

DEFENDING DEMOCRACY THROUGH FOREIGN INTERVENTION

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SUMMARY: I. *Disagreements on Democracy*. II. *Legal Constrains on Intervention*. III. *Practical Constraints on Intervention*. IV. *Conclusion*.

“[A] great principle is spreading across the world like wildfire. That principle, as we all know, is the revolutionary idea that the people, not governments, are sovereign. [This principle] has, in the last decade... acquired the force of historical necessity... Democracy today is synonymous with legitimacy the world over; it is, in short, the universal value of our time.”²

That was the claim advanced by the United States before the Organization of American States (“OAS”) in 1989, in rhetorical justification of the U. S. invasion of Panama.³ At the time, the international community was not impressed. Both the UN General Assembly and the OAS voted overwhelmingly to condemn the invasion,⁴ even though it was common knowledge that the advent of democracy in Panama had been frustrated by General Manuel Noriega’s refusal to seat the government of President-elect Guillermo Endara, and even though Endara and most other Panamanians appeared to welcome the invasion.⁵ Most states, and Latin American states in particular, rejected the notion that foreign states could legitimately employ armed force or other measures of coercion to seat a democratically elected government against the will

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² Bureau of Pub. Aff., U. S. Dep’t of State, Current Pol’y No. 1240, Panama: A Just Cause 2 (1990) (statement of Luigi R. Einaudi, U. S. Permanent Representative to the OAS), quoted in Ruth, Brad R., “Governmental Illegitimacy Revisited: ‘Pro-Democratic’ armed Intervention in the Post-Bipolar world”, 3 *Trans. L. & Contemp. Prob.* 482-490 (1993).

³ Although the promotion of democracy figured prominently in the public statements of U. S. officials regarding the objectives of the U. S. invasion, the U. S. did not claim any right of pro-democratic intervention as part of its legal justification for the invasion. Instead, the U. S. relied primarily on the right of self-defense (premised on an alleged threat to American lives and to the U. S. itself) and a claimed right to preserve the integrity of the Panama Canal treaties. See, e. g., Scheffer, David J., “Use of Force After the Cold War: Panama, Iraq, and the New World Order”, in *Right v. Might* 109, 121-122 (2d ed. 1991).

⁴ The General Assembly voted 75 to 20 to condemn the invasion, G.A. Res. 44/240 (1989); the vote in the OAS was 20 to 1, with only the United States dissenting. See OAS CP/Res. 534 (800/89) (December 22, 1989).

⁵ See Sofaer, Abraham D., *The Legality of the United States Action in Panama*, 29 *Col. J. Transnat’l L.* 281, 289-90 (1991).

of an indigenous political elite in effective control of the state. Indeed, many states questioned the propriety of any attempt by foreign states to influence domestic political processes.

In the next several years, however, the OAS condemned attempted coups in Surinam and Venezuela, and opposed the now famous "autogolpes" in Peru and Guatemala.⁶ The OAS also sent election monitors and human rights observers to join UN personnel in overseeing the electoral processes in Nicaragua, Haiti, and other member states. Most significantly, the OAS, along with virtually the entire international community, condemned the Haitian military's unconstitutional overthrow of President Jean-Bertrand Aristide.⁷ The OAS even took the lead, at least initially, in promoting coercive sanctions against the de facto authorities in Haiti,⁸ and it acquiesced in the Security Council's decision to authorize U.S. military intervention to restore the deposed President.⁹

This new interventionist spirit was not confined to the OAS. On all sides now, we hear that democracy is an idea whose time has come. Prominent international law scholars tell us that representative government is an emerging international legal entitlement.¹⁰ Historians and political scientists tell us that democracies almost never make war on other democracies,¹¹ and politicians assert important security interests in the spread of democratic governance. International civil servants proclaim a new shared consensus that democracy, human rights, and peace are inextricably linked.¹² Heads of state routinely announce their fealty to democratic norms, and insist that leaders of other states do so as well. International organizations pass resolutions announcing that governmental legitimacy rests on the consent of the governed,

6 See Acevedo, Domingo E., "The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy", in *Enforcing Restraint: Collective Intervention in Internal Conflicts*, 119, 141 (Lori F. Damrosch ed., 1993).

7 *Idem*, at 132.

8 *Ibidem*.

9 See Berenson, William M., Joint Venture for the Restoration of Democracy In Haiti: The Organization of American States and United Nations Experience: 1991-1995, 25 (1996) (unpublished manuscript on file with author).

10 See generally Franck, Thomas, "The Emerging Right to Democratic Governance", 86 *am. j. Int'l L.* 46 (1992); See also Fox, Gregory H., "The Right to Political Participation in International Law", 17 *Yale j. Int'l L.* 539 (1992).

11 See, e. g., Teson, Fernando, "The Kantian Theory of International Law", 92 *Colum. L. Rev.* 53, 74-81 (1992); Doyle, Michael W., *Kant, Liberal Legacies, and Foreign Affairs (Part I)*, 12 *Phil. & Pub. Aff.* 205, 213 (1983); Doyle, Michael W., *Kant, Liberal Legacies, and Foreign Affairs (Part II)*, 12 *Phil. & Pub. Aff.* 323 (1983).

12 See, e. g., Address by the Secretary-General of the United Nations at the Opening of the World Conference on Human Rights, U. N. Doc. A/CONF. 157/22, at 5 (1993), quoted in Gregory H. Fox & Georg Nolte, *Intolerant Democracies*, 36 *Harv. Int'l L. J.* 1, 5 (1995).

and some condition membership in the organization on acceptance of democratic principles.¹³ Even developing countries, once near-monolithic in their opposition to any external involvement in domestic politics, now commonly seek international legitimacy through external monitoring and even supervision of their electoral processes.¹⁴ Perhaps most remarkable, both the OSCE and the OAS have pledged to take action to reverse unconstitutional seizures of power within democratic member states.¹⁵

Was the United States then right, if perhaps premature, to announce democracy's triumph in 1989, and to suggest that in some cases outside states may legitimately intervene to support democratic outcomes in internal political contests? Clearly, recent years have witnessed a dramatic increase in the number, diversity, and proportion of states formally committed to democratic principles. Many states have also displayed a greater willingness to countenance foreign intervention in the name of democracy and human rights than at any time in this century.

But in many respects, the rhetoric in this area has outpaced reality. Although intervention to promote democracy may be more politically palatable than it was in the recent past, no broad right of pro-democratic intervention has emerged, or is likely to emerge any time soon. There are at least three reasons why. First, international consensus on the content and even the desirability of what Professor Tom Franck has labeled the "democratic entitlement" often proves elusive, at least in the context of particular cases. Second, international law remains strongly anti-interventionist, despite the increasingly common but still largely exceptional cases of Security Council consensus on the need for intervention in particular cases. Third, practical obstacles, especially a lack of resources and political will, continue to hamper external efforts to promote democratic governance in undemocratic states. The existence of these problems should not obscure the importance of recent changes linking democracy

¹³ The European Union, for example, makes democracy a pre-condition for membership. See Treaty on European Union, Title I(F), 31 I.L.M. 247, 256 (1992). Similarly, the OAS Charter now provides for the suspension from the General Assembly of any member state whose "democratically constituted government has been overthrown by force", See Protocol of Washington, OAS Charter art. 8 bis; OEA/Ser. P, AG/doc. 11 (VVI-E/92) rev. 1 (1992).

¹⁴ This trend began in 1989, when the Nicaraguan Government invited both the United Nations and the Organization of American States to help supervise its electoral process in order to verify the validity of the 1990 elections. Cerna, Christina M., *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 *N.Y.U. J. Int'l L. & POL.* 289, 293 (1995).

¹⁵ See The Santiago Commitment To Democracy and the Renewal of the Inter-American System, OEA/Ser.P/XXI.O.2 (1991); Resolution 1080, OAS Doc AG/RES. 1080 (XXI-O/91), OEA/Ser.P/XXI.O.2 (1991); Document of the Moscow Meeting of the Conference on the Human Dimension of the CSCE, reprinted in 30 I.L.M. 1670 (1990); Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, reprinted in 29 I. L. M. 1305 (1990).

to governmental legitimacy in the international system. But change in this area is neither as extensive nor as legitimacy-oriented as many have suggested.

I. DISAGREEMENTS ON DEMOCRACY

The international community has long paid at least lip service to basic principles of democratic governance. But it has proven extremely difficult to translate agreement on basic principles into a consensus for pro-democratic intervention in particular cases. In part that is because at the global level the principles at issue have been stated at a high level of generality —high enough to mask important substantive differences among states on the content of those principles. As a result, large numbers of states have been able to sign on to international instruments proclaiming support for democracy and associated values, without any real agreement on the meaning of democracy or the means by which it should be given effect. These differences among states surface when concrete measures are contemplated in specific cases.

In addition, even when states agree on the kinds of changes necessary to initiate or restore democracy in a particular country, they may disagree sharply on the role the international community should play in seeking such changes. Such differences reflect strong philosophical and political differences over the extent to which external actors may legitimately seek changes in the domestic politics of other states. In practice, therefore, cases in which broad international agreement on intervention can be achieved are the exception rather than the rule.

Within the UN system, broad statements in support of democratic governance date back to 1948, when the UN adopted the Universal Declaration on Human Rights by consensus.¹⁶ Article 21 of the Declaration states that “the will of the people shall be the basis of the authority of government”, and that “this will shall be expressed in periodic and genuine elections”. Implicitly, then, Article 21 links governmental legitimacy to respect for the popular will. But this linkage does not appear in the subsequent, and legally binding, International Covenant on Civil and Political Rights.¹⁷ In its place, Article 25 of the Covenant speaks of the right to participate in public affairs (including the right to genuine and periodic elections), but it does not purport to condition governmental authority on respect for the will of the people. The language of article 25 was intentionally drafted broadly enough to accommodate the wide

¹⁶ *Universal Declaration of Human Rights*, G. A. Res. 217A (III), U. N. Doc A/810 (1948).

¹⁷ *International Covenant on Civil and Political Rights*, G. A. Res. 2200, U. N. GAOR, 21st Sess., Supp. No. 16, at 52, U. N. Doc. A/6316 (1967).

range of governmental systems in place among the initial parties to the Covenant.¹⁸ As a result, even Soviet-bloc states felt free to ratify the Covenant. From their perspective, communist states satisfied the requirements of article 25 by affording voters access to various participatory mechanisms as well as an opportunity to ratify their leadership in periodic, albeit single-party, elections.¹⁹ Thus, the cost of consensus was language broad enough to obscure sharp differences among states on the nature of their commitment to democratic rule.

During the Cold War, it was next to impossible for the international community as a whole to agree both that a particular state was undemocratic, and that international action should be taken against that state, with one exception. As part of the process of decolonization, a consensus gradually developed within the UN that the denial of majority self-rule in the colonial territories of Africa and Asia should be treated as an international delict. When white minority regimes in South Africa and elsewhere resisted the transition to majority rule, states could agree, within the context of the UN system, to apply economic and diplomatic sanctions. By defining apartheid regimes as per se violative of international law, states could treat the character of the white minority governments as a legitimate subject for international action, without exposing all undemocratic regimes to similar scrutiny and pressure.

Outside of the decolonization context, however, there was little international consensus on the requirements of democratic governance beyond the general but limited insistence on periodic and genuine elections found in the Covenant on Civil and Political Rights and a number of other international legal instruments. As a result, states lacked generally accepted criteria by which to judge other states' compliance with substantive democratic principles.

With the end of the bi-polar ideological competition that characterized the Cold War, there has been a widely publicized shift in the character of public pronouncements about democracy. More and more states have now made, through treaty or by means of non-binding but still influential declarations, a formal commitment to democratic governance. In addition, states, international organizations, human rights tribunals, and legal scholars have sought increasingly to imbue that commitment with some real content, that is, to move beyond the simple but vague commitment to free elections contained in the Covenant on Civil and Political Rights.²⁰

¹⁸ See Steiner, Henry J., "Political Participation as a Human Right", *1 Harv. Hum. Rts. Yb.* 77, 8693 (1988).

¹⁹ *Ibidem*.

²⁰ See Fox, Gregory H. & Georg Nolte, *supra* note, at 3-5 (1995) (describing efforts of "the international community to address the perennial question of what makes a state 'democratic'").

The greatest progress in specifying the elements of democratic governance has been made in regional systems, and in particular, within the OSCE. At a 1990 meeting in Copenhagen, for example, members of the OSCE (then the CSCE) spelled out at least some of the characteristics of democratic systems and the rule of law, including the requirements of free elections, and the need for representative government, an executive accountable to an elected legislature or the electorate as a whole, a clear separation between the State and political parties, an independent judiciary, military and police forces under civilian control, and a panoply of related human rights.²¹

At the international level, however, support for democracy is still expressed in general terms. Most important, there has been relatively broad (though by no means uniform) acceptance of the principle that elections should entail competition among multiple political parties, something Soviet-bloc states rejected until recently.²² In addition, substantial international agreement now exists on many of the procedural and substantive prerequisites for free and fair elections.²³

Elections, however, are only part of any democratic system. They may assist in the formation of a government responsive to the popular will, but they do not guarantee such a government. In many countries, systemic problems override the positive effects of free elections. In a number of Latin American states, for example, entrenched militaries, powerful business elites, lopsided patterns of resource distribution, and a history of human rights abuses all sharply constrain the ability of elected governments to alter existing political relations.²⁴ In other countries, in Europe and elsewhere, the problem is just the opposite: elections result in governments that are too responsive to the popular will of an ethnic majority, and insufficiently attentive, or openly hostile to, minority group interests. In still other countries, elected governments abandon democratic principles after attaining office.

As yet, no international consensus exists on the best way to deal with such cases, or even on the criteria that should be used to judge whether or not a

²¹ See Copenhagen Document, *supra* note 3.

²² See Roth, *supra* note 1, at 506-07.

²³ Such prerequisites include near-universal adult suffrage, the right to vote in secret and to have one's vote counted equally with that of others, the right to campaign, to form political parties, to express political opinions without interference, to seek and receive information, to have reasonable access to mass media, and to have an effective remedy for violation of political and electoral rights. For a more complete list of the elements of democratic elections, see the Declaration on Criteria for Free and Fair Elections adopted unanimously by the Inter-Parliamentary Council of the Inter-Parliamentary Union, an organization with delegates from 129 different national parliaments (on file with author).

²⁴ See Schnably, Stephen J., "The Santiago Commitment As a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala", 25 *U. Miami Interam L. Rev.* 393, 51623 (1994).

particular government is substantively “democratic”. In part, this is because many states still do not share the West’s enthusiasm for liberal, parliamentary democracy. Some states, Islamic and Asian states in particular, view much of the recent rhetoric about democratic governance as a misplaced attempt to transplant western institutions and structures of governance to countries with radically different cultural and political traditions. In their view, any attempt to impose a western blueprint for democracy constitutes nothing short of cultural imperialism. Accordingly, although many such states have joined half-heartedly in the promulgation of resolutions and declarations proclaiming support for democracy and the right of political participation,²⁵ they also stress that each state has the “sovereign right freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other states”.²⁶

Even within regional systems with a relatively strong commitment to democratic government, evaluation of actual cases may prove very difficult.²⁷ The problem is particularly acute in the case of new or emerging democracies attempting to overcome a long legacy of authoritarian mismanagement in a climate of economic decline and political instability. In the states of the former Soviet Union, for example, it is relatively easy to make judgments about whether national elections have been fairly conducted. It is much harder to assess the extent to which those states can reasonably be characterized as democratic, and harder still to predict the consequences of taking action on the basis of such evaluations.

Even when states can agree on the character of a particular state’s government, they may disagree strongly on the approach the international community should take to dealing with that government. Many states remain firmly convinced that the character of a state’s government is fundamentally a matter of domestic concern. Some states acknowledge that democratic governance has become a subject of international commitments and therefore of international concern, but believe strongly that change should be effected through dialogue and negotiation rather than through coercive measures. Still other

25 See, e. g., Bell, Daniel A., “The East Asian Challenge to Human Rights: Reflections on an East West Dialogue”, *18 Hum. Rts. Q.* 641, 656 (1996) (noting that most East Asian states endorsed the Universal Declaration on Human Rights “for pragmatic, political reasons and not because of a deeply held commitment to the human rights norms it contains”).

26 G. A. Res. 45/150, UN GAOR 3d Comm., 45th Sess. Supp. No. 49, & 4, UN Doc. A/45/49 (1990).

27 For example, the states of the European Union (then the EC) agreed on criteria for recognizing new and emerging states in the former Soviet Union and Eastern Europe, see Declaration on Guidelines on the Recognition of New States in Eastern Europe and the Soviet Union, EPC Press Release 128/91 (Dec. 16, 1991), reprinted in 31 *I. L. M.* 1486 (1992), but then failed to follow those criteria in decisions on recognition of Croatia and Macedonia.

states, such as Mexico, are willing to countenance the use of limited coercive measures in exceptional cases, but nonetheless strongly oppose military intervention on the ground that it is almost invariably "traumatic", subject to abuse, and often ineffective in "attain[ing] its objective".²⁸

As a result of these differences among states, only in exceptional cases are departures from democratic principles likely to prompt a significant collective international response. When an elected government is overthrown by overtly anti-democratic forces, it is clear that international norms have been violated, and international condemnation can be anticipated. On rare occasions, as in Haiti, it may even prove possible for states to agree on coercive measures to restore the ousted government to power. But in general, easy cases of the sort represented by Haiti are likely to be few and far between.

II. LEGAL CONSTRAINTS ON INTERVENTION

When states and international organizations do decide that a threat to or absence of democracy in a particular state warrants a response, they have a wide range of tools from which to choose. The available tools range from diplomatic pressure to economic sanctions to military intervention. The international legality of the response will depend on the tool chosen and the authority under which it is employed.

In general, measures that do not entail coercion, or that are undertaken with the consent of the affected state, do not amount to prohibited intervention under international law. Thus, external actors are free to assist incumbent governments in carrying out agreed measures to institute or strengthen democratic practices, particularly in the electoral arena, and free to criticize states that do not employ such practices. Indeed, states seeking to end internal conflicts or to obtain international approval now routinely accept, and even solicit, international assistance in the supervision and monitoring of national elections,²⁹ even though some states still regard the presence of international observers as an affront to state sovereignty. In addition, states may condition recognition, trade, financial or military assistance, loans, airline landing rights, visas, and numerous other benefits on the character of another state's government. Although many states bitterly object to such conditions, states are generally free in international law to give or withhold such benefits as they see

²⁸ See UN Security Council Provisional Verbatim Record, 3413th Meeting, S/PV/3413 at 4 (July 31, 1994) (statement of Mr. Flores Olea articulating Mexico's opposition to military intervention in Haiti).

²⁹ See Fox, *supra* note, at 1658-61.

fit, in the absence of contrary international agreements.³⁰ The use of more coercive measures, such as asset freezes and trade embargos, is more controversial, but such measures should probably be deemed legitimate so long as they are directed toward encouraging compliance with human rights norms, including the right of political participation.³¹

By contrast, measures involving the use of force must be authorized by the Security Council in response to a threat to international peace and security. The issue here is whether and under what circumstances the Security Council may treat a particular government's failure to respect human rights or democracy as a threat to international peace grave enough to warrant a collective response.

In recent years, the Security Council has authorized military intervention to restore democracy in Haiti,³² and to end repression of Kurds in Iraq,³³ famine in Somalia,³⁴ ethnic cleansing in Bosnia,³⁵ and genocide in Rwanda.³⁶ In each of these cases, the Council cited a threat to international peace as the principal legal justification for intervention. With the exception of Bosnia, however, the existence of internal disorder in these cases did not entail the kind of "aggressive use of force across a boundary" traditionally understood to constitute a threat to international peace.³⁷ This has prompted a debate within legal circles as to whether in any of these cases the Council has exceeded its authority under the UN Charter, or whether the Council has effectively unlimited discretion to determine the existence of a threat to the peace based solely on political criteria.³⁸ However that question might be answered

³⁰ See Damrosch, Lori F., "Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs", 83 *Am. J. Int'l L.* 1, 31 (1989) (state practice "suggest[s] that affirmative economic leverage to influence political developments [in other states] is legitimate"); see also "Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)", 1986 *I. C. J. Reports* 1, 126 (stating, with reference to the U. S. decisions to terminate trade with Nicaragua, reduce its sugar quota, and impose a trade embargo, that the Court "is unable to regard such action on the economic plane as here complained of as a breach of the customary-law principle of non-intervention").

³¹ See Damrosch, *supra* note, at 31-34, 42-44 (arguing that economic sanctions are permissible if "directed at enhancing internationally protected rights"); *Nicaragua v. United States*, *supra* note, at 126 (refusing to find the U. S. trade embargo against Nicaragua violative of customary international law); *cf.* Restatement (Third) of Foreign Relations Law of the United States' 703 comment f (1987) (A state may ... shape its trade, aid or other national policies so as to dissociate itself from [a state violating international human rights standards] or to influence that state to discontinue the violations.).

³² See S. C. Res. 917 (1994); S. C. Res. 940 (1994).

³³ S. C. Res. 688 (1991).

³⁴ S. C. Res. 794 (1992).

³⁵ See, e. g., S. C. Res. 770 (1992); S. C. Res. 816 (1993).

³⁶ S. C. Res. 929 (1994).

³⁷ Falk, Richard, "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations", 36 *Harv. Int'l L.J.* 341, 342 n.3 (1995).

³⁸ See Reisman, W. Michael, "The Constitutional Crisis in the United Nations", 87 *Am. J. Int'l L.* 83, 93 (1993) (questioning whether there are any substantive limits on the Security Council when it is operating

as a matter of law,³⁹ it appears in practice that in almost any case of significant internal disorder, there will be sufficient transboundary effects to permit the Council to find a plausible threat to the peace if it wishes to authorize intervention.

It does not follow, however, that the Council will utilize its power to authorize intervention with any frequency. Although the flurry of Council-authorized military interventions in the last six years has led some commentators to celebrate (or lament) the Council's apparent willingness to intervene on behalf of human rights or democracy,⁴⁰ the reality is that the Council remains extremely reluctant to authorize intervention against the will of a sitting government, or to rely on humanitarian motives as the basis for installing a particular government or defeating a particular party to an internal conflict. UN-authorized military intervention in Rwanda and Somalia came only after the incumbent governments, each with an appalling human rights record, had collapsed. Similarly, the UN arms embargo on Liberia post-dated the fall of the notorious Doe government by two years. The U.S. and its allies did intervene to protect Iraqi Kurds against the established government, but the legal basis for that intervention was tenuous at best, rendering it of little precedential value.⁴¹ In Bos-

under Chapter VII, and finding the term "threat to the peace" "quite elastic"); Gowlland-Debbas, Vera, "The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case", 88 *Am. J. Int'l L.* 643, 671 (1994) (arguing that the Council is constrained by Charter provisions, but that its finding of a threat to the peace will be challenged only in the event of "a manifest irregularity or abuse of power"). See generally Alvarez, Jose E., "Judging the Security Council", 90 *Am. J. Int'l L.* 1 (1996) (discussing the debate between "realists" and "legalists").

³⁹ In *Prosecutor v. Duko Tadić*, *Decision on the Defense Motion on Jurisdiction*, para. 23 (August 10, 1995), the trial chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia held that the question of the Security Council's authority to determine the existence of a threat to the peace was non-justiciable: "The making of a judgment as to whether there was such an emergency in the former Yugoslavia as would justify the setting up of the International Tribunal under Chapter VII is eminently one for the Security Council and only for it; it is certainly not a justiciable issue but one involving considerations of high policy and of a political nature". The Appeals Chamber of the Tribunal disagreed. It held that the issue was justiciable, and that the Security Council does not have "totally unfettered discretion" to determine the existence of a threat to the peace. *Prosecutor v. Duko Tadić*, *Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction* (2 October 1995), reprinted in 35 *I. L. M.* 32, 43 (1996). The Appellate Chamber found that such a determination must remain, at the very least, within the limits of the Purposes and Principles of the Charter. @ *Id.* Nonetheless, the Appellate Chamber had no trouble finding the existence of a threat to the peace sufficient to warrant the establishment of the International Tribunal, noting in part that even if the conflict in former Yugoslavia "were considered merely as an 'internal armed conflict', it would still constitute a 'threat to the peace' according to the settled practice of the Security Council and the common understanding of the United Nations membership in general". *Ibidem.*

⁴⁰ Compare Tesón, Fernando R., "Collective Humanitarian Intervention", 17 *Mich. J. Int'l L.* 323 (1996) (defending the legitimacy of interventionary policies) with Falk, Richard, "The Haiti Intervention: A Dangerous World Order Precedent for the United Nations", 36 *HARV. INT'L L. J.* 341 (1995) (arguing that interventionary initiatives are problematic at best and criticizing their use in foreign policy).

⁴¹ The U. S. claimed that Security Council Resolution 688, which demanded that the Iraqi Government allow a humanitarian mission to provide relief aid to Iraqi Kurds, provided the "legal space" necessary for the intervention. But the U. S. interpretation of Resolution 688 was somewhat far-fetched. Certainly,

nia the UN authorized the use of force to deliver humanitarian aid and to protect designated safe areas, but the authorization was directed primarily at the Bosnian Serbs, not at the Bosnian government.⁴²

Only in Haiti has the UN actually authorized military intervention against a sitting government. But Haiti is an exceptional case. The UN's supervision of the 1990 elections gave the UN a stake in restoring Aristide to office.⁴³ In addition, the military's human rights violations, the misery caused by UN sanctions, and U. S. concern over refugee flows all combined to create pressure on the Security Council to authorize the use of force.⁴⁴ Even so, there was considerable opposition within the UN to the proposed intervention.⁴⁵ Indeed, even within the OAS, which took prompt action to impose economic sanctions on Haiti following the coup, many member states were strongly opposed to the use of force.⁴⁶

Thus, the Haitian precedent is a limited one. Few other cases are likely to generate as vigorous a response. It is therefore not surprising that the subsequent military coup against the democratically elected government in Niger, although it prompted international condemnation, did not result in any significant action against the coup-makers. Similarly, Nigeria's refusal to seat the elected government of Mashood Abiola, although it generated considerable criticism and limited sanctions, has not produced any concerted or effective international response.

In many respects, Haiti is as important legally for what the UN did not do as for what it did. Most important, the UN did not adopt any generally applicable test of democratic legitimacy as a basis for disregarding a government's right to speak for the state on questions of intervention. The interna-

the Security Council never directly authorized military intervention against the Iraqi government on humanitarian grounds. Moreover, the Secretary-General insisted that any effort to provide relief to the Kurds required the consent of the Iraqi government, which was ultimately forthcoming. See Stromseth, Jane, "Iraq's Repression of Its Civilian Population: Collective Responses and Continuing Challenges", in *Enforcing Restraint: Collective Intervention In Internal Conflicts* 77, 91 (L. Damrosch ed., 1993).

42 See, e. g., S.C. Res. 819 (1993) (establishing Srebrenica as a "safe area", and demanding the "immediate cessation of armed attacks by Bosnian Serb paramilitary units against Srebrenica").

43 Cerna, *supra* note, at 315.

44 See, e. g., Berenson, *supra* note, at 23 (discussing the increase in the level of violence against civilians and the disregard for basic human rights in Haiti during September and October of 1993); Schnably, *supra* note, at 48388 (discussing the role of sanctions in worsening the economic plight of Haiti's poor); Acevedo, *supra* note, at 13435 (commenting on U. S. actions prompted by the prospect of a massive influx of Haitian refugees).

45 This opposition is reflected in the debate preceding adoption of Resolution 940. See UN Security Council Provisional Verbatim Record, *supra* note.

46 During the debate in the Security Council, Mexico, Cuba, Uruguay, Venezuela, and Brazil all opposed military intervention. *Idem*.

tional community's response to the military's forcible overthrow of Haitian President Jean-Bertrand Aristide did, at least initially, call into question the authority of the de facto government to oppose external intervention. Both the OAS and the UN refused to recognize the military authorities as the government of Haiti, and both continued to recognize President Aristide and his designated representatives as "the only legitimate representatives" of that Government.⁴⁷ Since military intervention with the consent of the recognized government is not unlawful, it could be argued that Aristide acting unilaterally possessed the authority to authorize external military intervention to remove the usurpers. But when the United Nations Security Council finally authorized military intervention to restore Aristide to power, it relied primarily on its authority to maintain international peace under Chapter VII of the Charter.⁴⁸ The authorizing resolution took note of Aristide's consent to intervention,⁴⁹ but the Security Council was evidently unwilling to treat that consent as sufficient in and of itself to permit military action.⁵⁰ This may be attributable in part to the grudging character of Aristide's consent. More important, though, is the fact that international law continues to place considerable importance on effective control as an indicator of a government's authority to act in the name of the state.

If the Security Council had taken seriously its own claim that Aristide constituted the only legitimate authority in Haiti, and had relied on Aristide's consent as a sufficient basis in itself for military intervention, that would have signaled a significant shift in international law. It would have severed, at least in part, the link between a government's control of territory and its right to represent the state in international affairs. Under that approach, any state could use coercive measures to aid a deposed democratic government. But the Se-

47 See, e. g., Support to the Democratic Government of Haiti, M. R. E. Res. 1/91, OAS Permanent Council, OEA/ser.FV.1, OAS Doc. Mre/Res. 1/91 (1991); The Situation of Human Rights and Democracy in Haiti, UN GAOR, 46th Sess., Agenda Item 145, at 2, UN Doc. No. A/46/L.8/Rev.1 (1991).

48 See S. C. Res. 940, UN SCOR, 49th Sess., 3413th mtg., UN Doc. S/RES/875 (1993) ("determining that the situation in Haiti continues to constitute a threat to peace and security in the region", and authorizing "Member States . . . to use all necessary means to facilitate" the restoration of the Aristide government).

49 The resolution cited two letters, one from Aristide (S/1994/905, annex) and another from Haiti's Permanent Representative to the UN (S/1994/910). Both letters implicitly supported UN-authorized military intervention.

50 See generally UN Security Council Provisional Verbatim Record, *supra* note. In adopting Resolution 940, the Security Council considered the options outlined in the Report of the Secretary-General on the United Nations Mission in Haiti, S/1994/828 (15 July 1994). In that report, the Secretary-General states that an expanded UN force should operate with the consent of the legitimate authorities in Haiti, but also notes that such a force "would have to use coercive means in order to fulfill its mandate", and that it would therefore "be necessary for the Security Council to act under Chapter VII of the Charter in authorizing its mandate". *Idem*, para. 8.

curity Council did not pursue this avenue, presumably because of the risks of abuse associated with such an approach.

Alternatively, the Security Council could have pressed further the connection between democracy and peace. It is now popular to claim that the two are inextricably linked.⁵¹ In this vein, the Security Council could have declared the unconstitutional overthrow of an elected government to be automatically, or at least presumptively, a threat to the peace. Instead, the Council did just the opposite; it chose to emphasize the fact that Haiti was a "unique" case.⁵² In short, the Council did its best to minimize the precedential significance of the Haitian intervention.

Overall, the recent interventions in Haiti, Rwanda, Somalia and Iraq, though dramatic, have had relatively little effect on contemporary international law. Coercive measures, whether to promote democracy or human rights, still require Security Council authorization. Such authorization, though far easier to obtain now than it was six or seven years ago, is still and will likely continue to be the exception rather than the norm.

III. PRACTICAL CONSTRAINTS ON INTERVENTION

Even when the conceptual and legal obstacles to intervention can be surmounted, cases of coercive intervention to promote democracy are still likely to be few and far between. First, formal institutional structures for the promotion of democracy are weak, and are likely to remain so for the foreseeable future. Second, only extraordinary cases are likely to generate the political will required for an effective response to a determined indigenous elite unwilling to relinquish political power. Third, it is extremely difficult to calibrate existing tools for coercing state behavior in ways that will produce the desired ends without imposing unacceptable costs on the very people intervention is designed to help. And fourth, prospects for success in such cases are uncertain at best. For all these reasons, the use of drastic measures such as economic embargos and military intervention is likely to be rare. Instead, efforts to promote democracy in other states are likely to take other forms, including most notably continued efforts by international organizations and individual states to condition access to various benefits on good governance, broadly defined.

51 See Tesón, *supra* note, at 74-81; Doyle, *supra* note, at 213.

52 S. C. Res. 940, U. N. Doc. S/RES/940 (July 31, 1994).

A. Institutional Mechanisms for the Promotion of Democracy

The UN, the OSCE, and the OAS all have subsidiary organs whose mission it is to promote the spread of democracy. These organs lack enforcement powers, however. They are designed essentially to provide technical assistance to states that request it. Decisions that might amount to intervention under international law are left to the political organs.

Within the UN, there is no special set of institutional procedures for handling interruptions in democratic governance, much less for addressing undemocratic regimes generally. As a result, any effort to promote democracy through the political organs of the UN is subject to all the vagaries of UN politics.

The procedures within the OSCE are little better, and in some ways worse. The Moscow and Copenhagen documents commit the member states, morally if not legally, to "defend and protect" the "democratic order" in any participating state against a violent overthrow.⁵³ But the steps to be taken are not specified, not even to the extent of outlining the institutional procedures to be followed to determine what those steps should be. Although one author has argued that the Copenhagen Document implicitly authorizes military intervention to protect democracy,⁵⁴ it seems unlikely that the signatories would interpret it this way. In any event, OSCE decision making requires a consensus among the participating states, thus greatly limiting the likelihood of effective action by the organization in response to any but the gravest political upheavals in a member state.

The OAS alone among international organizations has developed at least minimal procedures for responding to an unconstitutional seizure of power within a member state. In such cases, the OAS Permanent Council must meet "to examine the situation, decide on and convene an ad hoc meeting of the Ministers of Foreign Affairs, or a special session of the General Assembly, all of which must take place within a ten-day period".⁵⁵ Although the steps to be taken are not specified, the requirement of a meeting by itself puts the organization under some pressure to do more than simply issue toothless condemnations. In addition, at least one step to be taken is suggested by a recent amendment to the OAS Charter, which authorizes the organization to suspend the participation of a state whose democratic government has been forcibly

⁵³ See note *supra*.

⁵⁴ See Halberstam, Malvina, "The Copenhagen Document: Intervention in Support of Democracy", 34 *Harv. Int'l L. J.* 163, 166-67 (1993).

⁵⁵ See Resolution 1080, *supra* note.

ousted.⁵⁶ It seems probable that the existence of even these modest institutional procedures facilitated the rapid OAS condemnations of the auto-golpes in Peru and Guatemala, and the initiation of economic and political sanctions against the Haitian military.

Nonetheless, the OAS is constrained by the non-intervention provisions of its Charter, and even more by the continued opposition of many of its members to anything that might open the door too widely to intervention in their internal affairs. Moreover, the OAS can only authorize and recommend coercive sanctions; it cannot legally compel its own members, much less other states, to implement such sanctions.⁵⁷

At present, there is simply no consensus, within the OAS or within other international organizations, on strengthening significantly their institutional capacity to promote democracy and to respond to unconstitutional seizures of power. OAS members remain divided on the extent to which they are willing to tolerate departures from the organization's traditional emphasis on non-intervention. Division within the UN on intervention to promote democracy is even greater, and any substantial departure from present practice must survive the critical scrutiny of veto-wielding states such as China and Russia, and potentially hostile regional blocs in the Middle East and Asia. The prospects for enhanced procedures are brightest in the OSCE, but those prospects are still not very bright, given the organization's emphasis on consensus decision making.

B. *Political and Resource Limitations*

The biggest potential obstacle to successful intervention to promote democracy is the difficulty of generating the necessary political will. A coup in a politically marginal state may have little direct impact on states outside the immediate vicinity. But a decision to intervene implicates the interests of virtually all states, most of which wish to limit carefully the situations under which coercive measures can be employed in international relations, and many of which view coercive efforts to promote democracy with skepticism or hostility. In many cases, states whose cooperation is essential to successful employment of coercive measures may find that their own economic or security interests militate against cooperation. In the case of Haiti, for example, many European states continued to trade with Haiti even after the OAS called for

⁵⁶ Protocol of Washington, *supra* note.

⁵⁷ Acevedo, *supra* note, at 136; Berenson, *supra* note, at 18.

a trade embargo, arguing that they were obligated to do so because of prior trade commitments.⁵⁸

Military intervention poses even greater obstacles. To obtain Security Council authorization for such intervention in Haiti, the U.S. and its allies on that issue had to engage in a delicate mix of political pressure and political deal making. The U.S. had the incentive to push through an authorizing resolution because it wanted to stem refugee flows and repair the political damage to the Clinton administration caused by domestic critics of its Haiti policy. Even so, obtaining the necessary authorization was not easy, and it is not something likely to happen with any frequency.

In addition, military intervention is expensive, in money, in political capital, and often in lives. Most states will not wish to incur a significant share of the costs and uncertainties of a coercive intervention unless they have substantial security or economic interests at stake. As a result, military intervention usually requires the lead of a committed and powerful state, one that is willing to invest the necessary resources and to stay long enough to accomplish the goals of intervention. But because promotion of democracy through force may prove to be a time-consuming and painful venture, few such states will be willing to risk it with any frequency.

Less coercive measures are much easier to deploy, and will likely be somewhat more frequent. Thus, it is not improbable, for example, that the OAS would suspend a member state from participation in the organization following a coup, or that it would authorize economic sanctions in egregious cases. Unfortunately, such measures are often ineffective, and in the case of economic sanctions, highly destructive.

C. The Difficulties of Targeted Sanctions

The OAS, with the eventual support of the UN, employed a wide array of economic sanctions in its efforts to force the Haitian military to accept the restoration of President Aristide. Unfortunately, restrictions on trade and fuel threatened to strangle many of Haiti's poorest citizens,⁵⁹ who were ironically among Aristide's strongest supporters.⁶⁰ To make matters worse, sanctions did more to open up highly lucrative black market trading opportunities for the Haitian military than they did to force negotiations.⁶¹ Recognizing this, the U.S.

⁵⁸ Acevedo, *supra* note, at 136-137; Schnably, *supra* note, at 487 n. 426.

⁵⁹ Schnably, *supra* note, at 488-90.

⁶⁰ See Acevedo, *supra* note, at 130-31.

⁶¹ See Reisman, W. Michael, "Humanitarian Intervention and Fledgling Democracies", 18 *Fordham Int'l L. J.* 794, 799 (1995).

and other countries attempted to find measures that could be more narrowly targeted at the military and its wealthy supporters. Among other things, the Clinton Administration froze the U. S. assets of the military's supporters, and restricted travel to the U. S. to cut off weekend shopping sprees to Miami.⁶² But the military and its supporters had ample time to find ways to circumvent these restrictions, which in the end did little to achieve their intended goals.⁶³

Unfortunately, the problems encountered in attempting to use economic sanctions in Haiti are not unusual. Such measures almost always fall most heavily on those members of society least able to bear the consequences, and least responsible for the policies that resulted in sanctions in the first place. As a result, there has been a great deal of talk about the need to find better targeted sanctions for use in future cases. But the reality is that effective targeted sanctions are largely a myth. In most cases, they are too easy to avoid, and they are unlikely in any event to outweigh the incentives that lead authoritarian rulers to seize power in the first place.⁶⁴

D. *The Uncertain Benefits of Intervention*

Finally, the benefits of coercive intervention are often uncertain. Some scholars, relying on arguments associated with political philosopher John Stuart Mill, claim that democracy cannot be imposed from without, and that attempts to do so are counterproductive.⁶⁵ In this view, the citizens of the state must earn their freedom if it is to be meaningful. Recent experience, however, suggests that the consequences of intervention are variable. In some cases, democracy, or at least multiparty electoral politics, can be furthered, if not imposed, by external intervention; in other cases, intervention may make a bad situation worse. In Panama, Grenada, and Haiti, for example, intervention did result in the substitution of electoral politics for dictatorial rule, and although the democratic transformation is not complete in any of these countries, each seems generally to have benefitted from intervention.

⁶² Berenson, *supra* note, at 24.

⁶³ For example, the military had time to stockpile oil and other supplies and to find a less vulnerable place for its assets when economic pressures eased from the end of August to mid-October 1993. Schnably, *supra* note, at 488.

⁶⁴ One exception to this arose in connection with the recent "auto-golpe" in Guatemala. In that case, international sanctions, and the threat they posed to the Guatemalan economy, played an important role in persuading the military to cooperate in the restoration of constitutional government. Schnably, *supra* note, at 483.

⁶⁵ See Walzer, Michael, *Just And Unjust Wars: A Moral Argument With Historical Illustrations* 87-88 2d ed., 1992 (discussing the argument of John Stuart Mill).

In other countries, such as Liberia and the Central African Republic, intervention may end up making matters worse. In Liberia, a group of West African states intervened in an attempt to end a destructive civil war and permit formation of a democratically elected national government. Six years later, however, war continues to ravage that country, and although it is too soon to be certain, it may be that intervention simply prolonged the conflict to no good end. In the Central African Republic, France recently intervened to help suppress an army mutiny against a government that was democratically elected but corrupt and authoritarian once in office. In that case, French intervention seems to have preserved a government that is democratic in name only, against the will of a substantial majority of the state's population.

Ultimately, the success of intervention depends on the strength, commitment, and resources of the intervenors, and more importantly, on the extent to which the leaders and the population of the affected state view intervention (and democracy) as in their interest. Factors of this sort are too subjective to incorporate into a legal rule governing intervention, and must necessarily be left to the political judgment of the actors that engage in or authorize intervention. As a result, there is ample room for states skeptical of the wisdom of pro-democratic intervention to oppose such intervention on utilitarian grounds in the large majority of cases where intervention might be suggested.

IV. CONCLUSION

Few will see the international community's present ambivalent approach to pro-democratic intervention as optimal. For some, the UN's reluctance to intervene forcefully in the vast majority of those states still subject to dictatorial rule represents primarily a failure of political will: a refusal to shoulder the burden of bringing the benefits of democratic governance to populations ruled by military thugs and parasitic elites. For others, the UN's recent willingness to authorize intervention in Haiti, Rwanda, Somalia and elsewhere represents a revival of western imperialism: a cynical pursuit of western economic and strategic interests in the name of universal values.

Plainly, both views greatly oversimplify a complex issue. Decisions about intervention typically reflect a broad constellation of interests. Not surprisingly, though, the perceived self-interest of the intervening states tends to predominate, even when those interests are filtered through an international organization such as the UN. Many western states now believe that a policy favoring the extension of democracy and human rights is the best way to promote both their own security and economic interests and the interests of

people in states not yet democratic. At the same time, however, more immediate geostrategic interests often demand that potential intervenors tolerate or even support governments that are either undemocratic, or only marginally democratic; such is the case, for example, with the attitude of most western states toward the government of Boris Yeltsin. Of necessity, then, attitudes toward pro-democratic intervention are "awkwardly selective".⁶⁶

In some cases, that selectivity may be morally indefensible, but politically inescapable. It is hard, for example, to defend the West's anemic response to the civil war in Liberia, but it is easy to explain that response. Various suggestions have been made for circumventing problems of selectivity, for example, by creating a standing UN intervention force.⁶⁷ But those suggestions hold little appeal for most governments, who though generally unwilling to intervene themselves are reluctant to let others do so for them. The result is that in the rare cases in which intervention is authorized, it is effectively delegated to the most interested available actor: for Haiti, it was the US, and for Rwanda, it was France. Those actors often press for outcomes noted as much for their compatibility with the actors' own interests as for their compatibility with universal norms or the specific interests of the affected state.

Even so, recent interventions cannot fairly be characterized as "imperialist". They do not constitute "the imposition of one country's power on another, and the removal of the victim's freedom".⁶⁸ The US, for example, may have pressed Aristide to modify his populist policies, but on balance US intervention did far more to restore than to impair Haitians' control over their own political destiny. In the absence of much stronger international organizations than we now have, episodic interventions that on balance benefit the affected state may be the best we can reasonably hope for.

⁶⁶ See Falk, *supra* note 1, at n. 23.

⁶⁷ For critical discussion of the prospects for and desirability of creating a standing U. N. force, see Sise, Lamin J., "Illusions of a Standing United Nations Force", 28 *Cornell Int'l L. J.* 645 (1995); Scheffer, David J., "United Nations Peace Operations and Prospects for a Standing Force", 28 *Cornell Int'l L. J.* 649 (1995); Morrison, Alex, "The Theoretical and Practical Feasibility of a United Nations Force", 28 *Cornell Int'l L. J.* 661 (1995); Telhami, Shibley, "Is a Standing United Nations Army Possible? or Desirable?", 28 *Cornell Int'l L. J.* 673 (1995).

⁶⁸ Falk, *supra* note, at n. 23.