*, in 86TH PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 249 (1992); JAMES CRAWFORD, *DEMOCRACY IN INTERNATIONAL LAW* 4-7 (1994); Babacar Ndiaye, *International Co-operation to Promote Democracy and Human Rights: Principles and Programmes*, INT'L COMM'N JURISTS, Dec. 1992, at 23; Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L L. 645 (1984); Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151, 1162 (1986); Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT'L L. 329, 332-38, 343-55 (1995).

41. W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L L. J. 794, 804-05 (1995); Fielding, *supra* note 40, at 343. The International Court of Justice in the 1966 South West Africa cases decided that not even compelling grounds of necessity could justify an *actio popularis* in international law. South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.), 1966 I.C.J. 6, 47, para. 88 (July 18) (rejecting necessity argument as based on "extra-legal" considerations and concluding that although "an *actio popularis*, or right resident in any member of a community to take legal action in vindication of a public interest" is recognized in some municipal legal systems, it is not a general principle of international law). This decision was a judicial indictment of unilateralism in the multilateral context of the United Nations system.

42. U.N. CHARTER art. 2(4).

43. See Richard Falk, *The Haiti Intervention: A Dangerous World Order Precedent for the United Nations*, 36 HARV. INT'L L.J. 341, 357 (1995). According to Falk, it is imperative to be cautious in seeking further expansion of the frontiers of humanitarian intervention in a system where selective and discriminatory application of international law has become the rule. *Id.* at 345 n.23.

national right to democracy that could be protected by collective intervention. Moreover, global and regional human rights instruments also have endorsed the right to democracy.⁴⁴

The Universal Declaration of Human Rights⁴⁵ (Universal Declaration) is the premier instrument on the right to democracy, and it contains the clearest statement on the issue of democracy.⁴⁶ While General Assembly resolutions are often regarded as not binding,⁴⁷ it must be noted that the Universal

44. See International Covenant on Civil and Political Rights, *adopted* Dec. 19, 1966, art. 25, S. EXEC. DOC. E, 95-2, at 23, 30-31 (1978), 999 U.N.T.S. 171, 179 (entered into force Mar. 23, 1976). Article 25 of the covenant provides that "every citizen shall have the right and the opportunity . . . without unreasonable restrictions . . . to vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors." *Id.* art. 25(b); see also Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Mar. 20, 1952, art. 3, 213 U.N.T.S. 262, 264 (entered into force May 18, 1954) (acknowledging obligation of parties to "hold free elections . . . under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"); American Convention on Human Rights, *done* Nov. 22, 1969, preamble, 1144 U.N.T.S. 123, 144 (entered into force July 18, 1978) (reaffirming commitment of parties to protecting rights "within the framework of democratic institutions"); *id.* art. 23, 1144 U.N.T.S. at 151 (guaranteeing the right to participate in public affairs, vote, and to have access to public service); *id.* art. 29, 1144 U.N.T.S. at 153 (disavowing interpretations of the convention that would preclude other rights and guarantees "derived from representative democracy as a form of government"); Banjul Charter on Human and Peoples' Rights, *adopted* June 27, 1981, art. 13, 21 I.L.M. 58, 61 (entered into force Oct. 21, 1986); Conference on Security and Co-operation in Europe: Document of the Copenhagen Meeting of the Conference on the Human Dimension, June 29, 1990, art. 3, 29 I.L.M. 1305 (expressing agreement of participating states that "democracy is an element of the rule of law"); International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* Mar. 7, 1966, art. 5(c), 660 U.N.T.S. 195, 220 (entered into force Jan. 4, 1969); Convention on the Political Rights of Women, *done* Mar. 31, 1953, arts. I-III, 27 U.S.T. 1909, 1911, 193 U.N.T.S. 135, 136-38; U.N. CHARTER arts. 2(1), 55-56.

45. Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., pt. 1, 183d plen. mtg. at 71, U.N. Doc. A/810 (1948) [hereinafter Universal Declaration].

46. *Id.* art. 21.

47. The conclusion that the resolutions are mere recommendations is based on narrow logic. If the fundamental principles of the United Nations are collectivism and sovereign equality, then one must concede at least that resolutions carry the moral force of the opinions of most sovereign states. Then again, there is no clear-cut distinction between morality and legality; both are overarching, mutually complementing.

The General Assembly's Uniting for Peace Resolution, G.A. Res. 377A, *supra* note 4, demonstrated the residual legal capacity of the General Assembly. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276

Declaration is not just another General Assembly Resolution. It has become an edifying referent for state constitutions, whose contents sometimes are a wholesale adoption of provisions of the Universal Declaration. Beyond state boundaries, the Universal Declaration has inspired regional and international agreements.⁴⁸ The Universal Declaration has effectively shed whatever stigma attended the circumstances of its birth because, according to the United Nations, the broadest legally binding human rights agreements—the International Covenant on Economic, Social and Cultural Rights⁴⁹ and the International Covenant on Civil and Political Rights⁵⁰—have “take[n] the provisions of the Universal Declaration a step further by making them binding upon States parties.”⁵¹ Additionally, the universal acceptance of the Universal Declaration constitutes an *opinio juris* sufficient for a binding customary rule of international law. It is in this light that the Universal Declaration is seen as having “evolved into the Magna Carta of the international human rights movement and the premier normative international instrument on the subject.”⁵²

(1970), 1971 I.C.J. 16, 45-50 (June 21) (rendering opinion that General Assembly did not act beyond its powers in adopting resolution 2145, which terminated the Mandate for South Africa). See also Certain Expenses of the United Nations, 1962 I.C.J. 151, 163 (July 20), in which the I.C.J. held that the powers and responsibilities under article 24 of the Charter were only *primarily* those of the Security Council and were never intended to be exclusively vested in the Security Council; thus, article 24 did not exclude the General Assembly from assuming similar responsibilities.

In any event, there can be no better evidence of a general practice accepted as law than the resolutions of states reached in the most widely representative and democratic organ of the United Nations, and in the course of discussing issues under the Charter, which, juridically, is the constitution of the United Nations.

48. See Egon Schwelb & Philip Alston, *The Principal Institutions and Other Bodies Founded Under the Charter*, in 1 THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS 231, 245 (Karel Vasak & Philip Alston eds., 1982).

49. International Covenant on Economic, Social and Cultural Rights, adopted Dec. 16, 1966, 993 U.N.T.S. 3.

50. International Covenant on Civil and Political Rights, *supra* note 44, S. EXEC. DOC. E, 95-2, at 23, 999 U.N.T.S. at 171.

51. See THE UNITED NATIONS AT 50: NOTES FOR SPEAKERS 52 (1995).

52. Thomas Buergenthal, *The Human Rights Revolution*, 23 ST. MARY'S L.J. 3, 7 (1991); see also Philip Alston, *The UN's Human Rights Record: From San Francisco to Vienna and Beyond*, 16 HUM. RTS. Q. 375, 376 (1994).

C. *The Duty of Intervention*

The right to a democratic governance is clearly borne out by article 21 of the Universal Declaration.⁵³ However, responsibility of States still must be determined. It is pertinent to note from the outset that "the traditional rule [is] that a State is not guilty of a breach of international law for injuring one of its own nationals."⁵⁴ By logical extension, a State that denies its citizens the right to democracy is protected from international scrutiny. The founders of the United Nations did attempt to entrench and widen this traditional sanctity of internal matters by substituting article 15, paragraph 8 of the League of Nations Covenant—which provided for non-interference in matters that according to international law are within the domestic jurisdictional sphere⁵⁵—with article 2(7) of the Charter. Article 2(7) did not, on its own, leave the scope of internal matters to be determined by international law, but instead opted for the vague and expansive phrase "essentially within the domestic jurisdiction."⁵⁶ However, contemporary practice shows that international law has moved beyond this traditional constraint, and there are now several grounds for justifying multilateral protection of democracy. For example, where a denial of democracy is effected by violent repression, state practice indicates that there is a right of intervention based on humanitarian imperatives and the right to self-defense of the people.⁵⁷ United States intervention in Haiti stands out as a prominent example.⁵⁸

Pursuant to international agreements, i.e., articles 55 and

53. Article 21 reads in full:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Universal Declaration, *supra* note 45, art. 21.

54. *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 192 (Feb. 5) (separate opinion of Judge Jessup).

55. LEAGUE OF NATIONS COVENANT art. 15, para. 8.

56. U.N. CHARTER art. 2(7).

57. See Fielding, *supra* note 40, at 355-69.

58. See *id.* at 363-65.

56 of the Charter⁵⁹ and article 1 of the Covenant on Civil and Political Rights,⁶⁰ all states parties have a legal interest and a duty to ensure the protection of human rights and the right to self-determination within the boundaries of member states.⁶¹ This interest, which would be useless without a remedy, could legitimize a multilateral measure.

Given that the right to democracy is an aspect of the peremptory norm of self-determination,⁶² all states have a positive obligation *erga omnes*⁶³ (i.e., opposable to, and valid against, the whole world and all legal persons irrespective of consent) to protect the democratic character of member states.⁶⁴ The legality of a Chapter VII-type measure⁶⁵ for the protection of democracy may be justified under the positive obligation *erga omnes* of all states in international customary law to protect the internal self-determination of states. The normative status of this peremptory norm is now unquestionable, such that the usually passive International Court of Justice has, in one case, indicated its readiness to subsume the Charter or powers exercised under it to peremptory norms.⁶⁶ If, however, the measure must be forced into the pronouncements of Chapter VII, then the "domestic jurisdiction"⁶⁷ and "threat" to "international peace"⁶⁸ limitations in the Charter would be abridged by the overriding responsibility placed on states to protect democracy by the peremptory norm of self-

59. U.N. CHARTER arts. 55-56.

60. International Covenant on Civil and Political Rights, *supra* note 44, art. 1, S. EXEC. DOC. E, 95-2, at 23, 999 U.N.T.S. at 173.

61. See *South West Africa* (Eth. v. S. Afr.; Liber. v. S. Afr.), 1962 I.C.J. 6, 425-33 (Dec. 21) (separate opinion of Judge Jessup); see also *High Commissioner for the Promotion and Protection of All Human Rights*, G.A. Res. 141, U.N. GAOR, 48th Sess., 85th plen. mtg., Agenda Item 114(b), ¶ 3(a)-(b), U.N. Doc. A/RES/48/141 (1994).

62. See *Barcelona Traction, Light and Power Co. (Belg. v. Spain)*, 1970 I.C.J. 3, 304 (Feb. 5) (separate opinion of Judge Ammoun).

63. See *id.* at 32. The court in *Barcelona Traction* comments on obligations *erga omnes*: "[A]ll states can be held to have a legal interest in their protection." *Id.*

64. See *South West Africa*, 1962 I.C.J. at 425, 428-29 (separate opinion of Judge Jessup).

65. See U.N. CHARTER arts. 39-51.

66. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosn. & Herz. v. Yugo.), 1993 I.C.J. 325, 436-41 (Sept. 13) (separate opinion of Judge Lauterpacht).

67. U.N. CHARTER art. 2(7).

68. *Id.* art. 39.

determination.

The legality of an intervention may be sought in article 24 of the Charter, which has been interpreted as vesting general powers beyond the specific powers of Chapters VI, VII, VIII, and XII of the Charter.⁶⁹ However, there are limits on measures taken under Chapter V, article 24 inclusive. First, these limits dictate that the U.N. Security Council act in accordance with the purposes and principles of the Charter;⁷⁰ these purposes can validly be summarized as "humanism," and the principles of "collectivism." In other words, whatever action the Security Council takes must be informed by the overriding interest of the people of the target state. Second, intervention must be multilateral or collectively sanctioned under the aegis of the United Nations. Finally, the intervention must not violate the undefined domestic jurisdiction clause, which is permissible only when intervention is effected pursuant to Chapter VII.⁷¹

Since the end of the Cold War, state practice appears to have endorsed the principles of the rejected League of Nations Covenant, article 15, as the cornerstone of domestic jurisdiction; that is, what constitutes "internal matters" is increasingly an international law determination.⁷² For example, it is no longer debatable that human rights issues are merely an item of domestic jurisdiction. In the same vein, the legitimacy of certain governments has acquired international relevancy. Given that they set a standard for legitimacy of government and internal sovereignty as the will of the people, international legal instruments⁷³ should be interpreted as validating international regulation and protection of that standard.⁷⁴ In addi-

69. See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 16, 52-54 (June 21).

70. U.N. CHARTER art. 24(2).

71. See *id.* arts. 39, 48, 51.

72. Article 15 reads in pertinent part:

If [a] dispute between . . . parties is claimed by one of them, and is found by the Council to arise out of a matter which by *international law* is solely within the domestic jurisdiction of that party, the Council shall so report and shall make no recommendation as to its settlement.

LEAGUE OF NATIONS COVENANT art. 15, para. 8 (emphasis added).

73. Particularly the Universal Declaration, *supra* note 45, art. 21, and the U.N. CHARTER arts. 55-56.

74. Former Secretary-General Javier Perez de Cuellar once observed that "[i]f

tion, the Declaration on Principles of International Law Concerning Friendly Relations⁷⁵—which is widely accepted as customary international law⁷⁶—expressly makes the territorial integrity of a state contingent on its possession of a consensual representative government.⁷⁷ The inescapable conclusion is that the legitimacy of a state government is no longer merely a concern of domestic jurisdiction.

D. Evidence of State Practice

While legal scholarship and international legal instruments do endorse the right to democracy, it is also important to examine the attitude of states in practice. Based on an annual survey in 1992, out of 183 states, six were communist, twelve were traditional monarchies, and eighteen were military regimes.⁷⁸ The remaining 147 states were either democratic or in transition to democracy.⁷⁹ Huntington has characterized this global phenomenon as the third wave of democratic expansion.⁸⁰ In Eastern Europe, the expansion was manifest in the disintegration of communist Russia, and the fall of the Berlin Wall.⁸¹ Traditional hardliners, such as Hungary, Romania, Bulgaria, and Albania, are fast embracing democra-

the character, aims and standards of internal sovereignty are . . . internationally defined, the external manifestations of sovereignty are similarly regulated." Javier Perez de Cuellar, *Perez de Cuellar Discusses Sovereignty and International Responsibility*, INT'L COMM'N JURISTS, Dec. 1991, at 24, 25 (published text of Perez de Cuellar's November 21, 1991 address to the University of Florence).

75. *Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations*, G.A. Res. 2625, U.N. GAOR, 25th Sess., 1883d plen. mtg., Supp. No. 28, at 121, U.N. Doc. A/8028 (1971).

76. See Frederic L. Kirgis, Jr., *The Degrees of Self-determination in the United Nations Era*, 88 AM. J. INT'L L. 304, 305 (1994) (citing BROWNIE, *supra* note 34, at 513); see also *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 101 (June 27) (determining that the adoption of the Declaration on Principles of International Law Concerning Friendly Relations by states parties "affords an indication of their *opinio juris* as to customary international law" on the use of force).

77. See G.A. Res. 2625, *supra* note 75, princ. 4, para. 2(b), at 124.

78. See YVES BEIGBEDER, *INTERNATIONAL MONITORING OF PLEBISCITES, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 2* (1994).

79. See *id.*

80. Samuel P. Huntington, *Democracy's Third Wave*, J. DEMOCRACY, Spring 1991, at 12, 12; see also BEIGBEDER, *supra* note 78, at 2.

81. See BEIGBEDER, *supra* note 78, at 3.

cy.⁸² Honduras, Argentina, Grenada, Panama, Chile, Nicaragua, Haiti, and the Americas are aspirants to the democratic circle.⁸³ In Asia—although tyranny still reigns over the people of Myanmar, formerly Burma⁸⁴—even China, one of the last bastions of communism, is said to be softening under intense international pressure.⁸⁵ Vietnam, Indonesia, Thailand, and Mongolia have demonstrated a resolve to join the train of democracy.⁸⁶ Nepal and Cambodia have moved towards democracy.⁸⁷ In Africa, the end of the Cold War signalled the death of totalitarianism.⁸⁸ African peoples have declared their preference for democracy in the Abuja Declaration of 1991⁸⁹ and the Dakar Declaration of 1992.⁹⁰ The European Union (EU) and the Organization of American States (OAS) have adopted measures that prioritize democratization of new states and the protection of member states' democratic character.⁹¹

The general embrace of democracy is also manifest in the operations of the United Nations, an organ that is perhaps the most credible index of consensus and collective will of states.

82. *See id.* at 3-4.

83. *See id.* at 5-6.

84. *See id.* at 6.

85. It is widely acknowledged that China is one of the fastest liberalizing market economies today. Underneath this liberalization lies a democratic ethic (at least of free enterprise) that should soon impact the political structure of China. While this point is debatable, it is unquestionable that the situation in China is far different than it has been in the past. A decade ago, no one would have anticipated China's warm reception of free enterprise in the 1990s.

86. *See* BEIGBEDER, *supra* note 78, at 6.

87. *See id.* at 6-7.

88. *See id.* at 7-8.

89. *Abuja Declaration on South Africa*, U.N. GAOR, 46th Sess., Annex II, Prov. Agenda Item 30, at 83-88, U.N. Doc. A/46/390 (1991) (indicating support for the abolition of apartheid and the institution of non-racial democracy in South Africa).

90. *Dakar/Ngor Declaration on Population, Family and Sustainable Development*, Recommendation 20, in U.N. DEPT FOR ECONOMIC & SOCIAL INFORMATION AND POLICY ANALYSIS, POPULATION BULLETIN OF THE UNITED NATIONS at 37, 42, U.N. Doc. ST/ESA/SER.N/37-38, U.N. Sales No. E.94.XIII.16 (1994) (recommending democratization as a priority in the efforts to eliminate the underlying causes of the worldwide refugee problem); *see Africa: Population Conference Sets Ambitious Targets*, Inter Press Serv., Dec. 14, 1992, available in LEXIS, News Library, Arcnws File.

91. *See Declaration on the "Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union,"* U.N. SCOR, Extraordinary EPC Ministerial mtg., Annex II, at 4, U.N. Doc. S/23293 (1992); O.A.S. CHARTER preamble, reprinted in 33 I.L.M. 981, 981.

The United Nations has endorsed the monitoring of elections as an important activity by creating an office of Electoral Assistance in 1992.⁹² It has assisted over forty-five states in conducting and financing elections.⁹³ In 1981, in a radical departure from its traditional passivism, the Human Rights Committee decided that Uruguay's military regime, by its curtailment of political freedom, was in violation of the International Covenant on Civil and Political Rights.⁹⁴ Hence, the normative status of the right to democracy is endorsed by state practice.

However, it must be restated that there is no evidence of a universally accepted model; indeed, there is overwhelming evidence to the contrary.⁹⁵ The Vienna Conference on Human Rights and Development expressly considered, and rejected, the more inclusive definition of democracy of "full participation of people in all aspects of their lives."⁹⁶ As Thomas Franck has noted, it is unnecessary to project any given model, for "the term 'democracy', as used in international rights parlance, is intended to connote the kind of governance which is legitimated by the consent of the governed. . . . [E]ssential to the legitimacy of governance is evidence of consent to the process by which a populace is consulted by its Government."⁹⁷ The

92. See *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, G.A. Res. 137, U.N. GAOR, 46th Sess., 75th plen. mtg., Agenda Item 98, U.N. Doc. A/RES/46/137 (1992); *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary General*, U.N. GAOR, 46th Sess., Agenda Item 98(b), U.N. Doc. A/46/609 (1991); *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary General*, U.N. GAOR, 47th Sess., Agenda Item 97(b), U.N. Doc. A/47/668 (1991); see also Tom J. Farer & Felice Gaer, *The UN and Human Rights: At the End of the Beginning*, in UNITED NATIONS, DIVIDED WORLD, *supra* note 3, at 240, 290-91 (discussing these resolutions).

93. See THE UNITED NATIONS AT 50: NOTES FOR SPEAKERS, *supra* note 51, at 70.

94. *Views of the Human Rights Committee under Article 5(4) of the Optional Protocol to the International Covenant on Civil and Political Rights (Concerning Communication No. R.10/44)*, U.N. GAOR Hum. Rts. Comm., 36th Sess., Supp. No. 40, at 153, ¶ 17, U.N. Doc. A/36/40 (1981).

95. See *supra* Part III.B.

96. *Vienna Declaration and Programme of Action*, U.N. GAOR World Conf. on Human Rts., 48th Sess., 22d plen. mtg. at 20, ¶ 8, U.N. Doc. A/CONF.157/24 (Part I) (1993) [hereinafter *Vienna Declaration*]; see also Susan Marks, *Nightmare and Noble Dream: The 1993 World Conference on Human Rights*, 53 CAMBRIDGE L.J. 54, 58 (1994).

97. Thomas M. Franck, *Fairness in the International Legal and Institutional*

position of the United Nations on this issue has been articulated by the former Secretary-General:

When, like so many others before me, I stress the imperative of democratization, I do not mean that some states should imitate others slavishly, nor do I expect them to borrow political systems that are alien to them, much less to gratify certain Western States—in fact, just the opposite. Let us state, forcefully, that democracy is the private domain of no one. It can and ought to be assimilated by all cultures. It can take many forms in order to accommodate local realities more effectively. Democracy is not a model to copy from certain states, but a goal to be achieved by all peoples! *It is the political expression of our common heritage . . .*⁹⁸

IV. THE CONTENTS OF THE RIGHT TO DEMOCRACY

A. *The Substantive Content*

Our initial question—"What is Universal Democracy?"—still persists. What are the elements constituting the "common heritage" that in the view of the United Nations make up the minimum democratic heritage that has "a universal dimension?" Article 21 of the Universal Declaration emphasizes the overriding importance of the will of the people.⁹⁹ Therefore, a government that is not based on the consent of the governed is not democratic. In addition, the government must be substantially representative of all distinct groups in the country. This is a logical interpretation of the phrase "[e]veryone has the right to take part in the government" in article 21 of the Universal Declaration.¹⁰⁰ In order not to lose

System, 240 RECUEIL DES COURS D'ACADEMIE DE DROIT INTERNATIONAL [R.C.A.D.I.] 102 (1993-III).

98. Cerna, *supra* note 12, at 291-92 (quoting former Secretary-General Boutros Boutros-Ghali, from his address at the opening of the World Conference on Human Rights in 1993) (emphasis added). There are fundamental experiences shared by all beings despite geo-cultural diversities. See STANISLAV GROF & HAL ZINA BENNETT, *THE HOLOTROPIC MIND* 89-91 (1992).

The universal heritage of democracy should be seen as a sum total of global rational choice based on the shared human experience of class domination and exploitation. At the least, it is evident in the near-universal demystification of the concept of governance, and in a broader sense it manifests in popular calls for accountability in governments.

99. Universal Declaration, *supra* note 45, art. 21(3).

100. *Id.* art. 21(1).

the essence or undermine the ethics of the concept of representation, one must check the tendency to presume a representation in fact from a nominal representation.¹⁰¹ Representation should be manifest in active participation such that "representation and participation [are] experienced as part of a continuum."¹⁰² Article 21 of the Universal Declaration did, in fact, contemplate a solution to the question of representation by providing that everyone has the right to take part in government,¹⁰³ this provision denotes an active participation beyond the initial consent usually expressed through free elections. The United Nations has defined the right to popular participation as the "judicial and political structures [that] enable all citizens to participate, freely and actively, in laying the constitutional foundations of the political community, determining the scope and purpose of the various institutions, *choosing their leaders, and governing the State*."¹⁰⁴ It would be frivolous to argue that because a people have voted in a government, every segment of the population must be deemed, *a fortiori*, to be participating. On the other hand, it is nonsensical to argue that a particular segment may choose to withdraw from participation in the government beyond exercising its voting rights. To be legitimate and democratic in international law, the emerging government must be based on the consent of the people and must be participatorily representative of all national and distinct political groups in the country. One assumption essential to this standard is that zero-sum politicking in international law is undemocratic and illegal. The consent of the governed and true representative quality of the government are the substantive components of universal democracy, to which everyone has a right; both components are necessary to preserve the sanctity and inviolability of a state's territorial integrity.

101. See WARWICK MCKEAN, *EQUALITY AND DISCRIMINATION UNDER INTERNATIONAL LAW* 12, 285 (1983).

102. Thornberry, *supra* note 38, at 116.

103. See *supra* note 53.

104. *Study by the Secretary-General*, U.N. ESCOR Hum. Rts. Comm'n, 41st Sess., Provisional Agenda Item 8(c), at 22, ¶ 94, U.N. Doc. E/CN.4/1985/10 (1985) (emphasis added).

B. *The Procedural Content*

Article 21 of the Universal Declaration provides for "periodic and genuine elections . . . by universal and equal suffrage and . . . by secret vote" as the only process by which democracy can be attained.¹⁰⁵ Government that gains or retains power by any other process is not democratic and is thus illegitimate in international law. Traditional monarchies apparently fail this test notwithstanding their acclaimed populist image. In short, the legitimacy of a government must be tested periodically by elections. There is no space for presumptions of consent.

C. *The Structural Content*

There is a third element—the structural element—which makes it mandatory for a state seeking to join the democratic circle to structure its government on a normative and institutional framework that provides for the welfare of the people.

1. Historical Perspective

History has portrayed the evolution of people from a natural, unorganized state to an organized civil society as being motivated by the necessity for collective security of both life and property.¹⁰⁶ In the 18th century, Immanuel Kant ob-

105. Universal Declaration, *supra* note 45, art. 21(3).

106. Even classical liberal thought, which professes to be averse to communitarianism, is paradoxically embedded in the logic of collectivism—the public good of the society. The social contractarians, notwithstanding their many differences, all recognized that from the inception of civil society, central authority has been a functional mechanism for the individual benefit of each and every member of society. John Locke theorized the central mechanism as follows: "Their power, in the utmost bounds of it, is limited to the public good of the society. It is a power that has no other end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the subjects." LOCKE, *supra* note 7, at 160; *see also* JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 49 (Maurice Cranston trans., Penguin Books 1968) (1762). Hobbes believed the very viability of a contract was dubious absent a central authority. As Hobbes put it:

If a Covenant be made, wherein neither of the parties performe presently, but trust one another; in the condition of meer Nature, (which is a condition of Warre of every man against every man,) upon any reasonable suspicion, it is Voyd: But if there be a common Power set over them both, with right and force sufficient to compell performance; it is not Voyd.

HOBBS, *supra* note 18, at 196.

served the position of trust occupied by the institution of government and that position's connection with both internal and international peace which, according to Kant, must be rooted in a domestic institutional guarantee of human rights and social welfare.¹⁰⁷ Historical evidence shows that the reason for the dislodgement of the feudal system—which, in turn, dispersed political and economic powers among secular rulers, the church, and the feudal lords—was that a unification of powers of all three of those institutions in a unified national state was the best mechanism for furthering the interest of each individual institution.¹⁰⁸ In 1648, the Peace of Westphalia marked the birth of the modern state, which—though it was intended to effect total unity and progress of all individuals—has progressively vindicated Machiavelli's prediction¹⁰⁹ that the state would ultimately metamorphose into an entirely self-sufficing and non-moral entity.¹¹⁰ The state is a unique sphere of human development, a functional instrument that, in isolation, has no inherent morality. The modern state, whether seen as a product of consensus, conflict or contrivance, evolved and was nurtured by people's search for security and social justice. Its moral justification should be measured by the extent to which it enhances the security and social welfare of its citizens. In other words, the primary purpose of the modern state should, as a basic norm, condition its functional framework, and this should necessarily translate into normative philosophy and material institutions.

2. Within the Framework of the Charter, By Necessary Implication

[T]he U.N. Charter established an instrument for international cooperation[,] . . . an organism capable of life and growth . . . depending not simply on the written injunctions of the founding fathers but on the visions and wisdom of

107. See Immanuel Kant, *On the Relationship of Theory to Practice in Political Right*, in *POLITICAL WRITINGS*, *supra* note 2, at 73, 74.

108. See WILLIAM STUBBS, *THE CONSTITUTIONAL HISTORY OF ENGLAND* 85-87 (1979).

109. See NICCOLÒ MACHIAVELLI, *THE PRINCE* (George Bull ed., Penguin Books, 1961) (1513).

110. See J.L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 5-6 (Humphrey Waldock ed., 6th ed. 1963).

succeeding generations.¹¹¹

The doctrine of necessity, which was applied in the *Expenses Case*,¹¹² has been the basis of much of U.N. activity falling outside the parameters of the Charter. The doctrine is perhaps at the root of the Uniting for Peace Resolution of 1950¹¹³ and of the concepts of peacekeeping and humanitarian intervention. An authentic statement of the boundaries of "necessity" was set forth by Chief Justice John Marshall in *McCulloch v. Maryland*: "Let the end be legitimate, let it be within the scope of the constitution [in this case, the Charter], and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution [the Charter]" are legitimate.¹¹⁴

111. BENJAMIN V. COHEN, *THE UNITED NATIONS: CONSTITUTIONAL DEVELOPMENTS, GROWTH, AND POSSIBILITIES* 2 (1961).

112. *Certain Expenses of the United Nations*, 1962 I.C.J. 151 (July 20). In this case, the court was faced with the difficult issue of the constitutional basis for the use of armed forces in the United Nations Emergency Force Operations in the Middle East (UNEF) and the United Nations operations in the Congo. The I.C.J., pursuing a policy of institutional effectiveness, decided that any action adjudged appropriate for the fulfillment of one of the stated purposes of the United Nations is presumed within the powers of the organization. *See id.* at 168; *see also* *International Status of South-West Africa*, 1950 I.C.J. 128, 136 (July 11) (court's advisory opinion on the international status of South-West Africa rested on the assumption of the necessity of international supervision); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 171, 183-85 (Apr. 9) (relying on the necessity of interpreting the legal personality of the U.N. as an objective international personality capable of bringing international claims against even non-signatories to the Charter).

113. G.A. Res. 377A, *supra* note 4 (adopted by a vote of 52-5 on November 3, 1950); S.C. Res. 119, U.N. SCOR, 11th Sess., 751st mtg. at 9, U.N. Doc. S/3721 (1956) (pursuant to the Uniting for Peace Resolution, Security Council's observation of "lack of unanimity" of permanent members necessitated an emergency special session of the General Assembly to make recommendations concerning the Suez Canal crisis); S.C. Res. 120, U.N. SCOR, 11th Sess., 754th mtg. at 8, U.N. Doc. S/3733 (1956) (necessity for emergency special session of the General Assembly to make recommendations concerning the Soviet suppression of "the efforts of the Hungarian people to reassert their rights"); S.C. Res. 129, U.N. SCOR, 13th Sess., 838th mtg. at 6, U.N. Doc. S/4083 (1958) (necessity for emergency special session of the General Assembly to make recommendations concerning complaints by Lebanon and Jordan of interference by the United Arab Republic in their domestic affairs); S.C. Res. 157, U.N. SCOR, 15th Sess., 906th mtg. at 8, U.N. Doc. S/4526, (1960) (necessity for emergency special session of the General Assembly to make recommendations concerning presence of Belgian troops in the Republic of the Congo).

114. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). To constitute a "necessity in the eyes of [international] law," the measure must be inherent in

A preliminary question arises: what are the ends of the Charter and who are the intended beneficiaries? Undoubtedly, states are the major actors in the U.N. system, but the interest of the people remains an overriding consideration. The opening phrase of the Charter, "We the peoples of the United Nations,"¹¹⁵ clearly places government and states in a position of trust.¹¹⁶ The ends for which the United Nations was established, as stated in the Preamble, are to forestall another world war; to reaffirm faith in fundamental human rights, in the dignity, worth and equality of all human beings; to establish favorable conditions for justice and respect for the rule of international law; and "*to promote social progress and better standards of life in larger freedom.*"¹¹⁷ Article 55 of the Charter identifies the well-being of the people as a necessary condition for peace,¹¹⁸ while the primary function and purpose of the U.N. under article 1 of the Charter is the maintenance of

the U.N. system as it was originally conceived, and not merely because it is desirable. *South West Africa (Eth. v. S. Afr.; Liber. v. S. Afr.)*, 1966 I.C.J. 6, 47, para. 89 (July 18).

115. U.N. CHARTER preamble.

116. See Richard Falk, *The Rights of Peoples (In Particular Indigenous Peoples)*, in *THE RIGHTS OF PEOPLES* 17, 25 (James Crawford ed., 1988); see also W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2(4)*, 78 AM. J. INT'L L. 642, 643-44 (1984).

117. U.N. CHARTER preamble (emphasis added). Article 31 of the Vienna Convention on the Law of Treaties provides that a treaty (to which judicial class the Charter belongs) shall be interpreted "in the light of its object and purpose." Vienna Convention on the Law of Treaties, May 23, 1969, art. 31(1), 1155 U.N.T.S. 331, 340 (entered into force Jan. 27, 1980). Article 31 classifies the preamble as part of the "context for purposes of interpretation," *id.* art. 31(2), and endorses a consideration of subsequent state practice, *id.* art. 31(3)(b). Hence, the Charter should be interpreted in the context of its preamble, and in the light of its stated objects, purposes, and contemporary state practice.

118. U.N. CHARTER art. 55. Article 55 reads in full:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- (a) higher standards of living, full employment, and conditions of economic and social progress and development;
- (b) solutions of international economic, social, health, and related problems; and international cultural and educational cooperation; and
- (c) universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Id.

international peace and security.¹¹⁹ These are legally binding international agreements that expressly stipulate certain obligations of a state to its citizens and the role of the United Nations in overseeing their implementation. Under article 56 each state accepts to take separate action for the achievement of the provisions of article 55. A literary interpretation of articles 55 and 56 imposes a legal obligation on the state and creates a populist responsibility for the United Nations. Any construction of state responsibility in this respect as lacking immediate obligation as a result of the United Nations' "promotional" role is bound to fail as it contradicts the letter and spirit of article 56. However, whatever interpretation is adopted should be contextualized. Within a socio-economic framework (where issues of social well-being are often displaced by the materialism of political power in most societies, and by individualism and liberal legalism in others), the externalization of social well-being from the reality of political power undermines any meaningful promotional activity. There must be a normative institutional framework providing empirical benchmarks for the evaluation of state performance, and also providing the leverage for internal enforcement.¹²⁰ Moreover, poverty is often rooted in the structure of a society. Thus, to be effective, any solution must be materially and normatively structural. If peace and social well-being are inseparable partners, then, in light of the duty assumed by states under article 56,¹²¹ the right to democracy necessarily envisions a

119. *Id.* art. 1(1).

120. Commenting on the promotional activity of the United Nations Committee on Economic, Social and Cultural Rights, Asbjørn Eide observed that difficulties arose, inter alia, from the fact that within the state "the obligations—and neglect of them—are very difficult to pinpoint." Asbjørn Eide, *Realization of Social and Economic Rights: The Minimum Threshold Approach*, INT'L COMM'N JURISTS, Dec. 1989, at 40, 41.

121. U.N. CHARTER art. 56. Article 56 of the Charter states: "All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55." *Id.* The duty of states to take effective action to create reasonable living standards for their citizens under article 56 was reiterated by the General Assembly in a resolution of December 12, 1958. See *International Co-operation for Economic Development of Under-developed Countries*, G.A. Res. 1316, U.N. GAOR, 13th Sess., Agenda Item 28, U.N. Doc. A/RES/1316 (1958); see also *Permanent Sovereignty over Natural Resources*, G.A. Res. 2158, U.N. GAOR, 21st Sess., Agenda Item 45, U.N. Doc. A/RES/2158 (1966); *Charter of Economic Rights and Duties of States*, G.A. Res. 3281, U.N. GAOR, 29th Sess., Supp. No. 31, 2319th plen. mtg. at 50, U.N. Doc.

democratic system possessing the normative—that is, constitutional—and institutional guarantees of the people's social well-being.¹²²

3. Within the Framework of the Universal Declaration of Human Rights

The Universal Declaration spells out civil, political, economic, social, and cultural rights of all beings. Specifically, the Universal Declaration provides, *inter alia*, for the right to democratic governance,¹²³ social security,¹²⁴ employment,¹²⁵ adequate standard of living, food, clothing, housing and medical care,¹²⁶ education,¹²⁷ and cultural development.¹²⁸ Article 28 states that “[e]veryone is entitled to a so-

A/9631 (1975); *Declaration on the Right to Development*, G.A. Res. 128, U.N. GAOR, 41st Sess., Supp. No. 53, 97th plen. mtg. at 186, U.N. Doc. A/41/53 (1987).

122. An African elder statesman once observed:

What rights has our subsistence farmer? He scratches a bare living from the soil provided rains do not fail. His children work at his side without schooling, medical care or even good feeding. Certainly he has freedom to vote and speak as he wishes. But these freedoms are much less real to him than his freedom to be exploited. Only as his poverty is reduced will his existing political freedom become properly meaningful and his right to human dignity a fact.

Amos Wako, *The Rule of Law: Cornerstone of Economic Progress*, 23 INT'L BUS. LAW. 350, 353 (1995).

123. Universal Declaration, *supra* note 45, art. 21(3).

124. *Id.* art. 22. Article 22 states:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

125. *Id.* art. 23(1). Article 23(1): “Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

126. *Id.* art. 25(1). Article 25(1):

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or lack of livelihood in circumstances beyond his control.

127. *Id.* art. 26(1). Article 26(1):

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

128. *Id.* art. 27. Article 27(1): “Everyone has the right freely to participate in

cial and international order in which the rights and freedoms set forth in this Declaration can be fully realized."¹²⁹ It is clear from the integrative language of the preamble and article 28 that each article is to be interpreted in the context of the Universal Declaration and not in isolation. Thus, article 21 means a right to a democratic system that guarantees the rights set out in articles 22 to 27, as required by article 28. In short, articles 21 and 28 together define a democratic state in international law as one that possesses the requisite substantive content, procedural content, and structural content (i.e., a constitutional and institutional framework guaranteeing every individual the rights set forth in articles 22 through 27).¹³⁰

4. Endorsement by United Nations Operations

More than 200 years after Immanuel Kant, the United Nations has programmatically endorsed his Republic. Indeed, "[Kant's] insight . . . anticipates and grounds Article 28 of the Universal Declaration of Human Rights"¹³¹ The new emphasis on peace-building and development¹³² is evidence of such endorsement, and the U.N. commitment to social progress was endorsed by 117 world leaders at the 1975 World Summit for Social Development.¹³³ The U.N. organizes and funds numerous conferences for critical assessment of national performance in the area of democracy, and takes positive steps to assist the uplifting of the welfare of peoples. The United Na-

the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits."

129. *Id.* art. 28.

130. See John P. Humphrey, *The Just Requirements of Morality, Public Order and the General Welfare in a Democratic Society*, in *THE PRACTICE OF FREEDOM* 137, 147 (R. St. J. MacDonald & John P. Humphrey eds., 1979). Humphrey observes that "the General Assembly . . . meant by democratic society the kind of society in which the rights enunciated by the Universal Declaration of Human Rights are recognized and respected." *Id.*

131. Marilyn McMorrow, *Global Poverty, Subsistence Rights, and Consequent Obligations for Rich and Poor States*, in *AFRICA, HUMAN RIGHTS, AND THE GLOBAL SYSTEM: THE POLITICAL ECONOMY OF HUMAN RIGHTS IN A CHANGING WORLD* 37, 40 (Eileen McCarthy-Arnolds et al. eds., 1994).

132. See BOUTROS BOUTROS-GHALI, *BUILDING PEACE AND DEVELOPMENT* at 1, U.N. Sales No. E.95.I.3 (1994). The former Secretary-General noted that economic and social questions have long occupied the major part of U.N. efforts, and that the U.N. is "deepening its attention to the foundations of peace." *Id.*

133. See *THE UNITED NATIONS AT 50: NOTES FOR SPEAKERS*, *supra* note 51, at 32.

tions Children's Fund; Development Program; Population Fund; World Food Program; Food and Agriculture Organization; Educational Scientific and Cultural Organization; Industrial Development Organization; and Environment Program are all material evidence of such positive steps.¹³⁴ But beyond this, it is significant that while the U.N. budget does not normally exceed \$3 billion,¹³⁵ the U.N. and the World Bank together disburse more than \$30 billion on social and development programs ranging from irrigation systems to primary health and education networks.¹³⁶ The foregoing is itself an acknowledgement that every state (whether democratic or not) has an obligation of minimum welfare for its people.

However, the attainment of democratic status is different from its sustenance. In 1793-94, revolutionary France had a democratically elected government which succeeded in establishing and maintaining a state of bloody terror. And in the recent past, Panama, Grenada, and the Philippines have shown that the reinstatement of a democratically elected government is not necessarily an assurance of the emergence of a virile democracy. With the hindsight of fledgling democracies, the next and concluding sections seek to demonstrate that democracy has an internal morality that strengthens or weakens its structure and its functional harmony.

V. THE INTERNAL MORALITY OF DEMOCRACY

The political ethic of a people is a product of the history and traditions of that people. It operates as a political instinct, informing and guiding political decisions, political relations, and political institutions. In the practical arena of politics, the personality of individuals and their acceptability for leadership are always preliminarily screened by this ethic and based on a wide range of cultural and traditional indices. For example, in most traditional African societies the public image of an indi-

134. See generally *id.*

135. See, e.g., *Programme Budget for the Biennium 1996-97*, G.A. Res. 215, U.N. GAOR, 50th Sess., Agenda Item 116, 100th plen. mtg. at 3, U.N. Doc. A/RES/50/215 (1996) (appropriating \$2,608,274,000 for U.N. budget); *Programme Budget for the Biennium 1994-95*, G.A. Res. 220, U.N. GAOR, 49th Sess., Agenda Item 107, 95th plen. mtg. at 5, U.N. Doc. A/RES/49/220 (1995) (appropriating \$2,608,274,400 for U.N. budget).

136. See *id.* at 34.

vidual is a reflection of the individual's ancestral antecedents. Evidence of some sacrilege or apostasy is an unspoken disqualification from public office; this disqualification may be reversed only by exceptional personal integrity and accomplishment. The political ethic could, in some cases, effectively perform the role of the unseen gatekeeper, filtering out the "unsuitable" from participating in leadership, thereby refining the quality of governance. It could constitute either an internal weakness or a pillar of strength of a democracy; for example, the mysticization of political leadership in some places is one surviving ethic that has consistently impeded the development of democracy. In some cases, the consequence of an extreme negative political ethic is a self-destructive democracy. Algeria's experience is instructive.¹³⁷ The importance of a people's democratic culture to the functioning of a democratic system was confirmed by the Report of the Conference on Security and Cooperation (CSCE) Seminar of Experts on Democratic Institutions made to the CSCE Council in Oslo in 1991.¹³⁸

Often, a combination of external factors such as corruption, patrimonialism, and clientelism worsen an inherently weak democracy. In Haiti, for example, corrupt elected representatives conspired with the judiciary and the military to subvert the popular mandate of the people. In Nigeria, in the wake of the annulment of the June 1993 elections, corrupt

137. The 1991 election in Algeria was won by the Islamic Salvation Front (F.I.S.), but the election results were annulled by the military after the party declared its intention to uproot all democratic institutions and cancel periodic elections in order to enthrone the rule of Islam. See *Human Rights in Algeria Since the Halt of the Electoral Process*, 4 MIDDLE EAST WATCH, Feb. 1992, at 4-5.

However, it is submitted that the publicly declared intent of the F.I.S. to destroy democracy, which was the basis of its mandate, was a repudiation of the authority of its mandate. Since it would have been illegal for the F.I.S. to assume office without a mandate, the military intervention may be justified on grounds of a threat to national security. See Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 HARV. INT'L L. J. 1, 6-9 (1995) (discussing the Algerian question).

138. See Thornberry, *supra* note 38, at 102 n.2. Part I of the Report stated that a

democratic culture was a necessary element for the functioning of all democratic governments, and required permanent encouragement. Where a democratic tradition of long duration has not had the chance to develop, or had been interrupted, it would be necessary to develop a democratic culture, on the local, regional and national level, in order to sustain new democratic institutions.

Id.

elected representatives betrayed their constituencies as they voted for the continuance of military dictatorship. In the Zairian "Kleptocracy," Mobutu Sesesoku amassed \$6 billion as personal wealth,¹³⁹ whereas the 1994 per capita income of Zaire was barely \$154 per annum.¹⁴⁰ The genocide that occurred in Rwanda, and is currently threatening Burundi, was partly due to non-representative and oppressive leadership.¹⁴¹ There is force in the argument that the intractable problems of internal crisis and the oppression of minorities and indigenous peoples would be greatly reduced if the democratic audit is strengthened. The frightening consequences of criminal leadership and the challenge to international lawyers has been lucidly laid out by Stanley Hoffman as follows:

[W]e face a world in which many States are "failed States," in a situation of chaos, anarchy or permanent strife, either because of disintegration along ethnic or religious lines, or because of the flimsiness and corruption of their institutions, or because of the artificiality both of their borders (arbitrarily traced by colonial rulers) and of the Western-based notion of the State when it is imposed on parts of Africa and Asia. . . . Both [Professor, and now Justice] Higgins and [Professor] Koskenniemi point out that the UN is simply not equipped to deal with collapsing States or with rulers who systematically violate human rights, and that "social transformation for the better might sometimes necessitate revolution."¹⁴²

Perhaps disintegration of states can be reduced. Perhaps violent revolutions can be avoided.

VI. CONCLUSION

A. *Redefining Democracy*

This paper has attempted to situate the universal democracy within a universal heritage and away from any particular political model. It has used empirical data, the Universal Declaration of Human Rights, and international and regional in-

139. See *Why Bankroll Africa's Ceausescu?*, N.Y. TIMES, Apr. 21, 1990, at A22.

140. See 2 EUROPA WORLD YEAR BOOK 1996, at 3613 (1996).

141. See DIXON KAMUKAMA, RWANDA CONFLICT: ITS ROOTS AND REGIONAL IMPLICATIONS 20-24 (1993).

142. Stanley Hoffman, *Thoughts on the UN at Fifty*, 6 EUR. J. INT'L L. 317, 324 (1995).

struments to buttress the normative character and institutional/structural requirements of the universal democracy. It ended the inquiry by throwing some light into the internal aspects of democracy, its configuration by historical and cultural norms, values, and even myths. As a result, it has shown that an inherently undemocratic political culture germinates institutions that are easily appropriated to mask exploitation, illusion, or corruption. Given these asymmetries that surround the development of democracy (for the benefit of hindsight, the discussion on the internal morality of democracy showed how political integration of civil society often has to contend with centrifugal socio-cultural factors), the project of democratic peace should not be left to the fortunes of a slow and uncertain voyage of domestic political change. The human and material cost of unassisted change emphasize the immediate necessity for a positive multilateral measure. Such a measure must consist of a step towards realigning the dominant institutional definition of democracy to the supreme political power of civil society. In order to accomplish this it is necessary to conceptualize democracy in terms of human development. This calls for democracy's redefinition in the language and material of human welfare. This measure will serve as the foundation for building a democratic solidarity for a civil society that feels empowered to demand accountability from public institutions, to confront totalitarian governments, and, if necessary, to bear any sacrifice for democracy.

Second, as the discussion on the internal and external problems of democracy shows, tensions inherent in pluralism are visible in many societies. These tensions are not necessarily accommodated by the majoritarian ethos of democracy which undergirds all spheres of participation. It is thus time to fortify the participation index of international instruments and reconciliatory devices of domestic institutions. This can be done by internationally criminalizing political oppression of minorities and the looting of public resources. This step promises the additional benefit of reassuring minorities, and ensuring that democratic institutions and devices for reconciling competing claims that flow from diversity are not undermined by corrupt and inept leadership. It is yet another building block to the needed and attainable consensus of democratic commitment in lieu of consensus of opinion. Again, the statist version of legitimacy grounded on the logic of "defactoism" or effectiveness

ought to be abandoned as it has masked the worst violations of civil and political rights. Legitimacy of any government should be a function of the aggregate perception of civil society. One way of materializing the populist expression of legitimacy is by neutralizing the capacity of any government to masquerade dictatorships as popular and accepted by the masses. With particular focus on democracy, the process by which civil society votes a government in or out (often the ultimate expression of popular sovereignty) presents a veritable means of realigning legitimacy to popular sovereignty. U.N. democratic activities around the world support the view that the participation of a neutral, disinterested observer is one means of protecting the sanctity of elections. Needless to say, such a principle of external involvement should be multilateral and of general application so that every state's sovereignty is equally affected.

B. A Role for International Law

In recent times the most authentic and stimulating intellectual effort to rediscover popular sovereignty and to subject political power to popular control is the work of the German philosopher Jürgen Habermas.¹⁴³ The major attraction of Habermas' work is that it demonstrates the capacity of positive law as an instrument of integration, and the building blocks of solidarity.¹⁴⁴ The challenge to international law is to

143. See generally JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY (William Rehg trans., MIT Press 1996) (1992). His theory of deliberative politics is an attempt to locate within the modern institutions of democracy a superior norm of deliberative public opinion. *Id.* at 274-75. Proceeding on the assumption of the existence of unavoidable factual complexities that make the ideals of uncoerced agreement and undistorted communication difficult to achieve, his theory offers a model that would overcome the tension between the "facts" of social complexities and the ideal "norms" of democracy. *Id.* at 430-36. The model emphasizes the use of law as an integrative instrument in guaranteeing a discursive lawmaking process in which all citizens reach an agreement. Furthermore, the model encourages open deliberations in both parliaments/congresses and in decisionmaking institutions, institutions in which all citizens can participate. See *id.* at 162-68. Habermas's stated objective is the transformation of "Communicative Power" into "Administrative Power." See *id.* at 187-88. In order to achieve this he seeks a new concept of normative legitimacy: "[O]nly those statutes may claim legitimacy that can meet with the assent (zustimmung) of all citizens in a discursive process of legislation that in turn has been legally constituted." *Id.* at 110.

144. Despite its logical appeal, the theory chooses a standard of democracy that is not practicable: *consensus*. See *id.* at 61. The theory therefore leaves many ques-

strengthen the internal morality of democracy by rediscovering popular sovereignty. Hence, international law must inject confidence and legitimacy to the electoral process by an institutionalized neutral observatory process, which should be applicable to all states without exception. Further, international law needs to serve as a deterrent to anti-democratic agents and to regulate the quality of representation in governments by clearly defining violations of a democratic mandate, in whatever form, as an international crime against the peace. International law needs to create a rallying point of solidarity for all citizens by fostering a sense of commitment and confidence in democracy. To accomplish this goal, however, the international legal regime must solidify its own view of democracy. When there is finally a clear-eyed view of democracy within the instruments of international law, the journey towards global peace and security may finally begin in earnest.

tions unanswered, in particular: 1) How can consensus be attained in an acknowledged context of diversity and pluralism?; 2) How practicable is it to create a forum or, indeed, multiple fora for all individuals to reach a consensus on multiple issues of governance?; 3) What is the basis for attributing requisite knowledge to all citizens, or is manipulation not more potent in uninformed participation?; and 4) Is mob governance not a real possibility in the model?

It is submitted that the very essence of democracy is the compromise between consensus and the pluralism-majoritarian principle. Indeed, if there were no differences in opinion there would be no need for democracy! In effect, a theory that seeks consensus can only be seeking an alternative to democracy.

Appendix

THE CONVENTION ON DEMOCRATIC GOVERNANCE

PREAMBLE

The States Parties to this Convention,

Determined to achieve international peace and security in accordance with the United Nations Charter;

Recognizing the need to ensure that States which are not signatories to this Convention act in accordance with its provisions and principles so far as may be necessary for the maintenance of international peace and security;

Reaffirming faith in fundamental human rights, in the dignity and worth of the human person;

Realizing that social and economic development of peoples founded on stable democratic systems of governance are the foundations of international peace and security;

Recognizing that the Universal Declaration of Human Rights is the normative standard of a democratic system;

Convinced that though democracy is susceptible to a people's culture and social economic reality, it has a core unalterable content as a result of a global cultural heritage which has been codified in Articles 21 to 28 of the Universal Declaration;

Have agreed as follows:

ARTICLE I

(1) All human beings have a right to democratic governance which shall consist of:

(a) a political system based on the free will of the people expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be by secret vote

or by equivalent free voting procedures.

(b) a political system based on constitutional guarantees and institutional framework for the realization of the fundamental human rights and the rights to work, food, clothing, housing, medicare, unemployment, security and education.

(c) These rights shall be justiciable and enforceable by individual or group legal action in each State.

(2) It shall be the primary duty of every State to channel a substantial part of its resources into providing opportunities for the enjoyment of these rights, and an equivalent reduction in its defense budget. Therefore, the budget and expenditures of member States shall give priority to the realization of these rights.

(3) Member States agreeing that the national budget, and any other empirical measures and projects in their territories, shall constitute the indices for compliance assessment, hereby agree to the monitoring of the implementation of these rights by any organ chosen by the United Nations.

(4) All member States hereby accept international monitoring as a requisite part of the electoral process. The international monitoring team shall be made up of Non-Governmental Organizations accredited to the United Nations, and United Nations experts. The monitoring shall be carried out under the auspices of the United Nations.

(5) This article provides for the minimum of a democratic system and is without prejudice to any international instrument or national legislation which confers wider benefits on peoples in any material particular.

ARTICLE 2

(1) The democratic character of every State shall be unalterable, and no exceptional circumstance other than a state of war shall justify its modification in any form.

(2) Each State shall take effective legislative, administrative, judicial, or other measures to protect the democratic character of the political system as provided in Article 1.

(3) From the commencement of this convention no State party shall recognize any government that comes to power by an undemocratic means. The duty of non-recognition shall include a duty to refrain from any acts, dealings, diplomatic relationships, or any contacts which could imply a recognition of the legitimacy of the Government.

(4) By virtue of this Article, all States have the right and the duty to take collective measures to protect the democratic character of any State, provided such action is taken under the aegis of the United Nations and in accordance with its Charter.

(5) The duties of non-recognition and collective protection above shall be enforced simultaneously and in such a manner as not to inflict unintended hardship on the general public of the target State.

ARTICLE 3

(1) Each State shall ensure that all acts of overthrowing a democratic government by force of arms or threat of same or otherwise taking control of government by any other means not democratic within Article 1 herein are offenses under its criminal law. The same shall apply to an attempt to take over control of government in like manner and to an act by any person which constitutes complicity or participation by membership in the executive body of an undemocratic government.

(2) Each State, taking into account the grave nature of these offenses and their consequences, shall make provision for appropriate penalties which must not be less than 5 years imprisonment without option of fine.

ARTICLE 4

(1) Each State shall take effective legislative, administrative, judicial, or other measures to enforce the accountability and responsiveness of the government to the people, and the inde-

pendence of the judiciary.

(2) Each State shall ensure that all acts of official corruption are offenses under its criminal laws.

(3) Each State party shall provide a penalty for the offense of official corruption not less than five years imprisonment without option of fine.

(4) For the purposes of this Convention the term "Official Corruption" means any act by a member of the executive council of any government which amounts to an illegal enrichment of himself or other person(s) or group, or an abuse of public office for an unwarranted purpose which threatens or affects the democratic character of the State, and includes any misuse of official position for suppression or oppression of a minority or indigenous group.

ARTICLE 5

(1) The penalty for a conviction under Articles 3 and 4 shall include a forfeiture of all properties acquired by the accused during the commission of the offense, and any other property unlawfully acquired in connection with the commission of the offense to the benefit of any person whatsoever.

(2) Articles 3 and 4 are without prejudice to any international instrument or national legislation which does or may contain provisions of wider application.

ARTICLE 6

(1) Upon a formal notification of a criminal charge before a competent court of law by a democratic government accompanied with a copy of the charge sheet and proof of evidence, any State in whose territory a person alleged to have committed any offense of same nature as those referred to in Articles 3 and 4 shall take the individual into custody or take legal measures to ensure his or her presence, and shall take the interim measure of holding as disputed all his or her assets within its jurisdiction.

(2) Such a State shall immediately make a preliminary judicial

inquiry into the existence of a *prima facie* case based on the proof of evidence.

(3) Upon being satisfied with the evidence it shall extradite the alleged offender to the State of nationality pursuant to Article 7, otherwise it shall assume jurisdiction over the offenses and shall, on notifying the State of nationality, request for full record of evidence which shall be promptly dispatched.

(4) This Convention is without prejudice to the right of the alleged offender to a fair trial.

ARTICLE 7

(1) Every State shall deem offenses of the same nature as those in Articles 3 and 4 as extraditable offenses based on this Convention.

(2) The conditions for extradition under this Convention shall be:

(a) That the requesting government is democratic;

(b) That the proof of evidence disclose *prima facie* the commission of the act alleged by the alleged offender, or any circumstance linking the alleged offender with the act or its consequence.

ARTICLE 8

(1) Every State shall, upon reasonable notice of the criminal charge against the alleged offender, take effective measures to preserve the property in all the assets of the offender within its jurisdiction as "disputed property" for duration of trial.

(2) Each State shall to the extent possible enforce within its jurisdiction the judgment of a trial under this Convention and shall take measures to transfer legal ownership of properties forfeited under the trial law and by virtue of this convention to the State of nationality.

(3) The State of nationality shall be responsible for the expenses of member States incurred in the extradition, prosecution of

the offender, or execution of the judgment or implementation of any part of this Convention; and shall be solely liable for all actions, claims, and damages arising from the implementation of this Convention.

ARTICLE 9

(1) The International Court of Justice is hereby given the jurisdiction to review any decision or action taken pursuant to this Convention, on the application of the alleged offender, in any of the following cases:

(a) Where there is convincing evidence that the alleged offender was a victim of persecution by the government of his or her country; or

(b) Where there is a substantial miscarriage of justice in the trial.

(2) The court shall determine its jurisdiction to review based on the application of the alleged offender.

(3) The structure and procedure of the court for the proceedings shall be determined by the court in accordance with its statute.

(4) The decision of the court shall be binding.