The U.N., the U.S., and the Security Council: Regulating the Use of Force in Pro-Democratic Intervention

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I. INTRODUCTION

Despite the near universal recognition of democratic processes as an essential human right and, at the very least, as an emerging international norm,[1] it is

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Cite as 53 ATENEO L.J. 295 (2008).

the author's considered view that pro-democratic intervention may be permitted only in limited situations under the auspices of the United Nations (U.N.) system. This Article undertakes an overview of the debate for and against the use of force to liberate a country from non-democratic government, followed by a survey of unilateral and multilateral pro-democratic intervention. The Article then analyzes the U.N. Security Council's practice of condemning, authorizing, or subsequently endorsing democratic regime change in countries, in light of fundamental norms contained in the U.N. Charter and in general international law.

Before proceeding further, it is useful to recall the conceptual framework and allocation of powers originally envisaged by the U.N. Charter. The Charter requires states to renounce the unilateral use of force in favor of the collective security mechanism under the U.N. aegis. Thus, the Charter provides that "[a]ll members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations."[2]

Two subtle points are discernible from the text. First, only members are precluded from the threat or use of force — the U.N. as a body is not similarly constrained. Second, the right to use force appears to be subordinate to the respect for territorial integrity and political independence. This should be understood in connection with paragraph 7 of article 2 of the Charter, which precludes intervention in matters that are "essentially within the domestic jurisdiction of any state."[3] However, this proscription does not apply to enforcement measures authorized by the U.N. Security Council under Chapter VII of the Charter.[4] Thus, U.N. intervention is permitted

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1. States, however, recognize that there is no universal model of democracy. *See* Promoting and Consolidating Democracy, G.A. Res. 55/96, at 2, U.N. Doc. A/RES/55/96 (Feb. 28, 2001).

2. U.N. Charter art. 2, ¶ 4.

3. U.N. Charter art. 2, ¶ 7 provides:

> Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter Vll.

4. U.N. Charter ch. VII. The chapter is cited in full below:

> CHAPTER VII
>
> ACTION WITH RESPECT TO THREATS TO THE PEACE, BREACHES OF THE PEACE, AND ACTS OF AGGRESSION
>
> Article 39. The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall

make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

Article 40. In order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable. Such provisional measures shall be without prejudice to the rights, claims, or position of the parties concerned. The Security Council shall duly take account of failure to comply with such provisional measures.

Article 41. The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

Article 42. Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

Article 43.

(1) All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security;

(2) Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location, and the nature of the facilities and assistance to be provided; and

(3) The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and Members or between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes.

Article 44. When the Security Council has decided to use force it shall, before calling upon a Member not represented on it to provide armed forces in fulfillment of the obligations assumed under Article 43, invite that Member, if the Member so desires, to participate in the decisions

of the Security Council concerning the employment of contingents of that Member's armed forces.

Article 45. In order to enable the United Nations to take urgent military measures, Members shall hold immediately available national air-force contingents for combined international enforcement action. The strength and degree of readiness of these contingents and plans for their combined action shall be determined within the limits laid down in the special agreement or agreements referred to in Article 43, by the Security Council with the assistance of the Military Staff Committee.

Article 46. Plans for the application of armed force shall be made by the Security Council with the assistance of the Military Staff Committee.

Article 47.

(1) There shall be established a Military Staff Committee to advise and assist the Security Council on all questions relating to the Security Council's military requirements for the maintenance of international peace and security, the employment and command of forces placed at its disposal, the regulation of armaments, and possible disarmament;

(2) The Military Staff Committee shall consist of the Chiefs of Staff of the permanent members of the Security Council or their representatives. Any Member of the United Nations not permanently represented on the Committee shall be invited by the Committee to be associated with it when the efficient discharge of the Committee's responsibilities requires the participation of that Member in its work;

(3) The Military Staff Committee shall be responsible under the Security Council for the strategic direction of any armed forces placed at the disposal of the Security Council. Questions relating to the command of such forces shall be worked out subsequently; and

(4) The Military Staff Committee, with the authorization of the Security Council and after consultation with appropriate regional agencies, may establish regional sub-committees.

Article 48.

(1) The action required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the United Nations or by some of them, as the Security Council may determine; and

(2) Such decisions shall be carried out by the Members of the United Nations directly and through their action in the appropriate international agencies of which they are members.

Article 49. The Members of the United Nations shall join in affording mutual assistance in carrying out the measures decided upon by the Security Council.

where the Security Council determines that there is a threat to the peace, breach of the peace, or act of aggression.[5]

II. THE RIGHT TO DEMOCRATIC GOVERNANCE

Professor Thomas Franck first explained the idea that democratic governance has evolved from a mere moral prescription into an international legal norm.[6] In fact, with the end of the Cold War in the early 1990s, liberal democracy was proclaimed as the dominant ideology in the world.[7]

The foundation of a right to democratic governance has long been set out in human rights instruments,[8] particularly the Universal Declaration of

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> Article 50. If preventive or enforcement measures against any state are taken by the Security Council, any other state, whether a Member of the United Nations or not, which finds itself confronted with special economic problems arising from the carrying out of those measures shall have the right to consult the Security Council with regard to a solution of those problems.
>
> Article 51. Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

5. U.N. Charter art. 39.

6. *See* Thomas M. Franck, *The Emerging Right of Democratic Governance*, 86 AM. J. INT'L. L. 46 (1992).

7. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN 43 (1992) (on the definition of democracy, Fukuyama concluded that "[a] country is democratic if it grants its people the right to choose their own government through periodic, secret-ballot, multi-party elections, on the basis of universal and equal adult suffrage").

8. *See* American Convention on Human Rights art. 23, Nov. 22, 1969, 9 I.L.M. 673; European Convention on Human Rights (Protocol I) art. 3, Nov. 4, 1950, 213 U.N.T.S. 262 (parties "undertake to hold free elections at reasonable intervals by secret ballot"); Charter of the Organization of American States [O.A.S.] Charter pmbl., 119 U.N.T.S. 3 ("[R]epresentative democracy is an indispensable condition for the peace, stability and development of the region."). *See also* Summit of the Americas, Declaration of Principles, Dec. 11, 1994, 34 I.L.M. 810 (Democracy "is the sole political system which guarantees respect for human rights and the rule of law.").

Human Rights[9] and the International Covenant on Civil and Political Rights.[10] Within the U.N. framework, it is generally recognized that the Charter-based purpose of promoting human rights and fundamental freedoms is the very basis for the recognition of democracy.[11] Thus, the U.N. has increasingly allocated resources and energy to the pursuit of democratization.[12] Since its inception in 1945, the U.N. Trusteeship Council has organized over 30 plebiscites, bringing self-rule and independence (although perhaps not full democracy) to former colonies and other non-self-governing territories.[13]

The U.N. is also involved in the active promotion of democratic governance among its membership[14] — through the Security Council's sponsorship of elections in the interest of international peace-keeping,[15] and

9. Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (1948) (Article 21 provides that "the will of the people shall be the basis of the authority of government.").

10. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (Article 22 (2), for instance, provides that "[n]o restrictions may be placed on the exercise of ... right other than those which are ... necessary in a democratic society."). *See also* The Right to Participate in Public Affairs, Voting Rights, and the Right of Equal Access to Public Service, U.N.C.H.R. Gen. Cmt. 25, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (July 12, 1996).

11. *See generally* BOUTROS BOUTROS-GHALI, AN AGENDA FOR DEMOCRATIZATION 3, 17 (1996).

12. The General Assembly affirmed its members' conviction that periodic and genuine elections are necessary and indispensable elements of sustained efforts to protect the rights and interests of the governed. *See* Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections, G.A. Res. 45/150, U.N. Doc. A/RES/45/150 (Dec. 18, 1990); A Right to Democracy, U.N.C.H.R. Res., U.N. Doc. E/CN.4/1999/L.55/Rev.2 (Apr. 26, 1999). *See also* General Assembly Millennium Declaration, G.A. Res. 55/2, U.N. Doc. A/RES/55/2 (Sep. 18, 2000) (evincing states' commitment to promote democracy and strengthen the rule of law); Promoting and Consolidating Democracy, G.A. Res. 55/96, U.N. Doc. A/RES/55/96 (Feb. 28, 2001).

13. *See generally* The Secretary-General, *Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections: Report of the Secretary-General, delivered to the General Assembly*, U.N. Doc. A/46/609 (Nov. 19, 1991).

14. *See, e.g.* Support by the United Nations System for the Efforts of Governments to Promote and Consolidate New or Restored Democracies, G.A. Res. 49/30, U.N. Doc. A/RES/49/30 (Dec. 22, 1994).

15. The Charter justification for Security Council actions promoting democracy is derived from the Council's mandate to preserve international peace and security. For the most part, these missions were undertaken with the state's consent, and not based on measures imposed under Chapter VII of the Charter. Pursuant to this authority, the Security Council has authorized extensive involvement of U.N. peace-keepers to assist in democratic transitions in

through the General Assembly's authorization of civilian assistance in elections, as may be requested by a member state.[16]

III. INTERVENTIONS TO RESTORE DEMOCRACY

The "doctrine" of pro-democratic intervention permits force to be used in assisting oppressed populations to attain democratic self-government, particularly where there has been usurpation of the sovereign prerogative to be governed by those who have been democratically elected.[17] It bears stressing that this "doctrine" has been offered, by and large, in the context of *restoration* of democracy, and not its *introduction* or *imposition* on a country.[18] This distinction is important as it shows implicit recognition that a state's

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Namibia, Cambodia, Angola, Mozambique, and El Salvador as a result of internationally brokered peace plans. It has similarly authorized election monitoring in the Western Sahara, Liberia, and South Africa. *See, e.g.* MWESIGA LAURENT BAREGU, ET AL., FROM CAPE TO CONGO: SOUTHERN AFRICA'S EVOLVING SECURITY CHALLENGES 260 (Mwesiga Baregu & Christopher Landsberg eds., 2003); JARAT CHOPRA, THE POLITICS OF PEACE-MAINTENANCE 3 (Jarat Chopra ed., 1998).

16. Examples include Nicaragua, G.A. Res. 44/10, U.N. GAOR, 44th Sess., Supp. No. 49, at 18, U.N. Doc. A/44/49 (1989); Haiti, G.A. Res. 45/2, U.N. GAOR, 45th Sess., Supp. No. 49A, at 12, U.N. Doc. A/45/49 (1990); and Eritrea, G.A. Res. 47/114, U.N. GAOR, 47th Sess., Supp. No. 49, at 195, U.N. Doc. A/47/49 (1992). Because the General Assembly has no power to order U.N. supervision of an election, the provision of electoral assistance depends upon the invitation of the subject government. The bases of the General Assembly's authority to conduct such activities rests on its residual role in preserving international peace and security, as well as its broad mandate to promote human rights. *See* U.N. Charter art. 1, ¶ 1. *See generally* Douglas Lee Donoho, *Evolution or Expectancy: The United Nations Response to the Disruption of Democracy*, 29 CORNELL INT'L. L.J. 329 (1996).

17. *See generally* Michael Byers & Simon Chesterman, *"You, the People": Pro-Democratic Intervention in International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 259 (Gregory H. Fox & Brad R. Roth eds., 2000). *But see* SIMON CHESTERMAN, JUST WAR OR JUST PEACE? HUMANITARIAN INTERVENTION AND INTERNATIONAL LAW 88, 93 (2001) (arguing that there is no such doctrine and as a concept, pro-democratic intervention is neither legally accurate nor politically desirable); MICHAEL BYERS, WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT 85 (2007) (explaining that there is no *opinio juris* authorizing the claim of pro-democratic intervention, the claim is only based on past experience where the United Nations authorized intervention for supporting or restoring democracy).

18. *See generally* Karsten Nowrot & Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS Intervention in Sierra Leone*, 14 AM. U. INT'L. L. REV. 321 (1998-99); David Wippman, *Pro-Democratic Intervention by Invitation*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 293 (Gregory H. Fox & Brad R. Roth eds., 2000).

political system or form of government is generally not a matter that can be externally imposed.[19]

As a corollary of the principle of sovereign equality, the principle of non-intervention ensures that every state, regardless of its power or stature, may conduct its affairs without outside interference. This principle is founded upon the security brought by state sovereignty, as enshrined in the U.N. Charter,[20] and reflected in customary international law, as evidenced

19. *See generally* RESTATEMENT (THIRD) OF U.S. FOREIGN RELATIONS LAW § 203 (1986) ("International law does not generally address domestic constitutional issues such as how a national government is formed.").

20. U.N. Charter art. 2. This article states:

> Article 2. The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.
>
> (1) The Organization is based on the principle of the sovereign equality of all its Members;
>
> (2) All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter;
>
> (3) All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered;
>
> (4) All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations;
>
> (5) All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action;
>
> (6) The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security; and
>
> (7) Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

by numerous treaties,[21] General Assembly Resolutions,[22] and decisions by the International Court of Justice (I.C.J.).[23]

Precisely, in situations involving unilateral recourse to force, non-intervention is tremendously important, since, inevitably, as history has shown, pro-democratic intervention is only applied to smaller and weaker states — the admirable ends are almost always intermingled with less laudable ones, and the support for democracy is usually put forward as ex post justification for the intervention.[24] As stated by the I.C.J., when the United Kingdom put forward the defense that it engaged in the use of force in furtherance of international justice:

> The Court cannot accept such a line of defense. The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and as such, cannot, whatever the present defects in international organization, find a place in international law. Intervention is perhaps still less admissible in the particular form it would take here; for, from the nature of things, *it would be reserved for the most powerful States, and might easily lead to perverting the administration of justice itself.*[25]

A. Ends v. Means

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21. *See, e.g.* Convention on the Rights and Duties of States (Montevideo Convention), art. 8, Dec. 26, 1933, 165 L.N.T.S. 19; Pact of the League of Arab States, art. 8, Mar. 22, 1945, 70 U.N.T.S. 237; Charter of the Organization of American States, art. 18, Apr. 30, 1948, 119 U.N.T.S. 3; Charter of the Organization of African Unity, art. III, May 26, 1963, 479 U.N.T.S. 39; Final Act of the Conference on Security and Cooperation in Europe (Helsinki Accords), princ. VI, Aug. 1, 1975, 73 Dept. St. Bull. 323 (1975), *reprinted in* 14 I.L.M. (1975).

22. *See, e.g.* Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (XX), at 11, U.N. GAOR, 20th Sess., Supp. No. 14, U.N. Doc. A/6014 (1965), *reprinted in* 5 I.L.M. 374 (1966); Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8028 (1970); Resolutions on Non-Interference in the Internal Affairs of States, G.A. Res. 31/91, at 42, U.N. GAOR, 31st Sess., Supp. No. 39, U.N. Doc. A/31/39 (1976); Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States, G.A. Res. 36/103, at 78, U.N. GAOR, 36th Sess., Supp. No. 51, U.N. Doc. A/36/51 (1981).

23. Corfu Channel (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9, 1949); Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27, 1986).

24. See discussion *infra* Parts IV & V.

25. *Corfu Channel*, 1949 I.C.J. 4 at 35.

W. Michael Reisman, one of the earliest and most vigorous proponents of pro-democratic intervention, argues that where a legitimately elected government has been overthrown, the use of force — whether unilateral or multilateral — to liberate the country from the oppressor is permissible, or, at the very least, excusable, as any force utilized is not directed against the territorial integrity or political independence of the country being liberated.[26] This is yet another iteration of the argument supporting a restrictive view of article 2, paragraph 4 of the Charter.[27] According to Reisman, a state contemplating unilateral action need only determine whether "a particular use of force enhance[s] or undermine[s] world order."[28] He writes:

> Article 2 (4) is the means. The basic policy of contemporary international law has been to maintain the political independence of territorial communities so that they can continue to express their desire for political community in a form appropriate to them.
>
> Article 2 (4), like so much in the Charter and in contemporary international politics, rests on and must be interpreted in terms of this key postulate of political legitimacy in the 20th century. Each application of Article 2 (4) must enhance opportunities for ongoing self-determination. Though all interventions are lamentable, the fact is that some may serve, in terms of aggregate consequences, to increase the probability of the free choice of peoples about their government and political structure.[29]

Reisman's self-judging and consequentialist view of article 2, paragraph 4, while seemingly compelling, is seriously problematic. First, it has never been suggested that democracy is equivalent to self-determination, which would, at the very least, be a norm equivalent to the peremptory prohibition on the use of force.[30] Second, the consequences of a particular intervention can rarely, if ever, be predicted, and it can never be guaranteed that a

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26. W. Michael Reisman, *Coercion and Self-Determination: Construing Charter Article 2 (4)*, 78 AM. J. INT'L. L. 642 (1984) [hereinafter Reisman, *Coercion and Self-Determination*].

27. While there is some debate among publicists as to whether article 2, paragraph 4 should be interpreted restrictively, so as to permit force that would not contravene the clause, or broadly, as reinforcing the primary prohibition, the weight of opinion supports the latter position, as the real concern of the Charter is not the prohibition of the use of force per se, but rather, the allocation of power in respect of the threat or use of force as a political instrument. *See* D. W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 21 (1958); IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 231-80 (1963).

28. Reisman, *Coercion and Self-Determination*, *supra* note 26, at 643.

29. *Id.* at 644.

30. *See Corfu Channel*, 1949 I.C.J. 4 at 35.

"liberator" will be animated by wholly laudable intentions.[31] Third, the view that the prohibition on the use of force may be done away with or interpreted by a state as it sees fit, in order to achieve allegedly worthwhile or legitimate objectives, is fundamentally at odds with the principles underlying the international legal system.[32]

In reply to Reisman's claim, Professor Oscar Schachter argues that a doctrine of pro-democratic intervention would give powerful states an almost unlimited right to overthrow governments alleged to be unresponsive to the popular will or to the goal of self-determination.[33] Furthermore, Schachter characterizes a foreign power's intervention as "against the political independence of that state, whatever its internal political structure."[34]

As will be demonstrated later, there is no showing that unilateral pro-democratic intervention has been accepted by states.[35] This position also finds support in *Nicaragua v. United States*,[36] where the I.C.J., after surveying state practice, concluded that there is no right to intervene based on political or moral considerations. Thus,

> [t]here have been in recent years a number of instances of foreign intervention for the benefit of forces opposed to the government of another State.... It has to consider whether there might be indications of a practice illustrative of belief in a kind of general right for states to intervene, directly or indirectly, with or without armed force, in support of an internal opposition in another state, *whose cause appeared particularly worthy by reason of the political and moral values with which it was identified.* For such a general right to come into existence would involve a *fundamental modification of the customary law principle of non-intervention.*
>
> In fact, however, the Court finds that states *have not justified their conduct by reference to a new right of intervention or a new exception to the principle of its prohibition.* The United States authorities have on some occasions clearly stated their grounds for intervening in the affairs of a foreign state for reasons connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign

31. *See* Ved P. Nanda, *The Validity of United States Intervention in Panama Under International Law*, 84 AM. J. INT'L. L. 494 (1990).

32. *See* U.N. Charter ch. VII; U.N. Charter art. 2.

33. *See* Oscar Schachter, *The Legality of Pro-Democratic Invasion*, 78 AM. J. INT'L. L. 645 (1984).

34. *Id.* at 649.

35. *See infra* Parts IV & V.

36. Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14 (June 27, 1986).

> policy. But these were statements of international policy, and not an assertion of rules of existing international law.[37]

B. New and Improved Definition of Sovereignty

Pro-democratic intervention is premised on a view of sovereignty vested in people, not states. Thus, where the results of free elections are thwarted, the international community "need not speculate on what constitutes popular sovereignty in that country," and military intervention to re-establish the rightful winner constitutes restoration, not violation, of sovereignty.[38] In that case, "any nation with the will and the resources may intervene to protect the population of another nation against ... tyranny."[39]

Fortunately, general principles and moral prescriptions rarely decide concrete cases.[40] It is all too easy to characterize a regime as wicked and despotic. From a policy standpoint, the international community should not be in the business of determining what constitutes sovereignty in another country. Furthermore, in reality, it is incredibly difficult to ascertain the "will of the people" and determine which faction should be recognized as the rightful government of a state, since that question turns on who maintains effective control of the state territory and its people. Effectiveness as the sole criterion in recognizing a government of a state has been widely recognized in state practice, as well as the judgments of international tribunals; the means by which a group obtains power, that is, by overthrowing the former government in a coup d'état is legally irrelevant and does not affect the legitimacy of the government in representing the state.[41]

C. A Species of Humanitarian Intervention

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37. *Id.* at 108-09, ¶ 206-07 (emphasis supplied).

38. W. Michael Reisman, *Sovereignty and Human Rights in Contemporary International Law*, 84 AM. J. INT'L. L. 866, 871 (1990) [hereinafter Reisman, *Sovereignty and Human Rights*].

39. Anthony D'Amato, *The Invasion of Panama was a Lawful Response to Tyranny*, 84 AM. J. INT'L. L. 516, 519 (1990).

40. *See, e.g.* Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) In *Lochner*, Justice Oliver Wendell Holmes first stated this concept which was laid as doctrine in later jurisprudence.

41. *See, e.g.* Tinoco Concession (U.K. v. Costa Rica), 1 R. Int'l. Arb. Awards 369, 381-82 (1923), *reprinted in* 18 AM. J. INT'L L. 147 (1924). Although the Security Council and the General Assembly have at times condemned such illegal usurpations of power, each of these undemocratic regimes — with the exceptions of South Africa and South Rhodesia — was eventually accepted by the U.N. as the legitimate representative of its state.

That justice demands the opposition of tyranny and protection of fellow states by the international community from brutality and enslavement is perhaps the most compelling argument in favor of pro-democratic intervention.[42] Like the classic formulation of "humanitarian intervention," wherein a threat or use of force is designed to compel a sovereign to respect fundamental human rights, pro-democratic intervention is perhaps justified in order to prevent or reverse violations of the fundamental right to popular government.[43]

In these circumstances, the use of force and the resulting technical violation of sovereignty may at best be described as not "unambiguously illegal,"[44] like other instances of humanitarian intervention. As former U.N. Secretary General Kofi Annan observed, the use of force is "tragic ... but there are times when the use of force may be legitimate in the pursuit of peace."[45] He was later quoted:

> *To those for whom the greatest threat to the future of international order is the use of force in the absence of a Security Council mandate*, one might ask — not in the context of Kosovo — but in the context of Rwanda: If, in those dark days and hours leading up to the genocide, a coalition of States had been prepared to act in defense of the Tutsi population, but did not receive prompt Council authorization, *should such a coalition have stood aside and allowed the horror to unfold*?[46]

It cannot be seriously argued that widespread systematic violations of human rights undertaken by a government against its people should remain unchecked, or that a rigid insistence on doctrine should prevail over *in extremis* necessity. Reisman has captured the essence of the tension inherent in humanitarian intervention when he stated that "[s]tate sovereignty prevails in all but the *most egregious instances* of widespread human rights violations, in which case multilateral or, in extreme situations, unilateral action to secure

42. D'Amato, *supra* note 39.

43. *See* W. Michael Reisman, *Humanitarian Intervention and Fledgling Democracies*, 18 FORDHAM INT'L. L. J. 794 (1995).

44. *See United Kingdom Materials on International Law*, 57 BRIT. Y.B. INT'L. L. 614 (1986).

45. Press Release, Secretary-General, Secretary-General Deeply Regrets Yugoslav Rejection of Political Settlement; Says Security Council Should Be Involved in Any Decision to Use Force, U.N. Doc. SG/SM/6938 (Mar. 24, 1999).

46. Press Release, Secretary-General, Secretary-General Presents His Annual Report to General Assembly, U.N. Press Release SG/SM/7136, GA/9596 (Sep. 20, 1999) (observation on NATO's bombardment of Serbia) (emphasis supplied).

an immediate remedy or even to change a regime — if need be, forcibly — may be taken."[47]

Nevertheless, the violation of the right to democratic governance, *without more*, is not a situation so grave or egregious that it demands or justifies humanitarian intervention. In the same manner that not all human rights violations would justify humanitarian intervention, the existence of a coup d'état, absent any concomitant violations of other serious fundamental rights, is insufficient to overturn fundamental considerations of sovereignty or the prohibition against forcible measures. There may not be a clear line in this case, but certainly, deprivation of the results of a popular vote are not akin to genocide, ethnic cleansing, or large-scale killings, which would engage the international community's right to protect.

This debate has been reformulated in recent years by the High-level Panel on Threats, Challenges, and Change, which suggested that "the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe."[48] However, this "*collective* international responsibility to protect is *exercisable primarily by the Security Council* authorizing military intervention as a last resort, in the event of genocide and other large scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent."[49]

IV. UNILATERAL PRO-DEMOCRATIC INTERVENTION

The actual practice of states is a poor indicator to show that there has been general acceptance of the doctrine of unilateral pro-democratic intervention. Rather, a perusal of the instances of unilateral intervention by the United States (U.S.) reveals vehement objections by other states to such interventions.

A. Dominican Republic

In 1963, a civilian junta overthrew the freely elected government of President Juan Bosch, which was later also overthrown by a military revolt, leading to the immediate outbreak of civil war between rival military factions. On 28 April 1965, U.S. troops landed in the country, ostensibly to secure the evacuation of foreign nationals. During the Security Council

47. W. Michael Reisman, *Why Regime Change Is (Almost Always) a Bad Idea*, 98 AM. J. INT'L. L. 516 (2004) (emphasis supplied) [hereinafter Reisman, *Regime Change*].

48. High-level Panel on Threats, Challenges, and Change, *A More Secure World: Our Shared Responsibility*, ¶ 201, delivered to the Secretary-General, U.N. Doc. A/59/565 (Dec. 2, 2004).

49. *Id.* ¶ 203 (emphasis supplied).

debates, however, the U.S. representative justified the intervention on grounds closely related to pro-democratic intervention,[50] including the attempt by communists to take over the government.[51] The U.S. representative asserted that, "the Dominican people, under the established principle of self-determination, should select their own government through free elections," and that the U.S. "interest lies in the re-establishment of constitutional government and, to that end, to assist in maintaining the stability essential to the expression of the free choice of the Dominican people."[52]

A Soviet resolution calling for the withdrawal of U.S. troops was voted down, but it was evident that the U.S. justifications were rejected by other states, whether in the Security Council or the General Assembly.[53]

B. Grenada

The New Jewel Movement, under Maurice Bishop, ousted the elected Prime Minister in 1979. Subsequently, a military coup ousted Bishop from power in October 1983 and a Revolutionary Military Council was formed to govern the island.[54] On 25 October 1983, the United States — acting purportedly upon the invitation of the Governor-General of Grenada, a request to intervene from the Organization of Eastern Caribbean States, and for the protection of its nationals — launched *Operation Urgent Fury* which was supported by members of the Organization of East Caribbean States. Although the United States did not rely on expanded interpretations of article 2 (4) or on a doctrine of pro-democratic intervention to justify its actions, it was later revealed that the operation was launched in order to free the people of Grenada from a military dictatorship.[55]

As in the Dominican Republic, a Security Council Resolution denouncing the U.S. action was vetoed.[56] However, the General Assembly condemned the intervention as a "flagrant violation of international law and

50. Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BRIT. Y.B. INT'L L. 189, 227 (1985).

51. *See* U.N. SCOR, 20th Sess., 1196th mtg. (May 3, 1965).

52. Doswald-Beck, *supra* note 50.

53. *See* Draft Resolution, Union of Soviet Socialist Republics, U.N. SCOR, 20th Sess., 1198th mtg., U.N. Doc. S/6328 (May 4, 1965). *See also* 1965 U.N.Y.B. 147 (1965).

54. Christoper C. Joyner, *The United States Action in Grenada: Reflections on the Lawfulness of the Invasion*, 78 AM. J. INT'L L. 131, 132 (1984).

55. U.N. SCOR, 38th Sess., 2489th mtg., ¶ 56, U.N. Doc. S/PV.2489 (Oct. 26, 1983).

56. *See* 1983 U.N.Y.B. 211 (1983). The United States, Togo, and the United Kingdom voted against the resolution.

the independence, sovereignty and territorial integrity"[57] of Grenada, and called for an "immediate cessation of the armed intervention and the immediate withdrawal of the foreign troops,"[58] at the same time reaffirming the "sovereign and inalienable right of Grenada freely to determine its own political, economic, and social system ... without outside intervention, interference, subversion, coercion, or threat in any form whatsoever."[59] The vast majority of states characterized the intervention as illegal under international law.[60]

C. Panama

In *Operation Just Cause*, the U.S. military invasion of Panama in December 1989,[61] the United States sent 14,000 troops to join those already stationed in Panama, invaded the country, and arrested General Manuel Antonio Noriega. The invasion followed General Noriega's nullification of the opposition candidate's election in May 1989. The United States again relied officially on various legal justifications, namely, "to safeguard the lives of Americans, to defend democracy in Panama, to combat drug trafficking, and to protect the integrity of the Panama Canal treaties."[62]

In the Security Council debate on the issue, no state, not even the U.S., put forward a legal right to use force to restore democratic government.[63] The U.S. representative declared that the United States did not claim a right to "enforce the will of history by intervening in favor of democracy where [they were] not welcomed," and that they "acted in Panama for legitimate reasons of self-defense and to protect the integrity of the Canal Treaties."[64]

However, somewhat inconsistently, the U.S. representative also stated that:

57. G.A. Res. 38/7, at 19, U.N. Doc. A/RES/38/7 (Nov. 2, 1983).

58. *Id.*

59. *Id.*

60. *See* 1983 U.N.Y.B. 212 (1983).

61. David J. Scheffer, *Use of Force After the Cold War: Panama, Iraq, and the New World Order*, in RIGHT V. MIGHT — INTERNATIONAL LAW AND THE USE OF FORCE 109, 118 (Louis Henkin et al. eds., 1991).

62. U.N. SCOR, Provisional Verbatim Record of the 2899th Meeting, at 31, U.N. Doc. S/PV.2899 (Dec. 20, 1989).

63. CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 50 (2004).

64. U.N. SCOR, 44th Sess., 2902d mtg., at 8, U.N. Doc. S/PV.2902 (Dec. 23, 1989).

> The question before us has never been our commitment to Panamanian sovereignty, nor is it today, for the sovereign will of the Panamanian people is what we are here defending.[65]
>
> The Panamanian people want democracy, peace, and the chance for a better life in dignity and freedom. The people of the United States seek only to support them in pursuit of those noble goals.[66]

The U.S. actions were "strongly deplore[d]" by the General Assembly, which, as in the Grenada invasion, recalled the prohibition on the use of force in article 2 (4) of the U.N. Charter and reaffirmed Panama's "'sovereign and inalienable right' to determine freely its social, economic and political system ... without any form of foreign intervention, interference, subversion, coercion or threat."[67] The attempt to justify the action as a means to restore democracy in Panama was widely criticized as incompatible with international rules on the use of force.[68]

D. Analysis

The analyzed state practice is muddled by political considerations, but certainly does not provide substantive support for a general right of unilateral pro-democratic intervention. For the most part, it was held that the interventions of the United States were incompatible with both the letter and spirit of the prohibition on the use of force and principle of non-intervention.[69] The analyzed practice may be viewed as invasions to advance

65. Provisional Verbatim Record of the 2899th Meeting, *supra* note 62, at 33.

66. *Id.* at 36.

67. Effects of the Military Intervention by the United States of America in Panama on the Situation in Central America, G.A. Res. 44/240, at 52, U.N. GAOR, 44th Sess., Supp. No. 21, U.N. Doc. A/RES/44/240 (Dec. 29, 1989); Serious Events in the Republic of Panama, OEA/Ser. G, CP/RES.534 (800/89) corr. 1, O.A.S., Wash., D.C. (prov. ed. Dec. 22, 1989) The GA condemned the invasion by a vote of 75 to 20 and the O.A.S. censured the United States by a vote of 20 to 1.

68. *See* Louis Henkin, *The Invasion of Panama Under International Law: A Gross Violation*, 29 COLUM. J. TRANSNAT'L. L. 293, 297 (1991); Nanda, *supra* note 31, at 498; Scheffer, *supra* note 61, at 119.

69. *See, e.g.* GRAY, *supra* note 63; Louis Henkin, *Use of Force: Law and U.S. Policy*, *in* RIGHT V. MIGHT — INTERNATIONAL LAW AND THE USE OF FORCE 37, 44 (Louis Henkin et al. eds., 1991); Schachter, *supra* note 33, at 649; Franck, *supra* note 6, at 85; YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE 89 (2d ed. 1994); MALCOLM N. SHAW, INTERNATIONAL LAW 803 (1997); Nanda, *supra* note 31, at 498.

foreign policy goals,[70] similar to U.S. interventions in Guatemala (1954), Cuba (1960), and Nicaragua (1980). Clearly, the fear of smaller and weaker states that interventions to restore democracy are merely a fig leaf for intervention and a ploy for Western domination is not without basis.

It is difficult to disentangle the United States' legal justifications from its political motivations, since pro-democratic intervention was never used as the primary justification for the use of force in these cases. The prominent theories offered, with some slight differences, have been, *inter alia*, the right to protect nationals abroad, self-defense, or invitation by the legitimate authorities. It also appears that the U.S. justified its interventions primarily on the political, and not the legal plane. This is, perhaps, why the I.C.J. declared that "these were statements of international policy, and not an assertion of rules of existing international law."[71]

It bears noting that the United States' disregard for the principle of non-intervention, by itself, does not restructure international legal norms, and is not constitutive of developments in the international legal system. Lack of acquiescence or support of other countries evinces that there has been no reliable demonstration of *opinio juris*, sufficient to alter existing rules of conduct.[72] Of course, it is always possible to change the existing legal regime. In fact, "customary law, by its nature, is revised by a general acquiescence in a state's current behavior that violates some prior norm."[73] Such acquiescence should, "ideally, be based on an *opinio juris* that the proposed changes promise to better serve the common interest in a new context than would the norms they are supplanting."[74] However, the consequences of a change in the collective security framework are severe.

V. MULTILATERAL PRO-DEMOCRATIC INTERVENTION — PRACTICE IN HAITI, SIERRA LEONE, BURUNDI, AFGHANISTAN, AND IRAQ

In two separate instances — one in Haiti and the other in Sierra Leone — the Security Council determined the existence of a threat of international peace and security and authorized collective action (though not necessarily the use of force) to restore democratically elected rule. Here, the Security Council specifically took action in view of enforcing the principle of

70. *See generally* Isaak I. Dore, *The United States, Self-Defense and the U.N. Charter: A Comment on Principles and Expediency in Legal Reasoning*, 24 STAN. J. INT'L L. 1, 4 (1987). *See also* Nowrot & Shabacker, *supra* note 18.

71. *Military and Paramilitary Activities*, 1986 I.C.J. 14 at 109, ¶ 207.

72. *See generally* CHESTERMAN, *supra* note 17; BYERS, *supra* note 17.

73. W. Michael Reisman, *The Raid on Baghdad: Some Reflections on its Lawfulness and Implications*, 5 EUR. J. INT'L L. 120, 129 (1994).

74. *Id.*

democratic governance. However, these instances are far from unambiguous to be justified even as humanitarian intervention.[75]

A. Prior Authorization: The Case of Haiti

Following the overthrow of democratically-elected President Jean-Bertrand Aristide by a military junta and the failure of economic sanctions, the Security Council — in an unprecedented move — affirmed that the goal of the international community was the "restoration of democracy in Haiti and the prompt return of the legitimately elected President."[76] Thus, the Security Council authorized "U.N. Member states to form a multinational force under unified command and ... to use all necessary means"[77] to ensure the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the government of Haiti.[78]

Interestingly, the debates over resolutions allowing such intervention reflect the Security Council members' caution against the erosion of state sovereignty and their desire to ensure that the invasion of Haiti would not set binding precedent, even for future U.N. action.[79] Hence, the text of

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75. *See* U.N. Doc. S/PV.2902, *supra* note 64.

76. S.C. Res. 940, at 2, ¶ 4, U.N. Doc. S/RES/940 (July 31, 1994).

77. *Id.*

78. *See* S.C. Res. 940, at 1, U.N. Doc. S/RES/940 (July 31, 1994) ("Condemning the continuing disregard of those agreements by the illegal de facto regime, and the regime's refusal to cooperate with efforts by the United Nations and the Organization of American States (OAS) to bring about their implementation.").

79. *See* U.N. SCOR, Provisional Verbatim Records of the 3413th Meeting, U.N. Doc. S/PV.3413 (July 31, 1994) (Agenda: The Question Concerning Haiti). During the deliberations, representatives made the following statements:

> Mexico – Mexico has doubts about the timeliness of the draft resolution before the Council today and profoundly regrets that the Security Council has decided that it is necessary to have recourse to the use of force to resolve the crisis in Haiti. The use of force in this case gives rise to grave legal and practical doubts, and we must not forget that history — for which we still have much to learn — has shown that military intervention in our hemisphere has invariably been traumatic.
>
> Venezuela – The government of Venezuela, faithful to its unswerving tradition of defending the principle of non-intervention, cannot support unilateral or multilateral military actions in any nation of the hemisphere, nor can it interfere with the sovereign will of any country.
>
> Brazil – We have only been able to live in peace and cooperation in the region because we strictly observe the principles of peaceful settlement of disputes and nonintervention ... Brazil considers that the draft resolution before U.S. is not felicitous in the invocation of the

both Resolutions 841 and 940 emphasized "the unique character of the present situation in Haiti and its deteriorating, complex, and extraordinary nature requiring an exceptional response."[80] In addition, Security Council members cited President Aristide's and the Organization of American States' (O.A.S.) requests for assistance as justifications for the collective measures.[81]

B. Ex Post Endorsement: The Case of Sierra Leone

The case of Sierra Leone arose in the context of a prolonged civil war and hundreds of thousands of casualties. On 25 May 1997, the democratically-elected President was overthrown by a military coup. The Organization of African Unity (O.A.U.) appealed to the Economic Community of West African States (ECOWAS) to restore the constitutional order. Acting under Chapter VII of the Charter, the Security Council imposed economic sanctions on Sierra Leone and "demand[ed] that the military junta take

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> criteria and the choice of means for attaining the goal of restoring democracy and restoring the legitimately elected government of Haiti.
>
> China – The practice of the Council's authorizing certain member states to use force is even more disconcerting, because this would obviously create a dangerous precedent.
>
> Nigeria – We reaffirm the special character of the present situation in Haiti. The adoption of the draft resolution should therefore not be seen as a global license for external interventions through the use of force or any other means in the internal affairs of member states.
>
> Spain – It must be stressed that this decision is an exceptional one, taken in response to the singular circumstances attending the Haitian crisis.

80. S.C. Res. 940, *supra* note 77, at 2. *See also* S.C. Res. 841, at 2, U.N. Doc. S/RES/841 (1993) (where the Security Council spoke of a "unique and exceptional situation warranting extraordinary measures").

81. *See* U.N. SCOR, Provisional Verbatim Records of the 3238th Meeting, U.N. Doc. S/PV.3238 (June 16, 1993) (Agenda: The Question Concerning Haiti).

> New Zealand – New Zealand supports the formal request by the legitimate government of Haiti for decisive action to be taken by the United Nations.
>
> Russia – I voting for this Security Council Resolution, the Russian Federation took into account the fact that it enjoyed the support of President Jean-Bertrand Aristide.

See also U.N. SCOR, Provisional Verbatim Records of the 3413th Meeting, *supra* note 80, at 18.

> Spain – I must add the position taken by the legitimate authorities of Haiti, as expressed in the letter addressed to the Secretary-General from the Constitutional President, Mr. Aristide, in which he invites the international community to take "prompt and decisive action under the authority of the United Nations."

immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order."[82] ECOWAS subsequently utilized force to oust the military junta, took over Freetown, and restored the legitimate government.[83]

Although the Security Council did not initially authorize the military actions undertaken by ECOWAS,[84] *ex post* ratification for the military intervention may be found in the later statement by the President of the Security Council on 26 February 1998, where the Council "welcome[d] the fact that the rule of the military junta has been brought to an end, and stress[ed] the imperative need for the immediate restoration of the democratically elected government."[85] The Security Council subsequently welcomed "the return to Sierra Leone of its democratically elected President"[86] and "commend[ed] the positive role of ECOWAS and ECOMOG in their efforts to restore peace, security and stability throughout the country at the request of the Government of Sierra Leone."[87]

It might be observed that the utilization of various legal and political justifications for the intervention in Sierra Leone (including as an act of humanitarian intervention that which was done at the request of the government or as a manifestation of the O.A.U. regional security pact) somewhat diminishes the strength of the claim that Sierra Leone constituted multilateral recognition of pro-democratic enforcement by a group of states.[88]

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82. S.C. Res. 1132, at 1, U.N. Doc. S/RES 1132 (Oct. 8, 1997).

83. The Secretary-General, *Fourth Report of the Secretary-General on the Situation in Sierra Leone*, ¶ 6, U.N. Doc. S/1998/249 (Mar. 18, 1998).

84. *See* U.N. Doc. S/RES/1132, *supra* note 83, ¶ 8 (by the terms of Res. 1132, the Security Council merely authorized the ECOWAS to "ensure strict implementation" of the sanctions regime).

85. The President of the Security Council, *Statement by the President of the Security Council*, at 1, U.N. Doc. S/PRST/1998/5 (Feb. 26, 1998) (note that statements of this sort are not legally insignificant). *See* RENATA SONNENFELD, RESOLUTIONS OF THE UNITED NATIONS SECURITY COUNCIL 57 (1988) (by expressing consensus among the Member States, presidential statements can have the same legal effect as a formal resolution). *See* SYDNEY DAWSON BAILEY, VOTING IN THE SECURITY COUNCIL 83 (1969).

86. S.C. Res. 1156, ¶ 1, U.N. Doc. S/RES/1156 (Mar. 16, 1998).

87. S.C. Res. 1181, ¶ 5, U.N. Doc. S/RES/1181 (July 13, 1998). *See also* S.C. Res. 1260, U.N. DOC. S/RES/1260 (Aug. 20, 1999); S.C. Res. 1231, U.N. Doc. S/RES/1231 (Mar. 11, 1999); S.C. Res. 1270, U.N. DOC. S/RES/1270 (Oct. 22, 1999).

88. *See* CHESTERMAN, *supra* note 17; Nowrot & Schabacker, *supra* note 18; Wippman, *supra* note 18.

C. Other Support by the Security Council for Democratic Entitlement

In other instances, the Security Council has subsequently supported the introduction of democracy following acts of humanitarian intervention in Somalia,[89] Liberia,[90] Bosnia-Herzegovina,[91] Kosovo,[92] and East Timor.[93]

Burundi

In Burundi, the Secretary-General and the Security Council strongly condemned the violent overthrow of the democratically elected government by a military coup d'état in July 1996.[94] Comprehensive economic sanctions against Burundi were called for in 1996 and gradually imposed by Tanzania, Kenya, Uganda, Ethiopia, Zaire, Rwanda, and Namibia.[95] The sanctions were imposed without the formal endorsement of the Security Council, although on 30 August 1996, in its Resolution 1072, the Security Council expressed "strong support for the efforts of regional leaders."[96] Under the

89. *See* S.C. Res. 814, at 3, U.N. Doc. S/RES/814 (Mar. 26, 1993) ("[e]xpressing its readiness to assist the people of Somalia ... to participate in free and fair elections").

90. *See* S.C. Res. 1626, U.N. Doc. S/RES/1626 (Sept. 19, 2005) (calling on all Liberian parties to demonstrate their full commitment to a democratic process of government).

91. *See* S.C. Res. 1088, ¶ 6, U.N. Doc. S/RES/1088 (Dec. 12, 1996) ("[Welcoming] ... the development of a Bosnian State based on the principles of democracy").

92. *See* S.C. Res. 1244, U.N. Doc. S/RES/1244 (June 10, 1999) (authorizing the Secretary General to oversee the development of democratic self-governing institutions).

93. *See* S.C. Res. 1272, U.N. Doc. S/RES/1272 (Oct. 25, 1999) (stressing the need to consult and cooperate with the East Timorese with a view to the development of local democratic institutions).

94. *See* S.C. Res. 1072, U.N. Doc. S/RES/1072 (Aug. 30, 1996) (condemning "the overthrow of the legitimate government and constitutional order in Burundi"). *See also* Statement, Presidential of the Security Council, U.N. Doc. S/PRST/1996/31 (July 24, 1996) (where the Council strongly condemned any attempt to overthrow the legitimate Government of Burundi by force or coup d'état); Statement, Presidential of the Security Council, U.N. Doc. S/PRST/1996/32 (July 29, 1996) (the Council condemned the actions that led to the overthrow of constitutional order in Burundi).

95. These States sought the restoration of the National Assembly, the re-legalization of political parties, and immediate and unconditional negotiations with all parties to the conflict in Burundi.

96. S.C. Res. 1072, *supra* note 95, ¶ 2.

pressure of embargo and the Security Council, the military junta was eventually forced to restore the Parliament.[97]

Afghanistan and Iraq

Most recently, the conflicts in Afghanistan and Iraq have brought renewed international attention on the right to effect regime change in dictatorial or undemocratic states by armed intervention. Of course, neither of these cases involved an invocation of the right of pro-democratic intervention. Rather, the U.N. operation in Afghanistan was premised on individual and collective self-defense[98] while the incursion of the U.S. in 2003 into Iraq was justified as (preemptive) self-defense and an invasion authorized by the Security Council through a creative reading of Resolutions 678, 687, and 1441.[99] However, the practice in these two instances does show Security Council endorsement of the introduction of democracy into a country and its support for efforts to rebuild a nation, whether or not the original invasion was legitimate.

In Afghanistan, following the intervention by the "Coalition of the Willing" and its establishment of control over the country, the Security Council expressed its support for "a new and transitional administration leading to the formation of a government which should be broad-based, multiethnic and fully representative of all the Afghan people."[100] A subsequent "endorsement" of the "Bonn Agreement," establishing an Interim Government for Afghanistan[101] and a new Afghan Constitution, was

97. *See generally* Morton H. Halperin & Kristen Lomasney, *Guaranteeing Democracy: A Review of the Record*, 9 J. OF DEMOCRACY 2, 134-47 (1998).

98. *See* Letter, Permanent Representative of the United States of America to the U.N., to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001); Letter, Chargé d'affaires a.i. of the Permanent Mission of the United Kingdom of Great Britain and Northern Ireland to the U.N., to the President of the Security Council, U.N. Doc. S/2001/947 (Oct. 7, 2001), 40 I.L.M. 1282 (2001).

99. *See generally* Miriam Sapiro, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L. L. 607 (2003); Jutta Brunneé, *The Use of Force Against Iraq: A Legal Assessment*, *in* 59 BEHIND THE LINES 4, 4-7 (2002).

100. S.C. Res. 1378, ¶ 1, U.N. Doc. S/RES/1378 (Nov. 14, 2001) (during the debates in the Security Council a number of states made reference to the need to establish a democratic government in Afghanistan). *See* U.N. SCOR, Provisional Verbatim Records of the 4414th Meeting, U.N. Doc. S/PV.4414 (Nov. 13, 2001); U.N. SCOR, Provisional Verbatim Records of the 4414th Meeting, U.N. Doc. S/PV.4414 (Resumption 1) (Nov. 13, 2001).

101. Press Release, Security Council, Security Council Endorses Afghanistan Agreement on Interim Arrangements Signed Yesterday in Bonn, Unanimously Adopting Resolution 1383; Also Declares Willingness to Take Further Action,

made by the Security Council, welcoming "the determination of the Afghan people to ensure the transition of their country towards a stable and democratic State."[102]

In the action in Iraq, aptly called the "mother of all regime changes,"[103] no Security Council authorization was sought or received for the invasion. Eventually, however, U.S. occupation of Iraq appears to have been acknowledged; through Resolution 1511, the Security Council recognized the fact that the "Coalition Provisional Authority" would cease upon the establishment of an "internationally recognized, representative government established by the people of Iraq" and called for the "establishment of electoral processes" for the country.[104] Later, in Resolution 1546, the Security Council welcomed the transition of Iraq to a democratic state, and expressed its support for the establishment of a "federal, democratic, pluralist, and unified Iraq."[105] The Security Council, in effect, legally recognized the fact of regime change despite the absence of prior authorization for the invasion of the country.

D. Analysis

The practice of the Security Council in this area is quite unclear, and, one might say, downright confusing. On one hand, it seems to go too far to argue that the above-mentioned practices support a general right of pro-democratic intervention in international law, when the prevailing view is that extra-constitutional changes in government are exclusively domestic political concerns that fall within the confines of article 2 (7).[106] Historically, U.N. practice offers little support for the proposition that the disruption of democracy creates a threat to peace justifying U.N. action. Instead, the U.N. and the international community in general have typically responded to unconstitutional seizures of power sporadically and based solely on political

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Calls on All Afghan Groups to Cooperate with Interim Authority, U.N. Doc. SC/7234 (Dec. 6, 2001).

102. Press Release, Security Council, Security Council Extends Afghanistan Mission for 12 Months; Unanimously Adopting Resolution 1536, U.N. Doc. SC/8042 (Mar 26, 2004). *See also* S.C. Res. 1659, U.N. Doc. S/RES/1659 (Feb. 15, 2006); S.C. Res. 1662, U.N. Doc. S/RES/1662 (Mar. 23, 2006).

103. Reisman, *Regime Change*, *supra* note 47, at 519.

104. S.C. Res. 1511, ¶ 10, U.N. Doc. S/RES/1511 (Oct. 16, 2003).

100. S.C. Res. 1546, ¶ 9, U.N. Soc. S/RES/1546 (June 8, 2004).

106. *See* Special Rapporteur on Human Rights, *Report of Special Rapporteur Mr. Marco Tulio Bruni Celli on The Situation of Human Rights in Haiti, Submitted to the U.N.C.H.R.*, U.N. Doc. E/CN.4/1994/55 (Feb. 7, 1994).

considerations.[107] The striking example of Haiti, for instance, only seems to demonstrate that the Security Council will find a threat to peace only where the interests of any of the permanent members[108] are affected. In numerous other cases of political upheaval,[109] the Security Council has failed to act decisively, if at all.

On the other hand, perhaps the Security Council is plagued by too much expectation and too little power. With the international system still predominantly characterized by a decentralized enforcement mechanism, it is inevitable that the U.N. will be dependent on the necessary resources and political will of the most powerful of its members. It would be incredibly naïve to hope that no state's self-interest would come into play and it would equally be a perverse requirement for states to disregard or act against their interests. Hence, collective security is institutionalized under the U.N. Charter, where members confer "primary responsibility for the maintenance of international peace and security"[110] on the Security Council, and "agree

107. *See* G.A. Res. 2625 (XXV), *supra* note 22, at 121; Gregory H. Fox, *The Right to Political Participation in International Law*, 86 AM. SOC'Y. INT'L L. PROC. 249, 249-50 (1992).

108. U.N. Charter art. 23, ¶ 1 provides:

> The Security Council shall consist of fifteen Members of the United Nations. The Republic of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America shall be permanent members of the Security Council. The General Assembly shall elect ten other Members of the United Nations to be non-permanent members of the Security Council, due regard being specially paid, in the first instance to the contribution of Members of the United Nations to the maintenance of international peace and security and to the other purposes of the Organization, and also to equitable geographical distribution.

109. *See, e.g.* MICHAEL B. OREN, ORIGINS OF THE ARAB-ISRAEL WAR: EGYPT, ISRAEL, AND THE GREAT POWERS, 1952-56, at 13 (1992) (explaining that the U.N. failed to resolve the crisis despite condemnation of Israel's eviction of joint forces from the disputed border); N.D. WHITE, THE UNITED NATIONS SYSTEM: TOWARD INTERNATIONAL JUSTICE 166 (2002) (discussing the failure of the Security Council to take the necessary military actions to prevent further breaches of its resolutions despite the Kosovo crisis in 1999); JEAN ALLAIN, INTERNATIONAL LAW IN THE MIDDLE EAST: CLOSER TO POWER THAN JUSTICE 127 (2004) ("[T]hroughout the Iraq-Iran War, the Security Council failed to act through passive neglect, only invoking Chapter VII of the U.N. Charter seven years after the start of the conflict.").

110. U.N. Charter art. 24, ¶ 1.

to accept and carry out the Council's decisions in accordance with the Charter."[111]

At the very least, the Security Council's practice does show genuine commitment to democratic governance. Even if there have been coups within U.N. member states in the past, the Security Council has, through the Haiti experience, effectively declared that the denial of democracy may — in exceptional instances — constitute a threat to international peace and security. In those extraordinary cases, therefore, where Chapter VII measures are authorized, the Security Council may authorize action either to restore democracy or to affirm regional organizations' efforts in this regard.

One might ask why the Security Council may take such actions when the disruption of democracy by itself cannot be a threat to the peace. The answer lies in the Security Council's wide discretion and flexibility to interpret which factual circumstances pose threats to international peace and security.[112] The Council's interpretation of this critical phrase is, perhaps by design and definitely in practice, much more an expression of political will than a determination of legal norms. After all, the Security Council is a political organ.

VI. CONCLUSION

Merely because the Security Council has authority or ability to sanction collective measures is not equivalent to an obligation to do so. In every instance where the right of democratic governance is threatened, the Security Council will still have to weigh all considerations carefully to determine whether Chapter VII measures are justified. There is no guarantee that enforcement action will always succeed, or that democracy will necessarily flourish in the countries involved.

Nonetheless, for the enforcement of the democratic entitlement to be effective, Franck argues that "all states [must] unambiguously renounce the use of unilateral, *or even regional*, military force to compel compliance with the democratic entitlement in the absence of prior Security Council authorization under Chapter VII of the Charter."[113] Collectivism is thus an

111. U.N. Charter art. 25.

112. *See* W. Michael Reisman, *The Constitutional Crisis in the United Nations*, 87 AM. J. INT'L. L. 83 (1993) [hereinafter Reisman, *Constitutional Crisis*]. The Security Council's power in this regard is constrained primarily by the Purposes and Principles of the U.N. Charter and by *jus cogens* principles. *See* Genocide Convention (Bosnia v. FRY) 1993 I.C.J. Rep. 325 (Lauterpacht, J., dissenting). *See also* Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.K.; Libya v. U.S.) 1998 I.C.J. Rep. 9 (Schwebel, J., dissenting).

113. Reisman, *Constitutional Crisis*, *supra* note 113, at 84.

essential component of a workable means of enforcing the democratic entitlement.

> To obtain the general consent necessary to render the denial of democracy a cognizable violation of an international community standard, it must be understood that whatever countermeasures are taken must first be authorized collectively by the appropriate U.N. institutions. Collective action — so the tremulous must understand and the powerful aver — is not a substitute for, but the opposite of, unilateral enforcement. In this respect, as in many others, the principal enemy of the evolution of a new rule is fear of its vigilante enforcement. For that reason, the entitlement to democracy can only be expected to flourish if it is coupled with a reiterated prohibition on such unilateral initiatives. Only then will the rule enjoy the degree of principled coherence necessary to the widespread perception of its legitimacy.[114]

Interestingly, even the staunchest proponents of pro-democratic intervention concede that "[t]he most satisfactory solution to this problem is the creation of centralized institutions, equipped with decision-making authority and the capacity to make it effective."[115] Precisely, it is the United Nations, considering it has the wide-ranging experience, authority, and legitimacy to take action where democratic values are threatened. Furthermore, it is also better equipped than individual states to undertake the necessary nation-building efforts to rebuild democratic institutions. One might go so far as to say that it is the only institution ready and willing to do so.

There is, of course, the fear that a prohibition on pro-democratic intervention will have the opposite effect, that it will merely encourage countries not to seek Security Council sanction when contemplating forcible interventions. Or, if the military action undertaken is unauthorized, the fear that states will merely continue in their course of action without regard for consent by the Security Council. However, these are fears associated with any rules-based system, particularly the U.N. This is the system today. Upon reflection, one might even take heart in resorting to other legal explanations to justify (*i.e.*, mask) political motivation, as what the U.S. has done in the past. But even this option shows implicit recognition of the value of the norms involved.

In sum, malcontents have criticized the U.N. in general and its Charter in particular, largely for its perceived inability to constrain state behavior. With respect to the alleged right to intervene for the benefit of democracy, it can be seen that there has been substantial, albeit imperfect, compliance with the international legal regime. When unburdened of unrealistic expectations, the work of the Security Council may better be appreciated. The notion that

114. Franck, *supra* note 6, at 85.

115. Reisman, *Sovereignty and Human Rights*, *supra* note 38, at 875.

there can ever be complete compliance is, of course, hopelessly utopian. Although it is tempting to view the Charter-imposed constraints on state use of force as largely illusory, as this Article has sought to show, the prohibition on the use of force and the principle of non-intervention are far from dead-letter.