

BALLOTS AND BULLETS: THE RIGHT TO DEMOCRATIC GOVERNANCE IN INTERNATIONAL LAW AFTER THE EGYPTIAN COUP

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Never resist a military coup . . . We must give them no pretext to justify our murders.¹

Ballots are the rightful, and peaceful, successors of bullets; and that when ballots have fairly, and constitutionally, decided, there can be no successful appeal, back to bullets; that there can be no successful appeal, except to ballots themselves, at succeeding elections. Such will be a great lesson of peace; teaching men that what they cannot take by an election, neither can they take it by a war.²

In the middle of the Cold War, the United States played a role in the overthrow of a democratically elected Iranian government.³

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¹ BENAZIR BHUTTO, *DAUGHTER OF THE EAST: AN AUTOBIOGRAPHY* 82 (1988). Pakistan Prime Minister Zulfikar Ali Bhutto to his son, Mir, as the military came to seize him in July 5, 1977. *See id.* at 80–82. It took more than a year before he was executed. *See* Mary Anne Weaver, *Bhutto's Fateful Moment*, NEW YORKER, Oct. 4, 1993, at 82, available at <http://www.newyorker.com/magazine/1993/10/04/bhuttos-fateful-moment>. Bhutto was one of Pakistan's most charismatic and popular leaders. *See* Peter Niesewand, *Bhutto is Hanged in Pakistan*, WASH. POST, Apr. 4, 1979, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/12/27/AR2007122701067.html>. His daughter Benazir Bhutto became Prime minister in 1988 when the next free and fair elections were held in Pakistan. Weaver, *supra*, at 83. She was assassinated in 2007 during the rule of another Pakistani general, Pervez Musharraf, who seized power in a 1999 military coup. *See* Jon Boone, *Pervez Musharraf Charged with Benazir Bhutto Murder*, GUARDIAN (Aug. 20, 2013), <http://www.theguardian.com/world/2013/aug/20/pervez-musharraf-benazir-bhutto-pakistan> (U.K.).

² President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), available at <http://teachingamericanhistory.org/library/document/message-to-congress-in-special-session/>.

³ *See* President Barack Obama, Remarks by the President On A New Beginning (June 4, 2009), available at <http://www.whitehouse.gov/the-press-office/remarks-president-cairo-university-6-04-09>. In a 2009 speech in Cairo, Egypt, President Barack Obama acknowledged the US's role in the overthrow of the democratically-elected government of Prime Minister Mohammed Mossadegh of Iran in 1953. *See id.* *See also* Dan Merica & Jason Hanna, *In declassified document, CIA acknowledges role in '53 Iran coup*, CNN (Aug. 19, 2013, 11:16 PM), <http://www.cnn.com/2013/08/19/politics/cia-iran-1953-coup/>. The coup was, in essence, a joint project of the British and Americans. Merica & Hanna, *supra*. It was largely motivated by the former's desire to retain control over the Iranian oil industry. *See* NPR Staff, *Declassified Documents Reveal CIA Role In 1953 Iranian Coup*, NPR (Sept. 1, 2013, 6:18 PM),

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INTRODUCTION

The overthrow of Egypt's first democratically elected president by the country's military on July 3, 2013, unleashed a torrent of justifications inside and outside Egypt by those determined to locate this

<http://www.npr.org/2013/09/01/217976304/declassified-documents-reveal-cia-role-in-1953-iranian-coup>. See also Malcolm Byrne, *CIA Admits It Was Behind Iran's Coup*, FP (Aug. 19, 2013), http://www.foreignpolicy.com/articles/2013/08/18/cia_admits_it_was_behind_irans_coup ("TPAJAX was the CIA's codename for the overthrow plot, which relied on local collaborators at every stage. It consisted of several steps: using propaganda to undermine Mossadegh politically, inducing the Shah to cooperate, bribing members of parliament, organizing the security forces, and ginning up public demonstrations. The initial attempt actually failed, but after a mad scramble the coup forces pulled themselves together and came through on their second try, on August 19."). This was the CIA's first successful overthrow of a foreign government and it became a template for several future efforts. See generally STEPHEN SCHLESINGER & STEPHEN KINZER, BITTER FRUIT: THE UNTOLD STORY OF THE AMERICAN COUP IN GUATEMALA (1982) (concerning the overthrow of the democratically elected government of Guatemala in 1954); STEPHEN KINZER, OVERTHROW: AMERICA'S CENTURY OF REGIME CHANGE FROM HAWAII TO IRAQ (2007).

revolutionary act within the ambit of *democracy-in-action* or *democratic necessity*.⁴ Consistent with this perspective, many, including the US government, have strained not to call the military's action a coup d'état.⁵ Indeed, US Secretary of State Kerry appeared to have given the Obama administration's imprimatur to the putsch when he suggested that the Egyptian generals were acting to restore democracy. Responding to a question from an interviewer who asked how the United States could justify the Egyptian military action while championing democracy around the world, the Secretary argued that,

the military was asked to intervene by millions and millions of people, all of whom were afraid of a descendance into chaos, into violence. And the military did not take over, to the best of our judgment so far. To run the country, there's a civilian government. In effect, they were restoring democracy.⁶

President Obama offered a more nuanced interpretation of the events in Egypt but his response suggested that the military putsch was somehow

⁴ For example, former United Kingdom Prime Minister Tony Blair stated that the Egyptian army had no choice but to remove President Morsi. See Toby Helm & Martin Chulov, *Egyptian army had no choice over move to topple Morsi, says Tony Blair*, OBSERVER (July 6, 2013, 21:22 BST), <http://www.theguardian.com/world/2013/jul/07/egypt-army-morsi-tony-blair> ("The events that led to the Egyptian army's removal of President Mohamed Morsi confronted the military with a simple choice: intervention or chaos. Seventeen million people on the streets are not the same as an election. But it as [sic] an awesome manifestation of power . . . I am a strong supporter of democracy. But democratic government doesn't on its own mean effective government. Today efficacy is the challenge."). See also William Booth, Abigail Hauslohner & Michael Birbaum, *Egypt orders arrests of Muslim Brotherhood leaders as interim president takes office*, WASH. POST (July 4, 2013), http://www.washingtonpost.com/world/after-military-takeover-little-known-judge-named-interim-president-of-egypt/2013/07/04/9a553378-e473-11e2-af3-339619eab080_story.html; David Brooks, Op-Ed., *Defending the Coup*, N.Y. TIMES (July 4, 2013), <http://www.nytimes.com/2013/07/05/opinion/brooks-defending-the-coup.html>; Charles Krauthammer, Op-Ed., *The Choice In Egypt*, WASH. POST (Aug. 22, 2013), http://www.washingtonpost.com/opinions/charles-krauthammer-the-choice-in-egypt/2013/08/22/eb9350da-0b5b-11e3-8974-f97ab3b3c677_story.html.

⁵ Shortly after the military takeover, the *Washington Post* reported that, "administration officials have avoided referring to the crisis as a coup, a finding that would require the U.S. government to cut off aid to the country." Booth, Hauslohner & Birbaum, *supra* note 4. See also Jackson Diehl, Op-Ed., *Obama's Dangerous Passivity on Egypt and Syria on Display*, WASH. POST (Aug. 15, 2013), http://www.washingtonpost.com/opinions/jackson-diehl-obamas-dangerous-passivity-on-egypt-on-display/2013/08/15/69d085fc-0522-11e3-9259-e2aaf5a5f84_story.html. The *American Heritage Dictionary* defines a coup d'état as the "sudden overthrow of a government by a usually small group of persons in or previously in positions of authority." *Coup D'état* Definition, AM. HERITAGE DICTIONARY, <https://www.ahdictionary.com/word/search.html?q=coup%20d'etat> (last visited Dec. 4, 2014).

⁶ See Editorial Board, Op-Ed., *No Going Back on Democracy in Egypt*, WASH. POST (Aug. 2, 2013), http://www.washingtonpost.com/opinions/no-going-back-on-democracy-in-egypt/2013/08/02/bd8d5d20-fb9d-11e2-9bde-7ddaa186b751_story.html.

justified: “we appreciate the complexity of the situation. While Mohamed Morsi was elected president in a democratic election, his government was not inclusive and did not respect the views of all Egyptians.”⁷ *New York Times* columnist Roger Cohen criticized the president’s response, stating, “those are dangerous words from an American president. They seem to relegate the importance of a free and fair vote.”⁸ Many others discounted the danger, however, and built on President Obama’s and Secretary Kerry’s criticisms of the Morsi government to argue that a deeper, or more nuanced, understanding of democracy justified the extraordinary measures the Egyptian military had taken.⁹ In an opinion piece published shortly after the coup, I made the following observations:

These efforts of the generals and their supporters inside and outside Egypt to rationalize the coup d’etat bring to mind Camus’s observation that he had seen people behave badly with great morality. It might be easier to digest this latest episode of the absurdities of global politics if it were accompanied by some traces of humility or even resignation.¹⁰

The rationalizations offered by those who either supported or accepted the intemperate and brutal truncation of Egypt’s democratic

⁷ President Barak Obama, Remarks by the President on the Situation in Egypt (Aug. 15, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/08/15/remarks-president-situation-egypt>. The President did go on to criticize the arbitrary arrests, the crackdown on the Muslim Brotherhood and other protesters, and the killings perpetrated or encouraged by the military junta and its supporters. See *id.* Obama also expressed regret for the lost opportunity for national reconciliation and democratic governance. See *id.* The President added:

Instead, we’ve seen a more dangerous path taken through arbitrary arrests, a broad crackdown on Mr. Morsi’s associations and supporters, and now tragically the violence that’s taken the lives of hundreds of people and wounded thousands more.

The United States strongly condemns the steps that have been taken by Egypt’s interim government and security forces. We deplore violence against civilians. We support universal rights essential to human dignity, including the right to peaceful protest. We oppose the pursuit of martial law, which denies those rights to citizens under the principle that security trumps individual freedom, or that might makes right. And today the United States extends its condolences to the families of those who were killed and those who were wounded.

Id.

⁸ See Roger Cohen, Op-Ed., *The Egyptian Debacle*, N.Y. TIMES (Aug. 19, 2013), <http://www.nytimes.com/2013/08/20/opinion/global/the-egyptian-debacle.html>.

⁹ See e.g., Anthony H. Cordesman, Op-Ed., *U.S. can’t force democracy on Egypt*, CNN (Aug. 20, 2013, 12:47 PM), <http://www.cnn.com/2013/08/20/opinion/cordesman-egypt/>; Krauthammer, *supra* note 4.

¹⁰ See Ibrahim J. Gassama, Op-Ed., *Military’s Ouster of Morsi Poorly Rationalized*, REGISTER-GUARD, July 10, 2013, at A7, available at <http://www.thefreelibrary.com/Military’s+ouster+of+Morsi+poorly+rationalized.-a0337632414>.

experiment by a popular uprising culminating in a military coup d'état were all similar in essence. They generally revolved around two sets of claims: (1) that the Morsi government engaged in serious violations of human rights as well as economic mismanagement during its twelve months in office, and thereby lost its legitimacy,¹¹ and (2) that the Muslim Brotherhood-dominated administration would terminate Egypt's experiment with democracy if it were allowed to remain in office through the course of its mandate.¹² This article examines whether these claims provide adequate justifications for the forcible removal of a democratically elected government under international law, regardless of their factual or political validity. Specifically, the article examines how these justifications match up against the principles and practices of democratic governance nurtured by the post-Second World War international human rights and peace regime and promoted by the United Nations, as well as by other international entities, such as the European Union (EU), the Organization of American States (OAS), and the Organization for Security and Cooperation in Europe (OSCE).¹³ The importance of these issues resonates beyond Egypt and the current moment.¹⁴ Egypt is only one instance in which opponents of a democratically elected government have sought to terminate the government's mandate since democratic governance became an international norm. As Jackson Diehl has observed,

The Islamic character of Egypt's ousted government should not obscure the way the country resembles Argentina, Venezuela, Turkey, Thailand, and other developing nations in which free

¹¹ See Fareed Zakaria, Op-Ed., *Morsi's lost opportunity in Egypt*, WASH. POST (July 3, 2013), http://www.washingtonpost.com/opinions/fareed-zakaria-morsis-lost-opportunity-in-egypt/2013/07/03/c1d8066c-e420-11e2-ae33-339619eab080_story.html.

¹² See Brooks, *supra* note 4; Krauthammer, *supra* note 4. See also Steve Clemons, *Why Would The Muslim Brotherhood Believe in Voting Now?*, ATLANTIC (Aug. 5, 2013, 4:08 PM), <http://www.theatlantic.com/international/archive/2013/08/why-would-the-muslim-brotherhood-believe-in-voting-now/278376/>.

¹³ The EU, OAS, and the OSCE are among the most prominent international entities that have developed extensive mechanisms and invested considerable material and moral resources to promote democratic governance around the world. See e.g., *New Prime Minister Sworn in After Sweep in Antigua*, ASSOCIATED PRESS (June 13, 2014, 9:52 PM), <http://bigstory.ap.org/article/new-prime-minister-sworn-after-sweep-antigua> ("The Organization of American States said its observers found the election to be well-run but said there were long lines as about 90 percent of registered voters cast ballots.").

¹⁴ See A.B. Assensoh & Yvette M. Alex-Assensoh, *African Leaders cast vote for ballots, not bullets*, REGISTER-GUARD, July 26, 2013, at A9, available at <http://www.thefreelibrary.com/African+leaders+cast+vote+for+ballots,+not+bullets.-a0338133981>.

elections after decades of autocracy have brought a new elite to power. The new rulers typically represent previously disenfranchised poor and rural populations, who often don't share the cultural values of the capital's middle and upper classes.¹⁵

The current situation in Thailand is the most clearly analogous at the moment, although civil strife in Venezuela also suggests similar issues.¹⁶

This article makes the following arguments in response to the justifications made by supporters of the Egyptian coup: (1) there is an established right to democratic governance in international law as a matter of doctrine, as well as practice, anchored around the holding of periodic free and fair elections; (2) this right to democratic governance was violated when the Egyptian military ousted the Morsi government; and (3) if, under the circumstances, the international community were to accept or endorse the rationalizations offered for overthrowing the Morsi government, it would undermine the right to democratic governance generally, including the specific foundational role of free and fair elections in the development of the right to democratic governance. The article appreciates that there are vexing, unresolved questions about democracy and its meaning, operations, and functions. These questions are of particular importance to emerging nations, but are by no means limited to them. The article also reaffirms the reality that those who have been deprived of power or otherwise oppressed should not be led to expect that mere satisfaction of the democratic governance mandate will bring about a more just society or provide the means to a better existence. As former UN Secretary General Javier Pérez de Cuéllar has observed:

we cannot be unmindful of the fact that, while democracy is a necessary condition for the recognition of basic human rights, it is not in itself sufficient to ensure the actual enjoyment of those rights. Indeed, genuine political democracy has little chance to survive, and stability is bound to prove elusive, without social justice. Such justice

¹⁵ See Jackson Diehl, Op-Ed., *Egypt's misguided coup*, WASH. POST (July 4, 2013), http://www.washingtonpost.com/opinions/jackson-diehl-egypts-misguided-coup/2013/07/04/64bd121c-e4b4-11e2-a11e-c2ea876a8f30_story.html.

¹⁶ Thomas Fuller, *Junta Sets Year's goal for its Rule in Thailand*, N.Y. TIMES (May 30, 2014), <http://www.nytimes.com/2014/05/31/world/asia/thai-junta-expects-to-rule-for-more-than-a-year.html>; Alexandra Ulmer, *Venezuela protests not over, vows hardline Maduro foe*, REUTERS (May 23, 2014, 3:50 PM), <http://www.reuters.com/article/2014/05/23/us-venezuela-protests-opposition-idUSBREA4M0NL20140523>; Associated Press, *Venezuela Death Toll Rises To 7 In Election Fallout Clashes*, HUFFINGTON POST (Apr. 17, 2013, 1:30 PM), http://www.huffingtonpost.com/2013/04/16/venezuela-death-toll-rises-election-fallout-clashes_n_3093528.html.

to be consolidated needs the help of those who can rightly encourage it, though too often, they abandon it just after it has been brought about.¹⁷

This observation applies equally to those within and outside the most economically powerful countries. Democratic governance is an essential predicate to any community's sustained struggle for social justice. Social justice implies a lot more than current discourse on democratic governance offers. Yet, absent the norm of democratic governance explicitly elaborated in various human rights instruments, the achievement of social justice will remain outside the realm of reality for many in our global community.

Organizationally, the article will address some of the critical international legal and political issues of democratic governance raised by the Egyptian military coup against the Morsi government in three sections. Section I will outline further why the treatment of the Morsi government and international response to the fate of democratic governance in Egypt have broad relevance for the development of international society. The section locates political developments in Egypt within the broader post-Second World War international efforts to concretize human rights norms. In a dynamic global environment, replete with violence and inequality, perpetrated by both domestic elites, as well as outside interests, these norms give individuals the chance to have a meaningful say in how they live their lives. This section likewise reminds readers of the tortuous journey of the democratic experience since the end of the Second World War and implicates much of the international community in previous efforts to hinder or eradicate the right to democratic governance.¹⁸

Section II proceeds to examine the evolution, as well as the nature, content, and value of the right to democratic governance in the

¹⁷ Press Release, Secretary-General, Statement by the Secretary-General at the Paris Meeting of the Conference on Security and Cooperation in Europe, U.N. Press Release SG/SM/4517 (Nov. 19, 1990) [hereinafter Press Release SG/SM/4517], *quoted in* United Nations, Centre For Human Rights, Professional Training Series no. 2, Human Rights and Elections: A Handbook On the Legal, Technical and Human Rights Aspects of Elections, para. 5, U.N. Doc. HR/P/PT/2 (1994), available at <http://www.ohchr.org/Documents/Publications/training2en.pdf> (incorrectly cited as Press Release SG/SM/1155).

¹⁸ The chronicle here includes at a minimum includes Czechoslovakia (1948), Iran (1953), Guatemala (1954), Congo (1961), Chile (1973), and Pakistan (1977). *See generally* Dan Bilefsky & Jan Krcmar, *Czech Wounds Still Open, Communists Face a Ban*, N.Y. TIMES (Dec. 26, 2009), <http://www.nytimes.com/2009/12/27/world/europe/27czech.html>; Merica & Hanna, *supra* note 3; SCHLESINGER & KINZER, *supra* note 3; KINZER, *supra* note. 3; LUDO DE WITTE, THE ASSASSINATION OF LUMUMBA (Ann Wright & Renée Fenby trans., 2001).

international community. It traces the right to democratic governance back to aspirations originating in antiquity that crested in what should be considered a brief revolutionary period in international law, beginning in the inter-war years and concluding after the Second World War. The norm of democratic governance is thus presented as part of the heritage of humanity as a whole, not just that of Europe.

The article argues that the substantive content of the modern right to democratic governance is rooted first in the hard-won right to self-determination of peoples and that it was nurtured by subsequent other post-Second World War international human rights guarantees. It is important to note that this is not an argument about a customary international law norm. The right to democratic governance is derived explicitly from binding treaties and interpretations of specific human rights standards by established international legal authorities.

Section II further discusses how popular elections, defined variously as genuine periodic elections,¹⁹ or free and fair elections,²⁰ or elections with integrity,²¹ have become the central feature in promoting and implementing democratic governance. The special role of such elections, regardless of their inherent and widely acknowledged limitations, provides an important foundation for the argument that democratically-elected governments should enjoy a high presumption of legitimacy that should be defended by the international community, even in the face of widespread popular protests.

Finally, in section III, the article deals with how to preserve democratic governance in the midst of widespread and violent civil discord. It engages strategies for dealing with unpopular, divisive, or threatening policies or actions taken by democratically elected

¹⁹ See International Covenant on Civil and Political Rights, art. 25(b), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 21(3), U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

²⁰ See *Statements: Free and Fair Elections*, U.S. MISSION TO ORG. FOR SECURITY & COOPERATION EUR., osce.usmission.gov/statements/free-and-fair-elections2/ (last visited Dec. 4, 2014) ("Government Authority Derives from the Will of the People: Free and fair elections are a fundamental element of a healthy democracy. To be truly free and fair, however, elections require not only transparent and well-managed election day polling, but also a society that encourages full citizen participation, political parties to operate freely, independent media to flourish, and which builds a judiciary system capable of exercising independent and impartial authority. All 57 OSCE participating States have made commitments to holding free and fair elections.").

²¹ See GLOBAL COMM'N ON ELECTIONS, DEMOCRACY & SEC., DEEPENING DEMOCRACY: A STRATEGY FOR IMPROVING THE INTEGRITY OF ELECTIONS WORLDWIDE (2012) [hereinafter GLOBAL COMM'N ON ELECTIONS].

governments that cause or result in extreme reactions by a broad section of the citizenry. The focus of this section is on how to nurture the substance and processes of democratic governance without resorting to the unproductive cycles of elation followed by rage, or hope followed by despair, crisis, rebellion, revolution, and then hope again. The oscillation between elation or hope, represented by popular elections, and despair, represented by crisis, rebellion, and revolution, urgently calls for a mediating alternative approach that defines appropriate, legitimate political actions, including even acts of civil disobedience, if the essential values of democratic governance are to be preserved and nurtured. This imperative applies with particular force to societies emerging from long periods of oppressive governance.

These questions are not new. Section III recognizes that there have been extraordinary circumstances or moments of such deep crisis when communities or, more accurately, groups within communities, have felt it necessary to take extralegal or violent actions to remove those in power, including those who attained power through legitimate elections.²² From that perspective, the Egyptian coup was actually quite unremarkable in its assault on democracy. Earlier moments have presented the world with numerous other instances. These include the 1948 overthrow of parliamentary democracy in Czechoslovakia by Communists;²³ the 1953 US-directed ouster of Prime Minister Mohammed Mossadegh in Iran; the 1954 overthrow of the Arbenz government in Guatemala;²⁴ the 1961 overthrow and assassination of Prime Minister Patrice Lumumba of the Congo;²⁵ the 1973 coup and killing of Chilean President Salvador Allende;²⁶ and the 1977 ouster and subsequent execution of Prime Minister Bhutto in Pakistan.²⁷

²² See John Mukum Mbaku, *Foreword* to A.B. ASSENSOH, *AFRICAN POLITICAL LEADERSHIP* vii, x (1998); Assensoh & Alex-Assensoh, *supra* note 14. One example that comes to mind involves Ghana and the second coup d'état orchestrated by army officer, Jerry Rawlings; this action removed the democratically elected government of President Limann that had won free and fair elections after Rawlings' first coup. See *Military Coup in Ghana Alarms West African Governments*, N.Y. TIMES (Jan. 4, 1982), <http://www.nytimes.com/1982/01/04/world/military-coup-in-ghana-alarms-west-african-governments.html>.

²³ See Richard Crossman, *Prague 1948: the February revolution*, NEWSTATESMAN (Feb. 14, 2008), <http://www.newstatesman.com/society/2008/02/trade-union-czech-communist> (U.K.).

²⁴ See Elisabeth Malkin, *An Apology for A Guatemalan Coup, 57 Years Later*, N.Y. TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/world/americas/an-apology-for-a-guatemalan-coup-57-years-later.html>. See also KINZER *supra* note 3, at 129–47.

²⁵ See generally DE WITTE, *supra* note 18.

²⁶ See *Salvador Allende: Revolutionary Democrat*, LEFTHISTORY (May 2, 2013), <http://lefthistory.com/post/49423592931/salvador-allende-revolutionary-democrat>; Senan Fox,

Such situations may well be impossible to prevent. There is only so much fidelity to the law that one may reasonably expect. Yet, as the tragic legacies of this unfortunate history continue to haunt the global community, it is necessary to engage with the question of how to discourage these types of events from happening in the future.²⁸ There may well be circumstances, when conditions are such in a country with a democratically elected government, where only the most extreme course will do. Such situations must stand outside of the law and international legitimacy. Morsi's overthrow now provides us with yet another opportunity to act. Our response should begin by recognizing that the initial instance of democratic governance in Egypt failed, and that the coup that took place also arrested the progress of democratic governance. If what results from the overthrow of Morsi were to be considered legitimate, it must be tested by the norms and operational standards of democratic governance. Whether the situation in Egypt had reached such a crisis is, at the most fundamental level, for the people of Egypt to decide. The victors of such a revolutionary process inherit the obligation to make their case for democratic legitimacy before the international

Remembering Salvador Allende, OPENDEMOCRACY (Aug. 21, 2013), <https://www.opendemocracy.net/senan-fox/remembering-salvador-allende>. A CIA report described its role in the ouster. See CENT. INTELLIGENCE AGENCY, CIA ACTIVITIES IN CHILE (2000), available at <https://www.cia.gov/library/reports/general-reports-1/chile> ("Awareness of Coup Plotting in 1973. Although CIA did not instigate the coup that ended Allende's government on 11 September 1973, it was aware of coup-plotting by the military, had ongoing intelligence collection relationships with some plotters, and—because CIA did not discourage the takeover and had sought to instigate a coup in 1970—probably appeared to condone it. There was no way that anyone, including CIA, could have known that Allende would refuse the putchists' offer of safe passage out of the country and that instead—with *La Monedam* Palace under bombardment from tanks and airplanes and in flames—would take his own life."). See also KINZER, *supra* note 3, at 170–94.

²⁷ See Niesewand, *supra* note 1.

²⁸ There have been efforts in the past to discourage military coups against democratic governments. When President Jean-Bertrand Aristide was overthrown by the Haitian military in 1991, shortly after he became Haiti's first democratically elected leader, the international community, led by the Organization of American States (OAS), rallied in defense of democratic governance. See Maureen Taft-Morales, Cong. Research Serv., 93-931, *Haiti: Background to the 1991 Overthrow of President Aristide*, (1993); Domingo E. Acevedo, *The Haitian Crisis and the OAS Response: A Test of Effectiveness in Protecting Democracy*, in ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS 119 (1993). The Aristide government was subsequently restored to office. *Id.* It seems, however, that this stand in defense of democratic governance has held only in the Americas and Europe. See generally Sean D. Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48 INT'L & COMP. L.Q. 545 (1999).

community.²⁹ International law has recognized that successful revolutions can create their own legality.³⁰ So far the record of the military and its allies who removed President Morsi speaks for itself.³¹ Opponents have been summarily executed in custody, protests and other indications of opposition have been violently suppressed, courts have capriciously issued the death penalty against hundreds of accused, and journalists have been sentenced to prison or otherwise silenced.³² This

²⁹ See Jared Malsin, *Why Egyptians Are Voting Away Their Freedoms*, TIME (Jan. 14, 2014), <http://world.time.com/2014/01/14/why-egyptians-are-voting-away-their-freedoms/>; David D. Kirkpatrick, *International Observers Find Egypt's Presidential Election Fell Short of Standards*, N.Y. TIMES (May 29, 2014), <http://www.nytimes.com/2014/05/30/world/middleeast/international-observers-find-fault-with-egypt-vote.html>; *Egypt's Election: A Coronation Flop*, ECONOMIST, May 31, 2014, at 42, available at <http://www.economist.com/news/middle-east-and-africa/21603071-president-abdel-fattah-al-sisi-fails-bring-enough-voters-ballot-box>.

³⁰ See *In re Secession of Quebec*, [1998] 2 S.C.R. 217 (Can.). The specific issue was the right of Quebec province to unilaterally secede from Canada, regardless of whether such a right existed under international law. *Id.* at 218. International practice has recognized "effective political realities" and governments that have come to power under the most odious circumstances have been recognized. *Id.* at 276, para. 110. See also Murphy, *supra* note 28. Indeed, the test for recognition of governments under international law is general evidence of "effective control" and a willingness to live up to international commitments. *Id.* See also Legal Aspects of the Problem of Representation in the United Nations, in Letter Dated 8 March 1950 from the Secretary-General to the President of the Security Council Transmitting a Memorandum on the Legal Aspects of the Problem of Representation in the United Nations, U.N. Doc. S/1466 (Mar. 9, 1950) [hereinafter Memorandum of the Secretary-General].

³¹ See Amr Darrag, Op-Ed., *Egypt's Blood, America's Complicity*, N.Y. TIMES (Aug. 15, 2013), <http://www.nytimes.com/2013/08/16/opinion/egypts-blood-americas-complicity.html>; David D. Kirkpatrick & Alan Cowell, *Death Toll in Egypt Clashes Surpasses 600*, BOSTON GLOBE (Aug. 15, 2013), <http://www.bostonglobe.com/news/world/2013/08/15/death-toll-egypt-clashes-surpasses/DxnN4nYWOEBx8fU82wOAAI/story.html>; Tawakkol Karman, *Egypt's coup has crushed all the freedoms won in the revolution*, GUARDIAN (Aug. 8, 2013), <http://www.theguardian.com/commentisfree/2013/aug/09/egypt-coup-crushed-freedoms-revolution-25-january> (U.K.); Mayy El Sheikh, *A Voice of Dissent in Egypt Is Muffled, but Not Silent*, N.Y. TIMES (May 2, 2014), <http://www.nytimes.com/2014/05/03/world/middleeast/an-egyptian-voice-of-dissent-is-muffled-but-not-silenced.html>; *Egypt's Election: A Coronation Flop*, *supra* note 29.

³² See David D. Kirkpatrick, *Turnout Rises in Egypt, but the Vote Raises Doubts*, N.Y. TIMES (May 28, 2014), <http://www.nytimes.com/2014/05/29/world/middleeast/egyptian-presidential-election.html> ("Abdel Fattah el-Sisi, the former army field marshal who led last summer's takeover, won election as president with more than 90 percent of the vote, according to preliminary tallies Wednesday night . . . The most effective checks on government fraud in previous Egyptian elections were parallel vote counts conducted by independent political movements, most notably the Muslim Brotherhood, which had the most effective national political network and built a track record of accurate reporting. But the government that ousted Mr. Morsi has outlawed and crushed the Brotherhood. Security forces have imprisoned its leaders and tens of thousands of their supporters, and killed more than 1,000 of them in street protests."). See also Associated Press, *Egyptian court Sentences Activists to 5 Years in Prison*, N.Y. TIMES (Feb. 23, 2015 1:23 PM), <http://www.nytimes.com/aponline/2015/02/23/world/middleeast/ap-ml-egypt.html>.

record should cause those who initially supported the coup against Morsi to reflect on whether military coups are ever a solution to discontent that emerges under democratic governance. The following section argues that the easy embrace of military interventions as solutions to conflicts that emerge during democratic rule stems from a fundamental misunderstanding of why democratic governance matters.

I. WHY DEMOCRATIC GOVERNANCE IN EGYPT (AND OTHER PLACES) MATTERS

The country may return to democracy in around 14 months as long as “peace, order, and reform is achieved We understand we live in a democratic world,” General Prayuth said. “Please give us time to change attitudes, values and many other things.”³³

Briefly, the foundational importance of the norm of democratic governance does not reside in any guaranty of the right political or social outcomes, or even a future untainted by passionate disagreements or political trauma. Its canonical value, as the UN Secretary-General has suggested, derives from the fact that it protects and promotes human political and social possibilities, the exercise of individual and group agency, and the continuation of struggle toward a future no one can predict or own.³⁴ The right to democratic governance as such should not be dismissed or caricatured, especially by those seeking a more meaningful or nuanced understanding of self-determination or a richer, more fruitful conception of democracy that goes beyond traditional notions of liberal democracy.³⁵ A right to democratic governance as a foundational norm of human existence and collaboration is not discussed here as a cure-all elixir, a modern doctrinal snake oil for the world’s ills. The perspective here is one of chastened idealism and activism on behalf of those who desperately need to live the lives that they are confronted by, without being used primarily as means for the realization of someone’s messianic dreams and convictions. This position affirms human beings as ends in themselves who must be given as much space as possible to self-determine the course of their own existence. The position of General Prayuth, quoted above, illustrates a rejection of this perspective. In his view, people must be ready for or prepared for

³³ Fuller, *supra* note 16.

³⁴ See Press Release SG/SM/4517, *supra* note 17.

³⁵ See generally RADICAL DEMOCRACY (David Trend ed., Routledge 1996) (1995).

democracy, presented as an ideal to be attained, as opposed to a work in progress.

The right to democratic governance should offer to all those wishing to take part in public life, at a minimum, a place and a role in the process. Further, it should reject the use of coercive violence or other efforts that constrict self-determination and delegitimizes them as options for aggrieved parties. The right to democratic governance above all should signify a testament to humility and a realization that the revolutionary pretensions of insurgents, the certitude of autocrats and others imbued with messianic complexes, and the fervor of their passionate followers, often end up consuming not just the people they claim to represent, but also all hope, often while engendering trans-generational misery. Thus democratic governance, at its core, is a sort of existentialist realism that seeks only to ensure an opening for each of us to define and contribute to our futures, and thus to own our possibilities.

The concerns of those opposed to the Morsi government were not unique to Egypt or infant democracies in general. This article rejects the view that different standards or a special dispensation regarding the meaning and processes of democracy should be made for the Egyptian people, or others similarly situated, so that passionate popular protests could, for example, serve as ad hoc referenda on democratic governance. If Communists in Europe or Tea Party politicians in the United States can struggle for the right to govern in more stable democracies, Islamists and others on the margins should also have the right to contest elections and govern based on the legitimacy derived from following democratic processes.

This argument does not minimize the grave problems that could be posed by those who, propelled by some version of religious faith or end-of-history ideology, deceptively appropriate the language, symbols, pageantry, and processes of democracy to achieve power once and for all time. What to do when such democratically elected governments begin to violate democratic values or when certain interest groups wield disproportionate power within a democracy is a matter of great concern for all democratic societies.³⁶ The article takes the position that these

³⁶ See David Ignatius, *Egypt Slides Toward Financial Ruin*, WASH. POST (Mar. 6, 2013), http://www.washingtonpost.com/opinions/david-ignatius-egypt-slides-toward-financial-ruin/2013/03/06/85974478-85e4-11e2-98a3-b3db6b9ac586_story.html; Karman, *supra* note 31; Amy Sawitta Lefevre & Aubrey Belford, *Special Report-Option B: The blueprint for Thailand's coup*, REUTERS (May 30, 2014),

concerns should generally be addressed by negotiated structural or constitutional provisions as well as by political action short of violent revolt. There are examples throughout history to support this view. Yet, the article acknowledges that the option of revolutionary action exists in exigent circumstances. No international law or morality could foreclose that extraordinary option in any society. John Stuart Mill captured the balancing that must be made when he observed that “[a] political convulsion is a fearful thing: granted. Nobody can be assured beforehand what course it will take: we grant that too. What then?”³⁷ He provided an answer that neither time nor experience has contradicted:

Men are not to make it the sole object of their political lives to avoid a revolution, no more than of their natural lives to avoid death. They are to take reasonable care to avert both those contingencies when there is a present danger, but they are not to forbear the pursuit of any worthy object for fear of a mere possibility.³⁸

It is undeniable that revolution and civil wars have sometimes been precursors to vibrant democracy.³⁹ However, when those occasions arise, democratic talk should not be employed to mask either the extreme nature or the consequences of such perilous endeavors. In the case of Egypt, if a segment or a majority of the Egyptian people had reached the conclusion that the revolutionary political actions that began with popular protests against the Mubarak regime needed to continue and sweep aside the democratically elected Morsi government, it was their prerogative. However, the necessity for ongoing popular revolutionary actions as well as their consequences should not be masked by talk of democratic necessity. Full appreciation of the pitfalls and unpredictability of such an endeavor should discipline such a move in the first place. Outsiders should be circumspect about cheering them on.

The distinction this article makes between democratic action and revolutionary action is not an abstract one. It has consequences for the development of legitimate international legal standards and stable governance. Many societies within and outside the Arab world are

<http://www.reuters.com/article/2014/05/30/us-thailand-politics-specialreport-idUSKBN0EA00B20140530>.

³⁷ *Alison's History of The French Revolution*, MONTHLY REPOSITORY, Aug. 1833, at 513, 514.

³⁸ *Id.*

³⁹ Both England and the United States, for example, suffered through violent revolutionary and civil conflicts before emerging as vibrant democracies. See generally CHRISTOPHER HILL, *THE ENGLISH REVOLUTION 1640* (1955); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* (1835); GARRETT EPPS, *DEMOCRACY REBORN* (2006).

undergoing dramatic changes like those Egypt is experiencing. Recent history is replete with military figures that seized power in the name of the masses, with promises of a better and more prosperous democratic future.⁴⁰ Their convictions were often only matched by the fatuousness of their pronouncements. There are not many examples of their successes.

The international legitimacy that the Egyptian coup has already received jeopardizes several decades of international efforts to develop and implement legal standards of democratic rule, consistent with the right to self-determination and the post-Second World War international human rights regime.⁴¹ The hard-won acceptance of the right to political participation and democratic governance that governmental and non-governmental human rights activists have long promoted has been undermined.⁴² And if the most rancid of the justifications offered by a few supporters of the coup—that Islamists, such as the Muslim Brotherhood per se cannot be trusted with democracy—is allowed to gain currency, the global consensus on the transcendental status of democracy as the preferred form of governance across all societies will unravel. As a consequence, democratic governance, built on the legitimacy that only free and fair elections can and should provide, will be reduced to just another ideological choice among many.⁴³

Secretary of State Hilary Clinton stated after the election of President Morsi that “there can be no going back on the democratic transition called for by the Egyptian people.”⁴⁴ She noted that this was the first election in the 5,000 year history of the nation.⁴⁵ If her prediction is to be realized, the international community should categorically reject the military’s overthrow of the Morsi government as an unacceptable violation of the right to democratic governance. This is the only option that would help preserve the gains of democratic governance in Egypt

⁴⁰ See NAUNIHAL SINGH, *SEIZING POWER: THE STRATEGIC LOGIC OF MILITARY COUPS* 17 (2014). See also KINZER, *supra* note 3.

⁴¹ See GLOBAL COMM’N ON ELECTIONS, *supra* note 21.

⁴² See Henry J. Steiner, *Political Participation as a Human Right*, 1 HARV. HUM. RTS. Y.B. 77, 77 (1988).

⁴³ See Brooks, *supra* note 4 (“it has become clear—in Egypt, turkey, Iran, Gaza and elsewhere—that radical Islamists are incapable of running a modern government. . . . Islamists might be determined enough to run effective opposition movements and committed enough to provide street-level social services. But they lack the mental equipment to govern. Once in office, they are always going to centralize power and undermine the democracy that elevated them.”).

⁴⁴ Editorial Board, *No Going Back on Democracy in Egypt*, WASH. POST (Aug. 2, 2013), http://www.washingtonpost.com/opinions/no-going-back-on-democracy-in-egypt/2013/08/02/bd8d5d20-fb9d-11e2-9bde-7ddaa186b751_story.html.

⁴⁵ *Id.*

and around the world. Recognizing that the terrain of democratic governance remains hotly contested in international law and politics does not undermine this conclusion.⁴⁶

The argument here acknowledges that in Egypt and other places, the international community has been seriously deficient in promoting a richly textured, fluid, and dynamic understanding of democracy sufficient to sustain the aspirations and support of historically marginalized groups or groups vulnerable to oppression. Furthermore, the article accepts that the concerns of many Egyptians, including women, religious minorities, and diverse secularists, which fed the massive street protests against the Morsi government, were valid and legitimate, and needed to be addressed through an institutionalized process that would forestall a resort to violent insurrection, and the inevitable cycle of elation followed by despair. However, the article emphasizes that the fact of the Morsi government having come to power through democratic means demands a certain margin of appreciation, in terms of how it governed, and that this was not granted by opponents within the country and beyond.

The United Nations and other entities that are invested in promoting democratic governance around the world cannot make peace with the military's action in Egypt or, for that matter, in Thailand, without doing enormous damage to the still fragile norm of democratic governance, buttressed by periodic free and fair elections.⁴⁷ If they accept the Egyptian situation as it has developed, they are further strengthening those who have long asserted one of two pernicious political perspectives: (1) that the norm of democratic governance and the intimately connected free and fair elections standards were essentially western propaganda in service of the West's material and military objectives in the world,⁴⁸ or (2) that the norm of democracy is foreign and inconsistent with the traditions of certain non-Western peoples. Perhaps more significantly, it would also undermine those who, while recognizing the deeply political nature and limitations of these

⁴⁶ See generally RADICAL DEMOCRACY, *supra* note 35.

⁴⁷ See Kofi Annan, Op-Ed., *Deepening Democracy: Why Elections With Integrity Matter*, ELDERS (Mar. 4, 2013), <http://theelders.org/article/deepening-democracy-why-elections-integrity-matter>. See also Krauthammer, *supra* note 4; Kirkpatrick, *supra* note 29. See Lefevre & Belford, *supra* note 36 (on the 2014 military coup in Thailand overthrowing a democratically elected government).

⁴⁸ See Peter Bergen, Op-Ed., *Al Qaeda leader's 'I told you so' on Egypt*, CNN (Aug. 15, 2013, 2:17 PM), <http://www.cnn.com/2013/08/15/opinion/bergen-zawahiri-egypt/>.

international democratic standards, continuously work to improve their content as well their processes.

II. MODERN INTERNATIONAL LAW PRESUMES DEMOCRATIC GOVERNANCE AS HERITAGE OF HUMANITY

Increasingly, governments recognize that their legitimacy depends on meeting a normative expectation of the community of states. This recognition has led to the emergence of a community expectation: that those who seek the validation of their empowerment patently govern with the consent of the governed. Democracy, thus, is on the way to becoming a global entitlement, one that increasingly will be promoted and protected by collective international processes.⁴⁹

It would be premature, however, to insist that every nation is now obliged, as an incident of its statehood and its membership in the community of states, to govern itself democratically.⁵⁰

A. DEMOCRATIC GOVERNANCE: DEFINITIONS AND HISTORY

Democratic governance may be defined simply and cogently using the language Lincoln employed in the Gettysburg address: "government of the people, by the people, for the people."⁵¹ Certainly, this definition does not capture the full scope of the complexities and difficulties that confront anyone trying to realize and nurture this contentious form of human political relations. But, over the course of the ages since it was first mentioned and practiced in infant form, the idea has persisted as a source of hope for many.

The origin of democratic governance is traceable to antiquity when it was first employed to describe, in a general manner, the type of governance that prevailed in some Greek city-states—Athens, in particular.⁵² In this historical sense, it referred to rule by the whole or a majority of the people of a particular polity. In its purest sense, it suggests direct rule by the majority or whole of the people, unmediated by representatives.⁵³ However, it was also commonly understood that it

⁴⁹ Thomas M. Franck, *The Emerging Right To Democratic Governance*, 86 AM. J. INT'L L. 46 (1992).

⁵⁰ Thomas M. Franck, *The Democratic Entitlement*, 29 U. RICH. L. REV. 1, 7 (1994).

⁵¹ President Abraham Lincoln, *The Gettysburg Address*, (Nov. 19, 1863).

⁵² See Robert A. Dahl, *Democracy and Its Critics* 1–3, 13–23 (1989).

⁵³ See Lawrence Emeka Modeme, *Right to Political Participation in International Law: A Rebuttal of The Democratic Entitlement Claim* (unpublished manuscript), www.academia.edu/576129/.

could only be effectively practiced where there was only a small number of citizens.⁵⁴ Often, this designated class of people constituted the most privileged in a broader society.⁵⁵ The fact that many, including women and slaves, were then excluded from this privilege⁵⁶ suggests that this connection to antiquity is more about the general concept than its proper execution. In fact, prior to the twentieth century, its elucidation as a form of rule was, at best, an experiment within a small number of countries that had already established their national identity by revolution, either against imperial domination or against a dominant class within. Even in these early experiments, democratic rule evolved from rule by a designated elite class and was broadened over time, often after much domestic discord and instability, to include less privileged others. In the United States, for example, the franchise was not extended to African Americans for decades after the American Revolution.⁵⁷ It took a

⁵⁴ DAHL, *supra* note 52, at 3–5, 16–19.

⁵⁵ James Madison was among those who were acutely skeptical of the benefits of democratic governance in the pure sense. He presented those benefits as unfavorable to a republican form of government:

From this view of the subject it may be concluded that a pure democracy, by which I mean a society consisting of a small number of citizens, who assemble and administer the government in person, can admit of no cure for the mischiefs of faction. A common passion or interest will, in almost every case, be felt by a majority of the whole; a communication and concert result from the form of government itself; and there is nothing to check the inducements to sacrifice the weaker party or an obnoxious individual. Hence it is that such democracies have ever been spectacles of turbulence and contention; have ever been found incompatible with personal security or the rights of property; and have in general been as short in their lives as they have been violent in their deaths. Theoretic politicians, who have patronized this species of government, have erroneously supposed that by reducing mankind to a perfect equality in their political rights, they would, at the same time, be perfectly equalized and assimilated in their possessions, their opinions, and their passions.

A republic, by which I mean a government in which the scheme of representation takes place, opens a different prospect, and promises the cure for which we are seeking

The two great points of difference between a democracy and a republic are: first, the delegation of the government, in the latter, to a small number of citizens elected by the rest; secondly, the greater number of citizens, and greater sphere of country, over which the latter may be extended.

See THE FEDERALIST NO. 10 (James Madison).

⁵⁶ See DAHL, *supra* note 52, at 4.

⁵⁷ The 15th Amendment to the US Constitution, ratified in 1870, banned racial discrimination in voting and extended the franchise to black and other non-white men. Ineffective enforcement and a culture of racial violence prevented the exercise of these rights for several more decades. In 1965, the Voting Rights Act was enacted to enforce voting rights for all. Even with all of these legal standards, minorities still complain about the denial of their rights to political participation. See U.S. COMM'N ON CIVIL RIGHTS, VOTING RIGHTS ACT: TEN YEARS AFTER (1975); JOHN

devastating civil war to bring this about.⁵⁸ Women did not get full voting rights until much later.⁵⁹ And the extension of the franchise to these groups was only the beginning of a longer struggle for full emancipation and inclusion.

Democratic governance today is understood in a more dynamic and nuanced sense to mean a government “in which the sovereign power resides in the people as a whole.”⁶⁰ This modern understanding of democratic governance no longer limits its promise only to citizens of small city-states or political entities who rule directly or through large majorities.⁶¹ Today, democratic governance not only embraces governing through elected representatives, it even allows for variations to include rule by pluralities.⁶² The key factor today is that citizens, a limitation inherited from antiquity even if now much more broadly or more instrumentally defined, still must approve the methods by which they are governed and must have effective periodic opportunities to express their opinions and preferences and to hold their leaders accountable.⁶³

John Rawls best captures this modern, dynamic and textured vision of a democratic society as one where:

All sane adults, with certain generally recognized exceptions, have the right to take part in political affairs, and the precept one elector one vote is honored as far as possible. Elections are fair and free, and regularly held. Sporadic and unpredictable tests of public sentiments by plebiscite or other means, or at such times as may suit the

HOPE FRANKLIN, *RECONSTRUCTION AFTER THE CIVIL WAR* 71–83, 127–36 (2d ed., 1994). See also LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 21–70 (1994).

⁵⁸ See generally James McPherson, *Battle Cry of Freedom: The Civil War Era* (2003); Eric Foner, *A Short History of Reconstruction* (1990).

⁵⁹ See generally Eleanor Flexner & Ellen Fitzpatrick, *Century of Struggle: The Women's Rights Movement in The United States* (1996). See also Paula Giddings, *When and Where I Enter: The Impact of Black women on Race and Sex in America* (2007).

⁶⁰ See William M. Reisinger, *Selected Definitions of Democracy*, U. IOWA, www.uiowa.edu/~c030142/DefinitionsOfDemocracy.html (last visited Dec. 4, 2014).

⁶¹ See DAHL, *supra* note 52, at 19–23, 28–30.

⁶² *Id.*

⁶³ See e.g., Phillippe C. Schmitter & Terry Lynn Karl, *What Democracy Is . . . and Is Not*, J. DEMOCRACY, Summer 1991, at 76 (“Modern political democracy is a system of governance in which rulers are held accountable for their actions in the public realm by citizens, acting indirectly through the competition and cooperation of their elected representatives.”). See also Ian Shapiro, *Democratic Justice*, as reprinted in THE DEMOCRATIC SOURCEBOOK 252 (Robert Dahl, Ian Shapiro & Jose Antonio Cheibub eds., 2003) (“Democrats are committed to rule by the people. They insist that no aristocrat, monarch, philosopher, bureaucrat, expert, or religious leader has the right, in virtue of such status, to force people to accept a particular conception of their proper common life. People should decide for themselves, via appropriate procedures of collective decision, what their collective business should be.”).

convenience of those in office, do not suffice for a representative regime. There are firm constitutional protections for certain liberties, particularly freedom of speech and assembly, and liberty to form political association. The principle of loyal opposition is recognized, the clash of political beliefs, and of the interests and attitudes that are likely to influence them, are accepted as a normal condition of human life.⁶⁴

This understanding of democracy as a constitutional regime is the one that international law embraced and promote, at first quite narrowly, but over time more broadly, extending to all of humanity. This expansionary vision of democracy took hold around the end of the First World War. In 1917, for example, President Woodrow Wilson called on Congress to declare war against Germany so that Americans would:

Fight for the things which we have always carried nearest our hearts, for democracy, for the right of those who submit to authority to have a voice in their own governments, for the rights and liberties of small nations, for a universal dominion of right by such a concert of free peoples as shall bring peace and safety to all nations and make the world itself at last free.⁶⁵

After the war, an ascendant and buoyantly moralistic United States of America, led by Wilson, advanced a process for codifying rules of international relations under a League of Nations that would later provide a foundation for current conceptions of democratic governance under international law.⁶⁶ He sold his vision as essential to preserving liberty and reducing the likelihood of another global conflagration.⁶⁷ Specifically, President Wilson promoted the norm of self-determination of peoples coupled with the rights of national minorities.⁶⁸ He saw self-determination and minority protection as matters of international concern whose peaceful and legal resolution would help to reduce the likelihood of intra-national conflicts burgeoning into transnational conflicts.⁶⁹ This was a curious focus and conviction by an American president who had demonstrated little empathy for the victims of domestic American racial

⁶⁴ John Rawls, *A Theory of Justice* 222–23 (1971).

⁶⁵ President Wilson, Address to Joint Session of Congress, (Apr. 2, 1917). See also DANIEL PATRICK MOYNIHAN, *ON THE LAW OF NATIONS* 36–37 (1990).

⁶⁶ MOYNIHAN, *supra* note 65, at 39–41.

⁶⁷ *Id.* at 52–53.

⁶⁸ *Id.* at 11, 103–05, 157–60.

⁶⁹ *Id.*

bigotry and violence.⁷⁰ Furthermore, Wilson's administration had been otherwise distinguished for waging war on weaker nations outside Europe.⁷¹ Yet, he applied himself with messianic vigor to the cause of containing the negative consequences of imperial power in Europe, specifically through legal recognition of the right to self-determination, and, more broadly, by promoting democratic governance.⁷²

Wilson's acclaimed January 1918 Fourteen Points speech for example, focused primarily on revising the geography of Europe, in order to expand self-determination and the human rights of its aggrieved minorities.⁷³ The fact that it largely ignored the ravages of European and American imperialism outside of Europe that ruthlessly suppressed the rights of far more people has not lessened its significance.⁷⁴ Under Wilson, America had emerged as the preeminent global power after one of the costliest conflicts in modern human history, and his evangelical vision of a new world order built on lasting universal peace captured the uncritical sentiments of a war-weary world. The fact that the proposed new world order substantially buttressed America's emerging global dominance and failed to tackle historic domestic injustices inside the United States has been minimized often in favor of recognizing its grand *liberal internationalist* vision.⁷⁵ The Second World War, coming so soon after this grand enterprise to "make the world itself at last free," testified to the incoherence and inherent operational weaknesses of *Wilsonianism*.⁷⁶ Yet, as Daniel Patrick Moynihan noted, "after Wilson,

⁷⁰ See Matthew Yglesias, *The Strange Case of Woodrow Wilson*, THINKPROGRESS (Dec. 11, 2009, 8:28 AM), ("Wilson is obviously an *important* historical figure but he doesn't seem to me to have been much of a president. For one thing, he was a huge racist. Noting racism on the part of past historical figures is sometimes a cheap shot—Abraham Lincoln said things that people would find repugnant today, but was very progressive for his time—but Wilson was a real racial reactionary who turned the clock backwards. He signed a bill banning miscegenation in the District of Columbia and segregating DC streetcars. He appointed white southerners to his administration who introduced segregation into their previously unsegregated departments, including the postal service which was a major employer."). See also Paul Rahe, *Progressive Racism*, NAT'L REV. ONLINE (Apr. 11, 2013, 4:00 AM), <http://www.nationalreview.com/articles/345274/progressive-racism-paul-rahe>.

⁷¹ MOYNIHAN, *supra* note 65, at 36. See also HAROLD EVANS, *THE AMERICAN CENTURY* 137 (1998).

⁷² MOYNIHAN, *supra* note 65, at 103–06; EVANS, *supra* note 71, at 137.

⁷³ MOYNIHAN, *supra* note 65, at 103–06; EVANS, *supra* note 71, at 137.

⁷⁴ MOYNIHAN, *supra* note 65, at 36.

⁷⁵ See *id.* at 33–54.

⁷⁶ For a critical perspective on the legacy of President Wilson, see Walter Russell Mead, *The Crisis of American Foreign Policy: Wilsonianism in the Twenty-first Century*, By G. John Ikenberry, Thomas J. Knock, Anne-Marie Slaughter, and Tony Smith, FOREIGN AFF., Mar./Apr. 2009, at 148 (2009) (book review), available at

governments became legitimate only as they could show that they were democratic."⁷⁷ Though an exaggeration of reality, Moynihan's sentiment was essentially correct.

International law's revival in the aftermath of the Second World War was built doctrinally on many of Wilson's ideas. True, Wilson's conceptual genius suffered from his operational deficiencies. He was spectacularly unable to get even domestic political support to execute his internationalist ideals.⁷⁸ His successors, Presidents Franklin Delano Roosevelt and Harry Truman, were much more successful in developing and promoting their versions of Wilsonianism or liberal internationalism.⁷⁹

Liberal internationalism after the Second World War was ideologically and effectively American hegemony, a refurbished *Pax Americana* that was promoted through inherited and intimately interconnected visions of promoting human rights and maintaining international peace and security. It succeeded by piercing the traditional veil of national sovereignty and promoting America's conception of self-determination and human rights within and across nations. These ideas and the unprecedented material resources invested in them became the foundations of the world order that has existed to this day.⁸⁰ Importantly, the new internationalist mission promoted these ideas as inextricably linked, with each essential to the realization of the others. In service of this quest, the United Nations Charter and subsequent international legal documents valorized somewhat paradoxically not just the sovereign equality of nations large and small, but also the sovereignty of the human person in them, without regard to identity or station in life.⁸¹

<http://www.foreignaffairs.com/articles/64728/walter-russell-mead/the-crisis-of-american-foreign-policy-wilsonianism-in-the-twenty> ("For Wilsonians, whether liberal or neoconservative, whatever the difficulties that may arise in particular cases, freeing people around the world is in the U.S. national interest. Whatever their internecine differences, both neoconservative and liberal Wilsonians will continue to argue this core position; realists will quietly continue to hope for a plague on both their houses.").

⁷⁷ MOYNIHAN, *supra* note 65, at 54.

⁷⁸ See MOYNIHAN, *supra* note 65, at 32–54; EVANS, *supra* note 71, 172–73. .

⁷⁹ See MOYNIHAN, *supra* note 65, at 55–79.

⁸⁰ See U.N. Charter pmbl., available at <https://treaties.un.org/doc/publication/ctc/uncharter.pdf> ("We the peoples of the United Nations determined to save succeeding generations from the scourge of war . . . and to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small . . ."). See also U.N. Charter arts. 1, 2, para. 1. See also Mead, *supra* note 76, at 148.

⁸¹ See U.N. Charter art. 1, para 3. See also UDHR, *supra* note 19, at 71; ICCPR, *supra* note 19; International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR].

Over time, it became costly to explicitly contradict these ideals as foundational principles of humanity and legitimate government, even for nations that routinely violated these expectations in their practices.⁸² All parties who sought a place in the new order eventually attached themselves self-consciously, often absurdly, cynically, and grotesquely, to the idea of human rights as a virtuous endeavor and a path to human realization, as well as international peace and security.⁸³ Implicit in this endeavor was a striving to represent, or at least claim, the heritage and privileges of a government sanctioned by the people, of the people, and for the people.⁸⁴ The ideological and practical disagreements that resulted in a decades-long Cold War, as well as the emergence of a group of new third world or non-aligned states with varying levels of disagreement with the existing international order, helped to sidetrack the emergence of a uniformly embraced practice of the norm of democratic governance.⁸⁵ But neither the failure to adopt a uniform practice model, nor the too frequent perversion of the norm should be confused with a rejection of the norm. The expectations of human rights, including the norms of self-determination and right to democratic governance were sustained and they grew.

B. THE EMERGING RIGHT TO DEMOCRATIC GOVERNANCE UNDER INTERNATIONAL LAW

Regardless of definition, the proliferation of democratic societies around the globe is abundantly evident—even though the precise meaning of this proliferation is difficult to gauge. Clearly in certain contexts this democratic globalization is far from an innocent or “natural” occurrence, as democracy is deployed to mask foreign interventions and neocolonial expansionism. In other situations, the changes are more benign. Either way, the ubiquity of democracy can

⁸² See Franck, *supra* note 49, at 46–52.

⁸³ See MARY ANN GLENDON, *A WORLD MADE NEW* xviii–xix (2001); LYNN HUNT, *INVENTING HUMAN RIGHTS* 203–08 (2007). See generally H. LAUTERPACHT, *INTERNATIONAL LAW AND HUMAN RIGHTS* (1950).

⁸⁴ See HUNT, *supra* note 83, at 206–08.

⁸⁵ See GLENDON, *supra* note 83, at 36, 132, 150; Samuel S. Kim, *Global Human Rights and World Order*, in *THE UNITED NATIONS AND A JUST WORLD ORDER* 356 (Richard A. Falk, Samuel S. Kim & Saul H. Mendlovitz eds., 1991); David P. Forsythe, *The United Nations and Human Rights 1945-1985*, in *THE UNITED NATIONS AND A JUST WORLD ORDER*, *supra*, at 377.

become a way of envisioning global political relations—not merely *within* nations, but *among* them as well.⁸⁶

The search for a workable process of democratic governance begins with the question whether there is a democratic entitlement under international law. This section demonstrates that such a right does exist. Subsequent sections engage in a critical discussion of how to concretely implement democratic governance and meet the various and recurring challenges to this entitlement, such as those found in Egypt.

Professor Thomas Franck wrote an important article on the subject of democratic governance under international law in 1992, even before developments in the immediate post-Cold War world bolstered his insights.⁸⁷ In “The Emerging Right To Democratic Governance,” he argued that there was a newly emerging international legal requirement that democracy validate governance, and that this precondition for legitimacy was being implemented through global standards.⁸⁸ Franck noted that, as of late 1991, “more than 110 governments” were “legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise,” and that, in many cases, it was governments that were promoting “international law-based entitlement” to govern.⁸⁹ Franck asserted that, “[t]he question is not whether democracy has swept the boards, but whether global society is ready for an era in which only democracy and the rule of law will be capable of validating governance.”⁹⁰

Professor Franck may have been too early in predicting the hegemony of democratic governance in the world, or perhaps too optimistic about the pace and hardiness of change. Recent events in Egypt, the rest of the Arab world, and elsewhere have also shown the need for caution and humility. It has proven enormously difficult in many cases to suppress the desires and determination of the privileged, powerful, ignorant, or depraved to rule by sheer force. The widespread embrace of that often disreputable symbol of sovereignty, the national military, by nascent nations and the easy availability of instruments of repression thanks to an irrepressible global trade in weapons, continue to make dictatorships an ever-present danger for most of humanity. Perhaps

⁸⁶ See David Trend, *Democracy's Crisis of Meaning*, in *RADICAL DEMOCRACY*, *supra* note 35, at 16 (emphasis in original).

⁸⁷ Franck, *supra* note 49. See also Franck, *supra* note 50.

⁸⁸ See Franck, *supra* note 49, at 47.

⁸⁹ *Id.*

⁹⁰ *Id.* at 49.

more importantly, the intoxicating pull of ends-justifying-means arguments in support of repression remains present in every society, just waiting for the right personality and social divisions. Furthermore, Franck's analysis might have substantially underestimated both the capacity of various dictatorships to hide behind the facade of democratic governance and the willingness of international society, including established democracies, to tolerate such tragic frauds on human yearnings. Yet, the overall arc of recent history has strengthened the thesis of Franck's work. In an increasing number of countries, the democratic entitlement has persisted as the rallying cry of the dispossessed.⁹¹ Certainly, the cry has often hidden much more than it revealed and contained far more hope than the most elevated of legal principles could deliver in a lifetime. But the quest here is not for perfection, utopia, or for the end of history; it is to find a workable process by which humans could reduce the number of occasions for bloodletting and carnage, with the goal of minimizing misery and other generators of conflict. As such, consistent with Professor Franck's query, it is not too premature to insist today that governments come to power and operate in a manner consistent with the requirements of democratic governance guaranteed under international law.

Professor Gregory Fox has done meticulous research on the right to democratic governance, especially as it is manifested through the right to political participation.⁹² He begins by asking whether international law was "prepared to accept a right to democratic governance."⁹³ In response, he makes the initial point that "international law has . . . come to understand democracy in narrower, more process-oriented terms."⁹⁴ He distinguishes such an understanding of democracy from one "understood in consequentialist terms as one or another comprehensive visions of 'the

⁹¹ See GLOBAL COMM'N ON ELECTIONS, *supra* note 21, at 5. See also *Sri Lanka's Tamil party wins landslide election victory*, AL JAZEERA AM., (Sept. 22, 2013, 1:25 AM), <http://america.aljazeera.com/articles/2013/9/22/sri-lanka-s-tamilpartywinslandslideelectionvictory.html>; Eric Gordy, *Serbia's Elections: Less of The Same, Open Democracy*, OPENDEMOCRACY (Jan. 23, 2007), https://www.opendemocracy.net/conflict-yugoslavia/serbia_election_4275.jsp; Jacqueline Charles & Lesley Clark, *Haiti's Michel Martelly Promises Elections, Gets Rave Reviews in Washington*, MIAMI HERALD (Feb. 6, 2014, 4:10 PM), <http://www.miamiherald.com/news/nation-world/article1960081.html>; Norimitsu Onishi, *A.N.C. Leads South Africa Vote, But Others Gain*, N.Y. TIMES (May 8, 2014), <http://www.nytimes.com/2014/05/09/world/africa/south-african-vote.html>.

⁹² See Gregory H. Fox, *The Right To Political Participation in International Law*, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 10 (Gregory H. Fox and Brad R. Roth, eds., 2000).

⁹³ *Id.* at 10.

⁹⁴ *Id.* at 11.

good life.”⁹⁵ According to Fox, this narrower, more process-oriented understanding of democracy focuses on “popular sovereignty—the notion of citizenship consent to the exercise of coercive power within a state.”⁹⁶ As a result, he states, the focus has been on political participation and electoral processes, noting that “international actors understand elections as the essential framework through which other ‘democratic goals’ are to be effectuated.”⁹⁷ Fox concludes that within this narrow vision of democratic governance, “the particulars of a human right to political participation, once a flashpoint for grand ideological battles, now appear rather pedestrian.”⁹⁸ In a fundamental sense, Professor Fox’s research illuminates the hardness of the democratic vision and the dynamic manner in which it has been defended and promoted in an international community that continues to embrace too easily the gulf between its ideals and its passions.

C. SELF-DETERMINATION AS THE FOUNDATION OF THE RIGHT TO DEMOCRATIC GOVERNANCE

The construction of the right to democratic governance under modern international law began with the embrace of the principle of the right to self-determination.⁹⁹ Self-determination became the normative bridge that connected the sovereignty of peoples to the needs of a world trying to recover from brutal global conflicts fueled by intractable inter-group conflicts. Acceptance of the self-determination principle, first of all, marked the end of a direct and uncontroverted right to imperial domination of weaker or lesser peoples.¹⁰⁰ Initially, ruling elites extolled only this thin version of self-determination and practiced it with a strabismic focus that captured only freedom from specified external domination. They earnestly embraced the external component of self-determination and derived from it an unbridled right to rule citizens they reconstituted as subjects, without regard to outside interference. They

⁹⁵ *Id.* at 10.

⁹⁶ *Id.* at 11.

⁹⁷ *Id.*

⁹⁸ *Id.* at 32.

⁹⁹ Franck, *supra* note 49, at 52. See also DANIEL THURER & THOMAS BURRI, SELF-DETERMINATION, OXFORD PUBLIC INT’L LAW, <http://opil.oup.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e873> (last updated Dec. 2008).

¹⁰⁰ Franck, *supra* note 49, 52–56.

evangelized, in essence, the right to oppress their people and claimed protection from outside intervention using the principle of non-interference in matters essentially within the domestic jurisdiction of sovereign states.¹⁰¹ This initial circumscribed and totally instrumentalist rendition of the self-determination principle actually fostered more avenues for domestic conflicts, some resulting in shocking brutality.¹⁰² It has taken some time for the equally important and more textured component of internal self-determination to be recognized.¹⁰³ Internal self-determination as the second prong of the self-determination principle engages the complicated and dynamic nature of what constitutes *people* in the processes of self-determination. The resulting richer understandings of self-determination are not now openly contradicted as a matter of practice, doctrine or, faith. Still, disagreements and conflicts over aspects of the norm are a persistent source of conflict, as we have observed in Egypt. Other contemporary examples abound—from Syria to South Sudan and Myanmar to North Korea.¹⁰⁴

The particularities of democratic governance were not specified in the emerging international law of the pre-Second World War period. However, the norm of self-determination, offered initially only to some in Europe after the First World War, was quickly expanded to incorporate other beneficiaries around the world, including those struggling against Western colonialism and imperial domination.¹⁰⁵ After the Second World War, the right to self-determination provided the legal

¹⁰¹ See U.N. Charter art. 2, para. 7; Respect for the principles of national sovereignty and non-interference in the internal affairs of States in their electoral processes, G.A. res. 48/124, 48 U.N. GAOR Supp. (No. 49) at 243, U.N. Doc. A/48/49 (1993).

¹⁰² See *Political Science Says Syria's Civil War Will Probably Last At Least Another Decade*, WASH. POST (Oct. 23, 2013), <http://www.washingtonpost.com/blogs/worldviews/wp/2013/10/23/political-science-says-syrias-civil-war-will-probably-last-at-least-another-decade/>. See also THE WORLD BANK, WORLD DEVELOPMENT REPORT 2011: CONFLICT, SECURITY, AND DEVELOPMENT (2011), available at http://siteresources.worldbank.org/INTWDRS/Resources/WDR2011_Full_Text.pdf.

¹⁰³ See Franck, *supra* note 49, at 63–77.

¹⁰⁴ See, e.g., Steven Erlanger, *France Urges Creation of Interim Syrian Government, Pledging Recognition*, N.Y. TIMES (Aug. 27, 2012), <http://www.nytimes.com/2012/08/28/world/middleeast/rebels-claim-to-shoot-down-syrian-helicopter.html>; Samantha Power, *How To Kill A Country*, ATLANTIC (Dec. 1 2003, 12:00 PM), <http://www.theatlantic.com/magazine/archive/2003/12/how-to-kill-a-country/302845/>; Rick Gladstone, *Myanmar Admits to Political Prisoners, Pledging Their Freedom*, N.Y. TIMES (July 15, 2013), <http://www.nytimes.com/2013/07/16/world/asia/myanmar-admits-to-political-prisoners-pledging-their-freedom.html>; Connor Ryan, *The Other Two-state Solution: After 56 Years, Sri Lanka, WORLD POST* (Aug. 8, 2013, 12:02 PM), http://www.huffingtonpost.com/connor-ryan/the-other-two-state-solution_b_3716398.html.

¹⁰⁵ See MOYNIHAN, *supra* note 65, at 103–05.

foundation for decolonization and, ultimately, as the article argues, expanded to encompass the broader, yet equally problematic, right to democratic governance.¹⁰⁶ One can say that the right to democratic governance flowed from self-determination deconstructed and reconstituted. Or, as Professor Thomas Franck has put it, echoing Moynihan's tribute to Wilson, "self-determination is the historic root from which the democratic entitlement grew."¹⁰⁷

This makes sense. The definition of what constitutes a people is always a matter of political contestation, resulting in a competition for legitimate exercise of power or the right to govern. Individuals have to desire and choose to belong to a group. The voice of the individual and his or her acquiescence are essential to the constitution of a people. This view is consistent with Richard Falk's argument that,

If one follows the lines of reasoning that flow from the American and French Revolutions, sovereignty inheres ultimately not in the state but in the citizens and is associated with the rights of the people . . . such international moral, legal, and political ideas as the right of self-determination and the right of development are direct expressions of this more modern and more humanistic (in the sense of seeing people as ends not means to some ends) understanding of national sovereignty.¹⁰⁸

The journey has not been peaceful, smooth, or lacking in controversy. Yet, decolonization and the legitimization of revolutionary victories have evolved a custom that is now supported by considerable international agreements.¹⁰⁹ Legitimization of political power now generally demands evidence of popular assent, usually through a popular process built around a plebiscite.¹¹⁰ Failure to generate or accede to this public expression of collective belonging has often provoked conflicts

¹⁰⁶ The major international legal documents of the time, including the United Nations Charter, gave a privileged position to the right of self-determination. See U.N. Charter art. 1 ("The purposes of the United Nations are: . . . 2. to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take appropriate measures to strengthen universal peace."). See also ICESCR, *supra* note 81, art. 1, para. 1 ("All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.").

¹⁰⁷ Franck, *supra* note 49, at 52.

¹⁰⁸ Richard Falk, *Sovereignty and Human Dignity: the Search for Reconciliation*, in Francis Deng and Terence Lyons (eds.), *AFRICAN RECKONING: A QUEST FOR GOOD GOVERNANCE* 13 (Francis Deng & Terence Lyons eds., 1998).

¹⁰⁹ See generally Franck, *supra* note 49; Fox, *supra* note 92; GLOBAL COMM'N ON ELECTIONS, *supra* note 21.

¹¹⁰ See generally Franck, *supra* note 49; Fox, *supra* note 92; GLOBAL COMM'N ON ELECTIONS, *supra* note 21.

with grave transnational consequences. No one today questions, in principle, the right of people of any particular political jurisdiction to freely decide on their government as part of the fundamental right of self-determination.¹¹¹ Of course, there remain important and often deadly disagreements over both the form and substance of internal, as well as external, self-determination. And too often, there is tolerance for those like Robert Mugabe, Marshall Al-Sisi, or dynastic families who retain power, such as in North Korea, Syria, or Gabon. These tyrants make a mockery of the norm of internal self-determination, including the specific right to political participation or the broader right to democratic governance.¹¹² Despite these cases, the core expectation of internal self-determination realized through democratic governance is broadly embraced and deeply entrenched today.¹¹³ The legitimacy of state sovereignty claims has come to depend substantially on the evidence of actualized self-determination and other components of democratic governance.¹¹⁴

While the principle of self-determination has provided the impetus for democratic governance to emerge as a norm of international law, by itself, it has been insufficient to develop the full scope of the norm. This is especially so with regard to conflicts over internal self-determination, where the holding of a plebiscite before independence is only the beginning of the even more difficult task of governing and preserving the heritage of democracy.¹¹⁵ Additional essential components of democratic governance are located in other international human rights guarantees that are more clearly directed toward protecting individuals and disfavored groups from oppressive national governments.¹¹⁶ The exposition of the human rights corpus and its promotion in the context of the sovereign equality of nations has gradually filled in what was missing

¹¹¹ See generally Franck, *supra* note 49; Fox, *supra* note 92; GLOBAL COMM'N ON ELECTIONS, *supra* note 21.

¹¹² See Power, *supra* note 104; Robert Marquand, *Zimbabwe's Mugabe says those doubting elections can 'go hang'*, CHRISTIAN SCI. MONITOR (Aug. 12, 2013), <http://www.csmonitor.com/World/Africa/2013/0812/Zimbabwe-s-Mugabe-says-those-doubting-his-election-can-go-hang-video>; Nick Cumming-Bruce, *UN Panel Urges International Action on North Korean Human Rights Abuses*, N.Y. TIMES (Sept. 17, 2013), <http://www.nytimes.com/2013/09/18/world/europe/un-panel-urges-action-on-north-korean-rights-abuses.html>.

¹¹³ See generally Franck, *supra* note 49; Fox, *supra* note 92.

¹¹⁴ See *id.*

¹¹⁵ See GLOBAL COMM'N ON ELECTIONS, *supra* note 21, at 3.

¹¹⁶ See ICCPR, *supra* note 81, arts. 18, 19, 21, 22, 25.

in the right to self-determination, both as a principle and a practice. Specifically, the provisions of diverse international legal agreements affirming broad rights of persons, sometimes defined narrowly as citizens, to freedom of opinion, expression, peaceful assembly, and association, combine with the specific internationally guaranteed right of citizens to participate in the political life of a country.¹¹⁷ Together, these rights fill out the outlines, indicated by the right to self-determination, to build and nurture the broader right to democratic governance.

D. ADDITIONAL HUMAN RIGHTS COMPONENTS OF THE RIGHT TO DEMOCRATIC GOVERNANCE

The foundational human rights documents, sometimes collectively called the International Bill of Human Rights, were developed to expand the promise of human rights to all of humanity and to broaden the scope of such rights.¹¹⁸ These principal human rights documents unequivocally spelled out the components of the contemporary right to democratic governance, which raises the question of why these documents' end product remained so unrecognized and unappreciated for so long. To fully appreciate the centrality of democratic governance to human rights, one should not simply focus on each of the rights specified in these documents, such as the right of citizens of sovereign states to participate in the public life of their polity and to choose their political leaders in isolation.¹¹⁹ One should appreciate the intimate and indissoluble connections of such specific guarantees of citizenship to the broader universal set of rights, including such rights as

¹¹⁷ *Id.*

¹¹⁸ The International Bill of Human Rights refers to the Universal Declaration of Human Rights (UDHR), and the two covenants, The International Covenant on Civil and Political Rights (ICCPR) and its two optional protocols, and the International Covenant on Economic, Social, and Cultural Rights (ICESCR). See U.N. Office of High Comm'r of Human Rights, *Fact Sheet No. 2 (Rev.1): the International Bill of Human Rights* (June 1996), available at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf>.

¹¹⁹ See UDHR, *supra* note 19, art. 21 ("1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives . . . 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."). See also ICCPR, *supra* note 19, art. 25 ("Every citizen shall have the right and the opportunity, without any of the distinction 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 . . .").

the rights to freedom of opinion and expression,¹²⁰ and the rights to freedom of peaceful assembly and association.¹²¹ Once all of these components are viewed in their totality, in terms of doctrine and practice, and in conjunction with the right to self-determination, the question of the right to democratic governance moves beyond the plane of vision, speculation, aspiration, or even debate, into the concrete quotidian field of standard-setting and implementation.

1. The Right to Freedom of Opinion and Expression

In his 1994 report, the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Mr. Abid Hussein, affirmed the critical role the right to freedom of opinion and expression plays in the human rights corpus as well as its intimate connection to democratic governance:

The right to freedom of opinion and expression is a core right of the International Covenant on Civil and Political Rights. It is both a civil right, in its capacity of protecting this sphere of life of the individual against undue infringements of the State, and a political right, in its capacity of guaranteeing the participation of the individual in political life, including that of State institutions. As such, the right to freedom of expression can be described as an essential test right, the enjoyment of which illustrates the degree of enjoyment of all human rights enshrined in the United Nations Bill of Rights, that comprises the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights. The respect for this right reflects a country's standard of fair play, justice and honesty.¹²²

The report underscored the fact that the right to freedom of opinion and expression is a human right that is foundational to all other

¹²⁰ See UDHR, *supra* note 19, art. 19 ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."). See also ICCPR, *supra* note 19, art. 19.

¹²¹ See UDHR, *supra* note 19, art. 20: ("1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association."). See also ICCPR, *supra* note 19, arts. 21, 22 ("The right of peaceful assembly shall be recognized . . . 1. Everyone shall have the right to free association with others . . .").

¹²² Special Rapporteur on Mr. Abid Hussain, *United Nations Economic and Social Council, Comm'n on Human Rights*, para. 14, U.N. Doc. E/CN.4/1993/45 (Dec. 14, 1994) [hereinafter Report of the Special Rapporteur].

rights and that its realization is essential to political participation.¹²³ This right protects the holding of opinions and the freedom to express a choice or a disagreement, all essential aspects in the development and maturation of a culture of democratic governance.¹²⁴ As such, no individual or group may be excluded from the political life of the community or state because of beliefs, opinions, or their expression.¹²⁵ There are, of course, specific restrictions to the freedom of expression, such as limitations designed to protect reputation, national security, public order, and public health.¹²⁶ But these are to be narrowly construed and there are legitimate variations on how these limitations are implemented.¹²⁷ There is also the general prohibition against “propaganda for war” and hate speech contained in Article 20, which is controversial in some societies with a more robust defense of the right to free expression.¹²⁸

It is clear that without this right, there can be no possibility of democratic governance. It is also clear that with this right respected, protected, and promoted, democratic governance has an impregnable structure. The Special Rapporteur affirmed this canon when he noted that “the scope of protection by [ICCPR] article 19 (2) [the right to freedom of expression] leads into the area of public life and thereby touches upon a fundamental aspect of democracy.”¹²⁹ Furthermore, the Special Rapporteur stated:

In contemporary society, because of the social and political role of information, the right of everyone to receive information and ideas has to be carefully protected. This right is not simply a converse of the right to impart information but it is a freedom in its own right. The right to seek or have access to information is one of the most

¹²³ See *id.*

¹²⁴ The Special Rapporteur argues “it should always be kept in mind that freedom of expression is the primary freedom and the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to other liberties. For these reasons, freedom of the press is indispensable in a democracy.” *Id.* para. 137.

¹²⁵ See *id.*

¹²⁶ See ICCPR, *supra* note 19, art. 19, para. 3. Note that these restrictions do not apply to the holding of opinions. See Report of the Special Rapporteur, *supra* note 122, paras. 38–55.

¹²⁷ See ICCPR, *supra* note 19, art. 19, para. 3 (“[The exercise of the rights] may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary.”).

¹²⁸ See *id.* art. 20 (“1. Any propaganda for war shall be prohibited by law. 2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.”).

¹²⁹ See Report of Special Rapporteur, *supra* note 122, para. 28.

essential elements of freedom of speech and expression. Freedom will be bereft of all effectiveness if the people have no access to information. Access to information is basic to the democratic way of life.¹³⁰

The right to democratic governance thus began with the right to self-determination and it advanced as it was nurtured by other fundamental human rights, including the rights to freedom of opinion and expression. As parties to agreements declaring these rights, states have accepted an obligation to fulfill, protect, and promote their realization.¹³¹ It is in this sense that States have embraced the right to democratic governance as the sum of several fundamental human rights. Democratic governance should therefore not be seen as an afterthought. On the contrary, it should be understood as an essential component of the international legal architecture built to promote human rights and values after the Second World War.¹³²

¹³⁰ See *id.* para. 35.

¹³¹ See *International Human Rights Law*, UNITED NATIONS OFF. HIGH COMMISSIONER FOR HUM. RTS., <http://www.ohchr.org/en/professionalinterest/pages/internationallaw.aspx> (last visited Dec. 4, 2014) ("International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect, to protect and to fulfill human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups against human rights abuses. The obligation to fulfill means that States must take positive action to facilitate the enjoyment of basic human rights. Through ratification of international human rights treaties, Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties. Where domestic legal proceedings fail to address human rights abuses, mechanisms and procedures for individual complaints or communications are available at the regional and international levels to help ensure that international human rights standards are indeed respected, implemented, and enforced at the local level.").

¹³² See *id.* ("A series of international human rights treaties and other instruments adopted since 1945 have conferred legal form on inherent human rights and developed the body of international human rights. Other instruments have been adopted at the regional level reflecting the particular human rights concerns of the region and providing for specific mechanisms of protection. Most States have also adopted constitutions and other laws which formally protect basic human rights. While international treaties and customary law form the backbone of international human rights law other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development. Respect for human rights requires the establishment of the rule of law at the national and international levels."). See also GLENDON, *supra* note 83, at xv–xxi. See generally Forsythe, *supra* note 85; Kim, *supra* note 85.

2. The Rights to Freedom of Peaceful Assembly and of Association

The right to freedom of peaceful assembly and the right to freedom of association are codified in articles 21 and 22 of the International Covenant on Civil and Political Rights (ICCPR), respectively.¹³³ One cannot reasonably accept the right to freedom of peaceful assembly and right to freedom of association as foundational to the human rights corpus while suggesting that the right to democratic governance is undeveloped or open to debate. In October 2010, the United Nations Human Rights Council adopted a resolution that made the same point:¹³⁴

Reaffirming that everyone has the rights to freedom of peaceful assembly and of association and that no one may be compelled to belong to an association,

Recognizing the importance of the rights to freedom of peaceful assembly and of association to the full enjoyment of civil and political rights, and economic, social and cultural rights,

Recognizing also that the rights to freedom of peaceful assembly and of association are essential components of democracy, providing individuals with invaluable opportunities to, inter alia, express their political opinions, engage in literary and artistic pursuits, and

Recognizing further that exercising the rights to freedom of peaceful assembly and of association free of restrictions, subject only to the limitations permitted by international law, in particular international human rights law, is indispensable to the full enjoyment of these

¹³³ See ICCPR, *supra* note 19, arts. 21, 22. See also UDHR, *supra* note 19, art. 20; ICESCR, *supra* note 81, art. 8. But see Special Rapporteur on the rights to freedom of peaceful assembly and of association, *First report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association*, Human Rights Council, para. 16, U.N. Doc. A/HRC/20/27 (May 21, 2012) (by Maina Kiai) [hereinafter Report of the Special Rapporteur Kiai].

(“The Special Rapporteur emphasizes that only “certain” restrictions may be applied, which clearly means that freedom is to be considered the rule and its restriction the exception. He refers to general comment No. 27 (1999) of the Human Rights Committee on freedom of movement: “in adopting laws providing for restrictions . . . States should always be guided by the principle that the restrictions must not impair the essence of the right . . . the relation between right and restriction, between norm and exception, must not be reversed.” As a result, when States would like to restrict these rights, all the above conditions must be met. Any restrictions must therefore be motivated by one of the above limited interests, have a legal basis (be “prescribed by law,” which implies that the law must be accessible and its provisions must be formulated with sufficient precision) and be “necessary in a democratic society.”).

¹³⁴ See G.A. Res. 15/21, U.N. Doc. A/HRC/RES/15/21 (Oct. 6, 2010).

rights, particularly where individuals may espouse minority or dissenting religious or political beliefs.¹³⁵

This resolution summarizes the intimate and inextricable connections between the fundamental rights to freedom of peaceful assembly and freedom of association and the other essential freedoms, including the right to democratic governance. It recognizes that the rights to peaceful assembly and association do not exist in the abstract, but as indispensable components of the totality of the human rights corpus that effectively demands democratic governance. Arguably, these rights to freedom of peaceful assembly and freedom of association, together with the rights to free opinion and expression, fully express the substantive body of the right to democratic governance even absent the additional rights to political participation affirmed in article 25 of the ICCPR.¹³⁶ It is axiomatic that a society that protects, fulfills, and promotes the rights to free opinion and expression as well as the rights to peaceful assembly and free association is a democratic society.¹³⁷ This does not make the Article 25 rights of citizens to vote in “genuine periodic elections” and “to take part in public affairs” superfluous. On the contrary, Article 25 serves an important role in further elaborating procedural measures to identify, build, sustain, and deepen the right to democratic governance as a human inheritance.

This first thematic report of the Special Rapporteur on the rights to freedom of peaceful assembly and of association elaborated further on the nature of the rights and their inextricable connections to democratic governance.¹³⁸ The report was presented to the UN Human Rights

¹³⁵ *Id.* (emphasis in original). The Special Rapporteur on the rights to freedom of peaceful assembly and of association has emphasized that, “while the rights to freedom of peaceful assembly and of association are clearly interrelated, interdependent and mutually reinforcing, they are also two separate rights.” Report of the Special Rapporteur Kiai, *supra* note 133, para. 4.

¹³⁶ See ICCPR, *supra* note 19, art. 25.

¹³⁷ See Report of the Special Rapporteur Kiai, *supra* note 133, para. 24 (defining an assembly as “an intentional and temporary gathering in a private or public space for a specific purpose. It therefore includes demonstrations, inside meetings, strikes, processions, rallies or even sits-in.”). It further elaborates that “[a]ssemblies play a vibrant role in mobilizing the population and formulating grievances and aspirations, facilitating the celebration of events and, importantly, influencing States’ public policy.” *Id.* Association “refers to any groups of individuals or any legal entities brought together in order to collectively act, express, promote, pursue or defend a field of common interests.” *Id.* para. 51.

¹³⁸ See Report of the Special Rapporteur Kiai, *supra* note 133, para. 12 (quoting G.A. Res. 15/21, *supra* note 134, pmb.) (“The rights to freedom of peaceful assembly and of association serve as a vehicle for the exercise of many other civil, cultural, economic, political and social rights. The rights are essential components of democracy as they empower men and women to “express their political opinions, engage in literary and artistic pursuits and other cultural, economic and social

Council in 2012, pursuant to Council Resolution 15/21.¹³⁹ The report also identified best practices by state parties and outlined broad specific recommendations for strengthening both sets of rights.¹⁴⁰ The report's conclusion clearly supports the view that the heritage of democracy resides in and is embraced by the array of human rights guarantees of the post-Second World War period. The conclusion reiterates, "the utmost importance of the rights to freedom of peaceful assembly and of association, which are cornerstone in any democracy."¹⁴¹ It also urged all states "to recognize that the rights to freedom of peaceful assembly and of association play a decisive role in the emergence and existence of effective democratic systems as they are a channel allowing for dialogue, pluralism, tolerance and broadmindedness, where minority or dissenting views or beliefs are respected."¹⁴² What was left to accomplish after this period of standard setting was the development of hardy, effective, and dynamic processes and systems of sustaining the democratic legacy.

3. *The Right to Political Participation Generally*

The old woman walked slowly, haltingly into the polling station in Mmabatho, a city about four hours drive northwest of Johannesburg. She wanted to vote for "the famous one." She was virtually blind, could hardly walk and needed assistance to "mark her cross." As an observer, I could only refer her to the station's presiding officer, a young woman with a lot of enthusiasm, one of about 200,000 hastily trained election officials overseeing South Africa's first democratic election open to all races.

I watched as the presiding officer tried to help the old woman clarify her choice by dutifully reading all the names on the ballot. There were nineteen of them but the presiding officer did not have to go past Mandela's, because at the mention of his name, the old woman's

activities, engage in religious observances or other beliefs, form and join trade unions and cooperatives, and elect leaders to represent their interests and hold them accountable" . . . Such interdependence and interrelatedness with other rights make them a valuable indicator of a States respect for the enjoyment of many other human rights.").

¹³⁹ See G.A. Res. 15/21, *supra* note 134. See also HRC Resolution 15/21-Mandate of The UNSR, UNITED NATIONS SPECIAL RAPPOREUR, <http://freeassembly.net/about/mandate/hrc-resolution-1521-mandate-of-the-unsr/> (last visited Dec. 4, 2014).

¹⁴⁰ See Report of the Special Rapporteur Kiai, *supra* note 133, para. 82–99.

¹⁴¹ See *id.* para. 82.

¹⁴² See *id.* para. 84(a). The Special Rapporteur also called on all states "to ensure that any restrictions on the rights to freedom of peaceful assembly and of association are prescribed by law, necessary in a democratic society, and proportionate to the aim pursued, and do not harm the principles of pluralism, tolerance and broadmindedness. Any restrictions should be subject to an independent, impartial, and prompt judicial review." *Id.* para. 84(e).

face brightened and she said softly in her native Tswana, "him." A little later, another woman came in, decades of hard farm labor reflected on her body. She would whisper "Mandela," as she approached any of the many official-looking types scattered around the polling station. It was both a question and a statement, and each time she said his name she would pause as if expecting to be challenged or chastised. Instead she was directed to a voting booth.

These two women were among the thousands of voters who went through that polling station over the three days of the election. I met many others in other polling stations throughout the region in the heart of the Transvaal. They came in spite of the great distances many had to travel, the physical toll, the threats, and the violence. They had waited all their lives for this opportunity and some had to wait for hours more in long lines to exercise what they had long considered their right. But wait they did, with dignity, determination, patience and it seemed, with faith that this process, this exercise of marking a few Xs on pieces of paper, would be worth all those decades of struggle and sacrifice. I had my doubts, but mesmerized by the spectacle, I kept them to myself.¹⁴³

The Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR) affirm the right of citizens to participate in the political life of their country, to engage in the conduct of public affairs of their country, and to choose political leaders.¹⁴⁴ Article 21 of the UDHR declares that, "everyone has the right to take part in the government of his country, directly or through freely chosen representatives."¹⁴⁵ It further asserts that, "the will of the people shall be the basis of the authority of government."¹⁴⁶ The drafters of this foundational human rights document clarified with substantial specificity what they meant by the will of the people: "this will shall be expressed in periodic and genuine elections which shall be by universal suffrage and shall be held by secret vote or by equivalent free voting procedures."¹⁴⁷ Those who would later question or minimize the international legal commitment to democratic governance embraced by an explicit right to political participation measured substantially by the

¹⁴³ The author served as an election observer as well as coordinator of non-governmental observers in South Africa's first all race democratic election in 1994. He wrote these observations for a newspaper column at the time and later published them in the *Fordham International Law Journal*. See Ibrahim J. Gassama, *Reaffirming Faith in the Dignity of Each Human Being: The United Nations, NGOs, and Apartheid*, 19 FORDHAM INT'L L.J. 1464, 1465-66 (1996).

¹⁴⁴ UDHR, *supra* note 19, art. 21; ICCPR, *supra* note 19, art. 25.

¹⁴⁵ UDHR, *supra* note 19, art. 21, para. 1.

¹⁴⁶ *Id.* art. 21, para. 2.

¹⁴⁷ *Id.* art. 21, para. 2.

holding of genuine, regular, and universal elections, devalue the achievements of the drafters of this timeless charter of human freedom.¹⁴⁸

The ICCPR, whose drafting and ratification occurred long after the UDHR, kept faith with the democratic vision of the latter, even as it negotiated a more legally binding commitment to internationally guaranteed human rights.¹⁴⁹ Its reiteration of the right to political participation and the role of elections were in that vein. According to Article 25:

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.¹⁵⁰

Thus, Article 25 not only embraced the political participation markers set by the UDHR, it refined them into essential operative standards of democratic governance, including providing specificity as to beneficiaries of the rights contained in them.¹⁵¹ As such, while these particular rights are guaranteed in each country only to citizens, however defined, of that particular country,¹⁵² the citizens are guaranteed specific

¹⁴⁸ See e.g., Fabienne Peter, *The Human Right to Political Participation*, 7 J. ETHICS & PHIL. 1, 1–2, (2013) (“I shall argue the right to political participation need not be interpreted as a right to democracy and I will defend a weaker requirement than the right to democracy”). However, the author argues persuasively that the right to political participation “should be expanded to include participation in global political debate as well . . .” *Id.* at 2. See also Steiner, *supra* note 42, 86–87 (“though not invoking a particular political tradition such as democracy, Article 25 affirms that the popular vote is meant to guarantee ‘the free expression of the will of the electors.’”).

¹⁴⁹ The ICCPR was concluded in 1966, nearly two decades after the UDHR was adopted, and it entered into force in 1976. See *International Covenant on Civil and Political Rights*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Dec. 4, 2014). The ICCPR has 168 State Parties as of 2014; the United States did not become a party until 1992. See *id.*

¹⁵⁰ ICCPR, *supra* note 19, art. 25.

¹⁵¹ See *id.*

¹⁵² See Hans Klein, Assoc. Professor of Pub. Policy, Ga. Inst. of Tech., Presentation at Global Democracy Conference, Montreal: The Right to Political Participation and the Information Society (May 29 – June 1, 2005), available at

rights: to take part in the conduct of public affairs, to vote, to be elected, to participate in genuine public elections that reflect “the free expression of the will of the voters,” and to have equal access to the public services of their country.¹⁵³ Article 25 also defines the requirement of “genuine periodic elections” to incorporate universal and equal suffrage, as well as the secret ballot.¹⁵⁴

UN interpretations of this provision have also emphasized its inextricable link to democratic governance. The UN Human Rights Committee adopted General Comment No. 25 that states, “article 25 lies at the core of democratic government based on the consent of the people and in conformity with the principles of the Covenant.”¹⁵⁵ It elaborated:

Paragraph (b) of article 25 sets out specific provisions dealing with the right of citizens to take part in the conduct of public affairs as voters or as candidates for election. Genuine periodic elections in accordance with paragraph (b) 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.¹⁵⁶

In distinguishing between the rights under Article 25 and the right of peoples to self-determination, the comment clarified that while “peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government,” the resulting choice and processes are subject to Article 25 provisions.¹⁵⁷ In that sense, there is no normatively viable escape from the prescription of democratic governance. Thus, while a people could, in theory, freely

http://www.ip3.gatech.edu/research/Right_to_Political_Participation.pdf (“The right to political participation is restricted to *citizens*. Whereas the other rights recognized in the Covenant inhere in human beings on the basis of their status as human beings, the right to political participation is limited to people endowed with the status of citizen. Such a status does not exist in isolation. A person can be a citizen only in the context of a political community and, most significantly, a government, and thus the right to political participation presupposes the existence of a government.”). See also Steiner, *supra* note 42.

¹⁵³ ICCPR, *supra* note 19, art. 25.

¹⁵⁴ See ICCPR, *supra* note 19, art. 25(b).

¹⁵⁵ U.N. Office of High Comm’r of Human Rights, Human Rights Comm., CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, para. 1, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (July 12, 1996) [hereinafter General Comment No. 25].

¹⁵⁶ See General Comment No. 25, *supra* note 155, para. 9.

¹⁵⁷ General Comment No. 25, *supra* note 155, para 2.

choose a political system that claims to not be a democracy, the rights guaranteed under Article 25, exercised in conjunction with the other rights discussed earlier—opinion, free expression, free assembly, and free association—in practice, would satisfy the understanding of democracy adopted in this article. This position is consistent with that of the UN Human Rights Council:

Although only the rights set out in Article 25 constitute political rights *sensu stricto*, a number of other rights are of fundamental importance for the democratic decision-making process. Broadly speaking, political freedoms—such as freedom of opinion, expression, information, media, assembly and association—may also be understood as political rights. Citizens may take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organize themselves.¹⁵⁸

Others have embraced a different and more limited understanding of the degree of ideological content contained in the ICCPR. Professor Steiner's seminal article on the right to political participation questioned whether the ICCPR as a whole, or Article 25 in particular, embraced the liberal democratic tradition. He distinguished what he perceived as the more explicit connections to "the tradition of liberal democracy," found in the UDHR from the more open, less ideologically defining provisions of the ICCPR.¹⁵⁹ Professor Steiner conceded that scholarship on this question was mixed.¹⁶⁰ While some scholars have argued that "nothing in the records suggests that the [UN Human Rights] Commission [responsible for drafting the documents] ever felt the need of a uniform theory, let alone ideology, of human rights,"¹⁶¹ others have claimed that the UDHR and the ICCPR evidence "a clear ideological commitment: rejection of communism and incorporation by reference, for limited but important purposes, of the

¹⁵⁸ U.N. Office of High Comm'r of Human Rights, Human Rights Council, Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities, para. 6, U.N. Doc. A/HRC/19/35 (Dec. 21, 2011) [hereinafter Human Rights Council].

¹⁵⁹ See Steiner, *supra* note 42, at 87. ("This earlier instrument [UDHR], influenced to a greater degree than the International Covenant by the tradition of liberal democracy, gives more emphasis to the role of the "will of the people" as the basis of "the authority of government.").

¹⁶⁰ *Id.* at 88.

¹⁶¹ *Id.* (citing Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights, in THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* 32, 36 (Louis Henkin ed., 1981)).

political ideologies of the West.”¹⁶² Professor Steiner preferred to interpret the right to political participation “as a programmatic right, one responsive to a shared ideal but to be realized progressively over time in different ways in different contexts through invention and planning that will often have a programmatic character.”¹⁶³

To the degree that Steiner insists on a material distinction between the programmatic nature of this political right and the “immediately effective” category of other rights in the ICCPR, his argument is problematic. In a fundamental sense, all rights are programmatic given that they ought to be interpreted dynamically, and always in context. It is erroneous to suggest that some rights are fully determined once declared. Whether it is the right to life, freedom from torture, or the right to water, the depth and breadth of all rights are subject to refining and redefinition over time.¹⁶⁴ In this light, it is difficult to see how the norm of political participation, especially when interpreted in the context of the other rights discussed earlier, could suggest anything other than a dynamic and textured requirement of democratic governance, subject to refinement over the course of time.

This position is further strengthened by the focus and the resources that the international community has put into promoting voting as the central mechanism for registering popular political participation, with rare institutional opposition. As Professor Fox has observed,

the particulars of the right to political participation . . . now appear rather pedestrian. That receipt of an electoral mandate bestows legitimacy upon governments, that genuine choice in an election require multiple parties, that incumbent regimes cannot monopolize the mass media during a campaign, that the other elements of fair

¹⁶² *Id.* at 88 n.35 (citing Oscar M. Garibaldi, *On the Ideological Content of Human Rights Instruments: The Clause ‘In a Democratic Society’*, in CONTEMPORARY ISSUES IN INTERNATIONAL LAW: ESSAYS IN HONOR OF LOUIS B. SOHN 23, 68 (T. Buergenthal ed., 1984)).

¹⁶³ Steiner, *supra* note 42, at 130.

¹⁶⁴ Professor Steiner’s position in this regard reflects an earlier much more divisive argument over the nature of rights that suggested a distinction between civil and political rights on one hand, and economic and social rights on the other. The former were generally referred to as negative or liberty rights while the latter were considered positive or welfare rights. This led to debates over what set of rights should be privileged and prioritized. In fact, many suggested that positive rights were not even rights at all. See Aryeh Neier, *Social and Economic Rights: A Critique*, HUM. RTS. BRIEF, Winter 2006, at 1 (2006); DAVID KELLEY, *A LIFE OF ONE’S OWN: INDIVIDUAL RIGHTS AND THE WELFARE STATE* (1998). But see generally AMARTYA SEN, *THE IDEA OF JUSTICE* (2009).

elections must be provided, all seem to flow from treaties announcing a commitment to representative government.¹⁶⁵

4. *Implementing The Right To Democratic Governance: The Special and Essential Role Of Genuine Periodic Elections*

The right to vote is arguably the most important political right. Genuine 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.¹⁶⁶

Institutional emphasis on elections has led to the legitimate criticism that the substance of democratic governance has been too often reduced to mere *electoralism*.¹⁶⁷ What should be a multi-layered, infinitely textured, dynamic, and enduring engagement of members of a community too often has been boiled down to a periodic exercise, sanctioned with excessive pageantry and encumbered by untethered hopes, only to be crushed by benign neglect. Nonetheless, 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.¹⁶⁸ Elections neither ensure democracy, nor, even more broadly, do they establish peace, security, freedom, or justice, but elections do *clarify* and *reaffirm* those aspirations. Elections provide important substantive and procedural markers of human successes and failures in an uncertain journey, too often accompanied by enormous pain and suffering. It is difficult, absent crude cynicism, to deny the cultivated humanism, the valorization of the human spirit in its quest for a better future, and the unadorned humility in light of the enormous complexities of existence that are represented when communities of people come out in their unbowed masses to exercise the right to vote for leaders of their choice. This was true in the

¹⁶⁵ See Fox, *supra* note 92, at 189.

¹⁶⁶ Human Rights Council, *supra* note 158, para. 7.

¹⁶⁷ See Schmitter & Karl, *supra* note 63, at 78-81; MICHAEL BRATTON & NICHOLAS VAN DE VALLE, *DEMOCRATIC EXPERIMENTS IN AFRICA: REGIME TRANSITIONS IN COMPARATIVE PERSPECTIVE* 234-36 (1997).

¹⁶⁸ Fox, *Supra* note 42 at 189; GLOBAL COMM'N ON ELECTIONS, *supra* note 21, 3-5.

case of Zimbabwe in 1980,¹⁶⁹ Namibia in 1989,¹⁷⁰ and South Africa in 1994,¹⁷¹ as it was in Egypt in 2012. The fact that rogues of all varieties have been so successful in perverting this exercise and its promise, in both emerging and advanced nations, does not negate its value.

An impressive amount of international moral and material resources have also been devoted to promoting and enhancing these standards and the resulting practices. The United States has been a major force in these efforts. The United States Agency for International Development (USAID) summarizes the rationale for US support for democratic elections in this manner:

Critical development efforts cannot succeed without a legitimate and democratically elected government that is responsive and accountable to its citizens. The [USAID] Elections and Political Processes (EPP) Fund provides assistance in cases of critical unanticipated need to support free and fair electoral and political processes in mission countries. Since the Fund was established in 2006, \$111 million of assistance has been provided to 66 countries. In 2012, more than \$30 million went to programs in 34 countries In FY 2012, EPP Funds expanded political participation by training more than 9,800 domestic election observers and officials, and providing voter and civic education reaching more than 6.5 million people.¹⁷²

It is of course entirely appropriate to point out here and elsewhere the discreditable and tragic instances and diverse ways in which the United States and other established democracies have acted to subvert electoral outcomes and support or tolerate nondemocratic governance around the world when it has suited their foreign policy or economic goals.¹⁷³

¹⁶⁹ See rethinkingzim, *Notes on 32 Years of Zimbabwe Independence Part 1— by Takura Zhangazha*, AFR. ARGUMENTS (July 13, 2012), <http://africanarguments.org/2012/07/13/notes-on-32-years-of-zimbabwe's-independence-part-1-by-takura-zhangazha/>.

¹⁷⁰ See *The Constitution of the Republic of Namibia: Drafting the Constitution*, GOV'T NAMIB., <http://www.gov.na/constitution> (last visited Dec. 4, 2014) (“The implementation of Resolution 435 in 1989 under the supervision of the Special Representative of the Secretary General of the United Nations and assisted by the United Nations Transitional Assistance Group led to the first ever democratic elections in Namibia. In November 1989 the Namibian people turned out in big numbers to elect representatives to the Constituent Assembly. Ten political parties registered for the November 1989 elections and 90% of the 701 483 registered voters cast their votes to elect the 72 representatives to draft a Constitution for an Independent Namibia.”).

¹⁷¹ See Bill Keller, *Mandela is Named President, Closing the Era of Apartheid*, N.Y. TIMES (May 10, 1994), <http://www.nytimes.com/1994/05/10/world/mandela-is-named-president-closing-the-era-of-apartheid.html>.

¹⁷² See Center for Excellence on Democracy, Human Rights and Governance, USAID, <http://www.usaid.gov/who-we-are/organization/bureaus/bureau-democracy-conflict-and-humanitarian-assistance/center> (last updated June 20, 2013).

¹⁷³ See generally KINZER, *supra* note 3; SCHLESINGER & KINZER, *supra* note 3.

Acquiescence in the coups in Egypt and Thailand are not extraordinary developments. Yet, these actions have never risen to the level of *opinion juris* or legal principle, to negate US or other international acceptance of the right to democratic governance under international law, or to subvert the importance of genuine national elections conducted according to the standards set by ICCPR Article 25.

The same may be said about the broader international community. It is true that, in general, the international community has lacked courage or consistency in practice when democratic rule has been threatened.¹⁷⁴ Yet, the right to democratic governance and the special place of an electorally derived mandate have been generally recognized in principle.¹⁷⁵ The consensus of the international community is reflected in the work of former UN Secretary-General Kofi Annan, who led the formation of a high-level international group, made up of former government leaders and policy makers, to focus international efforts on how to strengthen democratic governance by examining policies and actions that would “promote and protect the integrity of elections.”¹⁷⁶ The group, called the Global Commission on Elections, Democracy, & Security (“the Commission”), made this critical point in summarizing its mandate:

Elections are the indispensable root of democracy. They are now almost universal. Since 2000, all but 11 countries have held national elections. But to be credible, we need to see high standards before, during and after votes are cast. Opposition organizations must be free to organize and campaign without fear. There must be a level playing field among candidates. On polling day, voters must feel safe and trust the secrecy and integrity of the ballot. And when the votes have been counted the result must be accepted.¹⁷⁷

The statement highlights the special nature of elections, when properly conducted, engaging both their procedural and substantive values. In terms of process, elections provide a means through which humans in particular communities get to express their preferences and differences as to how they would like to organize their public affairs and about whom to entrust with leadership. Substantively, elections represent a means of capturing and refining the hopes and priorities that constitute and propel self-determined communities. As the Commission puts it:

¹⁷⁴ See generally Murphy, *supra* note 28.

¹⁷⁵ See UDHR, *supra* note 19, art. 21; ICCPR, *supra* note 19, art. 25.

¹⁷⁶ GLOBAL COMM’N ON ELECTIONS, *supra* note 21, at 3.

¹⁷⁷ *Id.*

When the electorate believes that elections have been free and fair, they can be a powerful catalyst for better governance, greater security and human development. But in the absence of credible elections, citizens have no recourse to peaceful political change. The risk of conflict increases while corruption, intimidation, and fraud go unchecked, rotting the entire political system slowly from within.¹⁷⁸

In an earlier, but equally fraught time, Abraham Lincoln made the same point about the value of elections, with characteristic eloquence:

Our popular government has often been called an experiment. Two points in it our people have already settled—the successful establishing and the successful administering of it. One still remains—its successful maintenance against a formidable internal attempt to overthrow it. It is now for them to demonstrate to the world that those who can fairly carry an election can also suppress a rebellion; that ballots are the rightful and peaceful successors of bullets; and that when ballots have fairly and constitutionally decided, there can be no successful appeal back to bullets; that there can be no successful appeal except to ballots themselves, at succeeding elections. Such will be a great lesson of peace; teaching men that what they cannot take by an election neither can they take by a war; teaching all the folly of being the beginners of a war.¹⁷⁹

The many who banded together to short circuit the historic democratic experiment in Egypt because of their distaste or contempt for the Morsi government or their fears for the future, missed the essential lesson about the nature and promise of democratic governance that President Lincoln understood generations ago. There is no easy path around the difficulties that existed before and that will persist after the ballot. This is not a fault with democracy. It is the reality of human existence. And it is still improbable that any society could achieve with bullets what it could not with ballots. Tragically, as the Egyptian and other similar episodes have illustrated, the difficulties of teaching people the impregnable validity of Lincoln's thesis, that what they could not take by an election, they could not take by war, remain. Egypt, like others before it, and likely still more to come, is paying the price of human impatience, frustration, and intolerance, born of a hubris that historical experience has not yet sufficiently ameliorated.

¹⁷⁸ *Id.* at 3.

¹⁷⁹ President Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), *available at*, <http://teachingamericanhistory.org/library/document/message-to-congress-in-special-session/>.

5. Dealing With Threats Posed By Democratically-Elected Government

It seems that the savage autocracy, any more than the divine democracy, does not limit its diet exclusively to the bodies of its enemies. It devours its friends and servants as well.¹⁸⁰

Elections in and of themselves do not constitute democracy. They are not an end but a step, albeit an important and often essential one, on the path towards the democratization of societies and the realization of the right to take part in the governance of one's country It would be unfortunate to confuse the end with the means and to forget that democracy implies far more than the mere act of periodically casting a vote, but covers the entire process of participation by citizens in the political life of their country.¹⁸¹

The fears that the democratically elected Morsi was intent on perverting democracy and imposing a fundamentalist Muslim Brotherhood dictatorship upon the Egyptian nation were not without merit, even if clearly exaggerated in light of evidence from the period.¹⁸² Still, the objective evidence shows that institutions of the *deep state*¹⁸³ were well entrenched and significantly outside of the control of the Muslim Brotherhood apparatus at the time of the ouster.¹⁸⁴ It was not just the Egyptian army and security forces, it was also the judiciary, large segments of civil society and social media, and the economic power structures that remained as sources and sites of opposition to the Morsi regime.¹⁸⁵ The Morsi regime had simply not consolidated power to the degree alleged by its implacable foes. The regime was, in effect, judged guilty and punished in advance for the crimes it was going to commit, obviously, certainly, and because of the inherent character of its political lineage. Indeed, many of the so-called democrats behind the well-

¹⁸⁰ JOSEPH CONRAD, UNDER WESTERN EYES 303 (1911).

¹⁸¹ U.N. Secretary-General, Enhancing The Effectiveness of The Principle of Periodic and Genuine Elections, para. 76, U.N. Doc. A/46/609 (Nov. 19, 1991).

¹⁸² See Jackson Diehl, Op-Ed., *Egypt's "democrats" abandon democracy*, WASH. POST (July 21, 2013), http://www.washingtonpost.com/opinions/jackson-diehl-egypts-democrats-abandon-democracy/2013/07/21/58beace0-efc8-11e2-9008-61e94a7ea20d_story.html.

¹⁸³ The term "deep state" was coined to describe "an assortment of long-standing political and bureaucratic forces that wield tremendous influence." Charles Levinson & Matt Bradley, *In Egypt, the 'Deep State' Rises Again*, WALL ST. J. (July 19, 2013, 5:03 PM), <http://www.wsj.com/articles/SB10001424127887324425204578601700051224658>. I sometimes also refer to these same forces as "established interests."

¹⁸⁴ See David D. Kirkpatrick, *Judge Helped Egypt's Military to Cement Power* (July 3, 2012), <http://www.nytimes.com/2012/07/04/world/middleeast/judge-helped-egypts-military-to-cement-power.html>; Levinson & Bradley, *supra* note 183.

¹⁸⁵ See Levinson & Bradley, *supra* note 183.

orchestrated campaign against Morsi have subsequently revealed themselves to be fascists who employed the language of democracy to return power to established interests.¹⁸⁶ The *Wall Street Journal* reported that,

In the months before the military ousted President Mohammed Morsi, Egypt's top generals met regularly with senior aides to opposition leaders, often at the Navy Officers Club nestled on the Nile. The message: if the opposition could put enough protesters in the streets, the military would step in—and forcibly remove the president By June 30, millions of Egyptians took to the streets, calling for Morsi to go. Three days later, the military unseated him.”¹⁸⁷

The *New York Times* also reported in 2012 that, “even as they promised to hand authority to elected leaders, Egypt’s ruling generals, along with one of the nation’s top judges, were planning to preserve their political power and block the rise of the Islamists.”¹⁸⁸ The judge, Tahani el-Gebali, Deputy President of the Supreme Constitutional Court, has openly discussed the role the judiciary played in subverting the democratic process even before Morsi was elected.¹⁸⁹ He claimed that opponents were motivated by the belief that, “democracy isn’t only about casting votes; it’s about building a democratic infrastructure.”¹⁹⁰ But Morsi’s opponents were not confronting a conundrum about democracy. They were not wrestling with the fractious politics of democratic nation building. Instead, they undemocratically rejected democracy *in the name of democracy*. They knew *in advance* what the outcome of democracy *should* look like and were intolerant of the possibility that the journey might take them somewhere else. Perhaps they were driven by fear, maybe prescience, but they rejected the democracy they had in hand for the vainglorious pronouncements of another run-of-the-mill, medal-bedecked mountebank, whose complicity in a well-developed, decades-long scheme of oppression was beyond dispute. It was the brazen denial of popular representation as the only legitimate route to power by those who had failed to secure legitimacy through democratic elections.

It is also important to recognize that many of these opponents of Morsi had served supinely under decades of autocratic rule under former strongman Hosni Mubarak and his predecessor. They apparently only

¹⁸⁶ See Diehl, *supra* note 182.

¹⁸⁷ Levinson & Bradley, *supra* note 183.

¹⁸⁸ See Kirkpatrick, *supra* note 184.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

discovered their nuanced and complicated understanding of democracy after facing the likelihood of the Egyptian people's first opportunity ever to choose their own leaders. This is the sort of perversion that has found favor among those that appear sincere in their belief that democracy is only democracy if the people are smart enough to choose leaders who are palatable to established interests.

The fact that Morsi and the Muslim Brotherhood had followed the rules laid down by others to win an office defined by others mattered little in the end. The fact that Morsi struggled to govern while those who tried mightily to thwart his victory were still in positions of power did not save him from the expressions of outrage that followed his quixotic efforts to assert some measure of control.¹⁹¹ Paradoxically, even after his successor, Marshall El-Sisi, has affirmed his dictatorial passions with the vigorous support of his allies, he has been given a pass by many of those who could not declaim enough Morsi's presumed potential for such.¹⁹² As one commentator asked, "if this military coup is accepted in Egypt, without a significant rebuke from the world's leading democracies, why would political Islamists put any faith in the process again?"¹⁹³ The same can easily be asked concerning democratic activists in other countries, like Thailand, where the international community has seemingly acquiesced in the military overthrow of a democratically elected government that ran afoul of established interests.¹⁹⁴ Similar to Egypt, where established interests embrace democratic principles, provided they

¹⁹¹ Levinson & Bradley, *supra* note 183.

¹⁹² See generally Rick Gladstone, *Attacks on Protesters in Cairo Were Calculated to Provoke, Some Say*, N.Y. TIMES (Aug. 16, 2013), <http://www.nytimes.com/2013/08/17/world/middleeast/attacks-on-protesters-in-cairo-were-calculated-to-provoke-some-say.html>; Rod Norlands, *Islamists Killed While in custody, Egypt Confirms*, N.Y. TIMES (Aug. 18, 2013), <http://www.nytimes.com/2013/08/19/world/middleeast/morsi-supporters-vow-to-defy-egypts-military.html>.

¹⁹³ Steve Clemons, *supra* note 12.

¹⁹⁴ Chris Blake & Suttinee Yuvejwattana, *Thai Coup Leader Prayuth Cements Power With Hand-Picked Assembly*, BLOOMBERG (Aug. 1, 2014, 12:19 AM), <http://www.bloomberg.com/news/articles/2014-07-31/thai-king-endorses-200-member-parliament-picked-by-coup-leader>. The report stated that the military strongman who led the overthrow of the democratically elected government of Thailand had personally selected a 200 member national assembly to act as the nation's parliament, with more than half of them military personnel. *Id.* The military banned protests and criticisms of the coup. This coup marked the twelfth time the Thai military has staged a coup in Thailand since 1932. See Adam Taylor & Anup Kaphle, *Thailand's Army Just Announced a Coup. Here are 11 Other Thai Coups Since 1932*, WASH. POST (May 22, 2014), <http://www.washingtonpost.com/blogs/worldviews/wp/2014/05/20/thailands-army-says-this-definitely-isnt-a-coup-heres-11-times-it-definitely-was/>.

do not result in the triumph of the Muslim Brotherhood, in Thailand, opponents object to the political movement established by Thaksin Shinawatra, a billionaire whose political movement has won every genuine democratic election in Thailand since 2001.¹⁹⁵

A complementary question presented by the Egyptian coup is what alternatives exist when democratic activists fear a turn to dictatorship by those properly elected in free and fair elections. This question is quite different from what to do after a democratically elected leader becomes a fully-fledged dictator, such as we have seen in Zimbabwe.¹⁹⁶ Clearly, the latter case removes much of the caution and constraint suggested here. Robert Mugabe has led Zimbabwe since the country became independent in 1980.¹⁹⁷ The former hero of the nation's liberation struggle, Mugabe has simply refused to concede power.¹⁹⁸ His reign has grown increasingly dictatorial with all significant opposition ruthlessly suppressed.¹⁹⁹ There appears to be no reasonable democratic manner to end his rule over the country. While no sustained armed insurrection against his rule has occurred, such a development would be outside of the constraints urged in this article.

Egypt under Morsi was clearly distinguishable from Zimbabwe under Mugabe, hence the need for more international legal attention. The very fact that Morsi was governing with a military, internal security establishment, and judiciary, as well as significant elements of civil society substantially opposed to his mandate, is abundant evidence that democracy was neither dead nor irreparably harmed in Egypt. International law could have made a difference in Egypt precisely because the Morsi government had not foreclosed all democratic options for political change. Egypt was a fledgling democracy in need of international assistance to sustain it. The international community had the experience and the resources to provide the necessary assistance to sustain the efforts toward a richer more fulfilling democratic culture in Egypt. The European Union, in particular, could have provided valuable

¹⁹⁵ Blake & Yuvejwattana, *supra* note 194.

¹⁹⁶ See Lydia Polgreen, *Taking Oath, Mugabe Adds to His Rule of Zimbabwe*, N.Y. TIMES (Aug. 22, 2013), <http://www.nytimes.com/2013/08/23/world/africa/striking-a-conciliatory-note-mugabe-takes-oath-of-office.html>.

¹⁹⁷ Jeffrey Smith, *After 34 Years of Mugabe: From Darling to Despot, and From Hope to Hunger*, THINK AFR. PRESS (Apr. 18, 2014, 10:40 AM), <http://thinkafricapress.com/zimbabwe/after-34-years-mugabe-darling-despot-hope-hunger>.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

leadership to help Egyptians develop processes and mechanisms for dealing with their political conflicts. The next section briefly examines how this could have been accomplished.

III. SUSTAINING DEMOCRATIC GOVERNANCE: LESSONS FROM THE EU

The European Union has done a creditable job in sustaining democratic governance in Europe and has considerable experience and resources that it could offer emerging democracies. According to article 2 of the Treaty on European Union (TEU), “the Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”²⁰⁰ Article 10 of the same founding treaty reaffirms the EU’s commitment to democratic governance.²⁰¹ The EU also expressly limits membership according to the 1993 Copenhagen Criteria that, among other things, require applicants to respect democratic values and commit to promoting them.²⁰² The EU also engages in active monitoring of policies and actions within member states that impact its democratic values.²⁰³ Further, under Article 7 of the TEU, the community has developed mechanisms for dealing with breaches of democratic values by member states that could be valuable to the broader international community, if there is a commitment to sustaining democratic governance on a wider scale and discouraging resort to bullets.²⁰⁴ The UN Security Council, with its expansive mandate,

²⁰⁰ Consolidated Version of the Treaty on European Union art. 2, May 9, 2008, 2008 O.J. (C 115) 13 [hereinafter TEU].

²⁰¹ *Id.* art. 10.

²⁰² Presidency Conclusions, Copenhagen European Council (June 21-22, 1993).

²⁰³ The EU is currently facing an acute challenge to its values from Prime minister Viktor Orban of Hungary who has gone from open admiration of autocratic leaders such as Russian president Vladimir Putin to a public call for creating an “illiberal state.” Kester Eddy, *EU Urged to Monitor Hungary as Orban Hits at ‘Liberal Democracy’*, FIN. TIMES (July 30, 2014, 4:48 PM), <http://www.ft.com/intl/cms/s/0/0574f7f2-17f3-11e4-b842-00144feabdc0.html#axzz3RVZCJtZb>; Editorial Board, Op-Ed., *A Test for the European Union*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2014/08/02/opinion/a-test-for-the-european-union.html>.

²⁰⁴ According to article 7:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in

might be the instrument for proactive interventions in those instances where all parties, especially prior to the ballot, bind themselves to democratic governance. Such commitments could be easier to obtain when hope and expectations are highest for electoral success. The commitments should include ongoing evaluations, such as are required as a condition for membership in the European Union, of their continuing commitment to play by democratic rules. Such evaluations could be done at the behest of citizens. It would be reasonable to expect those who are eager to have the UN or other international bodies monitor voting when they are confident of electoral success to agree to ongoing monitoring of democratic practices of those exercising power. The UN, at present, gives it imprimatur to winners of elections in emerging democracies with little regard to the long-term responsibility created by such endorsements.²⁰⁵ The UN role in verifying the legitimacy of such elections should, at a minimum, result in an ongoing mandate that includes monitoring of democratic governance. As it now stands, opponents of those who obtain power democratically seem to believe too

accordance with the same procedure. The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons. The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed

TEU, *supra* note 200, art. 7.

²⁰⁵ See *Member States: About UN Membership*, UNITED NATIONS, <http://www.un.org/en/members/about.shtml> (last visited Dec. 4, 2014). The UN position is that "recognition of a new State or Government is an act that only other States and Governments may grant or withhold." *Id.* In essence, it abdicates responsibility as a collective body to pass on the legitimacy of new governments unless a member state raises the issue. See *id.* In effect, there is normative standard. *Id.* See also U.N. Charter art. 4 ("Membership in the United Nations is open to all other peace-loving states which accept the obligations contained in the present Charter and, in the judgment of the Organization, are able to carry out these obligations."). See also Memorandum of the Secretary-General, *supra* note 30.

quickly that all hope is lost and that rage and bullets are the only alternatives when they begin to sense a developing dictatorship. A mechanism of the sort suggested here could help develop the culture of tolerance and restraints needed to build even the thinnest democratic culture.

With or without such mechanisms or international support, the caution still holds. There has to be a considerable margin of appreciation for the operations of democratic governance. While it cannot be said that a mandate derived from a free and fair election is a license to govern without rules, it must also be the case that those who seek to take with bullets that which has been mandated by the ballot should have the weight of history and international law against them. Indeed, it must be the standard that at least clear and convincing evidence that a democratically-elected government has so violated the foundations and principles of democratic governance that citizens have been left with no possibility of change through elections before nondemocratic actions could be taken or supported consistent with international law. In other words, evidence of malfeasance by the democratically elected regime must be demonstrated to a high level of proof—perhaps exceeding even that of Thomas Jefferson’s appeal in the US Declaration of Independence—before one should seriously countenance violence against democratically elected regimes. The alternative is adventurism, followed too often by a cycle of carnage that tends to grow grotesquely and exponentially, eventually consuming all hope and possibility of near term reconciliation.

This is, of course, a very conservative understanding of the role and nature of democratic governance. However, it is a perspective derived from human experience and forged in the humility that can only come from observing too many shattered dreams and wasted lives. Alternative perspectives have simply not worked. Those who have rushed to crush democratic experiments generally have not delivered upon their grand plans or fevered dreams. The examples are numerous: Field Marshall Idi Amin Dada was going to end corruption, ethnic strife, and build a truer democracy in Uganda;²⁰⁶ General Zia was going to end

²⁰⁶ See John Fairhall, *Curfew in Uganda after military coup topples Obote*, GUARDIAN (Jan. 26, 1971), <http://www.theguardian.com/theguardian/1971/jan/26/fromthearchive> (“A broadcast by an unnamed army officer accused President Obote and his regime of corruption, suppressing democracy, and failing to maintain law and order. He also alleged the former President had insulated Uganda from Kenya and Tanzania, and, perhaps most significantly of trying to divide the army and put his fellow Lango tribesmen in the most senior army and Government posts.”).

Prime Minister Zulfikah Ali Bhutto's rampant corruption in Pakistan;²⁰⁷ and benevolent autocrat of the moment, Marshall El-Sisi, vowed "to remedy Egypt's crippling fuel shortage by installing energy-efficient bulbs in every home socket, even if he [had] to send a government employee to screw in each one."²⁰⁸

IV. CONCLUSION

In 1848, workers joined with liberals in a democratic revolt to overthrow the French monarchy. However, almost as soon as the old order collapsed, the opposition fell apart, as liberals grew increasingly alarmed by what they saw as "radical" working class demands. Conservatives were able to co-opt fearful liberals and reinstall new forms of dictatorship. . . . Those same patterns are playing out in Egypt today—with liberals and authoritarians playing themselves, and Islamists playing the role of socialists. Once again, an inexperienced and impatient mass movement has overreached after gaining power. Once again, liberals have been frightened by the changes their former partners want to enact and have come crawling back to the old regime for protection. And as in 1848, authoritarians have been happy to take back the reins of power.²⁰⁹

There is a right to democratic governance under international law whose central feature is the right to political participation. This participation, evidenced at its most critical point by periodic elections with integrity, has provided a powerful mobilizing force against some of the most blatant abuses of governmental power in the world. Democratic governance should mean more than free and fair elections, but it rapidly loses its meaning when the results of such elections are so easily cast aside as in Egypt or Thailand.²¹⁰ The dominant liberal vision of

The reign of Idi Amin was marked by terror and absurdities extraordinary even in context. See *Uganda*, INT'L WAR CRIMES REP., (June 4, 2010), <https://internationalwarcrimesreport.wordpress.com/2010/06/04/Uganda/>.

²⁰⁷ See Niesewand, *supra* note 1.

²⁰⁸ David D. Kirkpatrick, *Egypt's New Strongman, Sisi, Knows Best*, N.Y. TIMES (May 24, 2014), <http://www.nytimes.com/2014/05/25/world/middleeast/egypts-new-autocrat-sisi-knows-best.html>.

²⁰⁹ Sheri Berman, *Marx's Lesson for the Muslim Brothers*, N.Y. TIMES (Aug. 10, 2013), <http://www.nytimes.com/2013/08/11/opinion/sunday/marxs-lesson-for-the-muslim-brothers.html>.

²¹⁰ See Shadi Hamid, Op-Ed., *Demoting Democracy in Egypt*, N.Y. TIMES (July 4, 2013), <http://www.nytimes.com/2013/07/05/opinion/demoting-democracy-in-egypt.html>; Editorial Board, *supra* note 6; Amy Sawitta Lefevre, *Thai Junta to Set up Reconciliation Centers across the Country*, REUTERS (May 30, 2014, 5:23 AM), <http://www.reuters.com/article/2014/05/30/us-thailand-politics-reconciliation-idUSKBN0EA0RO20140530>; *Thailand's Coup-In for the Long*

democracy today has not proven adequate to the task of dealing with the more intractable problems significant proportions of people around the world face. There is clearly a desperate need to improve upon this vision,²¹¹ but one must remain skeptical of those who insist that we need to give up on this admittedly thin standard, at least in some instances, in order to catapult society toward the ideal.²¹²

One hardy reality of international life for those at the bottom of the global order is that revolutionary desires and promises have rarely translated into concrete benefits.²¹³ Too often, ordinary people, elevated in imagery, theories, and speeches of political struggles, become mere instruments to be used by those with the big ideas and unbounded visions once the latter have consolidated power. Perhaps Joseph Conrad was a bit too pessimistic when he argued, “as if anything could be changed! In this world of men nothing can be changed—neither happiness nor misery. They can only be displaced at the cost of corrupted consciences and broken lives—a futile game for arrogant philosophers and sanguinary triflers.”²¹⁴ But his caution should be heeded. Those wearing the boots pressing down on the necks and spirits of the people may change, but the imprints of oppression too often remain. Chastened idealism suggests that one may harbor radical hopes for social justice while working with the best available remedies. One should exercise the discipline not to be intoxicated by the passion of leaders or awed by the fervor of their followers. It is in the concreteness of outcomes that one should find proof of the justice promised.

Haul, ECONOMIST, May 31, 2014, at 32, available at <http://www.economist.com/news/asia/21603033-crackdown-follows-coup-generals-may-stick-around-long-they-think-it-takes>.

²¹¹ See generally DEMOCRACY AND DIFFERENCE (Seyla Benhabib ed., 1996); RADICAL DEMOCRACY, *supra* note 35.

²¹² Malsin, *supra* note 29; Hamid, *supra* note 210; Editorial Board, Op-Ed., *False Choices on Egypt*, N.Y. TIMES (Aug. 1, 2014), <http://www.nytimes.com/2013/08/20/opinion/false-choices-on-egypt.html>; Thomas Fuller, *After Coup, General Vows to Create A ‘Genuine Democracy’ in Thailand*, N.Y. TIMES (May 26, 2014), <http://www.nytimes.com/2014/05/27/world/asia/thailand.html>.

²¹³ See e.g., JEFFREY D. SACHS, THE END OF POVERTY 1 (2006) (“Currently, more than eight million people around the world die each year because they are too poor to stay alive”); GRAHAM HANCOCK, LORDS OF POVERTY (1989); THOMAS POGGE, WORLD POVERTY AND HUMAN RIGHTS 2 (2d ed., 2008) (“As of 2004 . . . 2,533 million or 39.7 percent of humankind were reportedly living in severe poverty”). See also FRANZ FANON, THE WRETCHED OF THE EARTH (1963); PAULO FREIRE, PEDAGOGY OF THE OPPRESSED (1970); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

²¹⁴ CONRAD, *supra* note 180, at 258.