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THE GLOBAL COMMUNITY’S ROLE IN PROMOTING THE RIGHT TO DEMOCRATIC GOVERNANCE AND FREE CHOICE IN THE THIRD WORLD

Ndiva Kofele-Kale*

I. INTRODUCTION

This inquiry seeks to provide answers to two nagging questions on the responsibility of the community of nations in the promotion and defense of the universalist aspirations of the International Bill of Rights. When, it asks, is it right for the global community to intervene in the internal affairs of sovereign states to stop human rights abuses? And, as a follow up, should such intervention have as its ultimate goal that of replacing the government responsible for these violations? These questions have been provoked in part by the current debate over the legality and legitimacy of the use of force to effect a change in regime. But they are also in response to a perceived reluctance by the community of nations to intervene in the internal affairs of states to halt domestic violations of the right to democratic governance. Both the legal and normative factors that have contributed to this perceived unwillingness to take affirmative steps to expand the values of democratic governance beyond their Euro-American confines1 will be explored in this essay.

The obligation to intervene to protect the democratic entitlement puts in conflict two competing community expectations: on the one hand, the expectation that human rights, including the right to democratic governance, will be universally promoted and protected pursuant to the United

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Nations Charter (the Charter) article 1(3)\(^2\) and, on the other hand, the conviction that member states are free to conduct their domestic affairs without any outside interference. This doctrine of non-intervention is to international law what the Hippocratic Oath is to medicine. Entrenched in articles 2(4) and 2(7) of the Charter, this first commandment of international law prohibits states from interfering with the sovereignty, territorial integrity, and political independence of other states.\(^3\) The only derogation allowed is by way of a Security Council authorized collective action in response to breaches of international law that threaten international peace and security.\(^4\)

The interplay between articles 1(2), 2(4), 2(7), and 39 gives rise to a number of questions. First, when does the doctrine of non-intervention yield to the international responsibility to promote and encourage respect for human rights, specifically the right to democratic governance? Second, at what point do domestic human rights abuses pose a threat to international peace, justifying a response from the community of nations that could ultimately lead to a regime change? Should one of these rights be preserved at the expense of the other? If so, which one? Following current practice, the answer to the first question is clear: non-intervention will yield only to violations of human rights that threaten international peace and security. As to the second question, that is, at what point violations of the right to democratic governance rise to the level of a threat to global peace and security, the answer hinges on the interpretation of the "threat to [international] peace and security" clause of article 39 of the Charter.\(^5\) This author of this paper would like to see this order reversed, so that where fundamental rights are in danger, the doctrine of non-intervention in the domestic affairs of sovereign states should yield to a global community obligation to intervene in order to protect these rights. This would require a reinterpretation of the "threat to the peace" clause in article 39. As will be demonstrated, the traditional interpretation of the "threat to the peace" clause has provided the community of nations with a ready and convenient excuse to shirk its duty to check domestic violations of the democratic entitlement in Sub-Saharan Africa (SSA). A change in this approach is now necessary as the assaults on the right to democratic choice in this region of the world are quickly becoming the norm rather than the exception.

A. Some Definitions

By the right to "democratic governance," I mean the freedom to choose one's leaders through a democratic process: the right to change a government through free, fair, and transparent elections, with universal suffrage and secret ballot. Some have called this the democratic entitle-
ment; however, in this essay, it will be used as a synonym for democratic governance. I view the electoral process as the only way a people can express its will and on which the legitimacy of a government is based.

“Global community” refers to the community of nations or, more precisely, the members of the United Nations (U.N.). By “global community responsibility,” I mean the legal obligation of the global community in promoting and defending the right to democratic governance, even if this requires the use of force, where necessary, to effect a regime change.6

In the context of this inquiry, regime change will mean change in one of two directions: either (1) to restore constitutional and democratic order in the wake of the overthrow of a democratically elected government by a military coup d’etat,7 or (2) to remove an incumbent regime that is blocking a democratically elected successor from taking over.8 Under this scheme, countries ripe for regime change are limited to those where the opportunity to exercise the right of choice is offered and accepted only to have it brusquely taken back. The focus of this paper is SSA where “[a] decade of democratization has resulted in disappointing results and unfulfilled expectations, frustrating the democratic promise of

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6. That is, interventionist action along a wide continuum from the most pacific to the most coercive. At one end of the spectrum is diplomatic isolation, denial of visa privileges to high ranking state officials and their relatives, withdrawal of air landing rights, denying an offending state loans, denying a country most favored nation (MFN) status, removing it from the Generalized System of Preferences (GSP), cutting off foreign aid and freezing assets, and imposing trade embargo (exempting humanitarian supplies). At the other end of the continuum is the use of coercive measures including military intervention to effect change. See U.N. Charter arts. 41-42.


8. In Algeria, the leaders and supporters of the Islamic fundamentalist party, le Front islamique du salut, not only watched as their imminent victory at the polls was aborted by the military in December 1991 but also had to contend with the outlawing of their party from the Algerian political scene. In the 1993 Nigerian presidential elections, the declared winner, Moshood Abiola, was not allowed to take office by the military government headed by General Ibrahim Babangida; instead, Abiola was sent to jail where he subsequently died. Later, in the March 2002 Zimbabwe presidential election, the incumbent President, Robert Mugabe, used the control he enjoyed over the electoral system, the courts, media, army, and police to prevent Zimbabwean voters in general and supporters of his main rival, Morgan Tsvangirai of the Movement for Democratic Change, from exercising their right to elect a president of their choice. See REPORT OF THE SOUTH AFRICAN PARLIAMENTARY OBSERVER MISSION: ZIMBABWE PRESIDENTIAL ELECTION, Mar. 9-11, 2002, available at http://www.gov.za/issues/zimreport.html.
peace and development." One might also add that it is also in this region where global community response to domestic abuses to the democratic entitlement is most needed but where, regrettably, its absence is so glaringly noticeable.

If we accept (and I do) the indivisibility and universality of human rights, then the right to democratic governance is an entitlement available to the peoples of Africa as it is to the peoples of Europe and the United States. If so, then this fundamental right is deserving of global community protection. In fact, the international community has an affirmative duty to intervene to restore or install democratically elected government for a couple of reasons. First, international law places the primary responsibility for enforcing internationally accepted human rights norms on the community of nations, which was freely assumed by the global community when it adopted the International Bill of Rights several decades ago. As a consequence, failure to enforce respect for the democratic entitlement runs the risk of reducing it to a right without a legal remedy. The Roman law maxim, *ubi jus ibi remedium* (where there is a legal right, there is also a legal remedy)\(^{10}\) applies. Second, the universality of human rights\(^ {11} \) and the elevation of a select few to the level of *jus cogens*\(^ {12} \) have imposed on the community of nations an obligation *erga omnes*\(^ {13} \) to re-

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11. The Universal Declaration of Human Rights which was adopted by the U.N. General Assembly in 1948 (by an affirmative vote of 49 states, with no state voting against and 8 states abstaining) proclaims in its preamble that this Declaration is intended to serve as the “common standard of achievement for all peoples and all nations” and exhorts “every individual and every organ of society . . . [to] strive by teaching and education to promote respect for [the rights and freedoms contained in the Declaration] and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.” Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948) (emphasis added).

12. Article 53 of the Vienna Convention on the Law of Treaties defines *jus cogens* as “a peremptory norm of general international law . . . accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” See Vienna Convention on the Law of Treaties art. 53, Apr. 24, 1970, 1155 U.N.T.S. 331 (entered into force, Jan. 27, 1980 but not ratified by the United States) [hereinafter Vienna Convention]. Examples of *jus cogens* norms would include: genocide, torture, crimes against humanity, war crimes, the doctrine of *pacta sunt servanda*, and the right to self-determination.

13. The concept of obligations *erga omnes* (an obligation towards all) was framed by the ICJ by way of an *obiter dictum* in its judgment in the *Barcelona Traction Case*. The Court wrote that “an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, *all States can be held to have a legal interest in their protection; they are obligations erga omnes.*” Barcelona Traction, Light and Power Co., Ltd. (Belg.
spond affirmatively to violations of these rights wherever and whenever they occur.\textsuperscript{14}

It will be argued in this paper that the global community has been extremely reluctant to intervene to halt domestic violations of the right to democratic governance. This reluctance can be explained in part by the narrow definition given to the "threat to the peace and security" clause of article 39 of the Charter.\textsuperscript{15} It is the thesis of this paper that the international legal definition of what constitutes a threat to international peace should be expanded, for several reasons. First, the narrow definition reflects a Eurocentric historical paradigm that defined threats to international peace as only those that are global in scope to the exclusion of threats that are localized in nature. Since the Charter was adopted fifty years ago, much has changed to justify an expansion of international threats to peace to include both threats with worldwide ramifications as well as those that are basically local but with far-reaching consequences. Second, any treaty that has been around for as long as the Charter is affected by the passage of time, which can "change the language and meaning of words."\textsuperscript{16} As a consequence, ascribing a meaning to words in that instrument will depend on whether the interpretation is based on the time of the conclusion or the time the instrument is being interpreted.\textsuperscript{17}

\section*{B. Objectives of this Study}

With the preceding as backdrop, I intend to proceed with this inquiry in two stages: first, to situate the right to democratic choice/governance in international law and to make a case for global community protection of that right; next, to explore the doctrinal problems associated with construing the "threat to [international] peace" clause in articles 1 and 39 of the Charter, the yardstick against which decisions on whether the global community can intervene or not in the domestic affairs of states are measured; and finally, to discuss briefly some normative considerations that have provided a convenient cover for a global community that has been reluctant to intervene to restore and install democratic governments.

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\textsuperscript{15} U.N. Charter art. 13.
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\textsuperscript{17} \textit{Id}.
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II. THE RIGHT TO DEMOCRATIC CHOICE
IN INTERNATIONAL LAW

The right of a people to elect a government of their choice is a fundamental right recognized in numerous international and regional instruments. The Universal Declaration of Human Rights, the fountain of all subsequent human rights instruments, provides:

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 universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.18

Article 25 of the International Covenant on Civil and Political Rights also recognizes the importance of elections as the means for building a democratic government:

Every citizen shall have the right and the opportunity . . . (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.19

With the exception of the European Convention on Human Rights,20 virtually all the extant regional human rights instruments provide for the right to free and fair elections as the sine qua non of participatory democracy. Article XX of the American Declaration of the Rights and Duties of Man states: “Every person having legal capacity is entitled to participate in the government of his country, directly or through his representatives, and to take part in popular elections, which shall be by secret ballot, and shall be honest, periodic and free.”21

Similar language is contained in the 1969 American Convention on Human Rights which provides in its article 23: “Every citizen shall enjoy the [right] . . . to vote and be elected in genuine periodic elections, which shall be by universal and equal suffrage and by secret ballot that guarantees the free expression of the will of the voters.”22 And the more recent African Charter on Human and Peoples’ Rights recognizes the right of every citizen “to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law,”23 while providing that “[a]ll peoples shall

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freely determine their political status... according to the policy they have freely chosen.”

International commitment to democratic governance has also been expressed in General Assembly Resolution 45/150, which strongly affirms the conviction of U.N. members:

[T]hat periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, embracing political, economic, social and cultural rights.

A. **Ingredients of Free, Fair, and Transparent Elections**

In addition to the articulation of principles, there is also wide agreement on the criteria that define a free and fair election. These have been summarized by Gregory Fox as: (1) periodic elections at reasonable intervals; (2) a secret ballot; (3) honesty in vote tabulation; (4) universal suffrage, with minor exceptions permitted—minors, prisoners, the mentally ill, and the like; (5) an absence of discrimination against voters and candidates; (6) freedom to organize and join political parties, which must be given equal access to the ballot, and an equal opportunity to campaign; (7) to the extent the government controls the media, the right of all parties to present their views through the major media outlets; and (8) supervision of the election by an independent council or commission not tied to any party, faction, or individual, whose impartiality is insured in both law and practice.

From the foregoing discussion, it is submitted that treaty law recognizes free, fair, and transparent elections with universal suffrage and secret balloting as the means by which a people can express its will and on which the legitimacy of a government is based. It is imperative therefore that means be made available to the people through which they can vindicate this legal right if it is to mean anything—ubi jus ibi remedium. This rule was framed in the context of fundamental rights in *Marbury v. Madison*:

The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. . . . “[I]t is a general and indisputable rule, that where there is a legal right, there is also a legal remedy by suit or action at law, whenever that right is invaded.”

24. *Id.*, art. 20, § 1.
It is to these international human rights instruments that we must look for the means to enforce violations of human rights norms. These instruments uniformly place the primary responsibility for enforcing internationally accepted human rights norms on the community of nations. It follows therefore that this community cannot routinely ignore widespread and repeated violations of the peoples' right to elect leaders of their choice in free elections without running the risk of diluting this treaty-protected right and transforming it into a legal right without a legal remedy. Unfortunately, contemporary discussion of this right has tended to focus on situations where there has been a "usurpation of the sovereign prerogative of a population to be governed by those it has democratically elected," meaning forcible change of government. As a result, calls for democratic restoration, that is, international response to violations of the right to democracy, have been limited to measures designed to restore democratically elected governments that fall victim to military coups. On the other hand, efforts directed at the removal of repressive and authoritarian governments have been few and far between.

W. Michael Reisman has rightly observed that "[m]ilitary coups are terrible violations of the political rights of all the members of the collectivity, and they invariably bring in their wake the violation of all the other rights," Indeed, the very idea of military participation in civil politics, leaving aside for the moment how this involvement comes about, offends both the letter and spirit of democratic governance. When this involvement is secured through the violent overthrow of a popularly elected government, it undermines the participatory rights that constitute the democratic prerogative.

28. The Members of the United Nations have pledged themselves to jointly and severally take action to promote the "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion." U.N. Charter arts. 55, 56.

29. See Lois E. Fielding, Taking the Next Step in the Development of New Human Rights: The Emerging Right of Humanitarian Assistance to Restore Democracy, 5 DUKE J. COMP. & INT'L L. 329, 330 (1995) (arguing that the overthrow of a democratic government can constitute a threat to peace and security under article 39 of the Charter and that support for this emerging right of humanitarian assistance to restore democracy is found in various U.N. documents, declarations, and resolutions).

30. Examples would include the U.S. intervention in Haiti under U.N. authorization or the ECOWAS (Economic Community for West Africa) interventions in Liberia and Sierra Leone. See e.g., W. Michael Reisman, Humanitarian Intervention and Fledging Democracies, 18 FORDHAM INT'L L.J. 794, 795 (1995) (support for democratic governments that find themselves imperiled by violent domestic anti-democratic forces). President Tejan Kabbah of Sierra Leone was overthrown in a coup on 25 May 1997, forcing him into exile in neighboring Guinea. Kabbah was eventually helped by the United States, Britain, and the Organization of African States to get his presidency back, but while he was in Guinea, the United States and the United Kingdom paid the expenses of Kabbah's government in exile. See Baffour Ankormah, 'Chuck your bloody constitution in the dustbin,' - Jacques Chirac to Pascal Lissouba, NEW AFRICAN, May 1998, available at http://www.africasia.com/new african/index.php.

The case of Gambia, which came up for review before the African Commission on Human and Peoples’ Rights (the African Commission), is illustrative. In 1994, a military (junta) seized power when it overthrew the Jawara government. Since independence in 1965, The Gambia had always had a plurality of political parties participating in elections but this tradition was brought to an abrupt halt by the military coup. In a pattern that has been typical of military takeovers, the junta abolished the Bill of Rights contained in the 1970 Gambia Constitution; ousted the competence of the courts to examine or question the validity of decrees pronounced by the junta; banned political parties and Ministers of the former civilian government from taking part in any political activity; and placed restrictions on freedom of expression, movement, and religion on the civilian population. Charging the junta with “hijacking” the democratic process and for violating the Gambian peoples’ right to “self-determination,” the ousted President Jawara cited the military regime before the African Commission in the matter of Sir Dawda Jawara v. The Gambia. In one its boldest decisions to date, made all the bolder because the Commission is headquartered in Banjul in The Gambia, the Commission found the military government in violation of the right of Gambian people to exercise their right to democratic governance. It is true, the Commission observed, that “the military regime came to power by force, albeit, peacefully. This was not through the will of the people who have known only the ballot box since independence, as a means of choosing their political leaders.” This decision reaffirmed the importance of the right to choose.

While the manner in which that right was withdrawn from the Gambian people merits the condemnation it received from the African Commission, there are other equally insidious means for violating popular sovereignty that do not carry the high drama of a coup d’etat, nor for that matter, arrest for long the attention of the global community. These include the deliberate and systematic violation by incumbent regimes of the agreed rules of the game for electing a democratic government. The democratic entitlement implies the right of the people to be able to remove repressive and authoritarian governments through constitutional means. Free and fair elections are inextricably linked to the enjoyment of the right to democratic governance. Denial of this right was the central issue in Sir Dawda Jawara v. The Gambia. The banning of political parties and the obstructions placed on the peoples’ right to choose their government are no different when promoted by a military regime or an authoritarian civilian government. Nothing changes the fact that in either type of government, flawed elections or no elections at all have the same

32. *Sir Dawda Jawara, supra* note 7, at ¶ 72
33. Id. ¶ 3.
34. Id. ¶ 72.
35. Id. ¶ 73
practical effect on the civilian populations. A compromised electoral sys-
tem contributes to the obstruction of legitimate democracy in much the
same way as a violent overthrow of a popularly elected government.
Both deserve the same treatment from the community of nations.

B. EXTERNAL INTERVENTION TO PROTECT THE
RIGHT TO ELECT A GOVERNMENT

The right to vote out a government that is unresponsive, and/or to vote
in one that is responsive, to the peoples' democratic aspirations is a fun-
damental right entitled to global community protection. Some have ar-
gued that the right to pro-democratic intervention has not yet attained
the status of \textit{lex lata},\textsuperscript{38} while others submit that it at least qualifies as \textit{de lege feranda}.	extsuperscript{39} Some believe that this duty to promote democratic gov-
ernance, to the extent that it exists at all, should be advanced through
collective action bearing the imprimatur of the U.N. Security Council.\textsuperscript{40}
Truly, it does not really matter what vehicle moves this right forward,
unilateral, bilateral, or multilateral, because: (1) not each case of abuse of
the democratic entitlement will invite the same type of external response,
and (2) the effectiveness and legitimacy of these responses may depend
on who is doing what and where.\textsuperscript{41}

\begin{footnotes}
\item[38] Tom J. Farer, \textit{An Inquiry into the Legitimacy of Humanitarian Intervention, in Law and
Force in the New International Order} 189 (Lori Fisler Damrosch &
David J. Scheffer eds., 1991). \textit{See also} Oscar Schachter, \textit{The Legality of Pro-Demo-
cratic Invasion}, 78 AM. J. INT'L L. 645, 649-50 (1984) (who argues that pro-demo-
cratic invasions must be weighed against the dangerous consequences of
legitimizing armed attacks against peaceful governments).
\item[39] \textit{See e.g.}, Thomas M. Franck, \textit{Intervention Against Illegitimate Regimes, in Law and
Force in the New International Order} 159, 164 (Lori Fisler Damrosch &
David J. Scheffer eds., 1991) (arguing that intervention against gross domestic
human rights abuses already has become relatively normative in the system. What
is new is the idea that the system would include among those gross abuses trigger-
ing international concern those instances where governments deny their own
populations the right to participate democratically in the process of governance).
\textit{See also} Thomas M. Franck, \textit{The Emerging Right to Democratic Governance}, 86 AM. J. INT'L L. 46 (1992) (submitting that representative democracy is gradually
evolving from moral prescription to an international legal obligation based in part
on customary law and in part on the collective interpretation of treaties); Ibrahim
J. Gassama, \textit{Safeguarding the Democratic Entitlement: A Proposal for United Na-
tions Involvement in National Politics}, 30 CORNELL INT'L J. 287 (1997); Fielding,
supra note 29; Fox, supra note 26, at 540-41.
\item[40] Fielding, supra note 29, at 330. Lois Fielding takes the contrary view arguing that
the right of humanitarian assistance to restore democracy supports a unilateral
right of humanitarian intervention when the United Nations is not in a position to
act.
\item[41] For instance, a unilateral intervention by France in an English-speaking West Afri-
can State may be resented while a similar response from the Nordic countries may
provoke the opposite reaction. It is therefore important that the discourse on the
relative merits of unilateralism and multilateralism should focus on the approach
which, in a given context, can successfully advance this fundamental entitlement to
democracy. If in a given situation of domestic violation of the right to free choice,
a resolution which favors the right holders is obtained but only through the unilat-
eral involvement of a neighboring state or of a powerful distant one, then unilater-
alism is clearly the appropriate response. Other cases of such violations may merit
a collective response involving a coalition of nations or initiated by such powerful
\end{footnotes}
It has been insisted, and with some justification, that any form of external involvement should be aimed at arresting a situation that threatens international peace and security in conformity with the Charter's prescriptions. Since the Charter's provisions regulating external intervention in the domestic affairs of states represent the common will of the founding members of the U.N., so this argument goes, then this will must be given full effect. In response, this paper submits that, when in 1945 the founding members spoke of threats to the peace and security, they had as their point of reference their long experience with interstate conflicts that produced two major world wars in the space of twenty-five years—the First and Second World Wars.42

The conflicts of our time are, in the main, intrastate in nature though with the potential for grave trans-boundary effects.43 This new genre of disputes occurs with remarkable frequency in regions of the world that were not fully represented, nor whose interests were articulated during the drafting of the Charter. Having now become bona fide members of the U.N., it seems only fair and just that in construing the common will of the parties to the Charter, account should be taken of their realities along with those of the fifty or so mostly Euro-American States that met in San Francisco to create the U.N. To do so would require a dynamic and functional interpretation of the “threat to the peace and security” provisions of the Charter.44 Only through such an approach will it be possible to address domestic human rights abuses that can and do pose a threat to world public order. An uncompromising reliance on the common will of U.N. members, as expressed over a half century ago, in a world that has radically and dramatically changed since that time, works against the progressive development of the law of nations in general and human rights law in particular.

and influential global financial agencies like the Bretton Woods institutions. In the latter instance, the effective multilateral response could well be lending conditions imposed by the International Monetary Fund or the World Bank on the offending state. External response as used here is not limited only to situations involving the use of force but encompasses a wide range of responses on a continuum of varying degrees of intrusion, such as the withdrawal of aid, the suspension of diplomatic relations, economic sanctions, and so on. An external response that is backed by force of the threat of it becomes an option only in the most extreme cases.

42. In the Preamble to the Charter, the peoples of the United Nations unequivocally reaffirm their determination “to save succeeding generations from the scourge of war, which twice in [their] lifetime has brought untold sorrow to mankind.” U.N. Charter pmbl. (emphasis added).

43. David Wippman acknowledges that almost any case of significant internal disorder creates trans-boundary effects “to permit the Council to find a plausible threat to the peace if it wishes to authorize intervention.” But, it does not follow, he argues, “that the Council will utilize its power to authorize intervention with any frequency.” See David Wippman, Defending Democracy Through Foreign Intervention, 19 Hous. J. INT’L L. 659, 673 (1997).

III. THE LEGAL FRAMEWORK FOR EXTERNAL INTERVENTION

A useful starting point for any legal analysis of the right to intervene in the domestic affairs of another state in defense of fundamental human rights is the Charter of the U.N., the constitution of the world and the highest instrument in the international hierarchy of international and domestic documents on human rights. In the wake of the most massive and systematic violations of human rights in modern history, the U.N. was born. The Preamble to the Charter reaffirms “faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women.”

It goes on to declare the determination of the peoples of the U.N. “to promote social progress and better standards of life in larger freedom[s].” Article 1, which speaks to the purposes and principles of the U.N., includes in its paragraph 3, international cooperation “in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.” This principle comes up again in article 55, paragraph (c).

In article 13, paragraph 1, subparagraph (b), human rights are listed among the responsibilities for study and recommendation of the General Assembly and the Economic and Social Council. Article 68 authorizes the Economic and Social Council to set up commissions on human rights while Chapters XI and XII, dealing with non-self-governing territories and the international trusteeship system, also include numerous human rights provisions. Finally in article 56, members pledge to cooperate with the U.N. for the achievement of its human rights goals.

Under this article, the enforcement of human rights is seen as a cooperative effort with members working in concert with the U.N., not unilaterally.

The drafters may have unwittingly set up a clash between the international community’s responsibility to promote and protect human rights and the principle of non-intervention in the internal affairs of member states. Where article 1 of the Charter acknowledges that a fundamental purpose of the U.N. is the promotion and respect for human rights and fundamental freedoms, article 2, paragraphs 4 and 7, make clear that U.N. members must “refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the Purposes of the United Nations,” and:

45. U.N. Charter pmbl.
46. Id.
47. U.N. Charter art. 1, para. 3.
48. Id. art. 55, para. (c).
49. Id. art. 13, para. 1(b).
50. Id. art. 68.
51. Id. art 56.
52. Id.
53. Id. art. 2, para. 4.
Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.\(^5\)

Article 2, paragraphs 4 and 7 reflect the priority given to the principle of state sovereignty by the drafters of the Charter. But the prohibition against external intervention in matters that are domestic in nature does not entirely foreclose such action. Chapter VII of the Charter outlines the limited circumstances under which the U.N. may take action, forcible or non-forcible, against a sovereign nation.\(^5\) The juxtaposition of articles 1(3) and 2(4) give rise to two inter-related questions. First, when does the doctrine of non-intervention yield to the international responsibility to promote and encourage respect for human rights? Second, at what point do domestic human rights abuses pose a threat to international peace to justify a response from the community of nations?

### A. The Doctrine of Non-Intervention

The doctrine of non-intervention is to international law what the Hippocratic Oath is to medicine—first do no harm.\(^5\) Any discussion on external response to domestic human rights abuses must commence with the principle of non-intervention—the norm from which any departure has to be justified. It took a multinational effort spanning five continents to bring an end to the barbarous Nazi regime, so it is not surprising that the drafters of the Charter showed a strong preference for multilateral over unilateral action in defense of the rights enshrined in the Charter.

The authority for collective intervention is granted by articles 39, 41, and 42 of Chapter VII.\(^5\) Article 39 gives the Security Council the general authority to take action when there is a threat to the peace:

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.\(^5\)

Article 41 of Chapter VII governs the use of non-forcible collective measures to ensure compliance with Security Council decisions:

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\(^5\) Id. art. 2, para. 7.

\(^5\) Boutin, supra note 1, at 141.


\(^5\) U.N. Charter arts. 39, 41, 42.

\(^5\) Id. art. 39.
The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.59

Finally, the authority to employ military force is granted in limited circumstances by Chapter VII, article 42:

Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.60

Article 42 is invoked only in response to crisis situations that threaten "international peace and security."61 This language has been used to justify U.N. collective actions in defense of human rights.62

B. The Problem with the Language of Intervention

Strong reservations continue to be registered over the use of the term humanitarian intervention in human rights abuse situations. After an exhaustive study of external reactions to domestic human rights violations, the International Commission on Intervention and State Sovereignty (the Commission)63 came to the conclusion that the expression humanitarian intervention is not particularly helpful in carrying forward the debate for or against the right to intervene and proposed instead the term responsibility to protect.64 The Commission justifies this change in nomenclature

59. Id. art. 41.
60. Id. art. 42.
61. Id.
63. This cross-national independent body was set up in September 2000 by the Canadian Government in response to a statement made by the U.N. Secretary-General challenging the international community to try to build consensus around the basic questions of principle and process with respect to the so-called right to humanitarian intervention. The Commission's mandate was "to promote a comprehensive global debate on the relationship between intervention and state sovereignty." After twelve months of intensive research, worldwide consultations and deliberation, the Commission issued its report. Int'l Comm'n on Intervention and State Sovereignty, About the Commission, Mandate and Organization of the Commission, http://www.iciss.ca/mandate-en.asp (last visited Jan. 26, 2005).
64. ICISS REPORT, supra note 56, at 2.4. The traditional language's preoccupation with the right of humanitarian intervention or the right to intervene was found unhelpful for three reasons:
First, it necessarily focuses attention on the claims, rights and prerogatives of the potentially intervening states much more so than on the urgent needs of the potential beneficiaries of the action. Secondly, by focusing narrowly on the act of intervention, the traditional language does not adequately take into account the need
because it refocuses "attention where it should be most concentrated, on the human needs of those seeking protection or assistance." 65

In a similar vein, in this essay the term responsibility to respond is preferred over the term the right to intervene because the former properly focuses attention where it should be—on those who are on the receiving end of human rights abuses. They are the ones best placed to assess the effectiveness of external responses to their plight. As Jean-Jacques Rousseau is reputed to have observed, the view of the tree from the branches is quite different from its roots. So to the effectiveness of international response to human rights abuses is likely to elicit different reactions from the victims and their external rescuers. While the latter might get bogged down over the legality of their right to intervene, the victims for their part worry about the nature and effectiveness of international responses.

This discussion will treat external responses on a continuum of varying degrees of involvement, with military intervention at one extreme and mere condemnation at the other. 66 U.N. Secretary-General Kofi Annan, has underscored the importance of defining external responses to domestic violations of human rights "as broadly as possible, to include actions along a wide continuum from the most pacific to the most coercive." 67 Responses would include, in ascending order of gravity: diplomatic isolation, denial of visa privileges to high-ranking State officials and their relatives, withdrawing air landing rights, denying it loans, denying MFN status, removing the country from the General System of Preferences, cutting off foreign aid and freezing assets, imposing a trade embargo (exempting humanitarian supplies), and military intervention. 68

IV. THE MEANING OF THE "THREAT TO THE PEACE AND SECURITY" CLAUSE IN THE CHARTER

A. Article 39 in Perspective

The language of threat to peace is found in article 39 of the Charter which reads:

for either prior reventive effort or subsequent follow-up assistance, both of which have been too often neglected in practice. And thirdly, although this point should not be overstated, the familiar language does effectively operate to trump sovereignty with intervention at the outset of the debate: it loads the dice in favour of intervention before the argument has even begun, by tending to label and delegitimize dissent as anti-humanitarian.

Id. ¶ 2.28.

65. Id. ¶ 2.22.


68. See also Harold Hongju Koh, Democracy and Human Rights in the United States Foreign Policy?: Lessons from the Haitian Crisis, 48 SMU L. Rev. 189, 196-97 (1994).
The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.69

Article 39 has been described as "the single most important provision of the Charter"70 for two principal reasons. First, it backs up the most important goal of the U.N.: the maintenance of international peace and security.71 As such, when peace is threatened, article 39 steps in to provide a mechanism for the global community to respond in kind. Second, this article provides the only justification for the community of nations to arrest this threat, even if it means derogating from the principle of non-intervention in the domestic affairs of member states and even if such intervention involves the use of force.

A major reason for the relative lack of global community attention to the worldwide implantation of democratic governance can be attributed to the conviction that the human rights abuses resulting thereof do not have far-reaching trans-boundary effects. On the strength of this belief, the "threat to the peace" clause of article 39 has been interpreted to exclude from its scope the aftereffect of a flawed election. This interpretation does not conform to realities on the ground, where abuses of the electoral system have been known to have spillover effects. It is therefore necessary to broaden the scope of article 39's "threat to the peace" to make room for violations of the rights to political liberty found in almost every human rights instrument in force today.

1. The Scope of "Threat to the Peace" and "Breach of the Peace"

Before a decision to respond, unilaterally or collectively, in the internal affairs of another state is taken, the Security Council must first determine, under article 39 of the Charter, whether there exists "any threat to the peace, breach of the peace, or act of aggression."72 It is critical to the arguments advanced in this paper that some attempt is made to define or identify the types of domestic human rights situations that meet the article 39 threshold to justify derogation from the principle of non-intervention. This process of identification depends a great deal on whether the terms "threat to the peace" or "breach of the peace" are given a narrow and restrictive interpretation or are read broadly. As a number of publicists have noted, the phrases "threat to the peace" and "breach of the peace" can take on a broad or narrow meaning, which allows for a highly

70. See U.N. Secretary of State, Report to the President on the Results of the San Francisco Conference 90-91 (1945).
71. U.N. Charter art. 1, para. 1.
subjective interpretation. It would appear that Charter practice has been greatly influenced by the narrow construction of the article 39 threshold.

2. Vienna Convention Rules of Treaty Interpretation

Following the rules of treaty interpretation set forth in Section 3 of the Vienna Convention on the Law of Treaties, the general rule favors an interpretation that accords "with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This is what is generally referred to as the textual method since it lays stress on the text of a treaty as the best expression of the common will of its parties. Article 1 of the Charter, which enumerates the object and purpose of the U.N., lists as one of the Organization's main purposes the maintenance of:

[I]nternational peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

The operative word here is "international," which modifies the word "peace." Given its ordinary meaning within the context of the avowed goals of the Charter, the words "threat to the peace," as they appear in the charge to the Security Council in article 39, would arguably be referring to situations that threaten international peace. The plain and ordinary meaning of the word "international" is "existing or occurring between nations," involving "all or many nations," or, in short, worldwide in scope. Its use in articles 1 and 39 is in reference to a threat that is global or worldwide in scale.

A textual interpretation must accept this as the expression of the original will of the parties that adopted the Charter back in 1945. But what should one make of threats to the peace that have transnational though not worldwide effects. Should these be ruled out of the reach of article 39? It is submitted that to do so would unduly restrict the reach and scope of the Charter.

74. Vienna Convention, supra note 12, at art. 31, ¶ 1.
75. U.N. Charter art. 1, para. 1.
77. The Vienna Convention's treaty interpretation rules also provide that when the "ordinary meaning," according to article 31, is "ambiguous or obscure" or is likely to lead to a result that is "manifestly absurd or unreasonable" then recourse to supplementary means of interpretation are permitted. Vienna Convention, supra note 12, arts. 31-32. This subjective method, as a supplementary method of inter-
3. The Narrow Interpretation

Under Charter practice, the terms “threat to the peace” and “breach of the peace” have been narrowly construed to mean interstate conflicts. Judge Bruno Simma, the general editor of an authoritative two-volume commentary on the Charter, justifies this narrow construction on two grounds. The first is that the Security Council’s role was originally understood principally, “though not exclusively, with the prevention of inter-state war,” a goal which “corresponds with the fact that Art. 2(4) prohibits the use of force only between, not within States.” Furthermore, Simma argues, the first part of article 39 “does not refer to the use of force in the internal realm of States . . . [thus] a civil war is not in itself a breach of international peace, even though it might lead to such a breach.”

A more expansive view of the “threat to the peace” clause seeks to include internal armed conflicts within its meaning even when there is no prospect of an international war. Such a conflict must, however, offer “the prospect of a destabilization of the respective country, of human rights violations and of dire humanitarian consequences,” raising the possibility of external intervention as was the case following the break up of Yugoslavia.

Even when attempts have been made to incorporate grave violations of human rights into the scope of article 39, the intention was not to include “any severe violation of human rights.” Rather the focus has been only those abuses occurring in the course of internal conflicts. This increasing concern of the community of nations for the “internal order of States and for the position of their citizens,” has led to a construction of the “threat to [international] peace” clause to mean:

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78. Simma, supra note 16, at 720.
79. Id.
80. Id.
81. Id. at 721.
82. Id. at 723.
83. Id. at 725.
84. Id. at 721. In his review of post-1990 Charter practice that with respect to the application of article 39 to internal conflicts, Simma concludes that the emphasis is no longer the trans-border effects but on the internal situations as such. Id. at 724.
“gross and systematic violations . . . with grave humanitarian consequences,”

massive violations of humanitarian law or crimes against humanity,”

“overwhelming humanitarian catastrophe[s],”

situations “of extreme humanitarian distress on a large scale, requiring urgent relief,”

violations which “genuinely ‘shock the conscience of mankind,’”

violations “which present such a clear and present danger to international security,”

serious breaches “on a widespread scale . . . [and] a consistent pattern of gross violations.”

Worse, this trend in broadening the scope of the “threat to the peace” clause still excludes violations of democratic principles as constituting a threat to international peace within the meaning of article 39. Even in Haiti and Sierra Leone, where violations of democratic principles justified invoking this expansive interpretation of the language of article 39,
the internal situation had deteriorated to practically one of a civil war before the community of nations responded.

External intervention was authorized in Haiti and Sierra Leone not so much because of the violations of the democratic entitlement, but because these violations had created "a dangerous overall situation, in particular a severe destabilization of the countries, a degradation of the humanitarian situation, and refugee flows." These cases, therefore, do not justify, in Simma's words, "the conclusion that the violation of democratic standards as such constitutes a threat to the peace." This conclusion is in line with current orthodoxy. Following the rules of treaty interpretation prescribed by the Vienna Convention on the Law of Treaties, articles 31 (textual) and 32 (subjective), this narrow construction can be justified on two grounds. The first is that it reflects the common will of the parties to the Charter at the time that instrument was adopted. Second, it was never the intention of the founding members to confer on domestic human rights violations the character and weight of a breach of international law that poses a threat to international peace and stability. A proponent of this restrictive interpretation goes as far as to claim that nothing in the travaux preparatoires of the Charter suggests that the parties envisioned a government's treatment of its own nationals as likely to catalyze a threat or breach of peace within the meaning of article 39 and related articles.

Unfortunately, this approach views the Charter as static and not the dynamic document that it truly is. One is reminded of Justice Holmes oft-quoted statement on the protean character of law:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.

95. As Simma points out, these violations of democratic principles in Haiti and Sierra Leone were part of a "dangerous overall situation" marked by "a severe destabilization of the countries, a degradation of the humanitarian situation, and refugee flows." Simma, supra note 16, at 725.
96. Id.
97. Id.
98. The textual approach requires the jurist to remain faithful to the text of the instrument since it is the best expression of the common will of the parties. To this end, the interpretation accord "with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." And unless the parties to the instrument so intended, no special meaning should be given to a treaty term. Vienna Convention, supra note 12, art. 31, ¶ 1.
99. See Farer, supra note 38, at 190.
100. Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457, 469 (1897).
It would be wrong to treat the provisions contained in the Charter as if they are immune to change. The Charter has, in the last fifty years, grown from a lowly acorn to the giant oak tree of today, sprouting branches that extend into every conceivable corner of the globe. As one of its leading scholars points out, the Charter is:

[L]ike any other statute or international treaty that has been concluded for a long period of time, [and therefore] affected by the passage of time, which can change the language and meaning of words. Thus, the answer to a question concerning the meaning of a word may differ, depending on whether the answer is based on the meaning of the term at the time of the conclusion of the treaty (static-subjective interpretation based on the original will of the parties) or on the linguistic usage of the term at the time of interpretation (dynamic-evolutionary, objective interpretation).\(^{101}\)

A contemporaneous interpretation of the provisions of this fundamental document must shy away from the narrow interpretation currently given to article 39. Failure to do so would undermine the human rights protections entrenched in the international instruments that followed on the heels of the Charter. More importantly, this restrictive interpretation has the effect of ruling out most cases of human rights abuses because of the frightfully high threshold it sets for determining the kinds of human rights violations that pose a threat to international peace.

It is true that the U.N. was formed when memories of the holocaust were still fresh on the minds of its founding members. Their dogged determination to avoid a repeat of the unspeakable assaults on human dignity that characterized the Nazi regime is what gave this body its shape, form, and content. It is most unlikely that those nations that came together to form this organization would have intended that the horrors of the holocaust—one of the worst crimes against humanity in all of history—would serve as the yardstick against which to measure for all time human rights violations that pose a threat to international peace. This kind of descent by human beings into such barbaric depths, the pure evil that was Hitler’s Nazism, does not occur often in the history of mankind. Using it as a measuring rod can be, at best, misleading.

4. *Inherent Weakness of the Narrow Interpretation*

The focus on the exceptional or extraordinary human rights situations ignores the rarity of the events of the 1940s, although the killing fields of Cambodia and the genocide in Rwanda and the Balkans urge some caution in coming to any sweeping conclusions. Be that as it may, this fixation with the extraordinary succeeds in leaving out a whole range of domestic human rights abuses whose potential for threatening international peace and security is equally as potent as the traditional types. The international commitment to the universality of human rights is absolute

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and cannot afford to be relativized. To avoid falling into this relativist trap, the "threat to the peace" clause of article 39 must be given a reading much broader than it currently enjoys. Such an expansive interpretation would increase the kinds of domestic situations that pose a threat to international peace. As a consequence, arguably internal matters, such as the denial of democratic governance, would enter the mix.

There are several other problems with this narrow interpretation. For one thing, the threshold for determining the kinds of human rights violations that pose a threat to international peace is deliberately set so high that it excludes almost all types of human rights abuses except the most egregious, that is, those that are universally judged as shocking to the conscience of humanity (genocide, crimes against humanity). It is only these _jus cogens_ crimes that automatically trigger an _obligatio erga omnes_.¹⁰² Second, a consequence, perhaps unintended, of this narrow interpretation is that it freezes the Charter in time and place by ignoring the revolutionary change in the membership of the U.N. since the Charter was adopted in 1945. The U.N. today has close to 200 member states, 150 more than it had in 1945. Finally, a narrow interpretation downplays the fact that the historical conditions that provide a backdrop against which the language was drafted have also changed radically, such that we are obliged to ask how the founding fathers of the U.N. would have wanted these words construed in today's world. Some of the problems the U.N. is now confronting were unforeseen at the time of its foundation, such as (the use of) nuclear power, the field of nuclear arms, the utilization of outer space and the sea bed, differing economic growth rates, the global environmental threat, and the dangers in the health sector.¹⁰³

¹⁰² That was not the case when almost 800,000 Rwandans were slaughtered in the space of six weeks while the global community stood, watched, and did nothing. See Alain Destexhe, _Rwanda and Genocide in the Twentieth Century_ (1995); Alison Des Forges, _Leave None to Tell the Story: Genocide in Rwanda_ (Human Rights Watch 1999). At the height of this carnage, the U.S. government was not even willing to admit that what was occurring in Rwanda met the definition of genocide under the 1948 Genocide Convention, preferring instead to engage in semantic double-speak and "shameless evasions," as one writer saw it. For example, the following colloquy between Christine Shelley, a State Department spokeswoman, and the press corps during a routine briefing captures this effort at obfuscation: "Q: So you say genocide happens when certain acts happen, and you say that those acts have happened in Rwanda. So why can't you say that genocide has happened? Ms. SHELLEY: Because, Alan, there is a reason for the selection of words that we have made, and I have -- perhaps I have -- I'm not a lawyer. I don't approach this from the international legal and scholarly point of view. We try, best as we can, to accurately reflect a description in particularly addressing that issue. It's -- the issue is out there. People have obviously been looking at it." See Philip Gourevitch, _We Wish to Inform You That Tomorrow We Will Be Killed With Our Families_ 153 (1998).

¹⁰³ Simma, _supra_ note 16.
B. THE TELEOLOGICAL/FUNCTIONAL INTERPRETATION

To overcome the limitations of the narrow interpretation of the “threat to the peace and security” clause in article 39—interpretations which exclude from their scope violations of the democratic entitlement—a third approach, the teleological/functional approach, is proposed. This approach steps out of the text of the Charter to provide a functional interpretation; one that makes good sense because it seeks to capture the spirit of the Charter without, at the same time, offending the intent of its framers. Where the narrow or restrictive interpretation emphasizes the original will of the parties to the Charter at the time of its conclusion, the teleological approach stresses the object and purpose of a treaty at the time of its interpretation. The teleological approach, which looks to the purpose of an overall scheme of the statute, owes its origins to the civil law jurisdictions of Europe. The principle behind this approach was expressed by Lord Denning in Buchanan & Co. v. Babco Ltd.:

They adopt a method which they call in English by strange words—at any rate they were strange to me—the “schematic and teleological” method of interpretation. It is not really so alarming as it sounds. All it means is that the judges do not go by the literal meaning of the words or by the grammatical structure of the sentence. They go by the design or purpose which lies behind it. When they come upon a situation which is to their minds within the spirit—but not the letter—of the legislation, they solve the problem by looking at the design and purpose of the legislature—at the effect which it was sought to achieve. They then interpret the legislation so as to produce the desired effect. This means that they fill in gaps, quite unashamedly, without hesitation. They ask simply: what is the sensible way of dealing with this situation so as to give effect to the presumed purpose of the legislation?104

Similarly, in Henn & Derby v. DPP, Lord Diplock said:

The European Court, in contrast to English courts, applies teleological rather than historical methods to the interpretation of the Treaties and other Community legislation. It seeks to give effect to what it conceives to be the spirit rather than the letter of the Treaties; sometimes, indeed, to an English judge, it may seem to the exclusion of the letter. It views the Communities as living and expanding organisms and the interpretation of the provisions of the Treaties as changing to match their growth.105

The appeal of the teleological approach lies in its capacity to override or modify the rigidly literalist interpretation of the Charter favored by the restrictive approach. This method of interpreting the Charter is mandated by the language of article 31(1) of the Vienna Convention, which provides that a treaty (such as the Charter) “shall be interpreted in good

Several reasons have been advanced in favor of this method of interpreting the provisions of the Charter and these will be discussed in the following section of the paper.

C. **Doctrinal Support for a Teleological Approach to Interpreting the Charter**

1. **The Special Legal Position of the Charter**

   The U.N., among all international organization, it has been argued, holds a special position as possibly the only organization with a truly universal membership. As a consequence, its founding treaty, the Charter, also enjoys a special legal position in international law. According to Judge Simma, the Charter is not structurally homogeneous, because it encompasses both normative and contractual elements. Therefore, different rules of interpretation are required to interpret the different parts that make up the Charter. An evolutionary method of interpretation is therefore recommended because it is oriented toward the purpose of the organization.

2. **The Framers Envisaged a Dynamic Method of Interpretation**

   The dynamic-evolutionary method of interpretation was already envisaged during the San Francisco Conference. The Commission Report IV/2 to the U.N. Foundation Conference of May 12, 1945, on the subject of interpretation of the Charter reads as follows:

   In the course of the operations from day to day of the various organs of the Organization, it is inevitable that each organ will interpret such parts of the Charter as are applicable to its particular functions. This process is inherent in the functioning of anybody which operates under an instrument defining its functions and powers.

   This approach also finds support in the jurisprudence of international tribunals and is favored in scholarly writings.

3. **The Jurisprudence of the World Court**

   The teleological method of interpretation has been gaining ground in the jurisprudence of the International Court of Justice (the ICJ) and this movement has been gradual and deliberate. The approach was first articulated in the 1949 *Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion*, where the court was asked to ad-

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vise on whether the U.N. had the capacity to bring an international claim in respect of damage caused to its agent against the state responsible for his death or injury. The Court answered in the affirmative even though the Charter does not expressly confer upon the organization such a capacity. Then in 1950, Judge Alvarez, dissenting from the Case Concerning the Competence of the General Assembly for the Admission of a State to the United Nations, Advisory Opinion, argued:

[T]he interpretation of the San Francisco instruments will always have to present a teleological character if they are to meet the requirements of world peace, co-operation between men, individual freedom and social progress. The Charter is a means and not an end. To comply with its aims one must seek the methods of interpretation most likely to serve the natural evolution of the needs of mankind.

This was a minority position as evidenced by the ICJ's decision in the South-West Africa cases where the ICJ pointedly embraced a static-subjective interpretation of the Charter based on the original will of the founding members.

In 1966, the ICJ took the position that, when interpreting the Charter, "[t]he Court must have regard to the situation as it was at that time, which was the critical one, and to the intentions of those concerned as they appear to have existed, or are reasonably to be inferred, in the light of that situation." But in his dissent in the 1950 Case Concerning the Competence of the General Assembly for the Admission of a State to the United Nations, Judge Alvarez took a different approach with respect to the appropriate method for interpreting the Charter:

It is therefore necessary, when interpreting treaties—in particular, the Charter of the United Nations—to look ahead, that is to have regard to the new conditions, and not to look back, or have recourse to travaux preparatoires. A treaty or a text that has once been established acquires a life of its own. Consequently, in interpreting it we must have regard to the exigencies of contemporary life, rather than to the intentions of those who framed it .... [I]t is possible, by way of interpretation, to effect more or less important changes in treaties, including the Charter of the United Nations.

The teleological position also picked up support from Judge Jessup's dissent in the 1966 South-West Africa case, where he noted that "[t]he law can never be oblivious to the changes in life, circumstance and commu-

110. See also Deumeland v. Germany, 8 Eur. Ct. H.R. 448 (1986) (European Convention should be construed "in the light of modern-day conditions obtaining in the democratic societies of the Contracting States and not solely according to what might be presumed to have been in the minds of the drafters of the Convention").
111. Competence of the General Assembly for the Admission of a State to the United Nations, 1950 I.C.J. 4, 23 (March 3) [hereinafter Admission of a State to the United Nations].
113. Id. at 23.
114. Admission of a State to the United Nations, supra note 111, at 18 (dissenting opinion of Judge Alvarez).
nity standards in which it functions. Treaties—especially multipartite treaties of a constitutional or legislative character—cannot have an absolutely immutable character.”

A decade later in its Advisory Opinion on Namibia, the ICJ shifted ground and opted for a temporal reference point of interpretation when it stated that:

[T]he concepts embodied in Article 22 of the covenant . . . were not static, but were by definition evolutionary . . . [The ICJ's] interpretation cannot remain unaffected by the subsequent development of law, through the Charter of the United Nations and by way of customary law. Moreover, an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation.

This view is clearly expressed in an earlier concurring opinion by Judge Alvarez where he noted “that an institution, once established, acquires a life of its own, independent of the elements which have given birth to it, and it must develop, not in accordance with the views of those who created it, but in accordance with the requirements of international life.”

Reviewing this three-decade long jurisprudence, Judge Simma concludes that “the decisions of the ICJ . . . with regard to the temporal reference-point,” do not require the interpreter to follow rigidly “one or the other of the rules; instead, it must be investigated whether the intentions of the parties or the organizational purpose are better met by dynamic tendencies in the interpretation of terms or rather by a static argumentation.”

4. The View of Scholars

The Charter, like most fundamental documents, is not frozen in time, but is a living, dynamic document that is altered by the passage of time. This is the view of one of the foremost commentators on the Charter:

Like any other statute or international treaty that has been concluded for a long period of time . . . [the Charter] is affected by the passage of time, which affects the language and meaning of words. Thus, the answer to a question concerning the meaning of a word may differ, depending on whether the answer is based on the meaning of the term at the time of the conclusion of the treaty (static-objective interpretation based on the original will of the parties) or on the linguistic usage of the term at the time of interpretation (dynamic-evolutionary, objective interpretation).

119. Id. at 24.
This method promotes the progressive development of international law because it "calls for a solution even if there is no practice available that could advocate such a change in the meaning of the word."\textsuperscript{120}

D. ADVANTAGES OF THE TELEOLOGICAL METHOD

The teleological method of Charter interpretation is preferred over the narrow/restrictive approach for a number of reasons. First, it takes into account the fact that the Charter is an instrument of perpetual duration and should not reflect only the common intention of the Euro-American founding members of the U.N. as expressed over a half century ago, but should also implicate the realities of a world that has radically and dramatically changed since its adoption. Second, the new threats to international peace and security are intra-national in nature. They are no longer those threats originally thought of when the Charter was drafted and debated in the 1940s. Internal conflicts including those provoked by assaults on the right to democratic governance, broadly construed, have now become potent threats to world peace. While they may fall short of a threat that has worldwide reach, that such threats transcend the frontiers of a single state cannot be denied. Nor can it be ignored that more often than not the consequences from these threats touch quite a number of neighboring states.

Finally, this approach allows the jurist to treat the Charter as a flexible document that can be adapted, and is adaptable, to a changing world. It also allows for interpretations of its provisions, especially those that impact human rights, to keep pace with the natural evolution of the needs of mankind, by, "adapting the Charter to the changing tasks by way of an evolutionary dynamic interpretation."\textsuperscript{121} This approach would permit the Charter's provisions on human rights and fundamental freedoms to be interpreted broadly, paving the way for the right of a people to elect its government through free, fair, and transparent elections, and be accorded heightened global community attention and protection.

V. NORMATIVE CONSIDERATIONS

A. OTHER FACTORS CONTRIBUTING TO GLOBAL RELUCTANCE TO INTERVENE

While the major hurdle to pro-democratic intervention remains the problem of doctrinal conservatism as regards the scope of the "threat to the peace" clause in article 39 of the Charter, other factors of a normative character have contributed to this status quo. Three will be discussed in this section: (1) the problem of global fatigue, (2) the 'relativization' of the right to democratic governance, and (3) the calculations of national self-interest in deciding whether or not to intervene to protect the democratic entitlement.

\textsuperscript{120} Id.
\textsuperscript{121} Id. at 24.
1. The Problem of Global Fatigue

One reason for the global community's noticeable lack of interest in domestic violations of the right to free choice may have to do with the problem of global fatigue. After a decade of democratization in SSA, the results have been generally disappointing, and here one is being extremely charitable. Flawed elections in SSA (like official corruption) have become almost a way of life in this part of the world to the point where the international community has become jaded by the frequency of their occurrence.122 With some qualified exceptions, few elections in Africa in the last ten years have come anywhere close to meeting the minimal international standards set for free and fair elections. Consider this: in the last ten years few elections in Africa have come anywhere close to meeting the minimum international standards for free and fair elections—of the 48 countries in SSA, only six have been able to organize credible elections leading to a peaceful regime change (Senegal, South Africa, Zambia, Tanzania, Ghana, and Kenya), perhaps seven if Nigeria is added to this list. This is hardly a ringing endorsement for the implantation of democratic governance on the continent.

2. Democracy Is Not Suited for Africans

Related to the sense of déjà vu discussed above is the patronizing view of the democratic aspirations of the African people current in certain Western circles. It is the notion that Africans are congenitally unsuited for democratic governance and, if at all, only a tropicalized version of democracy is good for them. This nauseating assessment of the democratic suitability of Africans was confirmed by French President Jacques Chirac during a four-nation swing through francophone Africa in the summer of 1999. During a stop in Conakry, Guinea, Chirac appealed to the West to respect “the African rhythm” of democratization; an implicit support for the slow pace of democratic reforms marked by persistent electoral frauds.123 Many Africans found Chirac's remarks an affront to the continent, but they may very well explain France's reluctance to intervene to put right flawed elections or its willingness to certify them to be otherwise. The remarks also confirm a view that the international com-

122. There are notable exceptions to this catalog of flawed elections in country after country in SSA. The recent May 2002 parliamentary elections in Burkina Faso have been described as a breakthrough for democracy. These elections marked the end of an era, as they ended the dominance of the ruling Congress for Democracy and Progress (CDP), which has monopolized political power since the return to multiparty democracy in that country in 1991. The May 2002 elections saw the ruling CDP losing its crushing majority in the 111 seat National Assembly. CDP saw its share of seats shrink from 101 to fifty seven while the opposition increased its share from seven to fifty four. The May 2002 presidential elections in Mali also saw the defeat of the candidate of the long-standing ruling ADEMA party and the election of an opposition candidate Amadou Toumani Toure to the presidency. See Loada & Santiso, supra note 9, at 2.

munity merely pays lip service to basic principles of democratic govern-
ance in so far as this relates to the Third World. Indeed, this
relativization of human rights contradicts the universalist aspirations of
the International Bill of Rights to which all nations and, by extension, all
peoples now subscribe.

3. External Involvement Only to Protect Strategic Interests

An African scholar has rightly observed that: "[t]rue democracy is not
only about 'free and fair elections' that are certified to be so by the inter-
national election observers. Care should be exercised for elections not to
be used to certify bad leadership or promote the interests of foreign-
ers." The truth is that elections in Africa have routinely been used to
validate repressive and autocratic governments because it fits in with the
realpolitik interest of certain members of the international community.
This much can be seen in the response to the Haitian crisis in the mid-
1990s, which offers a textbook example of an external involvement driven
by the intervening state's own agenda. The United States' involvement
was as much for altruistic humanitarian reasons as it was in pursuit of self
interest.

To begin with, the U.S. government harbored genuine fears about the
potential for an enormous influx of refugees to American shores and
wanted to stem this tide, if at all possible. These fears were understanda-
able as hundreds of Haitian "boat people" had been streaming to the
United States long before the military overthrow of the Aristide govern-
ment. It is also likely that U.S. support for the Haitian intervention had
much to do with American economic interests. The deliberate weakening
of the 1992 Organization of American States' trade embargo against Ha-
iti by allowing a series of exemptions for U.S. companies in the Haitian
assembly sector was done ostensibly on humanitarian grounds to relieve
the suffering of some 40,000 Haitian workers. Many observers saw
through this gesture "as a hollow cover for a blatant concession to U.S.
business at the expense of an effective sanctions regime." For Lori
Damrosch, by its action the U.S. government was pursuing its "self-inter-
est in flows of profits rather than of refugees."

124. For an exposition of this thesis, see Wippman, supra note 43, at 665 (dismissing
those who claim that international law recognizes a right to democracy that justi-
fies external intervention in its defense and arguing that there is as yet no broad
right of democratic intervention and rhetoric over its existence has outpaced
reality.)
125. See Wafula Okumu, Is it Democracy or Democrazy for Africa? (Reflections on
Elections in Zimbabwe, Congo and Madagascar), THE PERSPECTIVE, Mar. 19,
126. See Julie Ann Waterman, Note, The United States' Involvement in Haiti's Tragedy
and the Resolve to Restore Democracy, 15 N.Y.L. SCH. J. INT'L & COMP. L. 187,
213 (1994).
127. See Pierce, supra note 66, at 499.
128. See ENFORCING RESTRAINT: COLLECTIVE INTERVENTION IN INTERNAL CONFLICTS
Of course, it would be naïve to expect that when states respond to defend domestic violations of human rights, it is always for altruistic reasons, after all, "good international citizenship is a matter of national self-interest." Canada's International Commission on Intervention and State Sovereignty, which explored this issue at length, offers this sobering conclusion on what motivates states to respond to domestic human rights violations:

[T]he budgetary cost and risk to personnel involved in any military action may in fact make it politically imperative for the intervening state to be able to claim some degree of self-interest in the intervention, however altruistic its primary motive might actually be. Apart from economic or strategic interests, that self-interest could, for example, take the understandable form of a concern to avoid refugee outflows, or a haven for drug producers or terrorists, developing in one's neighbourhood.

B. DENIAL OF THE RIGHT TO FREE CHOICE REPRESENTS A REAL THREAT TO WORLD PEACE

World community indifference to electoral mal-practices in SSA overlooks the potential threats posed to international peace and security. Examples from SSA where elections results have been contested by public opinion, opposition parties, and civil society underscore how the failure to preempt and prevent such abuses could easily lead to a messy conflict with spillover effects. Several consequences flow from popular contestations of the legitimacy of the polls and could include withdrawal of mass confidence and support in the electoral system and ultimately the central government itself. This withdrawal can be expressed in peaceful nonviolent ways. For instance, people can simply refuse to take part in future elections which they dismiss as nothing but state organized charades. It could also express itself in overt and violent confrontations with central authority.

The four-year old crisis in the Ivory Coast is a case in point. Persistent and widespread complaints about the fairness and transparency of past elections went ignored until they reached a boiling point. First, during

129. See ICISS Report, supra note 56, at 39, ¶ 4.36.
130. Id. at 39, ¶ 4.35.
131. Contested elections in the Congo Republic ended up in a destructed rebellion which split the country into war zones controlled by warlords, the Ninjas under the command of the former mayor of Brazzaville, Kolelas, and the Cobras led by Sassou-Nguesso, current president. In Cameroon, repeated electoral mal-practices have contributed to a home-grown secessionist movement, the Southern Cameroon National Council, which seeks to take the English-speaking section out of the present union. The troubles in Congo were not localized but had trans-boundary consequences; the secessionist impulse in Cameroon will likely spill into neighboring Nigeria where groups like the Ogoni and the Efiks are also asserting their right to self-determination.
the presidential election of October 2001, a serious contender, Alassane Ouattara, a former Prime Minister of the Ivory Coast, was stripped of his Ivorian citizenship, which disqualified him from being a candidate in that election. Then the elections to the National Assembly in July 2002 saw supporters of Ouattara's party, the Rally of the Republic (RDR), drawn mainly from the Muslim north, systematically denied voting cards on account of their ethnicity and presumed sympathy for Ouattara. These deliberate and systematic attempts to subvert the electoral system immensely contributed to a full-blown civil war pitting a largely Muslim north against a predominantly Christian south, from whence the current President Laurent Gbagbo hails.

The specter of a once stable Ivory Coast, cleaved into two antagonistic parts caught in a savage fratricidal war with the potential of endangering the stability of the region, has not been lost on African statesmen. In the early stages of the conflict, President Olusegun Obasanjo of Nigeria, in unusual candor for an African leader, acknowledged that "[a] threat to Ivory Coast is a threat to all of us." Among his many worries must have been the steady stream of refugees from both sides of the north/south divide ending up in the six countries that share boundaries with the Ivory Coast: Mali, Ghana, Guinea, Sierra Leone, Liberia, and Burkina Faso. This new flow of displaced persons only added to an earlier massive displacement of hundreds of thousands of people fleeing from the civil wars in Liberia and Sierra Leone. The Ivorian crisis, which has its roots in a democratization process gone awry, could have been avoided—and this point bears emphasizing—but for the lack of international will.

Doing nothing in the Ivory Coast may have contributed to the present crisis. The Commission on Intervention and State Sovereignty takes the position that the international responsibility to protect also implies a concomitant responsibility to prevent, noting that “[t]he failure of prevention

133. The Constitution was amended shortly before the election and contained a new provision requiring all presidential candidates to be Ivorian nationals born of parents who are themselves both Ivorians. The Constitution also rules out anyone who has ever held another nationality. Ouattara was disqualified on the alleged ground that he is a national of Burkina Faso.
135. At the outset of the conflict, the U.N. food agency, the World Food Program (WFP) warned of a humanitarian crisis in Ivory Coast on a scale comparable to the crisis in the Great Lakes region where millions have died in conflicts in Rwanda, the Democratic Republic of Congo, and Burundi. According to the WFP “[a]ll the ingredients are present for a large-scale humanitarian crisis through a massive displacement of people in the country and possible outflow of immigrant workers into neighbouring countries.” About 200,000 people have been displaced. See Ivory Coast Defence Minister Axed, BBC News, http://www.bbc.co.uk/2/hi/world/africa/2323577.stm.
136. It is estimated that 400,000 Ivorian residents were forced to flee to neighboring countries as a result of the crisis: of this number 95,000 fled to Liberia, 85,000 entered Guinea adding to an already 104,000 refugees who had earlier fled the civil wars in Liberia and Sierra Leone in the 1990s. An additional 800,000 persons were displaced within the Ivory Coast. Available at http://www.unrec.org/cote_ivoire.
can have wide international consequences and costs.”

The collapse of the Ivorian State would have entailed unimaginable consequences and costs. To begin with, the disintegration or balkanization of the Ivory Coast represents a threat to regional stability that could ultimately endanger international peace and security. As the civil war raged on, it triggered an arms race in this corner of the globe as the belligerents aggressively entered the international arms market in search of weapons to destroy each other. The government admitted to spending more than $1 billion to purchase arms from private companies in Angola. President Gbagbo conceded this much in response to rebel accusation that foreign soldiers had been imported from Angola to reinforce government troops: “We bought weapons and ammunition in Angola at the beginning of the crisis, we paid for them, and they are now arriving.”

In addition to involving Angola through arms purchases, the Gbagbo government also imported mercenaries from South Africa to help contain rebel forces holding most of the country’s north. As if that was not enough, a 1,300 strong West African force would later be deployed in the Ivory Coast several months into the conflict for peace-keeping duties. They were to replace the 3,800 French troops who were flown in the early days of the conflict to ensure the security of French and other Western nationals. These foreign troops are still quartered in the Ivory Coast. Here then is a crisis that began its life as a purely localized affair eventually snowballing into an international conflict as it slowly but surely sucked in other countries into its dragnet.

Secondly, it would have been economically beneficial for the global community to have funded the organization of free and transparent elections. The funds that will now be used to rebuild a collapsing or collapsed Ivorian State are likely to outstrip the cost of repairing the flawed elec-

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137. ICISS REPORT, supra note 56, ¶ 3.3. The international efforts to comply with this responsibility to prevent are not unidirectional; they can take the form of inducements in some cases or tough measures including punitive measures in others. Id. See also Yogesh K. Tyagi, The Concept of Humanitarian Intervention Revisited, 16 MICH. J. INT’L L. 883 (1995) (where the author argues that once a humanitarian crisis breaks out, it is difficult to control, so instead of providing relief to refugees it is better to arrest situations that create refugees).


140. An accord on the cessation of hostilities and an acceptance of a dialogue was brokered by the Senegalese Foreign Minister on behalf of the ECOWAS (Economic Community of West African States) presidency which was then held by Senegal. This accord was signed on October 17, 2002. Shortly thereafter, President Gbagbo declared his willingness to enter into direct negotiations with the insurgents (who occupied the whole of northern Ivory Coast as well as parts of the west). The cease-fire agreement was followed by talks in Lome, Togo aimed at finding a lasting solution to the Ivorian crisis. These talks began on October 30, 2002, under the auspices of the Togolese President, Gnassingbe Eyadema, who was acting as the coordinator of the ECOWAS Contact Group. This encounter between the Government and members of the Patriotic Movement of Ivory Coast
toral system in the first place. Reforms would have helped inspire confidence among a cross-section of the Ivorian population, Christian as well as Muslim, now bent on killing each other. Ivory Coast is the world’s largest cocoa producer attracting a large number of migrant workers on the cocoa and tropical fruits’ plantations. With a $10 billion economy (four times the size of its neighbors of Mali and Burkina Faso), a sizeable services industry and a regional hub for banking, insurance, and advertising, the Ivory Coast was able to provide an environment where an estimated five million non-Ivorian Africans could find gainful employment. If this economy is destroyed as a result of the current crisis, it will not be easy to rebuild. More importantly, the scarce resources that would be earmarked for economic reconstruction would most likely be diverted from resources that should be directed at resolving Africa’s perennial problems, those scourges that continue to plague this region: poverty, HIV/AIDS, malaria, river blindness, environmental degradation, and so on.

(PMIC) resulted in the signing of a joint communiqué on November 1, 2002, which addressed the major claims of the rebels. The promised direct negotiations between President Gbagbo and the insurgents took place in the French resort town of Linas-Marcoussis from January 15-23, 2003. Also taking part in these talks were representatives from Alassane Ouattara’s Rally of the Republic (RDR) which draws support from the Muslim north, and the PDCI of former Ivorian President Konan Bedie. The Marcoussis Agreement hammered out in nearly two weeks of negotiations provided inter alia for a government of national reconciliation that would include all the parties in the conflict, the appointment of a Prime Minister acceptable to all sides, and the amendment of article 35 of the Constitution which sets forth eligibility requirements for the presidency. This provision is widely believed to have been written into the constitution with the specific goal of eliminating Ouattara as a contender for the presidency. The insurgents listed this gerrymandering of the Ivorian Constitution as one of numerous examples of discrimination Northerners were forced to endure in their own country. Ouattara is a Muslim from the north. Available at http://www.unrec.org/cote-ivoire. A conference of African Heads of States met in Paris from January 25-26, 2003, convened and chaired by French President Jacques Chirac, to witness the official acceptance of the Marcoussis Agreement by Ivory Coast’s President Laurent Gbagbo. The agreement was subsequently endorsed by the U.N. Security Council, S.C. Res. 1464, U.N. Doc. S/RES/1464 (Feb. 4, 2003) (welcoming the deployment of ECOWAS and French troops and calling for full implementation of the Marcoussis Agreement). The Security Council resolution was prompted by the reluctance of President Gbagbo and his FPI (Front populaire ivoirien) supporters to accept the terms of the bargain the former had agreed to in France.

All is still not well with the Ivory Coast; the process of national reconciliation still has a long way to go. In September 2003, members of the Patriotic Movement of Côte d’Ivoire withdrew from the government of national reconciliation accusing President Gbagbo of foot dragging in implementing the Marcoussis Agreement. Shortly thereafter the U.S. State Department issued a statement urging the New Forces ministers to resume their participation in the government. The statement also appealed to President Gbagbo and the other parties to follow through on “the Demobilization, Disarmament and Reintegration process that the Linas-Marcoussis reforms for free, transparent election in 2005 can be implemented.” See State Department Urges Côte d’Ivoire to Resume Peace Talks, Sept. 28, 2003, http://all africa.com/stories/; Chinyere Amalu, ECOWAS Urges Ivoirian Rebels to Return to Government, Vanguard (Lagos), Sept. 26, 2003, http://allafrica.com/stories/.

141. See Hale, supra note 134.
VI. CONCLUSION

The propriety of external involvement in the domestic affairs of states in defense of the peoples’ right to freely choose whom they want to govern them has been the focus of this essay; the disparate global community response to systematic and persistent abuses of this fundamental right was a sub-theme. Thus, the interest in human rights in this essay was specifically limited to the enjoyment of the right to democratic governance and the obligation of the international community to vindicate or secure this legal right. The focus is on SSA where “[a] decade of democratization has resulted in disappointing results and unfulfilled expectations, frustrating the democratic promise of peace and development.”

With due apologies to the relativists, this essay takes as a given that the human rights contained in the International Bill of Rights were meant to be universally enjoyed. Among the fundamental rights people in SSA are yearning to enjoy is the right to live under a democratic form of government. A key component of this democratic entitlement is the right to political participation. Agreement is fairly widespread that the means to give expression to this right is through periodic and genuine elections. The centrality of the right to participation in legitimizing governance imposes an affirmative duty on the community of nations to safeguard and deepen this right in regions where its observance is more in the breach.

In SSA, popular expectations that elections to democratically choose a government will be free and fair have not been borne out in practice. The reality has been one of widespread, persistent, and systematic violations of this fundamental right. This reality then raises the question whether the best approach to restoring this right is through external unilateral or multilateral action. The position taken here is that the form of external response is not as critical as the effort made to treat comparable cases of violations of this right in like manner. That is, consistency and equality of treatment should be the hallmark of any form of external response, whether unilateral, bilateral, or multilateral, to human rights abuses wherever these have occurred. Such a response should be seen as balanced and evenhanded in order for it to be well-received by the victims of those abuses. An external response should not be driven primarily and exclusively by the external actor’s own narrow national and strategic geopolitical interests, but must be fully committed to democratic restoration as the ultimate goal. It is such commitment that guarantees a sustainable response without which success in the restorative quest is not guaranteed.

143. See LOADA & SANTISO, supra note 9.