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The Right to Political Participation in International Law

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The Right to Political Participation In International Law

Gregory H. Fox†

I. INTRODUCTION	540
II. THE EMERGING INTERNATIONAL LAW OF PARTICIPATORY RIGHTS	544
A. <i>Participatory Rights Before 1948: The Reign of the State Sovereignty Approach</i>	544
B. <i>The Nature and Scope of Post-War Treaty-Based Participatory Rights</i>	552
1. <i>The International Covenant on Civil and Political Rights</i>	553
a. <i>Non-Discrimination</i>	553
b. <i>The Right to Take Part in Public Affairs</i>	555
c. <i>Requirements Concerning Elections</i>	555
2. <i>The First Protocol to the European Convention on Human Rights</i>	560
a. <i>Rights Concerning Elections</i>	561
b. <i>Non-Discrimination</i>	563
3. <i>The American Convention on Human Rights</i>	565
4. <i>Other International Instruments Guaranteeing Participatory Rights</i>	568
a. <i>The African Charter on Human and Peoples' Rights</i>	568
b. <i>Council on Security and Co-operation in Europe Accords</i>	568
5. <i>Summary of Treaty-Based Norms</i>	570
III. INTERNATIONAL ELECTION MONITORING: THE ELABORATION AND ENFORCEMENT OF PARTICIPATORY RIGHTS	570
A. <i>Election Monitoring Prior to 1945</i>	571
B. <i>Monitoring Under the United Nations System</i>	572
1. <i>The Decolonization Process</i>	573
a. <i>West Irian</i>	575
b. <i>Namibia</i>	576
2. <i>Monitoring in the Post-Colonial Era</i>	579
a. <i>The Nicaragua Mission</i>	579
b. <i>The Haiti Mission</i>	583
C. <i>Future United Nations Monitoring Missions</i>	586
D. <i>Election Monitoring and Treaty Norms: The Legal Effect of the New Regime</i>	587
1. <i>Using Mission Standards to Interpret Treaties</i>	588
2. <i>Sovereignty and the Right to Political Participation</i>	590
3. <i>The Relationship Between Participatory Rights and Other Human Rights</i>	595

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IV. ENFORCING THE RIGHT TO POLITICAL PARTICIPATION 596

 A. *Is Enforcement of Participatory Rights Possible?* 596

 B. *Enforcing Participatory Rights Through the General Assembly's Accreditation Process* . 597

 1. *The Accreditation Process* 598

 2. *Existing Standards for Resolving Credentials Challenges* 600

 C. *The Proposed Standard: Using the Results of Monitored Elections to Resolve Credentials Disputes* 603

 D. *Criticisms of Accreditation Based Upon Elected Governments* 604

 1. *Choosing Between Governments is an Unwarranted Intrusion into a State's Sovereignty* 604

 2. *The United Nations Must Be Composed of Governments that Possess Actual Power and not "Paper Governments"* 605

 3. *The Credentials Process Should Remain a Purely Formal Exercise, Untainted by Political Considerations* 606

V. CONCLUSION 606

I. INTRODUCTION

The 1980s and early 1990s have witnessed the extraordinary demise of authoritarian regimes once thought to be a permanent fixture of the political landscape. Defying old orthodoxies and alliances, communist governments in Eastern Europe, military juntas in Latin America, and one-party states in Africa have given way to governments chosen in free and open elections.¹ "A tide of democratic change is sweeping the world," Professor Rustow recently declared,² and the numbers bear him out. At the turn of the century only nine countries could legitimately be called "democratic," even excluding the question of women's suffrage.³ The number rose to twenty-one by 1929 and twenty-nine by 1960.⁴ By 1990, according to one survey, sixty-five countries chose their governments in elections marked by "fair electoral laws, equal campaigning opportunities, fair polling and honest tabulation of ballots."⁵

1 See generally ELIE ABEL, *THE SHATTERED BLOC: BEHIND THE UPHEAVAL IN EASTERN EUROPE* (1990); Mark Falcoff, *The Democratic Prospect in Latin America*, WASH. Q., Spring 1990, at 183; Carol Lancaster, *Democracy in Africa*, FOREIGN POL'Y, Winter 1991-92, at 148. A slightly broader historical framework might identify these changes with the transitions to democratic rule in Greece, Spain, and Portugal of a generation earlier. See Arend Lijphart et al., *A Mediterranean Model of Democracy? The Southern European Democracies in Comparative Perspective*, W. EUR. POL. 1 (1988).

2 Dankwart A. Rustow, *Democracy: A Global Revolution?*, 69 FOREIGN AFF. 75, 75 (1990).

3 G. BINGHAM POWELL, JR., CONTEMPORARY DEMOCRACIES 238 n.3 (1982).

4 *Id.*

5 FREEDOM HOUSE SURVEY TEAM, *FREEDOM IN THE WORLD: POLITICAL RIGHTS & CIVIL LIBERTIES 1990-1991*, at 47, 49 (1991).

The Right to Political Participation

These domestic developments have occurred within a broader context, affecting traditional concepts of state sovereignty in international law. First, codification of political rights in international and regional human rights treaties accompanied democratization at the national level.⁶ These treaties reflect a growing international commitment to minimum standards of human rights generally and political rights in particular.⁷ Second, an increasing number of states have invited multinational organizations to monitor their elections, hoping that monitoring will bolster both the domestic and international legitimacy of their fragile governments. The work of the United Nations predominates this field:⁸ in little more than a year the United Nations accepted invitations to monitor elections in Namibia (November 1989), Nicaragua (February 1990), and Haiti (December 1990).⁹ Election monitoring appears

6 Article 25 of the International Covenant on Civil and Political Rights provides:

Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1986, art. 25, 999 U.N.T.S. 171, 179 [hereinafter Political Covenant]; *see also* African Charter on Human and Peoples' Rights, June 26, 1981, art. 13(1), O.A.U. Doc. CAB/LEG/67/3/Rev. 5, 9 I.L.M. 58, 61 (1981) [hereinafter African Charter] ("[e]very citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law"); American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 23(1)(b), 36 OAS T.S. 1, OAE/ser. L/IV/II.23, doc. 21, rev. 6, 9 I.L.M. 673, 682 (1970) [hereinafter American Convention] (stating that every citizen shall enjoy right "to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters"); 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 (stating that signatories undertake to eliminate racial discrimination in enjoyment of rights "to participate in elections—to vote and to stand for election—on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of public affairs at any level and to have equal access to public service"); Convention on the Political Rights of Women, *opened for signature* Mar. 31, 1953, art. 1, 27 U.S.T. 1909, 1911, 193 U.N.T.S. 135, 136 ("[w]omen shall be entitled to vote in all elections on equal terms with men, without any discrimination"); Protocol (No. 1) to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 3, Europ. T.S. No. 9, 213 U.N.T.S. 262, 264 [hereinafter European Protocol] (stating signatories' obligation "to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature"); Universal Declaration of Human Rights, art. 21, G.A. Res. 217 (III) A, U.N. Doc. A/810, art. 21, at 75 (1948) [hereinafter Universal Declaration] ("[e]veryone has the right to take part in the government of his country directly or through freely chosen representatives").

7 *See generally* LOUIS HENKIN, *THE RIGHTS OF MAN TODAY* (1978).

8 The Organization of American States (OAS) also has actively monitored elections. The OAS General Assembly voted in June 1990 to create a permanent Unit for Democratic Development, which would provide member states "with advice or assistance to preserve or strengthen their political institutions and democratic procedures." *Unit for Democratic Development*, AG/RES. 1063 (XX-O/90), at 109, OAE/ser.P/XX.O.2 (1990).

9 *See infra* notes 202-262 and accompanying text. During the same period the Secretary-General received an invitation to send observers to Romania, which he declined. *See U.N. Says it Won't Monitor Romanian Elections*, Reuters, Jan. 25, 1990, available in LEXIS, Nexis Library, Wires File (quoting U.N.

likely to become a regular U.N. activity: the General Assembly has accepted permanent guidelines to govern future U.N. monitoring missions¹⁰ and has voted to establish a central coordinator for monitoring activities within the Secretariat.¹¹

Political scientists have been quick to analyze various facets of this new "liberal internationalism."¹² Yet the literature has generally lacked a discussion of whether a universal right to participate in the selection of one's own national government¹³ exists in international law.¹⁴ This article traces the

spokesman's explanation that "the U.N. does not monitor internal elections in a country"). However, the United Nations assumed a supervisory role in elections in Cambodia and a plebiscite in the Western Sahara. See *Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations addressed to the Secretary-General*, U.N. GAOR, 46th Sess., Agenda Item 24, U.N. Doc. A/46/608 (1991) (annexing *The Final Act of the Paris Conference on Cambodia*, a treaty detailing U.N. role in organizing and observing Cambodian elections); S.C. Res. 690, U.N. SCOR, 2984th mtg., U.N. Doc. S/RES/690 (1991) (establishing United Nations Mission for Referendum in Western Sahara). See *infra* notes 265-269 and accompanying text (discussing Western Sahara and Cambodian monitoring missions).

10 *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), at 25, U.N. Doc. A/46/609 (1990); G.A. Res. 46/137, reprinted in United Nations Department of Public Information, *Resolutions and Decisions Adopted by the G.A. During the First Part of Its 46th Session*, Press Release GA/8307, at 365 (1992) (approving proposed guidelines).

11 The Resolution requires the Secretary-General to designate a senior member of his staff to perform the following functions:

[To] assist the Secretary-General to coordinate and consider requests for electoral verification and to channel requests for electoral assistance to the appropriate office or programme, to ensure careful consideration of requests for electoral verification, to build on experience gained to develop an institutional memory, to develop and maintain a roster of international experts who could provide technical assistance as well as assist in the verification of electoral processes and to maintain contact with regional and other intergovernmental organizations to ensure appropriate working arrangements with them and the avoidance of duplication of efforts . . .

G.A. Res. 46/137, *supra* note 10, at 365.

12 See e.g., Richard N. Gardner, *The Comeback of Liberal Internationalism*, WASH. Q., Summer 1990, at 23. For discussion of the prospects for democracy in various regions, see Nathan Keyfitz, *The Asian Road to Democracy*, 26 SOC'Y 71 (1988); Gibson Kamau Kuria, *Human Rights and Democracy in Africa*, FLETCHER F., Winter 1991, at 23; Giacomo Luciani, *Economic Foundations of Democracy and Authoritarianism: The Arab World in Comparative Perspective*, ARAB STUD. Q., Fall 1988, at 457; John Sloan, *The Policy Capabilities of Democratic Regimes in Latin America*, 24 LATIN AM. RES. REV. 113 (1989). On the process of democratic transition, see Juan J. Linz, *Transitions to Democracy*, WASH. Q., Summer 1990, at 143. On the historical development of the democratic state, see generally DAVID HELD, *POLITICAL THEORY AND THE MODERN STATE* (1989); SAMUEL P. HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* (1991). On the promotion of democratic government in national foreign policy, see EXPORTING DEMOCRACY: THE UNITED STATES AND LATIN AMERICA (Abraham F. Lowenthal ed., 1991) [hereinafter EXPORTING DEMOCRACY]; THE NEW DEMOCRACIES: GLOBAL CHANGE AND U.S. POLICY (Brad Roberts ed., 1990). On the relationship between democracy and economic development, see Enrique A. Baloyra, *Democracy Despite Development*, 150 WORLD AFF. 73 (1987). On the question of how democratic institutions can be sustained, see Larry Diamond et al., *Building and Sustaining Democratic Government in Developing Countries: Some Tentative Findings*, 150 WORLD AFF. 5 (1987). On support for democracy among third world intellectuals, see Mehran Kamrava, *Intellectuals and Democracy in the Third World*, 14 J. SOC. POL. & ECON. STUD. 227 (1989). And on whether elected regimes are less likely than others to initiate international conflict, see Michael W. Doyle, *Liberalism and World Politics*, 80 AM. POL. SCI. REV. 1151 (1986); Brad Roberts, *Democracy and World Order*, FLETCHER F., Summer 1991, at 9; Robert L. Rothstein, *Democracy, Conflict, and Development in the Third World*, WASH. Q., Spring 1991, at 43, 46-52 (summarizing major arguments and literature).

13 This article refers to such rights as "participatory rights."

The Right to Political Participation

emergence of participatory rights in international law, focusing on the development and application of international and regional treaties and principles derived from U.N.-sponsored election monitoring guidelines. This article argues that these treaties establish a right to political participation amongst signatory states, and evidence an emerging universal right to political participation not contingent upon treaty agreements.

Part I first outlines international participatory rights before the advent of the post-war human rights treaties. It then examines the treaties themselves, and argues that the essential elements of a "free and fair" election can now be described as a matter of law. Over one hundred states have signed the Political Covenant, and dozens have signed regional treaties with similar provisions. Treaty signatories formally commit themselves to create and protect participatory rights; these treaties thus create binding international obligations that exist independently of the enforcement capacity of the international system. Because signatory states effectively relinquish some measure of sovereignty in domestic affairs, the treaties demonstrate that, for certain purposes, the notion of "popular" sovereignty (inherent in the right to political participation) supplants traditional "state" sovereignty in international law.

Part II examines the international community's past efforts to enforce participatory rights through election monitoring.¹⁵ Although election monitoring has proceeded by invitation rather than imposition, various monitoring missions are evidence of the emerging right to political participation, and provide interstitial principles supplementing the rights outlined in the treaties. Because states have discovered that election monitoring helps to legitimize their governments, election monitoring activity will increase.

Interestingly, the United Nations has not invoked the treaty provisions when setting monitoring standards. Instead, the United Nations has styled standards

14 *But see* Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT'L L. 46 (1992) [hereinafter Franck, *Emerging Right*]; Thomas M. Franck, *United Nations Based Prospects for a New Global Order*, 22 N.Y.U. J. INT'L L. & POL. 601, 621-40 (1990) [hereinafter Franck, *New Global Order*] (discussing democracy as emerging "global entitlement"). Legal writing on participatory rights was extremely scarce before recent events in Eastern Europe stimulated much of the political science literature cited above. *See, e.g.*, Geert van Haegendoren, *International Election Monitoring*, 20 REVUE BELGE DE DROIT INTERNATIONAL 86 (1987); John P. Humphry, *Political and Related Rights*, in HUMAN RIGHTS IN INTERNATIONAL LAW 171 (Theodor Meron ed., 1984); Karl J. Partsch, *Freedom of Conscience and Expression, and Political Freedoms*, in THE INTERNATIONAL BILL OF RIGHTS 209, 238-45 (Louis Henkin ed., 1981) (discussing political freedoms in International Covenant on Civil and Political Rights); Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77 (1988).

15 Several non-government organizations actively monitored elections in addition to the United Nations, in particular the International Human Rights Law Group, the National Democratic Institute for International Affairs, and the Carter Center at Emory University. *See, e.g.*, COUNCIL OF FREELY ELECTED HEADS OF GOV'T & NATIONAL DEMOCRATIC INST. FOR INT'L AFFAIRS, 1990 ELECTIONS IN THE DOMINICAN REPUBLIC: REPORT OF AN OBSERVER DELEGATION (1990); INTERNATIONAL HUMAN RIGHTS LAW GROUP, GUIDELINES FOR INTERNATIONAL ELECTION MONITORING (1984); NATIONAL DEMOCRATIC INST. FOR INT'L AFFAIRS, NATION BUILDING: THE U.N. AND NAMIBIA (1990) [hereinafter NATION BUILDING].

which parallel treaty provisions in virtually all respects. Although these standards have guided the supervision of many elections, Part III argues that in future monitoring missions the United Nations should not rely upon such mission-specific guidelines to the exclusion of carefully drafted treaty norms. Since treaties provide a far more permanent and universal foundation than customary monitoring guidelines, reliance upon the treaties will lend an additional degree of legitimacy to processes that invoke them. Therefore, the United Nations should take the logical step of invoking the treaties directly when sanctioning future monitoring missions. In so doing, the United Nations would help craft an institutionalized enforcement mechanism to hold states to their treaty obligations.

International organizations can also enforce participatory rights by basing their accreditation decisions upon election monitoring results, given the vicissitude of bilateral recognition practices.¹⁶ The United Nations General Assembly, as the primary global forum that can accommodate such a process, possesses a unique potential to advance participatory rights by basing its accreditation decisions upon election monitoring results. Thus, Part IV argues that the United Nations should use the recommendations of election monitors as a basis for seating delegates, to effectively combine the norms developed by the treaties and the mission guidelines with the "enforcement capability" of the observer missions, and thereby enhance the international and domestic legitimacy of democratically elected governments.

II. THE EMERGING INTERNATIONAL LAW OF PARTICIPATORY RIGHTS

A. *Participatory Rights Before 1948: The Reign of the State Sovereignty Approach*

All human rights law presents a challenge to traditional notions of state sovereignty. In this sense the right to political participation is unexceptional. But participatory rights involve not only specific limits on state sovereignty in given areas, but the more fundamental question of *who* holds sovereign authority within a state. For most of recent history "the sovereign" has been that person or group actually wielding political power. The right to participation rejects this *de facto* control test by asserting that the mass of citizens is the ultimate repository of sovereignty. Participatory rights have thus created an acute tension within international law. This section briefly considers the sources of the conflict between traditional "absolutist" sovereignty and the emerging notion of "popular" sovereignty.

16 See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 95 (4th ed. 1990).

The Right to Political Participation

The traditional exclusion of participatory rights from international law can be explained by two sets of factors; those generic to all human rights norms and others specific to the right itself. The generic reasons are well known. The international law of human rights emerged following the Second World War, a product of such events as the Nuremberg Trials, the founding of the United Nations, and the passage of the Universal Declaration of Human Rights by the U.N. General Assembly in 1948.¹⁷ Before the Second World War, "apart from a few anomalous cases, in which individuals were allowed to vindicate their rights directly on the basis of a special international agreement, individuals were not subjects of rights and duties under international law."¹⁸ States in the nineteenth century, caught increasingly in the throes of aggressive nationalism, saw their domestic political institutions as essential components of a unique national culture. In order to protect these institutions from external pressures, the dominant states of Europe shaped an international law that carved out an exclusive sphere of domestic jurisdiction.¹⁹ A fortress-like conception of state sovereignty endowed governments with "a monopoly over fundamental political decisions, as well as over legislative, executive and judicial powers."²⁰

An individual right to participate in government did not and could not arise in this international legal climate. The manner in which states chose their leaders formed a central feature of the protected domestic sphere.²¹ Statism found its ultimate expression during the eighteenth and nineteenth centuries, in the conception of nations as autonomous moral beings which, in the selection of their leaders, gave expression to their national personalities.²² Vattel, who conceived of political societies as functioning moral persons, described the national sovereign as "*the moral person*" of his state. Once chosen, a sovereign became "the depository of the obligations relative to government" and other persons, while not "absolutely ceasing to exist in the nation, act[]

17 See generally Louis Sohn, *The New International Law: Protection of the Rights of Individuals Rather Than States*, 32 AM. U. L. REV. 1, 9-17 (1982) (discussing development of international law of human rights).

18 *Id.* at 9.

19 See MATTHEW S. ANDERSON, *THE ASCENDANCY OF EUROPE* 140-50 (1972).

20 Georg Steinberger, *Sovereignty*, in 10 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 397, 404 (Rudolf Bernhardt ed., 1987).

21 Henry Wheaton's views were typical of the period: "The perfect independence of every sovereign State in, respect to its political institutions, extends to the choice of the supreme magistrate and other rulers, as well as to the form of government itself." HENRY WHEATON, *ELEMENTS OF INTERNATIONAL LAW* 135 (2nd ann. ed. 1863).

22 *Id.* at 132 ("Every state, as a distinct moral being, independent of every other, may freely exercise all its sovereign rights in any manner not inconsistent with the equal rights of other states. Among these is that of establishing, altering, or abolishing its own municipal constitution of government.") Professor Tesón has termed this view the "Hegelian Myth." FERNANDO TESÓN, *HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW AND MORALITY* 53-76 (1988).

thencewards only in him and by him."²³ To condemn the process of choosing a leader, therefore, was to impugn the character of the nation itself.

Two more specific factors also contributed to the late emergence of participatory rights in international law. The first is that national elections did not become commonplace until the mid-nineteenth century.²⁴ An international requirement of free and fair elections could not reasonably be expected to arise until elections in individual states became the norm. Until the mid-twentieth century, however, many states were still engaged in national debates over the nature, power, and extent of representative institutions.²⁵ Even in 1948, when participatory rights were first formally expressed in the Universal Declaration, full adult suffrage was less than a generation old in many European countries.²⁶

The second specific cause of the late emergence of participatory rights relates to the treatment of unelected governments by the international community. Governments which obtain power in violation of participatory rights (i.e., without holding proper elections) do so illegally. Presumably, such govern-

23 I EMER DE Vattel, *THE LAW OF NATIONS* ch. IV, § 40 (Joseph Chitty ed. 1849) (1759) (emphasis in first quotation added).

24 See ALAN F. HATTERSLEY, *A SHORT HISTORY OF DEMOCRACY* 161 (1930); Leslie Lipson, *THE DEMOCRATIC CIVILIZATION* 79 (1964); STEIN ROKKAN, *CITIZENS, ELECTIONS, PARTIES: APPROACHES TO THE COMPARATIVE STUDY OF THE PROCESSES OF DEVELOPMENT* 84-85 (1970).

25 Although several European states had functioning parliamentary bodies in the seventeenth and eighteenth centuries, the size of their electoral base looks negligible by modern standards. HATTERSLEY, *supra* note 24, at 120-40. In mid-eighteenth century Britain, for example, no more than one in 20 citizens was eligible to vote for the House of Commons. LIPSON, *supra* note 24, at 80. Only after the twin upheavals of the French Revolution and the Napoleonic wars did representative institutions begin to proliferate and the base of suffrage expand. HATTERSLEY, *supra* note 24, at 161-62. In Belgium, which gained independence in 1830, the first constitution established a bicameral parliament with suffrage limited to men over 25 years of age who paid a minimum tax. Universal male suffrage was not introduced until 1893. THOMAS F. MACKIE & RICHARD ROSE, *THE INTERNATIONAL ALMANAC OF ELECTORAL HISTORY* 39 (3rd rev. ed. 1991). In France universal male suffrage for a Constituent Assembly was not instituted until 1848. *Id.* at 130-31. In the Netherlands a States-General was introduced in 1848; 11% of the adult male population was eligible to vote. Universal male suffrage did not appear until 1917. *Id.* at 322. In Norway the constitution of 1814 enfranchised about 28% of the adult male population; suffrage for virtually all males over 25 was introduced in 1898. *Id.* at 356. In Spain the constitution of 1812 tempered royal power by enacting broad franchise provisions, but a series of coups disrupted the work of parliament. *Id.* at 385-86. In the United Kingdom the Reform Act of 1832, much heralded as broadening the base of representation, increased the parliamentary electorate from 2.7% to 4.4% of the population. Successive reform bills in 1867 and 1884 gave the vote to most adult males. Until 1948 university graduates and businessmen were allowed two votes each. *Id.* at 438-39; HATTERSLEY, *supra* note 24, at 164-65; LIPSON, *supra* note 24, at 80-81. In the United States, members of the presidential electoral college were not chosen by direct election in all states until 1860. MACKIE & ROSE, *supra*, at 456. Senators were chosen by state legislatures until 1913, and poll taxes were only eliminated by constitutional amendment in 1964. U.S. CONST. amends. XVII, XXIV.

26 Women became entitled to vote on equal standing with men on the following dates: Austria (1920); Belgium (1948); France (1944); Germany (1919); Greece (1956); Italy (1948); the Netherlands (1919); Norway (1913); Portugal (1968); Spain (1931); Sweden (1921); United Kingdom (1928); United States (1920). MACKIE & ROSE, *supra* note 25, *passim*.

The Right to Political Participation

ments would themselves be considered illegal.²⁷ For most of recent history, however, the international law of recognition has paid little or no attention to the manner in which regimes are chosen. Rather, states have generally been free to conduct relations with governments which, under a scheme of participatory rights, would likely be regarded as pariahs.

This aspect of recognition law—a specific application of traditional sovereignty principles—has deep historical roots. From the Middle Ages through the era of royal absolutism, the doctrine of monarchical legitimacy dominated commentaries on the law of recognition.²⁸ While obviously quite different from the "popular legitimacy" embodied in a right to political participation, monarchical legitimacy also predicated a regime's authority to govern on the circumstances of its origin. Whether by virtue of divine right or through a theory of implied popular consent, dynastic succession entitled a government to international recognition.²⁹ Monarchical legitimacy began to fall out of favor with the rise of Enlightenment-era theories of popular sovereignty. Vattel, writing in 1758, rejected the doctrine entirely in favor of a *de facto* control test:

If a people, after having expelled their prince, submit to another—if they change the order of succession, and acknowledge a sovereign to the prejudice of the natural and appointed heir—foreign powers may, in this instance also, consider what has been done as lawful; it is no quarrel or business of theirs.³⁰

Monarchical legitimacy reemerged briefly in the early nineteenth century as a reaction to the French Revolution. In November 1792 the French Assembly extended its "fraternity and succor to all peoples bent on recovering their liberty," a declaration which the European monarchies regarded as profoundly subversive of the established order.³¹ At the Congress of Vienna in 1814, restoration of the *status quo ante bellum* was the primary goal of the assembled powers. It was, ironically, the French minister Talleyrand who argued most

27 To argue otherwise one must defend the proposition that the process of selecting a regime can be legally separated from the regime actually selected. Participatory rights, however, are instrumental: they are a means by which citizens make their views known and felt in the formulation of national policy. If citizens are excluded from the political process, those rights have not been instrumental in achieving anything. This delineation of a "proper" process creates a threshold of legitimacy that all governments must meet.

28 TI-CHINANG CHEN, *THE INTERNATIONAL LAW OF RECOGNITION* 105 (1951); JULIUS GOEBEL, JR., *THE RECOGNITION POLICY OF THE UNITED STATES* 19-41 (1915).

29 CHEN, *supra* note 28, at 105.

30 IV VATTEL, *supra* note 23, ch. V § 68. Recognition of governments exercising effective power also became common in practice, as in the case of the English republic under Cromwell. Jochen A. Fromein, *Recognition*, in 10 *ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW* 340, 341 (Rudolf Bernhardt ed., 1987).

31 CHARLES DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 25 (1957). Even before this decree was issued the German Emperor had urged other European powers to terminate "the scandal of usurpation founded on rebellion." CHEN, *supra* note 28, at 105 (quoting THEODORE D. WOOLSEY, *INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW* 49 (1879)).

vigorously for the indefeasible right of a ruling dynasty to foreign recognition.³² The settlement at Vienna restored France to its pre-revolutionary boundaries, brought Louis XVIII to the throne, and led to the establishment of the Holy Alliance of Austria, Prussia, and Russia, whose primary interest lay in "maintaining the absolutist regimes and in suppressing revolutionary movements everywhere by intervention."³³ As a result, the notion of legitimacy for purposes of recognizing governments came to be used to support monarchical succession. Instead of defining a "legitimate" government as one that had its origins in popular consent (the Enlightenment view), the doctrine was now used to resist pressures for liberal reforms. As one historian has written, "[a]gainst the international of peoples the international of rulers had won."³⁴

Despite the efforts at Vienna, however, neither monarchical nor popular legitimacy took hold as a doctrine of international law for three reasons. First, either standard would inevitably have created a hierarchy of regimes based on legitimacy of origin. Such an arrangement was incompatible with the emerging "balance of power" configuration in Europe, which presumed the existence of free and equal sovereigns, each enjoying virtually complete freedom to order its domestic affairs.³⁵ Second, the idea that forms of government ought to be fixed and immutable (of specific monarchical pedigree or the result of fair elections) simply proved impossible to implement in practice. The problem was one of infinite regression, for "all governments owe their origin to a revolutionary event in a more or less distant past."³⁶ Any regime, in other words, was potentially "illegitimate" given a sufficiently long historical view. Third, the political upheavals in Europe during the nineteenth century, particularly those following 1848, made recognition of de facto governments a political necessity.³⁷ France, for example, alternated regularly between monarchy and republic from 1791 to 1875, and any state refusing to recognize such rapid changes in government would find itself diplomatically isolated. European leaders recognized that the legitimacy doctrine was for this reason incompatible with practical politics.³⁸

32 DE VISSCHER, *supra* note 31, at 27; see also RENE ALBRECHT-CARRIÉ, A DIPLOMATIC HISTORY OF EUROPE SINCE THE CONGRESS OF VIENNA 9 (1958); GOEBEL, *supra* note 28, at 19. Talleyrand set out his views in his instructions to the King's ministers at the Vienna Congress. These are reprinted in POSTURE OF EUROPE, 1815-1940: READINGS IN EUROPEAN INTELLECTUAL HISTORY 9 (Eugene C. Black ed. 1964).

33 ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 188 (rev. ed. 1954); see also ALBRECHT-CARRIÉ, *supra* note 32, at 9.

34 ALBRECHT-CARRIÉ, *supra* note 32, at 16.

35 MORTON A. KAPLAN & NICHOLAS DEB. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 138 (1961).

36 Sir Hersch Lauterpacht, *Recognition of Governments*, 45 COLUM. L. REV. 815, 832 (1945).

37 KAPLAN & KATZENBACH, *supra* note 35, at 122-23.

38 CHARLES G. FENWICK, INTERNATIONAL LAW 180 (4th ed. 1965).

The Right to Political Participation

Most states have come to reject fixed rules on the recognition of governments.³⁹ A decision to recognize domestically illegitimate regimes is less a reflection of a state's position on the value of participatory rights than a judgment of political expediency. As a result, most states follow a *de facto* rather than a *de jure* standard in their bilateral recognition practices.⁴⁰ Even the United States, which has at times alluded to a policy of constitutional legitimacy, generally adheres to a *de facto* control standard.⁴¹ In sum, the central tenets of recognition law have never turned on judgments about the domestic legitimacy of governments. Instead, states and commentators generally eschewed concern with the character of national government well into the twentieth century.⁴² Oppenheim's 1905 statement is typical: "The Law of Nations prescribes no rules as regards the kind of head a State may have. Every State is, naturally, independent regarding this point, possessing the faculty of adopting any Constitution according to its discretion."⁴³

39 BROWNLIE, *supra* note 16, at 93.

40 *Id.* at 92-93.

41 The classic American statement of recognition policy is generally taken to be Thomas Jefferson's formulation, stated in 1792: "It accords with our principles to acknowledge any government to be rightful which is formed by the will of the nation, substantially declared." *Quoted in* FENWICK, *supra* note 38, at 187. In practice, however, the United States has rarely required proof of a "substantial declaration" of popular will. *See* Maurice Cranston, *From Legitimism to Legitimacy*, in LEGITIMACY 36, 40-41 (Athanasios Moulakis ed., 1986).

The policy of President Woodrow Wilson is the major exception to U.S. adherence to the *de facto* control standard. In 1913 Wilson announced that the United States would no longer recognize Latin American governments that came to power by extra-constitutional means. Recognition, 1 HACKWORTH DIGEST § 33, at 180-81; Paul W. Drake, *From Good Men to Good Neighbors: 1912-1932*, in EXPORTING DEMOCRACY, *supra* note 12, at 3, 13. This policy followed the so-called Tobar Doctrine of non-recognition, embodied in two treaties among the Central American republics. *See, e.g.*, Additional Convention to the General Treaty between the Governments of Costa Rica, Guatemala, Honduras, Nicaragua, and Salvador, Respecting Recognition of Governments, Intervention and Re-election of Presidents, Dec. 20, 1907, art. II, 206 Consol T.S. 77 (stating agreement not to "recognize any other Government which may come into power in any of the five Republics as a consequence of a coup d'état, or of a revolution against the recognized Government"). The United States used this policy from Wilson's presidency through the early 1930s as justification for armed intervention in Latin America. The occupying U.S. marines often found themselves observing local elections as a precursor to a decision on recognition by Washington. Drake, *supra*, at 15-34. Secretary Stimson announced the abandonment of the constitutional legitimacy doctrine in 1931. *See* Ellery C. Stowell, *Constitutional Legitimacy*, 25 AM. J. INT'L L. 302, 302 (1931). The United States recognized the revolutionary Soviet government two years later, reversing a 16-year policy. *See* Chandler P. Anderson, Editorial Comment, *Recognition of Russia*, 28 AM. J. INT'L L. 90, 90 (1934).

The United States currently denies that the issue of recognition arises upon a change of government in a foreign country. Rather, the United States continues its relations with the foreign state without formally determining the legitimacy of the new regime. *See* RESTATEMENT, *supra* note 47, § 203, reporters' note 1. The U.S. decision to join an OAS Ministers' resolution in October 1991, refusing to recognize the military government that overthrew the elected president of Haiti, Jean-Bertrand Aristide, was therefore a significant break with this policy. *See* Thomas L. Friedman, *Haiti's Coup: Test Case for Bush's New World Order*, N.Y. TIMES, Oct. 4, 1991, at A8.

42 While earlier writers also held such sentiments, their views are unexceptional given that virtually all states prior to the nineteenth century were governed by monarchies.

43 1 LASA OPPENHEIM, INTERNATIONAL LAW 403 (1905). In 1910 Professor Wilson declared bluntly in his Handbook of International Law that "[t]here is for international law no distinction between monarchy and republic, confederation and federation, simple and composite states." GEORGE G. WILSON, HANDBOOK

Such views represented a choice between two conflicting notions of sovereignty. The first is commonly referred to as "state" or "absolutist" sovereignty. It regards as "sovereign" that individual or entity, traditionally a monarch, wielding actual political power within a state. Other states must treat that person as exercising all prerogatives of national power both externally (in conducting foreign relations) and internally (in managing the affairs of government).⁴⁴ In recognition law the absolutist concept of sovereignty is applied through the de facto control test.

The second notion is referred to as "popular" sovereignty. Stated broadly, popular sovereignty is the view that individual citizens bestow legitimacy upon a government through their implied or actual consent to its rule.⁴⁵ In contrast to the absolutist focus on relations within the international community, popular sovereignty looks to the political role of individuals within single states.⁴⁶ As the state system matured the absolutist conception of sovereignty came to predominate, removing citizen consent to governmental rule as a concern of international law.⁴⁷

OF INTERNATIONAL LAW 23 (1910). Likewise in 1923 William Howard Taft, in the famous *Tinoco* arbitration, held that "non-recognition [of governments] on the ground of illegitimacy of origin was not a postulate of international law and did not secure general acquiescence." *Great Britain v. Costa Rica*, 1923-24 ANN. DIG. PUB. INT'L L. CAS. 34, 37 (1923).

44 Such an absolutist notion of sovereignty is often associated with the writings of Jean Bodin. See J.L. BRIERLY, *THE LAW OF NATIONS* 7-12 (6th ed. 1963).

45 This formulation is broad enough to describe a wide range of liberal political theorists and so glosses over ambiguities that an exclusively philosophical analysis would address in full. For example, to say that popular consent legitimizes government does not necessarily require a system of ongoing majority rule. Consent in perpetuity might have been given when the political community was established. This arrangement describes the Hobbesian social contract. Even if one concludes that popular sovereignty requires majoritarianism, the people may elect anti-democratic leaders who promise (or simply act) to end all future elections. If the people choose such leaders freely, can the new regime claim legitimacy based on a popular mandate? Further, even the term "popular sovereignty" begs the question of who constitutes "the people." In describing various forms of a democracy Aristotle spoke of systems in which access to office is controlled by a property assessment, and those where office-holding is denied to those who "fail to pass a scrutiny as to birth." ARISTOTLE, *THE POLITICS* bk. iv, ch. iv (T.A. Sinclair trans., 1962). Finally, many societies have restricted the scope of popular sovereignty by establishing a set of fundamental rights held to be immune from infringement by political institutions. Such counter-majoritarian rights arise from notions of inherent human dignity and autonomy. If a society recognizes a sufficient number of these rights, or if they repeatedly function to trump the majority will on particularly contentious issues, the following question arises: is popular sovereignty still the fundamental organizing principle of the society or has it been replaced, in whole or in part, by the principles of individualism undergirding the protected rights? See generally Lawrence G. Sager, *The Incurable Constitution*, 65 N.Y.U. L. REV. 893 (arguing that protection of key individual rights, not majoritarianism, is defining principle of U.S. political system).

46 Advocates of democratic reforms in the nineteenth Century offered two primary justifications for the theory of popular sovereignty. First, by offering individuals complete freedom of choice in ordering their society, popular government maximizes individual satisfactions or wants. Second, popular government allows for the fullest possible exercise of individuals' inherent human capacity for creativity and rational judgment and thought. See C.B. MACPHERSON, *DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL* 4-5 (1973). Robert Dahl has argued for a third justification based on the inherent equality of all persons and, as a result, the presumption that each is the best judge of her own interests. ROBERT A. DAHL, *DEMOCRACY AND ITS CRITICS* 108 (1989).

47 See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 203, cmt. e (1987) [hereinafter RESTATEMENT] ("[i]nternational law does not generally address domestic constitutional

The Right to Political Participation

Yet while popular sovereignty never emerged as a rule among states, it has lived on in the West and, over time, elsewhere, as the most enduring theory of domestic political legitimacy.⁴⁸ As long as international law did not purport to regulate the process of choosing national governments, popular sovereignty and statism could coexist without contradiction in their respective domains of authority. When the United Nations began codifying a list of basic human rights in the late 1940s, however, popular sovereignty emerged as the justification for the human right to participate in government. Article 21 of the Universal Declaration of Human Rights, for example, provides that "the will of the people shall be the basis of the authority of government."⁴⁹ With concern for domestic legitimacy thus elevated to the international plane, an acute tension developed within international law between absolutist and popular notions of sovereignty. Was international law suddenly to deny recognition to undemocratic regimes, or impose other types of sanctions, when it had for so long served to *protect* all regimes from external pressures? On the other hand, if the people are indeed sovereign, could the law countenance interaction with regimes that deny the people their sovereign rights?

Few international scholars have confronted this tension. Many still write of an immovable wall between domestic and international notions of governmental legitimacy.⁵⁰ For example, Michael Walzer has vigorously defended the idea that "states can be presumptively legitimate in international society and actually legitimate at home."⁵¹ He argues that most forms of domestic tyranny give rise only to the right of citizen rebellion, as citizens are the only aggrieved right-holders under social contract theory.⁵² By contrast, outside intervention, even if it is pro-democratic, violates citizens' rights by artificially accelerating their "aversion" to a tyrannical government.⁵³ While Walzer is writing primarily about forceful humanitarian intervention, his argument can

issues, such as how a national government is formed").

48 See PATRICK RILEY, *WILL AND POLITICAL LEGITIMACY* 1 (1982).

49 See, e.g., Universal Declaration, *supra* note 6, art. 21 (providing that "the will of the people shall be the basis of the authority of government").

50 David Held, for example, states:

The central problem facing liberal and liberal democratic theory concerned the relationship between the state, as an independent authority with supreme right to declare and administer law over a given territory, and the individual, with a right and interest to determine the nature and limits of the state's authority. In short, the question was: how should the 'sovereign state' be related to the 'sovereign people' who were in principle the source of its powers?

DAVID HELD, *POLITICAL THEORY AND THE MODERN STATE* 48 (1989).

51 Michael Walzer, *The Moral Standing of States: A Response to Four Critics*, 9 PHIL. & PUB. AFF. 209, 214 (1980).

52 Walzer allows for exceptions, permitting humanitarian intervention in cases where a national minority is attempting to secede, where a foreign power has intervened in a civil war, or where a state is massacring, enslaving or expelling large numbers of people. *Id.* at 216-18. Walzer argues that only in these instances is the lack of "fit" between the government and the community "radically apparent." *Id.* at 214.

53 *Id.* at 215.

be read to apply with equal force to non-forcible measures (such as a norm of political participation) designed to "undemocratic" regimes.⁵⁴ In Walzer's view, international legitimacy serves not the democratic value of individual choice but the "pluralist" value of respecting the process of organic political change on the national level. Hence, "foreign officials must act as if [tyrannical states] were legitimate."⁵⁵

As the sections below will suggest, international law has only begun to grapple with this problem. Indeed, the existence of the problem itself demonstrates progress: until recently, participatory rights were considered so ill-defined that they posed little threat to traditional forms of sovereignty. The post-Cold-War era has brought these rights into sharper focus, and the nature of the legal obligation to provide citizen participation has become clear.

B. The Nature and Scope of Post-War Treaty-Based Participatory Rights

Post-World War II human rights conventions guarantee the right to political participation primarily by requiring signatories to hold fair elections at regular intervals. The United Nations also began to monitor elections and plebiscites regularly in colonial territories and newly independent states. Developing interpretations of these conventions, as informed by the practice of electoral monitoring, suggest that the right to political participation is now established as a matter of treaty law.

This article argues that the right to political participation is binding upon the signatories of these conventions and treaties. Further, the right is coherent as it is derived from concrete treaty language and the standards developed by international election monitors, and it is enforceable through treaty and non-treaty mechanisms. The treaties suggest that a free and fair election must, at a minimum, satisfy several criteria: elections must be by universal and equal suffrage, by secret ballot, at reasonable, periodic intervals, and may not evidence discrimination against voters or candidates. The following sections will elaborate upon these criteria.

54 Other examples would include foreign financing of opposition political parties, economic boycotts and embargoes, suspension of diplomatic relations, etc. Walzer's emphasis on the primacy of local political communities would seem to exclude such external efforts to enforce participatory rights since they, like humanitarian intervention, represent efforts to destroy the very entities which give rise to shared conceptions of rights. *Id.* at 226-28.

55 *Id.* at 216 (emphasis added). For responses to Walzer, see Charles R. Beitz, *Nonintervention and Communal Integrity*, 9 PHIL. & PUB. AFF. 385 (1980); David Luban, *The Romance of the Nation-State*, 9 PHIL. & PUB. AFF. 392 (1980); Gearald Doppelt, *Statism Without Foundation*, 9 PHIL. & PUB. AFF. 398 (1980).

The Right to Political Participation

1. *The International Covenant on Civil and Political Rights*

The International Covenant on Civil and Political Rights (Political Covenant), which came into force in 1976,⁵⁶ is the most widely subscribed treaty guaranteeing participatory rights; as of January 1992, 105 states were party to the Political Covenant.⁵⁷ Article 25 is the principal provision on political rights in the Covenant,⁵⁸ and contains three principal guarantees: non-discrimination, the right to participate in public affairs, and the right to free elections.⁵⁹

a. *Non-Discrimination*

Article 25 initially states that the rights it provides shall be enjoyed "without any of the distinctions mentioned in Article 2 of this Covenant and without

56 The General Assembly originally passed the Political Covenant in 1966. See G.A. Res. 2200 (XXI), U.N. GAOR, 24th Sess., Supp. No. 16, at 55, U.N. Doc. A/6316 (1966). Article 49 of the Covenant provided that the agreement would come into force three months after the 35th instrument of ratification was deposited with the Secretary-General. *Id.* art 49.

57 UNITED NATIONS, MULTILATERAL TREATIES DEPOSITED WITH THE SECRETARY-GENERAL, STATUS AS AT 31 DECEMBER 1991, U.N. Doc. ST/LEG/SER.E/10 (1992) [hereinafter MULTILATERAL TREATIES] (listing 100 state parties). Drafting the Covenant took eighteen years, a process that involved arduous negotiations between capitalist and socialist states. The parties to the Political Covenant now include a substantial number of developing countries from all continents. SUPPLEMENT TO MULTILATERAL TREATIES, U.N. Doc. ST/LEG/SER.E/10 (Supp. 1992) (noting recent accession by Angola, Benin, Brazil, Cote d'Ivoire, and Latvia).

58 See *supra* note 6 (quoting text of Article 25). Other articles of the Political Covenant are also relevant to a citizen's participatory rights, such as those guaranteeing the right to hold opinions (art. 19), the right to peaceful assembly (art. 21), the right to freedom of association (art. 22), the right to freedom from discrimination (art. 24), and the right to equality before the law (art. 26). In addition, Professor Cassese has argued that the right to self-determination (art. 1) has an internal component that should be understood as providing an individual right to participate in national affairs. See Antonio Cassese, *Political Self-Determination—Old Concepts and New Developments*, in UN LAW/FUNDAMENTAL RIGHTS 137 (Antonio Cassese ed., 1979). This article does not address the scope or substance of these other provisions.

59 This article shall not consider subsection (c), which concerns equal access to public service. It is, in effect, a specialized non-discrimination clause.

Unlike other Covenant provisions, Article 25 addresses the rights of "citizens," rather than "persons" or "individuals." The significance of this distinction is not clear. Use of the word "citizen" limits an individual to participation only in the government of her own state, rather than those of all states or the state of her choice. Reference to "citizens" also shifts the justification for the right away from principles of individual dignity or autonomy to the *process* of interaction between individuals and their governments—the relationship that gives rise to the status of "citizen." See ANDREW VINCENT, *THEORIES OF THE STATE* 106-09 (1987). Neither the Covenant nor its *travaux* explicitly discuss restrictions on states' discretion in defining and granting citizenship. Since general international law does not regulate the granting of citizenship, see *Nottebohm Case* (Liech. v. Guat.), 1955 I.C.J. 4, 23 (Apr. 6) (stating that "international law leaves it to each State to lay down the rules governing the grant of its own nationality"), the omission of such criteria from the Political Covenant implies a deliberate decision to allow this discretion to continue. A potential for abuse therefore exists: Kuwait, for example, currently denies citizenship to hundreds of thousands of Palestinian guest workers, even though their families may have lived in the country for generations. See *Kuwait: Freed But Not Free*, WASH. POST, Jan. 26, 1992, at C6. Article 25 does not guarantee the right of these workers to participate in Kuwaiti politics because they are not Kuwaiti citizens. Since Article 25 contains no provisions on absentee ballots, these workers may also lack the right to participate in the elections of any other state of which they are citizens.

unreasonable restrictions."⁶⁰ Article 2 forbids any restrictions that discriminate against citizens on the basis of an explicitly prohibited characteristic.⁶¹ The phrase "without unreasonable restrictions" implies that some restrictions on participation not based on prohibited distinctions are "reasonable" and therefore permissible. The delegates included this phrase to allow denial of suffrage to minors, convicts, the mentally ill, and those not meeting residency requirements, and to permit the existence of certain limitations on the right to hold public office, such as a requirement of professional training.⁶² The delegates apparently did not consider such "reasonable" restrictions "discriminatory,"⁶³ but did not intend the standard of reasonableness to sanction the egregious forms of discrimination set out in Article 2.⁶⁴ While Article 25's

60 See *supra* note 6 (quoting text of Article 25).

61 Article 2 provides that all rights shall be respected "without distinction of any kind." Explicitly prohibited distinctions include "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Political Covenant, *supra* note 6, art. 2.

62 See U.N. GAOR, 3d Comm., 16th Sess., 1097th mtg. at 105, U.N. Doc. A/C.3/SR.1097 (1961); U.N. GAOR 3d Comm., 16th Sess., 1096th mtg. at 179, U.N. Doc. A/C.3/SR.1096 (1961) [hereinafter *Third Committee, 1096th Meeting*]; *Summary Record of the 365th Meeting*, U.N. ESCOR Commission on Human Rights, 9th Sess., 365th mtg. at 5, 15-16, U.N. Doc. E/CN.4/SR.365 (1953) [hereinafter *Commission on Human Rights, 365th Meeting*]; *Summary Record of the 364th Meeting*, U.N. ESCOR Commission on Human Rights, 9th Sess., 364th mtg. at 6, U.N. Doc. E/CN.4/SR.364 (1953) [hereinafter *Commission on Human Rights, 364th Meeting*]; *Summary Record of the 363d Meeting*, U.N. ESCOR Commission on Human Rights, 9th Sess., 363d mtg. at 12, 15, 16, U.N. Doc. E/CN.4/SR.363 (1953) [hereinafter *Commission on Human Rights, 363d Meeting*].

The Soviets proposed that property, educational, "or other qualifications restricting the participation of citizens in voting" be abolished as an alternative to this "limitations clause." See UNITED NATIONS ECONOMIC AND SOCIAL COUNCIL, COMMISSION ON HUMAN RIGHTS, UNION OF SOVIET SOCIALIST REPUBLICS: INSERTION OF A NEW ARTICLE IN THE DRAFT COVENANT OF CIVIL AND POLITICAL RIGHTS, U.N. Doc. E/CN.4/L.221, at 1 (1953). This proposal was rejected. *Summary Record of the 367th Meeting*, U.N. ESCOR Commission on Human Rights, 9th Sess., 367th mtg. at 12, U.N. Doc. E/CN.4/SR.367 (1953) [hereinafter *Commission on Human Rights, 367th Meeting*].

63 See *Commission on Human Rights, 363d Meeting, supra* note 62, at 16 (statement of Mr. Jevremovic, Yugoslavian delegate) (describing restrictions such as those based on mental deficiency as "reasons of a non-discriminatory character"); *Commission on Human Rights, 365th Meeting, supra* note 62, at 13 (statement of Mr. Cassin, French delegate) (similar).

64 See *Annotation by Secretary-General of the Draft International Covenants on Human Rights*, U.N. GAOR, 10th Sess., Supp. No. 19, U.N. Doc A/2929 (1955) [hereinafter *Annotation by Secretary-General*]. The *Annotation* states:

While it was considered necessary to prohibit restrictions which amounted to discrimination, it was observed that in most countries the right to vote was denied to certain categories of persons, such as minors and lunatics, and that the right to be elected to public office and the right of access to public service were generally subjected to certain restrictions.

Id. at 174. The Human Rights Commission also considered a Soviet proposal to enumerate specific grounds for discrimination in Article 25. The Soviet list, however, did not coincide with the examples given in Article 2 and (as a number of delegates pointed out) would have therefore created inconsistent obligations. See *Commission on Human Rights, 363d Meeting, supra* note 62, at 10 (statement of Mr. Whitlam, Australian delegate); *Commission on Human Rights, 365th Meeting, supra* note 62, at 4 (statement of Mr. Hoare, U.K. delegate); *id.* at 10 (statement of Mrs. Rossel, Swedish delegate). The Soviet list also failed to prohibit discrimination based on political opinion. As the Uruguayan delegate noted, if this omission permitted political discrimination "the ruling party in every totalitarian State would continue to enjoy a monopoly of government." *Commission on Human Rights, 363d Meeting, supra* note 62, at 8 (statement of Mr. Perotti, Uruguayan delegate). The Commission first voted to amend the Soviet draft to include political discrimination, but ultimately rejected the idea of a separate list altogether in favor of a reference

The Right to Political Participation

non-discrimination language is directed explicitly at individuals, it may also be read to prohibit states from discriminating against political parties embracing a particular ideology, a proposition endorsed by a U.N. study prior to the Covenant's coming into force.⁶⁵

b. *The Right to Take Part in Public Affairs*

Paragraph (a) of Article 25 guarantees the right to "take part in the conduct of public affairs directly or through freely chosen representatives."⁶⁶ Since paragraph (b) requires genuine, periodic elections, paragraph (a) must contemplate additional means of influencing public policy.⁶⁷ However, paragraph (a) does not identify the types of public bodies to which it applies, and the delegates rejected a proposal that would have applied to "all organs of authority."⁶⁸ Thus, below the primary leadership level (e.g., the head of state and the legislature), Article 25(a) is satisfied if appointed officials are "in some way responsible to elected officials."⁶⁹

c. *Requirements Concerning Elections*

Although it presents some of the most difficult interpretative questions in Article 25, the drafters spent little time discussing the central terms of paragraph (b), which guarantees the right to vote "at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret

to Article 2. *Commission on Human Rights, 367th Meeting, supra* note 62, at 11, 12. Article 2 generally prohibits all discrimination based on "political or other opinion."

⁶⁵ See HERNAN SANTA CRUZ, *STUDY OF DISCRIMINATION IN THE MATTER OF POLITICAL RIGHTS*, U.N. Doc. E/CN.4/Sub. 2/213/Rev. 1, U.N. Sales No. 63.XIV.2 (1962). Mr. Santa Cruz noted:

Political opinion is frequently expressed by political parties and organizations sponsoring certain ideas of government or maintaining certain political principles or beliefs. Discrimination on the ground of political opinion is therefore directed not only against individuals, but against political parties and organizations as such. The most drastic type of discrimination in this sphere, found in some countries, consists of the total suppression of all political parties and organizations. While clearly discriminatory, such action has been explained in most cases as a temporary emergency measure, necessary to the survival and growth of the State. However, in some notable instances it has become a permanent arrangement reflecting the philosophy of the Government, and therefore a persistent form of discrimination directed against almost all the nationals of that country.

Id. at 37.

⁶⁶ Political Covenant, *supra* note 6, art. 25(a).

⁶⁷ These might include local school boards, town meetings, or advocacy groups. A broader definition of "public affairs" might require open participation in political parties, particularly in systems of non-proportional representation where a few parties effectively monopolize access to political power. Broader still, and depending on a state's social structure, paragraph (a) might be read to encompass participation in labor unions, the officer corps of the military, or other institutions wielding influence over policy.

⁶⁸ See *Annotation by Secretary-General, supra* note 64, at 173.

⁶⁹ Partsch, *supra* note 14, at 239.

ballot, guarantee[ing] the free expression of the will of the electors."⁷⁰ The delegates generally agreed that the requirements of universal and equal suffrage and a secret ballot meant that each vote must count equally.⁷¹ However, the delegates left to individual states the question whether votes would have equal effect, to be determined in part by whether a country followed a proportional representation or a simple majority electoral system.⁷² The delegates also briefly discussed whether ballot secrecy was appropriate for states with a high percentage of illiterate voters,⁷³ and the majority concluded that ballot secrecy was a fundamental aspect of a fair election and should be retained.⁷⁴

The delegates failed to clarify whether the guarantee of a "genuine election" to establish "the free expression of the will of the electors" requires party pluralism. While western states have long maintained that single-party elections are incompatible with genuine choice, socialist states did not share this view.⁷⁵ Since these states ratified the Political Covenant, however, they must have concluded that Article 25 did not preclude single party systems.⁷⁶ Several African leaders (most prominently Tanzanian President Julius Nyerere) argued in the 1960s that the existence of multiple political parties was not a

70 Political Covenant, *supra* note 6, art. 25(b). See *Annotation by Secretary-General, supra* note 64, at 173 (reviewing drafting history).

71 *Id.*

72 See, e.g., *Commission on Human Rights, 364th Meeting, supra* note 62, at 8, 15 (statement of Mr. Cassin, French delegate). Debates on participatory rights often overlook the fact that the Covenant does not prescribe a particular type of electoral system. The *travaux* demonstrate that states may choose from any type of electoral system as long as it meets the minimum fairness criteria set out in Article 25. See generally MICHEL L. BALINSKI & H. PEYTON YOUNG, *FAIR REPRESENTATION: MEETING THE IDEAL OF ONE MAN, ONE VOTE* 87-90 (1982) (discussing relative merits of parliamentary, presidential, and other types of electoral systems).

73 See *Summary Records of Meetings of 3d Committee*, U.N. GAOR 3d Comm., 3d Sess., 132d mtg. at 450, U.N. Doc. A/C.3/SR.132 (1948) [hereinafter *Third Committee, 132d Meeting*] (statement of Mr. Saint-Lot, Haitian delegate); *id.* at 455 (statement of Mr. Garcia Bauer, Guatemalan delegate). The Universal Declaration provides for a secret ballot "or equivalent free voting procedures." Universal Declaration, *supra* note 6, art. 21(3). The quoted language was not retained in the Political Covenant, thus establishing secret balloting as the sole legitimate method of voting.

74 See *Third Committee, 132d Meeting, supra* note 73, at 450 (statement of Mr. Sandifer, U.S. delegate); *id.* at 459 (statement of Mr. Watt, Australian delegate); *id.* at 463 (statement of Mr. Pavlov, Soviet delegate). The Soviet delegate pointed out that illiterates might be helped by neighbors or friends in filling out their ballots with only minimal cost to ballot secrecy. *Id.* at 463. In the Third Committee, only two states (Haiti and Guatemala) voted against including a provision for a secret ballot in the Universal Declaration. U.N. GAOR 3d Comm., 3d Sess., 134th mtg. at 471 (1948) [hereinafter *Third Committee, 134th Meeting*]. Ballot secrecy recently became a volatile issue in Senegal, for example, which is in the process of redrafting its electoral code. See NATIONAL DEMOCRATIC INSTITUTE FOR INTERNATIONAL AFFAIRS, *AN ASSESSMENT OF THE SENEGALESE ELECTORAL CODE* 33-34 (1991).

75 For example, the Soviet delegate argued that "in his country, the bourgeois class had ceased to exist. There thus remained only workers and peasants, and the Communist Party by itself was capable of looking after their interests." *Third Committee, 134th Meeting, supra* note 74, at 471, (statement of Mr. Pavlov, Soviet delegate). He argued further that "[u]nder the prevailing system [in the Soviet Union], there was no justification for the creation of other parties." *Id.* These statements occurred during the debate over the Universal Declaration.

76 Steiner, *supra* note 14, at 93.

The Right to Political Participation

prerequisite to genuine electoral choice.⁷⁷ Others argued that permitting multiple parties would bring violence and perhaps civil war to states in which colonial-era boundaries had led to rampant tribal conflict.⁷⁸ Some Africans also asked whether the U.S. or British systems, which effectively cap the number of political parties at two or three, provide genuine choice,⁷⁹ and pointed to slavery, poll taxes, and property franchise requirements to question whether party pluralism alone guarantees genuine choice for all citizens.⁸⁰

The Political Covenant's *travaux préparatoires* barely address this issue. The Human Rights and Third Committees spent little time debating the meaning of the term "genuine," and did not discuss the specific question of party pluralism. The only attempt to define a "genuine" election came late in the drafting process, when the Chilean delegate stated that "[t]he adjective 'genuine' had been used to guarantee that all elections of every kind faithfully reflected the opinion of the population and to protect the electors against government pressure and fraud."⁸¹ The text itself supports this interpretation. A parenthetical clause providing for universal and equal suffrage and secret ballot, and the phrase "guaranteeing the free expression of the will of the electors" follow the requirement of "genuine periodic elections." The latter phrase appears to be describing the first: that is, a "genuine periodic" election is one which guarantees the will of the electors, freely expressed. On this view, if the

77 See, e.g., JULIUS K. NYERERE, *DEMOCRACY AND THE PARTY SYSTEM* (1962); see also HUMAN RIGHTS IN A ONE-PARTY STATE (International Comm'n of Jurists ed. 1978); Yougindra Khushalani, *Human Rights in Africa and Asia*, 4 HUM. RTS. L.J. 403, 417 (1983); Simbi V. Mubako, *Zambia's Single-Party Constitution—A Search for Unity and Development*, 5 ZAMBIA L.J. 67, 80-83 (1973). For a more recent view, see THE ONE PARTY STATE AND DEMOCRACY: THE ZIMBABWE DEBATE (Ibbo Mandaza & Lloyd Sachikonye eds., 1991).

78 See, e.g., Pius Msekwa, *The Doctrine of the One-Party State in Relation to Human Rights and the Rule of Law*, in HUMAN RIGHTS IN A ONE-PARTY STATE, *supra* note 77, at 22, 22-23. Togo, for example, defended its one-party system in response to queries from the U.N. Human Rights Committee as follows:

[P]luralism which had been instituted at the time of independence had rapidly degenerated, giving rise to a plethora of parties based on ethnic units, each serving its own interests. This had engendered a civil war mentality. The Togolese People's Rally had proved to be the best means of achieving national unity and solidarity. The concept of 'rally' implied respect for the individual and for diversity of opinions, the single Party being a forum where citizens could engage in dialogue and freely express their points of view.

Report of the Human Rights Committee, U.N. GAOR, 44th Sess., Supp. No. 40, at 60-61, U.N. Doc. A/44/40 (1989) [hereinafter *Report to 44th Session*]; see also *Report of the Human Rights Committee*, U.N. GAOR, 45th Sess., Supp. No. 40, at 121, U.N. Doc. A/45/40 (1990) [hereinafter *Report to 45th Session*] (statement of Zairian delegate) ("The limitation to three political parties had been chosen to avoid the repetition of the tragic experience of the years 1960-1965 when unrestricted multipartism caused serious difficulties and involved the death of more than half a million people.").

79 See, e.g., Mubako, *supra* note 77, at 82.

80 Ibbo Mandaza & Lloyd Sachikonye, *The Zimbabwe Debate on the One-Party State and Democracy*, in THE ONE PARTY STATE AND DEMOCRACY: THE ZIMBABWE DEBATE, *supra* note 77, at 1, 3-4.

81 *Third Committee, 1096th Meeting*, *supra* note 62, at 180.

electorate did not have the opportunity to express its opinion by casting a vote for a particular candidate or party⁸² the election would not be "genuine."⁸³

This interpretation suggests that Article 25 does not prohibit one-party states per se. Single party elections would run afoul of the Chilean formula only if public opinion in a state were actually divided on important political issues and if the single party did not permit candidates representing each faction to stand for election. A single party of homogeneous views would accurately reflect the "free expression of the will of the electors" if there were no divisions in public opinion. Similarly, if divisions did exist but the various factions *within* a party gave voice to all major points of view, additional parties would be unnecessary.⁸⁴ A state imposing an ideological orthodoxy on party members and prohibiting all political activity outside the party certainly would not meet the test of genuineness. The Chilean formula represents a compromise between the views of the U.S. and Soviet camps. Indeed, the very lack of debate over party pluralism suggests that these camps decided not to press their views, recognizing that neither was likely to prevail in pure form.⁸⁵ As a result, the Political Covenant sidestepped the issue of party pluralism and instead required that *any* electoral system meet standards of genuineness and accuracy in actual practice.

The U.N. Human Rights Committee, which reviews parties' adherence to the Political Covenant,⁸⁶ has consistently expressed skepticism that "genuine"

82 The word "opportunity" is important because the drafters did not attempt to mandate proportional representation. See *Draft International Covenants on Human Rights*, U.N. GAOR 3rd Comm., 16th Sess., 1018th plen. mtg., Annex I, Agenda Item 35, at 12, U.N. Doc. A/5000 (1961); *Third Committee, 1096th Meeting*, *supra* note 62, at 179.

83 The Inter-American Commission on Human Rights, for example, has concluded that an "authentic election" occurs when there exists "some consistency between the will of the voters and the result of the election." Mexico Elections Decision, Cases 9768, 9780, 9828, Inter-Am. C.H.R. 97, 108, OEA/ser. L/V/11.77, doc. 7, rev. 1 (1990). The Commission based this opinion upon the American Convention on Human Rights, whose provisions on participatory rights it has described as "fundamentally coincid[ing]" with Article 25 of the Political Covenant. *Id.* at 107.

84 The delegate from Cameroon stated in a 1989 General Assembly debate that "[i]n his own country, all the different political parties had opted to form a single entity in an attempt to remove bitter divisions caused by the old system. Although all candidates for election were members of the same party, the system was democratic because it provided for a free choice of those who were to govern." *Summary Record of the 54th Meeting*, U.N. GAOR 3rd Comm., 44th Sess., 54th mtg. at 12, U.N. Doc. A/C.3/44/SR.54 (1989) (statement of Mr. Engo). In February 1990 police arrested the former President of the Cameroon Bar Association and his supporters for attempting to form an opposition party. By June of that year the President of Cameroon announced his commitment to a multiparty system. See FREEDOM HOUSE, *supra* note 5, at 108-09.

85 See Partsch, *supra* note 14, at 240 (describing Chilean delegate's remark as a "very diplomatic formulation [which] avoided any allusion to a choice between at least two parties or to opposition against the government").

86 The Human Rights Committee is generally considered to be an authoritative interpreter of the Political Covenant, despite the fact that it is not explicitly so designated by the document. See THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS 85-86 (1986).

The Right to Political Participation

one-party elections are possible.⁸⁷ However, it has yet to address the issue directly in an individual petition⁸⁸ or a general comment on Article 25. The recent fall of one-party states in Africa,⁸⁹ Eastern Europe,⁹⁰ and Latin America⁹¹ has softened debate on this issue, and the principle of multiparty elections appears to have gained widespread support.⁹² This growing unanimity

87 Article 40 of the Political Covenant requires state parties to report to the Human Rights Committee the steps they have taken to implement the Political Covenant. Political Covenant, *supra* note 6, art. 40. Upon receipt of a report the Human Rights Committee usually questions delegates as to whether their state permits opposition parties, the extent to which those parties are allowed to operate freely, and whether any parties have been banned. *See, e.g., Report to 45th Session, supra* note 78, at 13 (Yemen); *id.* at 38 (Portugal); *id.* at 47 (Chile); *id.* at 52 (Argentina); *id.* at 95 (Nicaragua); *id.* at 104 (Vietnam); *Report to 44th Session, supra* note 78, at 28 (Mexico); *id.* at 57, 61 (Togo); *Report of the Human Rights Committee, U.N. GAOR, 42d Sess., Supp. No. 40, at 22, U.N. Doc. A/42/40 (1987) (Poland); id.* at 38 (Tunisia); *id.* at 57 (Senegal). For example, the Vietnamese delegate was questioned about "the leading role of the Communist Party and the compatibility of this situation with respect for the political rights protected by the Covenant." *Report to 45th Session, supra* note 78, at 104. And responding to a report by Zaire, Committee members "welcomed the constitutional reform abolishing the one-party system in the country." *Id.* at 128.

The Committee's inquiries suggest that it presumes one-party states are incompatible with Article 25, although it will solicit evidence to the contrary. State parties appear to recognize this presumption: of the states cited above, only Togo answered the Committee's inquiries by defending the principle of one-party rule. *Report to 44th Session, supra* note 78, at 60-61.

88 State parties have the option of permitting their citizens to bring claims directly to the Human Rights Committee. Optional Protocol to the Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1967).

89 *See* Gus Constantine, *Cameroon Leader Sees End of African One-Party Rule*, WASH. TIMES, May 8, 1991, at A8; *Togo's President Agrees to Yield Power to a Rival*, N.Y. TIMES, Aug. 29, 1991, at A13; *see generally* Catherine Bond, *African Dictators Bow to Pressure for Reform*, DAILY TELEGRAPH (London), Apr. 25, 1991, at 10; Kenneth B. Noble, *Despots Dwindle as Reform Alters Face of Africa*, N.Y. TIMES, Apr. 13, 1991, at A1; *A Fresh Wind in Africa*, N.Y. TIMES, June 5, 1990, at A28; Makau-wa Mutua, *African Renaissance*, N.Y. TIMES, May 11, 1991, at A23.

90 *See generally* TIMOTHY GARTON ASH, *THE MAGIC LANTERN* (1990) (discussing 1989 as a year of changes in various Eastern European nations).

91 *See* Falcoff, *supra* note 1, at 65.

92 For example, in June 1990 each of the former eastern bloc states signed the Conference on Security and Co-operation in Europe (CSCE) Copenhagen Document, in which they agreed to provide "a clear separation between the State and political parties." Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe, June 29, 1990, ¶ 5.4, 29 I.L.M. 1305, 1308 [hereinafter Copenhagen Document]; *see generally* Thomas Buergenthal, *The Copenhagen CSCE Meeting: A New Public Order for Europe*, 11 HUM. RTS. L.J. 217, 232 (1990). They further agreed:

[To] respect the right of individuals and groups to establish, in full freedom, their own political parties or other political organizations and provide such political parties and organizations with necessary legal guarantees to enable them to compete with each other on a basis of equal treatment before the law and by the authorities.

Copenhagen Document, *supra* note 92, ¶ 7.6, 29 I.L.M. at 1310. Although the Copenhagen Document does not legally bind its signatories, the breadth of its language and the emerging European consensus on human rights which it embodies have led Professor Buergenthal to describe it as "a document which, in its political scope and significance, is unmatched by other international human rights instruments." Buergenthal, *supra* note 92, at 231. The same states executed the CSCE Charter of Paris in November 1990. Conference on Security and Co-operation in Europe, Charter of Paris for a New Europe, Nov. 21, 1990, 30 I.L.M. 190 (1991) [hereinafter Charter of Paris]. The Charter does not explicitly discuss political parties, but it wholeheartedly embraces a western conception of democracy:

[The state parties] undertake to build, consolidate and strengthen democracy as the only system of government of our nations . . . Democratic government is based on the will of the people, expressed regularly through free and fair elections. Democracy has as its foundation respect for the human person and the rule of law. Democracy is the best safeguard of freedom of expression,

among parties to the Political Covenant suggests that a conflict between original and contemporary understandings of what constitutes a "genuine" election may never arise.

It would be a mistake, however, to end the search for interpretative guidance on the issue of party pluralism here. The other major source of participatory norms—U.N. election monitoring missions—has uniformly regarded party pluralism as essential to genuine elections. In Part III, this article argues that the standards developed by U.N. election monitors can be used to clarify the meaning of Article 25 and to help determine the legal status of one-party elections. Although the Political Covenant does not clearly require multi-party elections, the emerging law of participatory rights does not permit single-party elections.

2. *The First Protocol to the European Convention on Human Rights*

The European Convention on Human Right contains no provisions on participatory rights. However, Article 3 of the First Protocol to the Convention provides: "The High Contracting Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature."⁹³ Thus Article 3 is substantially narrower in scope than Article 25 of the Political Covenant, as Article 3 does not require universal suffrage or "genuine" elections, does not prohibit discrimination, and does not mention equal access to public service. Finally, Article 3 does not discuss political participation as an individual right, and therefore it does not appear to grant standing to individuals.

The European Commission and the European Court of Human Rights generally have disregarded these literal shortcomings, however, and have interpreted Article 3 to provide guarantees substantially similar to those contained in the Political Covenant. They have done so by viewing the Protocol's language through the lens of the European countries' common democratic heritage.⁹⁴ The assumption of political homogeneity indicates a profound

tolerance of all groups of society, and equality of opportunity for each person.

Id., 30 I.L.M. at 193-94. For further discussion of the Charter and the Copenhagen Document, see *infra* notes 152-162 and accompanying text.

⁹³ European Protocol, *supra* note 6, art. 3. The First Protocol entered into force on May 18, 1954, and the following states are parties: Austria, Belgium, Cyprus, Denmark, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Malta, Netherlands, Norway, Portugal, Sweden, Turkey, and the United Kingdom. 1985 Y.B. of Eur. Conv. H.R. 17. See generally P. VAN DIJK & G.J.H. VAN HOOF, *THEORY AND PRACTICE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 2 (2d ed. 1990).

⁹⁴ For example, the European Commission of Human Rights has held that Article 3 "presupposes the existence of a representative legislature, elected at reasonable intervals, as the basis of a democratic society." Greek Case, 1969 Y.B. Eur. Conv. on H.R. 179 (Eur. Comm'n of H.R.). The Commission, rejecting an argument that the Protocol requires proportional rather than majority representation, noted that both systems existed at the time the Convention was signed and that "[b]oth these forms of elections may

The Right to Political Participation

difference between the methods used to interpret the European Protocol and the Political Covenant. Unlike the U.N. Human Rights Committee, which rarely ventures beyond treaty language in its decisions on participatory rights, European tribunals have adduced extra-textual participatory rights to reflect the common expectations of the parties to the European Convention.⁹⁵

Article 3 of the Protocol applies to elections for "the legislature."⁹⁶ Thus, the Commission has held that Article 3 does not apply to Belgian Regional Councils which, under the Belgian constitution, exercise no legislative power.⁹⁷ Similarly, Article 3 does not apply to a body which only exercises legislative power delegated by a superior body or to a body whose power concerns only a small group of people.⁹⁸ As a general rule, the European Court has held that the nature of legislative power must "be interpreted in the light of the constitutional structure of the State in question," and therefore a "legislature" may mean more than just the national parliament.⁹⁹ Although neither the Court nor the Commission has considered whether Article 3 applies to the election of a president who is not a member of parliament, it is unlikely they would construe "legislature" to refer to a single individual.¹⁰⁰

a. *Rights Concerning Elections*

Article 3 requires the parties to hold "free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people."¹⁰¹ This language appears to impose a duty on states

be considered as a part of the common heritage of political traditions to which reference can be found in the Convention's Preamble." *X. v. United Kingdom*, App. No. 7140/75, 7 Eur. Comm'n H.R. Dec. & Rep. 95, 97 (1977). More recently the European Court of Human Rights upheld this principle by stating that Article 3 "enshrines a characteristic principle of democracy." *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 22 (1987).

95 Regional human rights enforcement is more effective in some respects than global attempts, because regional treaties are more likely to reflect shared normative expectations, heightening compliance by member states. However, not all regional human rights treaties provide the same degree of protection of participatory rights as the European Convention: the standards contained in the African Charter, for example, are significantly weaker. *See infra* notes 147-149 and accompanying text. If universal concepts of equal worth and dignity of all persons support political and human rights, it is difficult to justify excluding some regions of the world from high standards presumably applicable to all. Indeed, persons living in such regions would be *most* in need of the protections provided by the Political Covenant.

96 European Protocol, *supra* note 6, art. 3.

97 *W. v. Belgium*, App. No. 6745/74, 2 Eur. Comm'n H.R. Dec. & Rep. 110, 116 (1975). Therefore, a body which can propose bills but not enact them also is not a "legislature." *See VAN DIJK & VAN HOOF, supra* note 93, at 486.

98 *X. v. The Netherlands*, App. No. 9926/82, 32 Eur. Comm'n H.R. Dec. & Rep. 274, 281 (1983); *X. v. United Kingdom*, App. No. 5155/71, 6 Eur. Comm'n H.R. Dec. & Rep. 13, 13 (1976).

99 *Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 23.

100 *See VAN DIJK & VAN HOOF, supra* note 93, at 486 (arguing that Article 3 would not apply to election of president even if constitution required president's assent to bills passed by elected body).

101 European Protocol, *supra* note 6, art. 3.

rather than bestow a right on individuals.¹⁰² However, both the Commission and the Court have found an implicit guarantee of individual rights in the Protocol.¹⁰³ This interpretative leap has quite practical roots: denying standing of all voters and candidates to bring claims under Article 3 would limit claims to claims against other states under Article 24.¹⁰⁴ The Court has drawn on a number of sources¹⁰⁵ to conclude that Article 3 protects "subjective rights of participation—the 'right to vote' and the 'right to stand for election to the legislature.'"¹⁰⁶

Neither of these rights is unconditional. The Court recently announced a multi-faceted test to evaluate limitations on political rights: "[C]onditions [cannot] curtail the rights in question to such an extent as to impair their very essence and deprive them of their effectiveness In particular, such conditions must not thwart 'the free expression of the opinion of the people in the choice of the legislature.'"¹⁰⁷ The "free expression" requirement, the Court explained, "implies essentially—apart from freedom of expression (already protected under article 10 of the Convention)—the principle of equality

102 As a report of the Council of Europe stated in 1968:

[Article 3] does not guarantee that the individual shall enjoy a certain right The individual as citizen has at most the 'right' to expect the Contracting States to hold such elections, thus fulfilling the obligation assumed when ratifying the European Convention. But he can on no account deduce from the actual wording of the clause his own right to vote or his right as a citizen to take part in such elections.

COUNCIL OF EUROPE, REPORT OF THE COUNCIL OF EUROPE TO THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, 1968, § 5 (1968).

103 *Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 22-23 (1985). *W. v. Belgium*, 2 Eur. Comm'n H.R. Dec. & Rep. at 116.

104 Article 24 of the European Convention permits states to bring complaints concerning the practices of other state parties. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 24, Europ. T.S. No. 5, 213 U.N.T.S. 221 [hereinafter European Convention]. However, no state has brought such a claim under Article 3 of the First Protocol.

105 For example, the Court noted the relevance of the Preamble to the First Protocol, which ensures "the collective enforcement of certain *rights and freedoms* other than those" originally included in the Convention. European Protocol, *supra* note 6, pmb1. (emphasis added). As the Court also noted, Article 5 provides that the articles of the Protocol, including Article 3, "shall be regarded as additional Articles to the Convention," while the Preamble to the Fourth Protocol explicitly refers to the "rights and freedoms" protected in "Articles 1 to 3" of the First Protocol. Protocol (No. 4) to the European Convention on Human Rights, *open for signature* Sept. 16, 1963, Europ. T.S. No. 46. Finally, the Court in *Mathieu-Mohin* noted the repeated references to "political rights," the "right to free elections," and similar formulations in the *travaux préparatoires* for the First Protocol as evidence of the importance of these rights in the European system. 113 Eur. Ct. H.R. (ser. A) at 22-23.

106 *Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 22. The difficulty of reconciling this holding with the plain language of Article 3 became evident in the Commission's 1981 decision in *Liberal Party v. United Kingdom*, App. No. 8765/79, 21 Eur. Comm'n H.R. Dec. & Rep. 211 (1980). The Commission first stated that Article 3 guarantees "the *right* to vote and the *right* to stand for election to the legislature." *Id.* at 220 (emphasis added). It then stated that Article 3 "obliges the *Government* to hold free elections." *Id.* at 223 (emphasis added), but then reverts to its first reading: "Article 3 of the First Protocol gives an *individual right* to vote in the election provided for by this article." *Id.* at 224 (emphasis added). The actual language of Article 3 does not support the interpretation that it contains both a right and a duty.

107 *Mathieu-Mohin*, 113 Eur. Ct. H.R. (ser. A) at 23.

The Right to Political Participation

of treatment of all citizens in the exercise of their right to vote and their right to stand for election."¹⁰⁸

However, the Commission has held that states may restrict the rights to vote and to stand for election as long as the limitations are not arbitrary and do not infringe upon the free expression of opinion.¹⁰⁹ In contrast to the U.N. Human Rights Committee, the Commission held explicitly in 1969 that the abolition of political parties violated Article 3.¹¹⁰ Convicted prisoners serving jail sentences may be disqualified from voting,¹¹¹ as can imprisoned conscientious objectors,¹¹² and the Commission has upheld various residency requirements.¹¹³ In interpreting the right to stand for election, the Commission has upheld state subsidies to parties that attain a certain percentage of the vote,¹¹⁴ minimum signature requirements for a party to appear on a ballot,¹¹⁵ and prohibitions against members of one legislative body standing for election to another.¹¹⁶ The Commission also seems to follow an unexpressed *de minimis* rule: laws such as those excluding parties unable to muster 500 signatures are too inconsequential to alter the outcome of an election, and are therefore permissible.¹¹⁷ Such an approach toward small political movements is consistent with the Commission's longstanding view that Article 3 does not require a system of proportional representation; each party need not receive seats in the legislature in proportion to its percentage of the popular vote.¹¹⁸ The Commission apparently does not consider the exclusion from the legislature of a party with a small but demonstrable following to be discriminatory. Rather, such an exclusion is a legitimate exercise of discretion by a state.

b. *Non-Discrimination*

Article 3 of the Protocol does not contain an anti-discrimination provision, but the Commission has adjudicated claims of electoral discrimination under

108 *Id.* at 24.

109 *W. v. Belgium*, 2 Eur. Comm'n H.R. Dec. & Rep. at 110.

110 *Greek Case*, 1969 Y.B. Eur. Conv. on H.R. 179, 180 (Eur. Comm'n of H.R.).

111 *X. v. Federal Republic of Germany*, App. No. 2728/66, 25 Eur. Comm'n H.R. Dec. & Rep. 38, 40 (1967).

112 *H. v. The Netherlands*, App. No. 9914/82, 33 Eur. Comm'n H.R. Dec. & Rep. 242, 245-46 (1983).

113 *X. v. United Kingdom*, App. No. 7730/76, 15 Eur. Comm'n H.R. Dec. & Rep. 137 (1979); *X. v. United Kingdom*, App. No. 7566/76, 9 Eur. Comm'n H.R. Dec. & Rep. 121 (1976).

114 *X. v. Federal Republic of Germany*, App. No. 6850/74, 5 Eur. Comm'n H.R. Dec. & Rep. 90, 93 (1976).

115 *Id.* at 94.

116 *M. v. United Kingdom*, App. No. 10316/83, 37 Eur. Comm'n H.R. Dec. & Rep. 129, 135 (1984).

117 *See X. v. Federal Republic of Germany*, 5 Eur. Comm'n H.R. Dec. & Rep. at 94.

118 *X. v. United Kingdom*, App. No. 7140/75, 7 Eur. Comm'n H.R. Dec. & Rep. 95, 96-97 (1976). The Court affirmed this view in *Mathieu-Mohin v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 23-24 (1985).

Article 14, the general anti-discrimination clause of the European Convention.¹¹⁹ As with Article 2 of the Political Covenant,¹²⁰ Article 14 of the European Convention forbids discrimination on any ground, and the list of prohibited distinctions is not limited by restrictive phraseology. The European Court has confirmed the Commission's non-categorical approach to Article 3 by holding that Article 14 does not provide a remedy against all instances of inequality.¹²¹ Rather, the Court's test focuses on the reasons for differential treatment. The test asks whether:

[T]he facts found disclose a differential treatment; . . . the distinction does not have a legitimate aim, *i.e.*, it has no objective and reasonable justification having regard to the aim and effects of the measure under consideration; and . . . there is no reasonable proportionality between the means employed and the aim sought to be realised.¹²²

The test's initial criterion concerns not only facially discriminatory laws, but those laws that affect similarly situated persons differently. The British Liberal Party in a challenge to Great Britain's simple majority electoral system.¹²³ The Liberals claimed that the dominant parties' refusal to adopt a proportional system constituted discrimination based on political opinion and party affiliation. Liberal Party candidates received 13.8 percent of the popular vote in the May 1979 general election, but received only 1.7 percent of the seats in the House of Commons, thereby vastly diminishing the power the party would possess under a proportional system.¹²⁴ The Commission agreed that the system functioned to the Party's detriment, but found that the simple majority electoral system passed other elements of the test. As a result, the Commission found that differential electoral treatment was not *per se* discriminatory.¹²⁵

119 See *Liberal Party v. United Kingdom*, App. No. 8765/79, 21 Eur. Comm'n H.R. Dec. & Rep. 211 (1980) (reviewing claim that simple majority electoral system constitutes discrimination based on political opinion and party affiliation); *Lindsay v. United Kingdom*, App. No. 8364/78, 15 Eur. Comm'n H.R. Dec. & Rep. 247 (1979) (reviewing similar claim in regard to elections for European Parliament).

Article 14 provides: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." European Convention, *supra* note 104, art. 14. The Court has held that Article 14 does not operate independently of other Convention provisions. *Abdulaziz, Cabales and Balkandali v. United Kingdom*, 94 Eur. Ct. H.R. (ser. A) at 35 (1985). Article 14 therefore does not itself act as a source of rights. However, if a party alleges a violation of another article of the Convention, the Court or the Commission will conduct an Article 14 inquiry even if the party ultimately fails to prove a violation of that other article. *Id.* Conversely, once a tribunal finds a violation of another article, it will not consider claims under Article 14. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at 16 (1979).

120 See *supra* note 61 (quoting Article 2).

121 Case Relating to Certain Aspects of the Laws on the Use of Languages in Belgium (Belgian Linguistics Case), 6 Eur. Ct. H.R. (ser. A) at 34 (1968).

122 *Geillustreerde Pers N.V. v. The Netherlands*, App. No. 5178/71, 8 Eur. Comm'n H.R. Dec. & Rep. 5, 14-15 (1976); see *VAN DIJK & VAN HOOFF*, *supra* note 93, at 542 (discussing test).

123 *Liberal Party v. United Kingdom*, App. No. 8765/79, 21 Eur. Comm'n H.R. Dec. & Rep. 211, 221 (1980).

124 *Id.* at 213.

125 *Id.* at 221.

The Right to Political Participation

The second criterion, whether an "objective and reasonable justification" supports differential treatment, has been the crucial issue in most claims under Article 14. Review of this standard requires the Court or Commission to strike a "fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention" when reviewing a state's justifications for differential treatment.¹²⁶ In *Liberal Party* the Commission found no Article 14 violation, reasoning that "[t]he simple majority system is one of the two basic electoral systems. It is or has been used in ma[n]y democratic countries. It has always been accepted as allowing for the 'free expression of the opinion of the people' even if it operates to the detriment of small parties."¹²⁷ The Commission went on to note that the simple majority system is followed in states "which know of a fundamental right to equality of voting [yet] still admit the simple majority system as complying with this requirement."¹²⁸ This decision suggests that the Commission will view distinctions which have long been part of Europe's common political heritage as "objective and reasonable."¹²⁹

The third criterion, proportionality, has received somewhat less attention from the European Court and Commission, perhaps because the Court and Commission can only determine whether a restriction is reasonably proportional to its goal on a case-by-case basis.¹³⁰

3. *The American Convention on Human Rights*

Article 23 of the American Convention explicitly tracks Article 25 of the Political Covenant, varying only in minor respects.¹³¹ Yet despite textual

126 *Belgian Linguistics Case*, 6 Eur. Ct. H.R. (ser. A) at 44.

127 *Liberal Party*, 21 Eur. Comm'n H.R. Dec. & Rep. at 225.

128 *Id.*

129 In *Lindsay v. United Kingdom*, App. No. 8364/78, 15 Eur. Comm'n H.R. Dec. & Rep. 247 (1979), the only other case decided under Article 14, the Commission rejected a challenge by members of the British Ulster Dominion Party to the use of a proportional representation system in Northern Ireland for elections to the European Parliament, on the grounds that the system's purpose of protecting minority rights was objective and reasonable.

130 In *Lindsay*, for example, the Commission simply mentioned the requirement without analysis: "it does not appear that there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised." *Id.* at 252.

131 Article 23 provides:

- 1) Every citizen shall enjoy the following rights and opportunities:
 - a) to take part in the conduct of public affairs, directly or through freely chosen representatives;
 - b) to vote and to be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters; and
 - c) to have access, under general conditions of quality, to the public service of his country.
- 2) The law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph only on the basis of age, nationality, residence, language, education, civil

similarities, the unique problems in the region have sent the Inter-American Commission on Human Rights in its own interpretive directions. The Inter-American Commission has not focused on elucidating particular treaty terms, unlike both the U.N. Human Rights Commission and the European tribunals. Its reports often concern states in which the ruling party has suspended representative government entirely and is engaged in widespread violations of other human rights.¹³² Many of these reports involve actions which clearly violate Article 23, such as fraud, intimidation, and misuse of government property during election campaigns, whereas few of the reports contain a close textual analysis of the American Convention. The Commission may face narrower issues in the future now that all OAS member states except Haiti are ruled by elected governments.

The Commission's review of the 1990 elections in Mexico presents its most significant decision on participatory rights, as it held that violations of these rights in the Inter-American system are emphatically a matter of international concern.¹³³ The Commission rejected Mexico's arguments that because the Convention's participatory rights provisions impinge upon state sovereignty, they should be implemented gradually, and that only Mexican courts may determine the validity of Mexican law or practices.¹³⁴

According to the Commission, the central issue under Article 23 is whether an election is "authentic."¹³⁵ The Commission has defined an "authentic" election as one occurring in the context of "a legal and institutional structure conducive to election results that reflect the will of the voters."¹³⁶ The Com-

and mental capacity, or sentencing by a competent court in criminal proceedings.

American Convention, *supra* note 6, art. 23; *cf.* Political Covenant, *supra* note 6, art. 25. The following states are parties to the American Convention as of 1991: Argentina, Barbados, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Suriname, Uruguay and Venezuela. The United States has neither signed nor ratified the Convention. *See* Annual Report of the Inter-American Commission on Human Rights 1990-1991, OEA/ser.L.V/II.79, rev. 1, at 539, (1991).

132 *See Report on the Situation of Human Rights in Haiti*, OEA/ser.L/V/II.77, doc. 18, rev. 1, at 9-27 (1991) [hereinafter *Haiti Report*]; *Report on the Situation of Human Rights in Panama*, OEA/ser.L/V/II.76, doc. 16, rev. 2, at 47-61 (1989) [hereinafter *Panama Report*]; *Report on the Situation of Human Rights in Haiti*, OEA/ser.L/V/II.74, doc. 9, rev. 1, at 53-105 (1988); *Report on the Situation of Human Rights in Paraguay*, OEA/ser.L/V/II.71, doc. 19, rev. 1, at 93-113 (1987) [hereinafter *Paraguay Report*]; *Report on the Situation of Human Rights in Chile*, OEA/ser.L/V/II.66, doc. 17, at 253-83 (1985) [hereinafter *Chile Report*]; *The Situation of Human Rights in Cuba: Seventh Report*, OEA/ser.L/V/II.61, doc. 29, rev. 1, at 25-37 (1983) [hereinafter *Cuba Report*]; *Annual Report of the Inter-American Commission on Human Rights 1979-1980*, OEA/ser.L/V/II.50, doc. 13, rev. 1, at 120-24 (1980) [hereinafter *1979-1980 Annual Report*] (reviewing status of human rights in Uruguay).

133 Mexico Elections Decision, Cases 9768, 9780, 9828, Inter-Am. C.H.R. 97, 97, OEA/ser.L/V/II.77, doc. 7, rev. 1 (1990).

134 *Id.* at 103-05.

135 The Commission has not explained its choice of the term "authentic," despite the fact that Article 23 of the American Convention and Article 25 of the Political Convention solely employ the term "genuine."

136 *Panama Report*, *supra* note 132, at 47; *see also Mexico Elections Decision*, Inter-Am. C.H.R. at 108 ("[T]here must be some consistency between the will of the voters and the result of the election.

The Right to Political Participation

mission has stated that excessive government intrusions into the political process warp and delegitimize electoral outcomes,¹³⁷ and held that states should strive to prevent "a disproportionate presence of the government" in electoral activities.¹³⁸ An authentic election, therefore, is one in which no barriers, such as direct intimidation, fraud, and harassment, come between the popular will and the election's results.¹³⁹ If necessary, an independent electoral commission should verify voting rolls, tabulate ballots, and monitor campaign conduct.¹⁴⁰

The most important prerequisite to an authentic election is the absence of coercion or intimidation of voters.¹⁴¹ An institutional structure immune from manipulation by the incumbent government provides the best guarantee that such coercion will not occur.¹⁴² In the states investigated, electoral coercion often occurs through restrictions on political parties, which range from bans on all opposition groups or parties professing certain ideologies to restrictions on specific party activities.¹⁴³ The Commission has concluded that one-party states are inherently coercive, and by implication such states are incapable of holding authentic elections.¹⁴⁴ The Commission argues that pluralism prevents individuals or groups from acquiring monopolies on political power.¹⁴⁵ The absence of pluralism results in governments which are estranged from the views of their citizens, and therefore do not embody an "authentic" popular choice.¹⁴⁶

In the negative sense the characteristic implies an absence of coercion which distorts the will of the citizens.").

137 *1979-1980 Annual Report*, *supra* note 132, at 124; *Chile Report*, *supra* note 132, at 282; *Panama Report*, *supra* note 132, at 115; *Paraguay Report*, *supra* note 132, at 113.

138 *Mexico Elections Decision*, Inter-Am. C.H.R. at 112.

139 *Panama Report*, *supra* note 132, at 47 (suggesting that laws governing electoral campaigns also should be shaped by popular input).

140 *Panama Report*, *supra* note 132, at 48-57.

141 *Haiti Report*, *supra* note 132, at 10; *Mexico Elections Decision*, Inter-Am. C.H.R. at 108.

142 *Cuba Report*, *supra* note 132, at 36-7; *Panama Report*, *supra* note 132, at 47.

143 See *Cuba Report*, *supra* note 132, at 37 (noting that party restrictions impede "the existence of healthy ideological and Party pluralism, which is one of the bases of a democratic system of government"); *Panama Report*, *supra* note 132, at 50; *Paraguay Report*, *supra* note 132, at 97.

144 See *Cuba Report*, *supra* note 132, at 35 ("[T]he intolerance of the groups in power toward any form of political opposition represents the principal limitation on participation.").

145 INTER-AMERICAN COMM'N ON HUMAN RIGHTS, TEN YEARS OF ACTIVITIES 1971-1981, 334 (1982) [hereinafter INTER-AMERICAN COMM'N ON HUMAN RIGHTS]; *Mexico Elections Decision*, Inter-Am. C.H.R. at 107.

146 *Chile Report*, *supra* note 132, at 282. Encroachments by military leaders also impugn the integrity of representative institutions. In Uruguay, for example, a constitution drafted by a committee of the armed forces permitted only a single presidential candidate who must receive military approval. The constitution also vested all executive power in a council composed mainly of military officers, required military approval for the national budget, and stacked the national Constitutional Tribunal with active military officers. *1979-1980 Annual Report*, *supra* note 132, at 122-24. The Commission reported after its 1980 investigation that this constitutional scheme deprived Uruguayans of participatory rights, because the government they could elect wielded little if any actual power. *Id.* at 123.

4. *Other International Instruments Guaranteeing Participatory Rights*

a. *The African Charter on Human and Peoples' Rights*

Article 13 of the African Charter guarantees participatory rights, but because the provision lacks enforceable standards its utility remains limited. Article 13 provides that "[e]very citizen shall have the right to freely participate in the government of his country, either directly or through freely chosen representatives, in accordance with the provisions of the law."¹⁴⁷ The "freely chosen" requirement implies the right to vote without coercion or intimidation. However, unlike the Political Covenant or the European Convention, the African Charter fails to stipulate that an electoral choice must reflect the free expression of the electors' will or the opinion of the people. The absence of such a provision suggests the African Charter permits one-party elections.¹⁴⁸ Article 13 also lacks provisions on discrimination, universal suffrage, and a secret ballot. Finally, the reservation that all rights need only be "in accordance with the provisions of the law" suggests that Article 13 requires nothing more of states than what is already required by their national constitutions. If so, then Article 13 is almost entirely useless as an international standard of conduct by which each state is to measure the legality of its actions.¹⁴⁹

b. *Council on Security and Co-operation in Europe Accords*

The Council on Security and Co-operation in Europe (CSCE) recently adopted three documents containing lengthy and highly detailed provisions on participatory rights. The three documents are the culmination of a long negotiating process which began with the 1975 CSCE Final Act (generally referred to as the Helsinki Accords).¹⁵⁰ While CSCE states did not originally intend

147 African Charter, *supra* note 6, art. 13. Lack of background materials makes investigation of rights articulated in the African Charter difficult. Transcripts of a crucial drafting meeting have yet to be released to the public, and the decisions of the African Commission on Human Rights are kept confidential to protect the safety of the petitioners. See Daniel C. Turack, *The African Charter on Human and Peoples' Rights: Some Preliminary Thoughts*, 17 AKRON L. REV. 361, 377 (1984). The text of the Charter alone, however, suggests that it provides guarantees substantially narrower in scope than those found in the American and European Conventions or the Political Covenant.

148 The "freely chosen" clause does not necessarily contradict this interpretation, as one could argue that because the Charter does not require the candidate pool or election results to mirror accurately the opinions of the electorate, a government can limit the number of parties and candidates. The "freely chosen" clause could require merely an absence of coercion in any election, including one involving pre-selected parties or candidates.

149 The African Commission on Human Rights might defy this reading of Article 13 by referring to Article 60 of the African Charter, which directs the Commission to "draw inspiration from international law on human and peoples' rights" and in particular the Universal Declaration of Human Rights and "other instruments adopted by the United Nations."

150 Conference on Security and Co-operation in Europe Final Act (Helsinki Accords), Aug. 1, 1975, 14 I.L.M. 1292 (1975). See generally Buergethal, *supra* note 92, at 217-20 (providing overview of

The Right to Political Participation

for the Helsinki process to produce legally binding treaties,¹⁵¹ provisions in subsequent agreements read as obligatory rather than merely hortatory standards.

For example, the Copenhagen Document, concluded on June 29, 1990, begins with a number of broad statements affirming the importance of representative government.¹⁵² It then sets out principles directing the structure of all electoral systems.¹⁵³ The document also sets standards for the observation of elections, a provision intended to "enhance the electoral process."¹⁵⁴ Further, the Charter of Paris, signed on November 21, 1990 by the CSCE heads of state, contains broad endorsements of participatory rights.¹⁵⁵ The Charter also creates an institutional structure to oversee their implementation by establishing an Office for Free Elections that is charged with the task of implementing the provisions of the Copenhagen Document concerning participatory rights.¹⁵⁶ Its duties include compilation of information on elections in participating states, facilitation of election observation, and organization of educational seminars on election procedures and democratic institutions.¹⁵⁷

negotiating process).

151 See Alexander C. Kiss & Mary F. Dominick, *The International Legal Significance of the Human Rights Provisions of the Helsinki Final Act*, 13 VAND. J. TRANSNAT'L L. 293 (1980) (describing history of CSCE process).

152 See Copenhagen Document, *supra* note 92, pmb1., 29 I.L.M. at 1307 ("[The signatories] welcome the commitment expressed by all participating States to the ideals of democracy and political pluralism as well as their common determination to build democratic societies based on free elections and the rule of law.").

153 *Id.* ¶¶ 5.1-5.4, 29 I.L.M. at 1308. Paragraph 7 elaborates these principles, and it is worth quoting at length from the Document for its thorough exposition of participatory rights. Paragraph 7 requires participating states to: "hold free elections at reasonable intervals" (¶ 7.1); "permit all seats in at least one chamber of the national legislature to be freely contested in a popular vote" (¶ 7.2); "guarantee universal and equal suffrage to adult citizens" (¶ 7.3); "ensure that votes are cast by secret ballot or by equivalent free voting procedure, and . . . are counted and reported honestly with the official results made public" (¶ 7.4); "respect the right of citizens to seek political or public office . . . without discrimination" (¶ 7.5); "respect the right of individuals and groups to establish, in full freedom, their own political or other political organizations and provide such political parties and organizations with the necessary legal guarantees to enable them to compete with each other on a basis of equal treatment" (¶ 7.6); "ensure that law and public policy work to permit political campaigning to be conducted in a fair and free atmosphere in which neither administrative action, violence nor intimidation bars the parties and the candidates from freely presenting their views and qualifications, or prevents the voters from learning and discussing them or from casting their vote free of fear of retribution" (¶ 7.7); "provide that no legal or administrative obstacle stands in the way of unimpeded access to the media on a non-discriminatory basis for all political groupings and individuals wishing to participate in the electoral process" (¶ 7.8); and "ensure that candidates who obtain the necessary number of votes required by law are duly installed in office and are permitted to remain in office until their term expires or is otherwise brought to an end in a manner that is regulated by law in conformity with democratic parliamentary and constitutional procedures" (¶ 7.9), 29 I.L.M. at 1310.

154 *Id.* ¶ 8, 29 I.L.M. at 1310. This provision permits representatives of CSCE states and "any appropriate private institutions and organizations" to observe national elections in participating states.

155 The Charter succinctly states that signatories "undertake to build, consolidate and strengthen democracy as the only system of government of our nations." Charter of Paris, *supra* note 92, pmb1., 30 I.L.M. at 193.

156 *Id.* art.1, § 6, 30 I.L.M. at 195.

157 *Id.*

The CSCE dramatically strengthened the normative force of its standards in October 1991 through the Moscow Document.¹⁵⁸ Drafted following the attempted Soviet coup, the Moscow Document condemns "unreservedly forces which seek to take power from a representative government of a participating State against the will of the people as expressed in free and fair elections."¹⁵⁹ In the event of a coup against an elected regime, the Document directs member states not to recognize the usurping force.¹⁶⁰ This commitment repudiates the time-honored *de facto* control test, under which any government in control of a nation is recognized by other states. In its place, the Moscow Document substitutes a Wilsonian notion of democratic legitimacy.¹⁶¹ The Document's remarkable affirmation that human rights issues "do not belong exclusively to the internal affairs of the State concerned" underscores the fact that the signatories consider a regime's legitimacy a question of international concern, effectively merging notions of internal and external legitimacy.¹⁶²

5. *Summary of Treaty-Based Norms*

The preceding review of global and regional treaty systems reveals that a free, fair and legally sufficient election consists of the following four elements as a matter of treaty law: universal and equal suffrage; a secret ballot; elections at reasonable periodic intervals; and an absence of discrimination against voters, candidates, or parties. Many inconsistencies remain, however, such as the legitimacy of one-party elections or restrictions on coercion, intimidation, or harassment of voters. The next Part below examines a substantial body of state practice that contributes to the development of participatory norms—the monitoring of national elections and plebiscites. Election monitoring reports provide essential data for resolving interpretive ambiguities in treaty texts.

III. INTERNATIONAL ELECTION MONITORING:

THE ELABORATION AND ENFORCEMENT OF PARTICIPATORY RIGHTS

The United Nations has monitored a variety of elections in the post-war era, developing standards for "free and fair" elections that approximate quite closely the participatory rights guaranteed by the Political Covenant and other instruments. Interestingly, the United Nation's authority to do so was not based

158 Conference on Security and Co-operation in Europe: Document of the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact-Finding, Oct. 3, 1991, 30 I.L.M. 1670 (1991) [hereinafter Moscow Document].

159 *Id.* ¶ 17.1. 30 I.L.M. at 1677.

160 *Id.* ¶ 17.2., 30 I.L.M. at 1677.

161 *See supra* notes 27-43 and accompanying text (discussing recognition standards).

162 *Id.* pmb1., 30 I.L.M. at 1672 (noting that respect for human rights "constitutes one of the foundations of the international order").

The Right to Political Participation

on the treaties previously discussed, but on the U.N.'s peacekeeping and decolonization powers and on mission-specific resolutions reflecting the invitations of the monitored states. This lack of an explicitly normative function for election monitoring may be attributed, at least in part, because U.N. election monitoring activities preceded the development of the international human rights treaties. The U.N. standards specifically address several questions left unresolved by ambiguous treaty language and are therefore useful in interpreting the human rights treaties.¹⁶³ Cold War tensions, which relegated political rights to the bottom of the human rights agenda, were also a factor. Yet the coincidence of purpose and principles between monitoring activities and treaty norms suggests that future monitoring missions should be explicitly based upon the treaties themselves, in order to better link treaty-based rights with a viable enforcement mechanism.

A. Election Monitoring Prior to 1945

Regular national elections did not become common in Europe until the mid-nineteenth century, and it so is not surprising that foreign observers monitored few national elections before the First World War. While foreign observers monitored several plebiscites on national self-determination during this period,¹⁶⁴ these early votes did not generate a consistent set of criteria by which to judge elections.¹⁶⁵

The plebiscites held after 1918, however, produced a more consistent set of monitoring criteria. The Treaty of Versailles provided for referenda in ten territories of mixed ethnic composition.¹⁶⁶ The treaties did not establish spe-

163 Article 31(1) of the Vienna Convention on the Law of Treaties provides: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and 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 [hereinafter Vienna Convention].

164 See LAWRENCE T. FARLEY, PLEBISCITES AND SOVEREIGNTY 4 (1986) (noting instances of pre-World War I election monitoring). Several well-known plebiscites concerning the unification of the Italian provinces were held from 1848 to 1870. Other plebiscites of a similar nature followed, each involving questions of territorial affiliation: Moldavia and Wallachia (1857), the Ionian Islands (1863), St. Thomas and St. John in the West Indies (1866), St. Bartholomew in the West Indies (1877), and Norway (1905). See generally SARAH WAMBAUGH, A MONOGRAPH ON PLEBISCITES WITH A COLLECTION OF DOCUMENTS 58-169 (1920) (discussing early plebiscites). In addition, a limited number of property-owning citizens in several territories under French control in the latter part of the 18th century were asked whether they favored annexation by France or another political affiliation. The plebiscites were conducted in Avignon, Savoy, Nice, the Belgian Communes, the Rhine Valley, Alsace, and the Republics of Mulhausen and Geneva. *Id.* at 33-57. The Geneva vote, however, can hardly be called a plebiscite: a group of citizens assembled in a meadow, surrounded by 1600 French soldiers, who voted to terminate the existence of their republic. *Id.* at 57.

165 Early plebiscites generally were seen as territorial disputes between hegemonic powers, rather than opportunities for people to determine their own political future. See FARLEY, *supra* note 164, at 5.

166 Treaty of Versailles, June 28, 1919, 225 Consol. T. S. 189, 2 Bevens 43. Plebiscites were held in Schleswig (1920), Allenstein and Marienwerder (1920), Klagenfurt Basin (1920), Upper Silesia (1921), Sopron (1921), and the Saar Territory (1935). The Allies planned but did not carry out plebiscites in

cific election guidelines, requiring only that troops from the various interested states be evacuated from the plebiscite zones and that the "freedom, fairness and secrecy" of the ballot be ensured.¹⁶⁷ Instead, the Allied Plebiscite Commissions developed their own standards to implement the treaty requirements: the first electoral criteria promulgated by a diverse international body. The Commission's first task was to establish order. They did so by establishing supervisory control over their zones and enforcing penalties for intimidation, bribery, fraud, and other offenses connected with registration and voting.¹⁶⁸ They then granted the franchise to the inhabitants of a territory without regard to sex, property ownership, or literacy.¹⁶⁹ Campaigning occurred by groups on both sides of the ballot question with only modest restrictions,¹⁷⁰ and voting occurred by secret ballot.¹⁷¹ These minimal requirements represent the standard for more comprehensive monitoring practices under the United Nations system.

B. Monitoring Under the United Nations System

The recognition of a right to self-determination in the U.N. Charter¹⁷² and subsequent General Assembly resolutions¹⁷³ vastly increased the scope of multinational election monitoring. The new right required the development of mechanisms to ascertain the preferences of peoples emerging from colonialism. Rather than deferring to the decisions of established local leaders or colonial powers, the United Nations sought to follow democratic standards in the decolonization process. These missions constitute a substantial source of

Teschen, Spisz, and Orava. *See generally* 1 SARAH WAMBAUGH, *PLEBISCITES SINCE THE WORLD WAR* 46-411 (1933) (discussing plebiscites arising from Treaty of Versailles).

167 Treaty of Versailles, *supra* note 166, art. 88 (Annex art. 3), 225 Consol. T.S. at 239 (Upper Silesia); *see also id.* art. 49 (Annex art. 34), 225 Consol. T.S. at 222 (Saar Basin); art. 97, 225 Consol. T.S. at 242 (East Prussia); art. 109, 225 Consol. T.S. at 250-51 (Schleswig). The provisions concerning Upper Silesia also granted the Allied Plebiscite Commission the power "to order the expulsion of any person who may in any way have attempted to distort the result of the plebiscite by methods of corruption or intimidation." *Id.* art. 88 (Annex art. 3), 225 Consol. T.S. at 239.

168 *See* 1 WAMBAUGH, *supra* note 166, at 442-54, 482; D.W. BOWETT, *UNITED NATIONS FORCES: A LEGAL STUDY* 8-11 (1964).

169 1 WAMBAUGH, *supra* note 166, at 474-77.

170 1 *Id.* at 468-69. The sole exception occurred in Sopron, where the Allied Plebiscite Commission prohibited "propaganda" of any kind. 1 *Id.* at 468. This regulation was, however, widely ignored in practice. 1 *Id.* at 285-86.

171 1 *Id.* at 481.

172 U.N. CHARTER art. 1, ¶ 2 (declaring that United Nations to be dedicated to "develop[ing] friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples"); *id.* art. 55 (same).

173 *See, e.g., Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, at 66, para. 2, U.N. Doc. A/4684 (1960) (declaring that all peoples "have the right to self-determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development").

The Right to Political Participation

law, as they mark an area of consistent international consensus on participatory rights.

1. *The Decolonization Process*

The drafters of the U.N. Charter had colonial territories foremost in mind when proclaiming a right to self-determination.¹⁷⁴ The Charter explicitly requires member states to "develop self-government" in their "non-self-governing territories" and to "take due account of the political aspirations of the peoples, and to assist them in the progressive development of their free political institutions."¹⁷⁵ The General Assembly in 1953 adopted a resolution that outlined criteria for the determination of "self-government"¹⁷⁶ and that proposed a number of alternatives to colonial status, to be decided by the democratic choice of a territory's population.¹⁷⁷ In 1960 the General Assembly further clarified the meaning of "non-self-governing" by reaffirming the popular sovereignty requirements of the 1953 resolution:¹⁷⁸ self-government by integration with an independent state, for example, should be accomplished "through informed and democratic processes, impartially conducted and based on universal adult suffrage."¹⁷⁹ These principles guided the organization of plebiscites in a number of non-self-governing territories,¹⁸⁰ and in all but one

174 See Humphry, *supra* note 14, at 195-96.

175 U.N. CHARTER art. 73(b).

176 *Factors Which Should Be Taken Into Account in Deciding Whether a Territory Is or Is Not a Territory Whose People Have Not Yet Attained a Full Measure of Self-Government*, G.A. Res. 742 (VIII), U.N. GAOR, 8th Sess., Supp. No. 17, Annex, at 22-23, U.N. Doc. A/263 (1953).

177 See *id.* pt. 1(B)(1) (stating that full independence requires "[c]omplete freedom of the people of the Territory to choose the form of government which they desire"). The resolution also declares that states wishing to establish "other separate systems of self-government" ascertain the opinion of the population through "informed and democratic processes," *Id.* pt. 2(A)(1), whereas a territory forming an association with another state must make constitutional provision for "[u]niversal and equal suffrage, and free periodic elections, characterized by an absence of undue influence over and coercion of the voter or of the imposition of disabilities on particular political parties." *Id.* pt. 3(C)(1). The resolution explains "an absence of undue influence and coercion" by listing such factors as the existence of more than one political party in the territory, a secret ballot, the absence of marital law, and freedom to criticize the incumbent government. *Id.*

178 See *Declaration on the Granting of Independence to Colonial Countries and Peoples*, G.A. Res. 1541 (XV), U.N. GAOR, 15th Sess., Supp. No. 16, at 29, U.N. Doc. A/4684 (1960).

179 *Id.* Annex Principle IX(b); see also *id.* Annex Principle VII(a) (stating that self-government through association with another state "should be the result of a free and voluntary choice by the peoples of the territory concerned expressed through informed and democratic processes").

180 See, e.g., UNITED NATIONS, GENERAL ASSEMBLY, SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, REPORT OF THE UNITED NATIONS VISITING MISSION TO OBSERVE THE GENERAL ELECTIONS IN THE TURKS AND CAICOS ISLANDS, U.N. Doc. A/AC.109/664 (1981); UNITED NATIONS, GENERAL ASSEMBLY, SPECIAL COMMITTEE ON THE SITUATION WITH REGARD TO THE IMPLEMENTATION OF THE DECLARATION ON THE GRANTING OF INDEPENDENCE TO COLONIAL COUNTRIES AND PEOPLES, REPORT OF THE UNITED NATIONS MISSION TO OBSERVE THE ELECTIONS IN THE NEW HEBRIDES, U.N. Doc. A/34/852 Annex (1980) [hereinafter *New Hebrides Report*]; *Report of the Representative of the Secretary-General in West Irian, Submitted Under Article XXI, Paragraph I, of the Agreement Between the Republic of Indonesia and the Kingdom of the Netherlands Concerning West New Guinea (West Irian)*,

case (West Irian) the plebiscite commissioner reported to the Secretary-General that the vote was conducted freely and fairly.¹⁸¹

The General Assembly explicitly outlined monitoring standards in authorizing several of the missions. For example, the General Assembly sought to "ensure full respect for democratic freedoms . . . [and] universal adult suffrage" for the plebiscite in Equatorial Guinea.¹⁸² The General Assembly likewise urged Britain to abolish a regime based upon emergency powers and declare an amnesty for all imprisoned and exiled political workers in Rwanda-Urundi, in order that the population of the territory could "resume normal, democratic political activity before the elections."¹⁸³ It also recommended voting by universal adult suffrage in French Togoland and Western Samoa.¹⁸⁴

U.N. GAOR, 24th Sess., Annex II, Agenda Item 98, at 3, U.N. Doc. A/7723 Annex I (1969) [hereinafter *West Irian Report*]; *Report of the United Nations Representative for the Supervision of the Elections in the Cook Islands*, U.N. GAOR, 20th Sess., Annex 1, Agenda Items 23 & 24, at 2, U.N. Doc. A/5962 (1965) [hereinafter *Cook Islands Report*].

181 See, e.g., *Cook Islands Report*, *supra* note 180, at 149, 151 ("I was satisfied that the people were able to exercise their rights, while the Observers and I were in the Territory, prior to and during polling in complete freedom. . . . [T]he counting of the votes was correct and the reporting of the results was accurate.").

The U.N. Trusteeship Council also institutionalized the principle of self-determination. The Council is charged with the administration of the colonies of defeated World War II powers, and the territories formerly under League of Nations mandate. U.N. CHARTER art. 77, ¶ 1. In order to further the trust territories' "progressive development towards self-government or independence" in accordance with "the freely expressed wishes of the peoples concerned," U.N. CHARTER art. 76, the Council has dispatched missions to observe eight plebiscites or elections. See *Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands*, U.N. TCOR, 53d Sess., Supp. No. 2, at 1, U.N. Doc. T/1885 (1986); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands*, U.N. TCOR, 51st Sess., Supp. No. 2, at 1-2, U.N. Doc. T/1860 (1984); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Northern Mariana Islands, Trust Territory of the Pacific Islands*, U.N. TCOR, 43d Sess., Supp. No. 2, at 2-4, U.N. Doc. T/1771 (1976); *Question of the Future of Rwanda-Urundi: Report of the United Nations Commission for Rwanda-Urundi*, U.N. GAOR, 16th Sess., Annex 2, Agenda Item 49, at 1, U.N. Doc. A/4994 (1961) [hereinafter *Rwanda-Urundi Report*]; *Report of the United Nations Plebiscite Commissioner for Western Samoa*, U.N. GAOR, 16th Sess., Annex 1, Agenda Item 48, at 48, U.N. Doc. T/1564 (1961) [hereinafter *Western Samoa Report*]; *Report of the United Nations Plebiscite for the Cameroons Under United Kingdom Administration*, U.N. GAOR, 14th Sess., Annex 1, Agenda Item 41, at 1, U.N. Doc. A/4314 (1959); *Report of the United Nations Commissioner for the Supervision of the Elections in Togoland Under French Administration*, U.N. GAOR, 13th Sess., Annex 1, Addendum to Agenda Item 40, at 1, U.N. Doc. A/3957 (1958); *The Future of Togoland Under British Administration: Report of the United Nations Plebiscite Commissioner*, U.N. TCOR, 18th Sess., 733d mtg. at 279, U.N. Doc. T/1258 (1956) [hereinafter *British Togoland Report*].

182 *Question of Equatorial Guinea*, G.A. Res. 2355, U.N. GAOR, 22d Sess., Supp. No. 16, 1641st plen. mtg. at 54, U.N. Doc. A/6716 (1967).

183 *Question of Rwanda-Urundi*, G.A. Res. 1579, U.N. GAOR, 15th Sess., Supp. No. 16, at 34, U.N. Doc. A/4684 (1960).

184 See *The Future of Togoland under French Administration*, G.A. Res. 1182, U.N. GAOR, 12th Sess., Supp. No. 18, 724th plen. mtg. at 27, U.N. Doc. A/3805 (1957). This question also arose in Western Samoa, where the Trusteeship Council and Samoan leaders disagreed on whether the franchise should be restricted to heads of families in deference to Samoan tradition. The Council argued that Samoa should follow "the normal practice of secret ballot for legislative elections," *Western Samoa Report*, *supra* note 181, at 5, and the General Assembly eventually resolved that the elections should be conducted by universal adult suffrage. See *Question of the Future of Western Samoa*, G.A. Res. 1569 U.N. GAOR, 15th Sess., Supp. No. 16, 724th plen. mtg. at 34, U.N. Doc. A/4684 (1960).

The Right to Political Participation

Of particular interest is the plebiscite in West Irian, in which the General Assembly approved an "act of self-determination to be carried out *in accordance with international practice*," thereby explicitly acknowledging the existence of an accepted international body of participatory standards.¹⁸⁵

There is little uniformity in the observers' reports on participatory rights, though party pluralism formed a recurrent concern. Some reports merely describe the extent of the franchise, limitations on public debate, fairness in vote tabulation, and other such issues without critical comment.¹⁸⁶ However, monitoring standards have evolved over the decades, as evidenced by the differences between the West Irian and the Namibian missions.

a. *West Irian*

West Irian, also known as West New Guinea, was a former Dutch colony claimed by Indonesia since its independence in 1949.¹⁸⁷ Indonesia agreed with the Netherlands in 1962 to allow an "act of free choice," in which the people of West Irian would decide whether to remain part of Indonesia.¹⁸⁸ The arrangements for the "act" were to be made "with the assistance and participation" of a U.N. representative as well as local representative councils. Further, the agreement called for universal suffrage. The entire act was to be "carried out in accordance with international practice"¹⁸⁹ and the United Nations and Indonesia were to "guarantee fully the rights, including the rights of free speech, freedom of movement and of assembly, of the inhabitants of the area."¹⁹⁰

The General Assembly approved the agreement soon after it was signed,¹⁹¹ but the Secretary-General did not appoint a representative to observe the act until 1969. The representative soon found himself in ongoing

185 This language (with emphasis added) comes from a 1962 agreement between the Netherlands and Indonesia, creating a role for U.N. election monitors. *Agreement Concerning West New Guinea (West Irian)*, Aug. 15, 1962, Indon-Neth., art 18, 437 U.N.T.S. 273, 282 [hereinafter *West Irian Agreement*]. The General Assembly accepted this role shortly thereafter. G.A. Res. 1752, U.N. GAOR, 17th Sess., Supp. No. 17, at 70, U.N. Doc. A/5217 (1962). See *infra* notes 187-201 and accompanying text.

186 See, e.g., *Cook Islands Report*, *supra* note 180, at 24 (noting that five political parties contested election); *Report of the United Nations Special Mission to Observe the Act of Self-Determination in Niue*, U.N. Doc. A/9623/rev. 1, at 26 (1974) [hereinafter *Niue Report*] (noting wide public discussion of issues prior to referendum). In Equatorial Guinea, for example, the mission head merely noted the importance of "all political groups and candidates being able to enjoy freedom of assembly, being able to conduct their political campaigns, being able freely to express their views on all issues related to the elections, having equal access to the media of communication and having equal opportunity to present lists of candidates." *United Nations Mission for the Supervision of the Referendum and the Elections in Equatorial Guinea*, U.N. Doc. A/7200/Add.4, Annex V-VI, at 46 (1968) [hereinafter *Equatorial Guinea Report*].

187 See THOMAS M. FRANCK, *NATION AGAINST NATION* 76-82 (1985).

188 *West Irian Agreement*, *supra* note 185, at 5.

189 *Id.* art. XVIII.

190 *Id.* art. XXII.

191 G.A. Res. 1752 (XVII), *supra* note 185.

conflict with the Indonesian authorities. The government wanted to consult only elected representatives, not the population at large.¹⁹² The representative initially suggested a traditional plebiscite, arguing that there was "no other method for this delicate political exercise than the democratic, orthodox and universally accepted method of 'one man, one vote.'"¹⁹³ However, he conceded that "the geographical and human realities in the territory required the application of a realistic criterion" and proposed that consultation occur in the countryside if a direct vote were held in urban areas.¹⁹⁴ The government rejected this proposal, and announced that it would consult eight "consultative assemblies" of 1025 persons.¹⁹⁵ Other disputes followed.¹⁹⁶

The consultations took place in June 1969. Each of the eight assemblies voted unanimously, without the benefit of a secret ballot and in the presence of Indonesian government officials, to retain ties with Indonesia.¹⁹⁷ The representative's report concluded that "an act of free choice has taken place in West Irian in accordance with Indonesian practice."¹⁹⁸ In the subsequent General Assembly debate, Ghana proposed allowing West Irian another opportunity to carry out the terms of the 1962 agreement, but the proposal was soundly defeated,¹⁹⁹ and the General Assembly accepted the representative's report.²⁰⁰

b. *Namibia*

The Namibian mission in 1989 demonstrates the evolution of U.N. monitoring standards since the shameful West Irian mission.²⁰¹ In Namibia the United Nations made certain that clear standards for electoral participation were

192 *West Irian Report*, *supra* note 180, at ¶¶ 76-78.

193 *Id.* ¶ 82.

194 *Id.*

195 *Id.* ¶¶ 83-85.

196 For example, the representative attempted to ensure that all adults would be permitted to run as candidates for the representative assemblies. The government responded that only "legally existing" groups would be represented in the assemblies, and stated that bodies not favoring ties with Indonesia did not "legally" exist. *Id.* ¶ 126.

197 *Id.* ¶¶ 185-247.

198 *Id.* ¶ 253. Recall that the agreement specified a consultation in accord with *international practice*. See *supra* text accompanying note 185.

199 *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian): Report of the Secretary-General Regarding the Act of Self-Determination in West Irian (Concluded)*, U.N. GAOR, 24th Sess., 1813th plen. mtg. at 5, U.N. Doc. A/PV.1813 (1969) (proposal); *id.* at 16-17 (vote).

200 *Agreement between the Republic of Indonesia and the Kingdom of the Netherlands concerning West New Guinea (West Irian)*, G.A. Res. 2504, U.N. GAOR, 24th Sess., Supp. No. 30, 1813th plen. mtg. at 3, U.N. Doc. A/7630 (1969).

201 Professor Franck recounts that "[e]ven members of the Indonesian government were reported to have admitted, privately, that this consultation was a meaningless formality." FRANCK, *supra* note 187, at 81. United Nations observers subsequently never were so sanguine about the suppression of opposition parties, the lack of free campaigning, and the denial of a secret ballot.

The Right to Political Participation

articulated throughout the planning process. Perhaps more importantly, the observers consistently refused to permit the South African administering authorities to deviate from the standards in practice.²⁰²

The United Nations began to lay the groundwork for democratic self-rule in Namibia in the mid-1970s. In 1976 the Security Council adopted Resolution 385, calling for "free elections in Namibia under supervision and control of the United Nations."²⁰³ The Security Council developed a comprehensive settlement plan for the territory in 1978, which created a transitional working group to facilitate "the early independence of Namibia through free election[s]."²⁰⁴ In 1982 the five-member Western Contact Group,²⁰⁵ which had mediated disputes among the various parties, negotiated a set of electoral guidelines with South Africa to implement the 1978 plan. These guidelines stipulated specific voting rights to be guaranteed to all adult Namibians.²⁰⁶

202 The territory of present-day Namibia became a German protectorate beginning in the nineteenth century, and came under South African control through military conquest in 1915. This arrangement was confirmed in 1920 by the League of Nations, and continued under the aegis of the United Nations following World War II. In 1948 South Africa granted whites in the territory direct representation in its parliament and threatened to annex the territory as a fifth province. See generally NATION BUILDING, *supra* note 15, at 10-11. The International Court of Justice ruled in 1950 that South Africa had no right to alter the mandate unilaterally. *International Status of South-West Africa*, 1950 I.C.J. 128 (July 11). The General Assembly formally revoked the mandate in 1966 and placed the territory under direct U.N. supervision. See G.A. Res. 2145, U.N. GAOR, 21st Sess., Supp. No. 16, at 2, U.N. Doc. A/6316 (1966). The I.C.J. upheld these actions in 1971. 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. 6 (Jan. 26). That same year the Southwest Africa Peoples' Organization (SWAPO) began an armed rebellion against South African occupation, which lasted until the declaration of a cease-fire in July 1988. See *Principles for a Peaceful Settlement in Southwestern Africa, Approved by the South African Government on July 18, 1988*, reprinted in NATION BUILDING, *supra* note 15, app. X at 117 (reprinting agreement between Republic of Angola, Republic of Cuba and Republic of South Africa). SWAPO agreed to this settlement in August 1988. See UNITED NATIONS, SECURITY COUNCIL, LETTER ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. S/20129 (1988).

203 S.C. Res. 385, U.N. SCOR, 31st Sess., 1885th mtg. at 9, U.N. Doc. S/INF/32 (1976).

204 S.C. Res. 435, U.N. SCOR, 33d Sess., 2087th mtg. at 13, U.N. Doc. S/INF/34 (1978).

205 The Group consisted of the western members of the Security Council in 1976: Canada, France, West Germany, the United Kingdom, and the United States. See NATION BUILDING, *supra* note 15, at 17-18.

206 The guidelines stated:

Every adult Namibian will be eligible, without discrimination or fear of intimidation, from any source, to vote, campaign and stand for election to the Constituent Assembly.

Voting will be by secret ballot, with provisions made for those who cannot read or write.

The date for the beginning of the electoral campaign, the date of elections, the electoral system, the preparation of voter rolls and the respects of electoral procedures will be promptly decided upon so as to give all political parties and interested persons, without regard to their political views, a full and fair opportunity to organize and participate in the electoral process.

Full freedom of speech, assembly, movement and press shall be guaranteed.

The electoral system will seek to ensure fair representation in the Constituent [sic] Assembly to different political parties which gain substantial support in the election.

UNITED NATIONS, SECURITY COUNCIL, LETTER DATED JULY 12, 1982 FROM THE REPRESENTATIVES OF CANADA, FRANCE, THE FEDERAL REPUBLIC OF [GERMANY](sic), THE KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE UNITED STATES OF AMERICA ADDRESSED TO THE SECRETARY-GENERAL, Annex at 1, U.N. Doc. S/15287 (1982).

United Nations representatives and South African administrators began to negotiate a legal framework for elections based on these guidelines in 1989. The concessions obtained by the United Nations were remarkable. South Africa eventually agreed to grant a general amnesty for all Namibian political prisoners and to repeal all "discriminatory or restrictive laws" and regulations which might inhibit a free and fair vote.²⁰⁷ South Africa also agreed to a party registration system that permitted any political organization to field candidates if it could obtain two thousand signatures and pay a modest deposit.²⁰⁸ As the election approached, U.N. observers helped repatriate exiled Namibians, obtain the release of political prisoners, and register voters and parties.²⁰⁹

The November 1989 election was a resounding success for the United Nations, and particularly for the standards of electoral fairness it had devised. Ten different parties or coalitions of parties appeared on the ballot.²¹⁰ Ninety-seven percent of eligible voters cast ballots, and seven parties obtained seats in the seventy-two-member Constituent Assembly.²¹¹ The Secretary-General's Special Representative certified that the electoral process had "at every stage, been free and fair."²¹² In February 1990 the Namibian Constituent Assembly unanimously adopted a new constitution which incorporated the electoral principles approved by the Security Council in 1989.²¹³

207 Both steps were taken in June 1989. See NATION BUILDING, *supra* note 15, at 27-28. The repealed laws restricted "communist" political dissent, banned or limited activities by certain political organizations, suspended various rights under a state of emergency decree, authorized detention without trial, and imposed a curfew through much of the territory. *Id.* at 28.

208 *Id.* at 31.

209 See *id.* at 37-42. The most contentious discussions concerned a new electoral law proposed by South Africa, which compromised ballot secrecy by labelling ballots with voters' identification numbers, rejected local (and allegedly faster) tabulation of ballots, and denied observation posts at polling places to political parties. *Id.* at 32. The Security Council responded to this law by asked the Secretary-General to ensure that all electoral legislation conform to the principles enunciated by the Western Contact Group and to "internationally accepted norms for free and fair elections." S.C. Res. 640, U.N. Doc. S/RES/640 (1989) (available on microfiche). In October 1989, the South African Administrator General and the Secretary-General's Special Representative agreed on a law which responded to virtually all criticisms. The only disputed provision not wholly altered by this second proposal concerned centralized tabulation and verification of ballots, as it limited centralized tabulation to cases in which a voter's identification was in question. See NATION BUILDING, *supra* note 15, at 34.

210 UNITED NATIONS, SECRETARY-GENERAL, FURTHER REPORT OF THE SECRETARY-GENERAL CONCERNING THE IMPLEMENTATION OF SECURITY COUNCIL RESOLUTION 435 (1978) CONCERNING THE QUESTION OF NAMIBIA at 2, U.N. Doc. S/20967 (1989).

211 NATION BUILDING, *supra* note 15, at 57, 64. The South West Africa People's Organization received the most votes, obtaining 41 seats; second was the Democratic Turnhalle Alliance with 21. A number of small parties shared the remaining seats. *Id.* at 64.

212 *Id.* at 110.

213 Article 17 of the Namibian Constitution provides:

- (1) All citizens shall have the right to participate in peaceful political activity intended to influence the composition and policies of the Government. All citizens shall have the right to form and join political parties and, subject to such qualifications prescribed by law as are necessary in a democratic society, to participate in the conduct of public affairs, whether directly or through freely chosen representatives.
- (2) Every citizen who has reached the age of eighteen (18) years old shall have the right to vote and who has reached the age of twenty-one (21) years to be elected to public office, unless

The Right to Political Participation

The Namibian mission capped the United Nations' electoral practices in the decolonization era, reflecting standards consistently promulgated by election monitors since the British Togoland mission in 1956.²¹⁴ The most important of these was the prohibition on any substantive restrictions on party activity.²¹⁵ In insisting on party pluralism the United Nations made clear that the ambiguities of the Political Covenant on this crucial issue would not carry forward into the new era of participatory rights. The election's success served to validate these monitoring standards; in fact, the Namibian mission was so successful that when the United Nations began monitoring elections in independent states, the question of standards was hardly debated, as subsequent missions applied virtually the same criteria.

2. *Monitoring in the Post-Colonial Era*

United Nations monitoring in colonial territories composed the first phase of multilateral election observation. The second phase began in July 1989 when the Secretary-General agreed to oversee elections in Nicaragua, committing the United Nations to observe elections in an independent state for the first time. While decolonization was no longer the rationale for the monitoring process, the missions applied and developed the same set of standards. The missions to Nicaragua and Haiti illustrate the direction of this second phase.

a. *The Nicaragua Mission*

The Nicaragua mission originated in the Esquipulas II Agreement, an August 1987 pact among the presidents of five Central American countries.²¹⁶ The Agreement, which outlined a broad framework for peace in the region, called on the five states to hold "free, pluralistic and fair elections" by June 1988 and invited the United Nations, the OAS, and other states to send

otherwise provided herein.

- (3) The rights guaranteed by Sub-Article (2) hereof may only be abrogated, suspended or be impinged upon by Parliament in respect of specified categories of persons on such grounds of infirmity or on such grounds of basic public interest or morality as are necessary in a democratic society.

NAMB. CONST. art. 17. The influence of the Political Covenant on Article 17 is evident in the last phrases of subsection (1), which quote from Article 25(a) of the Political Covenant almost verbatim. *Cf. supra* note 6 (quoting Article 25 of Political Covenant). The Namibian Constitution goes farther, however, by making participatory rights non-derogable. NAMB. CONST. art. 24(3).

214 See NATION BUILDING, *supra* note 15, at 6 ("The success of UN-supervised elections in Namibia also signifies the growing importance of an internationally recognized legal framework for free and fair elections.").

215 See *supra* notes 75-92 and accompanying text (discussing failure of Political Covenant to clearly require party pluralism).

216 See *Letter Dated 27 August 1987 from the Permanent Representatives of Costa Rica, El Salvador, Guatemala and Nicaragua to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 42d Sess., Agenda Item 34, U.N. Doc. A/42/521 (1987) [hereinafter *Esquipulas II Agreement*].

observers.²¹⁷ The United Nations agreed to assume a role in November 1988.²¹⁸ In February 1989, President Daniel Ortega announced elections in Nicaragua and invited Secretary-General Javier Perez de Cueller to send a monitoring team.²¹⁹ The Secretary-General accepted the invitation in July and announced the formation of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua (ONUVEN).²²⁰

The Secretary-General was initially circumspect in describing ONUVEN's tasks, declaring that the mission should not "be construed as any kind of value judgement as to the laws in force in Nicaragua governing the electoral process."²²¹ However, the comprehensive "terms of reference" that served as the mission's mandate required ONUVEN to verify that the election was "equitable," "free," "without hindrance or intimidation," and "proper:"²²² determinations that clearly called for U.N. observers to make value judgments on the fairness of Nicaragua's electoral laws. A review of the U.N. terms of reference and of ONUVEN's five reports reveals that the United Nations

217 *Id.*

218 The General Assembly directed the Secretary-General "to afford the fullest possible support to the Central American Governments in their efforts to achieve peace, especially by taking the measures necessary for the development and effective functioning of the essential verification machinery." UNITED NATIONS, GENERAL ASSEMBLY, THE SITUATION IN CENTRAL AMERICA: THREATS TO INTERNATIONAL PEACE AND SECURITY AND PEACE INITIATIVES, para. 6, U.N. Doc. A/RES/43/24 (1989) [hereinafter THE SITUATION IN CENTRAL AMERICA].

219 *Letter Dated 24 February 1989 from the Representatives of Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 44th Sess., Annex, Agenda Item 34, *Joint Declarations of the Central American Presidents*, at 2, U.N. Doc. A/44/140 (1989).

220 *See Letter Dated 5 July 1989 from the Secretary-General Addressed to the Permanent Representative of Nicaragua to the United Nations*, U.N. GAOR, 44th Sess., U.N. Doc. A/44/375 (1989). The mission eventually issued five detailed reports: *Evolution of the Electoral Process in Nicaragua: First Report of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua to the Secretary-General*, U.N. GAOR, 44th Sess., Agenda Item 34, U.N. Doc. A/44/642 (1989) [hereinafter *First Nicaragua Report*]; *Second Report to the Secretary-General by the United Nations Observer Mission to Verify the Electoral Process in Nicaragua*, U.N. GAOR, 44th Sess., Agenda Item 34, U.N. Doc. A/44/834 (1989) [hereinafter *Second Nicaragua Report*]; *Third Report to the Secretary-General by the United Nations Observer Mission to Verify the Electoral Process in Nicaragua*, U.N. GAOR, 44th Sess., Agenda Item 34, U.N. Doc. A/44/917 (1990) [hereinafter *Third Nicaragua Report*]; *Fourth Report to the Secretary-General by the United Nations Observer Mission to Verify the Electoral Process in Nicaragua*, U.N. GAOR, 44th Sess., Agenda Item 34, U.N. Doc. A/44/921 (1990) [hereinafter *Fourth Nicaragua Report*]; *Fifth Report to the Secretary-General by the United Nations Observer Mission to Verify the Electoral Process in Nicaragua*, U.N. GAOR, 44th Sess., Agenda Item 34, U.N. Doc. A/44/927 (1990) [hereinafter *Fifth Nicaragua Report*]. The mission at its height deployed 237 U.N. personnel in the field. *Fifth Nicaragua Report*, *supra*, at 17.

221 *Letter Dated 5 July 1989 from the Secretary-General Addressed to the Permanent Representative of Nicaragua to the United Nations, The Situation in Central America*, U.N. GAOR, 44th Sess., Annex I, Agenda Item 34, *Threats to International Peace and Security and Peace Initiatives*, at 2, U.N. Doc. A/44/375 (1989).

222 *Establishment and Terms of Reference of the United Nations Observer Mission to Verify the Electoral Process in Nicaragua, The Situation in Central America*, U.N. GAOR, 44th Sess., Annex 1, Agenda Item 34, *Threats to International Peace and Security and Peace Initiatives*, app. at 3, U.N. Doc. A/44/375 (1989) [hereinafter *Terms of Reference*]. The terms of reference were derived from three agreements among the Central American presidents, including the Esquipulas II Agreement. *Id.*

The Right to Political Participation

indeed took specific positions on three important issues: party pluralism, the conduct of the Supreme Electoral Council, and the compilation of voting lists.²²³

Party pluralism was a central focus of the Esquipulas II Agreement, which required its signatories to ensure "equal access for all political parties to the communication media and . . . ample opportunities for organizing public demonstrations and any other type of political propaganda."²²⁴ Accordingly, the U.N. terms of reference required ONUVEN to "verify that political parties enjoy complete freedom of organization and mobilization, without hindrance or intimidation by anyone [and to] verify that all political parties have equitable access to State television and radio in terms of both the timing and the length of broadcasts."²²⁵ Further, the government agreed to repeal certain statutes (concerning, for example, conscription, public safety, and certain police duties) and to promulgate a new electoral law.²²⁶ ONUVEN concluded that the resulting guidelines were "sufficiently open to ensure that the elections [would] take place in an atmosphere of free competition."²²⁷ In particular, it approved of the procedures for the formation of political parties and their acquisition of legal status.²²⁸

223 ONUVEN itself later described the purpose of its reports as seeking "to pinpoint critical—and criticizable—aspects of the process and of the positions of the contestants." Third Nicaragua Report, *supra* note 220, at 24. Furthermore, the Secretary-General's representative stated in transmitting his final report that verifying the election "demanded more than merely recording the process, more than monitoring, and could not stop short of actively seeking to get corrected whatever substantial defects had been discovered." Fifth Nicaragua Report, *supra* note 220, at 3. The representative dismissed a "purely passive" role for ONUVEN as "morally unacceptable." *Id.*

224 *Esquipulas II Agreement*, *supra* note 216, at 6. The Agreement further stated: Complete pluralism of political parties must be established. Political groupings shall, in this connection, have broad access to the communication media and full enjoyment of the rights of association and the power to hold public demonstrations in unrestricted exercise of the right to publicize their ideas orally, in writing and on television, and members of political parties shall enjoy freedom of movement in campaigning for political support. *Id.* at 5.

225 *Terms of Reference*, *supra* note 222, at 3. These standards conflicted directly with an article of the Nicaraguan constitution which exempted "those ideologies advocating a return to the past or seeking to establish a political system similar to that of the past" from a guarantee of party pluralism. First Nicaragua Report, *supra* note 220, at 11 (quoting Article V of Nicaraguan Constitution). This constitutional provision is a clear reference to the deposed Somoza regime. ONUVEN never suggested that it would alter its mandate in order to accommodate this article, thus further eroding the Secretary-General's claim that the mission would not criticize existing Nicaraguan law.

226 First Nicaragua Report, *supra* note 220, at 6.

227 Fourth Nicaragua Report, *supra* note 220, at 7 (citation omitted).

228 See First Nicaragua Report, *supra* note 220, at 17. ONUVEN monitored all aspects of party activity throughout the electoral process. This included assessment of the submission and authorization of candidate lists, of party financing, and of violence directed towards party activists, particularly towards those in the opposition. See Fourth Nicaragua Report, *supra* note 220, at 7-11. The mission also investigated the use of state property by FSLN candidates, see Third Nicaragua Report, *supra* note 220, at 17, the frequency and openness of mass meetings, see *id.* at 11-13; Second Nicaragua Report, *supra* note 220, at 16-17, and the degree of access to polling places and ballot tabulation centers, see Fifth Nicaragua Report, *supra* note 220, at 6, 8.

Second, the U.N. observers reviewed the conduct of the Supreme Electoral Council (CSE), which directed all aspects of the electoral process.²²⁹ The U.N. terms of reference required ONUVEN to verify that "political parties are equitably represented in the [CSE] and its subsidiary bodies."²³⁰ The National Assembly elected the five members of the Council in June 1989: two from the Sandinista party, two from opposition parties, and one "eminent person."²³¹ The National Assembly also elected members of various opposition parties to regional electoral councils, with all but one election by unanimous vote.²³² ONUVEN reviewed over one hundred resolutions promulgated by the CSE on such issues as electoral ethics, donations from abroad, registering absentee voters and a timetable for the elections. It reported that an "[a]nalysis of these resolutions does not reveal bias towards the governing party."²³³ ONUVEN continued to monitor the Council throughout the campaign and on the eve of the elections concluded that "[t]here has been evidence of broad-mindedness, flexibility and a determination to ensure—as far as possible—the greatest possible participation of political groups in the electoral process."²³⁴

Third, ONUVEN reviewed the compilation of voting lists.²³⁵ The new electoral act provided that local boards were to revise fifteen-year-old rolls, each in a specified geographic area.²³⁶ ONUVEN trained and mobilized some 55,000 registration workers, monitored as many registration sites as possible, and reviewed written complaints. The mission ultimately concluded that the process was a logistical success and was free of any attempts to obstruct registration.²³⁷

The U.N. terms of reference also required the mission to monitor the equality of access to the mass media, an issue closely related to the broader question of equal campaigning opportunities. The Nicaraguan government adopted a new Mass Media Act in 1989 that eliminated prior censorship for print media and imposed only minimal restrictions on radio broadcasts. ONUVEN found the law "an improvement over the earlier legislation" under which censorship had been widespread. *Second Nicaragua Report, supra* note 220, at 21. ONUVEN criticized the government-operated television station, however, as wholly biased in favor of the ruling party:

[The station] overlooks the usual criteria for determining what coverage should be given to a news item, taking into account neither the political importance of the event, the number of people present nor its duration. . . . Not only is there less coverage of the opposition, but events are usually deliberately distorted to present opponents in the worst possible light. . . . Television is offering a narrow and dangerously Manichean view of national and international politics.

Id. at 24.

229 *First Nicaragua Report, supra* note 220, at 6. The Nicaraguan Constitution established the CSE as a fourth branch of government, independent of the executive, legislature, and judiciary.

230 *Terms of Reference, supra* note 222, at 3.

231 *First Nicaragua Report, supra* note 220, at 7.

232 *Id.* at 8.

233 *Id.* at 9.

234 *Fourth Nicaragua Report, supra* note 220, at 8.

235 ONUVEN was required to ensure that electoral rolls were "properly drawn up." *Terms of Reference, supra* note 222, at 3.

236 *Id.*

237 *Id.* at 7-11.

The Right to Political Participation

Finally, while the U.N. terms of reference did not explicitly direct ONUVEN to monitor polling places and the tabulation of ballots, ONUVEN assumed these to be among its most important tasks.²³⁸ ONUVEN prepared a comprehensive questionnaire for its poll watchers, designed to record any irregularities in the voting procedures set forth in the Electoral Act.²³⁹ The problems generally were minor (e.g., a shortage of paper ballots and the absence of a closed-off area in some polling places) and, in ONUVEN's opinion, did not cast doubt on the fairness of the elections.²⁴⁰ As a further safeguard against fraud, ONUVEN devised a formula to project the outcome based on approximately seventeen percent of precinct returns. This so-called "quick count" of the elections, held on February 25, 1990, deviated by less than one percent from the official results, according to which UNO won fifty-five percent and the Sandinistas forty percent of the vote in the presidential election.²⁴¹ In its final report ONUVEN concluded that "the elections were conducted in a highly commendable manner, and no problems have been detected which might cast doubts on their fairness."²⁴²

b. *The Haiti Mission*

The second request for monitoring in an independent state came from Haiti. The Haitian government attempted to hold elections in 1987, but outbreaks of violence and voter intimidation led to their cancellation even before the polls were to have closed.²⁴³ The next three years saw a succession of military-backed governments take power, followed by a provisional civilian government.²⁴⁴ In June 1990 Ertha Pascal Trouillot, President of the provisional regime, asked the Secretary-General to send a U.N. team to monitor elections scheduled for December 16 of that year.²⁴⁵ President Trouillot requested that the mission undertake several specific duties:

238 Nicaragua had requested electoral observers to verify the process "at every stage and in all electoral districts." *Terms of Reference*, *supra* note 222, at 3.

239 *Fifth Nicaragua Report*, *supra* note 220, at 7.

240 *Id.* at 9.

241 *Id.* at 10, 21. UNO's presidential and vice-presidential candidates received at total of 777,552 votes compared to 579,886 for the FSLN candidates. The next most popular slate received 11,136 votes. *Fifth Nicaragua Report*, *supra* note 220, at 20.

242 *Id.* at 12.

243 COUNCIL OF FREELY-ELECTED HEADS OF GOV'T & NATIONAL DEMOCRATIC INST. FOR INT'L AFFAIRS, *THE 1990 GENERAL ELECTIONS IN HAITI* 32-33 (1991).

244 UNITED NATIONS, GENERAL ASSEMBLY, *FIRST REPORT OF THE UNITED NATIONS OBSERVER GROUP FOR THE VERIFICATION OF THE ELECTIONS IN HAITI*, Annex, at 10, U.N. Doc. A/45/870, (1990) [hereinafter *First Haiti Report*].

245 *Letter Dated 17 July 1990 from the Permanent Representatives of the Bahamas, Colombia and Haiti to the United Nations Addressed to the President of the General Assembly*, U.N. GAOR, 44th Sess., Agenda Item, *Draft Resolution on Assistance to Haiti*, at 2, U.N. Doc. A/44/965/Add.1 (1990).

[O]bservation and verification of the elections, covering the entire electoral process, particularly registration of voters on the electoral rolls, registration of candidatures, freedom of expression and freedom of political parties to mobilize, respect for the equality of candidates in the electoral campaign, and independent verification of the outcome of the vote²⁴⁶

The General Assembly adopted an authorizing resolution on October 12, 1990,²⁴⁷ despite some states expressing concerns over the lack of a clear mandate²⁴⁸ and interference in Haiti's internal affairs.²⁴⁹ While the mission (named the United Nations Observer Group for the Verification of the Elections in Haiti (ONUVEH)) never received a formal mandate akin to the Nicaraguan "terms of reference," President Truillot's request effectively served that purpose.²⁵⁰ In substance, the mission scrutinized virtually the same core of participatory rights at issue in Nicaragua and Namibia.

The mission faced a formidable task. As ONUVEH noted in its first report, "there is no democratic tradition in Haitian politics . . . [and] violence has always been the means of settling conflicts and choosing leaders."²⁵¹ The violence surrounding the 1987 elections had, in ONUVEH's view, "created a feeling of insecurity . . . all the more acute because those responsible have not been sought out or arrested."²⁵² The elections also faced logistical barriers. There was no permanent register of voters, forcing the government to

246 *Id.* President Truillot also sought "advisors with experience in security matters" to assist the Haitian armed forces in maintaining order. *Id.* at 3.

247 UNITED NATIONS, GENERAL ASSEMBLY, ELECTORAL ASSISTANCE TO HAITI, U.N. Doc. A/RES/45/2 (1990) [hereinafter ELECTORAL ASSISTANCE TO HAITI].

248 UNITED NATIONS, GENERAL ASSEMBLY, PROVISIONAL VERBATIM REPORT OF THE TWENTY-NINTH MEETING at 61, U.N. Doc. A/45/PV.29 (1990) [hereinafter TWENTY-NINTH MEETING] (statement of Cuban delegate).

249 Cuba, which supported the resolution, spoke against "any attempt to use this United Nations resolution or activity as a pretext for interfering in the internal affairs of Haiti, a fraternal country." *Id.* at 62. National elections, Cuba stated, "can never be regarded as affecting international peace and security" and so cannot involve a breach of the Charter leading to collective action. *Id.* at 58-60. The Mexican delegate likewise argued that "sending this mission will not set a precedent in respect of the domestic jurisdiction of States. . . . [E]lectoral processes lie within the domain in which domestic legislation in each State is sovereign." *Id.* at 64-65. Even the Haitian delegate rose to make "it clear that our actions in no way impinge upon or alter the jurisdiction and sovereignty of the country." *Id.* at 71.

250 The authorizing resolution refers to President Trouillot's letter as the basis for the mission's work. *Id.* operative para. 1 (requesting Secretary-General to grant "the technical and administrative assistance to the electoral process that has been requested in the letter from the President of the Interim Government of the Republic of Haiti to the Secretary-General"). ONUVEH itself repeated the substance of the President's request in its first report:

The task of the electoral observers is to observe the different electoral operations and to assess, in particular, whether the political parties have been free to organize and allowed to mobilize the voters, whether the candidates have had equal access to the media, whether voters have been able to register and cast their ballots freely and whether the votes have been counted honestly.

First Haiti Report, *supra* note 244, at 6.

251 *First Haiti Report*, *supra* note 244, at 9. While Haiti passed a new election law three months prior to the establishment of the mission, there was considerable controversy over provisions requiring all candidates to pay a deposit prohibiting persons who were associated with the Duvalier government or who previously committed human rights abuses from running for office. *Id.* at 7-8, 18.

252 *Id.* at 12.

The Right to Political Participation

draw up new voter rolls for each election.²⁵³ Further, candidate registration procedures proved too complex, causing many potential candidates to be disqualified for filing incorrect or incomplete documentation.²⁵⁴

ONUVEH monitored compliance with the rights listed in President Trouillot's request. It reported that individuals representing "all shades of opinion" entered the elections, despite the cumbersome and confusing candidate registration procedures,²⁵⁵ and noted that the government permitted journalists to engage "in the most violent diatribes" without interference.²⁵⁶ While instances of double registration partially marred the voter registration process, in ONUVEH's view precautions taken against double voting vitiated the problem.²⁵⁷ ONUVEH also questioned whether ballot secrecy was preserved at all polling places, but concluded that any breaches were due to inadequate facilities and voters requesting assistance rather than organized attempts at fraud.²⁵⁸ ONUVEH concluded that apart from an attack on an opposition rally late in the campaign (for which no particular group was ever found responsible) the process operated smoothly and the electoral authorities functioned in an impartial manner.²⁵⁹

Yet ONUVEH's success was short-lived. Supporters of former President Duvalier attempted a coup against President-elect Aristide on January 6, 1991. The army quickly defeated this uprising but officers staged a second and successful coup on September 29, forcing President Aristide to flee the country. The international community reacted with unprecedented swiftness, with the recent democratic elections providing the appropriate argument with which to condemn the takeover. OAS foreign ministers, hastily convened in Washington on October 13, 1991, declared that the coup "represent[ed] disregard for the legitimate Government of Haiti, which was constituted by the will of its people freely expressed in a free and democratic electoral process under

253 *Id.* at 14.

254 For example, fifty-eight percent of those seeking to register as presidential candidates were rejected for failing to meet the filing requirements. *Id.* at 17. Twenty-six people originally registered as candidates for the presidency. *Id.*

255 *Id.* at 19.

256 *Id.* at 11.

257 *Id.* at 14-16; see also *Special Economic and Disaster Relief Assistance: Electoral Assistance to Haiti*, U.N. GAOR, 45th Sess., Annex, Agenda Items 86 & 154, at 22, U.N. Doc. A/45/870/Add.1 (1991) [hereinafter *Second Haiti Report*].

258 *Second Haiti Report*, *supra* note 257, at 8, 22 (noting that observers "did not detect any sign of fraudulent intent or any trace or suggestion of planned action" in the voting itself).

259 *Id.* at 19, 23. ONUVEH, together with an OAS observer team, used the same "quick count" of election results that it employed successfully in Nicaragua. ONUVEH released its projections to the Haitian electoral council and the major candidates in order to dissuade any fraud in the tabulation process. *Id.* at 13. It projected (with a six-point margin of error) that Jean-Bertrand Aristide would win the presidency with 66.4 percent of the vote. According to the official returns, Aristide received 67.5 percent. *Id.* at 12, 14.

international observation."²⁶⁰ The Ministers recommended that all OAS member states sanction the military government by suspending their economic and commercial ties to Haiti.²⁶¹ One week later the U.N. General Assembly passed a resolution urging U.N. member states to join the OAS embargo.²⁶² The resolution referred to the Aristide regime as "legitimate" and the coup as "illegal," thus reinforcing the OAS position that the disregard of democratic procedures in Haiti constituted an international wrong.²⁶³

C. Future United Nations Monitoring Missions

Two other monitoring projects, now in their early stages, provide further evidence of an emerging body of electoral norms sanctioned by the United Nations.²⁶⁴ The first project is an extraordinary mission to Cambodia in which the United Nations will not only structure and oversee elections, but will also function as the country's de facto government during a year-long transition period.²⁶⁵ All major parties to the conflict agreed to a comprehensive set of electoral guidelines in October 1991.²⁶⁶ The second project concerns a referendum in Western Sahara, approved by the Security Council, to determine whether the inhabitants desire independence or Moroccan rule.²⁶⁷ The referendum, which the Security Council characterized as an act of decolonization, is to be organized and monitored jointly by the United Nations and the Organization of African Unity.²⁶⁸ The interested parties and the Secretary-General

260 *Support to the Democratic Government of Haiti*, MRE/RES.1/91, corr. 1, at 2, OEA/ser.F/V.1 (Oct. 3, 1991). The resolution resurrected the legitimacy theory of recognition by declaring that the OAS would recognize representatives of the Aristide government "as the only legitimate representatives of Haiti." *Id.*

261 *Id.*

262 *The Situation of Democracy and Human Rights in Haiti*, G.A. Res. 46/7, at 3 (1991) (available on microfiche) [hereinafter G.A. Res. 46/7].

263 The General Assembly did not refer to human rights treaties, suggesting that its condemnation rested on principles of customary law. The Haitian junta, perhaps deterred by the forcefulness of this condemnation, has yet to send its own delegation to the General Assembly. As of this writing delegates appointed by President Aristide continue to represent Haiti in all U.N. bodies.

264 A cease-fire in Angola also calls for U.N. monitoring of the next round of elections. Alan Riding, *Angola Accord May Help Heal Old Wounds*, N.Y. TIMES, May 3, 1991, at A9. The Secretary-General had sent only an advance team by February 1992, and seeks formal Security Council authorization for the project. *Perez de Cuellar to Ask for Observer Mission for Angolan Elections*, Agence France-Presse, Dec. 21, 1991, available in LEXIS, Nexis Library, Crnt File.

265 *Letter Dated 30 October 1991 from the Permanent Representatives of France and Indonesia to the United Nations Addressed to the Secretary-General*, U.N. GAOR, 46th Sess., Annex II, Agenda Item 24, *Agreement on a Comprehensive Political Settlement of the Cambodia Conflict*, at 8-9, U.N. Doc. A/46/608 (1991).

266 *Id.* at 13-14. These include: 1) a system of proportional representation; 2) universal adult suffrage; 3) freedom to form political parties; 4) voting by secret ballot; 5) complete freedom of speech, assembly and movement; and 6) fair access to the media for all registered parties. *Id.* at 25-27, 40-41.

267 S.C. Res. 690, U.N. Doc. S/RES/690 (1991) (available on microfiche).

268 UNITED NATIONS, SECURITY COUNCIL, FOURTH COMMITTEE, QUESTION OF WESTERN SAHARA, U.N. Doc. A/43/797 (1988) ("the question of Western Sahara is a question of decolonization which remains to be completed on the basis of the exercise by the people of Western Sahara of their inalienable right to

The Right to Political Participation

will draft a code of conduct designed to "ensure . . . [a] responsibility placed on all concerned to accept others' freedom to campaign."²⁶⁹

Future missions are likely to continue refining the United Nation's emerging body of electoral standards. In November 1991 the Secretary-General announced the appointment of a permanent coordinator of electoral matters within the Secretariat. He also proposed a set of criteria to evaluate monitoring requests by member states,²⁷⁰ which require that: 1) the election have a clear international dimension; 2) the monitoring cover the entire electoral process; 3) there be broad public support in the state for the presence of U.N. monitors; 4) the concerned government seek the U.N. action; and 5) the competent U.N. organ approve the mission.²⁷¹ The General Assembly approved these recommendations in December 1991.²⁷²

D. Election Monitoring and Treaty Norms: The Legal Effect of the New Regime

The development of election monitoring standards raises three issues concerning participatory rights: the relationship of the monitoring standards to the substantive treaties establishing the rights themselves; the degree to which boundaries of national sovereignty concerns limit the enforcement of participatory rights; and the relationship between participatory rights and other human rights.

self-determination and independence").

269 UNITED NATIONS, SECURITY COUNCIL, THE SITUATION CONCERNING WESTERN SAHARA: REPORT BY THE SECRETARY-GENERAL, U.N. Doc. S/22464, at 8 (1991) [hereinafter *Western Sahara Report*]. The Security Council accepted the report's proposals in its authorizing resolution. See S.C. Res. 690, *supra* note 267, operative para. 3. The project also created a special Referendum Committee to advise the U.N. team "on measures necessary to ensure that the referendum is free and fair, without military or administrative constraints, and that there is no intimidation or interference in the referendum process." *Western Sahara Report*, *supra*, at 7-8.

270 *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), at 25-26, U.N. Doc. A/46/609 (1991).

271 *Id.* at 25. The second and third criteria are straightforward: The United Nations cannot be in a position to certify the fairness of an electoral process unless it actively monitors the election from the beginning and receives full cooperation from the government. The first criterion, however, is ambiguous: when does an election have a "clear international dimension?" Certainly such a dimension existed in Nicaragua, where elections were the result of a regional peace process, and in Namibia, which was the subject of U.N. regulation since the General Assembly established the United Nations Council for South West Africa in 1967. See *Question of South West Africa*, G.A. Res. 2248 (S-V), U.N. GAOR, 5th Special Sess., Supp. No. 1, at 1, U.N. Doc. A/6657 (1967).

The crisis in Haiti, however, seemed to be purely domestic in character. The United States suggested in debate a possible "international dimension," noting that political instability in Haiti had "swamped neighboring countries with Haitian refugees." TWENTY-NINTH MEETING, *supra* note 248, at 67 (statement of Mr. Watson, U.S. delegate). If this factor provided a "clear international dimension" to Haiti's elections, an international element could be found in virtually any national election. The next two U.N. monitoring missions (to Angola and Cambodia) are not likely to clarify this criterion, as each developed out of multinational peace processes.

272 *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections*, G.A. Res. 46/137, *supra* note 10, at 366-67.

1. Using Mission Standards to Interpret Treaties

The preceding sections suggest that two distinct but parallel systems of participatory rights now operate in the international community. The first consists of global and regional human rights treaties, including the decisions and reports of specialized tribunals. The second consists of a body of standards developed by international observer missions. These two systems affect the same state actors, address the same issues and, in many cases, protect the same substantive rights. Both thus represent the international community's views of a "free and fair" election.

No formal linkage exists between these two sources of law. Treaty-based participatory rights have not explicitly formed the basis of any observer mission, and the mission reports do not refer to any human rights instrument. Neither do regional or global treaty systems provide for election monitoring to enforce their norms.²⁷³ But our analysis need not end here. According to the Vienna Convention on the Law of Treaties, evidence of the "ordinary meaning" of treaty terms may be derived from sources not formally linked to a treaty.²⁷⁴ The ordinary meaning of a term is presumably one which does not vary with the context of its use but which rather has acquired a universal understanding. The terminology of participatory rights has now achieved such a context. While in the cold-war era terms such as "genuine" elections gave rise to unresolvable ideological debates, that divisiveness is now fading. As more states sign instruments protecting participatory rights and turn to elected governments at home, and as the United Nations and other organizations continue to monitor elections in sovereign nations, the language of electoral fairness has become both more universal and more uniform. States holding multiparty elections at home will be likely to call for the same standards of fairness in the international setting. If such cross-pollination of standards occurs, tribunals interpreting treaty terms may find little disagreement among state litigants on their plain meaning.

Treaty and election-monitoring norms are the best evidence of this emerging consensus on goals and terminology. All signatories of the major human rights conventions also have voted to establish the U.N. monitoring missions²⁷⁵ and to approve reports detailing participatory rights scrutinized by

273 The Copenhagen Document permits outside observers to monitor elections in member states of the Conference on Security and Cooperation in Europe (CSCE), but does not link observation to the substantive standards of fairness contained elsewhere in the document. See Copenhagen Document, *supra* note 92.

274 Vienna Convention, *supra* note 163, art. 31(1). Note that the right to participation can also be viewed as a "General Principle" of law. See M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 MICH. J. INT'L L. 768 (1990).

275 See, e.g., *Second Haiti Report*, *supra* note 257 (Haiti); *Terms of Reference*, *supra* note 222 (Nicaragua); *Question of the Turks and Caicos Islands*, G.A. Res. 35/25, U.N. GAOR, 35th Sess., Supp. No. 48, at 218, U.N. Doc. A/35/48 (1980); *Question of the New Hebrides*, G.A. Res. 34/10, U.N. GAOR,

The Right to Political Participation

the observers.²⁷⁶ Moreover, the rights protected by the treaty and election-monitoring systems are strikingly similar. From the League-supervised plebiscites of the 1920s to the plans for U.N. administration of Cambodia, international observers have made essentially the same demands of elections they monitor: party activity must not be limited or disrupted, ballot secrecy must be maintained, suffrage must be universal for adult residents, access to the media must not be restricted, and fraud in voting and ballot tabulation must

34th Sess., Supp. No. 46, at 199, U.N. Doc. A/34/46 (1979); *Question of Niue*, G.A. Res. 3155, U.N. GAOR, 28th Sess., Supp. No. 30, at 105, U.N. Doc. A/9030 (1973); *Question of American Samoa Gilbert and Ellice Islands, Guam, New Hebrides, Pitcairn, St. Helena, Seychelles and Solomon Islands*, G.A. Res. 3156, U.N. GAOR, 28th Sess., Supp. No. 30, at 105, U.N. Doc. A/9030 (1973); *Question of Equatorial Guinea*, G.A. Res. 2355, *supra* note 182, at 54; *Supervision of the Elections to be Held in the Cook Islands*, G.A. Res. 2005 (XIX), U.N. GAOR, 19th Sess., Supp. No. 15, at 7, U.N. Doc. A/5815 (1966); G.A. Res. 1752, *supra*, note 185 (West Irian); G.A. Res. 1579, *supra* note 183 (Rwanda-Urundi); G.A. Res. 1569, *supra* note 184 (Western Samoa); *The Future of the Trust Territory of the Cameroons Under United Kingdom Administration*, G.A. Res. 1350, U.N. GAOR, 13th Sess., Supp. No. 18A, at 1-2, U.N. Doc. A/4090/Add.1 (1959); G.A. Res. 1182, *supra*, note 184 (French Togoland); *The Togoland Unification Problem and the Future of the Trust Territory of Togoland Under British Administration*, G.A. Res. 944, U.N. GAOR, 10th Sess., Supp. No. 19, at 24-25, U.N. Doc. A/3116 (1955) (British Togoland).

Several of the votes on U.N. monitoring missions occurred in the Trusteeship Council. *See, e.g., Arrangements for the Dispatch of a Visiting Mission to Observe the Plebiscite in Palau; Trust Territory of the Pacific Islands*, T.C. Res. 2180, U.N. TCOR, 16th Sess., Supp. No. 3, at 5, U.N. Doc. T/1901 (1986) (Palau); *Arrangements for the Dispatch of a Visiting Mission to Observe the Plebiscites in Palau, the Marshall Islands and the Federated States of Micronesia, Trust Territory of the Pacific Islands*, T.C. Res. 2174, U.N. TCOR, 15th Sess., Supp. No. 1, at 5, U.N. Doc. T/1859 (1982) (Micronesia); *Arrangements for the Dispatch of a Visiting Mission to Observe the Plebiscite in the Mariana Islands District of the Trust Territory of the Pacific Islands*, T.C. Res. 2160, U.N. TCOR, 42d Sess., Supp. No. 1, at 1, U.N. Doc. T/1770 (1975) (Mariana Islands). The Namibian mission was authorized by the Security Council. *See S.C. Res. 385*, U.N. SCOR, 31st Sess., 1885th mtg. at 9, U.N. Doc. S/INF/32 (1976).

276 *See, e.g., The Situation in Central America: Threats to International Peace and Security and Peace Initiatives*, G.A. Res. 45/15, U.N. GAOR, 45th Sess., 43d plen. mtg. at 4, U.N. Doc. A/RES/45/15 (1991) (Nicaragua); *Question of Niue*, G.A. Res. 3285, U.N. GAOR, 29th Sess., Supp. No. 31, 2318th plen. mtg. at 98, U.N. Doc. A/9631 (1974) (Niue); *Question of the Gilbert and Ellice Islands*, G.A. Res. 3288, U.N. GAOR, 29th Sess., Supp. No. 31, 2318th plen. mtg. at 99, U.N. Doc. A/9631 (1974) (Gilbert and Ellice Islands); *Report of the Fourth Committee*, U.N. GAOR, 23d Sess., 1692d plen. mtg. at 22, U.N. Doc. A/PV.1692 (1968) (Equatorial Guinea); *Question of the Cook Islands*, G.A. Res. 2064, U.N. GAOR, 20th Sess., Supp. No. 14, 1398th plen. mtg. at 57, U.N. Doc. A/6014 (1965) (Cook Islands); *The Future of Western Samoa*, G.A. Res. 1626, U.N. GAOR, 16th Sess., Supp. No. 17, at 34, U.N. Doc. A/5100 (1961) (Western Samoa); *The Future of the Trust Territory of the Cameroons Under United Kingdom Administration: Organization of a Further Plebiscite in the Northern Part of the Territory*, G.A. Res. 1473, U.N. GAOR, 14th Sess., Supp. No. 16, at 38, U.N. Doc. A/4354 (1959) (Northern Cameroons); *The Future of Togoland under French Administration*, G.A. Res. 1253, U.N. GAOR, 13th Sess., Supp. No. 18, at 31, U.N. Doc. A/4090 (1958) (French Togoland).

In several cases the Trusteeship Council accepted the report of a visiting mission instead of the General Assembly. *See, e.g., Report of the United Nations Visiting Mission to Observe the Plebiscite in Palau, Trust Territory of the Pacific Islands, February 1986*, T.C. Res. 2182 (LIII), U.N. TCOR, 53d Sess., Supp. No. 3, at 13, U.N. Doc. T/1901 (1986) (Palau); *Report of the United Nations Visiting Mission to Observe the Plebiscite in the Federated States of Micronesia, Trust Territory of the Pacific Islands*, T.C. Res. 2177, U.N. TCOR, 51st Sess., Supp. No. 3, at 1, U.N. Doc. T/1869 (1984) (Micronesia); *Report of the United Nations Visiting Mission to observe the plebiscite in the Marshall Islands, Trust Territory of the Pacific Islands, September 1983*, T.C. Res. 2178, U.N. TCOR, 51st Sess., Supp. No. 3, at 1, U.N. Doc. T/1869 (1984) (Marshall Islands); *Report of the United Nations Visiting Mission to observe the plebiscite in the Mariana Islands District, Trust Territory of the Pacific Islands, June 1975*, T.C. Res. 2163, U.N. TCOR, 43d Sess., Supp. No. 1, at 1, U.N. Doc. T/1779 (1976) (Mariana Islands). In almost every case these resolutions were passed by unanimous votes or by consensus.

be prevented.²⁷⁷ These requirements all consistently match the texts of the major human rights treaties, and many echo holdings of the U.N. Human Rights Committee, the European Court and Commission of Human Rights, and the Inter-American Commission.²⁷⁸ While it is true that only the state which requests monitoring is the object of electoral standards in any given case, all member states have at some point participated in the formulation of such standards. This fact undercuts the argument that U.N. election monitoring standards should not be used to interpret treaties because the United Nations monitors elections only at the invitation of member states.²⁷⁹ The political organs of the United Nations which formulate these standards permit access to all states, and their decisions represent the opinion of international community as a whole. The fact that missions have been by invitation only does not alter the nature of this decision-making process.

The standards derived from U.N. election monitoring permit the addition of the following elements of a legally sufficient election to those derived solely from the human rights treaties:²⁸⁰ 1) citizens must have the opportunity to organize and join political parties, and such parties must be given equal access to the ballot; 2) to the extent the government controls the media, all parties must have the opportunity to present their views through the media; and 3) the election must be overseen by an independent council or commission not tied to any party, faction, or individual, but whose impartiality is ensured both in law and practice.

2. *Sovereignty and the Right to Political Participation*

Part II observed that while questions of political participation were subject to states' exclusive domestic competence before the First World War, subsequent treaties developed internationally-cognizable participatory rights.²⁸¹ Yet absolutist notions of state sovereignty retain adherents. These states essentially deny the enforceability of treaty-based participatory rights, and argue that any distinction between elected and non-elected regimes compromises the principle

277 The West Irian mission remains the sole exception. However, the West Irian mission can be distinguished because it originated in a bilateral treaty rather than an independent decision by an international organization to monitor the election.

278 Even where mission standards find no explicit support in treaty texts or judicial interpretation—for example, on the questions of party pluralism under the Political Convention and equal access to media under the three major human rights treaties—no evidence exists to indicate that those standards *contradict* the treaties.

279 Each member state may voice its opinion in the General Assembly and put objections on record. Even in the Security Council, which approved the Cambodia and Namibia missions, any state may participate in debates on election monitoring if it demonstrates an interest in the matter. *See* U.N. CHARTER, art. 31.

280 *See supra* part II.B.5.

281 *See supra* notes 17-49 and accompanying text.

The Right to Political Participation

of state equality.²⁸² This view labels criticism of national governments as an intervention into domestic affairs and contends that international law is designed to preserve the diversity of national systems.²⁸³

States making such claims are in a distinct minority.²⁸⁴ But, more importantly, the notion of sovereignty invoked by the opponents of the international enforcement of participatory rights is deeply flawed on at least three levels.

First, opponents of participatory rights depend upon an overbroad conception of sovereignty.²⁸⁵ In their most extreme moments the opponents seem to suggest that political rights are *inherently* beyond the competence of interna-

282 See *Respect for the Principles of National Sovereignty and Non-Interference in the Internal Affairs of States in Their Electoral Processes*, G.A. Res. 45/151, U.N. GAOR, 45th Sess., 69th plen. mtg. at 1, U.N. Doc. A/RES/45/151 (1990). This resolution invokes Article 2(7) of the U.N. Charter, appeals to states to stop financing political parties or candidates in other states, and declares that "there is no single political system or single model for electoral processes equally suited to all nations and their peoples." Most importantly, it asserts that any "extraneous" attempt to "interfere in the free development of national electoral processes, in particular in the developing countries . . . violates the spirit and letter of the principles established in the Charter" and the Declaration on Friendly Relations. The vote on this resolution evidenced a North-South split; the United States, other industrialized nations, and five Eastern European nations voted against the resolution, while virtually all other U.N. member states voted for it. The Soviet Union abstained. *Id.*

283 See e.g., Pact of the League of Arab States, Mar. 22, 1945, art. 8, 70 U.N.T.S. 237, 254 ("Every member State of the League shall respect the form of government obtaining in the other States of the League, and shall recognize the form of government obtaining as one of the rights of those States, and shall pledge itself not to take any action tending to change that form."); CHARTER OF THE ORGANIZATION OF AMERICAN STATES, Apr. 30, 1948, art. 13, 2 U.S.T. 2394, T.I.A.S. No. 2361, 119 U.N.T.S. 3, 56 ("[e]ach State has the right to develop its cultural, political and economic life freely and naturally").

Other norms arguably support this view: the lack of any general rules defining which governments should or should not be recognized, see RESTATEMENT, *supra* note 47, § 203(1) ("[a] state is not required to accord formal recognition to the government of another state"); the fact that membership in the United Nations is not limited to states with representative governments, see U.N. CHARTER art. 4, ¶ 1; and the absence of a right to intervene by force to preserve democratic government, see IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 338-42 (1963) (expressing skepticism as to legality of any form of humanitarian intervention); Ved Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L L. 494, 500 (1990) ("the justification of invasion for the sake of the institution of democracy has simply never been accepted"); see also see Lori F. Damrosch, *Politics Across Borders: Nonintervention and Nonforcible Influence Over Domestic Affairs*, 83 Am. J. Int'l L. 1 (1989) (discussing propriety of *nonforcible* intervention).

These arguments have arisen before in many contexts. For example, when the dispute between the United States and Nicaragua reached the International Court of Justice, the United States argued that Nicaragua's breach of a promise to hold free elections justified U.S. aid to the anti-government *contras*. *Military and Paramilitary Activities (Nicar. v. U.S.)*, 1986 I.C.J. 4, 130-33 (June 27). The Court responded that in the absence of specific treaty commitments, it would not normally address the composition of a state's government, since a "State's domestic policy falls within its exclusive jurisdiction." *Id.* at 131. The Court then stated that "[o]f its nature, a commitment to establish democratic government . . . is one of a category which, if violated, cannot justify the use of force against a sovereign state." *Id.* at 133.

284 See, e.g., G.A. Res. 46/137, *supra* note 10, at 365 (affirming importance of free and fair elections by vote of 135-3-13). However, participatory rights remain a relatively new concern for the United Nations, unaided by the General Assembly's willingness to pass inconsistent resolutions on the subject in consecutive sessions. See G.A. Res. 45/151, *supra* note 282 (declaring sanctity of domestic jurisdiction).

285 The most common claim of sovereign infringement is based on Article 2, paragraph 7 of the U.N. Charter, which provides that "[n]othing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state." This provision limits the United Nation's jurisdictional competence; the mandatory language indicates that a state cannot waive the requirement by consent.

tional law. But this proposition is demonstrably false. How else are we to explain that every major human rights treaty includes an article on political participation? The United Nations, the Organization of American States, and the Conference on Security and Co-operation in Europe are spending increasing amounts of time and resources on monitoring elections in independent states. Indeed, in an era in which national environments and economic policies have become the subject of prescriptive international norms it is difficult to imagine an area inherently *beyond* the competence of international law. The notion that states have exclusive sovereignty over all activities within national borders is clearly outmoded. While the sheer weight of the doctrine's history may still lend it rhetorical force, sovereignty so conceived simply does not describe the contemporary world.

Second, the treaties themselves create binding law.²⁸⁶ Where an international agreement is binding, the norm *pacta sunt servanda* obliges parties to adhere to each of its provisions in good faith.²⁸⁷ States that have ratified the Political Covenant or a regional equivalent therefore cannot claim that the failure to hold "genuine" elections remains a matter of exclusive domestic jurisdiction.²⁸⁸ Adherence may require the adoption of "such legislative or other measures as may be necessary" to give effect to the prescribed rights,²⁸⁹ and breach entitles other parties to remedies specifically provided for by the instrument as well as remedies generally provided under internation-

286 The General Assembly initially considered a non-binding declaration that would have left the protection of human rights primarily to individual states. See Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in THE INTERNATIONAL BILL OF RIGHTS, *supra* note 14, at 33-34. The General Assembly eventually decided to adopt both a declaration (the Universal Declaration on Human Rights) and a binding covenant (the Political Covenant), the latter leaving "no doubt about the legal nature of the provisions it contains." *Id.* at 34.

Delegates to the Political Covenant's first drafting session in 1953 repeatedly expressed this view. The Soviet delegate stated that including a right to political participation in the Covenant would ensure that signatories' governments would be obliged to grant the right to all individuals in their states. See *Commission on Human Rights, 363d Meeting, supra* note 62, at 4; *id.* at 7 (statement of Yugoslavian delegate); *Commission on Human Rights, 364th Meeting, supra* note 62, at 8 (statement of French delegate); *Commission on Human Rights, 367th Meeting, supra* note 62, at 14 (statement of Australian delegate).

287 Vienna Convention, *supra* note 163, art. 26 ("[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith").

288 A number of articles in the Political Covenant, for example, contain mandatory language, requiring specific, affirmative actions by state parties. For example, Article 2(2) requires states to adopt domestic legislation to implement Political Covenant provisions, Article 2(3)(a) requires "effective" remedies in domestic law for violation of the Political Covenant, Article 4(2) prohibits derogation from certain fundamental rights, and Article 41 requires state parties to submit periodic reports "on the measures they have adopted which give effect to the rights recognized herein." Political Covenant, *supra* note 6. See also BROWNLIE, *supra* note 16, at 572 ("The Covenants . . . have legal force as treaties for the parties to them . . ."); LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS 990 (2d ed. 1987) ("[p]rotection of civil and political rights is a binding obligation from the time a state becomes a party to that covenant").

289 Political Covenant, *supra* note 6, art. 2(2).

The Right to Political Participation

al law for violation of treaty obligations.²⁹⁰ The texts and the *travaux* of the Political Covenant and the regional human rights treaties do not suggest that participatory rights constitute exceptions to these requirements.²⁹¹

The fact that participatory rights were once a purely domestic concern does not affect the international enforcement of a treaty. Domestic jurisdiction is fluid, definable only by reference to international law, including treaty law.²⁹² Thus, elections are not an immutable mainstay of the domestic sphere, but may (and have) become the subject of binding international obligations through treaties.²⁹³ The International Court of Justice (I.C.J.) has held that a treaty commitment creates international law between the parties, and states cannot appeal to the previously domestic nature of their obligations to avoid sanctions for breach of a treaty.²⁹⁴ A clear affirmation of the obligatory

290 RESTATEMENT, *supra* note 47, § 701 cmt. c; Louis Henkin, *Human Rights and "Domestic Jurisdiction,"* in HUMAN RIGHTS, INTERNATIONAL LAW AND THE HELSINKI ACCORD 21, 25 (Thomas Buergenthal ed. 1977). A treaty party's right to terminate the treaty or suspend its operation upon a material breach by another party is not available in the case of human rights treaties. See Vienna Convention, *supra* note 163, art. 60(5).

291 According to one commentator,

[n]othing in Article 25 or in other text of the Covenant justifies a distinction between the clarity or immediacy of a state's duties under that article and, say, its duty to refrain from torture. Citizens of a party to the Covenant would have a valid claim under international law if their government had seized power and abolished elections.

Steiner, *supra* note 14, at 131. Nevertheless, Steiner suggests that Article 25 be implemented slowly over time so that disparities between economic and social systems may be taken into account. *Id.* at 129-34. The Spanish delegate noted in the final debate over the Political Covenant that "some people considered that the principle of universal and equal suffrage should be introduced gradually because of the low educational level in some countries," but argued that gradual enforcement was "unacceptable and should not be included in a legal instrument such as the draft Covenant." *Third Committee, 1096th Meeting, supra* note 62, at 180. No provision on gradual implementation was included. The Inter-American Commission has also rejected a request to interpret Article 25 to permit gradual implementation of participatory rights, and concluded that such a position "would condition the existence of human rights on 'the circumstances and situation of each country' leaving the whole legal system in a precarious state." Mexico Elections Decision, Cases 9768, 9780, 9828, Inter-Am. C.H.R. 97, 108, OEA/ser. L/V/11.77, doc. 7, rev. 1, at 118 (1990).

292 See, e.g., Advisory Opinion No. 4, *Tunis & Morocco Nationality Decrees*, 1923 P.C.I.J. (ser. B) No. 4, at 24 (Feb. 7) ("The question of whether a certain matter is or is not solely within the jurisdiction of a State is an essentially relative question; it depends on the development of international relations."); see also C.G. Fenwick, *The Scope of Domestic Questions in International Law*, 19 AM. J. INT'L L. 143, 144 (1925); Lawrence Preuss, *Article 2, paragraph 7 of the Charter of the United Nations and Matters of Domestic Jurisdiction*, 74 HAGUE RECUEIL DES COURS 553, 567 (1949); C.H.M. Waldock, *The Plea of Domestic Jurisdiction Before International Legal Tribunals*, 31 BRIT. Y.B. INT'L L. 96, 110 (1954).

293 As previously noted, the United States argued in the *Nicaragua* case that Nicaragua had breached a commitment to the OAS to hold free elections. See *supra* note 283. The Court held that no binding commitment existed, but noted in dicta:

The Court cannot discover, within the range of subjects open to international agreement, any obstacle or provision to hinder a State from making a commitment of this kind. A State, which is free to decide upon the principle and methods of popular consultation within its domestic order, is sovereign for the purpose of accepting a limitation of its sovereignty in this field.

Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 131 (June 27).

294 See *The S.S. Wimbledon (Gr. Brit., Fr., Italy, Japan, & Pol. v. Ger.)*, 1923 P.C.I.J. (ser. A) No. 1, at 25 (Aug. 17) (enforcing provision of Versailles Treaty over German claim of pre-existing sovereign rights); *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, 1950 I.C.J. 65, 70-71 (Mar. 30) (holding that interpretation of treaty is by its nature question of international law); see

nature of treaty-based participatory rights was made by the Inter-American Commission on Human Rights in an opinion involving elections in Mexico.²⁹⁵ Mexico argued that American Convention on Human Rights "does not limit the sovereign powers of the States to elect their political bodies."²⁹⁶ The Commission disagreed, concluding that the Convention empowered it to determine the compliance of states parties with the political rights outlined in the Convention.²⁹⁷

also Tunis & Morocco Nationality Decrees, 1923 P.C.I.J. (ser. B) No. 4, at 24 ("[I]n a matter which, like that of nationality, is not in principle, regulated by international law, the right of a State to use its discretion is nevertheless restricted by obligations which it may have undertaken towards other States."). States cannot, for example, invoke anti-democratic provisions of their own constitutions as a basis for dishonoring treaty obligations to hold elections. *See* Vienna Convention, *supra* note 163, art. 27 ("[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty"); Advisory Opinion No. 44, Treatment of Polish Nationals in Danzig, 1932 P.C.I.J. (ser. A/B) No. 44, at 24 (Feb. 4) ("a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force").

The parties to the Political Covenant voluntarily relinquished exclusive domestic control over political participation by agreeing to hold genuine, periodic elections in which suffrage is equal, universal, and conducted by secret ballot, and which guarantee the free expression of the will of the electors. Political Covenant, *supra* note 6, art. 25. If states do not meet these minimum requirements by, for example, failing to hold elections or by holding sham elections, the international community is entitled to impose sanctions. The Covenant does not prohibit explicitly states from recognizing governments that obtain power in violation of citizens' participatory rights. Instead, non-recognition forms a different kind of remedy from others generally available for breach of treaty obligations. Those remedies are wholly permissive as parties are not required to seek punishment for every violation of a right. *See* RESTATEMENT, *supra* note 47, § 902 ("[a] state *may* bring a claim against another state for violation of an international obligation owed to the claimant state or to states generally") (emphasis added). Thus, since non-recognition is simply another such remedy, states remain free to extend or to deny recognition to illegitimate governments. For a discussion of recognition by the U.N. in the form of accrediting delegates, *see infra* part V.

It is also important to emphasize that the provisions of human rights conventions provide *minimum* criteria. The Political Covenant, for example, does not regulate all or even most aspects of the electoral process. State parties retain domestic control over a range of issues that the Covenant does not address, including whether an election is conducted by proportional representation or some other system, whether candidates in a list system are chosen by the party or the voters, public financing of candidates; the length of the campaign, contribution or spending limits imposed on candidates or parties, and the drawing of electoral districts.

²⁹⁵ Mexico Elections Decision, Cases 9768, 9780, 9828, Inter-Am. C.H.R. 97, 108, OEA/ser. L/V/11.77, doc. 7, rev. 1, at 98 (1990). The case involved a complaint by three Mexican citizens, who alleged procedural improprieties in local Mexican elections and that electoral authorities failed to adjudicate their claims of fraud. Mexico replied that the Commission lacked jurisdiction over the claims, since the structuring of elections was a matter reserved to its domestic jurisdiction. *Id.* at 103-05.

²⁹⁶ *Id.* at 104.

²⁹⁷ The Commission stated:

[T]he Mexican State, by virtue of having signed and ratified the Convention, has consented to allow certain aspects of its internal jurisdiction to be the subject of judgments on the part of the organs instituted to protect the rights and guarantees recognized by the Convention. . . . [T]he Commission . . . is empowered to examine and evaluate the degree to which the internal legislation of the State party guarantees or protects the rights stipulated in the Convention and their adequate exercise and, obviously among these, political rights. The IACHR is also empowered to verify, with respect to these rights, if the holding of periodic, authentic elections, with universal, equal, and secret suffrage takes place, within the framework of the necessary guarantees so that the results represent the popular will, including the possibility that the voters could, if necessary, effectively appeal against an electoral process that they consider fraudulent, defective, and irregular or that ignores the 'right to access, under general conditions of equality, to the public functions of their country.'

The Right to Political Participation

Third, a shift in the locus of sovereignty undermines the arguments against participatory rights. For a non-democratic regime to claim that participatory rights violate its national sovereignty begs the question of whether that regime has legitimate authority to make such a statement. When the will of the people is the basis of the authority of government, regimes that thwart the will of the people will lack legitimacy. The participatory rights provisions of the human rights conventions have succeeded in extending this notion of legitimacy from the domestic to the international sphere. It is still an open question as to how far this principle should be extended. But if political participation is to have any meaning as an *internationally* enforceable right, the community of states must be empowered to prescribe standards detailing how participation is to occur and to insist that parties to the major treaties adopt these standards as law. A regime that bases its legitimacy on nothing more than the fact that it holds power exercises no "sovereign" authority to object to such prescriptions.

3. *The Relationship Between Participatory Rights and Other Human Rights*

Treaty-based participatory rights potentially conflict with other international human rights. It has been argued that the potential for a "tyranny of the majority" in a democracy requires that other, counter-majoritarian rights be given preference by the international community. Others argue that a minimum level of economic development is a prerequisite to meaningful political participation, and thus subsistence or welfare rights should be given priority. These arguments, however, find no support in human rights treaties, which view political participation as a keystone right—an essential prerequisite to the enjoyment of all other rights.²⁹⁸ The reasoning is straightforward: citizens will never attain sufficient power to advance their own welfare unless they possess a voice in the decisions of their government. One may conclude that human rights law does not favor elections to the exclusion or even subordination of other rights,

Id. at 119-20.

²⁹⁸ Many states expressed this view during the drafting of the Political Covenant. See *Commission on Human Rights, 363d Meeting, supra* note 62, at 11 (statement of Mr. Druto, Polish delegate) ("a citizen who had no direct say in the election of the parliament and government of his country could have no guarantee that his rights would be safeguarded"); *Commission on Human Rights, 364th Meeting, supra* note 62, at 4 (statement of Mr. Kriven, Ukrainian delegate) ("[T]he right to participate in government was an essential prerequisite for the enjoyment of all other rights, including economic, social and cultural rights."). See also European Convention, *supra* note 104, pmb1. (promoting protection of fundamental freedoms "by an effective political democracy"); *Mathieu-Mohn v. Belgium*, 113 Eur. Ct. H.R. (ser. A) at 22 (1987) (holding that guarantee of free elections is "of prime importance in the Convention System"); *Chile Report, supra* note 132, at 254 (Inter-American Commission stating that "periodic, free and authentic elections are the best guarantee of the full exercise of the other human rights"); *Haiti Report, supra* note 132, at 55 ("democracy is the best possible guarantee for the full exercise of human rights"); Copenhagen Document, *supra* note 92, 29 I.L.M. at 1307 (stating CSCE declaration that "pluralistic democracy and the rule of law are essential for ensuring respect for all human rights and fundamental freedoms"); Charter of Paris, *supra* note 92, 30 I.L.M. at 194 ("Democracy is the best safeguard of freedom of expression, tolerance of all groups of society, and equality of opportunity for each person.").

but establishes participatory rights as a necessary (though certainly not sufficient) condition for the achievement of other human rights.

IV. ENFORCING THE RIGHT TO POLITICAL PARTICIPATION

A. *Is Enforcement of Participatory Rights Possible?*

Critics often decry the weakness of human rights enforcement mechanisms. This claim would seem to be even stronger in the case of participatory rights. Unlike a requirement that a government discontinue a particular human rights violation (e.g., ceasing torture of political detainees), the enforcement of participatory rights often requires a state to restructure its government or constitutional system.²⁹⁹

Existing U.N. and regional enforcement mechanisms, which consist of non-binding adjudications by human rights tribunals, seem unlikely candidates for achieving such wholesale reallocations of political power. But decrying the lack of *institutional* enforcement mechanisms obscures an important aspect of participatory rights which may, in the long run, lead to too many enforcement opportunities instead of too few. The human rights revolution brought about a change in classical international law: in a limited number of areas individual entitlements of dignity and autonomy displace states' rights to hegemony in their domestic affairs. Recognition of the right to political participation, which is included among these rights, forces the international community to move beyond traditional human rights law and its discrete enclaves of permissible individual claims against official abuses. Participatory rights are based on an assessment that governments themselves result from prior, legally significant acts (i.e., elections) by citizens who are the ultimate repositories of national sovereignty. Hence the international community must look first to individuals to determine whether any given government is lawfully constituted.

The bearing of this theory of legitimacy on the enforcement of participatory rights is best illustrated through the example of South Africa. The South African government has been declared illegitimate by virtually every state. The United Nations and numerous individual states demanded removal of the white-run government and enfranchisement of all South African citizens. When it

299 As Henry Steiner observed:

In given circumstances, an authoritarian government can stop torturing and arresting without surrendering its monopoly of power. As events in Eastern Europe illustrate, however, such a government cannot grant the right to political participation without signing its death warrant. "Throw out the rascals" speaks the more dramatically after decades of unchosen and oppressive regimes.

Henry J. Steiner, *The Youth of Rights*, 104 Harv. L. Rev. 917, 930 (1991) (reviewing LOUIS HENKIN, *THE AGE OF RIGHTS* (1990)) (citation omitted).

The Right to Political Participation

refused to comply, South Africa became an international pariah.³⁰⁰ In sum, because the government was itself deemed illegal, every point of interaction between South Africa and other states presented an opportunity for those states to condemn its government. The regime could not disassociate itself from its objectionable policies, for the regime itself was objectionable.

These actions demonstrate a consensus among the international community that continued interaction with the South African government implicitly affirms its legitimacy and disavows the participatory rights of Black South Africans.³⁰¹ Thus, states and international organizations can take affirmative steps to indicate that a government which violates the participatory rights of its citizens will not be accorded legitimacy, thereby encouraging offending regimes that value their status in the international community to reform.³⁰² Governments lacking popular domestic support would be encouraged to gain both domestic and international legitimacy by recognizing participatory rights.

As the South African example demonstrates, the international community no longer grants states hegemonic control over their domestic affairs. This further supports the argument that, today, the international community *must* look first to the citizens of a state to determine whether a government is lawfully constituted. The most logical way to ensure that the international community indeed does so is to make effective, frequent use of election monitoring missions.

B. Enforcing Participatory Rights Through the General Assembly's Accreditation Process

There is one institutional enforcement mechanism that presents a unique opportunity to enhance the right to political participation. This is the General Assembly's accreditation of delegates, which provides a global forum in which the international community can debate the legitimacy of governments.³⁰³

300 Examples of sanctions are numerous. They include the refusal to seat South Africa's delegates in the General Assembly, a world-wide trade embargo, restrictions on loans from international financial institutions, and exclusion from international athletic competitions. See generally I.E. SAGAY, *THE SOUTHERN AFRICAN SITUATION AND THE EVENTUAL TRIUMPH OF INTERNATIONAL LAW* 34-36 (1991) (detailing international sanctions on South Africa).

301 Critics might respond that South Africa is a unique case built upon discrimination based on race and European guilt over colonial histories. But it is difficult to imagine the same degree of international reaction, even given these other factors, if South African Blacks had had a voice in their government. At bottom the principle at stake was that of majority rule.

302 Enforcement becomes more difficult when a state that denies its citizens participatory rights willingly suffers the consequences of international sanctions. Again, the slow history of change in South Africa is illustrative. Moreover, if that regime's domestic power base is unstable, it may wish to bolster its domestic legitimacy by encouraging other states to reaffirm its legitimacy.

303 For example, the General Assembly in 1974 rejected the credentials of the South African government because it did not represent the South African people. See *First Report of the Credentials Committee*, U.N. GAOR, 29th Sess., Annex, Agenda Item 3, at 2, U.N. Doc. A/9779 (1974) (describing Senegalese delegate's proposal to reject South African credentials on grounds that apartheid government

This section proposes that in certain limited but crucial situations—namely, following a monitored election—the representative nature of a government should be dispositive in accepting its delegation's credentials.

1. *The Accreditation Process*

The U.N. Charter provides for membership of states, not governments.³⁰⁴ Upon admission of a state, the focus shifts to the government purporting to represent that state and, ultimately, to the delegation purporting to represent the government. The General Assembly's Rules of Procedure provide that delegates shall submit credentials, "issued either by the Head of State or Government or by the Minister for Foreign Affairs," to the Secretary-General.³⁰⁵ The Secretary-General then transmits the credentials to a nine-member Credentials Committee, appointed at the beginning of each General Assembly session, which then must "examine the credentials of representatives and report without delay" to the full Assembly.³⁰⁶ However, neither the Rules nor the Charter tell the Committee and the General Assembly how to evaluate a government's credentials.

Credentials generally are reviewed and approved without discussion. The Credentials Committee and the General Assembly usually treat the process as a formality, automatically accepting accrediting documents if they bear the signature of the Head of State or Foreign Minister.³⁰⁷ However, there are two types of circumstances which prompt members of the Credentials Committee to ask whether a government is in fact representative. The first occurs when one state objects to the government of another. For example, in 1957 the United States challenged the credentials of the Hungarian government, which had recently been installed by invading Soviet forces.³⁰⁸ The second

"represented only a very small fraction of the South African population"); *id.* at 4 (noting acceptance of proposal by Credentials Committee); *Relationship Between The U.N. and South Africa*, G.A. Res. 3207 (XXIX), U.N. GAOR, 29th Sess., Supp. No. 31, at 2, U.N. Doc. A/9631 (1974).

304 The Charter requires a state to meet three requirements to qualify for admission to the United Nations: 1) be peace-loving; 2) accept the obligations of the Charter; and 3) be able and willing to carry out those obligations. U.N. CHARTER art. 4(1). The Charter makes no reference to democratic institutions, and the drafters of the Charter probably did not understand the requirement that a state be "peace-loving" to have any relation to democratic institutions. *See generally* RUTH B. RUSSELL, *A HISTORY OF THE UNITED NATIONS CHARTER* 845 (1958).

305 R. PROC. GEN. ASSEMBLY 27.

306 R. PROC. GEN. ASSEMBLY 28.

307 *See* Malvina Halberstam, *Excluding Israel from the General Assembly by a Rejection of its Credentials*, 78 AM. J. INT'L L. 179, 182 (1984) (discussing dangers of failure of accreditation of Israel). Normally, therefore, the Credentials Committee asks whether a delegation represents a government—it assumes that a government represents a state. *See* Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the U.N. General Assembly*, 7 CAL. W. INT'L L.J. 615, 620-21 (1977).

308 UNITED NATIONS, GENERAL ASSEMBLY, CREDENTIALS OF REPRESENTATIVES TO THE ELEVENTH SESSION OF THE GENERAL ASSEMBLY: REPORT OF THE CREDENTIALS COMMITTEE, U.N. Doc. A/3536 (1957). The United States based its objection on a General Assembly resolution declaring that "these credentials had been issued by authorities established as a result of military intervention by a foreign power

The Right to Political Participation

type, more important for this discussion, occurs when rival factions from the same state contend to the General Assembly that each is the legitimate government.³⁰⁹ The battle between the Chinese Communists which established the People's Republic of China after capturing the Chinese mainland in 1949 and

whose forces remained in Hungary despite requests by the General Assembly for their withdrawal." *Id.* at 1; see also *Credentials of Representatives of the Eleventh Session of the General Assembly*, G.A. Res. 1009, U.N. GAOR, 11th Sess., Supp. No. 17, at 1, U.N. Doc. A/3572 (1957) (approving REPORT OF CREDENTIALS COMMITTEE, U.N. Doc. A/3536). The U.S. delegate argued that the resolution "cast serious doubt upon the delegation which claims to represent the Hungarian people—and, in the view of my delegation, it does not represent them." U.N. GAOR, 12th Sess., 726th mtg. at 561, U.N. Doc. A/PV.726 (1957) (statement of Mr. Wadsworth, U.S. delegate). Hungary responded that "[t]he credentials of the Hungarian delegation were issued by the Presidential Council of the People's Republic in accordance with the required formalities" and declared the U.S. challenge "an interference in the internal affairs of Hungary." *Id.* (statement of Mr. Sik, Hungarian delegate). At the end of the General Assembly debate, during which states aligned themselves along East-West lines, the General Assembly voted to take no action on the Hungarian credentials but to seat the delegation provisionally. The General Assembly passed identical resolutions in the following years, and the United States ceased its challenges thereafter. See ROSALYN HIGGINS, *THE DEVELOPMENT OF INTERNATIONAL LAW THROUGH THE POLITICAL ORGANS OF THE UNITED NATIONS* 158-59 (1963) (discussing dispute over Hungarian credentials).

Similar challenges have included opposition to South African credentials by a wide array of states, see *First Report of the Credentials Committee*, U.N. GAOR, 29th Sess., at 2-4, U.N. Doc. A/9779 (1974); to Israeli credentials by Arab nations, see e.g., *Credentials of Representatives of the Thirty-Seventh Session of the General Assembly*, U.N. GAOR, 37th Sess. Agenda Item 3, at 1, U.N. Doc. A/37563 (1982) (letter of objection); *Letter Dated 12 October 1982 from the Permanent Representative of Israel to the United Nations Addressed to the President of the General Assembly*, U.N. GAOR, 37th Sess., Agenda Item 3, U.N. Doc. A/37565 (1982) (response of Israel); to Chilean credentials by the Soviet Union, see *First Report of the Credentials Committee*, U.N. GAOR, 15th Special Sess., at 2, U.N. Doc. A/S-15/36 (1988); *First Report of the Credentials Committee*, U.N. GAOR, 41st Sess., at 4, U.N. Doc. A/41/727 (1986); *First Report of the Credentials Committee*, U.N. GAOR, 39th Sess., at 3, U.N. Doc. A/39/574 (1984); to Afghani credentials by China, *Report of the Credentials Committee*, U.N. GAOR, 17th Sess., at 3, U.N. Doc. A/S-17/10 (1990); *First Report of the Credentials Committee*, U.N. GAOR, 44th Sess., at 3-4, U.N. Doc. A/44/639 (1989) [hereinafter 1989 *First Report to the Credentials Committee*]; and to Grenadan credentials by Cuba, see *Second Report of the Credentials Committee*, U.N. GAOR, 39th Sess., at 2, U.N. Doc. A/39/574/Add.1 (1984). Only politics seems to guide who challenges whom.

309 The recent case of Haiti provides an example. The legally elected president of Haiti was deposed by a coup following the U.N.-monitored election. There thus were two Haitian governments: the junta exercising actual power and the government-in-exile of President Aristide. Faced with this situation the foreign ministers of the OAS member states decided not to accept the junta's delegates, while the General Assembly has yet to speak on the credentials issue.

Events in Panama provide a similar example. General Noriega voided the results of the May 1989 elections after it became clear, according to all reliable accounts, that the opposition candidate won. Panama Report, *supra* note 132, at 52-57; NATIONAL DEMOCRATIC INST. FOR INT'L AFFAIRS & NATIONAL REPUBLICAN INST. FOR INT'L AFFAIRS, *THE MAY 7, 1989 PANAMANIAN ELECTIONS* 59 (1989) (hereinafter NDI & NRI, Panamanian Elections). The elections were not monitored by the United Nations, but by a number of non-governmental organizations. *Id.* The Security Council invited a representative of Panama to participate in an emergency meeting to discuss recent events, pursuant to Rule 37 of its Rules of Procedure. U.N. SCOR, 44th Sess., 2901st mtg. at 6, U.N. Doc. S/PV.2901 (1989). The Council, however, was required to decide which representative to invite to participate in its deliberations. The Secretary-General received telefaxed letters on December 20, 1989 from both General Noriega's Foreign Minister and from the new Minister appointed by opposition presidential candidate Guillermo Endara, each asking that their own representative be permitted to appear before the Security Council. The Secretary-General advised that he was "not in a position to formulate an opinion as to the adequacy of the provisional credentials which have been submitted." UNITED NATIONS, SECURITY COUNCIL REPORT OF SECRETARY-GENERAL at 3, U.N. Doc. S/21047 (1989). The issue was never resolved, since both delegations eventually declined to participate in the Council's debate. U.N. SCOR, 44th Sess., 2902d mtg. at 3-5, U.N. Doc. S/PV.2902 (1989).

the Kuomintang (or Nationalist) government on the island of Taiwan provides another example.³¹⁰ China was one of the four major powers issuing invitations to the United Nations drafting conference at a time when the country was under the control of General Chiang Kai-shek's Nationalist government.³¹¹ Beginning in November 1949, however, the new communist regime began to demand the expulsion of the Kuomintang delegation and the accreditation of its own representatives.³¹² The resulting dispute, which lasted until the People's Republic delegation was finally seated in 1971, spawned numerous suggestions as to how such conflicts should be resolved.³¹³

2. Existing Standards for Resolving Credentials Challenges

Three standards have been proposed for resolving credentials challenges since the China dispute: assessment of whether a particular government exercises effective control over the state; determination of the proper representative according to the "Purposes and Principles of the Charter;" and consideration of whether a particular government can meet the obligations of membership. None of these standards solely determines accreditation, and each fails

310 The China dispute set the precedent that conflicts between competing delegations should be resolved by vote on the Credentials Committee's report, rather than as a separate agenda item. Contests between competing delegations from Cambodia, the Congo, and Yemen were subsequently framed as credentials challenges. See UNITED NATIONS, GENERAL ASSEMBLY, CREDENTIALS OF REPRESENTATIVES TO THE SEVENTEENTH SPECIAL SESSION OF THE GENERAL ASSEMBLY: LETTER DATED 21 FEBRUARY 1990 FROM THE PERMANENT REPRESENTATIVE OF THE LAO PEOPLE'S DEMOCRATIC REPUBLIC TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. A/S-17/9 (1990) (stating objections to credentials of Democratic Kampuchea); UNITED NATIONS, GENERAL ASSEMBLY, CREDENTIALS OF REPRESENTATIVES TO THE FIFTEENTH SPECIAL SESSION OF THE GENERAL ASSEMBLY: FIRST REPORT OF THE CREDENTIALS COMMITTEE, U.N. Doc. A/S-15/36 (1988) (same).

311 LUNG-CHU CHEN & HAROLD D. LASSWELL, *FORMOSA, CHINA AND THE UNITED NATIONS* 7 (1967).

312 Herbert W. Briggs, *Chinese Representation in the United Nations*, 6 INT'L ORG. 192, 192 (1952).

313 The dispute over the credentials of the Chinese delegation was resolved as a separate agenda item in 1971, after 21 years of annual challenges before the Credentials Committee. See UNITED NATIONS, GENERAL ASSEMBLY, REQUEST FOR THE INCLUSION OF A SUPPLEMENTARY ITEM IN THE AGENDA OF THE TWENTY-SIXTH SESSION: THE REPRESENTATION OF CHINA IN THE UNITED NATIONS: LETTER DATED 17 AUGUST 1971 FROM THE PERMANENT REPRESENTATIVE OF THE UNITED STATES OF AMERICA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL, U.N. Doc. A/8442 (1971). The Nationalist government suggested that one essential criterion should be the degree of support a government enjoys within its territory. It asserted that "the only possible procedure" to verify such support "consistent with the principles of the Charter, is a fair and free election." LETTER DATED 13 MARCH 1950 FROM THE PERMANENT REPRESENTATIVE OF CHINA TO THE SECRETARY-GENERAL, U.N. Doc. S/1470, at 3 (1950).

The resolution of such conflicts during the credentials process may also determine the number of votes needed in the General Assembly to seat a delegation. Approval of the report of the Credentials Committee, like most other issues before the Assembly, requires only a simple majority. Under Article 18(2) of the Charter, however, an "important question" requires the approval of two-thirds of the members present and voting. Article 18(2) contains a non-exclusive list of "important issues," including several that are analogous to the choice between two delegations: suspension of the rights and privileges of membership, expulsion of members, and admission of new members.

The Right to Political Participation

to consider a government's obligation to assure the participatory rights of its inhabitants.

The effective control standard requires accreditation of whatever government exercises actual authority in a state,³¹⁴ a standard applied by most states in their bilateral relations.³¹⁵ Under this standard, the United Nations must seat the representative of any new government following a change in leadership. The principal advantage of the "effective control" test is its simplicity, as no investigation occurs into the new government's policies or the means by which it attained power. Furthermore, the test ensures that the United Nations will not be composed of paper governments.³¹⁶ If the United Nations is to help maintain international security, proponents of this standard argue, its members must exercise actual power over people and resources.

The second standard arose from the debate over the accreditation of the Chinese delegation in 1950, when the Soviet Union attempted to have the Kuomintang representative excluded from the Economic and Social Council.³¹⁷ The General Assembly established an ad hoc Political Committee to consider the issue³¹⁸ and propose recommendations.³¹⁹ The General Assembly adopted these recommendations in Resolution 396(V):

314 See Yuen-Li Liang, *Notes on Legal Questions Concerning the United Nations*, 45 AM. J. INT'L L. 689, 695 (1951) (discussing effective control standard).

315 See Tom J. Farer, *Panama: Beyond the Charter Paradigm*, 84 AM. J. INT'L L. 503, 510 (1990) (noting "the virtually uniform practice in international relations of treating any group of nationals in effective control of their state as constituting its legitimate government").

316 Briggs, *supra* note 312, at 207.

317 Liang, *supra* note 314, at 693.

318 The working document before the Political Committee consisted of a draft resolution submitted by Cuba, proposing the following criteria for determining representativeness: "(a) effective authority over the national territory; (b) the general consent of the population; (c) ability and willingness to achieve the Purposes of the Charter, to observe its Principles, and to fulfill the international obligations of the state; and (d) respect for human rights and fundamental freedoms." *Recognition by the United Nations of the Representation of a Member State*, U.N. GAOR Ad Hoc Political Comm., 5th Sess., Agenda Item 61, at 1, U.N. Doc. A/AC.38/L.6 (1950). The subcommittee also considered a number of other drafts. The most frequently discussed draft was submitted by the United Kingdom, which advocated the effective control test plus a requirement that the government enjoy "the obedience of the bulk of the population of that territory, in such a way that this control, authority and obedience appear to be of a permanent character." *Recognition by the United Nations of the Representation of a Member State*, U.N. GAOR Ad Hoc Political Comm., 5th Sess., Agenda Item 61, at 1, U.N. Doc. A/AC.38/L.21/Rev.1 (1950).

319 The subcommittee's draft resolution recommended four criteria: 1) general consideration of governments "in light of the purposes and principles of the Charter and the circumstances of each case;" 2) "[t]he extent to which the new authority exercises effective control over the territory of the Member State . . . and is generally accepted by the population;" 3) "[t]he willingness of that authority to accept responsibility for the carrying out [of] . . . its obligations under the Charter;" and 4) "[t]he extent to which that authority has been established through the internal processes in the Member State." *Recognition by the United Nations of the Representation of a Member State*, U.N. GAOR, Ad Hoc Political Comm., 5th Sess., Agenda Item 61, at 3, U.N. Doc. A/AC.38/L.45 (1950). At its meeting on November 27, 1950, the full committee adopted an Egyptian proposal to delete all but the first criterion. *Recognition by the United Nations of the Representation of a Member State*, U.N. GAOR Ad Hoc Political Comm., 5th Sess., 57th mtg., Agenda Item 61, at 364-67, U.N. Doc. A/1292.A/1308, A/1344, A/AC.38/L.45 (1950).

[W]henver more than one authority claims to be the government entitled to represent a Member State in the United Nations, and this question becomes the subject of controversy in the United Nations, it should be considered in the light of the Purposes and Principles of the Charter and the circumstances of each case.³²⁰

Unfortunately, this standard begs more questions than it answers: what precisely are "the Purposes and Principles of the Charter," and do they necessarily include fidelity to democratic elections? Or is non-intervention in domestic affairs such a principle? Resolution 396 (V) is so vague that it gives member states virtually "unfettered discretion in exercising their political judgments on the question of representation."³²¹

The third standard is set out in a legal memorandum on the representation question, issued by Secretary-General Trygve Lie at the outset of the China controversy.³²² The Lie Memorandum focused primarily on how to avoid subjective political judgments in the accreditation process: "The United Nations is not an association limited to like-minded States and governments of similar ideological persuasion (as is the case in certain regional associations). As an Organization which aspires to universality, it must of necessity include States of varying and even conflicting ideologies."³²³ Lie proposed that the criteria for recognition should reflect the ideologically neutral standard for membership contained in Article 4 of the Charter.³²⁴ He suggested that where two rival governments present formally valid credentials, the General Assembly should focus upon "which of these two governments in fact is in a position to employ the resources and direct the people of the State in fulfillment of the obligations of membership."³²⁵ This standard shares the concern for domestic authority found in the effective control standard, but adds the extra requirement that control be sufficient to fulfill the obligations of U.N. membership. Since the Lie standard does not require that the regime actually be committed to fulfilling Charter obligations, it adds little of substance to the effective control test.

320 *Recognition by the United Nations of the Representation of a Member State*, G.A. Res. 396 (V), U.N. GAOR, 5th Sess., Supp. No. 20, at 24, U.N. Doc. A/1775 (1950).

321 Jhabvala, *supra* note 307, at 632.

322 *Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations*, U.N. SCOR, 5th Sess., at 1-6, U.N. Doc. S/1466 (1950) [hereinafter *Lie Memorandum*].

323 *Id.* at 5.

324 Article 4 states in part: "Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able and willing to carry out these obligations." U.N. CHARTER art. 4.

325 *Id.* at 6.

The Right to Political Participation

C. *The Proposed Standard: Using the Results of Monitored Elections to Resolve Credentials Disputes*

How would the three existing accreditation standards work when the results of a U.N.-monitored election are overturned and an incumbent regime refuses to yield power? The incumbent's delegation would probably be seated, as the outcome under Resolution 396(V) is uncertain. I suggest here that the election results—as certified by U.N. observers to have been the result of a free and fair process—be used by the General Assembly as a basis for seating the opposition representatives.³²⁶

Admittedly, this scenario will not occur often; but the rarity of such episodes does not diminish their capacity to enhance the acceptance of the right to political participation. The General Assembly in this case would be faced with a stark choice between an elected regime and one staunchly resisting the authority of popular sovereignty, and the General Assembly will inevitably be seen as supporting or undermining participatory rights. Even infrequent accreditation disputes therefore create decisions of great precedential weight.³²⁷

The justification for accrediting elected regimes lies in the new relationship between the United Nations and the citizens of states in which elections are monitored. Each observer mission embodies a commitment by the United Nations to uphold and enforce participatory rights.³²⁸ What does it mean for the United Nations to undertake such a commitment? In seeking to enforce participatory rights the United Nations will have dispatched a mission to assist in the election of a government which fairly represents the views of its population. The United Nation's responsibility in such a situation is to a nation's individual citizens.³²⁹ It is in this spirit that the General Assembly, in condemning the coup in Haiti, quoted from Article 21 of the Universal Declaration: "the will of the people shall be the basis of the authority of govern-

326 A decision on this issue would begin when two factions submit credentials to the Secretary-General. The General Assembly could approve the Credentials Committee's choice by a simple majority vote on the Committee's report. Alternatively, the issue could be considered as a separate agenda item, which would require either a simple majority, or a two-thirds majority if it were designated an "important" issue under Article 18(2) of the Charter. If so designated it is possible that *neither* delegation would obtain support of two-thirds of the member states, and the existing delegation would continue to be seated provisionally until a final decision was reached. See R. PROC. GEN. ASSEMBLY 29.

327 This principle should not be limited to cases of election monitoring by invitation. The consent of the monitored state simply permits the United Nations to gather the best possible evidence on which to base a credentials decision, and is equally applicable to non-monitored elections, which present the question of whether a winner could be determined with an acceptable degree of accuracy.

328 The recipient state itself already may have undertaken such a commitment if it ratified the Political Covenant or one of its regional equivalents.

329 In the aftermath of the 1989 Panamanian elections, the O.A.S. Consultation of Ministers of Foreign Affairs declared that the voiding of the election had "abridged the right of the Panamanian people to freely elect their legitimate authorities." OAS Doc. OEA/Ser.F/II.21, Doc. 8/89 rev. 2 (1989).

ment."³³⁰ The question posed by the credentials fight is whether the General Assembly will continue to regard the citizens as sovereign in choosing between competing delegations. By granting accreditation solely to the elected government the General Assembly will effectively fuse the norms of the Political Covenant with the enforcement capacity of observer missions and will make clear its commitment to popular sovereignty.

In addition, basing accreditation upon election results provides a far more objective standard than the three standards currently applied. Current standards falter when faced with a successful guerilla insurgency or a full-blown civil war, as any government's control may be only temporary if sustained purely through force. These current standards also present opportunities for manipulation and promote ideologically-driven debate. The results of monitored elections, by contrast, provide verifiable data that can be scrutinized.

D. Criticisms of Accreditation Based Upon Elected Governments

This proposal is based on the simple premise that a government, certified to have been elected by the majority of its citizens, should represent those citizens in the United Nations. Arguments made by several states in the past contradict such a standard: protection of sovereignty prohibits international intrusion into domestic affairs; accreditation must be based on real, not purported authority; and accreditation should remain a purely formal exercise. Close examination of these positions, however, demonstrates that they are inconsistent with the international law of participatory rights.

1. Choosing Between Governments is an Unwarranted Intrusion into a State's Sovereignty

Several states have argued that the Charter provides the United Nations with no mandate to comment or act on the results of elections, even those it has monitored, because domestic elections "can never be regarded as affecting international peace and security."³³¹ There are two answers to this criticism. First, the incumbent government has already consented to election monitoring by the time the credentials debate occurs, and thus it already has allowed an "intrusion" by the United Nations into its sovereignty. Second, this view is based on the old notion of sovereignty as absolute domestic hegemony, a concept surpassed by the new human rights regime. The ascendance of participatory rights has recast sovereignty as the power enjoyed by those *entitled* to govern. Elections provide an empirical test of the right of an incumbent

330 G.A. Res. 46/7, *supra* note 262.

331 *See, e.g.*, TWENTY-NINTH MEETING, *supra* note 248, at 58-59 (statement of Cuban delegate).

The Right to Political Participation

government to exercise power. If a majority of citizens votes against the incumbent regime, the locus of sovereignty shifts to the prevailing candidate. The theory of legitimacy embodied in the Political Covenant holds that the defeated government is no longer entitled to speak for the state.

2. The United Nations Must Be Composed of Governments that Possess Actual Power and not "Paper Governments"

Other critics might argue that the proposed standard potentially could lead to the seating of governments-in-exile or powerless opposition movements by making electoral victory the sole criterion for accreditation. According to these critics, two dangers are thereby apparent. First, as Secretary-General Lie stated in his memorandum on the Chinese dispute, "[t]he obligations of membership can be carried out only by governments which in fact possess the power to do so."³³² A "paper government" could not, for example, make armed forces available in response to a request from the Security Council under Chapter VII of the Charter.³³³ Second, the United Nations would lose any leverage it might have to influence the policies of excluded unelected governments.³³⁴ Both these objections in effect advocate the effective control standard.

The work of the United Nations, however, will not be interrupted by the accreditation of a government-in-exile. The organization receives most of its funds from countries not likely to be the subject of election monitoring and, as the recent effort against Iraq demonstrates, efforts at collective security can be undertaken with only a small percentage of member states providing troops and materiel. In addition, arguments about the "effectiveness" of the United Nations cut both ways. The organization's effective support for human rights would be greatly diminished if it seated delegations of governments that violate a treaty obligation to protect participatory rights or disregard the results of a monitored election.

The second criticism—that incumbent governments denied a General Assembly seat will no longer be subject to international pressure—exaggerates the stability of those regimes, thereby overestimating the need for direct confrontation at the United Nations. As the disintegration of Soviet political

332 *Lie Memorandum, supra* note 322, at 6.

333 *See* U.N. CHARTER arts. 39-51.

334 *See* Louis B. Sohn, *Expulsion or Forced Withdrawal from an International Organization*, 77 HARV. L. REV. 1381, 1388 (1964) (discussing debate over expelling Soviet Union from League of Nations after its invasion of Finland in November 1939). For example, many U.N. delegates now consider the 1974 decision to reject South Africa's credentials a mistake which insulated South Africa from having to face and answer its numerous critics. *See* THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* 133 (1990) (detailing viewpoint). Of course, now that South Africa has announced its intention to dismantle the core of apartheid, this argument must focus on whether U.N. criticism would have accomplished the same result more quickly. *See* Christopher S. Wren, *South Africa Moves to Scrap Apartheid*, N.Y. TIMES, Feb. 2, 1991, at A1.

institutions suggests, authoritarian governments cannot hope to liberalize domestic political debate and maintain control in the long term. A government which has opened its society to the extent necessary to permit a monitored election will face widespread internal and external opposition if it refuses to respect the results of that election. The United Nations need not compromise the integrity of its monitoring efforts to add face-to-face criticism to the level of internal and external condemnation such a government would surely encounter.

3. *The Credentials Process Should Remain a Purely Formal Exercise, Untainted by Political Considerations*

Accreditation debates often resound with categorical statements that the credentials process is no more than a formality of accepting proper documentation signed by the proper domestic authorities.³³⁵ There are two problems with this position. First, the process cannot be considered pro forma when two or more delegations present credentials signed by different presidents or foreign ministers of the same state. Because the General Assembly must choose between them, the legitimacy of both must be scrutinized. Second, virtually no state follows a purely formal accreditation policy in practice. Credentials challenges occur frequently, and member states question far more than the formal requisites of the accrediting documents. Adoption of a standard based on monitored elections could actually decrease the frequency of these challenges by providing an objective standard of assessment.

V. CONCLUSION

The conclusions we may draw concerning the right to political participation now seem straightforward. That receipt of an electoral mandate bestows legitimacy upon governments, that genuine choice in an election requires multiple political parties, that incumbent regimes cannot monopolize the mass media during a campaign, and that the other elements of fair elections must be provided, all seem to flow inevitably from treaties announcing a commitment to representative government.³³⁶ It is becoming increasingly difficult to find either states or international institutions which argue as a matter of

335 See, e.g., *Credentials of Representatives to the Forty-First Session of the General Assembly: First Report of the Credentials Committee*, U.N. GAOR, 41st Sess., Annex, Agenda Item 3, at 5, U.N. Doc. A/41/727 (1986) ("If members of the Committee failed to recognize the technical nature of the credentials exercise and rejected the credentials of a country's representatives merely because they did not like its Government's policies it would lead to chaos in international relations.") (response of United States representative to Soviet challenge to Cambodian credentials).

336 These conclusions may not apply to the African Charter. See *supra* part II.B.4.

The Right to Political Participation

principle that factors such as these should be excluded from the definition of a "free and fair" election.

It is the seemingly mundane nature of this emerging consensus that is its most remarkable feature. Only four years ago Henry Steiner observed that the right to political participation "expresses less a vital concept meant to universalize certain practices than a bundle of concepts, sometimes complementary but sometimes antagonistic."³³⁷ This right, he noted, functioned less as a model of conduct than as a "weapon of rhetorical battle" through which "each of the world's ideological blocs, infusing the right with its own understandings, attacks the others for violating those understandings."³³⁸ In Professor Franck's terminology, the legitimacy of the right suffered from its lack of determinacy.³³⁹

This indeterminacy no longer exists. While one must not overstate the case, the list of sources is impressive; the constituent elements of the right to political participation can be derived from global and regional human rights treaties, thirty-five years of U.N. election monitoring reports, decisions of the United Nations Human Rights Committee and two regional tribunals, and two new CSCE instruments which count among their signatories all the former Soviet bloc nations. Questions concerning the boundaries of participatory rights no longer require resolution of ideological debates about the proper function of government, but involve treaty interpretation.

In sum, parties to the major human rights conventions have created an international law of participatory rights. They have agreed to open their political institutions to inspection for the purpose of ensuring minimum standards of procedural fairness. In the process, the nineteenth century concept of the nation-state has undergone a substantial change: international notions of legitimacy are no longer oblivious to the origin of governments, but have come to approximate quite closely those domestic conceptions embodied in theories of popular sovereignty. In Professor Reisman's words, "[i]nternational law still protects sovereignty, but—not surprisingly—it is the people's sovereignty rather than the sovereign's sovereignty."³⁴⁰

This does not, however, diminish the importance of the nation-state itself. On the contrary, treaties such as the Political Covenant exist as profound *reaffirmations* of the state as the essential forum of political activity and expression. In its new role as ombudsman, the international community simply ensures that all citizens within a state have the opportunity to exercise their right to political participation.

337 Steiner, *supra* note 14, at 77.

338 *Id.*

339 See FRANCK, *supra* note 334, at 50-66.

340 W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L L. 866, 869 (1990).