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Democratization's Discontents: Rediscovering the Virtues of the Non-Intervention Norm

Brad R. Roth*

Abstract

Post-Cold War triumphalism prompted efforts to transform international law into a tool of democratization, forsaking the international legal order's former neutrality with respect to the foundations of political legitimacy within states. Yet after three decades, the sources of political legitimacy remain "incorrigibly plural," and efforts to ascertain "the will of the people" remain beset by indeterminacy. It is time to rediscover international law's role as a framework of accommodation among bearers of conflicting interests and values, with consequent limits on pro-democratic intervention in the internal affairs of states.

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I. INTRODUCTION: WHITHER THE PROJECT OF ENTRENCHMENT OF DEMOCRATIC NORMS?

The use of international arrangements to “entrench” domestic political systems has been a quintessential post-Cold War-era project. Although this project had rather unsavory antecedents in the history of the international order—from the early nineteenth-century Congress of Vienna’s anti-republican alliance to the late twentieth-century machinations of the United States (U.S.) and the Soviet Union to maintain friendly governments in their respective spheres of influence¹—the 1990s version drew moral authority from the emergence of an ostensibly universal authoritative measure of governmental legitimacy.² With the collapse of Communist systems and the contemporaneous collapse of right-wing authoritarian regimes (many of which lost their *raison d’être* as Marxism-Leninism ceased to inspire credible threats to dominant interests), enthusiasm mounted for an “emerging right to democratic governance” that would displace the international order’s former neutrality as to the normative foundations of legitimate governance.³ With competing ideologies largely tamed and recalcitrant geo-strategic blocs mostly dissolved, international organizations and international law would stand firmly on the side of newly established liberal-democratic institutions and processes,⁴ providing guarantees against backsliding.⁵

Three decades later, in a new “post-post-Cold War” era, many of the conditions favorable to the democratic entrenchment project have eroded. As Tom Ginsburg and others have pointed out, the project very much persists, and continues to be able to claim significant successes in forestalling and even

¹ See BRAD R. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 142–49 (1999).

² Francis Fukuyama notoriously argued at the end of the Cold War that we had arrived at “the end of history as such: that is, the end point of mankind’s ideological evolution and the universalization of Western liberal democracy as the final form of human government.” Francis Fukuyama, *Have We Reached the End of History?*, 16 NAT’L INTEREST 3, 4 (1989).

³ Thomas M. Franck, *The Emerging Right to Democratic Governance*, 86 AM. J. INT’L L. 46 (1992); Gregory H. Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT’L L. 539 (1992); see generally DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW (Gregory H. Fox & Brad R. Roth eds., 2000) (presenting a range of views on the phenomenon).

⁴ See, e.g., “Promotion of the Right to Democracy,” Commission on Human Rights Resolution 1999/57 (27 April 1999) (approved 51–0–2). Twenty-five out of fifty-three member states dissented or abstained on inclusion of the “right to democracy” language in the title, though none dissented and only two (China and Cuba) abstained on the resolution as a whole. There was, however, some substantial quibbling about the practical implications of the statement. U.N. Doc. E/CN.4/1999/SR.57 (April 27, 1999).

⁵ The democratic entitlement’s pioneer, Thomas M. Franck, while explicitly opposing unilateral forcible measures against non-complying governments, did propose “that legitimate governments should be assured of protection from overthrow by totalitarian forces through concerted systemic action after—and only after—the community has recognized that such an exigency has arisen.” Franck, *supra* note 3, at 91.

reversing collapses of institutions and processes bearing the “democratic” imprimatur,⁶ even if the inconsistency of responses casts doubt on whether those successes bespeak the establishment of a fixed norm. Nonetheless, the resurgence of global geo-strategic division appears poised to undermine the coherence of collective responses to crises of authority within states. Moreover, the issue of “democratic backsliding” has lately been transformed, as the stability of constitutional orders and the commitment to democratic proceduralism within states at the core of the entrenchment project—above all, the U.S.—have come into question.⁷ With the most highly developed and most historically stable Western states showing the potential to be beset by unmediated social conflict, their self-presentation as manifesting a universally valid answer to the question of governmental legitimacy becomes far less compelling.

The discussion below will revisit the underlying premises of the entrenchment project in light of the lapsed certainties of the immediate post-Cold War era. It will suggest that although external support for constitutional solutions to internal political crises is in most aspects fully consistent with the sovereign equality principles designed for a more fractious world, the most intrusive measures depart from those principles and ought to be reconsidered. Those principles, rooted in the United Nations (U.N.) Charter and developed more fully in the period from the late 1950s to the late 1980s, fit with international legal order’s highest and best use as a framework of accommodation among bearers of divergent interests and values,⁸ and reflect the substantial (though not total) indeterminacy of the maxim that, “the will of the people shall be the basis of the authority of government.”⁹

⁶ See, e.g., TOM GINSBURG, DEMOCRACIES AND INTERNATIONAL LAW 103–23 (2021); FOX & ROTH, *supra* note 3 (collecting a wide range of accounts and analyses from the practice of global and regional intergovernmental organizations).

⁷ See, e.g., STEVEN LEVITSKY & DANIEL ZIBLATT, HOW DEMOCRACIES DIE (2018). For an overview of empirical evidence of erosion of liberal-democratic gains in recent decades, see V-DEM INSTITUTE, DEMOCRACY REPORT 2022: AUTOCRATIZATION CHANGING NATURE? 14 (March 2022) (“Liberal democracies peaked in 2012 with 42 countries. There are only 34 in 2021. There have not been so few liberal democracies in the world since 1995—over 25 years ago. Only 13% of the world’s population live in this least populous regime type.”); see also Larry Diamond, *Facing Up to the Democratic Recession*, 26 J. DEMOCRACY 141, 142 (2015) (“[A]round 2006, the expansion of freedom and democracy in the world came to a prolonged halt.”); Roberto Stefan Foa & Yascha Mounk, *The Signs of Deconsolidation*, 28 J. DEMOCRACY 5 (2017) (noting a surge of authoritarian attitudes among citizens of established democracies, and consequent electoral successes of illiberal parties and candidates).

⁸ See Oscar Schachter, *Just War and Human Rights*, 1 PACE Y.B. INT’L L 1, 18 (1989) (describing “a world of diversity, incorrigibly plural, where perceptions of freedom, well-being and self-rule vary and often conflict in specific cases.”).

⁹ Universal Declaration of Human Rights (1948), G.A. Res. 217 (III) (1948) (48-0-8), art. 21.

II. CONCEPTUALIZING THE INTERACTION OF INTERNATIONAL AND DOMESTIC LEGAL ORDERS

The U.N. Charter and subsequent authoritative elaborations of its core principles reflect a distinctive reconciliation of international and domestic legal authority.¹⁰ The Charter predicates “friendly relations”—in the wholly unromantic sense of a framework of accommodation among bearers of potentially rival interests and values—on “the principle of equal rights and self-determination of peoples.”¹¹ That is, member states represent the realization of the self-determination of territorially bounded political communities, and come together in an overarching peace and security order on the basis of “the principle of sovereign equality.”¹² Thus, state authority, far from being negated, is woven into the scheme of international cooperation, and is fully overridden only in respect of measures occasioned by a “threat to the peace” and approved by an extraordinary process demanding widespread concurrence (nine votes out of fifteen on the Security Council, with no vetoes from the permanent five members).¹³

The relationship between domestic and international legal authority is typically misunderstood as operating on a single plane, such that an expansion of the latter entails a correlative diminution of the former. State sovereignty, in this imagining, is a realm of unfettered discretion that recedes as international law advances. Even insofar as international legal obligation is conceded to be predicated on state consent (whether in the express form of treaty ratification or in the tacit form of refraining from “persistent objection” during the period in which a pattern of state practice and *opinio juris* congeals into a norm of customary international law), the act of sovereign consent is frequently misconstrued as a relinquishment of some part of the very authority that it manifests.

Such an interpretation of the relationship might seem to follow from the valid observation that, on the international plane, incompatible domestic law cannot be interposed to justify violating an international legal obligation.¹⁴ But such an extrapolation fails to observe the residual state authority that withstands international legal obligation and that maintains the capacity to create legal facts in defiance of such obligation—legal facts that not only are effective on the domestic plane, but cannot be treated as mere nullities on the international plane. (A ready example is recourse to force in violation of *jus ad bellum*, which

¹⁰ For a book-length treatment of this subject, see BRAD R. ROTH, *SOVEREIGN EQUALITY AND MORAL DISAGREEMENT: PREMISES OF A PLURALIST INTERNATIONAL LEGAL ORDER* (2011).

¹¹ U.N. Charter, art. 1(2).

¹² *Id.* art. 2(1).

¹³ *Id.* arts. 23, 27, 39, 41, 42.

¹⁴ A state “may not invoke the provisions of its internal law as justification for its failure to perform” its international legal obligations. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331 (opened for signature, 1969), art. 27.

nonetheless succeeds in establishing privileged belligerent status for combatants under *jus in bello*.)

Sovereignty is best understood as a retention of ultimate authority: a presumptive monopoly of the last word on what counts as public order within the state's territory.¹⁵ This authority is presumptive rather than conclusive because the principle of sovereign equality entails not only a renunciation of authority incompatible with a counterpart authority of co-equal members of the international system (e.g., renunciation of jurisdiction to execute domestic laws in a foreign state's territory or to use force against a foreign state's territorial integrity and political independence), but also a renunciation of authority to behave incompatibly (e.g., by conferring immunity *ratione materiae* for acts of genocide) with the essential logic of the scheme that acknowledges, protects, and in many cases creates (e.g., through decolonization) statehood's legal capacities. But such renunciations are exceptions; they do not swallow the rule.

Retention of the last word on what counts as public order in a territory is not incompatible with adopting wide-ranging legal obligations as to how public order is to be conducted. Although sovereignty is frequently invoked in a political context to assert (or to re-assert) unencumbered freedom of action, the desirability *vel non* of encumbrances is precisely a political judgment for which state authority furnishes the occasion.¹⁶

To be sure, a state, in binding itself to an international agreement or in affirming or acquiescing in the establishment of a customary norm, incurs both an obligation to honor the terms of its express or tacit commitment and a susceptibility to proportionate countermeasures for any subsequent breach. However, renouncing a practice does not, without a separate step (such as an express or implied withdrawal of immunity *ratione materiae* from state agents who

¹⁵ This statement is a refinement of Max Weber's famous description of the state as the institution "that (successfully) claims the monopoly of the legitimate use of physical force within a given territory." Max Weber, *Politics as a Vocation*, in FROM MAX WEBER: ESSAYS IN SOCIOLOGY 77, 78 (H.H. Gerth & C. Wright Mills eds. & trans., 1958). Carl Schmitt observed that whereas norms govern in normal times, there is an ultimate source of decisional authority that reemerges in exceptional times, with the capacity to suspend the operation of valid law. Thus, his notorious expression, "sovereign is he who decides on the exception." CARL SCHMITT, *POLITICAL THEOLOGY: FOUR CHAPTERS ON THE CONCEPT OF SOVEREIGNTY* 5, 9 (Chicago: University of Chicago Press, 2005) (George Schwab trans., 1922). Whatever one thinks about Schmitt's (often reprehensible) applications of that insight, it accurately reflects sovereignty's distinctiveness as a concept.

¹⁶ Thus, after Brexiteers trumpeted the slogan "Take Back Control" to mobilize support in the United Kingdom (U.K.) for invoking the withdrawal provision of the European Union (E.U.)'s Lisbon Treaty, some supporters of a "People's Vote" to rescind the decision to withdraw invoked the identical slogan. See Tim Houghton, *It's the Slogan, Stupid: The Brexit Referendum*, UNIV. BIRMINGHAM, <https://perma.cc/QSW8-BTLB>. Ironically, what the entire exercise demonstrated was that sovereign authority had never been, and had no prospect of being, lost.

might engage in conduct rising to the level of an international crime),¹⁷ imply renouncing the domestic legal authority to resume the practice, notwithstanding the consequent cost to national honor or to national interests.¹⁸ As a result, the same act may be lawful and unlawful simultaneously: legally authorized by domestic law, even though in violation of international law. Nor does the breach of the international legal obligation, in and of itself, forfeit the right to invoke international legal limitations on the injured parties' recourse. In consideration of the risk of abuse and of the interests of weaker states that lack equal access to instruments of unilateral enforcement, international law strictly limits countermeasures,¹⁹ constrains exercises of domestic jurisdiction against foreign state actors,²⁰ and bars the threat or use of force to redress any but the narrowest category of breaches.²¹ In short, "obligatory" does not imply "compulsory."

This relationship of international to domestic authority has special significance to norms pertaining to the legitimacy of a government. States, not the governments that act from time to time in their name, are the relevant bearers of international legal personality. Whereas states are the primary bearers of rights, obligations, powers, and immunities in the international order, governments assert rights, incur obligations, exercise powers, and confer immunities on behalf of their respective states. The state—the territorial political community that is the notional bearer of sovereignty—is thus the principal. But because the state, in this sense of the term, does not have the character of an actual institution, its presumed will can be expressed and acted upon only through its government—its internationally acknowledged (whether or not formally recognized) agent.

¹⁷ See, e.g., *Regina v. Bow Street Metropolitan Stipendiary Magistrate (Pinochet III)*, 1 AC 147, 203 (H.L. 1999) (former Chilean leader subject to extradition notwithstanding presumptive immunity *ratione materiae* because Chilean consent to the Convention Against Torture implied a waiver of the immunity for acts committed subsequent to the treaty's ratification).

¹⁸ "International law . . . recognizes the power—though not the right—to break a treaty and pay damages or abide other international consequences." LOUIS HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 168 (1972).

¹⁹ See *Report of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts*, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (2001), arts. 49–54 (limiting countermeasures to those "commensurate" with the internationally wrongful act and compliant with several express strictures).

²⁰ See, e.g., *Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervening)* 2012 ICJ Rep. 99 (discussing immunities of foreign states in domestic courts); *Case Concerning the Arrest Warrant of 11 April 2000, Democratic Republic of the Congo v. Belgium (Yerodia)*, 2002 ICJ Rep. 3 (discussing immunities *ratione personae* (status) and *ratione materiae* (functional) of state officials).

²¹ See U.N. Charter, *supra* note 11, art. 51 (noting that "the inherent right of individual or collective self-defence" applies if and only if "an armed attack occurs").

The U.N. General Assembly's 1970 "Friendly Relations Declaration,"²² adopted without a vote as a quasi-authoritative interpretation of fundamental U.N. Charter principles, articulated the following maxim as an application of sovereign equality: "Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State."²³ The non-intervention norm therefore makes room not only for ideological pluralism, but also for abrupt alteration of political systems,²⁴ so long as such alteration is attributed to the sovereign entity. Thus, *it would be a mistake to regard the international legal order as a legal order of legal orders*; it is, rather, a legal order of territorially delimited political communities that have the inherent capacity to overthrow their respective legal orders.

The above are, of course, mere doctrinal constructs—legal fictions upon legal fictions. It is an open question whether and to what extent developments of the immediate post-Cold War era altered the character of these categories. But it is important to appreciate the practical, and even moral, significance that these constructs had in the context of a geo-strategically and ideologically divided global system.

In the international order of the Cold War era, popular sovereignty and *realpolitik* were reconciled by ideological pluralism.²⁵ The conventional wisdom was that any external assessment of governmental legitimacy through imposition of criteria or procedures for gauging popular support would be parochial at best, and potentially an opening to outsiders to further their own interests by determining winners and losers in local political struggles. Given the prevalence of distrust and, especially, the history of colonialism and neo-colonialism, the presumption was that populations would perceive a greater confluence of interests

²² G.A. Res. 2625, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations (Oct. 24, 1970) [hereinafter Friendly Relations Declaration].

²³ This maxim is, in effect, a corollary to the self-determination maxim that "all peoples have the right freely to determine, without external interference, their political status and to pursue their economic, social and cultural development," as states are understood as manifestations of the self-determination of their territorial populations, and as the struggle against colonialism is followed by resistance to neo-colonialism on the part of those territorially-based political communities that have achieved full independence. The Declaration further specifies:

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic and cultural elements, are in violation of international law.

Id.

²⁴ "Successful revolution sooner or later begets its own legality." STANLEY A. DE SMITH, CONSTITUTIONAL AND ADMINISTRATIVE LAW 66–67 (3d ed. 1977).

²⁵ See ROTH, *supra* note 10, at 93–131.

with their own local tyrants than with foreigners pronouncing benevolent intentions.²⁶

On this rationale, although states were understood as manifestations of the self-determination of their territorial populations, what was to count as popular will would be determined in accordance with locally efficacious norms, institutions, and processes. States governed by one-party regimes that tolerated no organized opposition were the sovereign equals of states holding free and fair elections. And where authority was locally contested by armed factions, that struggle was taken to represent the working out (in effect, through trial-by-ordeal) of the political community's self-determination. Internal armed conflict, far from occasioning an exception to the non-intervention norm, was the quintessential context for that norm's reaffirmation.²⁷

Whereas the Cold War-era conception of international legality sought to maintain the rule of law among states while reserving to domestic political contestation the last word on public order within states (irrespective of the bindingness of international legal norms pertaining to the character of internal governance), the post-Cold War era brought an invocation of the rule of law to place conditions on the standing of internally effective political authorities to resist external impositions. The innovation lay not in asserting a package of human rights obligations that included the right to political participation, nor in harnessing diplomatic pressure and economic incentives to spur observance of those obligations, but in opening the door to presumptively inadmissible forms of intervention by nullifying a *de facto* government's capacity to assert the non-intervention norm on the state's behalf. That is the sting in the tail of the "democratic entitlement."²⁸

²⁶ Perhaps the most striking illustration of this cast of mind was Cambodian Prince Norodom Sihanouk's 1979 statement of support for the genocidal Khmer Rouge regime against Vietnamese invaders: "if by chance there is any problem dividing the Kampuchians, this problem must and should be solved by Kampuchians, without interference from outside countries." ROTH, *supra* note 1, at 281; 34 SCOR, 2108th mtg., para. 87 (1979).

²⁷ See, e.g., Friendly Relations Declaration, *supra* note 22 ("[N]o State shall . . . interfere in civil strife in another State."); G.A. Res. 36/103, Declaration on the Inadmissibility of Intervention and Interference in the Internal Affairs of States (Dec. 9, 1981) (passed 120-22-6 over the opposition of many Western liberal states), Annex, art. 2(f) (affirming "[t]he duty of a state to refrain from the promotion, encouragement, or support, direct or indirect, of rebellious or secessionist activities within other States, *under any pretext whatsoever*, or any action which seems to disrupt the unity or to undermine or subvert the political order of other States") (emphasis added); Convention on Duties and Rights of States in the Event of Civil Strife, 134 L.N.T.S. 45, entered into force May 21, 1929 (Inter-American treaty forbidding "the traffic in arms and war material, except when intended for the Government, while the belligerency of the rebels has not been recognized, in which latter case the rules of neutrality shall be applied"); Institut de Droit International [IDI], *Resolution: The Principle of Non-Intervention in Civil Wars* (Aug. 14 1975), <https://perma.cc/4NN3-2RNK>.

²⁸ See Gregory H. Fox & Brad R. Roth, *Democracy and International Law*, 27 REV. INT'L STUDIES 327, 335-38 (2001).

III. THREE LEGITIMATING FUNCTIONS OF POLITICAL PARTICIPATION

The relationship of political participation to legitimacy is typically associated with the word “democracy,” but this association lends itself to confusion, in part because the question of legitimacy arises from a variety of vantage points. The international system looks to participatory mechanisms to identify an institutional structure that can be designated as exercising a state’s legal capacities. Domestic constituencies—especially those sufficiently efficacious that their approval or acquiescence is indispensable to social peace—draw on participatory mechanisms as a component of a multi-faceted accord on the terms of local public order. Normative evaluators look to participatory mechanisms as evidence of political equality sufficient to justify attributing to the citizenry as the whole the resulting governance decisions. One can thus identify three distinct categories of legitimation to which participatory mechanisms relate: (a) popular sovereignty; (b) constitutionalism; and (c) substantive democracy.

A. Popular Sovereignty

As discussed above, since sovereign prerogative in the international order belongs in principle to the territorially bounded political community, a governmental apparatus’s capacity to exercise such prerogative must notionally be traceable to popular will. In the U.N. General Assembly’s formulation, “independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples” are those “possessed of a government representing the whole people belonging to the territory without distinction.”²⁹ Whereas the previously prevalent ideological pluralism led in most circumstances to an irrebuttable presumption in favor of any regime achieving widespread popular acquiescence without inadmissible foreign interference—“effective control through internal processes”—the post-Cold War transformation afforded the international community the tools to displace a *de facto* government perceived to have been unambiguously repudiated at the ballot box.

Argumentation along these lines had been overwhelmingly rejected as late as the December 1989 U.S. invasion of Panama,³⁰ where an ostensibly elected but not seated government purported to authorize a foreign military operation to install it by force. But less than two years later, the international community denied legal standing—not merely diplomatic courtesies—to the perpetrators of a *coup d’état* against a Haitian government that had been overwhelmingly elected in an internationally brokered electoral process, and subsequently authorized (by

²⁹ Friendly Relations Declaration, *supra* note 22.

³⁰ G.A. Res. 44/240 (Dec. 29, 1989) (75-20-40) (characterizing the U.S. invasion of Panama as “a flagrant violation of international law”).

Security Council resolution) the use of force to restore the elected government.³¹ A similar pattern followed in 1997–98 in Sierra Leone, where the Economic Community of West African States (ECOWAS), acting at the behest of a deposed government similarly traceable to an internationally supervised election, took military action against a demonstrably unpopular coup regime that the international community had refused to acknowledge.³² Although each of these cases represented the flouting of both an internationally brokered solution and a landslide electoral mandate by notoriously unpopular and brutal spoilers, thereby arguably rendering the electoral outcome *per se* less pivotal, defiance of an electoral outcome could now plausibly be asserted as a legal basis for an authoritative finding of governmental illegitimacy.

To these now can be added the cases of Côte d'Ivoire in 2010–11 and The Gambia in 2016–17. The Côte d'Ivoire case again involved the flouting of an electoral mandate in breach of an internationally brokered solution to internal conflict, but unlike in the earlier cases, the tally revealed a far more closely divided citizenry (a runoff margin of 54% to 46%), with geographically concentrated support for the rival candidates and a complex history of cleavages and recriminations.³³ The international response to the Gambian crisis relied even more heavily on the electoral outcome, even if colored by the vanquished long-time incumbent's reputation for corruption. On the basis of the challenger's plurality of less than four percent (43.3% to 39.6%)³⁴ in a far more ordinary election, international organizations recognized his authority. With tacit U.N. approval,³⁵ Senegalese troops crossed the border in service of an ECOWAS mandate to remove the recalcitrant incumbent, prompting the incumbent to flee.

³¹ S.C. Res. 940 (July 31, 1994) (characterizing the authorization of force as “an exceptional response” to the “extraordinary nature” and “unique character of the present situation”).

³² See S.C. Res. 1132 (Oct. 8, 1997) (unanimous vote on Sierra Leone arms and oil embargo); UN Doc. S/PRST/1998/5 (Security Council Presidential Statement welcoming the removal of the Sierra Leonean junta); S.C. Res. 1162 (Apr. 17, 1998) (commending ECOWAS after the fact for its role in the Sierra Leonean transition).

³³ See, e.g., Yejoon Rim, *Two Governments and One Legitimacy: International Responses to the Post-Election Crisis in Côte d'Ivoire*, 25 LEIDEN J. INT'L L. 683 (2012); see also S.C. Res. 1975 (Mar. 30, 2011) (“Acting under Chapter VII . . . Urges all the Ivorian parties and other stakeholders to respect the will of the people and the election of Alassane Dramane Ouattara as President of Côte d'Ivoire, as recognized by ECOWAS, the African Union and the rest of the international community.”).

³⁴ *Gambia Poll Winner Adama Barrow Says Jammeh Should Not Seek Asylum*, BBC (Jan. 13, 2017), <https://perma.cc/3TSM-EN28>.

³⁵ See S.C. Res. 2337 (Jan. 19, 2017) (endorsing regional organizations' ultimatums and invoking the African Charter on Democracy, Elections and Governance (ACDEG), though not expressly referring to the organizations' threat of force). Article 23 of the ACDEG asserts that “illegal means of accessing or maintaining power constitute an unconstitutional change of government and shall draw appropriate sanctions by the Union.” African Union [AU], African Charter on Democracy, Elections, and Governance art. 23 (2012), <https://perma.cc/CR8Q-9M5T>. The Charter takes a hard line against unconstitutional changes, including a threat of international criminal prosecution,

These cases thus provide increased support for the proposition that, at least where no countervailing political factors are present, the international community may confer legal standing to represent the state on the political faction in possession of an electoral mandate, even where that faction has been locally denied or ousted from the exercise of effective control.

Nonetheless, these four overrides of the non-intervention norm remain exceptional. In most cases of coups against elected governments, the pressure brought to bear by regional organizations remains beneath the threshold of presumptively prohibited interference, and in significant cases (e.g., Egypt in 2013, Ukraine in 2014, and Thailand in 2014), the forcible overthrow of elected governments has been internationally accepted or even welcomed. These outcomes speak more to the deterioration of the prior legal criterion of “effective control through internal processes” than to the establishment of a new legal criterion of electoral legitimation.

B. Constitutionalism

Ironically, the use of voting outcomes to resolve popular sovereignty controversies gives elections precisely the plebiscitary character that constitutional processes everywhere seek to avoid. It is only where the stakes of electoral contestation are sufficiently low that constituencies regard as unproblematic the use of a one-person, one-vote formula as the crucible of the legitimate exercise of governmental power. The antecedent conditions of relatively low-stakes electoral competition are both substantive and procedural safeguards to the perceived vital interests of the various constituencies—or at least, of those constituencies sufficiently efficacious to endanger by their defection the stability of the political order.

The more that societies are beset by ethno-national, socioeconomic, or other forms of polarization, the less able they are to resolve questions of legitimate authority by simple majority vote. Indeed, some societies face the prospect of predatory majoritarianism, where the losing side may be stripped of all influence over and all protection from decisions taken in the name of the collectivity, a condition widely recognized to justify taking up arms in defense of vital interests.

Constitutional orders in sharply divided societies frequently counter the threat of predatory majoritarianism by instituting consociational formulas that fragment governmental authority and require cross-cutting concurrence for the enactment of measures that specially affect discrete sectors of the political

but it makes no mention of the use of force. Moreover, The Gambia, along with almost half of the 55 AU member states, had yet to ratify the instrument. See *List of Countries Which Have Signed, Ratified/Acceded to the African Charter on Democracy, Elections, and Governance*, AU (June 15, 2017), <https://perma.cc/74TD-ZZL7>.

community.³⁶ Independent courts are authorized and reliably staffed to strike down infringements of guaranteed rights,³⁷ whether of a civil, political, economic, social, or cultural nature, that may be held by individuals or groups. Regulatory apparatuses (especially those supervising elections and specifying apportionments of representatives) are elaborately designed to be insulated from partisan influences. What matters here is not the objective fairness of any of these formulas, but the effectiveness of such formulas in persuading potent constituencies on the losing side of electoral contests to accept the outcome and to await the next scheduled election, rather than to seek to disrupt or to overthrow the existing order.

Where no framework for the legitimate exercise of power is broadly acknowledged, or where a once-effective framework begins to fail—perhaps as a result of changing stakes or of once-safely-neglected constituencies acquiring potency—unmediated social conflict ensues. It becomes fetishistic to accuse those resisting or disrupting the existing order of flouting the written constitution, because that constitution no longer functions as the touchstone of legitimate authority. Accordingly, for external actors to take sides in internal conflicts on the basis of the moribund constitution's dictates would be arbitrary, given that particular constitutional settlements have only situational rather than intrinsic relevance to legitimacy.

C. Substantive Democracy

Popular participation relates most directly to political morality in functioning as a component of what is referred to, often rather unreflectively, as “democracy.” Although political scientists have frequently sought to describe democracy in non-moralistic terms, so as to isolate variables that can be empirically measured,³⁸

³⁶ See Arend Lijphart, *Consociational Democracy*, 21 *WORLD POL.* 207 (1969); see also CHRISTINE BELL, ON THE LAW OF PEACE: PEACE AGREEMENTS AND THE LEX PACIFICATORIA 211 (2008) (“In the move from majoritarian voting mechanisms, consociationalism requires a notion of ‘effective participation’ rather than numerical ‘representation’ as the better measure of democratic legitimacy.”); John Nagle & Mary-Alice C. Clancy, *Constructing a Shared Public Identity in Ethnationally Divided Societies: Comparing Consociational and Transformationist Perspectives*, 18 *NATIONS & NATIONALISM* 78, 94 n.3 (2012) (“Consociational institutions normally consist of four key elements: a grand coalition representing the main (not all) segments of society; proportionality in representation, public employment and expenditure; community autonomy on issues deemed to be vital; and constitutional vetoes for minorities.”).

³⁷ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST* 73–104 (1980) (describing the need, in an electoral democracy based on interest-group competition, for judicial review to protect uncoalitionable “discrete and insular minorities” from political market failure).

³⁸ Samuel Huntington, for example, sought to reduce democracy to procedural criteria on the ground that teleological definitions—ideas about popular will and the common good—render democratic performance inherently unmeasurable by social science techniques. See SAMUEL HUNTINGTON, *THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY* 5–13 (1991). Putting aside the question of whether such a use of the term can ever appropriately be reconciled with the term’s

the assertion of democracy as an object of transboundary protection does not admit of so stripped-down a definition. To characterize a governmental system as “democratic” in this context is to claim for it a maximal legitimacy, sufficient to demarcate the moral high ground in internal political conflicts.

The difficulty is that global ideological pluralism does not furnish an environment conducive to accord on the content of democracy, understood as a moral norm. Democracy’s perceived virtue derives from substantive objectives that the associated procedural standards are designed to further, and those objectives are subject to contestation. In short, we do know what democracy *is* unless we know what it is *for*, and there will inevitably be sharply conflicting views about what it is for, especially as applied to divided societies.

Where procedurally sound elections produce the “wrong” outcome, even stalwart democracy advocates start to question their legitimacy-conferring status.³⁹ The tendency reflects, not hypocrisy, but the underlying predication of loyalty to democratic forms on those forms’ presumed tendency to further substantive goals of a democratic society.⁴⁰ Acute or chronic failure to achieve that substance predictably induces defection from those forms. Although the contingent nature of loyalty to procedural outputs may be morally justifiable, it reveals a source of unmediated social conflict, as each side may adhere vehemently to a set of “democratic” objectives. Moreover, external actors may tend (even unconsciously) to interpret democratic objectives as freedom and power for those members of a foreign society who most resemble themselves, and thus, quite ingenuously, to superimpose parochial interests in the name of universal values.

The substance of democracy is associated, above all, with political equality. But political equality is open to radically different interpretations, especially as applied to contexts where constituencies are differently situated, as in cases of pronounced socioeconomic stratification or prevalent racial, ethnic, linguistic, or cultural divisions. Relative economic and social equality may plausibly be regarded

role in the history of political thought or in popular morality, it needs to be recognized that Huntington was consciously seeking to strip the term of its ordinary normative implications, and to identify democracy as, at most, one of many political virtues. *Id.* at 10. The assertion of an international right to democratic governance, however, necessarily restores the normative baggage that Huntington and other political scientists have sought to remove.

³⁹ Ready examples are reactions of well-reputed “democratic” officials and commentators to such events as the Algerian coup to preempt the electoral victory of illiberal Islamists in 1992, Boris Yeltsin’s unconstitutional dispersal of the Russian legislature in 1993, the Dayton High Commissioner’s removal of Republika Srpska’s elected ethno-nationalist President in 1999, the Hamas electoral victory in the Occupied Palestinian Territories in 2006, and the Egyptian coup against the elected Islamist government of Mohamed Morsi in 2013, to name but a few.

⁴⁰ For one plausible elaboration of the substance of democracy, see Ronald Dworkin, *The Moral Reading and the Majoritarian Premise*, in *DELIBERATIVE DEMOCRACY AND HUMAN RIGHTS* 81, 103 (Harold Hongju Koh & Ronald Slye eds., 1999) (arguing that in a democratic society, each member must have “a part in any collective decision, a stake in it, and independence from it,” and the decisions’ benefits and burdens must be distributed “with equal concern for all”).

a *sine qua non* of political equality, and as requiring in extreme cases irregular measures to displace entrenched sources of domination. A majority group's hegemony may plausibly require remedial reallocations of political rights at odds with one-person, one-vote formulas and with conventional interpretations of freedom of expression and association. Or not. And so on.

It is for such reasons that democracy is properly understood to be an essentially contested concept.⁴¹ This observation does not preclude the possibility of an overlapping consensus about what democracy *is not* (any more than the existence of twilight refutes the distinction between day and night). However, it is crucial not to underestimate the potential for even well-intentioned (let alone mischievous) external actors to apply "democratic" standards in a parochial (let alone manipulative) manner, imposing arbitrary solutions on local stakeholders without having to live with, or to be accountable for, the outcomes.

IV. REVISITING THE GOAL OF DEMOCRATIC ENTRENCHMENT IN A POST-POST-COLD WAR WORLD

After roughly a generation of optimism about a convergence of interests and values in the global arena generally, and about an emerging consensus on the criteria of governmental legitimacy in particular, recent years have seen both a resurgence of fragmentation and a so-called "democratic recession." The implications of these trends for future democracy-promoting conduct of international organizations are unclear. At minimum, Security Council authorizations for forcible intervention in the internal affairs of states, such as in Côte d'Ivoire (to implement an electoral outcome)⁴² and Libya (to forestall humanitarian catastrophe)⁴³ in 2011, seem unlikely to be repeated in the present geopolitical context. Moreover, notwithstanding rhetorical flourishes that may seem to indicate otherwise, a greater salience of security issues tends, as a matter of both situational logic and historical practice, to lead a "democratic" bloc to be less selective about its allies and less demanding about conformity to standards of internal conduct, especially when such conformity is generally on the wane.

At any rate, notwithstanding some indulgence of "pro-democratic" intervention as noted above, the U.N. Charter-based order has consistently prioritized peace and cooperation among territorially delimited political communities whose governing arrangements reflect sharply differing interests and values. Territorial inviolability and non-intervention in internal affairs are foundations on which productive interactions can be built. However true it may be that, as David Mitrany famously put it, "the problem of our time is not how to

⁴¹ See, e.g., TOM GINSBURG, *supra* note 6, at 20.

⁴² S.C. Res. 1975 (Mar. 30, 2011).

⁴³ S.C. Res. 1973 (Mar. 17, 2011).

keep nations peacefully apart but how to bring them actively together,”⁴⁴ keeping nations peacefully apart is an indispensable first step in bringing them actively together. In particular, weaker states need to be reassured that binding themselves to cooperative arrangements, including obligations as to internal practices, is not taken to vitiate their fundamental inviolabilities.

Reaffirmation of the non-intervention norm, properly understood, does not preclude most measures actually undertaken (e.g., suspension of a state from a regional organization, withdrawal of diplomatic representatives, curtailment of economic assistance programs) to reinforce democratic norms. Recognizing as a government an apparatus not in effective control, for purposes of allowing it to consent on a state’s behalf to otherwise-inadmissible impositions, is a very rare practice in any event, and even more rarely takes place solely in consideration of a breached electoral mandate. Moreover, the marked selectivity in proposals for taking such extraordinary action (e.g., as to Venezuela, but not as to Egypt) raises questions as to whether such proposals reflect advocacy of a generally applicable standard or merely an effort to license a discretionary cross-border exercise of power.

Moreover, electoral outcomes are not unproblematic guides to legitimacy—a point that becomes more manifest as politics in traditionally stable constitutional democracies become more fractious. For substantial sectors of a society, the stakes of politics can become too high for even a temporary loss to be an acceptable outcome. Electoral majoritarianism has only a contingent relationship to political equality: elections can coexist with reserves of structural and institutional power placed out of reach of electoral accountability; voters may be permitted to choose among options presented to them, without necessarily having meaningful input into the range of options presented; one-person, one-vote is insensitive to the variations of intensity, both objective and subjective, of different sectors’ interest in consequent policy decisions; and differentially situated groups may lack the antecedent guarantees of minimum conditions that would justify their loyalty to majority decisions, as being on the losing end of a vote may mean an end to all influence on matters of vital interest. A given existing constitution—a negotiated *modus vivendi* among historical actors rather than an instrument of universal justice—may establish conditions sufficient to reconcile all efficacious sectors in a particular era, but not in a subsequent era when sectors newly emerge or become newly efficacious, be their grievances objectively warranted or unwarranted. In short, the quest for an international legal formula of governmental legitimacy is itself a flawed project.

None of this is to say that governmental illegitimacy cannot be perceived in common across a wide range of worldviews. Some apparatuses holding effective control are manifestly repudiated by the communities in whose name they seek to

⁴⁴ DAVID MITRANY, *A WORKING PEACE SYSTEM* 28 (1966).

rule and can properly be denied standing to exercise a state's international legal capacities. But efforts to use international law to entrench a particular solution to the ever-contested question of legitimate governance were dubious from the start and may end up being remembered as an artifact of an exuberant era gone by.