

2018

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## Recommended Citation

Rubinstein, Amnon and Roznai, Yaniv, "The Right to a Genuine Electoral Democracy" (2018). *Minnesota Journal of International Law*. 266.

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## Symposium Article

### The Right to a Genuine Electoral Democracy

Amnon Rubinstein and Yaniv Roznai\*

#### Abstract

*The right to electoral democracy has long been endorsed by international law. Yet after dramatic global waves of democratization, in recent years democracy has been in recession. The lack of a strong consolidation of democracy in the international community finds its roots in early faults of international mechanisms: the Universal Declaration of Human Rights, which did not explicitly support the right to live in a democratic regime with a multiparty political system, and the International Covenant on Civil and Political Rights, which guarantees the right to “genuine elections” but failed to clarify whether these guarantee required party pluralism. Since half of the world’s population now live under hybrid or authoritarian regimes, international law must take strong and progressive actions for embracing periodic genuine elections as the foundation of the international community. Steps must be taken to clarify that single-party elections and alike are incompatible with genuine elections, as they cannot guarantee the free will of the electors, and to ensure that election processes are free, fair and ultimately—genuine.*

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## I. INTRODUCTION

In 1992, eminent international law scholar Thomas Franck published in the *American Journal of International Law (AJIL)* his seminal work on *The Emerging Right to Democratic Governance*, which initiated an imperative discussion on the right to democracy in international law.<sup>1</sup> Nearly two decades later, in two contributions to *the European Journal of International Law (EJIL)*, Susan Marks shed further light on various engagements of the ‘emerging right of democratic governance,’ including its legal status and prospects, its relationship to international peace, the influence of securitization,<sup>2</sup> and the link between human development and democratic governance.<sup>3</sup> In response, Jean d’Aspremont agreed that the post-1989 practice indicated that democracy had become a prominent benchmark by which to assess governments’ legitimacy.<sup>4</sup> However, d’Aspremont noted that more recent practices endangered the consolidation of practices that focused on the democratic origin of governments.<sup>5</sup> Instead, modern practices focused on the manner in which governments exercised power (for example concentrating more towards the respect for basic rights than on the exercise of free and fair elections).<sup>6</sup> We wish to continue and contribute to this debate in light of the events following the Arab Spring and the recent decline of global democratic institutions.<sup>7</sup>

The great hope sparked by the Arab Spring was followed by great disappointment. Aside from the developments in Tunisia, the Arab Spring has not spawned democratic regimes in the region but, rather, has given rise to bloodshed which has reached unimaginably horrifying proportions.<sup>8</sup> Due to the presupposition

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1. Thomas Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46, 46 (1992).

2. Susan Marks, *What Has Become of the Emerging Right to Democratic Governance?*, 22(2) EUR. J. INT’L L. 507, 510 (2011).

3. *Id.* at 515–17.

4. Jean d’Aspremont, *The Rise and Fall of Democratic Government in International Law: A Reply to Susan Marks*, 22(2) EUR. J. INT’L L. 549, 549 (2011).

5. *See id.*

6. *See id.*

7. Amichai Magen, *The Democratic Entitlement in an Era of Democratic Recession*, 4(2) CAMBRIDGE J. INT’L & COMP. L. 368, 368 (2015).

8. *See, e.g.*, JOHN L. ESPOSITO, TAMARA SONN & JOHN O. VOLL, ISLAM AND DEMOCRACY AFTER THE ARAB SPRING 3 (2015).

that democratic regimes would have minimized the bloodshed, and considering concerns about the legitimacy of military intervention against dictatorial regimes, the debate regarding the existence of a right to democracy has resurfaced.<sup>9</sup>

Indeed, at least in Syria, the link between the right to life and the right to democracy appears stronger than ever.<sup>10</sup> Many refer to the slaughter in Syria as “the Syrian tragedy”<sup>11</sup>—yet this is no Greek drama. The daily horrors are not an affliction sent by gods to punish human beings for their sins. Had Syria been governed by a democratically elected government, Bashar al-Assad’s regime could have been replaced in elections and not in a revolt with grave human consequences.<sup>12</sup> Domestic bloodshed would have probably been avoided. One of the main reasons for the deaths of thousands of civilians is plain: where there are no ballots, there are bullets.<sup>13</sup>

The right to democracy is not merely a collective right of “a people”—which is inherently vague and difficult to implement—but a personal right to live in a democratic government which is supplementary to the accepted international bill of rights. Just as the right to life is antecedent to all other rights,<sup>14</sup> the right to live in a democratic regime is central to the right to life and, more broadly, important to a broader set of rights, since “respect

9. Compare Margaret G. Hermann & Charles W. Kegley, Jr., *Ballots, a Barrier Against the Use of Bullets and Bombs: Democratization and Military Intervention*, 40(3) J. CONFLICT RESOL. 436, 436 (1996) (explaining that democracies are generally unlikely to be the target of military intervention), with REIN MÜLLERSON, *REGIME CHANGE: FROM DEMOCRATIC PEACE THEORIES TO FORCIBLE REGIME CHANGE 175–78* (2013) (showing that attempts to expand the circle of democracy may lead to breaches of peace by justifying foreign intervention with democratic peace theories).

10. See generally TOM COOPER, *SYRIAN CONFLAGRATION: THE SYRIAN CIVIL WAR 2011–2013, 22–27* (2015) (showing how the lack of democracy resulted in civilian massacres).

11. See, e.g., Jonathan Stevenson, *The Syrian Tragedy and Precedent*, 56(3) SURVIVAL: GLOBAL POL. & STRATEGY 121, 121 (2014) (labeling the situation in Syria as the “Syrian Tragedy”).

12. See generally COOPER, *supra* note 10, at 9–11 (portraying an overview on the ongoing conflict in Syria).

13. See Dominic M. Ayine, *Ballots as Bullets?: Compliance with Rules and Norms Providing for the Right to Democratic Governance: An African Perspective*, 10 AFR. J. INT’L & COMP. L. 709, 733 (1998).

14. See, e.g., BERTRAND MATHIEU, *THE RIGHT TO LIFE IN EUROPEANS CONSTITUTIONAL AND INTERNATIONAL CASE-LAW 15* (2006); B.G. Ramcharan, *The Concept and Dimensions of the Right to Life*, in *THE RIGHT TO LIFE IN INTERNATIONAL LAW 1, 4* (B.G. Ramcharan ed. 1985); Christian Tomuschat, *The Right to Life—Legal and Political Foundations*, in *THE RIGHT TO LIFE 3, 3–6* (Christian Tomuschat, Evelyne Langrange & Stefan Oeter eds., 2010).

for human rights . . . greatly depends on the extent of democracy.”<sup>15</sup> Again, this reasoning is instrumental to understanding the integral relationship between the right to democracy and the right to life. Democratic regimes in the Middle East and elsewhere would have minimized, if not eliminated, the number of civilians who paid for the lack of democracy in their countries with their lives.

The right to live in a democracy is a “gateway” right through which the primordial right to life can be achieved,<sup>16</sup> as it removes the threat of arbitrary death at the hands of a tyrannical regime. Additionally, experience demonstrates that democracies do not go to war against each other.<sup>17</sup> Yet, international law has not yet satisfactorily guaranteed the right of an individual to live in a democracy.<sup>18</sup>

Section II of the article reviews the right to democracy in international law in light of the main international human rights instruments. In this section, we argue that the inadequate recognition of a right to democracy in international law originates from an unfortunate compromise with the former Soviet Union allowing a one-party electoral system. Section III

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15. F. Menghistu, *The Satisfaction of Survival Requirements, in THE RIGHT TO LIFE IN INTERNATIONAL LAW*, *supra* note 14, at 80; see Thilo Rensmann, *Munich Alumni and the Evolution of International Human Rights Law*, 22(4) EUR. J. INT'L L. 973, 988 (2011) (describing how Karl Loewenstein, the father of the right to democracy, claimed that “human rights were not neutral in relation to the frame of the government. History has shown, and this was also his personal experience, that human rights can be realized only in a democracy. Since a democratic constitution was accordingly an indispensable condition for the effective realization of human rights, an international bill of rights without this structural *condition sine qua non* would make no sense.”).

16. Cf. Michael W. Doyle, *Kant, Liberal Legacies and Foreign Affairs*, 12(3) PHIL. & PUB. AFF. 205, 206–07 (1983) (explaining that the right to democracy is necessary to uphold other liberal rights).

17. Dean V. Babst, *Elective Governments—A Force for Peace*, 3 WIS. SOCIOLOGIST 9, 10 (1964); JOANNE GOWA, *BALLOTS AND BULLETS: THE ELUSIVE DEMOCRATIC PEACE* 3 (2000); see *DEBATING THE DEMOCRATIC PEACE* (Michael E. Brown, Sean M. Lynn-Jones & Steven E. Miller eds., 1995). *But see* EDWARD D. MANSFIELD & JACK SNYDER, *ELECTING TO FIGHT: WHY EMERGING DEMOCRACIES GO TO WAR* 7 (2005) (“Although mature democracies have never fought a war against each other, incomplete transitions from autocracy toward democracy are fraught with the danger of violent conflict in states whose political institutions are weak.”); James D. Fearson & David D. Laitin, *Ethnicity, Insurgency, and Civil War*, 97(1) AM. POL. SCI. REV. 75, 84–85 (2003) (detailing how the risk of internal conflict or civil war rises in democratizing states with weak institutions).

18. See Marks, *supra* note 2, at 522 (explaining how, despite an emerging entitlement, a right to democracy has not been fully established in international law).

reviews regional efforts for the promotion of the right to democracy in Europe, Africa, and Latin America. Section IV discusses the current reality in which, notwithstanding the right to democracy, only half of the world's countries are considered full or flawed democracies. This points to a failure of international law to promote democracy. Section V outlines our modest proposals for strengthening the right to a genuine electoral democracy. We argue that the international community should make a clear statement that genuine elections require a multiparty and pluralist electoral system. Moreover, we call for an obligatory monitoring system that is overseen the United Nations (U.N.).

## II. THE RIGHT TO ELECTORAL DEMOCRACY IN INTERNATIONAL LAW

### A. THE ORIGINAL SIN

The U.N. Charter opens with the lofty but empty phrase “[we the peoples]”.<sup>19</sup> This phrase, which is modeled after the Preamble of the United States Constitution, seems to express a democratic basis for the U.N.<sup>20</sup> Hans Kelsen criticized this opening, stating that the U.N. Charter is an international treaty concluded by governments’ representatives, not representatives of the people, and that some of the represented states do not acknowledge the political ideology of popular sovereignty.<sup>21</sup> Moreover, democracy is neither mentioned in the Charter nor is a commitment to democratic ideals a condition for admission as a member state.<sup>22</sup> In fact, many non-democratic regimes are U.N. member states.<sup>23</sup> Furthermore, the U.N. has itself been criticized as a non-democratic institution by virtue of the veto power accorded to the five permanent members of the Security

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19. U.N. Charter pmb.

20. Bardo Fassbender, *We the Peoples of the United Nations: Constituent Power and Constitutional Form in International Law*, in *THE PARADOX OF CONSTITUTIONALISM: CONSTITUENT POWER AND CONSTITUTIONAL FORM* 269, 286 (Martin Loughlin & Neil Walker eds., 2007).

21. HANS KELSEN, *THE LAW OF THE UNITED NATIONS: A CRITICAL ANALYSIS OF ITS FUNDAMENTAL PROBLEMS* 7 (1950).

22. *See generally* THOMAS D. GRANT, *ADMISSIONS TO THE UNITED NATIONS: CHARTER ARTICLE 4 AND THE RISE OF UNIVERSAL ORGANIZATION* 21 (2009) (discussing a summary of criteria for admissions to the United Nations).

23. Sean Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 *INT’L & COMP. L.Q.* 545, 556 (1999).

Council.<sup>24</sup>

The right to live under a democratic form of government formally came into existence as an international legal right in 1948.<sup>25</sup> The Universal Declaration of Human Rights (“UDHR”), adopted by the General Assembly in 1948, expresses the concept of democracy by stating in Article 21 that:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. Everyone has the right of equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.<sup>26</sup>

Depending on how the vague term “genuine elections” is interpreted, the right to vote is thus obliquely mentioned. However, this phrasing does not seem to encompass a right to vote in contested, multi-party elections, nor the right to present a candidate or establish a party. And in fact, as Marc Plattner writes, “the provision of Article 21 calling for ‘genuine’ elections has been consistently violated by many UN [sic] member states with one-party or other dictatorial governments.”<sup>27</sup> As such, it is

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24. Same Varayudej, *The Right to Democracy in International Law: Its Implications for Asia*, 12 ANN. SURV. INT'L & COMP. L. 1, 4 (2006).

25. Christina M. Cerna, *Universal Democracy: An International Legal Right or the Pipe Dream of the West?*, 27 N.Y.U. J. INT'L L. & POL. 289, 290 (1995).

26. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter UDHR].

27. MARC F. PLATTNER, DEMOCRACY WITHOUT BORDERS?: GLOBAL CHALLENGES TO LIBERAL DEMOCRACY 67 (2007). *See also* Franck, *supra* note 1, at 64 (“At the time, only UN [sic] members outside the socialist, Arab and Latin American blocs took this as a restatement of conditions already prevailing in their *polis*. With rapid decolonization, the proportion of UN [sic] members actually practicing free and open electoral democracy began to shrink further under the aegis of one-party modernizing authoritarianism in Africa and Asia. Nevertheless, even in that relatively hostile atmosphere, few states were willing openly to block the textual evolution of a specific electoral entitlement, however many mental reservations their regimes may have harbored.”).

an empty right to vote in a Soviet-style one-party dictatorial state—the attitude of the Declaration toward democracy having been tailored to make it palatable to the U.S.S.R. Communist system.<sup>28</sup> During the drafting sessions, the Belgian delegate proposed to include the words “according to the party system” after the word “periodic”—pointing to the right to form political parties—since “a duality or plurality of parties . . . was essential to the efficient functioning of the democratic system.”<sup>29</sup> However, the Belgian delegate withdrew his amendment after an objection by the Soviet delegate who reasoned that “under the prevailing [Soviet] system . . . [there is] no justification for the creation of other parties . . . [and that the amendment was] absolutely irreconcilable with the social structure of certain member States.”<sup>30</sup>

It is, therefore, apparent that the UDHR does not explicitly support the right to live in a democratic regime with a multiparty political system with all the accompanying rights such as the right to propose candidates or establish parties.<sup>31</sup> Moreover, the UDHR does not have binding force and does not incorporate any institutional enforcement mechanisms to ensure the observance of the rights declared therein.<sup>32</sup> Christina Cerna writes that for decades, until the end of the Cold War and the fall of the Berlin Wall, Article 21 was honored more in the breach than in the observance.<sup>33</sup> Indeed, Hurst Hannum casts doubts on whether Article 21 actually reflects international law as practiced: “Despite the arguments of some that a ‘right to democracy’ may be emerging as a norm of international customary law, it is apparent that many states have not accepted *Article 21’s* guarantee of the right to participate in the political life of one’s country.”<sup>34</sup>

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28. See JOHANNES MORSINK, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: ORIGINS, DRAFTING, AND INTENT* 58–61 (1999).

29. *Id.* at 60.

30. *Id.* at 61.

31. UDHR, *supra* note 26, art. 20, ¶ 1 (declaring only that “Everyone has the right to freedom of peaceful assembly and association.”); see Morsink, *supra* note 28, at 60 (showing how, although, previous drafts expressly stated that freedom of peaceful assembly included the right to form political parties, this language was dropped in the final draft).

32. Mary Ann Gelndon, *The Rule of Law in the Universal Declaration of Human Rights*, 2 NW. J. INT’L HUM. RTS. 2, 4 (2004).

33. Cerna, *supra* note 25, at 290.

34. Hurst Hannum, *The Status of the Universal Declaration of Human Rights in National and International Law*, 25 GA. J. INT’L & COMP. L 287, 348 (1995) (emphasis added).



## B. GENUINE ELECTIONS

In contrast to the UDHR, Article 25 to the International Covenant on Civil and Political Rights of 1966 (ICCPR), which is currently binding upon those 168 States that have ratified it,<sup>35</sup> sets out a much less vague arrangement which corresponds to the recognized principles of democratic regimes:

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.<sup>36</sup>

Because it guarantees the rights to freedom of expression,<sup>37</sup> peaceful assembly,<sup>38</sup> and freedom of association,<sup>39</sup> the ICCPR lays out the legal basis for the right to democracy under international law.<sup>40</sup> This conception of democratic governance is stated “at a high level of generality—high enough to mask important substantive differences among states on the content of those principles.”<sup>41</sup> However, it is determinate enough to

35. See International Covenant on Civil and Political Rights art. 51, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].

36. *Id.* art. 25.

37. *Id.* art. 19.

38. *Id.* art. 21.

39. *Id.* art. 22.

40. See Human Rights Committee General Comment 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7, ¶ 12 (Aug. 27, 1996) (“Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected.”).

41. See David Wippman, *Defending Democracy Through Foreign Intervention*, 19 HOUSTON J. INT'L L. 659, 664 (1997) (claiming that “[t]he international community has long paid lip service to basic principles of democratic governance.”); see also Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 77 (1988) (noting that the right to political participation “expresses less a vital concept meant to universalize

establish not only rights for citizens, but additionally, obligations for States. These obligations include holding periodic elections using the secret ballot and ensuring that elections manifest a genuine and a free expression of the will of the people.<sup>42</sup> Yet, Gregory Fox notes, “[g]iven Cold War tensions, it is not surprising that the drafters failed to clarify whether the guarantee of a ‘genuine election’ . . . required party pluralism.”<sup>43</sup> In fact, Fox remarks that the ICCPR’s *travaux préparatoire* hardly addressed the meaning of the term “genuine,” and the issue of party pluralism was not discussed.<sup>44</sup> The single effort to define the meaning of “genuine” elections came from the Chilean delegate.<sup>45</sup> He stated, at a late stage in the drafting process, 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.”<sup>46</sup> Thus, originally, Article 25 did not prohibit one-party elections.

In the absence of an explicit reference to multi-party elections, some states have interpreted this provision as allowing one-party elections. These states claim that genuine electoral choice does not require the existence of multiple political parties or that multiple parties would exacerbate ethnic divisions in deeply divided societies and would bring violence.<sup>47</sup> But in order for elections to reflect the free will of the voting population, it would seem imperative that candidates and political parties representing factions and divisions in society be able to actively contest the elections in order to give these

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certain practices than a bundle of concepts, sometimes complementary but sometimes antagonistic . . . . [O]ften it becomes another weapon of rhetorical battle, a convenient, even authoritative concept through which each of the world’s ideological blocs, infusing the right with its own understandings, attacks the other for violating those understandings.”)

42. THE CARTER CTR., STRENGTHENING INTERNATIONAL LAW TO SUPPORT DEMOCRATIC GOVERNANCE AND GENUINE ELECTIONS 26–27 (2012), [http://www.democracy-reporting.org/files/dri\\_report\\_strengthening\\_democratic\\_governance\\_.pdf](http://www.democracy-reporting.org/files/dri_report_strengthening_democratic_governance_.pdf).

43. Gregory H. Fox, *The Right to Political Participation in International Law*, in *DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW* 48, 55 (Gregory H. Fox & Brad R. Roth eds., 2000).

44. *Id.* at 56. *Travaux préparatoire* means the preparatory work of a treaty which can be taken as supplementary means of treaty interpretation. *See* art. 32 of the United Nations, Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331.

45. *Id.*

46. *Id.* at 56–57.

47. *Id.* at 56.

factions a voice.<sup>48</sup>

In any case, the interpretation that Article 25 supports one-party elections no longer seems to be widely accepted.<sup>49</sup> Further, it has been stated that “[t]extual determinacy, once again, is gradually being augmented by process determinacy under the auspices of the Human Rights Committee, which is authorized to monitor compliance.”<sup>50</sup> For instance, upon receiving a state party’s periodic report, the Human Rights Committee (Committee) usually questions the state delegates about whether opposition parties are permitted, to what extent these parties act freely, and whether any parties have been banned.<sup>51</sup> It would, therefore, appear that the Committee has consistently expressed its doubts that one-party elections are indeed “genuine.”<sup>52</sup>

An example in which the Committee came close to explicitly dealing with the question of whether a state’s election was free concerned Iran’s tenth Presidential election in 2009. In its third periodic review of the Islamic Republic of Iran, the Committee raised its concern about the various flaws in the electoral process.<sup>53</sup> The Committee was concerned with the right of the Guardian Council to reject candidates to the Majlis, noting that out of more than 450 prospective candidates, only four candidates were approved.<sup>54</sup> The Committee also noted that international observers were prohibited from monitoring the election results and that the election results were approved by Ayatollah Khamenei before certification by the Guardian Council.<sup>55</sup> Additionally, the Committee discussed the arrest of dozens of political opposition members in February 2011 as well as the dissolution by court order of two pro-reform political

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48. *See id.* at 57 (showing how a state would have to bar candidates representing different factions in order to violate the right to elections); *see also* Christopher C. Joyner, *The United Nations and Democracy*, 3 GLOBAL GOVERNANCE 339, 351 (1999) (explaining how legitimate democracies need transparency to prevent negative reactions).

49. Gregory H. Fox, *Election Monitoring: The International Legal Setting*, 19(3) WIS. INT’L L.J. 295, 299 (2000); Fox, *supra* note 43, at 89.

50. Franck, *supra* note 1, at 64.

51. *See* Human Rights Comm., Concluding Observations on Islamic Republic of Iran, U.N. Doc. CCRP/C/IRN/CO/3 (Nov. 29, 2011) [hereinafter Iran Report] (detailing the conclusions drawn after questions Iran about their treatment of opposition parties).

52. Fox, *supra* note 43, at 57.

53. Iran Report, *supra* note 51, ¶ 15.

54. *Id.* ¶ 29.

55. *Id.*

parties.<sup>56</sup> As a result, the Committee called upon the state to amend its law, to ensure that it was in conformity with the rights guaranteed in Article 25, and to take adequate steps to guarantee that elections were conducted in a free and transparent manner.<sup>57</sup>

The Committee elaborated on the meaning of Article 25 and its doubts toward one-party elections further in other cases. In a 1993 decision, the Committee held that a one-party system that restricts political activity outside the only organized political party imposes inherent limitations on genuine electoral choice and “an unreasonable restriction on the [ . . . ] right to ‘take part in the conduct of public affairs.’”<sup>58</sup> That decision came as a result of a petition by a Zambian citizen who attempted to run for Parliamentary election as a member of an opposition party that was banned under Zambia’s one-party system.<sup>59</sup> Accordingly, he was prevented from participating in the electoral campaign and was ultimately detained for thirty-one months on charges of belonging to the banned party.<sup>60</sup> In a decision concerning the Democratic Republic of the Congo (formerly Zaire), a Zairian national, Andre Alphonse Mpaka-Nsusu, presented his candidacy for the presidency of Zaire in conformity with existing Zairian law.<sup>61</sup> After the rejection of his candidacy, Mpaka-Nsusu submitted a proposal to the government requesting recognition of a second party in Zaire, the Federal Nationalist Party.<sup>62</sup> While Mpaka-Nsusu claimed that he acted in accordance with Article 4 of the 1967 Constitution which envisaged a two-party system, he was arrested on July 1, 1979, later detained without trial, and banished to his village of origin for an indefinite period.<sup>63</sup> Mpaka-Nsusu then fled the country.<sup>64</sup> Based upon the rejection of his candidacy, the Committee found a violation of Article 25.<sup>65</sup>

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56. *Id.*

57. Iran Report, *supra* note 51, ¶ 9.

58. Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 314/1988, ¶ 6.6, U.N. Doc. CCPR/C/48/D/314/1988 (July 14, 1993).

59. *Id.* ¶¶ 1–2.1.

60. *Id.* ¶ 6.3.

61. Human Rights Comm., Mpaka-Nsusu v. Zaire Views, ¶¶ 1.1–1.2, U.N. Doc. CCPR/C/27/D/157/1983 (Mar. 26, 1983).

62. *Id.* ¶ 1.2.

63. *Id.* ¶ 1.3. Concerning Communication No. 1354/2005, ¶ 1, U.N. Doc. CCPR/C/100/D/1354/2005 (Oct. 19, 2010).

64. *Id.*

65. *Id.* ¶ 10.

The Committee weighed in on another decision that concerned a refusal to register a candidate for the 2004 elections to the House of Representatives in Belarus.<sup>66</sup> Based on grounds of providing incorrect personal data, the Committee noted that “article 25 of the Covenant secures to every citizen the right and the opportunity to be elected at genuine periodic elections without any of the distinctions mentioned in article 2, paragraph 1, including political opinion.”<sup>67</sup> In a 2005 decision, the Committee found that Cameroon violated Article 25(b) for depriving a person’s right to vote and to be elected, without any objective and reasonable grounds, holding that “persons who are otherwise eligible to stand for election should not be excluded by reason of political affiliation.”<sup>68</sup>

In its 1996 General Comment on Article 25, the Committee emphasized the centrality of the electoral process to an effective democratic system, noting that it “lies at the core of democratic government based on the consent of the people . . . .”<sup>69</sup> Yet, the only references to the ‘genuineness’ of the elections are that:

... [g]enuine periodic elections . . . are essential to ensure the accountability of representatives for the exercise of the legislative or executive powers vested in them. Such elections must be held at intervals which are not unduly long and which ensure that the authority of government continues to be based on the free expression of the will of electors.<sup>70</sup>

Additionally, it held that:

... elections must be conducted fairly and freely on a periodic basis within a framework of laws guaranteeing the effective exercise of voting rights. Persons entitled to

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66. Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1354/2005, ¶ 1, U.N. Doc. CCPR/C/100/D/1354/2005 (Oct. 19, 2010).

67. *Id.* ¶ 6.6.

68. Human Rights Comm., Views of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1134/2002, ¶ 5.6, U.N. Doc. CCPR/C/83/D/1134/2002 (May 10, 2005).

69. Human Rights Comm., General Comments Under Article 40, Paragraph 4, of the International Covenant on Civil and Political Rights: General Comment 25 (27), ¶ 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996).

70. *Id.* ¶ 9.

vote must be free to vote for any candidate for election and for or against any proposal submitted to referendum or plebiscite, and free to support or to oppose government, without undue influence or coercion of any kind which may distort or inhibit the free expression of the elector's will. Voters should be able to form opinions independently, free of violence or threat of violence, compulsion, inducement or manipulative interference of any kind . . . . The results of genuine elections should be respected and implemented.<sup>71</sup>

These statements do not refer to multiparty systems, yet *prima facie*, one might infer the importance of having multiple-choices when these statements are read together with other paragraphs which protect the “free choice of candidates,”<sup>72</sup> “the right of persons to stand for election,”<sup>73</sup> and “the right to form and join political associations.”<sup>74</sup> The General Comment stresses that “although the Covenant does not impose any particular electoral system, any system operating in a State party must be compatible with the rights protected by Article 25 and must guarantee and give effect to the free expression of the will of the electors . . . .”<sup>75</sup> This is a specific manifestation of the U.N.’s general approach not to promote any specific form of government or a particular model or system for democracy.<sup>76</sup> This approach was clearly demonstrated in 2008 when a complaint was lodged against Spain on the basis that the Spanish monarchy is not subject to free and public elections. The Committee noted that Article 25 “does not impose a specific political model or structure” and “that a constitutional monarchy based on separation of powers is not in itself contrary to Article 25 of the Covenant.”<sup>77</sup>

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71. *Id.* ¶ 19.

72. *Id.* ¶ 15.

73. *Id.* ¶ 17.

74. *Id.* ¶ 26.

75. *Id.* ¶ 21.

76. *Democracy*, UNITED NATIONS, <http://www.un.org/en/sections/issues-depth/democracy/> (last visited Oct. 2, 2017) (“It is also important to note that the United Nations does not advocate for a specific model of government, but promotes democratic governance as a set of values and principles that should be followed for greater participation, equality, security and human development.”); see Boutros Boutros-Ghali, *Agenda for Democratization*, U.N. Doc. A/51/761, ¶ 10 (Dec. 20, 1996); Joyner, *supra* note 48, at 350.

77. Human Rights Comm., Decision of the Human Rights Committee Under the Optional Protocol to the International Covenant on Civil and

Indeed, in its review of the parties' adherence to the ICCPR, the Committee deals with alleged violations of Article 25.<sup>78</sup> Yet, most of the decisions focus on electoral problems within governments in which multiparty systems exist, and the Committee rarely interferes in authoritarian regimes which do not conduct genuine elections.<sup>79</sup> As Kofele-Kale notes, international responses to violations of the right to democracy are very limited and are almost never directed toward the removal of repressive and authoritarian governments.<sup>80</sup>

The importance of the abovementioned statements concerning Zambia, the Democratic Republic of the Congo, and Iran should not be overlooked because they assist in advancing international law and the interpretation of the ICCPR in a more genuine democratic direction. Yet, apart from them, there is no

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Political Rights Concerning Communication No. 1745/2007, ¶ 3.2, U.N. Doc. CCPR/C/92/D/1745/2007 (Apr. 23, 2008).

78. *Id.* ¶ 2.1.

79. *See, e.g.*, Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 2155/2012 (Mar. 25, 2014) (discussing Lithuania's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1410/2005 (Mar. 21, 2011) (discussing Russia's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1553/2007, CCPR/C/95/D/1553/2007 (Apr. 24, 2009) (discussing Belarus's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 1373/2005, CCPR/C/93/D/1373/2005 (Aug. 4, 2008) (discussing Sri Lanka's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 993-995/2001, CCPR/C/85/D/993-995/2001 (Oct. 28 2005) (discussing France's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 884/1999, U.N. Doc. CCPR/C/72/D/884/1999 (July 31, 2001) (discussing Latvia's compliance with the ICCPR); Human Rights Comm., Views of the Human Rights Committee Under Article 5, Paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights Concerning Communication No. 500/1992, U.N. Doc. CCPR/C/53/D/500/1992 (Apr. 4, 1995) (discussing the Netherlands' compliance with the ICCPR).

80. Ndiva Kofele-Kale, *The Global Community's Role in Promoting the Right to Democratic Governance and Free Choice in the Third World*, 11 L. & BUS. REV. AM. 205, 212 (2005).

clear, unequivocal clarification as to the nature of genuine elections, and, *a fortiori*, no duty has been imposed upon state parties to hold multiparty or multicandidate elections with all their accompanied rights. We are still lacking an explicit recognition of the right to live in a “genuine” democratic government, and “genuine[ss]” remains open to interpretation. This allows different types of dictatorships to claim that, due to the election conducted in the state, their regimes were democratic (even those in which a single candidate receives ninety-nine percent of the vote).<sup>81</sup> Yannick Lécuyer writes that national governments have resisted “a right to free elections in international law,” attempting to put obstacles in the terms of its recognition, applicability and effectiveness since it was seen as a limitation on national sovereignty.<sup>82</sup> Accordingly, while the U.N. “is constantly promoting democracy, it is less concerned with the quality of democracy practices by its members.”<sup>83</sup> If the omission from the U.N.’s Charter and human rights treaties of the right to live under a democratic regime stemmed originally from the need to accommodate and placate victorious Soviet Communism after World War II,<sup>84</sup> it is today dictated by the composition of the U.N. itself—the majority of whose members are non-democratic in some way—as well as by the fear of causing a split within the international community.

### III. REGIONAL DEVELOPMENTS

#### A. EUROPE

In the European Union (EU), things are markedly different.

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81. See, e.g., Bruce Pannier, *Turkmenistan: Explaining the Presidential Election*, RADIO FREE EUROPE (Feb. 08, 2007, 13:03 GMT), <https://www.rferl.org/a/1074577.html> (discussing Saparmurat Niyazov’s 1992 victory with 99.8% turnout and 99.5% of the vote in a competition where he ran unopposed); *The World of 100% Election Victories*, BBC NEWS: MAGAZINE MONITOR (Mar. 11, 2014), <http://www.bbc.com/news/blogs-magazine-monitor-26527422> (discussing lopsided electoral victories in authoritarian states).

82. YANNICK LÉCUYER, *THE RIGHT TO FREE ELECTIONS* 9 (2014).

83. *Id.* See also Varayudej, *supra* note 24, at 5.

84. WILLIAM A. SCHABAS, *THE UNIVERSAL DECLARATION OF HUMAN RIGHTS: THE TRAVAUX PRÉPARATOIRES OCTOBER 1946 TO NOVEMBER 1947*, at 1778, 2552 (2013), <http://documents.law.yale.edu/sites/default/files/UDHR2013 FullText.pdf> (discussing the Union of Socialist Soviet Republics’ objections to requiring periodic elections; and then discussing the Union of Socialist Soviet Republics’ proposal of an amendment requiring only that the government “consider” the will of the people).



Under the Lisbon Treaty, a state cannot become a member of the EU if it does not prove that it has a democratic regime.<sup>85</sup> Any country seeking membership must conform to the conditions set out in Article 49 to the Treaty,<sup>86</sup> the principles laid down in Article 2<sup>87</sup>—democracy being one of them—and the principles established under Title II of the Treaty on European Union concerning the democratic principles of the EU itself.<sup>88</sup> Moreover, the criteria established by the Copenhagen European Council in 1993 must be met.<sup>89</sup> The Madrid European Council in 1995 and the transatlantic agenda of “promoting peace and stability, democracy and development around the world” strengthened those criteria.<sup>90</sup>

The result of these cumulative conditions is that a new EU member state must demonstrate the political stability of its institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities. The same apply to the Council of Europe. The Preamble to the Statute creating the Council of Europe states that the member states are “reaffirming their devotion to the spiritual and moral values which are the common heritage of their peoples and the true source of individual freedom, political liberty and the rule of law, principles which form the basis of all genuine democracy.”<sup>91</sup> Furthermore, a special body—the European Commission for Democracy through Law, known as the Venice Commission—reviews and recommends constitutional and legislative changes in countries asking to be accepted into the council and those that are already members, and has been active in the electoral field.<sup>92</sup>

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85. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 49, Dec. 13, 2007, 2007 O.J. (C 306) 1.

86. *Id.*

87. *Id.* art. 2.

88. Consolidated Version of the Treaty on European Union, arts. 9–12, Dec. 13 2007, 2008 O.J. (C 115) 1. On whether the EU should play a role in protecting liberal democracy in Member States, see Jan-Werner Müller, *Should the EU Protect Democracy and the Rule of Law Inside Member States?*, 21(2) EUR. L. J. 141 (2015).

89. Copenhagen European Council, Conclusions of the Presidency, E.U. BULL., No. 6, ¶ 1.13, [http://aei.pitt.edu/1443/1/Copenhagen\\_june\\_1993.pdf](http://aei.pitt.edu/1443/1/Copenhagen_june_1993.pdf) (1993).

90. Madrid European Council, Conclusions of the Presidency, E.U. BULL., No. 12, at 24, [http://aei.pitt.edu/1452/1/madrid\\_dec\\_1995.pdf](http://aei.pitt.edu/1452/1/madrid_dec_1995.pdf) (1995).

91. Statute of the Council of Europe, pmbl, May 5, 1949, 87 U.N.T.S. 103, <http://conventions.coe.int/Treaty/en/Treaties/Html/001.htm>.

92. See *Elections and Referendums, Political Parties*, VENICE COMMISSION, [http://www.venice.coe.int/WebForms/pages/?p=01\\_Elections\\_and\\_Referendum](http://www.venice.coe.int/WebForms/pages/?p=01_Elections_and_Referendum)

As democracy is considered one of the pillars of the European constitutional heritage and of the Council of Europe, together with human rights and the rule of law, elections represent a particular aspect of the European constitutional heritage which is often termed “European electoral heritage.”<sup>93</sup> This heritage includes core electoral principles such as universal, equal, free, secret and direct suffrage, alongside a set of principles without which genuine democratic elections cannot be held, such as fundamental rights, the stability of electoral law and effective procedural guarantees.<sup>94</sup>

In addition to these mechanisms, one should mention European human rights law. Whereas the European Convention on Human Rights (ECHR) does not contain any provisions on participatory rights, Article 3 of the Protocol I to the ECHR stipulates the right to 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.”<sup>95</sup> Read literally, this provision seems even narrower than Article 25 of the ICCPR as it does not require “genuine elections,” and, importantly, does not refer to elections as an individual right, but rather as a duty which is imposed upon the state parties.<sup>96</sup> Nevertheless, the European Commission and Court of Human Rights (ECtHR) have interpreted this provision broadly according to the abovementioned “European electoral heritage” and draw from it both “the right to vote” and “the right to stand for election.”<sup>97</sup> While the ECtHR has afforded state parties a wide margin of discretion in structuring their electoral

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s (last visited Oct. 2, 2017); *Opinions and Studies in the Electoral Field*, VENICE COMMISSION, [http://www.venice.coe.int/WebForms/pages/?p=02\\_Opinions\\_and\\_studies](http://www.venice.coe.int/WebForms/pages/?p=02_Opinions_and_studies) (last visited Oct. 2, 2017). See generally Maartje De Visser, *A Critical Assessment of the Role of the Venice Commission in Processes of Domestic Constitutional Reform*, 63(4) AM. J. COM. L. 963 (2015) (explaining the Venice Commission’s advising and assisting role on states’ constitutional reform projects).

93. LÉCUYER, *supra* note 82, at 28.

94. See *Code of Good Practice in Electoral Matters—Guidelines and Explanatory Report, Opinion no. 190/2002*, VENICE COMMISSION (Oct. 30, 2002), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2002\)023-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2002)023-e).

95. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 262, art. 3, Mar. 20, 1952, [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).

96. Fox, *supra* note 43, at 59.

97. See *Mathieu-Mohin v. Belgium*, App. No. 9267/81, 10 Eur. H.R. Rep. 1 (1987); D. J. HARRIS ET AL., *LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS* 920–951 (3d ed. 2014).

systems,<sup>98</sup> it is clear that this margin presupposes a multiparty system which allows diverse and pluralist dialogue. The ECtHR commented on this in its decision concerning Turkey's banning of political parties that support Kurdish separatist movements based upon their threat to the state's unity and territorial integrity.<sup>99</sup> It held that "it is the essence of democracy to allow diverse political programmes to be proposed and debated, even those that call into question the way a State is currently organised, provided they do not harm democracy itself."<sup>100</sup>

## B. AFRICA

Processes of democratization are also reflected in Africa's regional law. Article 13 of the African Charter on Human and Peoples' Rights guarantees every citizen "the right to participate freely in the government of his country, either directly or through freely chosen representatives . . ."<sup>101</sup> While the Charter protects the "free choice," in contrast with Article 25 of the ICCPR, it neither addresses discrimination, universal suffrage, or a secret ballot, nor stipulates that electoral choice must reflect the free expression of the electors' will. Lacking such stipulation, the Charter may be interpreted as allowing one-party elections.<sup>102</sup>

Notwithstanding these shortcomings, the African Commission on Human Rights has issued a series of statements articulating the principles of electoral democracy as "based on the consent of the people freely expressed by them" and condemning military governments as clearly violating fundamental principles of democracy.<sup>103</sup> The principles of electoral democracy were reaffirmed in the 2007 African Charter on Democracy, Elections and Governance,<sup>104</sup> of which, according

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98. *Gitonas v. Greece*, App. No. 18747/91, 26 Eur. H.R. Rep. 691, ¶ 39 (1997); *Matthews v. United Kingdom*, App. No. 24833/94, 28 Eur. H.R. Rep. 361, ¶ 64 (1999).

99. *Socialist Party v. Turkey*, App. No. 21237/93, 27 Eur. H.R. Rep. 51, ¶ 47 (1998).

100. *Id.*

101. Organization of African Unity, African Charter on Human and Peoples' Rights, Art. 13, June 27, 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58, at 5.

102. Fox, *supra* note 43, at 66; Ayine, *supra* note 13, at 719.

103. Organization of African Unity, *Eighth Annual Activity Report of the Commission on Human and People's Rights* (June 26–28, 1995), <https://www1.umn.edu/humanrts/africa/ACHPR1.htm>.

104. African Union, African Charter on Democracy, Elections and

to Article 17 “State Parties re-affirm their commitment to regularly holding transparent, free and fair elections . . . .”<sup>105</sup> Notwithstanding these principles, democratization in Africa has taken a rather slow pace, with democratic reforms on the one hand but striking electoral frauds on the other.<sup>106</sup>

### C. LATIN AMERICA

Article 23.1(b) of the American Convention on Human Rights follows Article 25 of the ICCPR with minor modifications. Article 23.1(b) guarantees the 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.”<sup>107</sup> Due to the region’s particular circumstances, the early jurisprudence of the Inter-American Commission on Human Rights mainly focused on states with grave violations of human rights and in which ruling parties had completely suspended representative government.<sup>108</sup> The Commission emphasized that the core issue under Article 23 is whether elections are “genuine” which, according to the Commission, means one without intimidation, fraud, and harassment, and that reflect the voters’ will.<sup>109</sup> Importantly, the Commission has held that one-party states are inherently coercive, and consequently, one-party states are incapable of holding authentic elections.<sup>110</sup> According to the Commission, the principle of pluralism is characteristic of a representative democracy, and in the absence of which, elections cannot be free and genuine.<sup>111</sup>

In addition to this jurisprudence, one should mention the Inter-American Democratic Charter of 2001, which was adopted

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Governance, pmbl, [http://www.ipu.org/idd-E/afr\\_charter.pdf](http://www.ipu.org/idd-E/afr_charter.pdf).

105. *Id.* art. 17.

106. Kofele-Kale, *supra* note 80, at 232.

107. Organization of American States, American Convention on Human Rights art. 23.1(b), Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

108. *See* Report on the Situation of Human Rights in Chile, Inter-Am. Comm’n H.R., OEA/Ser.L/V/II.66, doc.17, Ch. XII(a), ¶ 49 (1985) [hereinafter Chile Report].

109. Report on the Situation of Human Rights in Panama, Inter-Am. Comm’n H.R., OEA/ser.L/V/II. 76, doc. 16, rev. 2, Ch. VIII, ¶ 3 (1989).

110. *See* Report on the Situation of Human Rights in Cuba: Seventh Report, Inter-Am. Comm’n H.R., OEA/ser.L/V/II.61, doc. 29, rev. I, Ch. I, ¶ 30 (1983); *id.* Ch. II, ¶ 38.

111. Chile Report, *supra* note 108, ¶ 96.

by a special session of the General Assembly of the Organization of American States with the central aim of strengthening and upholding democratic institutions in the nations of the Americas.<sup>112</sup> Article 3 of the Charter explicitly states that “essential elements of representative democracy include, inter alia . . . the holding of periodic, free, and fair elections based on secret balloting and universal suffrage as an expression of the sovereignty of the people, the pluralistic system of political parties and organizations . . . .”<sup>113</sup> Thus, the Charter recognized the importance of pluralism and the strengthening of political parties.<sup>114</sup> Over a decade ago, it was argued that the Democratic Charter is one of the most recent examples of an emerging international law norm of democratic governance.<sup>115</sup>

#### IV. A RIGHT TO DEMOCRACY IN A NON-DEMOCRATIC WORLD

##### A. HAS THE RIGHT TO DEMOCRACY EMERGED?

It might simply be *realpolitik*, or perhaps the great number of non-democratic states within the U.N., but the fact is that the gap remains today. The inconsistency between the various standards of electoral democracy around the world began with the compromise with the U.S.S.R. True, the U.N. General Assembly and the Human Rights Council have time and again reaffirmed the right to live in a democratic government. For example, in one of its resolutions in support of governments’ efforts to promote and consolidate new or restored democracies, the General Assembly encouraged “Member States to promote democratization and to make additional efforts to identify possible steps to support the efforts of Governments to promote and consolidate new or restored democracies.”<sup>116</sup> In April 1999, the U.N. Commission on Human Rights adopted resolution 1999/57 concerning “Promotion of the right to democracy,” which

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112. Organization of American States, Inter-American Democratic Charter ¶ 1, 40 I.L.M. 1289.

113. *Id.* art. 3. See Timothy D. Rudy, *A Quick Look at the Inter-American Democratic Charter of the OAS: What Is It and Is It Legal*, 33 SYRACUSE J. INT’L L. & COMM. 237, 243 (2005).

114. GUY S. GOODWIN-GILL, FREE AND FAIR ELECTIONS 43 (2006).

115. Enrique Lagos & Timothy D. Rudy, *In Defense of Democracy*, 35(2) U. MIAMI INTER-AM. L. REV. 283, 287 (2004).

116. G.A. Res. 51/31, art. 6 (Jan. 10, 1997).

“[a]ffirms that democracy fosters the full realization of all human rights,”<sup>117</sup> and that the rights of democratic governance include, *inter alia* “[t]he right of universal and equal suffrage, as well as free voting procedures and periodic and free elections”<sup>118</sup> and “the right of political participation . . . .”<sup>119</sup> In December 2000, the General Assembly adopted a resolution that “[c]alls upon States to promote and consolidate democracy;”<sup>120</sup> however, these dramatic declarations were not accompanied by sufficient steps for their fulfillment.<sup>121</sup>

So, based on various human rights instruments, regional developments, and countless declarations by international bodies, a line of scholars have been announcing the development of a new human right: the right to participate in the political process within a democratic government.<sup>122</sup> Most famously, perhaps, Franck argued that we were in the course of consolidating a right to democracy, which was once limited to only a few western states: “This newly emerging ‘law’—which requires democracy to validate governance . . . [is] becoming a requirement of international law applicable to all and implemented through global standards, with the help of regional and international organizations.”<sup>123</sup> To support his conclusion, Franck relied upon democratization processes that took place towards the end of the Twentieth century, particularly the democratic revolution which occurred at the time in the former Soviet Union and in Latin America.<sup>124</sup> Laurence Whitehead claimed in 2004 that “[d]emocratization is now more commonly viewed as the norm rather than the exception,”<sup>125</sup> and as Amichai Magen writes, “over the period 1990–2005 we observe a structural shift in the status of democracy, as an ideal and model of government, in the international system.”<sup>126</sup> Still, many

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117. Economic and Social Council Res. 1999/57, art. 1 (Apr. 28, 1999).

118. *Id.* art. 2(d).

119. *Id.* art. 2(e).

120. G.A. Res. 55/96, art. 1 (Dec. 4, 2000).

121. See, e.g., Niels Petersen, *The Principle of Democratic Teleology in International Law*, 34(1) *BROOK. J. INT’L L.* 33, 38 (2009).

122. Gregory H. Fox, *The Right to Political Participation in International Law*, 17 *YALE J. INT’L L.* 539, 551 (1992).

123. Franck, *supra* note 1, at 47.

124. *Id.* at 46–47.

125. Laurence Whitehead, *Democratization with the Benefit of Hindsight: The Changing International Components*, in *THE U.N. ROLE IN PROMOTING DEMOCRACY: BETWEEN IDEALS AND REALITY* 135, 135 (Edward Newman & Roland Rich eds., 2004).

126. Magen, *supra* note 7, at 378.

states—some of which are very active in the U.N., and which comprise more than one-third of humanity—do not see themselves bound by this “new norm” of democratization.<sup>127</sup>

In contrast, some argue that there is no right to democracy, and that it is undesirable for such a right to exist. Matthew Lister, for example, relies on John Rawls to argue that recognizing the right to democracy is undesirable because such recognition would justify democratic states’ intervention in non-democratic states.<sup>128</sup> Intervention may occur even if the states are not systematically responsible for grave human rights abuses (such as Saddam Hussain’s Iraq), but rather what he terms “decent” non-democracies (such as the Kingdom of Jordan) and even in states which are advancing toward decentness.<sup>129</sup>

The focus of this article is not on the issue of pro-democratic intervention, which deserves its own treatment.<sup>130</sup> We would mention, however, that even if one takes seriously the “responsibility to protect” doctrine and humanitarian intervention,<sup>131</sup> it is hard to see how the right to democracy would justify a use of force. The responsibility to protect doctrine acknowledges that the prime responsibility for protecting the people rests upon the sovereign state.<sup>132</sup> However, when a state is unable or unwilling to protect its own people, or when the state itself poses a threat to its people, responsibility to protect then rests upon the international community.<sup>133</sup> Humanitarian intervention generally refers to the use of force against a state in order to prevent or reduce the suffering of that state’s citizens.<sup>134</sup> Yet, for the use of force to be justified, even on these accounts, the threat must be grave, the main aim of the military

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127. See, e.g., Cerna, *supra* note 25, at 293.

128. Matthew Lister, *There Is No Human Right to Democracy. But May We Promote It Anyway?*, 48(2) STAN. J. INT’L L. 257, 263 (2012).

129. *Id.* at 273.

130. See, e.g., Lois E. Fielding, *Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy*, 5 DUKE J. COMP. & INT’L L. 329, 329 (1995); W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT’L L.J. 794, 794 (1995); Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT’L L. 645, 648 (1984).

131. The two concepts are not identical. See, e.g., Erfau Norooz, *Responsibility to Protect and Its Applicability in Libya and Syria*, 9(3) VIENNA J. INT’L CONST. L. THESIS 1, 1 (2015).

132. GARETH EVANS, *THE RESPONSIBILITY TO PROTECT: ENDING MASS ATROCITY CRIMES ONCE AND FOR ALL* 46 (2008).

133. ALEX J. BELLAMY, *THE RESPONSIBILITY TO PROTECT* 2–3 (2015).

134. See THOMAS G. WEISS, *HUMANITARIAN INTERVENTION* 7 (3d ed. 2016).

action must be to stop or prevent the threat, the use of force must be exercised only after all other peaceful means for resolving the conflict have been exhausted, and when the implications of the military intervention will not be more severe than non-intervention.<sup>135</sup> In the absence of clear rules, a wide elaboration of the emerging humanitarian exception to the prohibition on the use of force might lead to the use of force for solving not only survival humanitarian crises, but also a wide range of crises.<sup>136</sup> In any event, even these grounds for intervention are still contested. In 2005, at the world summit, “the states of the world confirmed that the UN [sic] Charter’s provisions regarding the use of force and its exceptions . . . were sufficient to address the wide variety of threats to peace and international security.”<sup>137</sup> Furthermore, “[a]ny forcible intervention without UN [sic] Security Council authorization and which is not covered by the conditions for the right of self-defense—even one which is driven by moral and humanitarian considerations—is a violation of state sovereignty and *prima facie* of the prohibition on the use of force.<sup>138</sup> This supposition seems to preclude the possibility of a pro-democratic intervention. Even if a full right to democracy is recognized, this would not justify a military intervention merely on the basis that a state is non-democratic.<sup>139</sup> One has to distinguish between the right to democratic entitlement and a separate question of the right to use force in order to establish, restore or maintain democracy—which is not supported by either state practice or *opinio juris*.<sup>140</sup> Even a recognized right to democracy would not prevail over the *jus cogens* prohibition on the use of force as enshrined in Article 2(4) of the U.N. Charter.<sup>141</sup>

Moreover, it is also questionable whether a forcible intervention of a foreign state can actually bring about democracy in general—and a stable democracy in particular—especially where a social and cultural basis for democracy was

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135. U.N. Secretary-General, *A More Secure World: Our Shared Responsibility*, ¶ 207, U.N. Doc A/59/565, (Dec. 2, 2004).

136. Yaniv Roznai, *The Insecurity of Human Security*, 32(1) WIS. INT’L L.J. 95, 121–22 (2014).

137. *Id.* at 118. See G.A. Res. 60/1, World Summit Outcome, ¶ 79 (Sept. 16, 2005).

138. Roznai, *supra* note 136, at 118.

139. Varayudej, *supra* note 24, at 17.

140. *Id.*

141. *Id.*



lacking in the first place.<sup>142</sup>

We raise the question of forcible intervention only to mention some of the objections to a right to democracy. In any case, we refer to positive international law which recognizes a right to democracy, as we have seen in Section II of the article. We raise concerns as to why this right is hardly debated when it comes to clearly undemocratic states and is not granted unequivocal declaration, and to highlight the gloomy reality that we live in a non-democratic world.

## B. NON-DEMOCRATIC WORLD

It is said that “a political system is either a democracy or not. The latter, in contrast, is gradual—democracy is a question of degree. Both concepts, however, are complementary and not mutually exclusive.”<sup>143</sup> The Economist’s Democracy Index 2016 distinguishes between four types of regimes: “full democracies,” “flawed democracies,” “hybrid regimes,” and “authoritarian regimes,” which are based upon five categories: electoral process and pluralism, civil liberties, the functioning of government, political participation, and political culture.<sup>144</sup> According to the 2016 index, only nineteen countries (compared to twenty-four in 2014) are considered full democracies, fifty-seven countries (compare to fifty-two in 2014) are considered flawed democracies, forty countries (compared to thirty-nine in 2014) are considered hybrid regimes, while fifty-one countries (compare to fifty-two in 2014) are considered authoritarian regimes.<sup>145</sup> Around 2.6 billion people, the report states, or over one-third of the world’s population, live in a country under authoritarian rule.<sup>146</sup> Taken together with hybrid regimes, over

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142. See Ved P. Nanda, *Agora: U.S. Forces in Panama: Defenders, Aggressors or Human Rights Activists? (The Validity of United States Intervention in Panama Under International Law)*, 84 AM. J. INT’L L. 494, 498–500 (1990); see also Varayudej, *supra* note 24, at 12.

143. Petersen, *supra* note 121, at 37.

144. Economist Intelligence Unit, *Democracy Index 2016: Revenge of the “Deplorables”*, THE ECONOMIST: INTELLIGENCE UNIT (2017), at 1, <https://www.eiu.com/democracy2016>.

145. Economist Intelligence Unit, *Democracy Index 2014: Democracy and Its Discontents*, THE ECONOMIST: INTELLIGENCE UNIT (2017), at 2, <https://www.eiu.com/democracy2014>; Economist Intelligence Unit, *Democracy Index 2016*, *supra* note 144, at 3.

146. Economist Intelligence Unit, *Democracy Index 2016*, *supra* note 144, at 3.

forty percent of the world population does not live in a democratic regime, either full or flawed.<sup>147</sup> The Economist Intelligence Unit also reveals a disturbing trend of regressing previously-attained progress in recent years.<sup>148</sup> Indeed, Magen demonstrated how “the global democratic wave hit the shoal somewhere around 1999–2000, plateaued between 2000 and 2005, and has since suffered sustained reversals. By 2015 the condition of global democratic institutions and procedures declined for nine consecutive years.”<sup>149</sup>

This is the sad reality of the world we live in, albeit the optimistic assertions of some international scholars. While in Western countries and a number of non-Western countries the right to democracy exists in practice, a large portion of the world’s population still live in non-democratic and authoritarian regimes, some of which can be described as outlaws.<sup>150</sup> We are surely aware of the problem that such categorization of democracy “has been on Western terms and has been unequal; many emerging states have found it nearly impossible to adhere to the Western model.”<sup>151</sup> In this Article, we focus first on the narrower procedural aspect of democracy; on electoral democracy, which ought to be more acceptable. We argue that if international law was meant to protect these people, it failed; the UDHR is lacking and reflects a compromise with the Soviet Regime. Although the ICCPR adequately preaches democratic systems (notwithstanding the missing emphasis on multiparty systems), many of the member states do not have one in practice. In the General Assembly and other U.N. institutions, the voices of non-democratic states are loudly heard, and countries that are a part of the Human Rights Council violate Article 25 of the ICCPR every day.<sup>152</sup>

Of course, one of the biggest problems of international law

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147. *Id.* at 2.

148. *Id.* at 3–4.

149. Magen, *supra* note 7, at 369.

150. Steiner, *supra* note 41, at 82.

151. Ruth Gordon, *Saving Failed States: Sometimes a Neocolonialist Notion*, 12(6) AM. U. INT’L L. & POL’Y 903, 964 (1997).

152. Compare U.N. Office of the High Commissioner for Human Rights, Current Membership of the Human Rights Council, 1 January–31 December 2017 (last visited Oct. 1, 2017), <http://www.ohchr.org/EN/HRBodies/HRC/Pages/CurrentMembers.aspx> (showing the forty-seven current members of the Human Rights Council), with Economist Intelligence Unit, *Democracy Index 2016*, *supra* note 144, at 9–11 (listing countries considered authoritarian and hybrid regimes, including over a dozen Human Rights Council members).

is enforcement.<sup>153</sup> And herein lies one of the obstacles: it is easier to enforce international human rights law upon democratic regimes which demonstrate a broad pattern of cooperation and compliance than upon non-democratic and outlaw states.<sup>154</sup> Unfortunately, research shows that human rights treaties have not systematically improved human rights outcomes.<sup>155</sup> In fact, certain authoritarian regimes have actually engaged in more violations *after* ratifying human rights treaties.<sup>156</sup> While only a few dozen states ratified the ICCPR during its birth in 1976, by 2012, almost 170 countries have ratified it.<sup>157</sup> However, the average global political rights score as measured by Freedom House has only moderately improved.<sup>158</sup> One should realize that in the current composition of the U.N., there is hardly a chance for Article 25 to be enforced and applied in non-democratic and outlaw states.<sup>159</sup>

## V. A MODEST AND LESS MODEST PROPOSAL

### A. MULTIPARTY AND PLURALIST ELECTORAL SYSTEM

One of the hypothetical solutions could be amending Article 25(b) of the ICCPR—explicating the meaning of “genuine” elections by inserting, after the word “genuine,” the term “multiparty and pluralist” to the obliging characteristics of the electoral system.<sup>160</sup> This process can be useful because “genuine” democratic states would be willing to join such an amendment, and “non-genuine” democratic states would hesitate before joining such a treaty. Nevertheless, amending Article 25(b) carries with it three major problems. First, the process of re-negotiation of the treaty amendment and bringing the amended treaty into force for all the parties can be protracted, which often

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153. Hannum, *supra* note 34, at 292.

154. *See, e.g.*, SRINI SITARAMAN, STATE PARTICIPATION IN INTERNATIONAL TREATY REGIMES 7 (2009).

155. ERIC A. POSNER, THE TWILIGHT OF HUMAN RIGHTS LAW 73–78 (2014).

156. *Id.* at 73–77.

157. *Id.* at 73.

158. *Id.* at 74–75. The average global political rights score has improved from 2.61 to 3.65. The scale ranges from one (the worst) to seven (the best). *Id.*

159. *Id.* at 73–77.

160. Vienna Convention on the Law of Treaties between States and International Organizations of 1986 art. 40, June 26, 1987, 8 I.L.M. 679, 1155 U.N.T.S. 331 (showing the procedure of amending multilateral treaties); ICCPR, *supra* note 35, at 185–86.

can be more difficult than the negotiation and enforcement of the original treaty.<sup>161</sup> Second, the new amendment, upon its coming into forces, shall only be binding upon those States Parties which have accepted it.<sup>162</sup> Other state parties would still be bound by the provisions of the original Covenant but not by amendments which they have not accepted.<sup>163</sup> Third, such a move might create a negative arrangement according to which the current terminology of Article 25 excludes multiparty elections.<sup>164</sup> This is an undesirable result.

The more modest and effective solution is to focus on the interpretation of Article 25.<sup>165</sup> The appropriate interpretation of the ICCPR is that elections must “provide voters with a free choice among legitimate alternatives.”<sup>166</sup> If this is indeed the case, international law must make a clear statement that single-party elections and alike are incompatible with genuine elections as they cannot guarantee the “free will of the electors” as required by Article 25(b).<sup>167</sup> As Robert Goodin claimed, “insofar as the citizens’ choice is limited to a single party and a single programme, the citizens cannot really make a choice . . . so one-party democracy is undemocratic.”<sup>168</sup> This should be made clear and expressly stated by the Human Rights Committee which publishes its interpretation of the content of human rights provisions, which are considered “authoritative.”<sup>169</sup> It would also be valuable if this interpretation would be accompanied by an unequivocal declaration by the United Nations General Assembly.<sup>170</sup> But such an interpretation and a General Assembly declaration would not have a binding

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161. ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 91 (2d ed. 2010).

162. ICCPR, *supra* note 35, at 186. See Robert Y. Jennings, *Treaties, in INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS* 135, 149 (Mohammed Bedjaoui ed., 1991).

163. ICCPR, *supra* note 35, at 186.

164. Jennings, *supra* note 162.

165. SCOTT N. CARLSON, *PRACTICAL GUIDE TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (ICCPR)* 152–53 (2003).

166. *Id.*

167. *Id.* at 149–51.

168. ROBERT E. GOODIN, *INNOVATING DEMOCRACY: DEMOCRATIC THEORY AND PRACTICE AFTER THE DELIBERATIVE TURN* 218 (2008). See also KONRAD ADENAUER STIFTUNG, *CHALLENGES TO DEMOCRACY BY ONE-PARTY DOMINANCE: A COMPARATIVE ASSESSMENT* (2006), [http://www.kas.de/wf/doc/kas\\_10560-1522-2-30.pdf?070328103113](http://www.kas.de/wf/doc/kas_10560-1522-2-30.pdf?070328103113).

169. THE CARTER CTR., *supra* note 42, at 12, 19.

170. *Id.* at 12–13.

force.<sup>171</sup> Here, we can learn an important lesson from the Helsinki Accord.

#### B. LESSONS FROM THE HELSINKI ACCORD

Franck claimed that there must be consequences when the government refuses to conduct free and fair elections or abide by their results, and that these consequences are in the form of “sanctions, blockade or military intervention in limited circumstances.”<sup>172</sup> We are not advocating in favor of such enforcement mechanisms. An emphasis on the correct construction of a “genuine” electoral democracy would not get rid of despotic regimes overnight, but it would be a significant declaration of *principle* and as such constitute an initial step that may help democratic elements in non-democratic societies overcome despots.<sup>173</sup> Studies demonstrate that in some countries, international human rights treaties had an impact on the public awareness, creating the belief that the government should comply with treaties it has ratified.<sup>174</sup> Likewise, an international recognition of a right could have an influence in the internal-domestic sphere; especially in regimes with buds of democracy, even a toothless declaration can foster democratization processes.<sup>175</sup>

Additionally, there is a notable precedent which demonstrates the success of soft law.<sup>176</sup> The Helsinki Accords—signed in 1975 by the Organization for Security and Cooperation in Europe—formed important principles to reduce the cold war tensions in Europe by including a specific section on

171. *Id.* at 12.

172. Franck, *supra* note 1, at 85.

173. Larry Diamond, *Chasing Away the Democracy Blues: Why Democracy is Worth Fighting For—Now More Than Ever*, FOREIGN POLICY (Oct. 24, 2014, 3:33 PM), <http://foreignpolicy.com/2014/10/24/chasing-away-the-democracy-blues/>.

174. POSNER, *supra* note 155, at 72–76.

175. *Id.*

176. See, e.g., Christine M. Chinkin, *The Challenge of Soft Law: Development and Change in International Law*, 38 INT'L & COMP. L.Q. 850, 856 (1989); Christine Chinkin, *A Mirage in the Sand? Distinguishing Binding and Non-Binding Relations Between States*, 10 LEIDEN J. INT'L L. 223, 246–47 (1997); DINAH SHELTON, COMMITMENT AND COMPLIANCE: THE ROLE OF NON-BINDING NORMS IN THE INTERNATIONAL LEGAL SYSTEM 345–46 (2000); Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 INT'L ORG. 421, 447–48 (2000); Dinah L. Shelton, *Soft Law*, in HANDBOOK OF INTERNATIONAL LAW 9 (ROUTLEDGE PRESS, 2008).

fundamental rights and recognizing principles such as territorial integrity of States and peaceful settlements of disputes.<sup>177</sup> In principle VII of the Accords, the participating states agree to “act in conformity with the purposes and principles of the Charter of the United Nations and with the Universal Declaration of Human Rights” and to “fulfil their obligations as set forth in the international declarations and agreements . . . including, *inter alia*, the International Covenants on Human Rights, by which they may be bound.”<sup>178</sup> Since the Accords does not have binding force as an international treaty,<sup>179</sup> the affirmation by the former Soviet Union of its respect for human rights and fundamental freedoms was dismissed at the time as mere verbiage and the Soviet leaders saw it as a victory for the communist cause.<sup>180</sup> The West recognized its limitations and received in return a vague and unenforceable promise to respect human rights.<sup>181</sup>

However, these non-binding documents can have a legal significance and even become binding customary international law.<sup>182</sup> Even non-binding agreements can have an authoritative and controlling force.<sup>183</sup> Undeniably, the Helsinki Accords eventually proved these claims as to the recognition of human rights, encouraging domestic Soviet opposition groups and indirectly helping those groups topple the Soviet despots.<sup>184</sup> As Dimitrijevic remarks with regard to the Accords, “the signatory States would not risk political and moral responsibility . . . by not complying with the agreed obligations . . . . Constant reminders by the public abroad and at home threaten a nation’s prestige, which is in itself an element of power to be neglected

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177. Conference on Security and Cooperation in Europe Final Act, Aug. 1, 1975, 14 I.L.M. 1292 [hereinafter *Helsinki Accords*].

178. See *id.* Principle VII; Antonio Cassese, *The Approach of the Helsinki Declaration to Human Rights*, 13 VAND. J. TRANSNAT’L L. 275, 288–90 (1980); Richard N. Dean, *Beyond Helsinki: The Soviet View of Human Rights in International Law*, 21 VA. J. INT’L L. 55, 88–91 (1980-1981); 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, 309 (1980).

179. Jordan J. Paust, *Transnational Freedom of Speech: Legal Aspects of the Helsinki Final Act*, 45 L. & CONTEMP. PROBS. 53, 55 (1982); Kiss & Dominick, *supra* note 178, at 309.

180. Dean, *supra* note 178, at 88–91.

181. *Id.*

182. Paust, *supra* note 179, at 61–66.

183. Oscar Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT’L L. 296, 300–01, 304 (1977).

184. Dean, *supra* note 178, at 91–95.

only at one's own peril.”<sup>185</sup> The name “Helsinki” became the rallying cry in the fight against the Kremlin. Whether or not the Helsinki Accords hastened the opposition struggle has not been definitively answered, but at the very least it provided them with “ideological ammunition” and significant international support, based upon the Soviet Union explicit obligation.<sup>186</sup> Words have a force of their own when they are included in international agreements, non-binding treaties, and *a fortiori* binding treaties.<sup>187</sup>

### C. OBLIGATORY MONITORING SYSTEM

International law's modest approach to democracy must focus on genuine elections through which popular consent may manifest itself.<sup>188</sup> The clarification of the meaning of “genuine elections” is a necessary step for promoting the right to democracy, but it is insufficient.<sup>189</sup> What is required is a general and obligatory international monitoring of elections.<sup>190</sup> Franck notes that the U.N.'s mission to oversee the elections in Haiti in 1990 can be understood “as the first instance in which the United Nations, acting at the request of a national government, intervened in the electoral process solely to validate the legitimacy of the outcome.”<sup>191</sup> Since then, international election monitoring has become a widespread practice.<sup>192</sup> Global and regional international organizations are increasingly involved in observing national elections and the U.N. has developed important election-monitoring activities and institutions.<sup>193</sup> In 2005, the secretariat of the U.N. endorsed the Declaration of Principles for International Election Observation,<sup>194</sup> and in

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185. Vojin Dimitrijevic, *The Place of Helsinki on the Long Road to Human Rights*, 13 VAND. J. TRANSNAT'L L. 253, 272–73 (1980).

186. CHRISTIAN PETERSON, *GLOBALIZING HUMAN RIGHTS: PRIVATE CITIZENS, THE SOVIET UNION, AND THE WEST* 101 (2012).

187. LEENA GROVER, *UN HUMAN RIGHTS TREATY BODIES: LAW AND LEGITIMACY* 102 (2012).

188. Fox, *supra* note 43, at 49.

189. *Id.* at 55–59.

190. *Id.* at 85–86.

191. Franck, *supra* note 1, at 72–73.

192. *Id.* at 82.

193. *Id.* at 65.

194. U.N. Secretary-General, Remarks at Ceremony of Endorsement for Principles of International Electoral Observation (Oct. 27, 2005), <https://www.un.org/sg/en/content/sg/statement/2005-10-27/secretary-generals-remarks-ceremony-endorsement-principles>.

2011, the General Assembly adopted the Resolution on Strengthening the Role of the United Nations in Enhancing Periodic and Genuine Elections and the Promotion of Democracy, which, *inter alia*, acknowledges “the importance of international election observation for the promotion of free and fair elections and its contribution to enhancing the integrity of election processes.”<sup>195</sup> However, international law does not require international observation of elections.<sup>196</sup> Such observation is exercised upon the invitation of states, i.e., it is voluntary, and unfortunately, still exceptional.<sup>197</sup> Apart from overcoming the principles of sovereignty and non-intervention, such consent to monitoring serves another function: requiring all major political groups to agree to the U.N. presence encourages negotiation and participation of all major parties in the agreement to monitoring.<sup>198</sup> Nonetheless, as Franck rightly observed, “few states are likely to volunteer as long as participation in international monitoring is tantamount to a government’s admission that it does not have credibility with its own people.”<sup>199</sup> We argue that international observation of national elections must become a general obligation in which all states participate; it ought to be “an unremarkable universal habit.”<sup>200</sup>

There are some regional antecedents supporting our approach. Some intergovernmental organizations (such as the OSCE or the African Union Department of Election Assistance) have required member-states to permit international observation of elections.<sup>201</sup>

We are aware that this proposal for obligatory international observation mechanisms of elections within independent states may be considered intrusive and in conflict with the principle of non-intervention.<sup>202</sup> It requires a dual attitude shift from both the U.N. and states; the U.N. must no longer consider election

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195. G.A. Res. 66/163, at 2 (Dec. 19, 2011).

196. Joyner, *supra* note 48, at 346–48.

197. *Id.* at 340, 343.

198. David Stoelting, *The Challenge of UN-Monitored Elections in Independent Nations*, 28 STAN. J. INT’L L. 371, 392 (1992).

199. Franck, *supra* note 1, at 87.

200. *Id.*

201. THE CARTER CTR., *supra* note 42, at 45.

202. See Jon M. Ebersole, *The United Nations’ Response to Requests for Assistance in Electoral Matters*, 33 VA. J. INT’L L. 91, 104 (1992); Varayudej, *supra* note 24, at 9. Cf. Franck, *supra* note 1, at 79–80.



monitoring as an “exceptional activity of the organization.”<sup>203</sup> The U.N. wants to reduce its role in monitoring elections, since the presupposition is that “a decline in demand for United Nations assistance would indicate that the Organization has fulfilled its role successfully and can focus on other important elements of the democratization process such as post-election follow-up and institutionalization.”<sup>204</sup> But the international community still faces momentous challenges in enhancing the right to political participation and promoting democracy. It should be clear that the promotion of genuine democracy is not an exhibit of disrespect for state sovereignty but rather a reflection of deep commitment to popular self-rule, guided by the principle of self-determination.<sup>205</sup> From the states’ perspective, election monitoring must be “reconciled in the minds of governments with their residual sovereignty.”<sup>206</sup> In order for the interference with the principle of non-intervention to be minimal yet maintain an effective monitoring mechanism, several conditions must be met: first, all states must unequivocally repudiate the use of military force—not in accordance with existing international rules—to compel compliance with the right to democracy.<sup>207</sup> Second, the validity of the election’s results will not be dependent upon the monitoring report. It should be the governments’ own understanding that election monitoring mechanisms are a useful tool to bestow legitimacy to their democratic elections.<sup>208</sup> Third, the obligatory monitoring mechanisms must be limited to “observation” and not “supervision.” The latter is the direct involvement in the election’s machinery. The former is a less direct involvement which aims to insure free and fair elections.<sup>209</sup> Of course, upon the request of the states themselves, the U.N.’s assistance can simultaneously include a more refined mission that would assist with the design and operation of the electoral process.<sup>210</sup> Finally,

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203. Ebersole, *supra* note 202, at 101.

204. *Id.* at 122.

205. Joyner, *supra* note 48, at 350.

206. Franck, *supra* note 1, at 84.

207. *Cf. id.* But see Morton H. Halperin, *Guaranteeing Democracy*, 91 FOREIGN POLICY 105, 121 (1993) (“An international guarantee clause [which ensures the maintenance of constitutional democracy] will be credible only if key countries . . . commit to using force if necessary to restore or establish constitutional democracy.”).

208. *Cf. d’Aspremont, supra* note 4, at 555.

209. Ebersole, *supra* note 202, at 94.

210. Marks, *supra* note 2, at 517.

in the end of this observation mission, a report would be issued, which describes the process's fairness and certifies that the elections were free, fair and ultimately, genuine.<sup>211</sup>

The goal would be to make the results of the monitoring transparent and globally published, and to shift the world's focus and pressure on those countries which do not conduct genuine elections.<sup>212</sup> Since the monitoring system should have no formal influence upon an individual election's results, it is still respectful of state's sovereignty, yet remains faithful to international obligations.<sup>213</sup>

Importantly, procedural democracy is merely the starting point and we should emphasize that the substance of democratic governance must not be reduced to mere electoralism.<sup>214</sup> However, "embracing periodic genuine elections as a foundation of international governmental legitimacy is important evidence of the widespread acceptance of democracy, both as a right and a human heritage. Elections neither ensure democracy, nor, even more broadly, do they establish peace, security, freedom, or justice; yet, elections clarify and reaffirm those aspirations,"<sup>215</sup> as long as the process is genuine.<sup>216</sup>

## VI. CONCLUSION

We wish to conclude our Article where we began it—with the Arab Spring. Gerald Butt recently wrote that "the reality is that Arab democracy has made little progress thus far in breaking patterns of leadership established during long decades of autocratic rule. The Arab Spring promised much, but thus far it has achieved little."<sup>217</sup> In Egypt, notwithstanding presidential

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211. *Id.* at 515.

212. *See, e.g., id.* (explaining the development of the democracy).

213. *See* Kofele-Kale, *supra* note 80, at 233 (claiming that the limited involvement should mitigate the fears of critics who claim that international observance of elections might be used "to certify bad leadership or promote the interests of foreigners").

214. U.N. Secretary-General, *Support by the United Nations System of the Efforts of Governments to Promote and Consolidate New or Restored Democracies*, ¶ 30, U.N. Doc. A/52/513 (Oct. 21, 1997).

215. Ibrahim J. Gassama, *Ballots and Bullets: The Right to Democratic Governance in International Law After the Egyptian Coup*, 32 WIS. J. INT'L L. 621, 662 (2014).

216. *Id.* at 673.

217. Gerald Butt, *Why Arab Spring Has not Delivered Real Democracy*, BBC (June 2, 2014), <http://www.bbc.com/news/world-middle-east-27632777>.

and parliamentary elections and three referendums, the military and security services remain the power behind these displays of democracy.<sup>218</sup> In Syria, the one-party Presidential elections are taking place in the absence of free debate or a serious competitor to Bashar al-Assad and are merely a formality.<sup>219</sup> And in Libya, the chances of an inclusive democratic system taking root in the foreseeable future seems remote.<sup>220</sup> Tunisia is the only democratic success story.<sup>221</sup> In Arab countries that were largely untouched by the Arab uprisings, such as Iraq and Lebanon, the democratic processes have been distorted by sectarianism, and the electorate is denied the opportunity to choose candidates espousing the common good of the nation as a whole.<sup>222</sup> Democracy in Algeria is practiced under the shadow of the military and the interests of the ruling elite, and in Jordan and Morocco, the Monarchs still control the political life.<sup>223</sup> At present, Butt concludes,

Arab countries . . . are practising democracy in different ways and to differing degrees. But one vital ingredient is missing—politics in its broadest sense . . . . When elections become a contest among competing political visions, then the annual calendar of voting dates in the Arab Middle East will have real meaning.<sup>224</sup>

International law instruments have advanced the right to procedural democracy. Yet, we still live in a largely non-democratic world. As Pippa Norris writes, “the core principles of electoral integrity have been long endorsed by the international community, but unless the standards of elections reflect these principles, by eliminating common malpractice and enforcing human rights, contests will fail to strengthen democracy and reduce conflict.”<sup>225</sup> The data that Magen provides is a source for great concern. Since 2006, there has been no net expansion in the number of electoral democracies, and the number of electoral

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218. *Id.*

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. PIPPA NORRIS, WHY ELECTIONS FAIL 177 (2015).

and liberal democracies has actually slightly declined.<sup>226</sup> The average level of freedom in the world has slightly declined as well.<sup>227</sup> Additionally, between 2000 and 2015, 17.6 of world democracies broke down, by means of coups, fixed elections, etc.—a very high percentage compared with relatively low rates of eight percent from 1984–1993, and eleven percent from 1994–2003.<sup>228</sup> With the risk to the erosion of the right to democracy, international law must take progressive action. Insisting on the correct interpretation to the meaning of “genuine election” as explicitly including multiparty and pluralist electoral systems,<sup>229</sup> coupled with a global monitoring system of elections, as we propose in this article, should provide powerful means for the real promotion and protection of the right to genuine electoral democracy.

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226. Magen, *supra* note 7, at 378–79.

227. *Id.* at 379.

228. *Id.*

229. KHALIFA A. ALFADHEL, *THE RIGHT TO DEMOCRACY IN INTERNATIONAL LAW: BETWEEN PROCEDURE, SUBSTANCE AND THE PHILOSOPHY OF JOHN RAWLS* 39 (2016) (“Genuine elections . . . mean that voters have certain influence on the turnout of election, through practicing their right to vote amongst a number of political alternatives. Therefore, with these guarantees, puppet elections cannot be used by states in order to fulfill the requirements of Article 25.”).